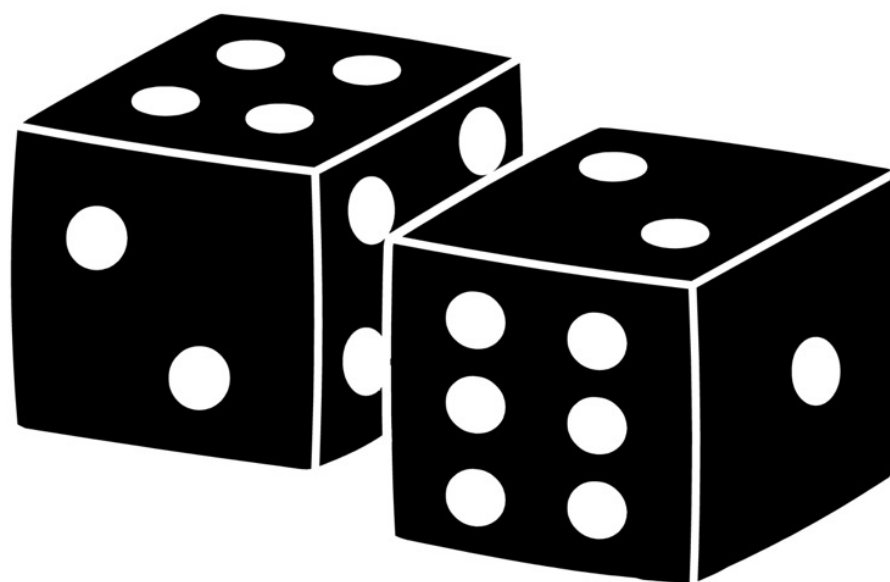


# COMPULSIVE GAMBLING

DO CASINOS SHARE RESPONSIBILITY?



A Section 6, Frontier Torts White Paper  
November 26, 2013



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## The Frontier Torts Project

In the fall of 2013, the 83 students in Harvard Law School's 1L Section 6 participated in an experimental group project in their first-year torts class. The project required students to research, discuss, and write about a current policy problem for which tort law (or some form of civil liability) could provide a partial solution.

Based on their expressed preferences, students were assigned to one of three policy groups:

1. Predatory lending
2. Gun manufacturer liability
3. Casino liability for addicted gamblers

Each of the three *policy groups* consisted of roughly 27 students. Each policy group was further divided into the following nine *specialty groups* consisting of 3 students each:

1. Project Steering Committee
2. Tort Doctrinalists
3. Historians
4. External Situationists – or Contextualists
5. Internal Situationists – or Mind Scientists
6. Economists
7. Policy Wonks
8. Public Choice Experts
9. Media Analysts

The name and role of each specialty group was purposefully vague, and the role could vary based on the nature of the policy issue itself and the interests and particular focus of students working in the given specialty group.

Each policy group drafted a white paper and gave a presentation to the class about their policy problem and possible solutions to that problem. Experts working on each issue visited the class to speak about the topic and their work. At the conclusion of the class presentations, each group led a class discussion and a class vote to select the best policy options. (Videos are available of the class various class presentations.)

Each policy group then submitted a final draft of its white paper, informed by research, class presentations, discussions, and votes, and by written feedback from the class and teaching staff.

The course was taught and supervised by Professor Jon Hanson and teaching fellows Sam Caravello, Deena Greenberg, and Oded Oren. For more information, contact Jon Hanson at [hanson@law.harvard.edu](mailto:hanson@law.harvard.edu) or visit the website at <http://learning.law.harvard.edu/frontiertorts/>.

## Frontier Torts Terminology

***Dispositionism*** is an attributional approach that explains human behavior and outcomes as primarily the result of individuals' thoughts, preferences, and will. Dispositionism presumes that a person's behavior reflects decisions and choices that reflect that person's beliefs, attitudes, preferences, personality, thoughts, and intentions, the details of which he is generally conscious. The dispositionist model assumes a person's preferences are revealed through his choices, since the actor has the will to choose his actions.

***Naïve psychology*** is a model of human thinking and behavior that posits people are aware of, and able to explicate, the forces motivating their decisions and behaviors. The dominant naïve psychology model, particularly in western cultures, is dispositionism. That naïve model is also at the foundation of law and in many of the most influential legal theories, including law and economics.

***Situationism*** is an attributional approach that explains behavior, outcomes, and events by looking at situational influences—that is, non-salient internal and external forces operating within and around individuals. Situationism is informed by social science—particularly social psychology, social cognition, cognitive neuroscience and related fields—and the discoveries of market actors devoted to influencing consumer behavior—such as marketers and public relations experts. Situationism is premised on the social scientific insight that the naïve psychology—that is, the highly simplified, affirming, dispositionist model for understanding human thinking and behavior—on which our laws and institutions are based is largely wrong. In explaining human behavior, situationism looks to nonconscious psychological forces and non-obvious contextual behavioral constraints that might shape people's behavior.

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## EXECUTIVE SUMMARY

Gambling has existed in the United States since colonial times. Despite the many challenges it has faced in the past, the gambling industry has grown into a thriving multi-billion dollar business. Its success can be attributed to its many creative means of attracting and encouraging gamblers. While most adults engage in gambling as an infrequent, leisure activity, a proportion of gamblers exhibit abnormal gambling behavior. This paper is about them.

Problem gamblers (also referred to as compulsive gamblers) are addicted to gambling, and often suffer large financial losses. These losses frequently have a ripple effect, inducing other problems such as social, familial and mental problems. The medical profession has recognized pathological gambling as an impulse control disorder, similar to other behavioral addictions and substance abuse disorders. Yet, the public at large views problem gamblers as rational actors who choose to gamble, and therefore, who should be held accountable for the consequences of their behavior.

The situation, however, is more complex than it appears. Casinos are aware of the existence of problem gamblers and intentionally target them. Studies have shown that people with low incomes living in disadvantaged neighborhoods are more likely to become problem gamblers than people with high incomes. It is no coincidence that most casinos are located in economically disadvantaged areas where they can prey on the poor. They send promotional advertisements to problem gamblers, enticing them to visit and misinforming them about their chance of winning. Once on site, problem gamblers are encouraged to keep gambling by the casino environment – free alcohol, artificial oxygen, no sunlight, no display of clocks and much more. Many problem gamblers who try to quit often fail due their own biological deficiencies coupled with an environment that encourages them to gamble.

In search of assistance, some problem gamblers have voluntarily placed their names on self-exclusion lists maintained by casinos. Their hope is that once their names are on the list, casinos will be obligated to turn them away if and when they return to the casinos to gamble. To their disappointment, casinos have failed to live up to these expectations, often allowing these self-excluded gamblers to return. In some instances, casinos have even continued to send promotional materials to these self-excluded problem gamblers, who frequently relapse. Unfortunately, courts have failed to grant recourse for such gamblers through tort law. Echoing public sentiment, and citing a lack of legislative intent, the courts have held that casinos do not owe self-excluded problem gamblers a duty of care.

This paper explores several potential avenues for legal action to protect problem gamblers from the predatory behavior of casinos, including legislative reforms, tort litigation, regulations and public policies. The goal of these proposed actions is to hold casinos liable for the consequences of predatory targeting of problem gamblers, so that compulsive gamblers will finally have the support of a legal system that recognizes the situational factors at play and apportions responsibility accordingly.

**American courts and legislatures have largely declined to reevaluate the traditional legal view of compulsive gambling.**

## **INTRODUCTION**

### **Stulajter v. Harrah's Indiana Corporation, 808 N.E.2d 746 (Ind. Ct. App. 2004)**

Milan Stulajter had a gambling problem, and he knew it. His problem rose to the level of an uncontrollable compulsion, and on April 15, 2001, he filled out and filed a Permanent Self-Exclusion Request and Release form, which was provided under Indiana state law as a tool to help compulsive gamblers quit their addiction. Once Stulajter handed the self-exclusion request in to Harrah's Indiana Corporation, the company was required to remove him from their marketing list and ban him from their casinos within the state. The self-exclusion form was irrevocable and stated that Stulajter wanted to be permanently shut out of casinos for the rest of his life.

Soon afterward, however, Stulajter began receiving marketing materials encouraging him to visit Harrah's casinos. Stulajter succumbed and made multiple gambling trips. Despite the form he had signed, and the state law regulating casinos, Harrah's did not evict him from the premises; instead, it allowed him to gamble, and Stulajter lost approximately \$70,000. Afterward, he sued the casino, arguing they had been negligent in allowing him to incur gambling losses after he placed himself on the self-exclusion list. The courts were not sympathetic. Stulajter lost at trial and again on appeal.

Despite the fact that compulsive disorders such as alcoholism are increasingly treated as medical problems rather than sins, and advances in neurobiology are leading to a better understanding of the biochemical bases of out-of-control behavior, American courts and legislatures have largely declined to reevaluate the traditional legal view of compulsive gambling. According to this traditional view, promoted by the gaming industry, gambling is a recreational pastime in which any adult can choose to indulge in. If a gambler incurs crushing debt, even after informing a casino of his inability to control his own behavior and his wish to be excluded, the law places responsibility on the gambler's own shoulders.

In this paper, we promote an alternative view. Using Stulajter's case as an example, we zoom out from a focus on the gambler as an isolated rational actor to a broader picture that takes in the influence of situations and other actors on the decision to gamble. We question whether casinos owe vulnerable patrons a duty beyond simply providing gaming amenities. Finally, we consider what steps could be taken, both through tort law and other legal and policy mechanisms, to grant a remedy to compulsive gamblers like Milan Stulajter, whom the law has thus far left to their own unfortunate fate.



## BACKGROUND

### HISTORICAL EVOLUTION OF GAMBLING

While gambling, in the form of lotteries and social gambling, has existed in the United States since colonial times, the legalization of gambling was a gradual process.<sup>1</sup> The rise of Jacksonian morality in the early 19<sup>th</sup> century, which was based on Christian values and favored state-imposed morals, saw a push for civil legislation banning gambling.<sup>2</sup> The Reconstruction Era marked a resurgence in gambling that lasted until 1890, when a gambling scandal in Louisiana led to federal legislation banning various types of gambling.<sup>3</sup> As a result, by the early 20<sup>th</sup> century, horse racing was the only type of legal gambling in the United States.<sup>4</sup>

Legalization of gambling, which has led to its modern prevalence, began in 1931 when Nevada became the first state to legalize casino gambling, followed by Puerto Rico in 1948, and New Jersey in 1976.<sup>5</sup> Iowa, Illinois, and Mississippi legalized gambling on boats and barges connected to navigable water in 1990, while Missouri legalized riverboat casinos in 1992, followed by Indiana in 1993.<sup>6</sup> The intent underlying riverboat casinos was to control the geographic and economic impacts of gambling.<sup>7</sup> Colorado legalized limited casino gambling in 1990, and South Dakota and Detroit did so in 1998 and 1999, respectively.<sup>8</sup> Moreover, after Congress passed the Indian Gaming

Regulatory Act in 1988, approximately 28 states signed deals with Native American tribes allowing different types of casinos or other types of gambling.<sup>9</sup>

### THE INDUSTRY TODAY

In contrast to other forms of gambling, such as horse racing, bingo, and Native American gaming, casinos fall into a sector known as commercial gaming. There are many forms of commercial casino gaming, including riverboat casinos and racetrack casinos, but the most recognizable form is the Las Vegas-style casino.<sup>10</sup> Although gambling is legal in 48 states, commercial casinos exist in only 23 states, while stand-alone casinos exist in only 17 states.<sup>11</sup>

Currently, Indiana has 13 operational casinos, including riverboat, racetrack, and land-based casinos, with more than \$2.6 billion of gross revenue and 24 million annual visitors.<sup>12</sup> After legalization, casinos began to dot the Indiana landscape quickly. Hoosier Park opened in 1994, and seven riverboat casinos opened in 1996-97.<sup>13</sup> By 2013, Indiana had 11 riverboat casinos.<sup>14</sup> Many riverboat casinos are purposely sited in border communities with struggling economies to attract out-of-state visitors.<sup>15</sup> The first land-based casino opened in 2003.<sup>16</sup>

Commercial casinos play an important role in the U.S. travel and tourism industry.<sup>17</sup> The business of gaming is measured in gross gaming revenue (GGR), which is calculated by adding the total amount wagered and

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subtracting the money paid back to players.<sup>18</sup> In 2012, the commercial casino industry's GGR was \$37.34 billion, up from \$35.64 billion in 2011.<sup>19</sup>

## **PROBLEM GAMBLING**

Gambling is a widespread activity. Approximately 85% of U.S. adults have gambled at least once in their lives, and 60% have gambled in the past year.<sup>20</sup> For most adults, gambling is an infrequent, recreational activity that they are able to engage in responsibly.<sup>21</sup> However, in any given year, 2 million (1%) of U.S. adults are estimated to meet the criteria for pathological gambling, and an additional 4-6 million (2-3%) are considered to be problem gamblers.<sup>22</sup> Problem gambling is defined as gambling behaviors that compromise, disrupt, or damage personal, family, or vocational pursuits.<sup>23</sup> Symptoms of problem gambling include, but are not limited to, increasing preoccupation with gambling, a need to bet more money more frequently, loss of control, feelings of restlessness or irritability when attempting to stop gambling, and "chasing" losses.<sup>24</sup>

## **EMERGENCE OF SELF-EXCLUSION PROGRAMS**

The concept of physically banning individuals from casinos first emerged in the mid-1990s as a topic of discussion among gaming industry leaders.<sup>25</sup> In 1996, Missouri instituted the first state-wide self-exclusion program.<sup>26</sup> Today, the majority of

states with legalized commercial casinos have mandatory self-exclusion programs.<sup>27</sup> In states without mandatory programs, such as Nevada, South Dakota, and Rhode Island, casinos are permitted to implement their own facility-based self-exclusion programs.<sup>28</sup>

In states with mandatory self-exclusion programs, an individual may seek to be banned from all casinos within the borders of the state by entering a self-exclusion program.<sup>29</sup> This process is driven by the individual gambler: it is the gambler's responsibility to seek and obtain self-exclusion by entering the program. Family members, including parents and siblings, and family friends and business associates cannot initiate or impose self-exclusion on an individual.<sup>30</sup> After entering the program, individuals have two obligations: (1) refrain from entering gaming facilities and gambling, and (2) release the state and the casinos from any liability associated with the self-exclusion program.<sup>31</sup> Casinos also have obligations to the individuals within the program: (1) create and follow appropriate internal procedures for handling self-exclusion requests; (2) refrain from knowingly providing gambling, wagering, and check-cashing privileges to self-excluded patrons; (3) keep self-excluded patrons' identities confidential; and (4) make reasonable efforts to ensure that self-excluded persons do not receive direct marketing materials and solicitations.<sup>32</sup>

In many aspects, state-administered self-exclusion programs

do not vary significantly from state to state. One way in which they do vary, however, is in the sanctions imposed upon the gambler for violating the terms of the self-exclusion program. Sanctions range from placement on the state's involuntary list of Excluded Persons and forfeiture of winnings to charges of criminal trespass.<sup>33</sup> By contrast to state-administered programs, casino-administered programs are different at each individual casino. Nonetheless, their programs are generally similar to state-administered programs.<sup>34</sup>

### **LAWSUITS FILED BY GAMBLERS**

Some compulsive gamblers have brought lawsuits against casinos to hold the casinos accountable for allegedly predatory behavior against the plaintiffs and similarly situated individuals.<sup>35</sup> For example, some patrons sue in tort for damages covering all of their gaming losses. This type of lawsuit was more common before the implementation of self-exclusion programs.<sup>36</sup> It usually involved a patron who claimed that the casino was negligent and engaged in fraudulent and malicious conduct by allowing the patron to bet while intoxicated and by continuing to serve drinks to the patron while he or she was playing and losing.<sup>37</sup>

Recently, other kinds of substantive arguments have been gaining traction. Some patrons argue that the debt contract with the casino should be invalidated because the casino removed the patron's rational will to freely enter into contracts for

debts by serving drinks, rendering the patron "incompetent to make a contract."<sup>38</sup> Other patrons have alleged that casinos breached an implied covenant of good faith and fair dealing and were negligent in allowing the gamblers to play, and that the casinos therefore caused the person's gambling losses.<sup>39</sup>

## **WHAT DRIVES COMPULSIVE GAMBLERS: THE REAL SITUATION**

Gamblers, including compulsive gamblers, are generally viewed as rational actors that make a conscious decision to gamble. However, there are several situational factors, both external and internal, that shape gambling behavior. An in-depth analysis of those factors reveals the true forces underlying problem gambling.

### **THE EXTERNAL SITUATION**

Three main external factors influence problem gamblers: social factors, economic factors, and the gambling environment. These factors affect all gamblers, but more strongly affect problem gamblers.

#### ***Social Factors***

Social factors induce problem gambling in two ways. First, observational learning and modeling play an important role in shaping individual behaviors.<sup>40</sup> That is, individuals who are exposed to gambling in their day-to-day environment are more likely to

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**Casinos are often located in poor areas, which welcome the economic boost that casinos usually bring.**

develop gambling problems. The family environment is especially influential, and there is a “high probable risk that children of problem gamblers will, themselves, during their lifetime develop a serious gambling problem.”<sup>41</sup>

Second, social structures within casinos can play a role in the development and maintenance of problem gambling. Social rewards that casinos can provide to individuals, such as group membership, emotional and moral support, and social status, can encourage gamblers to continue gambling despite losses. This effect may be reinforced by the gamblers’ problems with the outside society, such as loss of outside social networks and value conflicts.<sup>42</sup>

### ***Economic Factors***

Poverty is a strong external factor that influences people to become problem gamblers and to continue gambling even after they recognize that they have a problem. Casinos are often located in poor areas, which welcome the economic boost that casinos usually bring.<sup>43</sup> Unfortunately, people are more likely to gamble and become problem gamblers if there is a casino near their home. One study found that people living within sixteen kilometers of a casino have double the rate of pathological gambling compared to those who do not live near casinos.<sup>44</sup> This study also found that the rate of problem gambling is much higher in disadvantaged neighborhoods, and in places with high levels of poverty and unemployment.<sup>45</sup>

Second, poor people are more likely to become problem gamblers than wealthy people. Poor people often see gambling as a way to earn money and escape poverty; they gamble to try to escape their situation.<sup>46</sup> A California study found that 26.5% of the problem and pathological gamblers they studied had incomes under \$25,000 a year.<sup>47</sup> Poor problem gamblers are also underrepresented among gamblers who seek treatment for their problem.<sup>48</sup>

Problem gamblers may try to quit, but their environment encourages them to keep gambling. Many problem gamblers are still poor, living near a casino, and are not seeking professional help. All of these factors prime problem gamblers to be susceptible to marketing campaigns by casinos.

### ***Gambling Environment***

All casinos know of the existence of problem gamblers, as they are forced by many state statutes to provide resources for treating compulsive gambling.<sup>49</sup> Despite this knowledge, casinos continue to create an environment that not only permits addicts who have put themselves on voluntary exclusion lists to enter casinos, but also encourages them to gamble once inside.

First, casinos send marketing materials and reward program offers to potential customers, including to people who have asked not to receive such materials because of their gambling addiction.<sup>50</sup> In fact, one study showed that casinos receive from 27 to 55% of their profits from

compulsive gamblers, an obvious incentive for casinos to keep marketing to this group despite the voluntary exclusions lists.<sup>51</sup> Although voluntary exclusion lists are designed to prevent problem gamblers from receiving such materials, the casinos are not liable to the gamblers for sending them marketing, although they may be fined by the state. Problem gamblers, on the other hand, may be required to forfeit their winnings or even be arrested for trespassing if they are found in the casino.<sup>52</sup>

Once problem gamblers enter a casino, the environment of the casino itself encourages them to gamble indefinitely. Slot machines are particularly addictive. For instance, they advertise large jackpots while usually paying out very small amounts of money, which encourages gamblers to keep playing in hope that they might hit a jackpot while positively reinforcing them with trivial winnings.<sup>53</sup> Slot machines are configured to create near misses, where the player perceives that he was close to winning but does not actually receive any money. Near misses generate rewards in the brain that are similar to those generated by wins without paying out any money.<sup>54</sup> Casinos also offer free alcohol to gamblers, reducing inhibitions and reasoning abilities.<sup>55</sup> Finally, casinos pump in artificial oxygen and do not display any clocks, preventing gamblers from getting tired or noticing how long they have been gambling.<sup>56</sup> These factors induce gamblers to spend more time playing in the casino,

and addicted gamblers are especially susceptible to them.

## THE INTERNAL SITUATION

In the early 2000s, the discourse regarding the factors underlying problem gambling behavior shifted from environment- and culture-based explanations to biological models.<sup>57</sup> Biological models treat problem gambling as a medical disorder in need of treatment. This shift in perspective has created a “double bind” for problem gamblers. Viewed through a biological frame, problem gamblers are situationalized as patients who lack control over their emotions and behavior. However, the same frame creates a perception that gamblers are an out-group that is abnormal or different from the general population.

### *Classification of Gambling as a Disorder*

The diagnostic criteria for pathological, or compulsive gambling include persistent and recurrent gambling behavior; deception regarding the extent of one’s involvement with gambling; tolerance and withdrawal symptoms during abstinence; disruption of relationships, education, or job due to excessive gambling; and “chasing” losses or attempting to win back money that has been lost while gambling.<sup>58</sup>

Before May 2013, pathological gambling was classified as an “impulse control disorder” in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders

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**The increase of dopamine in the reward circuitry inadvertently increases the rate of pathological gambling among Parkinson's patients with no apparent history of gambling.**

(DSM-IV-TR). In the fifth edition (DSM-V), however, it was re-categorized as a “Substance-Related and Addictive Disorder” in response to recent brain imaging and neurochemical research, which has shown that gambling is a form of addiction that activates the same neurocircuitry as psychoactive drugs.

The re-classification of pathological gambling under “Substance-Related and Addictive Disorders” was one of the major changes of the DSM-V and generated significant debate. Curiously, pathological gambling was the only “behavioral addiction” added to the previous category of “Substance Use and Dependence.”<sup>59</sup> Grouping pathological gambling with substance abuse has raised questions about whether the medical experts who designed the diagnosis system were acting on stereotypes about out-group disorders (disorders related to crime, such as gambling or substance abuse).<sup>60</sup> While it may seem plausible that pathological gambling and substance abuse disorders should be grouped together because research shows that they share the same neural circuitry, research also shows that this same circuitry is implicated in other disorders such as Obsessive Compulsive Disorder (OCD), Attention Deficit Hyperactivity Disorder (ADHD), and eating disorders. The suggestion, then, is that the DSM-V may be differentiating behavioral addictions that are more connected to crime from those that are not, thus relying on implicit

stereotypes rather than purely medical or scientific grounds.

***Pathophysiology of Gambling***

Several neurotransmitter systems related to reward and impulse control are implicated in the pathophysiology of gambling addiction. Pathological gamblers show elevated levels of norepinephrine (a neurotransmitter that elicits arousal and excitement), lower levels of serotonin (a neurotransmitter implicated in behavioral inhibition and impulse control), and elevated levels of dopamine (a neurotransmitter that elicits a sense of reward and reinforcement).<sup>61</sup> In addition, the importance of these neurotransmitters in gambling addiction has been inadvertently demonstrated by research on treatment for other disorders. For instance, a common treatment for patients with Parkinson's disease, a neurodegenerative disorder caused by lower levels of dopamine, is to increase the level of dopamine by administering a dopamine agonist. But the increase of dopamine in the reward circuitry inadvertently increases the rate of pathological gambling among Parkinson's patients with no apparent history of gambling before they receive the treatment.<sup>62</sup> Similarly, naltrexone, one of the most clinically effective treatments for opioid addiction, has also been effective for treatment of pathological gambling because it works by blocking dopamine from binding to the opioid receptors, which reduces the rewards and reinforcement caused by gambling behavior.

Several brain circuits implicated in the development of addictive behavior have also been studied in pathological gambling. Imaging studies have revealed substantial differences between pathological gamblers and control groups in neural activity in three major areas of the brain. When engaging in gambling behavior or presented with contextual cues related to gambling, pathological gamblers have (1) higher activity in the reward circuit, (2) higher activity in the memory and learning circuit, and (3) lower activity in the control and executive function circuit.<sup>63</sup> Thus, a dispositionist schema of pathological gambling demonstrates that the addicted brain is not only characterized by higher sensitivity to reward and reinforcement learning, but also lower levels of cognitive and executive control (Figure 1).

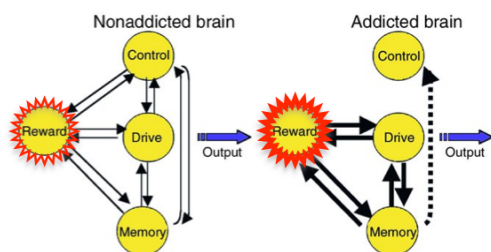


Figure 1. “Dispositionist” schema of the addicted brain<sup>64</sup>

### ***Operant Conditioning of Gamblers***

In addition to neurological insights, mind scientists have offered explanations for problem gambling anchored within classical behavioral psychology.<sup>65</sup> Researchers have long shown that situational factors can be manipulated to induce or inhibit

certain human behaviors.<sup>66</sup> Individuals can be taught, or “conditioned,” to perform targeted behaviors through attaching psychological rewards to those behaviors. In the gambling context, for example, the targeted behavior of spinning a slot machine can be operationally conditioned by attaching monetary rewards whenever an individual performs this action. Although the spinning behavior is initially voluntary – in the sense that the individual’s mental faculties have greater control over deciding whether or not to perform the action – as he undergoes operant conditioning, internal control over this behavior can be gradually eroded. Studies have conclusively shown that targeted behaviors can become more frequent, strong, and expansive over time.<sup>67</sup> In other words, casual gamblers can be operationally conditioned to become pathological gamblers.

Behavioral psychologists have also identified certain methods of manipulating the administration of awards to amplify the effects of operant conditioning.<sup>68</sup> Through a “variable-ratio reinforcement schedule,” individuals can be psychologically inclined to perform the targeted behavior more frequently and for longer periods of time. As applied to a slot machine, for example, “variable” means that a reward is given after a *random* number of spins, as opposed to “fixed” schedules, where a reward is produced after a *constant* number of spins. “Ratio” here means that money is awarded after spinning the machine a certain number of times, as opposed to “interval”

**Casual gamblers can be operationally conditioned to become pathological gamblers.**

**... it is easy to appreciate why financially strained communities are most at risk of developing serious gambling problems.**

schedules, where a win occurs based on how much time has passed. For example, at first, a gambler makes a voluntary choice to spin the slot machine. He is then rewarded with monetary credits and a barrage of flashing lights and exciting sounds. Psychologically, he is now more inclined to continue. Suppose he spins it again, but loses. On the third try, however, he is greeted with the reward once again. The random nature of the reward conditions the gambler to gamble more frequently and for longer periods of time.

The casino reinforces this spinning behavior by rewarding the visitor randomly. This variability has been shown to elicit a high steady rate of responding, and this rationale underlies many of the games offered by casinos. Brick-and-mortar casinos can also reinforce gambling behaviors by producing other types of rewards, such as material rewards (free drinks), social rewards (friendly employees), and cognitive rewards (giving larger wins to gamblers who embark on riskier strategies).<sup>69</sup>

Administration of rewards can also encourage the formation of durable gambling habits. As gamblers associate the excitement of rewards to the behavior of gambling, individual goal-directed actions gradually "shift" into long-term habits.<sup>70</sup> As explained earlier, the neurological circuits and transmitters that are implicated in exercising volitional control over personal behavior become less active, which hastens the formation of gambling habits. Researchers have also found a strong correlation

between poverty and susceptibility to compulsive gambling problems. When we account for the fact that casinos are often located near low-income or minority-populated communities (or, at least, are made accessible to these populations, such as by offering free shuttle bus services to the casino), it is easy to appreciate why financially strained communities are most at risk of developing serious gambling problems.

### ***Theories Explaining Gambling Behavior***

Laws are often created to protect vulnerable classes of people.<sup>71</sup> Yet neither courts nor legislators have advocated for laws to protect pathological gamblers from their addiction or the manipulation of casinos. Several mind science theories why decision-makers perceive gamblers as a class that does not need legal protection.

One such theory is attribution theory. Social psychologists have shown that when something bad happens to other people, we tend to attribute it to their disposition: the negative result is their own fault. When something good happens to another person, however, we tend to attribute it to their situation: they just got lucky. (Interestingly, in looking at ourselves, these lenses shift: we attribute good outcomes to our own disposition and acts, and we attribute bad outcomes to our situation being unlucky.<sup>72</sup>) Since we see the bad outcomes happening to other people as a product of their disposition, we believe that they had control over that



outcome and are responsible for it. Thus, judges and legislators do not protect compulsive gamblers because they believe that gamblers are responsible for their own gambling problem. Consequently, casinos ought not be blamed for merely responding to the choices that their patrons made.

Another theory that aligns well with attribution theory is System Justification Theory (SJT). This theory states that we all have a deep-seated motive to justify the status quo and perpetuate existing social institutions. As a result, we tend to assume that “people get what they deserve and deserve what they get”.<sup>73</sup> Accordingly, decision-makers assume that compulsive gamblers deserve to pay the price when they choose to gamble and should not be able to shift their own losses to casinos. SJT further posits that people tend to defend and justify systems of which they are a part.<sup>74</sup> Thus, judges and legislators defend the current system of laws and are hesitant to make big changes: they believe that casinos should not “suddenly” be held liable for the “volitional” acts of compulsive gamblers.

The in-group/out-group bias may also help explain the lack of empathy for gamblers among lawmakers. According to this theory, we tend to express more favorable attitudes toward groups of which we are members (in-group) than toward groups of which we are not members (out-group).<sup>75</sup> Additionally, the dissimilarities we have with out-group members are often seen as greater than they actually are.<sup>76</sup> Thus, decision-

makers (and many other people) form unfounded stereotypes of compulsive gamblers, and use these stereotypes to perceive them as part of an out-group. Lawmakers and judges are especially vulnerable to forming stereotypes about gamblers, because the former are an elite class of individuals, far removed from the stereotypical pathological gambler. Thus, they may find it difficult to empathize with or care about the problems faced by compulsive gamblers and choose not to concern themselves with such issues. In reality, however, compulsive gamblers are not that distinct of a group: they are mostly males, aged 40-49, and come from all social classes and educational levels.<sup>77</sup>

Compulsive gambling affects people of all social classes, of all educational levels, of all ages, and in every part of the country. The combination of pathological addiction and casinos’ manipulation create a situation that can wreak havoc on vulnerable compulsive gamblers, but few judges or lawmakers are motivated to protect them.

## **MEDIA REPRESENTATION**

For such a costly vice, gambling addiction seems to receive less than adequate coverage in the media. The existing coverage does, however, show a divide between how medical professionals and academics perceive gambling addiction, and how the general public perceives it. Medical professionals and academics consider gambling addiction to be a disorder similar to alcoholism or drug

**Lawmakers and judges are especially vulnerable to forming stereotypes about gamblers, because the former are an elite class of individuals, far removed from the stereotypical pathological gambler.**

Some casinos exaggerate even further and lead customers to believe that they simply “can’t lose.”

addiction, while the public takes a more dispositionist approach, viewing gambling as a personal choice in which the gambler has complete autonomy. Casino advertising contributes to the latter perception by promoting gambling as entertainment and downplaying the risks.

*Predatory Behavior Of Casinos*

Casinos use provocative numbers and images to give off the impression that it is easy to win big. Presumably, everyone understands that these types of advertisements exaggerate the chance and size of potential winnings. The degree of exaggeration, however, may be much greater than most gamblers expect.



**Figure 1:** Examples of exaggerated and deceptive claims in casino advertisements<sup>79</sup>

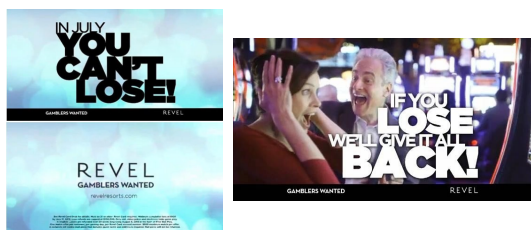
Consider the statistical house edge for the most popular casino games, shown in Table 1 below. House edge is how much advantage the casino has against its customers in a given game. The existence of a house edge is not surprising in itself—casinos are for-profit businesses; for a customer to lose \$5 for every \$100 wagered does not sound unreasonable. However, customers playing slot

machines could lose as much as \$35 for every \$100, hardly what one would prefigure from looking at casino advertisements.

| Statistical Edges Against the Player for Casino Games |  | %         |
|---|--|-----------|
| Baccarat  |  | 1.17-14.1 |
| Blackjack   |  |           |
| Normal  |  | 10.0-20.0 |
| Perfect strategy                                      |  | 1.2-2.0   |
| Strict card counting                                  |  | 0.0-2.0   |
| Craps   |  |           |
| Normal bets   |  | 1.4-16.7  |
| Single odds   |  | 0.8       |
| Double odds   |  | 0.6       |
| Ten times odds  |  | 0.0       |
| Keno  |  | 29.5      |
| Roulette  |  | 5.26      |
| Slot Machines   |  | 2.0-35.0  |
| Sports Betting  |  |           |
| Football and Basketball                               |  | 4.54      |
| Single bets   |  | 10.0      |
| Two-bet parlays                                       |  | 12.5      |
| Three-bet parlays                                     |  | 31.3      |
| Horse Racing  |  | 19.0      |

**Table 1:** Statistical Edges Against the Player for Casino Games<sup>80</sup>

Some casinos exaggerate even further and lead customers to believe that they simply “can’t lose.” For example, Revel Resorts, an Atlantic City casino, launched a campaign this summer featuring the advertisements in Figure 2 below. However, many customers missed the conditions listed in small letters at the bottom of the screen at the end of the advertisement: the minimum loss for refunds was \$100; the refunds were capped at \$100,000; and the “refunds” were made, not as a cash, but in form of free slot plays.



**Figure 2:** Screenshot of Revel Resorts video advertisement<sup>81</sup>

Even more problematic are predatory advertisements that target compulsive gamblers. Casinos often identify and keep track of their most frequent visitors and mail them coupons and promotions to encourage additional visits. For example, casinos such as Harrah's—the defendant corporation in the *Stulajter* case—"reward" its customers with discounted hotel stays (Figure 3), encouraging them to visit the casinos and to spend money there.



**Figure 3:** Hotel Discounts Offered by Casinos<sup>82</sup>

### ***Public Opinion***

Although awareness of gambling addiction is widespread, the public tends to reject a situationist perspective in favor of dispositionist

attributions. One blogger remarked that when he asked people for their thoughts on gamblers, respondents usually had a harsh perception, viewing gamblers as lacking self-control and wasting their fortunes away<sup>83</sup>. In response to articles addressing gambling addiction concerns, one reader commented:

"I know that gambling is a serious addiction, BUT no one is forcing them to spend \$\$\$\$ on casino trips, lottery, and/or Northfield park."<sup>84</sup>

Another argued:

"These are the same people that sued McDonalds because their coffee was too hot."<sup>85</sup>

Indeed, the public often blames gamblers for their addiction, just as they blamed the plaintiff in the infamous McDonald's hot coffee suit.<sup>86</sup> In that case, 79-year-old Stella Liebeck sued McDonald's for severe burns she sustained from a spilled cup of coffee that had been heated to over 180 degrees. Public reaction toward the suit was extremely negative, and the general belief was that Liebeck was responsible for her own injuries.<sup>87</sup>

A new study reveals that individuals subscribing to a dispositionist view of gambling might be in the minority.<sup>88</sup> The National Center for Responsible Gaming reported a new study surveying public opinion of gambling addiction.<sup>89</sup> The study, which surveyed almost 8500 adults in the Toronto area, asked individuals for their opinions on

**Even more problematic are predatory advertisements that target compulsive gamblers.**

**Most viewed gambling addiction as a disorder similar to drug addiction, with roughly 33% viewing it as a habit and 17% viewing it as a form of wrongdoing.**

gambling addiction.<sup>90</sup> Most viewed gambling addiction as a disorder similar to drug addiction, with roughly 33% viewing it as a habit and 17% viewing it as a form of wrongdoing.<sup>91</sup> The blog post indicates that this study is the first of its kind, suggesting that further studies, especially in the United States, may be illuminating.

### ***Media Coverage of Stulajter v. Harrah's***

In 2004, the Indiana Court of Appeals echoed public opinion when it affirmed the lower court's ruling in *Stulajter v. Harrah's, Ind. Corp.* After Stulajter placed himself on the Indiana Gambling Commission's voluntary self-exclusion list, he continued to receive promotional marketing materials from the casino. Stulajter subsequently returned to Harrah's and was allowed to gamble, contrary to the enforcement rules of the voluntary self-exclusion list. Articles covering the case voiced a dispositionist attitude. For example, in an interview the Chicago Tribune conducted with the head of the Illinois Gaming Board, the latter commented that "[t]his program [voluntary self-exclusion] is meant to help people help themselves. It's not to create lawsuits<sup>92</sup>."

Since then, however, media coverage of gambling cases and problem gamblers has begun to shift. In June 2012, This American Life ran a radio broadcast explaining the story of a woman in Indiana who, after being sued by a casino for unpaid losses, sued the same casino for her lost inheritance. The radio broadcast covers not only the dispositionist

public opinion left in blog comments, but also highlights the situational factors at play through extensive interviews with both the woman and her attorney Terry Noffsinger.<sup>93</sup> The segment was inspired by a book, *The Power of Habit*, which contains a chapter that explores the nature of addictions such as gambling, including the neurological factors that contribute to the arguably uncontrollable impulse of problem gamblers.<sup>94</sup>

Other media outlets have also provided more sophisticated coverage on problem gambling. In February 2012, Fox News published an article online, "The Psychology of Compulsive Gambling," shedding light on recent studies on the underlying psychological issues prevalent in compulsive gamblers.<sup>95</sup> In 2013, a Bloomberg BusinessWeek article, "How Slot Machines Trick Your Brain," discussed research toward a drug to treat compulsive gambling, and an ABC News article covered casinos' ability to identify compulsive gamblers and mentioned their reluctance to do so for fear of liability.<sup>96</sup> Articles such as these suggest not only a growing awareness of the issue, but public acknowledgement that there might be factors other than an individual's personal choice at play.

### **PUBLIC CHOICE DYNAMICS**

As in any public policy debate, various competing interest groups struggle to gain the upper hand vis-à-vis one another. One might intuitively assume that this effort is a zero-sum

game: if people see problem gambling as undesirable, they should, at least in theory, blame casinos. In actuality, however, casinos and their proxies have successfully shifted the debate onto much more favorable terrain. Casino spokespeople and most legislators speak of problem gambling as like other addictions, caused by biochemical forces but not those who provide the addicting product (i.e. liquor stores for alcoholics, all stores for compulsive shoppers, etc.). In reality, this deflects attention from the gambling addict's full situation, which often includes predatory targeting by the casinos. This section explores the rather one-sided dialogue in the public forum, and the forces that have bent the debate to their will.

### ***The Gaming Industry in Indiana***

The American Gaming Association, the Casino Association of Indiana, and individual casinos (e.g. Hoosier Park) represent the interests of the gaming industry in Indiana. The industry emphasizes its role as a business, providing entertainment services that help boost local economies by creating jobs, paying tax revenues, and serving as a leader in corporate social responsibility.<sup>97</sup> It also funds peer-reviewed research on gambling disorders.<sup>98</sup> The industry advocates a dispositionist view of gamblers, seeing them as willing participants in an entertainment activity – one where it is common knowledge that the house always wins. On the surface, the gaming industry seems to empathize with the issue of problem gambling. It complies with problem gaming regulations, but these regulations are often self-imposed, and serve to create a façade of regulation

rather than actually helping problem gamblers.<sup>99</sup> Moreover, these regulations have a heavy educational component that allows the industry to frame compulsive gamblers as dispositional actors, choosing to gamble despite information warning them of the dangers. This rhetoric helps make pro-gambling legislation more politically viable.

Moreover, in Indiana, although the gaming industry cannot contribute to campaigns directly, it is heavily involved in lobbying lawmakers. Last year, it spent over \$700,000 lobbying,<sup>100</sup> and it has spent over \$19 million lobbying over the past 12 years.<sup>101</sup> This has helped the industry shape gaming laws to allow riverboat gambling operations to dock permanently, grant an exception to the state's water rules for construction of the French Lick Casino, and pass favorable tax laws.

### ***Compulsive Gambler Groups in Indiana***

Both national groups and Indiana state groups participate in the debates surrounding problem gambling. With few exceptions, these groups focus on raising awareness of treatment options, rather than criticizing predatory casino practices. For example, the National Center for Responsible Gambling (NCRG) conducts most of the peer-reviewed scientific research on compulsive gambling.<sup>102</sup> However, the NCRG receives nearly all of its funding from gaming interests. In fact, the only donors who gave over \$200,000 in 2013 are casino operators Caesars Entertainment Corporation, Las Vegas Sands Corporation, and MGM Resorts International, as well as slot machine

**The industry emphasizes its role as a business, providing entertainment services that help boost local economies by creating jobs, paying tax revenues, and serving as a leader in corporate social responsibility.**

manufacturer International Game Technology.<sup>103</sup> Though the research appears fairly unbiased on its face, the NCRG funnels research funding to inquiries about biochemical causes of addiction.<sup>104</sup> In doing so, the NCRG focuses on one aspect of the compulsive gambler's situation – biochemical proclivities – and thus deflects attention from casinos' predatory practices.<sup>105</sup>

The National Council on Problem Gambling (NCPG) is the primary, independent national group focusing on problem gambling. It does not advocate for or against legalized gambling.<sup>106</sup> Despite its financial independence from the gaming industry, the NCPG focuses its efforts toward increasing funding for compulsive gambling treatment.<sup>107</sup> It takes a fairly dispositionist view of the gambler. On its frequently asked questions page, the organization claims: "The cause of a gambling problem is the individual's inability to control the gambling. . . . The casino or lottery provides the opportunity for the person to gamble. It does not, in and of itself, create the problem any more than a liquor store would create an alcoholic."<sup>108</sup> The NCPG's Indiana affiliate, the Indiana Council on Problem Gambling, takes only a slightly more nuanced view. It notes that, "[m]uch like other addictions, some people are more susceptible to developing a gambling problem," thereby acknowledging the import of individuals' situations while deflecting attention from casinos' actions.<sup>109</sup>

Finally, the Methodist Church has taken a fairly active role in criticizing legalized gambling in

Indiana. Church leaders founded the Indiana Coalition Against Legalized Gambling to criticize the legalization of riverboat gambling in the 1990s.<sup>110</sup> The group criticizes Indiana's dependence on tax revenues from an activity that so clearly targets the poor.<sup>111</sup> The Coalition's situationist view, of casinos as targeting the poor, led it to affiliate with Stop Predatory Gambling, a national group that acts on the premise that casinos are "using gambling to prey on human weakness *for profit*."<sup>112</sup> Stop Predatory Gambling does not take any money from the gaming industry.<sup>113</sup> Nevertheless, Stop Predatory Gambling's recognition of the situational factors that affect problem gamblers is anomalous even among those interest groups that purport to advocate for problem gamblers.

### ***Government Regulators***

The Indiana General Assembly and state agencies appear to share the gaming industry's dispositionist view of compulsive gamblers. The only statutory protection for compulsive gamblers is a voluntary exclusion program (VEP).<sup>114</sup> Gamblers must voluntarily sign up for the program, a process that must be witnessed by a gaming agent or staff member. They are then responsible for avoiding "gaming areas of casinos." Casinos, in turn, are only required to make "reasonable attempts," as determined by the Indiana Gaming Commission, to cease direct marketing efforts.<sup>115</sup>

At first blush, this appears like a politically reasonable solution. The government and casinos assume a piece of the responsibility by forbidding the casinos from actively

**Gamblers must voluntarily sign up for the program, a process that must be witnessed by a gaming agent or staff member. They are then responsible for avoiding "gaming areas of casinos."**



catering to problem gamblers. However, the casinos' implementation of the law is poorly documented and pitifully sanctioned. In 2009, disciplinary sanctions from the state totaled \$83,569, roughly 0.01% of the taxes paid by casinos that year.<sup>116</sup> Casinos have not been found liable to the patrons themselves.<sup>117</sup> Moreover, gamblers who violate their own self-imposed ban are forced to submit any winnings to the state, while the casino keeps any losses.<sup>118</sup> Thus, the regulation creates a lose-lose situation for compulsive gamblers.

These casino-friendly regulations exist, in part, because the legislature is reliant on the tax income from casinos. As Scott Pelath, Democratic minority leader in the Indiana House of Representatives, puts it, "We have the rhinoceros by the tail . . . [c]ontinuing to hold on is a necessity."<sup>119</sup> Because of this reliance, in 2013 the casino lobby was able to request a \$5,000,000 tax break per casino on "wagers made by patrons using noncashable vouchers, coupons, electronic credits, or electronic promotions."<sup>120</sup> This legislation helps casinos at the expense of state tax revenue, and provides increased incentive for casinos to target future problem gamblers with free-play promotions. This startling alignment of government and casino interests overlooks and arguably encourages the situational forces that negatively impact problem gamblers.

## **HOLDING CASINOS RESPONSIBLE AND LIABLE**

## **THE PROSPECT OF LITIGATION**

Milan Stulajter believed that he had succeeded in protecting himself from coming into contact with casinos by placing his name on a "voluntary exclusion" list. Nonetheless, casino operators flooded him with advertisements to draw him back. After his inevitable relapse, he sought restitution in the courts. Judges, using long established doctrine and statutory interpretations, have repeatedly held that compulsive gamblers have no recourse against casinos for their injuries.

### ***Litigation History of Problem Gambling***

Courts have held that a casino has no common law duty of care to stop gamblers from gaming and thus are not negligent in failing to do so.<sup>121</sup> Courts have also rejected claims because of a lack of evidence indicating legislatures' intent to expand casino liability.<sup>122</sup> Further, courts have declined to imply a private cause of action arising out of a tortious breach of dram shop and other statutes.<sup>123</sup>

### ***Negligence***

Addicted gamblers have claimed that casinos are liable for negligence. To make a case for negligence, plaintiffs must show that casinos owe them a duty of care. Typically, a duty of care is created by a special relationship between the parties, by an affirmative action, or by a duty to control. Plaintiffs argue that gamblers are particularly vulnerable in

**Gamblers who violate their own self-imposed ban are forced to submit any winnings to the state, while the casino keeps any losses.**

**The Indiana Supreme Court refused to create a duty because the legislature, through self-exclusion lists, had intended compulsive gamblers to take personal responsibility for their own actions.**

casinos, thus creating a special relationship between casinos and their patrons and causing casinos to owe gamblers a heightened duty of care. Nevertheless, courts have generally held casinos to the same duty of care as other businesses and do not award damages resulting from problem gambling.<sup>124</sup>

Reasons for courts' reluctance to raise casinos' duty of care include the lack of legislative intent from lawmakers as well as the view that compulsive gamblers are responsible for their own injuries. For example, the Third Circuit in *Hakimoglu v. Trump Taj Mahal Assocs.* declined to extend dram-shop liability to casinos because there did not exist "a glimmer of legislative intent."<sup>125</sup> Similarly, in *Caesars Riverboat Casino, LLC v. Kephart*, the Indiana Supreme Court refused to create a duty because the legislature, through self-exclusion lists, had intended compulsive gamblers to take personal responsibility for their own actions.<sup>126</sup> Courts have also raised policy concerns in allowing gamblers to recover, as compulsive gamblers may sue for damages only after losing at a casino, but never voluntarily pay back winnings.<sup>127</sup>

***Statutory Breach***

Another avenue of litigation, pursued by Stulajter, is a claim for tortious breach of a statute.<sup>128</sup> Under some circumstances, courts allow a plaintiff to bring a private cause of action for a defendant's statutory breach.<sup>129</sup> Stulajter argued that he should have a cause of action because

the casino failed to uphold its mandate to "maintain a list of evicted persons," which includes people who request their names on the list.<sup>130</sup> Stulajter argued further that since this law was created to protect compulsive gamblers, the legislature intended that when the casinos violate this law, they should be liable to the gamblers they injure.<sup>131</sup>

Nevertheless, Indiana courts do not imply a private cause of action where the legislature has expressly provided for enforcement of the statute.<sup>132</sup> Here, the court held that because the Gaming Commission was given the express power to enforce the law, the casinos were responsible only to the Commission, and not liable to gamblers.<sup>133</sup> As a result, Stulajter was left without a remedy.

***Avenues for Change***

Although compulsive gamblers must overcome many hurdles if they seek to change the common law, similar reforms have occurred in the past. One example is dram shop laws, which hold taverns liable for the harms caused to third parties when they serve intoxicated patrons. Dram shop laws started as criminal statutes that did not contain a civil remedy for victims.<sup>134</sup> However, courts eventually expanded the responsibility of taverns to include a duty of care to people injured by intoxicated patron, because those victims are part of the class of people the law was intended to protect.<sup>135</sup> Furthermore, some courts have expanded that duty to include the patrons themselves.<sup>136</sup> Even states that do not have dram shop statutes



recognize common law liability of tavern owners to those injured by drunken patrons.<sup>137</sup>

Dram shop laws and the associated common law remedies were primarily motivated by the need to curb drunk driving and to provide a remedy to third-parties injured by drunk patrons. Similarly, courts could hold casino owners accountable for the harms caused by their addicted or otherwise incapacitated patrons to third-parties, such as family members or others injured by their excessive gambling.

Alternatively, courts or legislatures could change their view of the blameworthiness of compulsive gamblers and assert that casinos have a duty of care to gamblers. Courts and legislatures currently appear to perceive the compulsive gambler as the blameworthy or responsible one, thus precluding the casino from having a duty of care. However, if courts and legislatures took into account the situation compulsive gamblers find themselves in, they might be more likely to find a duty of care. Imposing a duty on casinos to exclude and not contact patrons who have gambling addictions shifts the burden to those most able to prevent the behavior. Many casinos have elaborate monitoring and advertising systems that allow them to track gamblers, enticing them back to play more.<sup>138</sup> They also have surveillance equipment in casinos as well as reward card systems that allow them to identify their gamblers. Casinos can use these tools to protect the addicted gambler, and a duty to exclude would help ensure casinos do so.

Once the duty has been established, plaintiffs will still have to prove that casinos' actions were the proximate cause of the harm. Plaintiffs can do so in two ways. First, plaintiffs may argue that their losses were foreseeable because the casino continued to encourage them to wager despite their self-identification as addicts. Second, it is generally foreseeable that patrons will lose money because, as the Indiana Court of Appeals has observed, "[c]asinos and other gambling enterprises do not go into business to lose money."<sup>139</sup>

## EFFICIENCY MODELING OF LITIGATION

The relative efficiency of various alternative rules for casino liability can be analyzed using game theory. We modeled three different categories of gamblers for which casinos can be liable: self-excluded gamblers, all gamblers, and compulsive gamblers. We determined that the most efficient solution is imposing strict liability on casinos for the losses of compulsive gamblers. We then examined two additional considerations that strengthen the viability of this policy: the ability of casinos to identify compulsive gamblers, and the existence of mitigating factors that would offset the loss of casino revenues.

### *Modeling Casino Liability*

In the models presented below, several assumptions are made. The models involve three actors: the casino, the non-compulsive gambler,

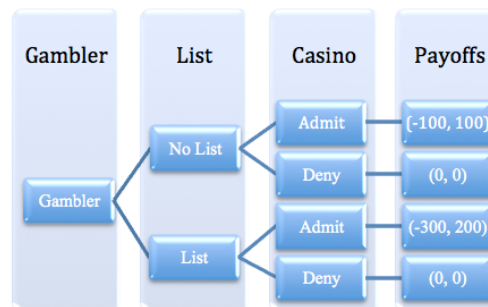
**Imposing a duty on casinos to exclude and not contact patrons who have gambling addictions shifts the burden to those most able to prevent the behavior.**

**The most efficient solution is imposing strict liability on casinos for the losses of compulsive gamblers.**

and the compulsive gambler. The non-compulsive gambler gambles \$100, and the corresponding loss equals the casino's gain. The compulsive gambler gambles \$200, and the corresponding loss is greater than the casino's gain due to negative, non-monetary impacts of gambling on the gambler's quality of life (such as emotional distress, disruptions in familial relationships, disruptions at work, etc.). The model values this loss at \$300. Note that these precise values are not necessary for the results of the model: as long as the basic relationships remain the same (that a compulsive gambler gambles more than a non-compulsive gambler and loses more than just the money given over to the casino) we get the same results. A person who chooses to place him- or herself on a list is a compulsive gambler, but if he or she chooses not to, then he or she could be either a compulsive or non-compulsive gambler. Liable casinos would pay damages for all of the players' losses, including both economic and non-economic losses. Thus the full \$300 is recovered through litigation for a compulsive gambler, not just the \$200 lost directly to the casino. If litigation occurs, both sides incur legal fees of \$50. Casinos have the ability to identify compulsive gamblers and every payoff is modeled as follows: (Gambler, Casino). The most efficient outcome is the one with the least societal cost, i.e. the highest net payoff, calculated by the sum of the two payoffs. We examined a total of five models.

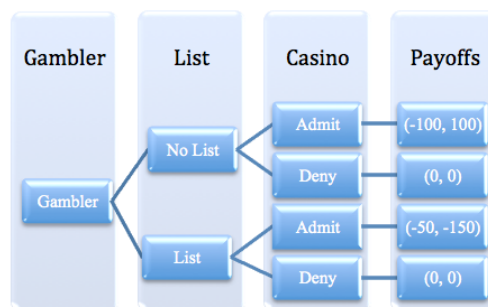
## 1. Compulsive gamblers place themselves on exclusion list:

### a. No liability for enforcement of exclusion list



**RESULTS:** Casinos have no incentive to enforce the exclusion list if they are not liable. The casino's dominant strategy is to admit compulsive gamblers, creating an inefficient outcome.

### b. Liability for enforcement of exclusion list

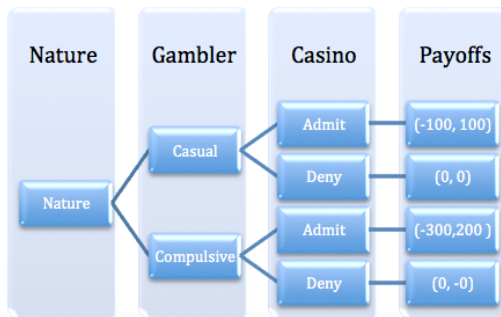


**RESULTS:** Creating liability for enforcement results in casinos making the most efficient choice by denying compulsive gamblers admission. However, this result only obtains if compulsive gamblers self-identify and

voluntarily place themselves on the exclusion list. As we argue below, it seems likely that casinos may be better able to identify compulsive gamblers than gamblers themselves.

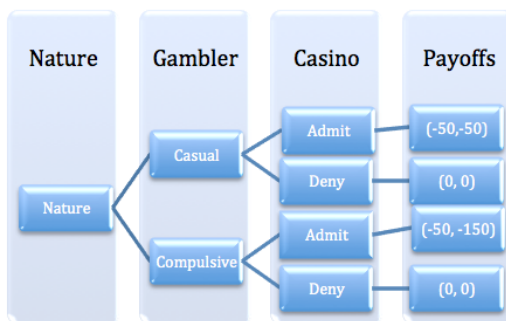
## 2. Compulsive gamblers do not place themselves on exclusion lists or such lists do not exist:

### a. No liability for casinos



**RESULTS:** The absence of liability encourages casinos to admit all customers. The casino's dominant strategy is to admit compulsive gamblers.

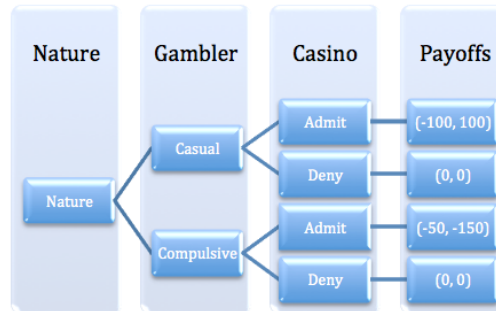
### b. Casino liable for losses of all gamblers



**RESULTS:** If casinos are strictly liable for losses of all

gamblers, litigation costs become decisive and incentivize them to not admit anyone. This results in all casinos going out of business.

### c. Casino liable for losses of compulsive gamblers only



**RESULTS:** If casinos are strictly liable for only compulsive gamblers, they will no longer admit compulsive gamblers but will continue to admit and profit from casual gamblers. This creates an efficient outcome.

### Can Casinos Identify Compulsive Gamblers?

Our modeling only works on the assumption that casinos can identify compulsive gamblers with some degree of reliability. For example, a significant quantity of false positives (casinos turning away casual gamblers) or false negatives (casinos admitting compulsive gamblers) in the identification process could render our results unreliable. The gaming industry argues that casinos lack not only the obligation to do so ("Is it McDonald's obligation to decide you have a problem because you have a tendency

**The absence of liability encourages casinos to admit all customers. The casino's dominant strategy is to admit compulsive gamblers.**

**By turning  
away  
compulsive  
gamblers,  
casinos can  
offer a safer  
and more  
attractive  
product.**

to eat high-calorie lunches?” asks Gary Lovemen, the CEO of Caesars Entertainment Corp), but also the capacity: “You’re talking about trying to diagnose a mental health disorder,” says a spokesman for MGM Resorts International. “I don’t know too many nonprofessionals who are trained to do that offhand.”<sup>140</sup>

However, identification is possible. Researchers have created algorithms that predict problem gambling based on the casinos’ own marketing data. For example, Sarah Nelson, a Harvard Medical School professor leading Cambridge Health Alliance’s division on addiction, cooperated with an online betting company to identify variables strongly correlated with problem gambling and built a predictive model.<sup>141</sup> Key variables correlated to problem gambling include length of play, intensity of play, chasing losses, changes in behavior, win and loss patterns, time of play, and money management.<sup>142</sup>

The same sort of data also exists in brick-and-mortar casinos. Most frequent gamblers register for loyalty programs, which casinos use to keep track of their betting patterns for marketing purposes. Gamblers are incentivized to join these programs through a series of ‘comps’ or perks and free gifts. Focal Research Consultants has successfully used this data on Canadian gamers to identify as many as 800 variables related to gambling behavior.<sup>143</sup> Indeed, some government-run casinos in Canada and New Zealand have

already begun using similar algorithms to screen for compulsive gamblers.<sup>144</sup>

### ***Is There a Silver Lining for Casinos?***

A policy of strict liability could potentially benefit casinos as well if they offset the loss of revenues by using the opportunity to expand their consumer base. The perception that casinos exploit compulsive gamblers has created a negative public perception of casinos. Even for those who are not directly concerned with the issue, casinos often become less attractive due to their association with suicide, substance abuse, and violent crime. These negative externalities are strongly associated with compulsive gambling.<sup>145</sup> By turning away compulsive gamblers, casinos can offer a safer and more attractive product, and potentially attract a consumer base they had been unable to reach.

### ***Strict Liability: Efficient and Feasible***

The most efficient model from an economic perspective is strict liability for casinos for the losses of compulsive gamblers. Relative to an exclusion list-based model, casinos are, compared even to compulsive gamblers themselves, in the best position to identify who is a compulsive gambler. Casinos can do this by analyzing the data they already possess of gamblers’ betting patterns and behavior. Moreover, Exclusion list-based models are inherently flawed in that they rely on non-rational actors (compulsive gamblers) to voluntarily place themselves on a list. The duty can be reasonably imposed

upon casinos given that they already possess the information they need to analyze betting patterns and gamblers' behaviors, and thus can identify compulsive gamblers. Moreover, removing compulsive gamblers may actually have a positive effect on a casino's attractiveness to other patrons, which could offset the potential economic loss for the gaming industry.

The benefits of strict liability are not limited to casinos and gamblers. On a larger social level, strict liability can be the most efficient means to redistribute the negative social externalities produced by compulsive gambling. Even without complex cost-benefit analyses or technological innovations necessary for government regulations, strict liability can internalize the externalized cost by making the casinos bear the cost. This will in turn give the casinos a strong incentive to minimize the newly internalized costs. This dynamic is more efficient than regulation, because in comparison to the government, casinos have better information and stronger incentives to bring the cost down. Overall, strict liability can be also seen as an effective means to utilize the market itself to regulate its manipulative behavior.<sup>146</sup>

## ALTERNATIVES TO LITIGATION

There are various policy mechanisms that have been or could be used to address a predicament like Stulajter's. This section provides a briefing on policy alternatives to tort

litigation by (1) exploring how policy makers have dealt with issues of addiction and compulsion in the past; (2) examining existing policies that are currently being implemented; and (3) studying foreign examples of regulating the gambling industry with respect to compulsive gamblers.

### *Previous Regulation of Industries Producing Legal Yet Addictive Products*

Any attempt to remedy the problem of compulsive gambling would benefit from an analysis of how policy makers have responded to people's addictions to other substances, especially to alcohol, tobacco, and certain over-the-counter drugs.

As introduced above, in an attempt to mitigate the damages of alcohol abuse, thirty-eight states have adopted "dram shop" rules. These rules make a business that sells alcoholic drinks to an obviously intoxicated person strictly liable to any third party injured by the intoxicated patron's actions.<sup>147</sup> In addition, common law deems any contract voidable if one party enters into it under the influence of alcohol and the other party is aware of that intoxication. The central idea behind these policies is that a drunken person is not a rational actor, and thus, liability should be shifted unto another, rational actor. This same idea applies in the case of a compulsive gambler. In both situations, an actor has lost the capacity to make rational decisions, and another, rational party is

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in a better position to limit the resulting harm.<sup>148</sup>

Another highly addictive, yet legal, substance is tobacco. Since the 1980s, policy makers have implemented a variety of measures to regulate the tobacco industry.<sup>149</sup> Some of the most effective means of curbing addiction to tobacco products were publicity schemes that informed the general public about tobacco's dangers. Advertisement campaigns and warning labels had a pronounced effect on deterring potential nicotine addicts. One can imagine a similar strategy having a significant effect on deterring would-be compulsive gamblers.

Another example concerns the regulation of certain over-the-counter drugs. In 2006, the U.S. Food and Drug Administration announced new legal requirements for the purchase of over-the-counter drugs containing pseudoephedrine, ephedrine, and phenylpropanolamine in accordance with the Combat Methamphetamine Epidemic Act of 2005.<sup>150</sup> As a result of this act, a database was created that would record the "quantity sold, names and addresses of purchasers, and the dates and times of the sales."<sup>151</sup> Based on the information in this database, the FDA could monitor and enforce limitations on the amount of the products that consumers could purchase in a given time period. By requiring similar monitoring of a person's gambling history, compulsive gamblers would become more easily identifiable, thereby making any regulation of their compulsion much easier to enforce.

Policy considerations concerning alcohol, tobacco, and over-the-counter medicines are admittedly different in many ways from those of compulsive gambling. Nevertheless, an analogous issue need not be identical to glean valuable insight from it. Strict liability, publicity schemes, and comprehensive monitoring could all help to mitigate the problem of compulsive gambling just as they diminished the effects of various social ills in the past.

### ***Current Policies***

Beside the self-exclusion lists, there have been few other policies implemented by governments or casinos to address the issue of predatory targeting of compulsive gamblers. These policies have only indirectly touched on the issues facing individuals like Stulajter.

For example, current federal restrictions place a limit on the types of advertising allowed by casinos, but do not completely ban all types of advertising and do not explicitly protect compulsive gamblers. The Federal Communications Commission (FCC) has implemented a rule, 47 C.F.R. §73.121, which prohibits broadcast advertising of any "lottery, gift enterprise, or similar scheme." However, this rule does not prevent casinos from advertising about their other services, such as casino restaurants and entertainment.<sup>152</sup> The regulation thus still allows casinos to contact compulsive gamblers through advertisement, albeit not about gambling per se. In addition, the rule does not apply to gambling advertised



by any Indian Tribe under the Indian Gaming Regulatory Act.<sup>153</sup>

Moreover, the casinos have done almost nothing to police themselves. Casino operators claim that they have no reliable way of determining who is a compulsive gambler, and that it would be “extremely difficult for the casino to find and evict these patrons.”<sup>154</sup> Nevertheless, some casinos have attempted novel techniques to stop compulsive gamblers from walking through their doors. For example, one casino issued a “Cease Admissions” letter to compulsive gambler David Williams, informing him that unless he provided certification from a psychologist or doctor that his gambling would not threaten his safety or well-being, he would not be allowed to gamble.<sup>155</sup> However, this method was not successful, as Williams was able to get inside the casino simply by not carrying his identification card.<sup>156</sup>

Some casinos have tried to combat the issue by funding operations that aim to prevent problem gambling in the first place. The gambling industry has spent millions to support problem gambling research and public education efforts.<sup>157</sup> Harrah’s Operation Bet Smart, for example, is an “educational awareness program designed to formally train employees about compulsive gambling, offer directional assistance, and most recently, to deny credit, direct marketing and even play to players at their request.”<sup>158</sup> These research and education efforts, however, are silent when it comes to

the issue of predatory solicitation of compulsive gamblers.<sup>159</sup>

### *International Policies*

A public health perspective on pathological gambling emphasizes prevention and harm reduction. In countries that have adopted this approach, laws on casino liability have focused on early detection of the problem, enforcement of mandatory identification, and exclusion of compulsive gamblers at the entrance of casinos and from targeting by casinos.

The public health approach entrusts casinos to enforce self-exclusion mechanisms under governmental supervision. In Switzerland, the Netherlands, and Ontario, Canada, the government monitors and enforces self-exclusion programs through its gaming regulatory authority.<sup>160</sup> Moreover, the Swiss government has a constitutional responsibility to regulate gambling,<sup>161</sup> and casinos are regulated under the Casinos Act of June 1998. As of 2003, approximately 2,301 gamblers were excluded under the Swiss self-exclusion program.<sup>162</sup>

In both Switzerland and the Netherlands, casinos are required to identify gamblers at the door, sometimes through a scanned identification card.<sup>163</sup> In British Columbia, Canada, facial recognition technology is used to identify cheaters and self-excluded gamblers.<sup>164</sup> In Switzerland, all casinos are networked, meaning that if a gambler is banned from a single casino, he will be banned at all other casinos in the country.<sup>165</sup> In

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Germany, monitoring of slot machines is required to impede access by self-excluded gamblers<sup>166</sup>. Despite these regulatory systems, casinos in these countries still operate and gambling remains a profitable business. This suggests that regulatory costs will not make the gambling industry unprofitable.

The possibility of imposing liability on casinos based on a breach of duty of care has been signaled by courts abroad and established by jurisdictions such as Austria<sup>167</sup> and Ontario, Canada.<sup>168</sup> In Ontario, Canada, Joseph Treyes, diagnosed as a compulsive gambler, excluded himself from a racetrack but returned there three years later. He suffered considerable financial losses, which led him to file a claim against the establishment. The parameters for determining duty of care elucidated by the Ontario Superior Court of Justice in the *Treyes* case could provide basis for regulation in the U.S. The court determined that liability for losses can be pursued by gamblers if a 3-part test is met: 1) the person was being treated for problem gambling; 2) the person signed a self-exclusion form at the casino; and 3) the person was still provided entry to the casino and suffered losses. The court signaled that the casino had a duty of care to the problem gambler. Treyes had been diagnosed with Parkinson disease and claimed that drugs against the disease contributed to his gambling addiction, which was also relevant for the consideration of liability by the casino, which had knowledge of his condition.<sup>169</sup> As gambling is regulated

by the state of Ontario, the latter is always a defendant in claims against casinos. To avoid the establishment of a precedent, Ontario Lottery and Gaming Corporation, the governmental-owned enterprise, has settled *Treyes* and other complaints out of courts.<sup>170</sup>

Any regulation of the gambling industry will be difficult considering both the casino industry's substantial interest in preventing any such regulation and American notions about personal responsibility. Certainly those difficulties help to explain, at least in part, why current policies regarding the predatory targeting of compulsive gamblers provide almost no protection for those gamblers. An analysis of both domestic regulations of similar industries and international policies on compulsive gambling, however, provide a useful framework for the development of more protective policies.

## **PROPOSED RECOMMENDATIONS**

Drawing from existing tort doctrines, the results of game theoretic modeling, and regulations and policies in other contexts and countries, we recommend several tort law reforms, as well as regulations and policies, to combat the predatory behavior of casinos toward problem gamblers.

### **TORT LIABILITY**

We propose several tort law reforms to protect compulsive gamblers from the predatory behavior



of casinos, and to provide a remedy to gamblers. Each of our proposals depends on courts interpreting state self-exclusion regulations to imply a private cause of action for gamblers wrongfully admitted to casinos.

#### ***Strict Liability to Self-Excluded Gamblers***

Casinos would be required by law to keep a voluntary self-exclusion list, which would allow self-identified compulsive gamblers to inform casinos of their problem gambling. By law, casinos would not be allowed to contact the self-excluded gamblers in any way or form. If they did, the casinos would be held strictly liable for economic damages, determined primarily from the gambling losses. Punitive damages would also be available to deter casinos from engaging in such predatory conduct. A potential 2-prong test for determination of liability would be as follows: (1) gambler signed a self-exclusion form at the casino; and (2) the gambler was allowed to enter the gaming area of the casino.

#### ***Strict Liability to Self-Excluded Gamblers, Negligence Liability to Non-Excluded Compulsive Gamblers***

In addition to the strict liability scheme proposed above, casinos would also be held liable under the doctrine of negligence to gamblers who display a pattern of activity consistent with compulsive gambling. Such activity includes frequency of gambling and “chasing” losses. Such factual determinations would be made on a case-by-case basis. To make a

prima facie case of negligence, the plaintiffs must argue that the casinos owe them a duty of care. The gambler would need to show the following: (1) a reasonable person would conclude that the behavior exhibited at the casino by the gambler is likely that of a person suffering from compulsive gambling according to the most recent edition of the DSM; and (2) the casino encouraged the gambler to continue gambling. The casino would be held liable for economic damages only, and not punitive damages, to account for the challenges casinos may face in identifying compulsive gamblers.

#### ***Negligence Liability to Self-Excluded Gamblers and Non-Excluded Compulsive Gamblers***

Another option is to hold casinos liable for negligence toward both self-excluded and non-excluded compulsive gamblers. For non-excluded compulsive gamblers, the same analysis as above applies. For self-excluded gamblers, the self-exclusion list would become a special agreement between the gambler and the casino creating a duty to control, and casinos would be held liable for negligently breaching that duty.

### **REGULATIONS AND POLICIES**

#### ***Statutory Requirements for Casinos***

Congress should regulate casinos in several ways. First, all casinos should be networked. Thus, if a compulsive gambler is excluded from one casino, that gambler should be excluded from all casinos in the

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**Some states depend on tax revenues from casinos and will be wary of enacting any laws that might drive casinos to other states with more lenient laws.**

country. Second, all casinos should be required to maintain exclusion lists, which should be easy to sign up for online and publicly advertised within the casinos. Self-identified compulsive gamblers can voluntarily place their names on the exclusion list. Casinos can also place the names of any gamblers that they identify as compulsive gamblers on the list. Placement on the list will be viewed as a contract between the casino and the gambler, in which the casino agrees not to contact the gambler until the expiration of a specified period of time, or indefinitely, depending on the severity of the gambler's problem. Third, casinos should be held strictly liable for economic, personal and punitive damages for any gambler on the self-exclusion list, but will not be strictly liable for losses by gamblers not on the list.

#### ***Regulatory Monitoring and Treatment of Compulsive Gamblers***

In addition to casinos' voluntary self-exclusion lists, states would be required to have self-exclusion lists. To ensure that the two lists are identical, communication between the state agency responsible for the list and the state casinos should be frequent. Names on the list will be referred to a treatment center for compulsive gamblers funded out of casino tax revenues.

#### ***Exclusion of Compulsive Gamblers from Specific Games***

Studies have shown that certain games are more addictive and result in

more substantial losses than others. Slot machines are a key example. Thus, instead of completely banning compulsive gamblers on self-exclusion lists from casinos, an alternative approach is to ban such gamblers from the more addictive games such as slot machines.

#### **FEASIBILITY**

We recognize the challenge in persuading courts and legislatures to adopt the proposals above. Some states depend on tax revenues from casinos and will be wary of enacting any laws that might drive casinos to other states with more lenient laws. Additionally, pro-gaming lobbies contribute, directly or indirectly, large sums of money to the political campaigns of politicians and judges resulting in the election of officials who support the gaming industry. Thus, it will be extremely difficult to persuade such politicians and judges to further regulate the behavior of casinos. Furthermore, any proposals will be highly contested by some advocates of tort reform, who propose limitations to tort claims and caps on awards of damages.

Overcoming these obstacles starts with changing the public perception about problem gambling and making people aware of the predatory behavior of casinos. The publication of more scientific articles on the addictive nature of gambling will educate the public, including politicians and judges, about the inability of problem gamblers to control their behavior. Additionally, investigative journalism can play a

role in exposing the predatory behavior of casinos and the impact of compulsive gambling on the lives of the family and friends of problem gamblers.

Moreover, a different approach may be needed in bringing claims against casinos. So far, individual plaintiffs have brought most of the lawsuits against casinos, and there is little public empathy for such individuals. However, casinos also target the elderly. Sometimes, in partnership with the management team of retirement homes, casinos organize frequent trips for retirees, busing the elderly to and from the casinos where they lose their retirement funds on gambling. Given the public's protective nature toward the elderly, a class action suit filed by retirees against casinos who are known to specifically target the elderly may garner strong public support and help persuade legislators and judges to step in and protect the public from predatory casinos.

## **RECOMMENDATIONS: THE CLASS VOTE**

The vote on proposed solutions took place at the conclusion of each group's ninety-minute presentation and class discussion. Those presentations and discussions were informed by each group's draft white paper, which all students were assigned to read, and by a one-hour talk delivered by a guest speaker who was expert on the underlying topic. The discussion and voting process lasted between fifteen and thirty

minutes. Voting took place in an open forum, and students voted by raising their hands – with outcomes determined by majority rule. The policy proposals recommended in this section reflect a class vote and not necessarily the views or recommendations each white paper's authors.

Two separate votes were held, one for the best tort-based solution, and another for best regulation or policy. For the tort-based solutions, sixty-two (62) students voted for strict liability for self-excluded gamblers and negligence liability for non-excluded compulsive gamblers; eight (8) students voted for strict liability for self-excluded gamblers; two (2) students voted for negligence liability for self-excluded and non-excluded gamblers; and no student voted for no tort liability.

For solutions based on regulations and policies, sixty-one (61) students voted for statutory requirements for casinos: eight (8) voted for regulatory monitoring and treatment of compulsive gamblers; and no student voted for either exclusion of compulsive gamblers from certain games or no regulatory reform.

## **DON'T SEND FLOWERS: A TALK BY TERRY NOFFSINGER**

On November 22, 2013, Terry Noffsinger, a plaintiff's attorney from Indiana with extensive knowledge on casino predatory behavior and experience in representing problem gamblers in lawsuits against casinos,

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**Noffsinger used to think that suing a casino to get back money lost in gambling did not make sense and was a frivolous lawsuit. That all changed when he met David Williams.**

gave a poignant presentation to Harvard Law School's 1L Section 6 that ended with a standing ovation. Noffsinger used to think that suing a casino to get back money lost in gambling did not make sense and was a frivolous lawsuit. That all changed when he met David Williams. An Indiana tax auditor, Williams had never gambled before until he received a coupon to Aztar, a riverboat casino in Evansville, Indiana.<sup>171</sup> Two years later, he had lost about \$160,000. The casino eventually placed Williams's name on a self-exclusion list and sent Williams a "cease admissions" letter. Williams did get treatment and stayed away from gambling for about a year. However, when he returned to Aztar, no one stopped him and Williams started gambling again. The casino encouraged Williams to continue gambling by tracking his betting pattern and triggering promotional mailings through his "Fun Card." Williams lost about \$20,000 before he was finally told to leave. By then, he had gambled away his life's savings, and he turned to Noffsinger for assistance.

Knowing nothing about gambling, Noffsinger researched the topic and was surprised to learn that compulsive gambling behavior was well-known and that there had been a few gambling pro se gambling cases. While none of the cases had been successful, Noffsinger remained intrigued. For one thing, the cases did not pass the smell test. Also, drawing inspiration from the parable of the Good Samaritan, Mr. Noffsinger felt compelled to at the very least consider

doing the right thing. So he filed suit in federal court, citing multiple theories: duty to protect; RICO violations (mail fraud); premises liability; intentional infliction of emotional distress; breach of constructive or implied contract; fraudulent misrepresentation; and breach of contract. After the suit was dismissed, Noffsinger appealed to the Seventh Circuit, which held that the RICO claim was frivolously filed and threatened Noffsinger with sanctions.

About three months later, Genevieve Kephart reached out to Noffsinger for help. A middle-aged woman living on her own, Kephart began gambling to pass away the time, losing most of her money playing blackjack. After declaring bankruptcy in Iowa, Kephart moved to Tennessee and later inherited \$1 million. Soon afterwards, casinos began to get in touch, leaving her voicemail messages. She eventually relapsed and started gambling again, losing all her inheritance and owing \$125,000 to Caesars Riverboat Casino. Unable to pay off her debt, Ms. Kephart reached out to Noffsinger for help. Recognizing his second opportunity was different from the first one because already Kephart was the defendant in a suit filed by a casino, Noffsinger filed a counterclaim on Kephart, asking for her inheritance money back. This time, he reframed the issue as a casino's duty of care to refrain from encouraging a known addicted gambler to continue gambling. Despite the attacks in the briefs from the casino attorneys, Noffsinger knew it was the right thing

to do. Kephart was one of many who had been preyed upon by casinos and Noffsinger had spoken to many of them, some of whom had become suicidal. It was time that someone fought for them, no matter how exhausting and lonely the fight may be.

The casino filed a Rule 12(b)(6) motion to dismiss but the trial judge denied the motion. On an interlocutory appeal, the Indiana Court of Appeals ruled 2-1 in favor of the motion to dismiss. The dissenting judge believed that “three factors militate in favor of imposing a duty on Caesars to refrain from enticing to its casino pathological gamblers... [because] [t]o hold otherwise would be to conclude that there is no level below which a casino...may not go in enticing patrons and encouraging their reckless behavior.” Encouraged by the dissent, Noffsinger appealed.

Again, the Indiana Supreme Court affirmed the dismissal 4-1. However, the dissenting judge found that “the result in this case is particularly disturbing...[and] [t]hese facts call for application of the well-established principle of Indiana common law that business owners must use reasonable care to protect their customers while on the business premises.”

Even though he has yet to win a casino case, Noffsinger is encouraged because in his view, we are near the tipping point. More research data is teaching the public about addictive gambling, and the Mayo Clinic now has a checklist to identify problem gambling.

Additionally, it has become evident that casinos know more than they are claiming to know. They are able to identify problem gamblers by noting how much they spend, how frequently they gamble, and their inability to stop themselves, to the extent that some gamblers are known to soil themselves as they keep playing the same slot machine for hours. Estimates indicate that, contrary to their claims, casinos depend on problem gamblers for 33 to 62% of casino revenues. There is mounting evidence against casinos.

Noffsinger believes that litigation is the only avenue that will have a lasting positive effect on the harms caused by the gambling industry. He recommends that the next steps should involve assembling a team, raising money, and being creative. He posits that the best way to proceed is to come up with novel ideas to show the damning evidence that reveals the predatory nature of casinos.

Another of Noffsinger’s cases concerned a successful business executive, Sam, who started gambling six years ago. He lost over \$11 million at slot machines. Upon learning that Sam has stolen company funds to support his gambling habit, his employer fired him, yet he continued to gamble. The three casinos that he frequented knew how much he gambled because they each assigned him a hostess and kept detailed records. After exhausting all of his family’s accounts, including his retirement account and his daughter’s college fund, Sam committed suicide at the age of 52. Noffsinger read a portion of his suicide note to his

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family. To add insult to injury, three casinos sent flowers to the funeral home; hence the title of Noffsinger's presentation, "Don't Send Flowers."

Noffsinger then discussed how much can change within 70 years, the length of his life so far: from the Lewis and Clark expedition in 1804 to the child labor laws of 1874 to the D-Day Invasion and Noffsinger's own birth in 1944 to now. He has dedicated his life to starting the battle to stop predatory gambling practices by casinos, but he also recognizes that he might not be around for the end of the battle. He concluded his presentation by challenging the class to imagine how much could be changed by the end of our own lifetimes.

## **CONCLUSION**

Gambling is not a new industry, but it has experienced a rapid expansion in the past quarter-century. Almost all U.S. states have legalized gambling in some form, and almost half play host to commercial casinos. As Americans take to gaming in larger and large numbers, the industry's annual revenue continues to rise into the tens of billions of dollars. But the rise of casinos has meant increasing danger for those gamblers who are predisposed or unusually vulnerable to compulsive behavior. For problem gamblers, walking into a casino can mean the loss of a week's salary, or a year's; it can mean foreclosure, bankruptcy, or even suicide.

With the help of state programs and support groups, a gambler at risk

of losing everything can take a step toward safety by placing him- or herself on a self-exclusion list. Many gamblers reasonably expect that to be sufficient; they are wrong. The promise of not being targeted by casinos or admitted to gaming areas is illusory so long as casinos aren't held liable for their violations of the self-exclusion list. And those problem gamblers who have not had the knowledge or the willpower to self-exclude fare even worse. Casinos have no incentive to do anything but take their money, despite the ease with which the gaming industry could, if it chose, identify and deter problem gambling.

For many Americans, gambling is a form of release or a vacation. This paper is not about them. The gaming industry doesn't need the money of the gambling addicts it preys on, any more than the liquor industry depends on the patronage of alcoholics. When a casino watches a gambler like Milan Stulajter lose, over the course of a few trips, an amount equal to more than three times his state's per capita income,<sup>172</sup> it can tell that something's wrong; and when Stulajter's gambling binges came on the heels of targeted solicitations the casino had promised not to send him, it takes little imagination to see both a duty of care and a breach of that duty.

Courts have thus far been reluctant to recognize any duty on the part of casinos to even those gamblers who have identified themselves as addicted, and the lawsuits brought on theories of negligence or statutory breach have failed. But the legal

theory is there to support liability for the gaming industry, and the policy arguments are more than sufficient to justify a legislative response.

Our argument is that a 21<sup>st</sup>-century industry should be viewed through a 21<sup>st</sup>-century lens that perceives gamblers as more than individual actors moving in a vacuum. Compulsive gamblers are bound up in a web of connections that includes the

family and friends they may hurt through their losses, as well as the lavish casinos and riverboats that profit from their misfortune. A legal system that takes situational factors into account and apportions responsibility in line with their influences could do much more for problem gamblers than simply leaving them to whatever fate the world has in store for them.

**... a 21st-century industry should be viewed through a 21st-century lens that perceives gamblers as more than individual actors moving in a vacuum.**

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<sup>20</sup> *F: Problem Gamblers*, NAT'L COUNCIL ON PROBLEM GAMBLING, <http://www.ncpgambling.org/i4a/pages/index.cfm?pageid=3390> (last visited Nov. 25, 2013).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Carol O'Hare, *Self-Exclusion—Concept vs. Reality*, 8 GAMING L. REV. 189, 189-91 (2004).

<sup>26</sup> Irina Slavina, *Don't Bet On It: Casinos' Contractual Duty to Stop Compulsive Gamblers from Gaming*, 85 CHI.-KENT L. REV. 369, 369-70 (2010).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 371.

<sup>29</sup> *Id.* at 370.

<sup>30</sup> William N. Thompson, Robert W. Stocker & Peter J. Kulick, *Remedying the Lose-Lose Game of Compulsive Gambling: Voluntary Exclusions, Mandatory Exclusions, or an Alternative Method?*, 40 J. MARSHALL L. REV. 1221, 1246 (2007).

<sup>31</sup> Slavina, *supra* note 26, at 373

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

<sup>33</sup> *Id.* at 371; Thompson, Stocker & Kulick, *supra* note 30, at 1247.

<sup>34</sup> Slavina, *supra* note 26, at 375-76.

<sup>35</sup> Thompson, Stocker & Kulick, *supra* note 30, at 1229.

<sup>36</sup> Slavina, *supra* note 26, at 377.

<sup>37</sup> GNOC v. Aboud, 715 F. Supp. 644 (D.N.J. 1989).

<sup>38</sup> Thompson, Stocker & Kulick, *supra* note 30, at 1236; *see Lomonaco v. Sands Hotel Casino & Country Club*, 614 A.2d 634, 635-36 (N.J. Super. Ct. Law Div. 1992).

<sup>39</sup> *Merrill v. Trump Ind., Inc.*, 320 F.3d 729, 732-33 (7th Cir. 2003).

<sup>40</sup> Karen K. Hardoon & Jeffrey L. Derevensky, *Social Influences Involved in Children's Gambling Behavior*, 17(3) J. GAMBLING STUD. 191, 194 (2001).

<sup>41</sup> Rina Gupta & Jeffrey Derevensky, *Familial and Social Influences on Juvenile Gambling Behavior*, 13(3) J. GAMBLING STUD. 179, 181 (1997). "In Lesieur et al.'s (1991) study of 1771 university students, among the subjects who said either of their parents had gambling problems, 19% were PGs themselves, compared to 5% of the remaining sample that did not report gambling problems in their parents. Jacobs et al. (1989) surveyed 844 children and found that those who had parents that gamble reported more gambling-related problems (29%) compared to peers (14%)." Namrata Raylu, *Pathological Gambling: A Comprehensive Review*, 22 CLINICAL PSYCHOL. REV. 1009, 1017 (2002). "Winters, Stinchfield and Fulkerson (1993) found that 79.7% of 61 adolescent problem gamblers reported that one or both parents also gambled." Tony Toneatto, Tamara Blitz-Miller, Kim Calderwood, Rosa Dragonetti & Andrea Tsanos, *Brief Report: Cognitive Distortions in Heavy Gambling*, 13(3) J. GAMBLING STUD. 253, 264 (1997).

<sup>42</sup> Raylu, *supra* note 41, at 1019. This is problematic because it influences especially those who may find social rewards more appealing such as those belong to lower status and minority groups.

<sup>43</sup> See NATIONAL GAMBLING IMPACT AND POLICY COMMISSION, Final Report (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html>.

<sup>44</sup> John W. Welte, Grace M. Barnes, William F. Wieczorek, & Marie-Cecile Tidwell, *Gambling Participation and Pathology in the United States: A Sociodemographic Analysis using Classification Trees*, 29(5) ADDICTIVE BEHAVIORS, 983, 988 (2004).

<sup>45</sup> John W. Welte, William F. Wieczorek, Grace M. Barnes, Marie-Cecile Tidwell, & Joseph H. Hoffman, *The Relationship of Ecological and Geographic Factors to Gambling Behavior and Pathology*, 20(4) J. GAMBLING STUD. 405, 417 (2004).

<sup>46</sup> Welte, *supra* note 44, at 988.

<sup>47</sup> Rachel A. Volberg, Kari L. Nysse-Carris, & Dean R. Gerstein, NATIONAL OPINION RESEARCH CENTER AT THE UNIVERSITY OF CHICAGO, CALIFORNIA PROBLEM GAMBLING PREVALENCE SURVEY (2006), available at [http://www.adp.ca.gov/opg/pdf/CA\\_Problem\\_Gambling\\_Prevalence\\_Survey-Final\\_report.pdf](http://www.adp.ca.gov/opg/pdf/CA_Problem_Gambling_Prevalence_Survey-Final_report.pdf)

<sup>48</sup> Rachel A. Volberg, *The Prevalence and Demographics of Pathological Gamblers: Implications for Public Health*, 84(2) AM. J. PUB. HEALTH 237, 239 (1994).

<sup>49</sup> See OHIO REV. CODE ANN. §3772.18 (year).

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<sup>102</sup> *About NCRG*, NATIONAL CENTER FOR RESPONSIBLE GAMING, <http://www.ncrg.org/about-ncrg> (last visited Nov. 15, 2013).

<sup>103</sup> *See Funding*, NATIONAL CENTER FOR RESPONSIBLE GAMING, <http://www.ncrg.org/about-ncrg/funding> (last visited Nov. 15, 2013). The only donors without direct interests in promoting gaming are Acadia Healthcare, which provides services to those suffering from mental health or addictive disorders, and Glenn Christenson, chairman of the NCRG. Mr. Christenson also serves as chairman of the Governor's Gambling Advisory Committee in Nevada. He was previously the executive vice president and CFO of Station Casinos. Once again, we see people move across the somewhat artificial boundaries – casinos, problem gambler groups, and government – we established for ease of analysis.

<sup>104</sup> *See Project Grants*, NATIONAL CENTER FOR RESPONSIBLE GAMING, <http://www.ncrg.org/research-center/ncrg-funded-research/project-grants> (last visited Nov. 15, 2013).

<sup>105</sup> The tobacco industry used similar techniques, emphasizing the role of genetics as a cause of cancer.

<sup>106</sup> *About NCRG*, NATIONAL CENTER FOR RESPONSIBLE GAMING, <http://www.ncrg.org/about-ncrg> (last visited Nov. 15, 2013).

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<sup>114</sup> IND. CODE § 4-33-4 (2010).

<sup>115</sup> *Id.*

<sup>116</sup> Ernest Yelton, *2009 Indiana Gaming Commission Annual Report to Governor Mitch Daniels* 11 (2009).

<sup>117</sup> Justin E. Bauer, *Self-Exclusion and the Compulsive Gambler: The House Shouldn’t Always Win*, 27 N. ILL. U. L. REV. 63, 70-71 (2006).

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<sup>119</sup> Steven Yaccino, *Indiana’s Gambling Lock Loosened by Competition*, NEW YORK TIMES (Jan. 23, 2013), [http://www.nytimes.com/2013/01/24/us/indianas-gambling-lock-loosened-by-competition.html?\\_r=0](http://www.nytimes.com/2013/01/24/us/indianas-gambling-lock-loosened-by-competition.html?_r=0)

<sup>120</sup> IND. CODE § 4-35-8-5 (2013).

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<sup>122</sup> *Logan v. Ameristar Casino Council Bluffs, Inc.*, 185 F.Supp.2d 1021, 1024 (S.D. Iowa 2002); *Caesars Riverboat Casino, LLC*, 934 N.E.2d at 1124; *Rahmani v. Resorts Intern Hotel, Inc.*, 20 F.Supp.2d 932, 937 (E.D. Virginia 1998); *Annito v. Trump Marina Hotel Casino*, 2005 WL 4344137 at 5 (N.J. Super. Ct. App. Div. 2005); *Williams v. Aztar Indiana Gaming Corporation*, 2003 WL 1903369 at 8 (S.D. Indiana 2003).

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<sup>126</sup> 934 N.E.2d 1120, 1124 (Ind. 2010).

<sup>127</sup> This issue is most directly raised by the lower court in *Hakimoglu*, 876 F.Supp. at 640.

<sup>128</sup> *Stulajter v. Harrah's Ind. Corp.*, 808 N.E.2d 746 (Ind. Ct. App. 2004).

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<sup>130</sup> 68 Ind. Admin. Code 6-2-1.

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<sup>137</sup> Jessica L. Krentzman. *Dram Shop Law – Gambling While Intoxicated: The Winner Takes All? The Third Circuit Examines A Casino's Liability for Allowing a Patron to Gamble while Intoxicated*, 141 VILL. L. REV. 1255, 1259 (1996).

<sup>138</sup> Michael Bush, *Why Harrah's New Loyalty Effort is the Industry's Gold Standard*, ADVERTISING AGE (Oct. 5, 2009), <http://adage.com/article/news/harrah-s-loyalty-program-industry-s-gold-standard/139424/>.



<sup>139</sup> Schrenger v. Caesars Indiana, 825 N.E.2d 879, 883 (Ind. Ct. App. 2005).

<sup>140</sup> Alexandra Berzon, *Researchers Bet Casino Data Can Identity Gambling Addicts*, WALL STREET JOURNAL (Aug. 3, 2013), <http://on.wsj.com/1e8qxRY>; Jen A. Miller, *Will U.S. Casinos Adopt an Algorithm That Could Identity Problem Gamblers?*, PHILADELPHIA (Aug. 6, 2013), <http://www.phillymag.com/news/2013/08/06/u-s-casinos-pass-formula-identify-problem-gamblers/>

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<sup>157</sup> Phil Satre, *Help for problem gambling: The casino industry is funding research on why some bettors go too far*, PHILADELPHIA INQUIRER, available at <http://www.americangaming.org/newsroom/op-eds/help-problem-gambling-casino-industry-funding-research-why-some-bettors-go-too-far> (last visited Nov. 16, 2013).

<sup>158</sup> Mary Jane Fuller, *Harrah's Entertainment and Responsible Gaming*, PROBLEM GAMBLING, available at <http://www.problemgambling.com/harrah.html> (last visited Nov. 16, 2013).

<sup>159</sup> See, e.g. *About NCRG*. NATIONAL CENTER FOR RESPONSIBLE GAMBLING, available at <http://www.ncrg.org/about-ncrg> (last visited Nov. 16, 2013).

<sup>160</sup> S. GAINSBURY, ONTARIO PROBLEM GAMBLING RESEARCH CTR., SELF-EXCLUSION: A COMPREHENSIVE REVIEW OF THE EVIDENCE 19 (2010).

<sup>161</sup> BUNDESVERFASSUNG [CONSTITUTION] Apr. 18, 1999, SR 101, art. 106 (Switz.).

<sup>162</sup> KILIAN KUNZI ET AL., SWISS FEDERAL GAMING BOARD, GAMBLING AND GAMBLING ADDICTION IN SWITZERLAND (2004).

<sup>163</sup> Joseph Kelly & Alex Igelman, *Compulsive Gambling Litigation: Casinos and the Duty of Care*, 13(5) GAMING L. REV. & ECON. (2009).

<sup>164</sup> Andrew Chung, *Casinos Not Taking Chances in Court*, TORONTO STAR (Aug. 5, 2007), [http://www.thestar.com/news/2007/08/05/casinos\\_not\\_taking\\_chances\\_in\\_court.html](http://www.thestar.com/news/2007/08/05/casinos_not_taking_chances_in_court.html)

<sup>165</sup> Gainsbury, *supra* note 162.

<sup>166</sup> Kelly & Igelman, *supra* note 165.

<sup>167</sup> *Gambling addict wins a fortune in court ruling against casino; compulsive player is compensated by Austrian operator that failed to help him kick the habit*, SUNDAY TELEGRAPH (London), Feb. 22, 2004.

<sup>168</sup> *Treyes v. Ontario Lottery Gaming Corp.*, 2007 WL 2039590 (Ont. S.C. J.), 2007 Carswell Ont. 4458.

<sup>169</sup> John Mangels, *U.S. Courts Say Casinos Have No 'Duty of Care' Responsibility to Halt Compulsive Gamblers from Playing*, PLAIN DEALER (May 15, 2011, 6:00 A.M), [http://blog.cleveland.com/metro/2011/05/us\\_courts\\_say\\_casinos\\_have\\_no.html](http://blog.cleveland.com/metro/2011/05/us_courts_say_casinos_have_no.html)

<sup>170</sup> U.S. Census Bureau, Census 2000 Summary File 3, <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>