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Subpoenaing Information from the Gambling Industry: Will the Discovery Process in Civil Lawsuits Reveal Hidden Violations Including the Racketeer Influenced and Corrupt Organizations Act?

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INTRODUCTION

As the twenty-first century began, tort, contract, constitutional, and class-action attorneys throughout the world were beginning to dip into the cornucopia of litigation opportunities against the deep-pocketed gambling interests. Pro-gambling interests were saddled with the media image of promoting an activity which created new addicted gamblers (and associated suicides), and caused bankruptcies and crime. In this context, plaintiffs' attorneys focused on the prospect of sympathetic juries and concomitant large damage awards.

Parallel to the 2001 publication of *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*,¹ more lawsuits were filed in the United States and Canada.² By May 2002, "[l]awyers and activists [in Canada were] . . . predicting a flood of lawsuits against government-run gambling facilities."³ One class-action suit in Quebec sought "\$625-million in damages, alleging the provincial gaming corporation knew or should have known that its video lottery terminals created dangerous addictions."⁴ Nancy Langille of Gambling Watch commented: "I see it as having national significance, if not global significance."⁵ One news source explained:

Just as bars and party hosts have been found liable for drunk-driving accidents, operators of casinos, racetracks and other betting venues will soon be forced into civil court battles to answer for the effects their products have on addicts, legal experts predicted. There are already anecdotal reports of individual suits being filed in Ontario, then settled out of court with clauses preventing the release of details, said Jim Hillyer, a Toronto-area civil litigation lawyer studying the issue.⁶

¹ John Warren Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, 22 *MANAGERIAL & DECISION ECON.* 17 (2001) [hereinafter *Mega-Lawsuits*].

² Tom Blackwell, *Gambling Case Can Go to Trial, Court Rules: First Class-Action Suit of Its Kind*, *NAT'L POST* (Toronto, Ont., Can.), May 7, 2002, at A5, available at 2002 WL 19617084 [hereinafter *Quebec Class-Action Suit*].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* In August 2003, a similar class-action lawsuit was being prepared against the province of Nova Scotia in Canada. Dan Arsenault, *Tory MLA Wants Study on Price of Gambling*, *HERALD* (Halifax, N.S., Can.), Aug. 21, 2003, reprinted at Responsible Gambling Council, http://www.responsiblegambling.org/articles/Tory_MLA_wants_study_on_price_of_gambling.pdf. A University of Manitoba study suggested that "problem gamblers end up costing government an average of \$56,000 [Canadian]—to say the costs might outweigh the benefits. . . . Self-described patho-

Thus, the Canadian lawsuits seemed to be setting the common law precedents for the developing wave of gambling litigation.

In the Quebec class-action case, Justice Roger Banford of the Superior Court summarized his initial findings and asks:

[E]ach and every member of the group is a pathological gambler and therefore touched by this disorder; each member of the group suffers from this sickness because of the respondent's fault; each member of the group is entitled to the payment of a compensation still to be quantified; the extra-contractual liability of the respondent: Has the respondent a responsibility to warn the users? If so, has he fulfilled this responsibility?⁷

These determinations are significant precedents.

In 2002, U.S. tort lawyers targeted gambling. Scott Harshbarger, the former Massachusetts Attorney General who took on the tobacco industry, went after the gambling industry as President of Common Cause, a citizens' group promoting government accountability.⁸

Public health advocates and their litigators say . . . [pathological (i.e., "addicted")] gambling is a crisis that has reached epidemic proportions and something must be done to stop casinos from injuring the many addicts who look to them to feed their roughly \$50 billion a year habit.

"It's very similar to the drive to snort coke or smoke crack. It's that pressing, that urgent," said [Professor] Henry Lesieur, a gambling treatment therapist.⁹

Apologists for the gambling industry, however, resented the "demonization" of gambling and argued that gamblers assume the risk of engaging in high-risk behavior. Critics countered that there was no assumption of the risk, because the risk was illusory and artificial since the House always wins—eventually (the "gambler's ruin" principle).¹⁰ Nevertheless, policy experts con-

logical gambler Bernie Walsh of Halifax thinks he lost about \$50,000 to the [video gambling] machines—as well as his family—before he quit playing. However, he's sure that he has cost the province much more [approximately \$200,000] in treatment and hospital costs because of the addiction." *Id.*

⁷ Press Release, Garneau, Verndon, Michaud, Samson, *The Class Action Against Loto-Quebec Has Been Authorized* (May 6, 2002).

⁸ Alisyn Camerota, *Tort Lawyers Target Gambling*, Fox News Channel, May 31, 2002, at <http://www.foxnews.com/story/0,2933,54083,00.html> [hereinafter *Tort Lawyers Target Gambling*].

⁹ *Id.*

¹⁰ See *id.*; see also Judy DeHaven & Kate Coscarelli, *Casinos Draw Talk of Lawsuits*, STAR-LEDGER (Newark, N.J.), June 23, 2002, at 1, available at 2002 WL 23258317, reprinted as Judy DeHaven & Kate Coscarelli, *Gambling Industry Likely*

cluded: “tobacco and gambling are just the beginning of a wave of litigation against big industry.”¹¹ Harshbarger, who helped win \$246 billion in damages from the tobacco industry, summarized that if gambling facilities were “going to lure people to come, and families to come, you need to deal with the reality that this introduces potential addiction problems.”¹²

In 1997, as the 1999 National Gambling Impact Study Commission [hereinafter 1999 U.S. Gambling Commission or NGISC] began its work, pro-gambling Commissioner John W. Wilhelm sent a three-page memo to associates that effectively cautioned “that, based on various legal analyses, the industry probably [would not] be able to invoke trade secret protections to rebuff any requests”¹³ for documents by the Commission. Political columnist Jon Ralston commented:

Considering the memo’s wide distribution—it was sent to nearly two dozen people—Wilhelm knew the risk he was running in writing words that could become part of the public domain, sounding like a warning to the industry and giving fuel to anti-gamers who have accused him of being an industry shill. But Wilhelm . . . obviously believed that the commission’s underlying danger was so pernicious for the [gambling] industry, his workers and ultimately the state, that he had no choice.

Wilhelm makes the case that anti-gaming forces hope to exploit the commission’s subpoena powers “to place the gaming industry in a no-win situation: Either you refuse information requests and resists [*sic*] subpoenas, making it look like you have things to hide; or you comply with broad requests flowing from the commission’s broad mandate . . . thus permitting fishing expeditions.”¹⁴

Familiar with the gambling industry, Commissioner Wilhelm apparently recognized that the Achilles’ heel of the gambling industry was the process involving the legal discovery of information.

On a strategic level, Kansas City attorney Stephen Bradley Small, who has sued casinos, predicted in 2000 that there were

Target for Next Big Suit, HONOLULU STAR-BULL., June 25, 2002, at C6. See *infra* notes 80-81 and accompanying text. For formulae demonstrating the gambler’s ruin principle, see Michael Orkin & Richard Kakigi, *What is the Worth of Free Casino Credit?*, AM. MATHEMATICAL MONTHLY, Jan. 1995, at 3-4 [hereinafter *Free Credit*].

¹¹ *Tort Lawyers Target Gambling*, *supra* note 8.

¹² *Id.*

¹³ Jon Ralston, Column, *Casinos and Smoking Guns*, LAS VEGAS REV.-J., Sept. 2, 1997, at 7B, available at 1997 WL 4552321.

¹⁴ *Id.*

“Mega-Lawsuits” awaiting action by the attorneys general of various states.

Small said . . . [pathological (i.e., “addicted”)] gambling might present deeper issues such as whether the industry, like the tobacco industry, could someday be charged with creating the addiction.

“If a person considers himself to have a compulsion to gamble, the deeper question is why? Is it extraneous to the gambling industry or did the industry cause it?”¹⁵

During the 1990s, Small initiated some of the first well-publicized lawsuits against gambling facilities, alleging violations of the Racketeer Influenced and Corrupt Organizations Act.¹⁶ The dean of pathological gambling issues, Professor Henry Lesieur, chided governmental officials and the gambling industry: “They are not asking the hard questions. How much are we [i.e., the government/gambling industry partnership] contributing to the problem?”¹⁷

If the hard questions are asked, the answers may come from, as the Introduction notes, the Achilles’ heel of legal discovery of marketing and other information from the gambling industry. The inadvertent destruction of documents fostered by delays in the discovery process could also make parties potentially vulnerable—even to charges of obstruction of justice. In class-action cases, certification in gambling cases should be relatively easy compared with other class-action lawsuits, because casinos and video gambling machines track players via a variety of computer programs, such as “Players Cards” and “Fun Cards.”

Part I of this discussion delimits the problematic areas and categorizes the potential lawsuits faced by the gambling industry into: (1) strategic lawsuits brought by state attorneys general or federal authorities; (2) class-action lawsuits by those losing at gambling; and (3) private lawsuits brought on behalf of individuals or groups of individuals.

As enumerated in Part II, “Clarification of Goals,” governments need to recriminalize electronic gambling devices (EGDs)

¹⁵ Stephanie S. Maniscalco, *Gambling Addict Suits vs. Casinos Are Foreseen: ‘Self-Exclusion’ Program May Create Duty*, MO. LAW. WKLY., Dec. 17, 2000, at 15 [hereinafter *Self-Exclusion*].

¹⁶ 18 U.S.C. §§ 1961-68 (1994).

¹⁷ Rick Green, *Problem-Gambler Suits: Activist Foresees Damage Claims*, HARTFORD COURANT, May 17, 2002, at A17, available at 2002 WL 4807090 [hereinafter *Problem Gambler Suits*].

and video gambling machines (VGMs) where those machines are convenient to the public, which is practically everywhere. This goal was unanimously recommended by the 1999 U.S. Gambling Commission. The goal of maintaining the “fairness” of the games is also discussed with regard to legal actions challenging “fairness.” The legal actions highlight two questions: Is it unfair for “fairness issues” and regulatory constraints to be determined de facto by the owners and designers of the games? In this regard, is U.S. government-licensed gambling unconstitutional if its net effect is to mislead people into losing, thereby depriving them of their Fourteenth Amendment property “without due process of law”? The next section, Part III, on the history behind these issues, reveals that legalizing gambling activities increases illegal gambling and associated crime. These analyses are followed by a discussion in Part IV on “trends and conditioning factors” which focus on attempts by the lobbyists for pro-gambling interests to control and confuse the information available not only to the public, but also to the 1999 U.S. Gambling Commission itself. Part V, “policy alternatives and recommendations,” highlights the gambling industry’s Achilles’ heel—the legal discovery of information—and the industry’s need to avoid litigation since plaintiffs’ attorneys can piece together information from individual cases.

The Conclusion is that the enormous amounts of money that pro-gambling interests have siphoned from various U.S. jurisdictions has created a new class of elite pro-gambling scofflaws and transformed many gambling interests into quasi-sovereigns challenging international, as well as U.S., judicial and governmental systems.

*A. Mega-Lawsuits and the Legal Discovery of Information:
The “Achilles’ Heel” of the Gambling Industry as the Discovery
of Marketing Information*

In 1994, two separate lawsuits were filed in U.S. District Court by Florida residents William Poulos and William Ahern against multiple defendants in the gambling industry, and in 1995 these cases were consolidated with similar cases in the District of Nevada as *Poulos v. Caesars World, Inc.*¹⁸ The plaintiffs lost money playing slot machines during the previous twenty years, and they “claimed that the machines induced them to play by misrepre-

¹⁸ No. CV-S94-1126-RLH-RJJ, 2002 WL 1991180 (D. Nev. June 25, 2002).

senting their actual odds of winning.”¹⁹ If plaintiffs prevailed in this case, the defendants would be locked into a classic case of fraud. However, in 1997 the court granted defendants’ motion to dismiss for failure to plead fraud with particularity but denied the motion to dismiss for failure to state a claim.²⁰ The court generally denied defendants’ other motions to dismiss on various grounds, such as: (1) lack of personal jurisdiction; (2) lack of subject matter jurisdiction; (3) a stay on primary jurisdiction and abstention grounds; and (4) the Act of State Doctrine.²¹

The approximately seventy defendants included cruise ship casinos, land-based casino operators, and slot manufacturers. The press recognized *Poulos* was significant because the plaintiffs were “suing virtually every major casino operator and slot manufacturer . . . [and] asking a federal judge for access to documents they say will prove a long-term effort was made by industry players to intentionally mislead slot players.”²² Despite obvious attempts by the defendants’ representatives to limit the public’s knowledge of these potential issues, the Nevada press outlined some salient but sensitive industry information, which the discovery process could reveal.

Such documents could include marketing materials, memos, presentation materials and slot operations manuals. The plaintiffs are also seeking access to casino player records, which they claim will show that the playing habits of the defendants are typical among slot players. The amount of records being sought is considerable; since [the plaintiffs] would have to demonstrate a widespread history of such marketing, [they] are demanding materials that go back a decade or more.²³

The fact that the discovery requests could reveal information

¹⁹ David Strow, *Gamers Face Wider Fraud Lawsuit*, LAS VEGAS SUN, June 22, 1999, available at <http://www.lasvegassun.com> [hereinafter *Fraud Lawsuit*].

²⁰ *See id.*; *Poulos*, No. CV-S94-1126-DAE (RJJ) (D. Nev. Dec. 19, 1997) (granting in part and denying in part defendants’ motion to dismiss pursuant to Rule 9(b) for failure to plead fraud with particularity and denying defendants’ motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim).

²¹ *See, e.g., Poulos*, No. CV-S94-1126-DAE (RJJ) (D. Nev. Dec. 19, 1997) (Orders: regarding New Jersey casino defendants’ motion to dismiss for lack of personal jurisdiction and defendant Delta Diversions, Inc., motion to dismiss for lack of personal jurisdiction; denying cruise ship defendants’ motion to dismiss for lack of subject matter jurisdiction; denying defendants’ motion for a stay on primary jurisdiction and abstention grounds; and denying defendant Princess Hotel’s motion to dismiss under the act of state doctrine).

²² *Fraud Lawsuit*, *supra* note 19.

²³ *Id.*

for over ten years was quite important. Examples of the plaintiffs' requests for information provided a blueprint for discovery requests in other potential cases.

"What the plaintiffs are now seeking are any documents and materials that will show slots and video poker machines have always been marketed in a misleading way, and that slot players perceive the machines in the same manner as the defendants."²⁴ For example:

[A] video poker machine that claims it deals from a 52-card deck, when in fact it deals from 10 preselected cards . . . [or] a slot that repeatedly places winning symbols near the payline, giving the player the impression of just missing a big jackpot. To achieve class action status, the plaintiffs [were] trying to prove such methods are pervasive among the defendants.²⁵

In addition to obtaining the discovery of information in the United States, plaintiffs' attorneys were well advised to note that the defendant multinational corporations provided opportunities to gather relevant information, including public information and internal memos from overseas operations owned by United States-based companies.

B. Delays in Discovery: The Five-Year Hiatus in the Poulos Nevada Case: The Danger of Inadvertent Destruction of Documents and Vulnerabilities to Obstruction of Justice?

Although *Poulos* was first filed in 1994, the discovery process for industry marketing information was apparently delayed until 1999.²⁶ Interposing for delay would technically be an unethical legal practice by any party to a suit.²⁷ Also, in this case, any delays in the discovery of sensitive marketing information would at first appear to operate to the benefit of the gambling industry by making the litigation process more expensive to plaintiffs without "deep pockets." However, since the suit was filed in 1994 and consolidated in 1995, the defendants (i.e., virtually every casino operator, slot manufacturer, and cruise line) would technically be on notice that no potentially relevant discoverable information could be destroyed. As the Arthur Andersen/Enron scandal of 2001 highlighted, the destruction of potentially relevant informa-

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.*

²⁷ For examples of precedent, see CODE OF PROF'L RESPONSIBILITY DR 7-102 and EC 7-38 (1970), reprinted in BLACK'S LAW DICTIONARY xvii (rev. 4th ed. 1968).

tion in itself—even when part of normal procedures—crosses into the area of criminal behavior.²⁸ What would happen in *Poulos* if it was later determined that relevant or potentially relevant information had been destroyed inadvertently? As a practical matter, the long relevant timeframe for the *Poulos* discovery requests put the defendants at perhaps greater risk because there were higher probabilities for the inadvertent loss of discovery information.

C. Class-Action Certification of the “Class” via the “Players Cards” and “Fun Cards”

In *Poulos*, the plaintiffs filed a motion for class action status on March 18, 1998, which the court initially denied because the class was not “cohesive” enough, according to Judge Roger L. Hunt.²⁹ In 2002, this denial was scheduled for appeal by David Barrett of the New York City firm of Boies, Schiller & Flexner LLP, to the Ninth Circuit U.S. Court of Appeals.³⁰ Furthermore, as casino companies began to issue more “Players Cards” (e.g., Harrah’s Entertainment, Inc.) and “Fun Cards” (e.g., Casino Aztar in Indiana) during the 1990s, it became relatively easier to identify those who had lost funds gambling; losses are recorded for virtually everyone with a gambling-facility issued card.³¹ All of the card owners/holders and their addresses (as well as credit ratings) were consolidated in the computer marketing files of nearly

²⁸ Kurt Eichenwald & Floyd Norris, *Early Verdict on Audit: Procedures Ignored*, N.Y. TIMES, June 6, 2002, at C6, available at LEXIS, News & Business, News, News, All (English, Full Text); *The Fall of Andersen: Greed Tarnished Golden Reputation*, CHI. TRIB., Sept. 1, 2002, § 1, at 1, available at 2002 WL 26770388. See Kristen Hays, *Enron Files Reorganization Plan*, AP ONLINE, July 11, 2003, available at 2003 WL 59741154, reprinted as *Plan Filed by Enron Leaves Little for Creditors*, NEWS-GAZETTE (Champaign, Ill.), July 11, 2003, at A11 (Bankrupt Enron’s creditors will receive 14.4 to 18.3 cents on the dollar, while bankrupt WorldCom’s creditors will receive 36 cents on the dollar.). See also *Hearing on H.R. 3763, the Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002 Before the House Comm. on Fin. Servs.*, 107th Cong. (2002), available at <http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=96>.

²⁹ *Vegas Federal Court Decision on Slots Favors Gambling Industry*, ASSOCIATED PRESS NEWSWIRES, July 2, 2002, available at WL, NV-News, reprinted as *Vegas Federal Court Decision on Slots Favors Gambling*, RENO GAZETTE-J., July 2, 2002; *Poulos*, No. CV-S94-1126-RLH-RJJ, 2002 WL 1991180 (D. Nev. June 25, 2002).

³⁰ Liz Benston, *Gamblers To Appeal Ruling on Marketing of Slots*, LAS VEGAS SUN, July 16, 2002, at 1, available at 2002 WL 15200014.

³¹ E.g., Fred Faust, *Slot Machines Run Other Games Off the Table*, ST. LOUIS POST-DISPATCH, Apr. 12, 1993, at BP1, available at 1993 WL 8014076 [hereinafter *Slot Machines Run*].

all gambling companies/facilities. Therefore, the class became more identifiable because the cards show “the losers” or “net losers” consisting of practically everyone who gambled.

D. Blueprints for Legal Discovery in Gambling Issue Areas: The American Trial Lawyers Association Gets Focused on Gambling Facilities

In discovery proceedings, the Federal Rule of Civil Procedure 30(b)(6) depositions in an Indiana case, *Williams v. Aztar Indiana Gaming Corp.*,³² blueprint some of the information to be discovered, such as requests for state “License Renewal Reports” and, to quote the Discovery Notice, “specifically, the information which would disclose the following:”³³

- (a) The average amount of gambling losses per patron per cruise or gaming session for those who visit[ed] the Casino regularly;
- (b) The average amount of gambling losses per year per patron for those who visit[ed] the Casino regularly;
- (c) The average amount of gambling losses per year per patron for those who are or were issued “Fun Cards”; and
- (d) The average amount of gambling losses per year per patron for those who are or were designated by the Casino as belonging to the “Premium Passenger Club.”³⁴

As leading edge cases, *Williams*³⁵ and *Poulos* provided

³² Notice of Rule 30(b)(6) Deposition of Aztar Indiana Gaming Company, LLC, *Williams v. Aztar Ind. Gaming Corp.*, No. EV-01-75-C-Y/H, 2003 WL 1903369 (S.D. Ind. filed May 9, 2002). See also Third Amended Complaint For Damages, *id.* (filed Jan. 4, 2002). Summary judgment was entered on behalf of defendants. *Id.* (Apr. 5, 2003). The Seventh Circuit U.S. Court of Appeals heard arguments in Williams’ appeal on Oct. 22, 2003. See generally Brief of Appellant, *Williams v. Aztar Ind. Gaming Corp.*, No. 03-1822, 351 F.3d 294 (7th Cir. filed July 14, 2003).

³³ Notice of Rule 30(b)(6) Deposition of Aztar Indiana Gaming Company, LLC, *Williams v. Aztar Ind. Gaming Corp.*, No. EV-01-75-C-Y/H, 2003 WL 1903369 (S.D. Ind. filed May 9, 2002).

³⁴ *Id.*

³⁵ See, e.g., Terry Noffsinger, Presentation to the Casino Gaming Litigation Group, Association of Trial Lawyers of America Annual Convention (July 23, 2002) (public information from filed case complaint). See also Laura Parker, *Gambler Says Casino Played Him*, USA TODAY, Feb. 21, 2003, at A3, available at 2003 WL 5305672. Three cases similar to *Williams*, including one involving an addicted gambler’s suicide, have placed the casino industry on the defensive. See Rick Alm, *Lawsuits Allege that Harrah’s Casinos Encouraged Troubled Gamblers*, KAN. CITY STAR, May 31, 2002, available at 2002 WL 19852997. In *Burdett v. Harrah’s Kansas Casino Corp.*, No. Civ. A. 02-2166-KHV, 2003 WL 124665 (D. Kan. June 12, 2003), the court decided discovery issues in favor of the plaintiff whose addicted gambler husband committed suicide. In another case, a casino’s extension of credit to a debtor gambler did not constitute an act in “good faith,” and debtor’s trustee in bankruptcy

blueprints for discovery requests by the attorneys involved, such as Williams' attorney, Terry Noffsinger from Evansville, Indiana. By 2002, the Casino Gaming Litigation Group of the Association of Trial Lawyers of America also was blueprinting the guidelines for specialized discovery in lawsuits involving gambling issues.³⁶

I

DELIMITATION OF PROBLEMS

For organizational purposes, the mega-lawsuits faced by the gambling industry during the twenty-first century could be organized into three major types. First, public-interest "strategic" lawsuits could be brought by state attorneys general or federal authorities. Second, class-action lawsuits could be brought on behalf of large classes of people. Although individuals' rights are involved, these types of mega-lawsuits would be largely strategic in their impacts. Third, private lawsuits could be brought on behalf of individuals or groups of individuals.

A. *Potential Antitrust Cases and Subpoenaed Discovery*

In 2002, Illinois Attorney General Jim Ryan's office "subpoenaed top casino executives after they jetted to Chicago . . . to devise a unified counterattack to the state's steep casino tax increase."³⁷ The object of these subpoenas was "to determine whether the action taken at this meeting violate[d] state or fed-

prevalled. *Meeks v. Red River Entm't (In re Armstrong)*, 285 F.3d 1092, 1098 (8th Cir. 2002). The debtor's casino markers did not have to be paid by the bankruptcy trustee. *Harrah's Tunica Corp. v. Meeks (In re Armstrong)*, 291 F.3d 517 (8th Cir. 2002).

By comparison, in *Merrill v. Trump, Ind., Inc.*, 320 F.3d 729 (7th Cir. 2003), the U.S. Seventh Circuit could not find under Indiana law any duty by Trump's Indiana casino to pathological gambler Mark Merrill to exclude him from the casino—even after his clinic requested the exclusion on Merrill's behalf. However, this case was decided in 2003, just before Indiana enacted a self-exclusion statute—despite the efforts of Indiana Sen. Larry E. Lutz (R) (representing Casino Aztar's district) to kill the legislation or alternatively grant de jure immunity to casinos for most torts. Sen. Lutz's bizarre "immunity provisions" were stricken from the final bill. See Conference Committee Report, Engrossed H.B. 1470, 1st Sess., § 4, ch. 16, at 3-4 (2003) (codified as amended at IND. CODE §§ 4-22-2, 4-33-4).

³⁶ See, e.g., Robin Reid Boswell, *Obtaining the Casino's Information*, in ATLA ANNUAL CONVENTION REFERENCE MATERIALS: CASINO GAMING 1783 (2002), available at 2 Ann. 2002 ATLA-CLE 1783. See generally ATLA ANNUAL CONVENTION, *supra* at 1783.

³⁷ Douglas Holt, *Casino Meeting Notes Subpoenaed*, CHI. TRIB., June 17, 2002, § 2, at 1, available at 2002 WL 2666206 [hereinafter *Casino Notes Subpoenaed*].

eral antitrust law.”³⁸ According to Argosy Gaming Chief Executive Officer James B. Perry, the “gathering was to discuss lobbying efforts to rescind the tax increase,”³⁹ and it was considered important as attested by the attendance of Boyd Gaming Corp. Chief Executive Officer, William S. Boyd.⁴⁰ If the state legislators did not rescind the tax increase, casino executives reportedly “threatened” to cancel construction projects, layoff employees, slash marketing efforts, and reduce charitable donations.⁴¹ This meeting “raised suspicions among state antitrust lawyers that the casinos [were] plotting anti-competitive agreements to punish the state with reduced casino revenues until the tax [was] lifted.”⁴² Paul Slater, an antitrust lawyer and adjunct professor at Northwestern University School of Law, commented: “If they were saying, ‘We’ll reduce competition between our Illinois casinos in order to punish the State of Illinois,’ you could have a violation of the Sherman Act”⁴³ which bars private businesses from acting in restraint of trade.⁴⁴

Regardless of any potential antitrust issues in this specific scenario, the trend appeared to be toward attorneys general monitoring the gambling industry more closely—particularly in areas such as Internet gambling activities. During the 1990s several state attorneys general filed suit against Internet gambling operations that were testing the law by violating the Interstate Wire Act.⁴⁵ The attorneys general included Hubert “Skip” Humphrey III in Minnesota and Jeremiah “Jay” Nixon in Missouri.⁴⁶ Private citizens were also bringing successful lawsuits to retrieve their losses from Internet gambling.⁴⁷

³⁸ *Id.* See generally Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1994); Clayton Act, 15 U.S.C. §§ 12-27 (1994); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1994). See also Robinson-Patman Act, 15 U.S.C. §§ 13(a)-13(c) (1994).

³⁹ *Casino Notes Subpoenaed*, *supra* note 37.

⁴⁰ *Id.*

⁴¹ *Id.*; Jay Krall, *Casino Executives Threaten Cuts in Illinois After Tax Boost*, WALL ST. J., June 12, 2002, at B3, available at 2002 WL 3397559.

⁴² *Casino Notes Subpoenaed*, *supra* note 37.

⁴³ 15 U.S.C. §§ 1-7 (1994).

⁴⁴ *Casino Notes Subpoenaed*, *supra* note 37.

⁴⁵ 18 U.S.C. § 1084 (1994).

⁴⁶ See, e.g., Beth Berselli, *Gamblers Play the Odds Online*, WASH. POST., Aug. 19, 1997, at A1, available at 1997 WL 12882117; Charles Bowen, *Whose Flag Flies Over the Internet*, STAR-LEDGER (Newark, N.J.), Aug. 18, 1997, at 51, available at 1997 WL 12554431.

⁴⁷ See, e.g., *Online Gambler Sues Credit Companies*, AP ONLINE, Aug. 17, 1998, available at 1998 WL 6710706, reprinted as *Online Gambling Suit Is Filed*, BELLEVILLE NEWS-DEMOCRAT, Aug. 18, 1998, at A2.

B. Legalized Gambling Causes Crime

By the twenty-first century, the public interests in Canada, the United States, and internationally were relearning what academics and police authorities had known and warned about as states and communities decriminalized gambling during the 1980s and 1990s: Legalized gambling activities cause increased crime. The trend was obvious in Canada, which served as a microcosm. “The number of fraud and internal theft cases involving problem gamblers . . . skyrocketed along with the expansion of casinos, slot machines and Internet gaming in the last 10 years . . . [according to] police, lawyers and addiction counselors.”⁴⁸ The comparisons between the costs of drug addiction and gambling addiction⁴⁹ were becoming increasingly obvious to the public and government officials.

Sergeant Bud Snow, representing the Halifax police fraud squad, commented: “At one time, most of our large internal thefts were drug-related. Now they’re more or less gambling related. . . . Over the last few years, there are probably more and more getting involved in stealing to support their gambling habit.”⁵⁰

In Canada, examples of criminal cases not only highlighted the types of crimes committed by pathological (addicted) gamblers but also revealed some of the underlying principles not commonly recognized by the public wisdom.

These bourgeois crooks tend to be trusted members of their organizations, with families and nice homes and are *just as likely to be women as men*. They include one female bank employee in Saskatchewan who took her employer for \$200,000, was convicted, then later got caught stealing another \$64,000. *A single video lottery terminal* sucked up all the money.

An RCMP officer who tailed *organized crime figures around Ontario’s casinos* stole from his unit’s expense fund to feed his own gambling habit. A stock broker siphoned money from his clients to bankroll his wife’s wagering.⁵¹

⁴⁸ Tom Blackwell, *Gambling Addiction Fueling Crime*, NAT’L POST (Toronto, Ont., Can.), May 6, 2002, at A9, available at 2002 WL 19616841 [hereinafter *Gambling Addiction Fueling Crime*].

⁴⁹ See, e.g., John Warren Kindt, Statement to the National Gambling Impact Study Commission, U.S. and International Concerns over the Socio-Economics Costs of Legalized Gambling: Greater than the Illegal Drug Problem? (May 21, 1998) (transcript on file with Nat’l Gambling Impact Study Comm’n).

⁵⁰ *Gambling Addiction Fueling Crime*, supra note 48.

⁵¹ *Id.* (emphasis added).

As one problem-gambler summarized another truism, “[t]he casinos . . . don’t care about compulsive [i.e., pathological and problem] gamblers.”⁵² As the negative impacts of gambling on consumer businesses were highlighted in the early 1990s, by the turn of the century increasing numbers of major businesses, such as L.L. Bean and MBNA, were *publicly* opposing gambling initiatives,⁵³ in part because of problems caused by gambling costs such as “lost work productivity” costs, criminal costs, and insurance costs.⁵⁴

Elsewhere, there is abundant evidence that gambling is turning the middle class to crime. One such community is Windsor, Ontario, which opened one of the first Canadian casinos in 1994.

Detective Mike Kelly of the Windsor police is working on a case involving an employee who stole \$4-million from a local manufacturer. “He said it’s all gone to gaming and there is very little hope of recovery.”

Windsor recorded a dramatic case . . . [in 2001], when Carmen Lauzon, a Bank of Montreal manager, was convicted of stealing \$1.2-million from the accounts of clients at her branch. Ms. Lauzon got a two-year jail sentence.⁵⁵

By comparison, in 2002 the legal profession in Australia sued to recover \$1.77 million stolen by an attorney from trust accounts, including \$635,940 allegedly spent at the Crown casino.⁵⁶ The plaintiffs took this legal action to recover money gambled by a probable pathological gambler, lawyer Gabriel Werden, and many believed the case was a case *primae impressionis* for Aus-

⁵² *Id.* See generally, John Warren Kindt, *Increased Crime and Legalizing Gambling Operations: The Impact on the Socio-Economics of Business and Government*, 30 CRIM. L. BULL. 538 (1994) [hereinafter *Increased Crime and Legalizing Gambling*].

⁵³ Compare John Warren Kindt, *The Negative Impacts of Legalized Gambling on Businesses*, 4 U. MIAMI BUS. L.J. 93 (1994), with email from Office of President, L.L. Bean, to All L.L. Bean Employees (April 17, 2003) (opposing casino gambling in Maine), reprinted at Citizens for a Stronger Pennsylvania, <http://strongerpa.org/gamblingdamage/llbean.htm>, Grace Murphy, *Credit Card Giant MBNA Embraces Anti-Casino Stand*, PORTLAND PRESS HERALD (Me.), June 13, 2003, at 1A, available at 2003 WL 58364669, and Jason Clayworth, *Casino Would Put Riverwalk Pledge at Risk*, DES MOINES REGISTER, July 8, 2003, at 1A, available at 2003 WL 59168102 (“Principal Financial Group will pull the plug on a proposed \$25.5 million riverwalk plan if [Des Moines] city leaders allow riverboat gambling near the project.”).

⁵⁴ John Warren Kindt, *The Economic Impacts of Legalized Gambling Activities*, 43 DRAKE L. REV. 51, 62, 85-86 (1994) [hereinafter *Economic Impacts*].

⁵⁵ *Gambling Addiction Fueling Crime*, *supra* note 48.

⁵⁶ Geoff Wilkinson, *Casino Sued for Lost Cash*, HERALD SUN (Melbourne, Vict., Austl.), May 9, 2002, at 5, available at LEXIS, News & Business, News, News, All (English, Full Text).

tralia.⁵⁷ The Australian “Supreme Court writ issued [in April 2002] by the Law Institute of Victoria’s professional standards association [apparently relied] on a section of the Lotteries Gaming and Betting Act.”⁵⁸ The claim filed with the writ specified “10 payments to Crown by Werden between June 1997 and February 1998”⁵⁹ as wagers, which should be recoverable under section 67 of the Lotteries Gaming and Betting Act when stolen funds were “paid to any person as . . . a wager or bet.”⁶⁰

In Austria, another case was garnering international attention when the Austrian Supreme Court in Vienna ruled in 2003 that the country’s major casino chain had to refund £33,000 to a pathological (addicted) gambler. This case was notable because it established that “Austrian gamblers who lose large amounts of money in casinos may be able to claim back some of their losses if they prove they are addicted to gambling.”⁶¹

C. Addicted Gamblers, Criminal Defenses, and Civil Actions Against Gambling Facilities

Like other addictions, by the 1990s “pathological gambling” was more frequently surfacing in criminal cases as a mitigating factor, and even as a defense arguing lack of mens rea (i.e., criminal intent).⁶²

When addicted gamblers were convicted, civil suits against the gambling facilities became an option. For example, in 2000 a Florida prisoner filed a lawsuit in U.S. District Court against “Donald Trump, his floating Trump Casino in Gary[, Indiana]

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Lotteries Gaming and Betting Act, 1966, § 67 (Austl.).

⁶¹ *The Supreme Court in Vienna has . . .*, GUARDIAN (London), Jan. 25, 2003, at P5, available at 2003 WL 9520211; *Compulsive Gambler Refunded Losses*, Ananova.com, at http://www.ananova.com/news/story/sm_741340.html (Jan. 19, 2003).

⁶² Cf. James H. Juliussen, Note, *Compulsive Gambling and Mitigation of Work Place Discipline: A Step Too Far?*, 27 WILLAMETTE L. REV. 711 (1991). “Compulsive gambling” is the laymen’s term for the medical “pathological gambling.” Convicted for bank robbery, Mark Merrill, for example, explored during his trial the defense that pathological (addicted) gambling obviated the criminal intent necessary for a conviction. See also *Merrill v. Trump Ind., Inc.*, 320 F.3d 729 (7th Cir. 2003).

In an interesting argument, former Arizona Superior Court Judge William L. Scholl, who was an addicted gambler, sought to have his convictions for filing false tax returns overturned on appeal because of the “distortions in thinking and ‘denial,’ which impact [addicted gamblers’] ability and emotional wherewithall to keep records.” *U.S. v. Scholl*, 166 F.3d 964 (9th Cir. 1998). The Ninth Circuit U.S. Court of Appeals rejected defendant’s arguments and affirmed his conviction.

and its manager for \$2.1 million, saying his continued gambling at the casino led him to rob two Illinois banks.”⁶³

In the average casino with thousands of surveillance cameras and devices combined with casino “cards” which can theoretically track every casino chip and interface the wagering with the casino’s computerized credit reports, one issue was the “duty” of the casino to exclude an addicted gambler once notice of the addiction was relayed to the casino.

Mark Merrill, 38, alleges he sought counseling in October 1996 for his gambling addiction and requested, by certified mail, that local casinos evict or arrest him on sight as part of his rehabilitation. While at least one casino honored his request, the Trump Casino in Buffington Harbor did not, according to the lawsuit filed in federal court in Hammond.⁶⁴

Regardless of the results in this case and the similar *Williams* case, these issues in other jurisdictions also would interface with legislated “self-exclusion” programs such as Missouri’s “List of Disassociated Persons.”⁶⁵

D. Gambling Causes Crime: Therefore, File Class-Action Suits Against Governments for Legalized Gambling Facilities: Making Governments Pay for Gamblers’ Crimes

A prescient March 2002 article, *Make Governments Pay for Gamblers’ Crimes*,⁶⁶ previewed the remarks of criminal lawyer Brian Beresh at the University of Alberta’s conference on gaming and justice issues.⁶⁷

The government has knowledge that a certain percentage of the population will become seriously addicted to gambling,

⁶³ *Bank Robber Sues Trump, Gary Casino for \$2.1 Million*, ASSOCIATED PRESS NEWSWIRES, Feb. 8, 2000, available at WL, IN-News.

⁶⁴ *Id.* In 2003, Merrill’s appeal probably failed because he basically appealed pro se while incarcerated for robberies allegedly occasioned by his addicted gambling. *Merrill v. Trump Ind., Inc.*, 320 F.3d 729 (7th Cir. 2003). Accordingly, this case set inappropriate precedents which were cited in a summary judgment rejecting the claims of the pathological gambler in *Williams*, which claimed *et alia* that Casino Aztar owed a duty to keep a pathological gambler who was known to the casino from gambling there. *Williams v. Aztar Ind. Gaming Corp.*, No. EV 01-75-C-TH, 2003 WL 1903369, at *7-8 (S.D. Ind. Mar. 5, 2003). Summary judgment was appealed to Seventh Circuit in 2003.

⁶⁵ MO. CODE REGS. ANN. tit. 11, § 45-17.010 (2003).

⁶⁶ Charlie Gillis, *Make Governments Pay for Gamblers’ Crimes, Lawyer Says: ‘They’re Responsible’*, NAT’L POST (Toronto, Ont., Can.), Mar. 8, 2002, available at 2002 WL 15263581 [hereinafter *Make Governments Pay for Gamblers’ Crimes*].

⁶⁷ *Id.*

particularly VLT [video lottery terminal] machines. . . . They know there's going to be a social consequence. If the government knows it has contributed to this dilemma, then it ought to bear some of the responsibility for the loss that occurs to employers and the rest of society.⁶⁸

In common law countries, particularly the United States, a type of *qui tam*⁶⁹ legal action should also be considered as an alternative form of lawsuit:⁷⁰

What's required is some expert evidence to show the direct link between the governments' actions—in this case, the acquiescence to having the gambling machines—and the person's conduct," [Beresh advised]. Garry Smith, a gambling research specialist and co-ordinator of the conference, welcomed Mr. Beresh's paper at a time when governments are throwing open the doors to increased gambling. "It's certainly worthwhile bringing it up."⁷¹

In 1999, after only seven years of Illinois casinos, Illinois papers began running editorial comments about suing the state it-

⁶⁸ *Id.*

⁶⁹ Enacted in 1863 to curb military procurement fraud, the False Claims Act allowed the U.S. government and private plaintiffs (called "relators") to recover damages from any person or organization which knowingly presented or caused another party to present a false or fraudulent payment claim to the government. 31 U.S.C. §§ 3729-33 (1994); *see also* Civil Monetary Penalties Inflation Adjustment, 28 C.F.R. § 85.3 (2003) (increasing the civil monetary awards). Recovery amounts included the costs of the action, fines up to \$11,000 per claim, and treble the government's damages. *See* 31 U.S.C. § 3729(a)(7) (1994); 28 C.F.R. § 85.3 (2003). Historically in common use, "10 of the first 14 statutes enacted by the first United States Congress relied on *qui tam* actions to aid the police enforcement role of government agencies." Thomas R. Grande, *An Overview of the Federal False Claims Act*, in ATLA ANNUAL CONVENTION REFERENCE MATERIALS: PRODUCTS LIABILITY 1177 (2002), available at 1 Ann.2002 ATLA-CLE 1177, 1179 (citing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989)). False Claims Act actions constituted a type of *qui tam* action, which stood for the Latin *qui tam pro domino rege quam pro se ipso in hac parte sequitur* and translates as "who as well for the King as for himself sues in this matter." BLACK'S LAW DICTIONARY 1262 (7th ed. 1999). The legal definition of a *qui tam* action is one filed by:

[A]n informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution.

BLACK'S LAW DICTIONARY 1414 (rev. 4th ed. 1968). Between 1986 and 1999, more than 3,000 suits were filed, primarily in the health care industry. Robin Potter, *False Claims Act Litigation in Employment Cases—A View from Plaintiffs'/Relators' Counsel*, in ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1207, 1208 (2002).

⁷⁰ *See generally supra* note 69.

⁷¹ *Make Governments Pay for Gamblers' Crimes*, *supra* note 66.

self for the public's gambling losses. One columnist agreed with a reader who summarized his feelings:⁷² "Every time I read the word "gaming" I'm ready to throw up. . . . It is gambling. No matter what their spin doctors say, it is NOT a game . . . it is gambling, pure and simple. Nothing will change that."⁷³ The columnist also agreed with a reader who opined: "When people lose the farm, they should do exactly what the states have done to cigarette and gun manufacturers[:] Sue the states for causing pain and suffering."⁷⁴ The tax revenues, which the states received from gambling activities, would be dwarfed by the losses which were dropped in casinos and other gambling venues. "What a delightful class-action suit that would make. Thousands who have lost their food and rent money in the casinos or lottery could join."⁷⁵ By the beginning of the twenty-first century such class-action suits were gaining attention and momentum, such as a \$625 million class-action suit in Quebec, Canada.⁷⁶

II

CLARIFICATION OF GOALS

A. *Recriminalize Convenient Electronic Gambling Devices and Video Gambling Machines As Recommended by the 1999 U.S. Gambling Commission*

As unanimously recommended by the 1999 U.S. Gambling Commission, convenience gambling available to the public via electronic gambling devices [hereinafter EGDs], subcategories of video gambling machines [hereinafter VGMs], and similar gambling should be recriminalized,⁷⁷ as South Carolina did in 2000.⁷⁸

Kansas City attorney Stephen Bradley Small highlighted the strategic liability faced by the U.S. gambling industry, particularly regarding electronic gambling devices and concomitant

⁷² Jack Mabley, Column, *Try Suing the State for Gambling Losses*, DAILY HERALD (Arlington Heights, Ill.), Nov. 3, 1999, at 18, available at LEXIS, News & Business, News, News, All (English, Full Text).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Quebec Class-Action Suit*, *supra* note 2.

⁷⁷ See, e.g., NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT para. 3-6, at p. 3-18 (1999) [hereinafter NGISC FINAL REPORT]; NAT'L GAMBLING IMPACT STUDY COMM'N, EXECUTIVE SUMMARY para. 3-6, at 30 (1999) [hereinafter NGISC EXEC. SUMMARY].

⁷⁸ Sarah O'Donnell, *Where to Haul 22,000 Poker Machines?*, HERALD (Rock Hill, S.C.), June 29, 2000, at A1, available at 2000 WL 6573944.

video gambling machines, which by 2001 were producing 70 to 90 percent of the monies lost in casinos.⁷⁹

“Small said video poker games are known to be especially addictive,”⁸⁰ an issue highlighted by the 1999 U.S. Gambling Commission.⁸¹ They are “the crack cocaine of gambling because they are run by software designed by sophisticated people who know how to maintain a player’s interest in the device by letting them think they almost won the jackpot,” Small said, defining the practice as “psychological warfare.”⁸² “There are serious issues involving fraud and fraudulent inducement to contract,” he said.⁸³

During the mid 1990s, a loophole slipped into a South Carolina statute by pro-gambling interests, allowing video and electronic gambling throughout the state’s convenience store industry.⁸⁴ The resultant crime and social disruption was so overwhelming that convenience gambling via EGDs and VGMs was de facto recriminalized via a South Carolina Supreme Court decision effective July 1, 2000.⁸⁵

⁷⁹ See, e.g., Tom Gorman, *Casinos Bet on High-Tech Slots to Improve Returns*, L.A. TIMES, Feb. 16, 2003, at A20, available at 2003 WL 2385550. Nationwide, video gambling machines (VGMs) constitute seventy-five percent of total wagers. *Id.* In some Indian casinos (such as the Cherokee casino in North Carolina) and “racinos” (combination racetracks and casinos), VGMs constitute 100 percent of the casino revenues because there are no card games. See *id.* Card games need employees, so the trend in the 1990s was toward fewer card games. For example, Las Vegas marketing dictated that there be multiple venues for card games, and therefore only fifty percent of Las Vegas casino revenues were attributable to VGMs. *Id.* Of course, VGMs required relatively few employees, and as VGM technologies consolidated over time, fewer and fewer casino employees were needed as the twenty-first century began. See, e.g., *New Slot Machine Technology Means Layoffs at Argosy*, POKERMAG.COM, May 2, 2003, at <http://www.pokermag.com/managearicle.asp?c=150&a=3702>. See also Fred Faust, *Increasing Play of Slots Makes Casino Table Game Disappear*, ST. LOUIS POST DISPATCH, Nov. 16, 1998, at BP2, available at 1998 WL 3362223 (in 1998 Missouri’s slots provided 74.8% to 84.4% of casinos’ revenues); *Slot Machines Run*, *supra* note 31, at BP12 (in 1983 for the first time casino revenues in Nevada and Atlantic City “from slot machines exceeded the win from table games” and by 1993 “casinos derive[d] at least 60 percent of their win from slots”). In 1996 *USA Today* intimated that the search was being conducted for a slot machine with an addictive game, termed “Gambling’s Holy Grail.” J. Taylor Buckley, *The Quest for Gambling’s ‘Holy Grail,’* U.S.A. TODAY, May 20, 1996 at 1A, available at 1996 WL 2055931 [hereinafter *Gambling’s ‘Holy Grail’ Slot Addictive Game*].

⁸⁰ *Self-Exclusion*, *supra* note 15.

⁸¹ Cf. NGISC FINAL REPORT, *supra* note 77, at p. 5-5.

⁸² *Self-Exclusion*, *supra* note 15.

⁸³ *Id.* For an overview of issues involving video gambling (slot) machines, see *Gambling’s ‘Holy Grail’ Slot Addictive Game*, *supra* note 79.

⁸⁴ See S.C. CODE §§ 12-21-2770 to 12-21-2809 (repealed 1999).

⁸⁵ *Joytime Distrib. & Amusement Co. v. State*, 528 S.E.2d 647 (S.C. 1999) (hold-

B. Reveal the Marketing Techniques of Gambling Interests

Pathological gamblers have been deterred from suing casinos because of a public stigma greater than the “disgruntled loser” tag traditionally applied to those who sue to recover losses.⁸⁶

[T]he gambler [often is] skittish about going before a jury, said [Professor I. Nelson] Rose. The “embarrassment factor” of not wanting to admit to massive debt and a mental illness, *i.e.*, a gambling addiction, deters many people from seeking their day in court. But as the public becomes more educated about gambling—and more receptive to victimization defenses in general—these barriers are coming down, he said.⁸⁷

Unlike other basic marketing principles, the marketing of gambling involves an overwhelming majority of patrons who are dissatisfied customers. However, gambling patrons do not wish to admit they are “losers”; so even as dissatisfied customers they remain silent because of the social stigma of being “a loser.”⁸⁸ *A fortiori*, a pathological gambler will be in denial of being a loser for even longer periods of time than the recreational gambler.⁸⁹

Over time, a capitalist will win via education and expertise. Over time, a gambler loses everything.⁹⁰ A business risk in a capitalistic economy is always winnable given education and expertise. Over time, short-term failure brings the education to succeed.

However, the artificial risk which defines gambling results in the gambler losing everything (known as “gambler’s ruin”).⁹¹ Over time, the House wins everything, and the gambler loses everything.⁹² Therefore, the House’s marketing is directed toward keeping the gambler thinking that the gambler is winning when in fact, over time the gambler is always losing.⁹³

ing proposed referendum on video gambling machines was unconstitutional delegation of legislative power).

⁸⁶ Diana Digges, *Stakes Rise in ‘Compulsive Gambling’ Suits*, LAW. WKLY. USA, Nov. 26, 2001, at 16.

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *Free Credit*, *supra* note 10 (presenting formulae for “gambler’s ruin”).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

C. *Utilize the State Statute Shibboleth: The Term “Compulsive” Gambler Indicates Inordinate Influence by Pro-Gambling Interests*

The standard reference book of the American Psychiatric Association is *The Diagnostic and Statistical Manual of Mental Disorders*, which delimits “pathological gambling.”⁹⁴ Instead of utilizing the proper terminology of “pathological gambling” (and the concomitant term “problem gambling”), pro-gambling interests during the 1990s started insisting that their supporters utilize the less-threatening term “compulsive” gambling, which operated to the public-relations benefit of pro-gambling interests.⁹⁵ As the twentieth century ended, however, there was no single mention of “compulsive” gambling in the *The Diagnostic and Statistical Manual of Mental Disorders*—the proper terminology was “pathological” gambling (and associated “problem” gambling).⁹⁶ When found in state statutes or regulations, references to “compulsive” gambling were definitive signs of pro-gambling influences’ direct impact on the drafted legislation or indirect impact through naïve draftsmanship. Accordingly, litigators should be alerted to regulatory legislation and self-exclusion programs for pathological gamblers which fail the shibboleth by utilizing the term “compulsive” gambler instead of the proper term “pathological” gambler.

D. *Model Causes of Action on Cases which Include RICO: Johnson v. Collins Entertainment Co.*

In *Johnson v. Collins Entertainment Co.*, thirty-eight court-described “habitual gamblers” brought suit in a South Carolina state court claiming video poker operators violated state law as well as the Racketeer Influenced and Corrupt Organizations Act.⁹⁷ The case was removed to U.S. District Court for the District of South Carolina, which granted partial summary judgment for the plaintiffs.⁹⁸ The video poker operators then appealed to the Fourth Circuit U.S. Court of Appeals.⁹⁹ The court of appeals

⁹⁴ AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 312.31, at 615-18 (4th ed. 1994) [hereinafter DSM-IV].

⁹⁵ For a discussion and supporting materials analyzing changes in terminology, see, for example, *Mega-Lawsuits*, *supra* note 1, at 31, 32-34.

⁹⁶ DSM-IV, *supra* note 94.

⁹⁷ *Johnson v. Collins Entm’t Co.*, 564 S.E.2d 653, 657-58 (S.C. 2002).

⁹⁸ *Johnson*, 88 F. Supp. 2d 499 (D.S.C. 1999).

⁹⁹ *Johnson*, 199 F.3d 710 (4th Cir. 1999).

vacated the order on the basis that the district court “improperly ruled on unsettled issues of the state law.”¹⁰⁰ The district court then certified questions to the South Carolina Supreme Court, which held:

- a. The prohibition on offering special inducements to play video gaming machines was constitutional.¹⁰¹
- b. The prohibition of offering the possibility of winning more than \$125 per day was not unconstitutionally vague and did not violate procedural due process.¹⁰²
- c. This prohibition applied to people who leased machines to others who maintained the place the machine was used.¹⁰³
- d. Violating the prohibition on special inducements was an act subject to prosecution under the statute.¹⁰⁴
- e. Violating the prohibition on special inducements meant that the violator was “operating an illegal gambling business in violation of the law of this state,” which violated RICO.¹⁰⁵
- f. South Carolina Code §§ 32-1-10 and 32-1-20¹⁰⁶ did not provide the exclusive remedy for gambling losses and did not limit the other remedies to the 90-day limitation on these two sections.
- g. The Defendants’ payment of cash above the statutory cap and related practices constituted unfair trade practices under the South Carolina Unfair Trade Practices Act.¹⁰⁷

The practical effect of this South Carolina case was that “[a]ddicted video poker gamblers, whose lawsuit helped topple a \$3 billion industry, got a chance . . . to win back up to three times the money they poured into gaming machines.”¹⁰⁸ At gambling’s peak in the mid-1990s, South Carolina “had about 37,000 ma-

¹⁰⁰ *Johnson*, 564 S.E.2d at 658.

¹⁰¹ *Id.* at 658 (interpreting S.C. CODE § 12-21-2804(B) (repealed 1999)). The Court interpreted an advertising ban as it interfaced with the First Amendment of the U.S. Constitution.

¹⁰² *Id.* at 660-61 (interpreting S.C. CODE §§ 12-21-2791, 12-21-2804(B) (repealed 1999)).

¹⁰³ *Id.* at 661-62 (interpreting S.C. CODE §§ 12-21-2791, 12-21-2804(B) (repealed 1999)).

¹⁰⁴ *Id.* at 663 (interpreting S.C. CODE § 12-21-2804(F) (repealed 1999)).

¹⁰⁵ *Id.* at 663-64 (interpreting S.C. CODE §§ 12-21-2770 to 12-21-2809 (repealed 1999)).

¹⁰⁶ *Johnson*, 564 S.E.2d at 663-64 (interpreting S.C. CODE §§ 32-1-10, 32-1-20, 39-5-10 *et seq.* (Law Co-op. 1991)). The relevant sections were originally adopted as part of the Statute of Anne enacted in 1710. An Act for the Better Preventing of Excessive and Deceitful Gaming, 1710, 9 Ann. c. 14, §§ 1, 2, 4 (England). *See also* S.C. CODE §§ 12-21-2770 to 12-21-2809 (repealed 1999).

¹⁰⁷ *Johnson*, 564 S.E.2d at 665-66 (interpreting S.C. CODE §§ 39-5-10 *et seq.* (Law Co-op 1991)).

¹⁰⁸ Clif LeBlanc, *Ruling Says Gamblers Could Recoup Losses, More*, STATE (Co-

chines that grossed an average of up to \$25,000 each.”¹⁰⁹ However, the South Carolina Supreme Court de jure “banned video poker effective July 1, 2000, and stopped a referendum that might have allowed the gaming industry to stay alive.”¹¹⁰ In *Johnson*, the supreme court held that “video poker operators ran their legal gambling operations illegally.”¹¹¹ The decision concluded that the video gambling “operators offered jackpots that far exceeded the state payout cap of \$125; violated fair trade practices[;] and did it in a way that could amount to criminal racketeering.”¹¹² Plaintiffs’ attorney Richard Gergel cautioned that “the ruling takes the gamblers’ position so completely that it warns anyone who gets into the gambling business that they must abide by the letter of the law.”¹¹³ Charleston attorney Larry Richter, a 2002 candidate for the state attorney general, indicated that plaintiffs would pursue the assets of the video poker companies as well as the owners’ personal wealth—several of whom became millionaires.¹¹⁴

E. Follow Administrative Judicial Rulings on Expert Testimony Resolving Issues in Pathological Gambling

Prior to the recriminalization of electronic gambling devices and the video gambling machines in South Carolina, a 1998 administrative judge’s ruling on pathological gambling issues was illuminating.¹¹⁵ After evaluating expert testimony on several debated issues, the judge ruled:

I find the following attributes exist concerning gambling in society. Pathological gambling, the clinical term used to describe compulsive gamblers, is a very disruptive illness that occurs in some individuals who choose to gamble. The increase of the legalization of various forms of gambling increases the occurrence of pathological gambling in society. Various direct and indirect economic and social costs accompany pathological gambling, including crime, loss of productivity, broken homes,

lumbia, S.C.), May 29, 2002, at 1, available at 2002 WL 18743184 [hereinafter *Gamblers Could Recoup*].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See, e.g., Public Hearing Report of the Administrative Law Judge in re: Proposed Regulations §§ 12-21-2720(A)(3), 12-21-2804 S.C. Dep’t of Revenue, Doc. No. 97-ALJ-17-0589-RH (Apr. 28, 1998).

bankruptcy, etc. In fact, pathological gambling affects the entire society, in the work environment and the family environment. Specifically, there is a strong relationship between compulsive gambling and crime. Money is the substance of the pathological gambling addiction. Once the compulsive gambler exhausts all legal access to money, he routinely commits crimes to get money. Thus the greater the prevalence of gambling, the greater the prevalence of crime. Consequently, the reduction of gambling reduces the potential for pathological gambling, and the resulting amount of social harm.¹¹⁶

This administrative judge's ruling was insightful, and it answered many questions contrary to the public relations dogma of pro-gambling interests. This ruling was also significant since it was issued over a year before the 1999 U.S. Gambling Commission's *Final Report*¹¹⁷ and the *Executive Summary*,¹¹⁸ which largely confirmed the judge's conclusions.

F. Question: What Constitutes a "Fair Game" When the Pro-Gambling Interests Can Legislate the Definition of the Term "Fair"?

The main problem with the decriminalization of gambling in the United States during the 1980s and 1990s was that it was decriminalized and then supposedly regulated by pro-gambling interests—an inherent conflict of interest. During the 1990s, several states decriminalized casino gambling¹¹⁹ and modeled their regulations on legislation drafted by pro-gambling interests including what constituted a "fair game." Kansas City attorney Stephen Bradley Small summarized the problems in 2000:

The fundamental problem with suing a casino is that the courts appear unwilling to get involved—as if by walking into a casino you are asking to be robbed. . . . The state's rules say the games must be fair. The games are not fair, so this is an area ripe for litigation.¹²⁰

In 2003, Small brought the "fairness" issues into the public spot-

¹¹⁶ *Id.*

¹¹⁷ NGISC FINAL REPORT, *supra* note 77.

¹¹⁸ NGISC EXEC. SUMMARY, *supra* note 77.

¹¹⁹ Other than Nevada (1931) and New Jersey (in Atlantic City, 1976), the first state to allow non-Indian casinos was South Dakota (in Deadwood, 1989). In 1989, riverboat casinos were authorized first in Iowa and then in Illinois. George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 GAMING RES. & REV. J. 65, 70, 72, 74 (1996) [hereinafter *Chronology of (Legal) Gaming*].

¹²⁰ *Self-Exclusion*, *supra* note 15.

light in *State ex rel. Small v. Ameristar*.¹²¹

As indicated in the previous analysis, practically all, if not all, games developed by the gambling industry have a built-in statistical edge for “the House” (*i.e.*, the House Advantage) which means that over time the House will always win the money wagered—a principle known as “gambler’s ruin.”¹²² By definition, the games are designed as “zero-sum” games to leave the gambler with “zero” and the house with the “sum” of all the money wagered. Over time, this will always occur. Statistically, a gambler thus only can come out ahead if the gambler has a short-term positive cash “win”—and then never gambles again. Continued gambling can statistically only lead to “gambler’s ruin.”

These scenarios raised the strategic issues of “fairness”: Were the states with legalized gambling really giving each of their citizens an equitable or fair chance to have an ultimate gambling win? The gambler’s ruin principle suggested that the states were not. In other words, statistics indicated that anyone who could be enticed to play would be a loser. In this context, another issue queried whether U.S. government-licensed gambling was constitutional if its net effect was to mislead people into losing their property and thereby deprive them of their Fourteenth Amendment property “without due process of law?” *A fortiori*, how could state gambling statutes and regulations drafted and/or dominated by pro-gambling interests comply with due process of law when by definition all legalized gambling (except parimutual wagering) is designed to transfer citizens’ property to the House (in partnership with state governments) as a zero-sum game?

These scenarios also raised individualized issues of “fairness”: Were the states with legalized gambling really monitoring the fairness of individualized games or were the states deferring to determinations of “fairness” as formulated by the Nevada gaming interests?

Scenarios which exemplified individualized complaints involved the ability of gambling venues to change the “House Advantage” or odds on various electronic gambling machines, all known as sucker machines for sucker bets.¹²³ The House Advan-

¹²¹ *State ex rel. Small v. Ameristar Casino Kan. City, Inc.*, No. CV103-3190CC (Cir. Ct., Clay Co., Mo. May 12, 2003). This case blueprints several causes of action in these issue areas.

¹²² See *supra* notes 86-93 & accompanying text. See generally *Free Credit*, *supra* note 10.

¹²³ Although such manipulation generally would be illegal, technologically the

tage could range from one to ten percent (or higher) on VGMs. By comparison, the House Advantage in blackjack or baccarat was one percent—but only if the player played optimum strategies (without any sucker bets).

The 1999 U.S. Gambling Commission suggested throughout its *Final Report* that states with legalized gambling relied to their detriment, and the detriment of their citizens, on the advice and regulatory schema of pro-gambling interests.¹²⁴ Accordingly, by the early twenty-first century, citizens began bringing lawsuits challenging the state regulatory mechanisms themselves, such as *Small*, which plaintiffs brought in part on behalf of the general public. *Small* raised issues involving fairness and an allegedly defective slot machine.¹²⁵ The lawsuit claimed “the casino and the state gaming commission . . . knowingly allowed a defective slot machine to continue to operate.”¹²⁶ The questionable machine was a double \$1 slot produced by International Game Technology.¹²⁷

For the first time, a judge (not a gambling agent) ordered a VGM “pulled off the floor” of a casino, and attorney “Small also implied that the [casino’s] other 3,000 [VGMs were] at risk.”¹²⁸ These VGMs appeared to be particularly vulnerable to such challenges because by the late 1990s VGMs accounted for seventy to ninety percent of casino revenues¹²⁹ and were static play ma-

“owner [of a video gambling machine] can flip an internal switch to change the odds and make it almost impossible to win.” Virginia Young, *Kids’ Amusement Games Run Afoul of Gaming Laws*, ST. LOUIS POST-DISPATCH, Mar. 2, 1999, at B1, available at 1999 WL 3013375. The House Advantage on VGMs interfaces with the advertising of “the loosest slots.” For a discussion of slot machine payout percentages, see Fred Faust, *Casinos Here Differ on Just What Makes a Loose Slot Machine Loose*, ST. LOUIS POST-DISPATCH, Feb. 23, 1998, at BP2, available at 1998 WL 3321726. The profit margin on video gambling machines is so large that they typically pay for themselves within two weeks of being installed. Even so, the temptations and apparent ease with which the VGMs can be fixed have led to high-profile cases. See, e.g., Peter O’Connell, *Pair Sentenced for Roles in Killing of Witness in Slot-Rigging Case*, LAS VEGAS REV.-J., Dec. 22, 1999, at 1B, available at 1999 WL 9300741. See *supra* note 79 and accompanying text.

¹²⁴ NGISC FINAL REPORT, *supra* note 77.

¹²⁵ Plaintiff’s Class Action Complaint, *Small*, No. CV103-3190CC (filed May 12, 2003).

¹²⁶ *Judge Orders Slot Machine Pulled From Ameristar Casino*, KMBC-TV, May 12, 2003, at <http://www.thekansascitychannel.com/news/2198782/details.html> [hereinafter *Judge Orders Slot Machine Pulled*]; *Small*, No. CV103-3190CC (granting temporary restraining order).

¹²⁷ *Judge Orders Slot Machine Pulled*, *supra* note 126.

¹²⁸ *Id.*; see *Small*, No. CV103-3190CC (granting temporary restraining order).

¹²⁹ See *supra* notes 77-79, 123 and accompanying text.

chines controlled by the gambling industry's various VGM chips, allegedly involving no valid "skills" for general play.¹³⁰

The *Small* complaint raised numerous allegations relating to individualized "fairness" and even to improprieties. Most of the allegations in the complaint were directed to issues involving the networking between centralized computer systems, video gambling machines, and the "chips" driving the VGMs:

One particular chip . . . [allegedly] permits cheating and stealing through the entry of a sequence of player activated button pushes. When this occurs, the machine empties its hopper and consequently reflects that it has "paid out" a higher number of coins than actually has occurred. This chip has existed in the thousands of . . . slot machines at [various casinos].¹³¹

The allegations were supported by multiple citations to the "patents" for chips formulated to perform specialized functions.¹³²

Furthermore, the complaint alleged:

The slot machine as all other . . . [various] slot and video poker machines are networked through communication links to central computer processing equipment. . . .

All game data is communicated between a gaming machine and the central computer. Pursuant to the . . . [jackpot system], the gaming machine requests and central computer[s] periodically communicate packets of game/prize information to the slot machines. As these packets of information are depleted by wagering activity, additional packets of information are requested by the machine and transmitted from the . . . computer suite. The content of the packets are win/loss and jackpot prize instructions. Most if not potentially all of the stacks and sub stacks of packets can be preset by the casino to contain no winning progressive jackpot. Through this methodology the casino can assure that jackpots are not awarded for the indefinite future. The casino can also dispense a packet with a jackpot winning instruction to a particular machine to force a jackpot to be awarded to a particular player at a predetermined time. The casino can also take the slot machine in question off line to prevent it from receiving large prize award

¹³⁰ *Id.* "Although state laws mandate that winning at slots be based only on luck and chance, many players' [false] sense that skill makes a difference goes a long way toward explaining the phenomenal popularity of video poker. . . . 'The illusion that player participation makes a difference' in the outcome drives which slot machines get players," according to Whittier Law Professor I. Nelson Rose. *Gambling's 'Holy Grail' Slot Addictive Game*, *supra* note 79. The U.S. rule defines a "game of chance" as a game where chance *predominately controls* the outcome. *See, e.g., Johnson v. Collins Entertainment Co.*, 508 S.E.2d 575 (S.C. 1998).

¹³¹ Plaintiffs Class Action Complaint at para. 6, *Small*, No. CV103-3190CC.

¹³² *See, e.g., U.S. Patent No. 5,779,545* (issued July 14, 1998); Plaintiff's Class Action Complaint at para. 7, *Small*, No. CV103-3190CC.

instructions. . . . [Missouri Gaming Commission] regulations require maintenance of all communications with gaming machines. Through this communications system, the casino can manage the timing and location of jackpots as well as to whom the jackpots are awarded and maximize its return (as well as progressive financial losses to players, some of which may or can result in devastating damage including personal or financial ruin). Through this system the casino can also systematically win money from any given individual or plurality of players, most particularly those it has targeted [particularly via Customer Cards]. The casino can also award jackpots or other prizes to selected players including potentially its confederates.¹³³

While none of these allegations were proved in court, this case highlighted future issue areas. For example, the potential interstate communications systems between various VGMs also raised spectres of potential violations of the Interstate Wire Act.

In addition, Small could claim that several issues were not addressed and that the judge's decision focused only "on testimony about one of several computer chips" that drove the VGMs.¹³⁴ A summary of court testimony was revealing:

The Missouri Gaming Commission earlier [in 2003] revoked the license for that chip after determining that a programming flaw could allow a player—in collusion with an accomplice with access to the chip—to cheat the machine by tricking it into paying excess amounts of jackpot coins.

Commission gaming enforcement manager Clarence Greeno testified that the programming flaw "had nothing to do with game outcomes."

Small, however, argued . . . in court that "this chip cheats players," and he insisted that it continues to do so because the commission has allowed the flawed chip to remain in that lone machine until its big jackpot is won.¹³⁵

The court's narrow focus and the refusal of the court to address all of the issues raised in the complaint frustrated the plaintiff.

Greeno testified that the casino sought a waiver to continue using the chip in order not to create a public perception that its big jackpot game was being manipulated in any way.

When Small attempted to cross-examine Greeno, Mike Bradley, an assistant attorney general representing the commission, successfully objected and halted Greeno's testimony

¹³³ Plaintiff's Class Action Complaint at paras. 11-12, *Small*, No. CV103-3190CC.

¹³⁴ Rick Alm, *Judge Puts Ameristar Slot Machine Back in Action*, KAN. CITY STAR, May 16, 2003, at C2, available at 2003 WL 19781772.

¹³⁵ *Id.*

before it could become a matter of public record.¹³⁶

The judge ruled that the slot machine at issue could be returned to the floor of the casino.¹³⁷ Although this did not establish precedent, some of the issues raised in the fifty-page complaint highlighted the vulnerability of casinos' computer networks and became a blueprint for future causes of action.

Accordingly, gambling facilities appear to be vulnerable to lawsuits in these issue areas. Even so, plaintiffs' attorneys pursued other issue areas more aggressively as the twenty-first century began.

III

HISTORICAL BACKGROUND

A. *Legalize It in Nevada and Eventually It Will Be Legal Everywhere: Is Las Vegas the Nation's Shadow Capitol?*

As destructive social and economic policy, gambling was not only criminalized throughout the United States for most of the twentieth century, but also "successfully criminalized." In 1931, casino gambling was decriminalized in Nevada,¹³⁸ and in 1976, casino gambling was voted into Atlantic City, New Jersey, after failing in 1974.¹³⁹ Beginning in 1988, both tribal and commercial casino gambling were not approved by votes in public referendum but were created by legislative fiat via casino lobbyists until thirty states had casinos by 2002. Until 2002, the two major exceptions with statewide public votes on casino gambling were 1988 in Deadwood, South Dakota, for limited mini-casinos¹⁴⁰ and 1996 in Detroit (after three previous rejections by voters).¹⁴¹ With Detroit Mayor Dennis Archer "serving as a sort of croupier,"¹⁴² different groups including one headed by former Detroit Mayor Coleman Young maneuvered for the Detroit licenses.¹⁴³

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Chronology of (Legal) Gaming*, *supra* note 119, at 70.

¹³⁹ *Id.* at 72.

¹⁴⁰ *See, e.g., Economic Impacts*, *supra* note 54, at 70-75.

¹⁴¹ George Weeks, *Young Enters Race for Casino*, DETROIT NEWS, Mar. 21, 1997, at A1; *New Wheels for Motor City*, ECONOMIST, Apr. 11, 1998, at 23, available at 1998 WL 8884781 [hereinafter *New Wheels for Motor City*].

¹⁴² *New Wheels for Motor City*, *supra* note 141.

¹⁴³ Adam Steinhauer, *Gaming's New Frontier*, LAS VEGAS REV.-J., Aug. 18, 1997, at 1D, available at 1997 WL 4551150.

Thus, within a decade there were thirty new casino states with approximately 800 casinos and bingo facilities, both tribal and non-tribal.¹⁴⁴ Furthermore, the first U.S. lottery in New Hampshire in 1964 had spread during the 1980s to include thirty-eight states (plus Washington, D.C.) with lotteries by 2003.¹⁴⁵

While these trends toward decriminalizing gambling started slowly, they gained momentum during the 1990s. It also became apparent that Nevada legislation and regulations, drafted by the gambling industry or heavily influenced by the industry, were being utilized as models for gambling expansions into other states. By the end of the 1990s, Nevada legislation was not just the model; it set the agenda for U.S. gambling expansion.

One example included Nevada's legalization of sports gambling, which was at first rubber-stamped by Washington, D.C., via a federal legislative Nevada "exception" in the Professional and Amateur Sports Protection Act of 1992.¹⁴⁶ However, the exception was soon manipulated to make the rule nationally.¹⁴⁷ Other examples were gambling via the Internet or other cyberspace venues, which were illegal under the Interstate Wire Act.¹⁴⁸ To leverage Washington, D.C., into de facto, if not de jure, legalization of Internet gambling, Nevada legislators tried to legalize their own Internet gambling.

It won't come as a surprise . . . to learn that Nevada casinos usually get what they want from our state lawmakers. Thus, when high-powered casino lobbyist Harvey Whittemore asked the 2001 State Legislature for an Internet gambling bill, our elected representatives gave him and his wealthy clients what they wanted.¹⁴⁹

¹⁴⁴ Dave Palermo, *Playing the Numbers Game*, INT'L GAMING & WAGERING BUS., June 2002, at 22 [hereinafter *Playing the Numbers Game*] (approximately 750 casinos/gambling parlors, and 37 states with lotteries); U.S. Rep. Frank Wolf (R), Column, *Most Indians Still Mired in Poverty*, DAY (New London, Conn.), Oct. 26, 2003, at C3, (approximately 800 casinos/gambling facilities) reported at Peace Party, <http://www.bluecorncomics.com/stype3a.htm> [hereinafter *Indians Still Mired in Poverty*].

¹⁴⁵ *Playing the Numbers Game*, supra note 144, at 22; *Indians Still Mired in Poverty*, supra note 144, at C3.

¹⁴⁶ 28 U.S.C. §§ 3701-04 (1994).

¹⁴⁷ John Warren Kindt & Thomas Asmar, *College and Amateur Sports Gambling: Gambling Away Our Youth?*, 8 VILL. SPORTS & ENT. L.J. 221, 231-32 (2002) [hereinafter *Gambling Away Our Youth*].

¹⁴⁸ 18 U.S.C. § 1084 (1994). See also *Gambling Away Our Youth*, supra note 147, at 232-33.

¹⁴⁹ Guy W. Farmer, Column, *Internet Gaming, a Losing Proposition*, NEV. AP-

Even members of the Nevada press were outraged. “Following last-minute passage of this flawed piece of legislation, . . . political columnist Jon Ralston accused lawmakers of acting like ‘a 63-member rubber-stamping board of trustees for the Nevada Resort Association.’”¹⁵⁰

In a parallel scenario, in 1998 federal prosecutors indicted several U.S. “business” persons operating six on-line gambling facilities based outside the United States.¹⁵¹ One high-profile provider of Internet gambling services and a San Francisco resident, Jay Cohen, surrendered to federal authorities for trial in New York.¹⁵²

Cohen, co-owner of a popular gaming Web site based on the tiny island of Antigua, was convicted [in 2000] in New York federal court of violating the 40-year-old Interstate Wire Act, which bans companies and individuals from using interstate phone lines to take bets. Cohen, who was sentenced to 21 months in prison and fined \$5,000, . . . appealed his conviction to the U.S. Supreme Court on grounds that his customers’ wagers took place in Antigua rather than in the U.S.¹⁵³

Cohen lost his appeal and began serving his sentence in 2001.¹⁵⁴ By comparison, several of the twenty-one other indicted individuals did not immediately surrender to U.S. authorities and remained fugitives.¹⁵⁵

Just as Nevada interests had spread gambling throughout the United States during the 1990s, critics noted that the Shadow Capitol was politically market-testing the legalization and spread

PEAL (Carson City, Nev.), Apr. 7, 2002, available at <http://www.nevadaappeal.com> [hereinafter *Losing Proposition*].

¹⁵⁰ *Id.*

¹⁵¹ Dean Starxman, *U.S. Indicts 14 Over Gambling On the Internet*, WALL ST. J., Mar. 5, 1998, at A8, available at 1998 WL 3485072.

¹⁵² *Id.*; Larry Neumeister, *FBI Charges 14 Individuals in Six Companies with Conspiracy*, ASSOC. PRESS, Mar. 4, 1998, available at 1998 WL 6643890.

¹⁵³ *Losing Proposition*, *supra* note 149.

¹⁵⁴ *United States v. Cohen*, 260 F.3d 80 (2d Cir. 2001); Larry Neumeister, *Appeals Court Upholds Conviction of Web Sports Gambling Defendant*, ASSOCIATED PRESS NEWSWIRE, July 31, 2001, available at WL, Allnewplus; *U.S. Wins First Offshore Internet Gambling Case*, REUTERS LTD., March 9, 2000, reprinted at SearchDice.com, <http://www.searchdice.com/Magazine/Business/Articles/78801.html> [hereinafter *Offshore Gambling*].

¹⁵⁵ *Offshore Gambling*, *supra* note 154. See generally, John Warren Kindt & Stephen W. Joy, *Internet Gambling and the Destabilization of National and International Economies: Time for a Comprehensive Ban on Gambling Over the World Wide Web*, 80 DENV. U. L. REV. 111 (2002) [hereinafter *Gambling's Destabilization of Economies*].

of drugs and prostitution as the new saviors for state budgets.¹⁵⁶ However, critics opined that the most blatant example of the influence of the Las Vegas Shadow Capitol was its direct influence on the U.S. Congress in the \$100 billion Economic Stimulus Bill of 2002.¹⁵⁷ While few tax credits were allowed to consumer or product-oriented companies, the gambling companies received a tax write-off slipped into the bill by the House Gaming Caucus and worth a reported \$40 billion in write-offs for “slot machines” and associated technical equipment.¹⁵⁸

B. Legalizing More Gambling Activities Increases Illegal Gambling and Associated Crime: Existing Gambling Facilities Attract Criminals

Illegal sports wagers in the United States totaled an estimated \$8 billion in 1983 and grew to \$29 billion in 1990.¹⁵⁹ In another estimate, U.S. illegal sports betting was placed at \$100 billion in 1992 and exceeded the \$80 billion narcotics business.¹⁶⁰ In 1996, a trade magazine for the gambling industry referenced the Coun-

¹⁵⁶ See, e.g., Charlie LeDuff, *Nevada Turns to Brothels as a Budget Fix*, N.Y. TIMES, June 28, 2003, at A7, available at LEXIS, News & Business, News, News, All (English, Full Text).

¹⁵⁷ Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (2002) (codified as amended in scattered sections of 26 U.S.C.) (commonly referred to as the 2002 Economic Stimulus Bill). See also John Warren Kindt & Anne E.C. Brynn, *Destructive Economic Policies in the Age of Terrorism: Government-Sanctioned Gambling as Encouraging Transboundary Economic Raiding and Destabilizing National and International Economies*, 16 TEMPLE INT'L & COMP. L.J. 243 (2002) [hereinafter *Gambling Destabilizing Economies*].

¹⁵⁸ See Job Creation and Worker Assistance Act, *supra* note 157; Tony Batt, *Tax Break for Slots OK'd: Measure Will Let Companies Deduct Technological Expenses*, LAS VEGAS REV.-J., Oct. 16, 2001, at 10D, available at 2001 WL 9541525. See generally, John Warren Kindt, *Would Re-Criminalizing U.S. Gambling Pump-Prime the Economy and Could U.S. Gambling Facilities Be Transformed into Educational and High-Tech Facilities? Will the Legal Discovery of Gambling Companies' Secrets Confirm Research Issues?*, 8 STANFORD J.L., BUS. & FIN. 169 (2003) [hereinafter *Gambling Facilities Transformed into Educational Facilities*]; John Warren Kindt, *Internationally, The 21st Century Is No Time for the United States to Be Gambling with the Economy: Taxpayers Subsidizing the Gambling Industry and the De Facto Elimination of All Casino Tax Revenues via the 2002 Economic Stimulus Act*, 29 OHIO N. UNIV. L. REV. 363 (2003) [hereinafter *Gambling with the Economy and the Elimination of All Casino Tax Revenues*].

¹⁵⁹ Paul Doocey, *The Case for Legal Sports Betting*, INT'L GAMING & WAGERING BUS., Apr. 1996, at 1, 42 (citing to estimates from Christiansen/Cum-mings Associates, Inc.) [hereinafter *Case for Sports Betting*].

¹⁶⁰ James Cook, *"If Roxborough Says the Spread Is 7, It's 7"*, FORBES, Sept. 14, 1992, at 350, 351, available at 1992 WL 3066694 [hereinafter *The Spread*].

cil on Compulsive Gambling,¹⁶¹ estimating that the U.S. illegal sports gambling was \$88 billion of a total \$125 billion in illegal U.S. wagers.¹⁶² In 1995, legalized sports betting was merely \$2.6 billion in the only state where it was legalized, i.e., Nevada.¹⁶³ These numbers were within acceptable ranges for the Nevada Attorney General's Office, which posited in 1997 that there was a problem with illegal U.S. gambling.¹⁶⁴ While the gambling industry frequently argued that legalizing gambling activities decreased illegal gambling, the opposite trend was occurring—the legalization of U.S. gambling activities was increasing illegal gambling and associated crime, and according to the FBI's fugitive apprehension program, existing gambling facilities attract criminals (with Las Vegas at number one).¹⁶⁵

Furthermore, organized crime controlled much of the illegal bookmaking activities.¹⁶⁶ A national system of layoff betting was controlled and maintained by such crime families as the Chicago crime syndicate, the New England crime syndicate, and the Gambino and Genovese crime syndicates in New York.¹⁶⁷

Both legal and illegal sports gambling has ensnared and transformed substantial numbers of the U.S. public, including teenagers and collegiates, into pathological and problem gamblers.

According to one estimate, 4% of all adults and 7% of all teenagers [in 1992 were pathological] gamblers—degenerates, as the gambling fraternity calls them—and the numbers are growing rapidly. There are some prominent victims among them, ranging from baseball's Pete Rose and football's Art Schlichter (both suspended for life from their sports leagues) to ABC Sports' former director Chet Forte (who lost his job

¹⁶¹ The article did not indicate whether it meant the national or Nevada council.

¹⁶² *Case for Sports Betting*, *supra* note 159, at 40.

¹⁶³ *Id.*

¹⁶⁴ Nev. Att'y Generals Off., Analysis (1997) (on file with Nev. Att'y General's Off.).

¹⁶⁵ John M. Glionna, *Fugitives Roll Dice on Vegas*, L.A. TIMES, Nov. 11, 1999, at A1, available at 1999 WL 26194263, reprinted as John M. Glionna, *Vegas: Where Crooks Gamble on Escape*, ROANOKE TIMES, Dec. 5, 1999, at A13 [hereinafter *Vegas: Where Crooks Gamble on Escape*]; Lex Varria, Column, *They're All of a Kind*, OREGONIAN (Portland, Ore.), Apr. 25, 1997, at D11, available at 1997 WL 4166854 [hereinafter *They're All of a Kind*]. See generally, Robert Dorr, *Ex-Mob Insider Says Betting Does Harm*, OMAHA WORLD-HERALD, Dec. 10, 1996, at 13, available at 1996 WL 6041759; Bill O'Brien, *Gambling Foes Demand Voters' Voices Be Heard*, DAILY HERALD (Arlington Heights, Ill.), Mar. 17, 1997, at A1, available at <http://archives.dailyherald.com>.

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., *The Spread*, *supra* note 160, at 350.

and his career) to the degenerate don himself, John Gotti, who used to plunder his own sports books with his profligate betting.¹⁶⁸

These numbers were still within the estimated ranges of the percentages of pathological and problem gamblers in the U.S. public in 2003, and they paralleled numbers in the *Final Report* of the 1999 U.S. Gambling Commission.¹⁶⁹ Highlighting the problem of gambling among collegiates, NCAA Executive Director Cedric Dempsey complained: "We know every institution in this country has student bookies, tied directly or indirectly to organized crime."¹⁷⁰ By 1998 more of the news media outlets were reporting that the costs to taxpayers associated with legalized gambling activities outweighed any benefits.¹⁷¹

Pro-gambling interests claimed that legalizing gambling activities, such as sports gambling and casino gambling, would decrease illegal gambling activities via regulating gambling. Ergo, pro-gambling interests also argued, for example, that legalizing illegal gambling machines would decrease illegal gambling because that illegal gambling would no longer be a crime. However, trends throughout the 1980s and 1990s clearly indicate that legalizing gambling activities increased illegal gambling activities and associated crime. News stories featured headlines such as *Ex-Mobster Says Legalized Gambling Brings in the Mob*,¹⁷² based on congressional testimony from nationally recognized ex-

¹⁶⁸ *Id.* at 354.

¹⁶⁹ NGISC FINAL REPORT, *supra* note 77, at p. 4-6 tbl.4-2. For summaries of the numbers of pathological gamblers and the associated costs from gamblers' addictive behaviors, bankruptcies, and crime, see *Mega-Lawsuits*, *supra* note 1, at 44-63 tbls.A1-14. See also *Gambling Away Our Youth*, *supra* note 147; John Warren Kindt & John K. Palchak, *Legalized Gambling's Destablization of U.S. Financial Institutions and the Banking Industry*, 19 BANKR. DEV. J. 21, 26-29 (2002); John Warren Kindt, *Diminishing or Negating the Multiplier Effect: The Transfer of Consumer Dollars to Legalized Gambling*, 2003 MICH. ST. DCL L. REV. 281, 312-13 [hereinafter *Gambling's Crime Multiplier Effect*]; *Gambling with the Economy and the Elimination of All Casino Tax Revenues*, *supra* note 158, at 367-69, 388-89.

¹⁷⁰ Robyn Norwood, *NCAA Knows This Is Tough To Fix*, L.A. TIMES, Mar. 27, 1998, at C1, available at 1998 WL 2412360.

¹⁷¹ See, e.g., Editorial, *Counties Losing Out: Despite Receiving Few Benefits, Counties with Indian Casinos Experience Higher Social Costs*, TOPEKA CAP.-J., Apr. 28, 1998, available at LEXIS, News & Business, News, News, All (English, Full Text). See also John Warren Kindt, *Legalized Gambling Activities as Subsidized by Taxpayers*, 48 ARK. L. REV. 889 (1995) [hereinafter *Gambling Subsidized by Taxpayers*]. See generally, *Case for Sports Betting*, *supra* note 159, at 1. *Contra Gambling Away Our Youth*, *supra* note 147, at 221.

¹⁷² Christine A. Verstraete, *Ex-Mobster Says Legalized Gambling Brings in the Mob*, KENOSHA NEWS, Oct. 2, 1998, at A6.

mobster William Jahoda.¹⁷³

As U.S. gambling activities were decriminalized during the 1980s and 1990s, regulations at first curbed overt abuses, but the regulatory schemes were largely ineffective in removing inappropriate activities and all organized crime influences.¹⁷⁴ In 1995

¹⁷³ See, e.g., *Nat'l Gambling Impact & Policy Comm'n Act of 1995: Hearing on H.R. 497 before the House Comm. on the Judiciary*, 104th Cong. 60-61 (1995) (statement of William Jahoda) [hereinafter *Congressional Gambling Hearing 1995*].

¹⁷⁴ See John Warren Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 S. ILL. U. L.J. 219 (2003). See also *Increased Crime and Legalizing Gambling*, *supra* note 52. In California, for example, the head of the Attorney General's Division of Gambling Control and other superiors were even accused by four former employees of "routinely quash[ing] investigations into suspected corruption, embezzlement, and theft at Indian casinos . . . with the result being that millions of dollars of taxpayer money [was] basically 'looted' by corruption in the casinos." Onell R. Soto, *Agents say Indian casino probes stymied*, SAN DIEGO UNION-TRIB., Oct. 10, 2003 [hereinafter *Indian Casino Probes Stymied*], available at http://www.signonsandiego.com/news/uniontrib/fri/news/news_1n26indians.html. The head of the California Division of Gambling Control, Harlan Goodson, relinquished his post during the summer of 2003 and went to work for a Las Vegas law firm, which critics cited as another example of the "revolving door" of regulators going to work for the regulated. *Indian Casino Probes Stymied*, *supra* (Goodson did not return calls from the press.) By comparison, when Philip C. Parenti the administrator to the Illinois Gaming Board resigned to take a job with Harrah's casino company, Illinois Governor Rod Blagojevich promptly "fired" him—rather than allow him to collect several weeks salary as a de facto job transition bonus. Assoc. Press, *Gaming Board may change conduct code*, NEWS-GAZETTE (Champaign, IL), July 19, 2003, at B4.

A pattern of "revolving door" incidents in Illinois exemplified the continuing regulatory problems throughout the United States. After only a few weeks as a regulator beginning in 2001, "Thomas F. Swoik quit his job at the Illinois Gaming Board [and] began a part-time job representing gambling interests as executive director of the Illinois Casino Gaming Association. Swoik's current move has enraged gambling opponents and government watchdogs, who want the Gaming Board to bar such moves." Assoc. Press, *Former Casino Regulator Gets New Job: Move To Gambling Association Angers Opponents, Watchdogs*, ST. J.-REG. (Springfield, Ill.), Apr. 4, 2002, at 11. The fact that Swoik took over the Illinois casino "association so quickly after leaving the Gaming Board raise[d] suspicions about cozy relationships between casinos and board staff." *Id.* at 11. There had been multiple prior incidents of the Illinois "revolving door."

Swoik isn't the first person to leave the Gaming Board to work in the industry. Its first administrator, attorney William Kunkle, has represented several casino groups, including Emerald Casino Inc., which is fighting to open a casino in Rosemont. Former acting administrator Joseph McQuaid is Emerald's vice president. And Donna More, a former board legal counsel, is a regular at board meetings, representing multiple casinos.

Id. at 11.

For a classic article on the problem of the "revolving door" in the regulation of gambling, see Brett Pulley, *From Gambling's Regulators to Casinos' Men*, N.Y. TIMES, Oct. 28, 1998, at A1. To solve the problem of the regulatory revolving door, the 1999 National Gambling Impact Study Commission recommended a one-year

congressional hearings, gambling opponents argued persuasively that the spread of legalized gambling activities would increase the opportunities for organized crime.¹⁷⁵ Throughout the 1980s and 1990s, organized crime's infiltration into tribal gambling increased as tribal gambling facilities spread.¹⁷⁶ In commercial gambling facilities, state regulation was not effective. For exam-

hiatus before a gambling regulator could become a gambling industry employee, which was a common standard in other industries such as the defense industry, but states basically ignored this ethical standard, giving a free pass to gambling companies. NGISC FINAL REPORT, *supra* note 77, rec. 3.17, at p. 3-19. The federal government also ignored the one-year safeguard. Furthermore, top government talent was migrating to employment in the gambling industry. For example, after just three months on the job, the "FBI's top counterterrorism official announced his retirement [in 2003] . . . to take a top security job for a large casino firm in Las Vegas . . . controlled by casino magnate Steve Wynn." Dan Eggen, *Top FBI Counterterror Official Announces Retirement*, WASH. POST, Oct. 9, 2003, at A11. For a review of issues involving the interface between gambling and terrorism, see *Gambling Destabilizing Economies*, *supra* note 157; *Gambling's Destabilization of Economies*, *supra* note 155.

Political contributions from the gambling industry to elected officials also drew fire from the 1999 National Gambling Impact Study Commission which called for "tight restrictions" and a gambling "industry-specific contribution restriction in particular." NGISC FINAL REPORT, *supra* note 77, rec. 3.5, at p. 3-18. For specific examples of issues involving campaign contributions and its interface with the gambling industry, see John W. Kindt, *Follow the Money: Gambling, Ethics, and Subpoenas*, 556 ANNALS AM. ACAD., POL. & SOC. SCI. 85 (1998) [hereinafter *Follow the Money*]; Chris Fusco & Graham Buck, *Gambling Industry Rewards Stephens with \$96,000*, DAILY HERALD (Arlington Heights, Ill.), Feb. 3, 2000, at 5 (criticizing Mayor Donald E. Stephens, of Rosemont, Illinois); James Webb, *New Gambling Regulators Listed as GOP Fund-Raisers*, ST. J. REG. (Springfield, Ill.), July 29, 1999, at 3.

In one well-known case in Louisiana, U.S. Senator Mary Landrieu was elected by pro-gambling interests allegedly campaigning with inappropriate methods.

As midafternoon exit polls on [Nov. 5, 1996] showed a clear advantage for Woody Jenkins to become Louisiana's first Republican senator in [the twentieth] century, Democrats advised [that] . . . [g]ambling interests would save Democratic candidate Mary Landrieu with a late burst of activity bringing out African-American voters. . . . Allegations that this frantic surge included non-voters and dead voters led to a Republican legal challenge . . .

There was also a fraud complaint to the U.S. Senate, both of which were later dropped due to evidentiary time constraints. Robert Novak, Column, *In Louisiana Gamblers Got Their Woman*, ST. J.-REG. (Springfield, Ill.), Nov. 19, 1996, at 6.

¹⁷⁵ See, e.g., *Congressional Gambling Hearing 1995*, *supra* note 173, at 60-61. See also, *Indians Still Mired in Poverty*, *supra* note 144; *Vegas: Where Crooks Gamble on Escape*, *supra* note 165.

¹⁷⁶ See, e.g., James Popkin, *Gambling with the Mob?: Wise Guys Have Set Their Sights on the Booming Indian Casino Business*, U.S. NEWS & WORLD REP., Aug. 23, 1993, at 30, available at 1993 WL 6870574. See also *Gambling Facilities Transformed into Educational Facilities*, *supra* note 158, at 172-76; *Indians Still Mired in Poverty*, *supra* note 144.

ple, in Illinois, the second state to legalize riverboat casinos in 1992 and to allow them to become land-based in 2000, headlines were self-explanatory: *Expert: Chicago Mob Would Taint Any Nearby Casino*.¹⁷⁷ While the Illinois Gaming Board's regulations appeared to work in one instance, they were only effectively enforced after scandals and exposure in multiple media outlets.¹⁷⁸

In a stinging blow to what once seemed an unstoppable deal, the Illinois Gaming Board on [January 30, 2001] rejected a planned Rosemont casino, concluding that top officials of the would-be riverboat had misled the board and that some investors had links to mob figures.

"The investigative record establishes the insidious presence of organized crime elements associated with this proposed project that cannot be ignored," Gaming Board Administrator Sergio Acosta said in a statement to the board.¹⁷⁹

In 1999, Law Professor I. Nelson Rose complained that in California's Tribal-State Gaming Compact, "[t]here can be no doubt that the Compact provision [sec. 6.4.4.(c)] was designed to license felons and members of organized crime."¹⁸⁰ The implications were not only that tribal gambling interests "wanted" this provision in the compact but that they also had the power to place it there. These scenarios exemplify the lack of de facto regulation of legalized gambling activities, particularly when the sophisticated legal communities in various states cannot restrain or even influence the draftsmanship of pro-gambling regulations with impacts allegedly assisting and protecting organized crime figures.

In 2002, Local 69 of the Hotel Employees and Restaurant Employees International Union was placed under a court-ordered monitor "after prosecutors filed a civil complaint accusing union officials of racketeering."¹⁸¹ The complaint stated: "For over 15 years, members and associates of the Genovese crime family

¹⁷⁷ Shamus Toomey & Ames Boykin, *Expert: Chicago Mob Would Taint Any Nearby Casino*, DAILY HERALD (Arlington Heights, Ill.), Feb. 1, 2001, at 12, available at <http://archives.dailyherald.com>. See also Michael Higgins & Douglas Holt, *Gaming Board Rejects Rosemont Casino Bid*, CHI. TRIB., Jan. 31, 2001, § 1, at 1, available at 2001 WL 4036200 [hereinafter *Rejects Rosemont*].

¹⁷⁸ See, e.g., *Rejects Rosemont*, *supra* note 177.

¹⁷⁹ *Id.*

¹⁸⁰ I. Nelson Rose, *Will California license Mobsters?*, GAMBLING AND THE LAW (No. 57) (1999).

¹⁸¹ Amy Westfeldt, *Fed Judge Appoints Union Monitor*, AP ONLINE, Apr. 17, 2002, available at 2002 WL 19258018, reprinted as Amy Westfeldt, *Feds Seize Culinary Local in N.J.*, LAS VEGAS SUN, Apr. 18, 2002.

of La Cosa Nostra have exercised influence over Local 69.”¹⁸² According to Union General President John W. Wilhelm, however, “[t]he international union and all of its locals have left these kinds of problems behind. . . . We’re not going to permit anyone to go back to those kinds of practices.”¹⁸³ U.S. Representative Richard Gephardt (D-Mo.) appointed Wilhelm, while union president, to serve on the 1999 U.S. Gambling Commission.

These problems were exacerbated by the chameleon changes in organized crime during the 1990s as “investigators continue[d] to find mob influence on Wall Street, in the penny stock trade and in the expansion of legalized gaming.”¹⁸⁴

C. The “Direct Link” Between Increased Legalized Gambling Activities and Increased Crime

Throughout the 1990s, in particular as U.S. legalized gambling spread, prosecutors were indicating that there was a “direct link” between increased legalized gambling and increased crime.¹⁸⁵ Evidence of the direct link between increased crime and gambling was available at the local,¹⁸⁶ state,¹⁸⁷ and national levels,¹⁸⁸ and Kay C. James, the Chair of the 1999 National Gambling Impact Study Commission, confirmed this conclusion.¹⁸⁹ During congressional hearings in 1995, Massachusetts Attorney General Scott Harshbarger summarized the opinion of the U.S. legal community regarding legalizing gambling activities:

As president-elect of the National Association of Attorneys

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ John L. Smith, Column, *Here Come New Mobs, Not Quite the Same as Old Mobs*, LAS VEGAS REV. J., Jan. 4, 1998, at 1B, available at 1998 WL 7206767.

¹⁸⁵ See, e.g., Marilyn Lewis, *Prosecutor Says Crime Rate Linked to Gambling*, INLAND VALLEY DAILY BULL. (Ontario, Cal.), Feb. 18, 1995, reprinted in POMONA CARD CLUB REP. 1 (April 1995).

¹⁸⁶ See, e.g., *id.*; Press Release, City of San Jose, Cal., Police Chief Confirms Councilmembers’ Concerns: Card Clubs Foster Crime Throughout the City, Mar. 5, 1996 (on file with City of San Jose, Cal.).

¹⁸⁷ See, e.g., J. JOSEPH CURRAN, JR., OFFICE MD. ATT’Y GEN., THE HOUSE NEVER LOSES AND MARYLAND CANNOT WIN: WHY CASINO GAMBLING IS A BAD IDEA (1995), available at <http://www.oag.state.md.us/Reports/casinogambling.pdf>; Frank Santiago, *Authorities Link Gambling to Cases of Theft*, DES MOINES REG., Nov. 21, 1997. See also *Increased Crime and Legalizing Gambling*, supra note 52.

¹⁸⁸ See, e.g., *Congressional Gambling Hearing 1995*, supra note 173, at 456-59 (statement of Mass. Att’y Gen. Scott Harshbarger).

¹⁸⁹ See, e.g., Kay C. James, Chair, 1999 Nat’l Gambling Impact Study Comm’n, Speech before the Annual Conf. of the Nat’l Coalition Against Legalized Gambling, Jackson, Miss., Sept. 26, 1999.

General, I have had the opportunity to consult with many other members of the law enforcement community on the effects of gambling on a city or state. Overwhelmingly, the response has been “Don’t do it.” Almost every Attorney General who has faced the issue of casino gambling in their state has cautioned me that there are a range of public safety, regulatory, and social issues that are never addressed before the introduction of gambling.¹⁹⁰

Harshbarger noted the link between increased crime and the spread of legalized gambling activities:

One of the most noted consequences of casino gambling has been the marked rise in street crime. Across this nation, police departments in cities that have casino gambling have recorded surges in arrests due to casino-related crime. In many cases, towns that had a decreasing crime rate or a low crime rate have seen a sharp and steady growth of crime once gambling has taken root.¹⁹¹

The Florida Department of Law Enforcement and the state’s law enforcement community summarized the problems in a 1994 report:

As this report reflects, it has been clearly demonstrated in other jurisdictions that a significant *increase in crime* and its consequences accompanies casino gambling. Therefore, the Florida Sheriffs Association, Florida Police Chiefs Association and the Florida Department of Law Enforcement are strongly *opposed* to any form of legalized gambling in Florida.¹⁹²

In supporting its conclusions, the Florida Department of Law Enforcement noted the “before and after” crime problems that surfaced after casino gambling was legalized in Atlantic City. “The well-documented explosion of crime which has been experienced in the gambling city of Atlantic City, New Jersey is also telling.”¹⁹³ Within three years of the advent of casino gambling in Atlantic City, the city “went from 50th in the nation in per capita crime to first.”¹⁹⁴ Furthermore, “from 1977 to 1990, the crime rate in that city rose by an incredible 230%.”¹⁹⁵

These conclusions still were valid in 2001, and evidence contin-

¹⁹⁰ *Congressional Gambling Hearing 1995*, *supra* note 173, at 456 (statement of Mass. Att’y Gen. Scott Harshbarger).

¹⁹¹ *Id.*

¹⁹² FLA. DEP’T L. ENFORCEMENT ET AL., INCREASED CRIME: IS IT WORTH THE GAMBLE? (1994) (emphasis in original).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

ues to accumulate that legalizing gambling activities causes more illegal gambling and associated crime.

It is well established that crime rates rise substantially when gambling is legalized. Since some communities in Mississippi legalized casino gambling, their crime rate has increased at least 800 percent, with rapes increasing 200 percent and robberies 218 percent. And in 1994, one study showed that communities with gambling had nearly twice the national crime rate.¹⁹⁶

The definitive study on the link between increased crime and legalizing casinos was a study by Professors Earl Grinols, David Mustard, and Cynthia Dilley, which analyzed virtually every casino community before and after the advent of casinos.¹⁹⁷ The study showed crime increased on average nine percent in the third year after a casino opened and trended upward thereafter.¹⁹⁸

IV

TRENDS AND CONDITIONING FACTORS

A. *Attempts to Get the U.S. Gambling Industry to Acknowledge the Obvious*

In 2002, the main trade magazine for the gambling industry, *International Gaming and Wagering Business (IGWB)*, cited the 1997 Harvard Addictions Meta-Analysis.¹⁹⁹ The analysis,²⁰⁰ although funded by the gambling interests themselves,²⁰¹ showed the “pathological gambling” rate increased more than 50 percent in a three-year period—from a base of 0.84 percent in 1977-93 to 1.29 percent in 1994-97.²⁰²

¹⁹⁶ Tyler J. Jarvis & Heidi Baumann Jarvis, *What are the Odds?*, *BYU MAGAZINE*, Spring 2001, at 49, available at <http://magazine.byu.edu/article.tpl?num=48-Spr01>.

¹⁹⁷ Earl L. Grinols et al., *Casinos And Crime* (June 1999) (unpublished draft, on file with author), forthcoming as Earl L. Grinols & David B. Mustard, *The Curious Case of Casinos and Crime*, ___ *REV. ECON. & STAT.* ___ (2003) [hereinafter *Casinos and Crime*].

¹⁹⁸ *Id.*

¹⁹⁹ *Playing the Numbers Game*, *supra* note 144, at 22.

²⁰⁰ HOWARD J. SHAFFER ET AL., *HARV. MED. SCH., ESTIMATING THE PREVALENCE OF DISORDERED GAMBLING BEHAVIOR IN THE UNITED STATES AND CANADA: A META-ANALYSIS* (1997).

²⁰¹ David Ferrell & Matea Gold, *Casino Industry Fights an Emerging Backlash*, *L.A. TIMES*, Dec. 14, 1998, at A1, available at 1998 WL 18903648.

²⁰² Press Release, Harvard Medical School, Harvard Medical School Researchers Map Prevalence of Gambling Disorders in North America (Dec. 4, 1997), available at <http://www.hms.harvard.edu/news/releases/1297gambling.html>.

Even *IGWB* noted that the meta-analysis supported “the contention by gambling critics that the proliferation of legal casinos, lotteries and racetracks not only increases the number of problem and pathological gamblers, but it raises the prevalence rate, or the percentage of the adult population with gambling problems.”²⁰³ The *IGWB* trade magazine then queried rhetorically: “What happened in the 1990s to increase the prevalence rate of gambling addicts? Legal casino and lottery gambling spread like wildfire throughout the country.”²⁰⁴ Then, significantly, the gambling industry’s own trade magazine castigated the U.S. gambling industry’s long-held public relations dogma.

But the industry remains in denial.

It defies any study linking gambling with bankruptcy, suicide and other social problems. And it steadfastly refutes any claim by critics that the spread of legal casino gambling in this country increases the prevalence of problem and pathological gambling.

That position defies logic. In fact, it’s insulting.

The caseload for specialists in addiction treatment has skyrocketed when commercial and tribal government casinos open for business.²⁰⁵

²⁰³ *Playing the Numbers Game*, *supra* note 144, at 22.

²⁰⁴ *Id.*

²⁰⁵ *Id.* In 1994, American Medical Association Resolution 430 estimated the socio-medical costs of gambling at \$40 billion per year. Am. Medical Assoc., House of Delegates Resolution 430 (A-94) (1994). Adjusted to 2003 dollars, the AMA’s estimate would be approximately \$70 billion in costs which is more than the entire revenues derived from U.S. gambling of approximately \$65 billion.

In 2003, the Maine Medical Association publicly opposed the siting of a casino anywhere in the state. Maine Medical Assoc., Public Health Comm., *Resolution Against Locating a Casino in Maine* (2003).

In 1997, Professor David P. Phillips published a study, *Elevated Suicide Levels Associated with Legalized Gambling*, which noted that suicide rates in gambling communities were two to four times higher than in non-gambling areas with comparable populations. David P. Phillips, Ward R. Welty, & Marisa Smith, *Elevated Suicide Levels Associated with Legalized Gambling*, 27 *SUICIDE & LIFE-THREATENING BEHAV.* 373 (1997); see Sandra Blakeslee, *Suicide Rate Is Higher In 3 Gambling Cities*, N.Y. TIMES, Dec. 16, 1997, at A10. In 2003 in Ottawa, Canada, “statistics indicate[d] 126 gambling addicts have killed themselves since 1999, an alarming increase from 27 such suicides in the [previous] five years,” which Canadian experts attributed to video lottery terminals in bars which were legalized in 1994. *Gambling-Related Suicides Soar*, LAS VEGAS SUN, Oct. 3, 2003. Furthermore, a 2003 “investigation by The Canadian Press found more than 10 percent of suicides in Alberta and more than six percent in Nova Scotia were linked to gambling in 2001,” which prompted Canadian officials “to standardize the collection of [Canadian] suicide data related to gambling.” Louise Elliott, *Former Copps Coliseum Exec Sue Ontario*, Aug. 24, 2003, available at <http://cnews.canoe.ca/CNEWS/Canada/2003/08/19/164161-cp.html>. For examples of how U.S. stories linking legalized gambling to

It was significant that in 2002 the gambling industry's own trade magazine, *IGWB*, was complaining about the industry's obfuscation and denial of the academic findings as well as those of the 1999 U.S. Gambling Commission.

B. Examples of the Attempts by Pro-Gambling Interests to Control and Confuse the Information Available to the Public: The Formation of the 1999 U.S. Gambling Commission

The 1996 National Gambling Impact Study Commission Act provided that the appointment of its nine commissioners be made by October 2, 1996, before the November 1996 elections; however, by March 1997 President Clinton had not yet announced his three selections.²⁰⁶ Concerns of political posturing linked to campaign donations and pro-gambling lobbyist activities were raised by the national press²⁰⁷ and echoed by charities and public interest groups such as the National Coalition Against Legalized Gambling (an organization similar to Mothers Against Drunk Driving).

The *Washington Post* highlighted the political interface with potential Presidential appointments to the Commission:

Start with the guess-who's-coming-to-coffee list at the White House. Last March, for example, one White House coffee guest was the chairwoman of the Oneida Nation, an Indian tribe with gambling interests. On that same day, according to the *Wall Street Journal*, the Oneida Nation donated \$30,000 to the Democratic National Committee. Coffee guest lists show at least 10 representatives of Indian gambling interests since mid-1995.²⁰⁸

Furthermore, the *Post* was alarmed by other Commission appointments linked to pro-gambling interests:

One of Speaker Gingrich's choices is the chairman and CEO of a Las Vegas casino company [J. Terrence Lanni of MGM Grand, Inc.]. House Minority Leader Gephardt, who gets one

increased suicides have been suppressed, see Stephen Braun, *Lives Lost in a River a Debt*, L.A. TIMES, June 22, 1997, at A1.

²⁰⁶ See Don Feder, Column, *Clinton Rolls Dice on Gaming Study*, BOSTON HERALD, May 7, 1997, at 31, available at 1997 WL 5399872; see also James Bennet, *Clinton Finally Puts 3 on a Panel to Examine Gambling*, N.Y. TIMES, Apr. 30, 1997, at A14, available at LEXIS, News & Business, News, News, All (English, Full Text).

²⁰⁷ Editorial, *Gambling Payoff?*, WASH. POST, Feb. 10, 1997, at A18, available at 1997 WL 9334059 [hereinafter *Gambling Payoff?*]; Warren Richey, *Anti-Gambling Activists Warn of Stacked Commission Deck*, CHRISTIAN SCI. MONITOR, Mar. 21, 1997, at 3, available at 1997 WL 2800006 [hereinafter *Stacked Commission Deck*].

²⁰⁸ *Gambling Payoff?*, *supra* note 207.

selection—and whose political committees received at least \$46,500 from gambling interests along with another \$4,500 from three women listed as homemakers from Las Vegas—reportedly favors the head of a union representing casino employees.²⁰⁹

As anticipated, U.S. Rep. Richard Gephardt (D-Mo.) later appointed John W. Wilhelm, general president of the Hotel Employees and Restaurant Employees International Union.

Established in 1995 under CEO Frank Fahrenkopf, the American Gaming Association [hereinafter AGA] and its lobbying activities were scrutinized by the press.

According to lobby registration statements on file in Congress, Fahrenkopf's AGA spent \$460,000 on lobbying between July and December 1996. The forms say one of the two issues the group worked on was "Establishment of the National Gambling Impact Study Commission." Of the \$460,000, lobby registration forms show that \$232,000 went to nine outside lobbyists.²¹⁰

In 1996, the nine outside lobbyists employed by the AGA included: (1) former U.S. Rep. Dennis Eckart (D-Ohio); (2) Judy Kern Fazio, wife of U.S. Rep. Vic Fazio (D-Calif.) and former finance director of the Democratic Congressional Campaign Committee; (3) Steven Champlin, the former director for the House Democratic Caucus; (4) Kenneth Duberstein, the former assistant for legislative affairs for President Reagan; and (5) Donald Fierce, a former aide to Haley Barbour, chair of the Republican National Committee and an initial supporter of the Mississippi casinos.²¹¹

While the selections to the Commission were being made, the monetary influences of the AGA became a concern voiced by various charities and public interest groups, such as the NCALG.²¹²

[T]he \$1.9 million in soft-money donations the gambling industry made to the Democratic Party may be playing a role in the president's appointments. They also cite \$232,000 in lobbying fees paid to well-connected Washington insiders working, they say, to influence who is named to the commission.

"If they can stop an objective study it is well worth it to

²⁰⁹ *Id.*

²¹⁰ *Stacked Commission Deck*, *supra* note 207.

²¹¹ *Id.*

²¹² *Id.*

them,” says Bernie Horn, NCALG’s political director.²¹³

The AGA rebutted these public concerns: “These kinds of allegations . . . are disgraceful,” stated Frank Fahrenkopf, a former chair of the Republican National Committee. “For the amount of money that is involved here do you believe you are going to buy the president of the United States?”²¹⁴ However, the appointees to the 1999 U.S. Gambling Commission reflected a significant influence by pro-gambling interests.

The legislation which established the nine-member Commission indicated the following legislators (accompanied by their eventual choices) would choose the commissioners:²¹⁵

- a. Speaker of the U.S. House of Representatives Newt Gingrich (R-Ga.), two choices: Kay C. James, dean of Regent University’s School of Government, and J. Terrence Lanni, chief executive officer of MGM Grand, Inc., a casino and entertainment company;
- b. U.S. House of Representatives Minority Leader Richard Gephardt (D-Mo.), one choice: John W. Wilhelm, general president of the gambling industry’s union, the Hotel Employees and Restaurant Employees International Union;
- c. U.S. Senate Majority Leader Trent Lott (R-Miss.), two choices: Paul H. Moore, a Mississippi doctor, and (as chosen by U.S. Sen. Dan Coats (R-Ind.))²¹⁶ James C. Dobson, Ph.D., president of Focus on the Family;
- d. U.S. Senate Minority Leader Tom Daschle (D-S.D.), one choice: Leo T. McCarthy, former California lieutenant governor for 12 years; and,
- e. President William J. Clinton (D), three choices: William A. Bible, chair of the Nevada Gaming Control Board; Robert W. Loescher representing Native American interests; and Richard C. Leone, former chair of the Port Authority of New York and New Jersey.²¹⁷

In May 1997, James was appointed Commission chair.²¹⁸ James described herself as from a minority background,²¹⁹ and although she was highly qualified—a former Virginia government official, former corporate director, and dean of the Regent

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See NGISC FINAL REPORT, *supra* note 77, at app. II.

²¹⁶ Dave Berns & Tony Batt, *Nevadans Up for Gaming Panel*, LAS VEGAS REV.-J., Sept. 7, 1996, at 1A, available at 1996 WL 2348635.

²¹⁷ See NGLSC FINAL REPORT, *supra* note 77, at app. II.

²¹⁸ Rick Alm, *Study Leader Appointed*, KAN. CITY STAR, May 21, 1997, at B1, available at 1997 WL 3014098 [hereinafter *Leader Appointed*].

²¹⁹ Tammie Smith, *Kay Cole James*, TIMES-DISPATCH (Richmond, Va.), Feb. 6, 2002, at E1, available at 2002 WL 7191281.

University School of Government²²⁰—she was immediately criticized by Fahrenkopf.²²¹ Fahrenkopf continued his criticisms unabated throughout the years the Commission was in operation,²²² and James did not respond to those criticisms until after the Commission was completed and issued its *Final Report*.²²³

V

POLICY ALTERNATIVES AND RECOMMENDATIONS

A. *Strategic Lawsuits Against Public Participation (SLAPP Suits and SLAPP-Back Suits)*

In the 1970s and 1980s, industries engaging in initiatives which generated public debates involving policy were often losing those debates, such as in the areas of economic development vis-à-vis environmental protection. As a consequence, some industries began filing what became known as “strategic lawsuits against public participation” (SLAPP suits),²²⁴ lawsuits purportedly designed to stifle, limit, or intimidate public debate on public issues. After some initial industry successes, First Amendment issues began to prevail, and many of these suits were dismissed. Otherwise, defendants began to countersue in what became known as SLAPP-Back suits. These SLAPP-Back suits against the deep pockets of certain industries soon began enjoying increased success with large damage awards for harassment and other damages awarded to the individuals targeted by the initial SLAPP suits.²²⁵ The result was a chilling effect on most industries considering bringing SLAPP suits,²²⁶ and this chilling effect was compounded by a trend toward enacting state statutes to assist individuals fighting SLAPP suits.²²⁷ Perhaps an even greater chilling effect on some industries initiating SLAPP suits was the

²²⁰ NGISC FINAL REPORT, *supra* note 77, at app. II at p. II-1.

²²¹ *Leader Appointed*, *supra* note 218.

²²² See, e.g., Laurence Arnold, *Gambling-Addiction Report Stirs Debate*, ADVOCATE (Baton Rouge, La.), Mar. 19, 1999, at 2A, available at 1999 WL 6098726.

²²³ See, e.g., Jennifer Peter, *Chairwoman Helped Unite Gambling Panel*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk, Va.), June 19, 1999, at A1, available at 1999 WL 7168361.

²²⁴ See, e.g., George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3 (1989).

²²⁵ See, e.g., John C. Barker, *Common-Law and Statutory Solutions to the Problem SLAPPs*, 26 LOY. L.A. L. REV. 395 (1993).

²²⁶ See generally GEORGE W. PRING & PENELOPE CANAN, *SLAPPs: GETTING SUED FOR SPEAKING OUT* (1996).

²²⁷ See, e.g., MASS. GEN. LAWS ch. 231, § 59H (2003).

discovery process, which necessarily accompanied such suits and subjected the companies involved to the public disclosure of sensitive and/or embarrassing information.

The classic example of far-reaching impacts caused by unanticipated revelations generated by the legal discovery process involved the Paula C. Jones lawsuit filed in 1994 against President William J. Clinton. The sexual harassment suit²²⁸ demonstrated that even a sitting president could be made vulnerable to the discovery process of information pursuant “to a civil suit . . . [which led] to the Monica Lewinsky scandal and ultimately the impeachment hearings.”²²⁹

B. *SLAPP Suits Against Public Citizens Groups*

A classic example of what should be termed a SLAPP suit to deter anti-gambling citizens groups occurred in 2001 after the Greenbrier resort in West Virginia lost a Nov. 7, 2000 referendum to bring casino gambling to the Greenbrier by a vote of 7,065 to 5,109.²³⁰ The Greenbrier Hotel filed a \$36-million defamation case against a leader of the citizens group, attorney Barry Bruce of Lewisburg, West Virginia.²³¹ Bruce refused to be cowed, but before he could file a countersuit, Greenbrier President Ted Kleisner quickly dropped the hotel’s case. Thereafter, both sides agreed in the future to comply with the West Virginia Code of Fair Campaign Practices.²³² Although the Greenbrier had the option of pursuing a second referendum in 2002, the number of anti-casino voters purportedly increased between 2000 and 2002, and the Greenbrier decided to forgo a second referendum.

Another example of a SLAPP suit involving gambling issues occurred before the election on November 7, 2000. Massachusetts ballot “Question 3” contained an initiative by a citizens’

²²⁸ See *Clinton v. Jones*, 520 U.S. 681 (1997) (holding that sitting president not immune from lawsuits).

²²⁹ Barbara Palmer et al., *Low-Life-Sleazy Big-Haired-Trailer Park Girl v. The President: The Paula Jones Case and the Law of Sexual Harassment*, 9 AM. U. J. GENDER SOC. POL’Y & L. 283, 284 (2001). For the U.S. House of Representatives report on the impeachment of President William J. Clinton (D), see H.R. Rep. No. 105-830 (1998).

²³⁰ *Greenbrier Resort Drops Lawsuit*, ROANOKE TIMES, June 23, 2001, at B4 [hereinafter *Greenbrier Resort Drops Lawsuit*].

²³¹ *Id.* Complaint, *Greenbrier Resort Mgt. Co. v. Bruce*, No. 01-0-80(J) (Cir. Ct., Greenbrier County, W. Va. filed Apr. 20, 2001).

²³² *Greenbrier Resort Drops Lawsuit*, *supra* note 230.

group, Grey2K, and community leaders, such as Carey Theil, to ban dog racing in Massachusetts.²³³ Charles Sarkis, owner of Wonderland Greyhound Park in Revere, Massachusetts, filed a \$10-million defamation action against Grey2K just five days before the election.²³⁴ Andrew Upton, the attorney for Grey2K, summarized: “This is a Nixonian pattern of intimidation and harassment by the track owners. . . . The track owners have millions of dollars at stake in this industry.”²³⁵

The day before the election, Superior Court Judge Margot Botsford refused to grant Wonderland Greyhound Park an injunction blocking Grey2K’s ads,²³⁶ and the attorneys for Grey2K filed a special motion with the same judge seeking “to dismiss the defamation lawsuit Sarkis filed against the group.”²³⁷ Grey2K’s attorneys “argued that the suit should be dismissed under the state’s anti-SLAPP statute, which prohibits the use of frivolous litigation or intimidation tactics against people trying to exercise their constitutional rights.”²³⁸ Although Grey2K lost the election, they won the initial legal decisions involving the SLAPP suit.²³⁹ By April 13, 2001, the defendant’s special motion for dismissal had been granted²⁴⁰ pursuant to the Massachusetts anti-SLAPP statute.²⁴¹

By comparison, in 1992 the tobacco industry began a series of legal maneuvers that de facto, if not de jure, harassed the authors

²³³ Rick Klein, *Track Owner Sues Backers of Dog Questions*, BOSTON GLOBE, Nov. 4, 2000, at B1, available at 2000 WL 3349358 [hereinafter *Track Sues*]. For another example, see *Wichita Racetrack Warns Critics of Suit: Testimony Before Legislative Panel Is Called Slanderous*, KAN. CITY STAR, Apr. 17, 1997, at C4, available at <http://www.kansascity.com> (the track quickly withdrew its objection).

²³⁴ *Track Sues*, *supra* note 233. Compare Verified Complaint, Sarkis v. Grey2K, No. 00-4891-E (Super. Ct., Suffolk, Mass. filed Nov. 2, 2000), with Answer to Plaintiff’s Verified Complaint, *id.* (filed Dec. 4, 2000).

²³⁵ *Track Sues*, *supra* note 233.

²³⁶ See Sarkis, No. 00-4891-E (filed Nov. 6, 2000); Sacha Pfeiffer, *Judge Refuses to Block Greyhound Ads*, BOSTON GLOBE, Nov. 7, 2000, at B6, available at 2000 WL 3349595 [hereinafter *Judge Refuses*].

²³⁷ *Judge Refuses*, *supra* note 236.

²³⁸ *Id.* See also Scott Van Voorhis, *Greyhound Dogfight Bitter to End*, BOSTON HERALD, Nov. 7, 2000, at 10, available at 2000 WL 4340030.

²³⁹ Compare Defendant’s Special Motion For Dismissal Under G.L. c.231, § 59H and Request For Hearing, Sarkis, No. 00-4891-E (filed Nov. 15, 2000), with Plaintiff’s Memorandum of Law in Opposition to the Defendants’ Emergency Special Motion to Dismiss under G.L. c.231, § 59H, *id.* (filed Dec. 5, 2000).

²⁴⁰ Plaintiff’s Memorandum of Decision and Order on Defendant’s Special Motion for Dismissal, *id.* (filed Apr. 13, 2001).

²⁴¹ MASS. GEN. LAWS ch. 231, § 59H (2003).

of a study embarrassing to the industry.²⁴² The “study . . . showed that ‘Old Joe’ [Camel] was nearly universally recognized by six-year-old children, a level of awareness that matched the logo for the Disney channel.”²⁴³ The prestigious *Journal of the American Medical Association* published the study.²⁴⁴ The harassment of the study’s authors eventually led legal scholars and academics to call for changes in Rule 45 of the Federal Rules of Civil Procedure to restrict the ability of an industry to abuse the discovery process.²⁴⁵ However, in this “Old Joe” scenario, the scientists involved were admittedly unsophisticated regarding the legal process²⁴⁶ and probably unaware of their multiple legal counteractions including discovery of sensitive industry information as well as countersuits. In fact, some groups could be prepared to engage the issues for the public welfare, regardless of an industry’s “deep pockets.”

CONCLUSION

This analysis has focused on the great leverage that gambling’s opponents can find in the legal discovery process. This conclusion will focus on the significant need for this power of discovery as pro-gambling interests exert substantial power in acting as sov-

²⁴² See generally, Paul M. Fischer, *Science and Subpoenas: When Do the Courts Become Instruments of Manipulation?*, 59 LAW & CONTEMP. PROBS. 159 (1996) [hereinafter *Science and Subpoenas*].

²⁴³ *Id.* at 159. For the published study, see Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 J. AM. MED. ASS’N 3145 (1991).

²⁴⁴ *Science and Subpoenas*, *supra* note 242.

²⁴⁵ For a summary of this scenario in the tobacco industry, see Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935, 946-48 (1999). The academics could have reversed the de facto impact of the discovery process via countersuits, which would have perhaps embarrassed the tobacco industry by requesting and/or revealing sensitive industry information including industry marketing surveys and the interface with the use of nicotine. *Id.* See also FED. R. CIV. P. 45; Bert Black, *Research and its Revelation: When Should Courts Compel Disclosure?*, 59 LAW & CONTEMP. PROBS. 169, 180-83 (1996) (calling for specific changes to Rule 45 of the Federal Rules of Civil Procedure to address abuses in the discovery process relating to third party research). For an entire law publication dedicated to these issues, see Symposium, *Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law*, 59 LAW & CONTEMP. PROBS. 2 (1996). Accused by the tobacco industry of improprieties, the academics involved were eventually exonerated by their colleagues. Wagner, *supra* at 947-48 nn.52-54. See generally Anna Burdeshaw Fretwell, Note, *Clearing the Air: An Argument for a Federal Cause of Action to Provide an Adequate Remedy for Smokers Injured by Tobacco Companies*, 31 GA. L. REV. 929 (1997).

²⁴⁶ *Science and Subpoenas*, *supra* note 242, at 166-67.

ereigns, as possible scofflaws, as taking it all, and as above the law.

A. *Gambling Interests as Sovereigns*

After five years of legal actions, in 1998 Mike Strain was awarded \$5.2 million in a case against the City of Hammond, Indiana, and the Empress Casino riverboat.²⁴⁷ Strain, who owned the Great Lakes Inland Marina, claimed de facto that the local government in concert with gambling interests utilized the sovereign powers of eminent domain to take his land.²⁴⁸ He alleged “he was not offered a fair market value and was denied due process to recoup a half-acre of land condemned by the city to build a highway overpass at the marina.”²⁴⁹ The Empress Casino, “which built the overpass as part of its agreement with the city, [was] responsible for the damages.”²⁵⁰ The Indiana Court of Appeals affirmed the judgment.²⁵¹

B. *Gambling Interests as Scofflaws?*

On November 6, 1985, the City of Las Vegas formed the Las Vegas Downtown Redevelopment Agency,²⁵² which “is actually the City Council of Las Vegas [because] there are no public members of the Agency.”²⁵³ To begin the eminent domain process to obtain property for a redevelopment project later known as the Fremont Street Experience, the Agency filed a “Complaint in Eminent Domain and a Motion for Order Permitting Immediate Occupancy Pending Entry of Judgment” on November 19, 1993, against defendant landowners, the Carol Pappas family.²⁵⁴

²⁴⁷ *Jury Awards \$5.2 Million in Casino Case*, CHI. SUN-TIMES, Oct. 1, 1998, at 10, available at 1998 WL 5600435 [hereinafter *Jury Awards \$5.2 Million*].

²⁴⁸ See *id.* “The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good.” BLACK’S LAW DICTIONARY 616 (rev. 4th ed. 1968). Governmental units exercising eminent domain must give “just compensation” to the owner of the realty equating to a “fair return on the value of the property,” which is a concept deemed synonymous with “due process of law.” *Id.* at 1001-02.

²⁴⁹ *Jury Awards \$5.2 Million*, *supra* note 247.

²⁵⁰ *Id.*

²⁵¹ *City of Hammond v. Marina Entm’t Complex, Inc.*, 733 N.E.2d 958 (Ind. Ct. App. 2000).

²⁵² Respondents’ Answering Brief at 3, *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. filed Feb. 2, 2000) (No. 33812).

²⁵³ *Id.*

²⁵⁴ *Id.* at 4, 7.

Delayed service of process was made upon Mrs. Pappas, an elderly widow, on December 8, 1993.²⁵⁵ The Pappas land was allegedly “stripped from them in less than 50 seconds in a summary proceeding on December 15, 1993 at which they were not even present.”²⁵⁶

It took another three years before the Agency’s exercise of eminent domain resulted in a judicial decision.²⁵⁷ In the interim, a parking garage concomitant to the Fremont Street Experience was built on the Pappas’s land because city fathers were convinced that the Fremont Street Experience and adjacent parking were essential to revitalize downtown casinos bordering Fremont Street.²⁵⁸ In *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, Judge Don P. Chairez granted the Pappas’s motion to dismiss the Agency’s eminent domain action and ruled:

The Agency has acted contrary to law and in an arbitrary and capricious manner as to the adoption of its initial plan in 1986, in its failure to amend the plan for the various projects that it engages in to meet the specificity requirements, in its failure to hold the requisite public hearings, in its failure to allow owner participation in its projects, in its failure to show the inability of its private partners to purchase property without the use of eminent domain and in its failure to negotiate in good faith with current landowners.²⁵⁹

As part of his decision, Judge Chairez reviewed and analyzed “whether the City had adequate information to make a finding of blight as to the redevelopment area or if the designation of the area was arbitrary and capricious.”²⁶⁰ He ruled:

[T]he Agency merely took the statutes and constructed them into a plan. . . . The Agency simply designated an area of the City as subject to redevelopment and then wrote a report that would satisfy the statutes by incorporating the language of the statute as evidence. The Agency, the Planning Commission and the City Council must all pass upon this Plan yet not one of these entities inquired as to the factual findings for their resolutions. It is important to note that the Agency and the City Council are one and the same. It is obvious therefore that they were aware of the lack of empirical evidence to con-

²⁵⁵ *Id.* at 7.

²⁵⁶ *Id.* at 8.

²⁵⁷ *Id.*, No. A327519 (Nev. 13th Dist. Ct. July 3, 1996).

²⁵⁸ Respondents’ Answering Brief at 3-11, *Pappas*, 76 P.3d 1.

²⁵⁹ *Id.*, No. A327519 at 64.

²⁶⁰ *Id.* at 42-43.

firm their actions. The failure to obtain evidence prior to the confirmation of the redevelopment area, which was known to all three entities at the time of the approval of the plan, led to the area having been designated in an arbitrary and capricious manner and as such the municipality's actions are violative of the statutes. The Court finds that there was not substantial evidence to support the findings of the Agency, the Commission and the City Council.²⁶¹

Even with this decision, it took another six years, until August 2002, before the Nevada Supreme Court granted the Pappas family's "Motion to Expedite the Briefing and Resolution of the Appeal."²⁶² Among legal watchdog groups, this case was included among "The Top 10 Abuses of Eminent Domain" by the Institute for Justice's Castle Coalition,²⁶³ and *Pappas* was highlighted by one national magazine in deciding to designate Las Vegas as one of the top ten most corrupt cities in America.²⁶⁴ The coalition summarized the history of the Pappas case:

Unbeknownst to Mrs. Pappas, however, [in 1993] there was a hearing in only seven days to decide whether the agency would get immediate possession of the property. Mrs. Pappas did not know about the hearing and did not attend. The Judge granted title to the agency, and the buildings were promptly demolished. Later, the Judge recused himself because he had invested in one of the casinos that was to acquire the property.

The case has been in litigation ever since. In 1996, [Judge Chairez] ruled that the condemnations were unconstitutional and illegal. In a harshly worded 65-page opinion, the judge found that the agency had "set itself up as an entity only unto itself." The court found that the agency ignored many statutes and procedures. For example, the supposed justification for the condemnation was that the area was blighted. However, the surveys of the area revealed no blight, and in fact, no one had even surveyed Mrs. Pappas' block.

²⁶¹ *Id.* at 43.

²⁶² *Id.*, No. 39255 (Nev. Aug. 21, 2002) (granting motion, motion to expedite the briefing, and resolution of appeal).

²⁶³ DANA BERLINGER, CASTLE COALITION, GOVERNMENT THEFT: THE TOP 10 ABUSES OF EMINENT DOMAIN: 1998-2002, at 8 (2002), available at http://www.castlecoalition.org/top_10_abuses/top_10_report.pdf [hereinafter GOVERNMENT THEFT]. See also Vin Suprynowicz, Column, *The Most Valuable Corner in the World*, ELKO DAILY FREE PRESS, Mar. 6, 1996, reprinted in LIBERTARIAN ENTERPRISE, Mar. 1996, <http://www.webleyweb.com/tle/le960301.html>.

²⁶⁴ Craig Offman, *The 10 Most Corrupt Cities in America*, GEORGE, Mar. 1998, at 90, available at 1998 WL 31007411. For advertisements attacking the casino interests of Steve Wynn, Bill Boyd, and Jackie Gaughan as well as Becky, Ted, and Jack Binion as those interest interfaced with the *Pappas* case, see *Eminent Domain or Eminent Thievery*, LAS VEGAS REV.-J., May 20, 2003, at B3; *Eminent Domain Case Draws National Outrage*, LAS VEGAS REV.-J., Apr. 1, 2003, at B3.

On March 29, 2000, the Nevada Supreme Court threw out the city's second too-early appeal and warned the city's attorneys against providing further "misleading" information. After a series of judges recused themselves for accepting campaign contributions from casino interests, the Nevada Supreme Court ruled that campaign contributions did not disqualify judges.²⁶⁵

On September 8, 2003, the Nevada Supreme Court ruled that the taking of the Pappas's property in 1993 by the Las Vegas Downtown Redevelopment Authority (which was actually the Las Vegas City Council) did not violate the eminent domain provisions²⁶⁶ of either the U.S. Constitution²⁶⁷ or the Nevada Constitution.²⁶⁸ This textbook example of eminent domain being manipulated to the monetary benefit of casino interests prompted the Executive Director of the National Coalition Against Legalized Gambling to opine: "Does the public expect the 'elected' Nevada justices to rule against Nevada's political powerhouses?"²⁶⁹

This type of case highlighted the larger issues of whether pro-gambling interests reflected so much financial and political influence that a scofflaw attitude was becoming endemic among those interests. In 1994, Professor Robert Goodman's leading-edge book, *Legalized Gambling as a Strategy for Economic Development*, cautioned the decriminalization of gambling would lead to such problems,²⁷⁰ and his conclusions and concerns were echoed thereafter in forums such as 1994 and 1995 congressional hearings.²⁷¹

²⁶⁵ GOVERNMENT THEFT, *supra* note 263. For more on the city's failure to survey the Pappas property, see *Pappas*, No. A327518. For more on the Nevada Supreme Court's dismissal of the city's second appeal, see Mike Zapler, *Settlement Talks Between City, Family Stalled*, LAS VEGAS REV.-J., Apr. 11, 2000, at 1B, available at 2000 WL 8203861; Editorial, *Misleading the Court*, LAS VEGAS REV.-J., Apr. 11, 2000, at 6B, available at 2000 WL 8203868. The supreme court's ruling on judicial recusals is *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial District Court*, 5 P.3d 1059 (Nev. 2000). See also Ed Vogel, *State's High Court Rules Judge Can Stay on Redevelopment Case*, LAS VEGAS REV.-J., Aug. 19, 2000 at 1B; available at 2000 WL 8210199.

²⁶⁶ *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003).

²⁶⁷ U.S. CONSTITUTION, amend. V.

²⁶⁸ NEV. CONST. art. 1 § 8(6).

²⁶⁹ Tom Grey, Comments at the National Coalition Against Legalized Gambling Annual Conference (Sept. 25-27, 2003).

²⁷⁰ ROBERT GOODMAN, *LEGALIZED GAMBLING AS A STRATEGY FOR ECONOMIC DEVELOPMENT* 16-19 (1994).

²⁷¹ See generally, *The National Impact of Casino Gambling Proliferation: Hearing*

C. Gambling Interests As "Taking It All"

In 1974, New Jersey voters rejected a state constitutional amendment that would have permitted casino gambling in Atlantic City.²⁷² On November 2, 1976, the voters accepted a similar amendment²⁷³ "after a long history of a constitutional prohibition on legalized gambling."²⁷⁴ In this context, "the primary difference between the [1974 and 1976] amendments was the fact that the Casino Amendment specifically dedicated revenues derived by the State from privately owned casino gambling establishments to projects designed to aid senior citizens and disabled residents."²⁷⁵ The Casino Amendment stated:

Any law authorizing the establishment and operation of such gambling establishments shall provide for the State revenues derived therefrom to be applied solely for the purpose of providing . . . reductions in property taxes, rental, telephone, gas, electric, and municipal utilities charges of eligible senior citizens and disabled residents of the State, . . . in accordance with such formulae as the Legislature shall by law provide.²⁷⁶

Once the voters had been prompted by the public relations campaign of "benefits to senior citizens" to approve the casino gambling, there was a legislative maneuver designed to redirect the funds for senior citizens back to the benefit of gambling interests.²⁷⁷

In 1984, the New Jersey legislature created the Casino Reinvestment Development Authority.²⁷⁸

In this act, casinos are presented with a choice between paying an additional tax of 2.5% of gross revenues to the Casino Revenue Fund for the benefit of senior citizens and the disabled, or making "investments" of one-half of that amount (i.e., 1.25% of gross revenues) in CRDA bonds or other projects

before the House Comm. on Small Bus., 103d Cong. 77-81 (1994) [hereinafter *Congressional Gambling Hearing 1994*]; *Congressional Gambling Hearing 1995*, *supra* note 173.

²⁷² See U.S. COMM'N ON THE REV. OF A NAT'L POL'Y TOWARD GAMBLING, GAMBLING IN AMERICA (1976) [hereinafter U.S. COMM'N GAMBLING].

²⁷³ N.J. CONST. art. IV, § 7, para. 2 ("Casino Amendment").

²⁷⁴ Press Release, Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein: Senior Groups Join Together in Suit to Protect Their Share of Casino Revenues (June 20, 1997), *available at* WL, Allnewsplus [hereinafter *Groups Join Together*].

²⁷⁵ *Id.*

²⁷⁶ N.J. CONST. art. IV, § 7, para. 2.

²⁷⁷ See *Groups Join Together*, *supra* note 274.

²⁷⁸ N.J. STAT. ANN. § 5:12-153 (West 1996).

approved by CRDA. . . . Given this “choice,” casinos have obviously made the CRDA investments, thereby retaining 1.25% of their gross revenues and depriving the Casino Revenue Fund of an additional 2.5% of the casino’s gross revenues. Upon information and belief, over \$400 million has been so “invested” by the casinos.²⁷⁹

To reclaim these funds, large groups of New Jersey senior citizens filed suit in 1997 against New Jersey, the state treasurer, and the Casino Reinvestment Development Authority for the unconstitutional use of hundreds of millions of dollars of revenue derived from casino gambling.²⁸⁰

D. Gambling Interests As “Above the Law”: State Examples

1. New York

Even after the 9/11 terrorist attacks on the World Trade Center, pro-gambling lobbyists callously pushed through previously stalled legislation authorizing new casinos in New York State.²⁸¹ Although an arguable violation of the New York Constitution (which required two successive legislatures to approve a constitutional change regarding gambling),²⁸² Gov. George

²⁷⁹ Groups Join Together, *supra* note 274 (citation omitted). For statutory language regarding taxes and investments, see N.J. STAT. ANN. § 5:12-144.1 (West 1996).

²⁸⁰ Groups Join Together, *supra* note 274.

²⁸¹ New York leaders put ongoing discussions about gambling on hold after the 9/11 attacks. Tom Precious, *Terrorist Attacks Delay Key Initiatives*, BUFFALO NEWS, Sept. 20, 2001, at B1, available at 2001 WL 6358040. Discussions eventually returned to the casino legislation because of its potential for economic development and increased state revenues, especially in the face of economic losses suffered by the 9/11 attacks. Marc Humbert, *Post-Terrorist Attacks, Pataki and Legislature Eye Gambling Expansion*, ASSOCIATED PRESS NEWSWIREs, Oct. 24, 2001, available at WL Allnewsplus. See also Tom Precious & Jerry Zremski, *Challengers Prepare Lawsuit*, BUFFALO NEWS, Oct. 28, 2001, at A1, available at 2001 WL 6362624 (“‘I find it immoral that our Legislature would use the tragedy of the attack on the World Trade Center as a rationale for victimizing the most vulnerable in our communities on the altar of casinos and slot machines,’ said the Rev. G. Stanford Bratton.”).

²⁸² Generally, legislative approval of a casino would require a constitutional change, which would have to be approved by two successive legislative sessions. Joel Stashenko, *Bruno, Silver Say Gambling Talks Driven by Post-Sept. 11 Revenue Loss*, ASSOCIATED PRESS NEWSWIREs, Oct. 22, 2001, available at WL, Allnewsplus. The two-session requirement was not applied to the legislation that approved Indian casinos, leading to a lawsuit challenging the legality of the casinos. *Id.*; James M. Odato, *Lawsuit Challenges Gaming Law*, TIMES UNION (Albany, N.Y.), Jan. 30, 2002, at B4, available at 2002 WL 8887949.

Pataki (R) signed the bill into law in 2001.²⁸³ The constitutionality of this legislation was immediately challenged by state Sen. Frank Padavan (R), Assemblyman William L. Parment (D), the Saratoga Chamber of Commerce, and other plaintiffs via attorney Cornelius D. Murray.²⁸⁴

If the socio-economic cost/benefit analysis of the New York casino proposals were negative and unconvincing to economists and legislators before the 9/11 attacks, then the cost/benefits were not changed by the 9/11 attacks. The only change was the new atmosphere of ill-advised and panicked decisionmaking which allowed the 2001 New York casino proposal to move forward and be legalized.

On June 12, 2003, Murray won a parallel New York case, *Saratoga County Chamber of Commerce v. Pataki* in a 4-3 decision of the New York Court of Appeals,²⁸⁵ which held that the governor could not bypass the state legislature when authorizing tribal casinos.²⁸⁶ The net effect was to invalidate a ten-year-old compact between Gov. Mario Cuomo and the Akwesasne Mohawks for a casino in Hohanburg, New York.²⁸⁷ The U.S. Supreme Court declined to hear the case, thereby affirming Murray's win in *Saratoga County Chamber of Commerce*.²⁸⁸

President Franklin D. Roosevelt conquered the Great Depression without legalizing casinos, because decriminalized gambling would catalyze destructive economic policies. However, in 2001, New York's legislators ignored the fundamental economic principles of legalized gambling, as well as the New York Constitution, and licensed more casinos.

2. *Indiana*

The fast-shuffle tactics of pro-gambling interests and their failure to comply with state constitutional provisions was exemplified by their unconstitutional legislative gambling mandates in

²⁸³ Carolyn Thompson, *Pataki Signs Gambling Bill Into Law*, TIMES UNION (Albany, N.Y.), Nov. 1, 2001, at B2, available at 2001 WL 24817715.

²⁸⁴ Shaila K. Dewan, *Fighting Gambling, While Keeping His Hand In*, N.Y. TIMES, May 14, 2002, at B2, available at LEXIS, News & Business, News, News, All (English, Full Text).

²⁸⁵ *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003), cert. denied, 124 S. Ct. 570 (2003) (mem.).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*; *Supreme Court Refuses to Hear Indian Gambling Case*, ASSOCIATED PRESS NEWSWIRE, Nov. 17, 2003, available at WL, Allnewsplus.

New York after the 9/11 tragedy.²⁸⁹ Yet even without a national tragedy as a PR impetus, pro-gambling interests evidence little regard for pre-existing legislative and constitutional safeguards, as was exemplified in Indiana in 1993. During a 1993 special session of the Indiana General Assembly, convened by Gov. Evan Bayh (D) to pass the 1994-95 biennial budget, a separate bill that authorized casino gambling on riverboats but failed during the regular session “was attached as an amendment to the budget bill during a conference committee.”²⁹⁰ This logrolled bill was quarterbacked by state Sen. Earline Rogers (D)²⁹¹ and passed by both houses of the General Assembly; although it was vetoed by Gov. Bayh, the General Assembly repassed the budget bill into law.²⁹² Thus, the gambling riverboat language was codified.²⁹³

A group of Indiana citizens filed suit against the state in *Schulz, Phillips & Becker v. Indiana*.²⁹⁴ The suit claimed the gambling riverboat legislation violated the following state constitutional provisions:

1. “The General Assembly shall not grant to any citizen . . . privileges or immunities, which, upon the same terms, shall not belong to all citizens”;²⁹⁵
2. all legislative acts should be limited “to one subject and matters properly connected therewith”;²⁹⁶ and
3. “[i]n all the cases . . . and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.”²⁹⁷

As in other states, the net effect of the Indiana gambling riverboat legislation was arguably to establish a special class of gambling owners with de facto gambling monopolies within their geographic markets (which also crossed state lines into non-casino states).²⁹⁸

²⁸⁹ See *supra* notes 281-84 & accompanying text.

²⁹⁰ Amended Complaint paras. 7-8, at 2-3, *Schulz*, No. 31C01-9610-CP-214 (Cir. Ct., Harrison County, Ind. filed June 30, 1998).

²⁹¹ Cam Simpson, *Legislative Waters Were Choppy for a Long Time*, EVANS-VILLE COURIER, Oct. 24, 1993, at 15A, available at 1993 WL 6174583.

²⁹² Amended Complaint paras. 8-10, at 2-3, *Schulz*, No. 31C01-9610-CP-214.

²⁹³ IND. CODE § 4-33-3-1 (2001).

²⁹⁴ Amended Complaint, *Schulz*, No. 31C01-9610-CP-214.

²⁹⁵ IND. CONST. art. I, § 23.

²⁹⁶ *Id.* art. IV, § 19.

²⁹⁷ *Id.* art. IV, § 23.

²⁹⁸ See generally *Gambling Subsidized by Taxpayers*, *supra* note 171. See also John Warren Kindt, *Legalizing Gambling Activities: The Issues Involving Market Saturation*, 15 N. ILL. U. L. REV. 271 (1995).

The Indiana case was appealed to the Indiana Supreme Court via a petition to transfer,²⁹⁹ but it was not heard on its merits due to an ironic procedural twist which virtually prohibited a majority vote of the justices.

Only Chief Justice Shepard voted to deny the petition on the merits. Justices Dickson and Rucker voted to grant the petition. Justice Boehm voted to deny the petition, but only because Justice Sullivan could not participate. Remember, Justice Sullivan had a conflict because he was the state Budget Director when the Gambling Statute was logrolled in with the budget bill. Justice Boehm specifically noted that he thought the issue was of great public importance.³⁰⁰

The vote was two justices in favor of granting the petition to transfer, two against, and one abstention due to a potential conflict of interest.³⁰¹ Thus, the case of unconstitutionality was never decided on its merits.

3. *South Carolina*

During the 1990s South Carolina served as the pre-eminent example of a state dominated by pro-gambling interests.³⁰² In 1985 a gambling provision slipped unnoticed into South Carolina legislation,³⁰³ and this provision, coupled with a 1991 South Carolina Supreme Court decision allowing de facto payouts, precipitated a massive influx of video gambling machines into the state.³⁰⁴ At the cost of his own political career, as both a governor and a potential vice-presidential candidate, South Carolina Gov. David Beasley (R) courageously legislated the VGMs out of the state,

²⁹⁹ See Brief in Opposition to Transfer, *Schulz*, 741 N.E.2d 1259 (Ind. filed Sept. 5, 2000).

³⁰⁰ Letter from Richard A. Waples, plaintiff's attorney, to Walter Schulz et al., plaintiffs (Dec. 12, 2000) (on file with Richard A. Waples).

³⁰¹ *Schulz*, 741 N.E.2d 1259 (Ind. 2000) (table).

³⁰² See, e.g., NGISC FINAL REPORT, *supra* note 77, at chs. 2-3.

³⁰³ S.C. CODE ANN. § 16-19-60 (1985). The words "money or property" were struck from the statutory ban against distributions from gambling machines via state Sen. Jack Lindsay (D). See, e.g., Margaret N. O'Shea, *Video-Poker Ban Presents Obstacles*, AUGUSTA CHRONICLE, June 11, 2000, at A1, available at WL, SC-News. For the most comprehensive analysis of court cases related to pathological gambling and gambling's interface with the political, social and economic environments, see R. Randall Bridwell & Frank L. Quinn, *From Mad Joy To Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 Miss. L.J. 565 (2002) [hereinafter *The Merger of Law and Politics in Gambling*]. See also NGISC FINAL REPORT, *supra* note 77, at 2-5.

³⁰⁴ *State v. Blackmon*, 403 S.E.2d 660 (S.C. 1991).

and they were gone by 2000.³⁰⁵ At its height in the mid-1990s, the South Carolina gambling interests were estimated to be grossing an amount nearly half the size of the entire state budget³⁰⁶ and keeping almost thirty percent of the gross.³⁰⁷ Multiple cases involving pathological gamblers resulted in multi-million-dollar judgments against the owners of VGMs.³⁰⁸ However, collecting those judgments from elusive, corrupt, and sometimes criminal VGM owners was difficult and time-consuming.³⁰⁹

4. *West Virginia*

The West Virginia scenario exemplifies the gambling principle of “migration of illegality.” Once the South Carolina VGMs were de facto recriminalized in 2000, many of the VGMs moved into other states, such as Georgia and West Virginia, and the VGMs began operating illegally. In 2002, in Georgia, the legislature refused to legalize the VGMs,³¹⁰ which was the scenario in practically every other state. However, in West Virginia the illegal machines were progressively legalized in specialized legislation, particularly in 2001 with specific legislative strong-arming by Gov. Bob Wise (D).³¹¹ By 2003, West Virginia had legalized 9,049 VGMs, specifically video lottery terminals (VLTs), at the four racetracks in Charles Town, Chester, Nitro, and Wheel-

³⁰⁵ *The Merger of Law and Politics in Gambling*, *supra* note 303, at 590-98; Jim Drinkard & William M. Welch, *Gambling Industry Ups the Ante in Politics*, USA TODAY, Jan. 8, 1999, at A8, available at 1999 WL 6831072 [hereinafter *Gambling Industry Ups Ante in Politics*]; see Rick Bragg, *End Video Poker Gambling*, *South Carolina Chief Urges*, N.Y. TIMES, Jan 22, 1998, at A14, available at LEXIS, News & Business, News, News, All (English, Full Text) [hereinafter *End Video Gambling*].

³⁰⁶ *Id.*

³⁰⁷ *Id.* South Carolina gambling interests grossed \$2.5 billion, according to state figures in 1999, the same year the South Carolina's state budget was \$5.3 billion. See NGISC FINAL REPORT, *supra* note 77, at 2-5 (letter from D. John Taylor, Manager, South Carolina Department of Revenue, to the National Gambling Impact Study Commission (Apr. 26, 1999)); *Lawmakers Return to Finish Budget, Other Business*, HERALD (Rock Hill, S.C.), June 23, 1999, at 9A, available at 1999 WL 9648271. See also *End Video Poker Gambling*, *supra* note 305; *Gambling Industry Ups the Ante in Politics*, *supra* note 305.

³⁰⁸ See generally *The Merger of Law and Politics in Gambling*, *supra* note 303.

³⁰⁹ See generally *id.*

³¹⁰ Rhonda Cook, *U.S. Judge Halts Use of Poker Machines*, ATLANTA J.-CONST., Jun. 26, 2002, at B1, available at 2002 WL 3727664; Bill Rankin & Rhonda Cook, *Video Poker Loses Bet on Georgia High Court*, ATLANTA J.-CONST., May 29, 2002, at A1, available at 2002 WL 3724236.

³¹¹ Randy Coleman, *Wise Signs Video Poker Legislation*, ASSOCIATED PRESS NEWSWIRES, May 8, 2001, available at WL, Allnewsplus, reprinted as *W. Va. Governor Moves Ahead with Video-Poker Strategy*, ROANOKE TIMES, May 9, 2001, at A5.

ing.³¹² Another 5,275 machines were located in bars and restaurants.³¹³ Apparently in contravention of the West Virginia Constitution, the state's "take" from its VGMs was tied to specialized legislative programs.³¹⁴ Represented by Jackson County attorney Larry Harless, citizens groups filed a lawsuit on June 11, 2003, claiming that the West Virginia Lottery was not enforcing existing laws and VLT regulations, and that the VGMs constituted an "economic threat."³¹⁵ Summarized in 1994 and reconfirmed throughout the next decade, the socio-economic costs of new legalized gambling activities were \$3 for every \$1 in benefits.³¹⁶ Lewisburg attorney Barry Bruce and Paula McLaughlin, treasurer of the Greenbrier County Coalition Against Gambling Expansion, noted that not one state with widespread gambling, including Nevada,³¹⁷ was "really well off financially."³¹⁸

Appealed directly and quickly to the West Virginia Supreme Court, the petition filed by Harless claimed the video poker machine payouts were "rigged . . . to ensure that over time, almost all players lose their money."³¹⁹ In the context of marketing, the

³¹² Paul J. Nyden, *Groups File Suit to Shut Down Video Gambling*, CHARLESTON GAZETTE, Jun. 12, 2003, at 12A, available at 2003 WL 5468822 [hereinafter *Suit to Shut Down Video Gambling*].

³¹³ *Id.*

³¹⁴ See, e.g., *id.*

³¹⁵ *Id.*

³¹⁶ *Congressional Gambling Hearing 1994*, *supra* note 271, 77-81 & nn.9, 12 (statement of John Warren Kindt, Professor, University of Illinois at Urbana-Champaign). See also John Warren Kindt, *The Business-Economic Impacts of Licensed Casino Gambling in West Virginia: Short-Term Gain But Long-Term Pain*, 13 W. VA. U. PUB. AFF. REP. 22 (1996), available at <http://www.polsci.wvu.edu/faculty/dilger/PS321/report13.22.htm> [hereinafter *Business-Economic Impacts of Gambling*]; Earl L. Grinols & David B. Mustard, *Business Profitability Versus Social Profitability: Evaluating Industries with Externalities, the Case of Casinos*, 22 MANAGERIAL & DECISION ECON. 143, 153 (2001), available at <http://www.terry.uga.edu/~dmustard/profitability.pdf> [hereinafter *The Case of Casinos*]; Casinos and Crime, *supra* note 197; Earl L. Grinols & David B. Mustard, *Management and Information Issues for Industries with Externalities: The Case of Casino Gambling*, 22 MANAGERIAL & DECISION ECON. 1 (2001), available at <http://www.business.uiuc.edu/grinols/pdf/Paper82-300CT02.pdf>. See *supra* note 205 and accompanying text.

³¹⁷ In 2003, Nevada Gov. Kenny Guinn (R) stated in his State of the State address that taxes from gambling sources were unreliable and poor fiscal policy. Nevada Gov. Kenny Guinn, State of the State Address to the Nevada Legislature (Jan. 20, 2003), available at <http://gov.state.nv.us/sos2003.htm>.

³¹⁸ See *Suit to Shut Down Video Gambling*, *supra* note 312. See, e.g., John Warren Kindt, Column, *Time to Cut Better Deal with Casinos, or Take Them Over*, CHI. SUN-TIMES, June 4, 2003, at 51, available at 2003 WL 9554955.

³¹⁹ *Suit to Shut Down Video Gambling*, *supra* note 312. Compare *id.*, with *Free Credit*, *supra* note 10, (providing formulae for "gambler's ruin").

petition also claimed the West Virginia Lottery was “violating state law by engaging in illegal ‘advertising and promotional activities to entice and induce persons to gamble, or gamble more.’”³²⁰

On Oct. 17, 2003, three justices of the West Virginia Supreme Court issued their opinion that had the net effect of leaving in place the state’s VGMs.³²¹ However, concurring Justice Starcher’s “lament instead of a dissent” was illustrative of the dilemmas faced by the judicial community:³²²

Professionally, I think that the Legislature, which has overwhelmingly [actually a procedural one-vote margin in 2001] and repeatedly voted to establish a massive, statewide, government-operated gambling system in West Virginia—and to finance a significant piece of our public budget from that system—has the legal right to do so under our *Constitution*.

Personally, I question whether it is right or wise for my government to set up and operate this massive, statewide, government-operated gambling system—and to use, in managing this system, thousands of privately-managed sites that are impossible to supervise and monitor; and to also use thousands of gambling devices that are known to be especially dangerous and addictive; and then to make it next to impossible for future generations to cancel, revamp, or restrict this system, because of the legal obligation to pay off bonds that are based on gambling revenues.³²³

Evidently, the justices had the opportunity to distinguish the court and reinforce the rule of law by restraining the West Virginia gambling bureaucracy via writs of mandamus. The oxymoron of this case was that the court declined to restrain the gambling bureaucracy based on apparent political considerations rather than adhere to a strict interpretation of the West Virginia Constitution as supported by the practical facts.

5. *Nebraska*

Unlike the West Virginia Supreme Court in 2003, the Nebraska Supreme Court adhered to a strict interpretation of the state constitutional safeguards and rebuffed attempts by pro-gambling interests to circumvent those safeguards. *Loontjer v. Robinson* highlights the necessity for the judicial system to incor-

³²⁰ *Suit to Shut Down Video Gambling*, *supra* note 312.

³²¹ *State ex rel. City of Charleston v. W.V. Econ. Dev. Auth.*, 588 S.E.2d 655 (W.V. 2003).

³²² *Id.* at 674 (Starcher, J., “concurring and lamenting”).

³²³ *Id.* See W.V. CONST. art. VI § 36.

porate and apply the public policy safeguards inherent in state constitutions.³²⁴ This case exemplifies the confrontation between public policy safeguards in a state constitution and the overwhelming monetary power of the gambling industry.

Throughout the twentieth century, more than two-thirds of the state constitutions had total prohibitions and/or other provisions against gambling because of the overwhelming socio-economic negatives.³²⁵ In their attempts to expand various types of gambling during the 1980s and 1990s, the enormous PR dollars of pro-gambling interests positioned lotteries as being able to generate revenues for social programs—if voters would amend their state constitutions to allow gambling. Misleading terminology in these constitutional referenda often removed all prohibitions against gambling instead of merely permitting lotteries. The explosion of various gambling proposals during the 1990s for casinos, off-track betting parlors, electronic (slots) gambling venues, and other gambling facilities was driven by state legislative lobbying absent the constitutional standards, erased by lottery “legalization.”

As a result, public votes on any gambling proposals became rare. Where pro-gambling interests were forced into scenarios requiring public votes, there were frequent allegations of pro-gambling interests’ utilizing “fronts,”³²⁶ bogus “citizen

³²⁴ *Loontjer v. Robinson*, 670 N.W.2d 301 (Neb. 2003).

³²⁵ *Business-Economic Impacts of Gambling*, *supra* note 316, at 21, 22.

³²⁶ In one well-known example, two supposedly “objective” public officials wrote opinion-editorials on behalf of two casinos. One official was James Treffinger, the executive for Essex County, New Jersey, whose column was published in New Jersey’s largest newspaper, *The Star Ledger*.

Little did Treffinger and *The Star-Ledger* know that the *Ocean County Observer* published an identical column two days earlier. That column appeared under the byline of H. George Buckwald, chairman of the Ocean County Planning Board. Both columns were copied nearly verbatim from a “sample opinion-editorial” written by MWW/Strategic Communications of East Rutherford. The company sent the column along with a four-page “fact-sheet” to state politicians in an effort to defeat the tunnel project [that would benefit another casino competitor].

Anti-Tunnel Tactic Backfires, INT’L GAMING & WAGERING BUS., July 1996, at 12. The press should have asked if either or both of these “objective” public officials were offered honoraria for their writings—a question recommended by the *Columbia Journalism Review* when gambling issues are covered by the press. Stephen J. Simurda, *When Gambling Comes to Town*, COLUM. JOURNALISM R., Jan./Feb. 1994, at 36-38, available at 1994 WL 12802626 [hereinafter *When Gambling Comes to Town*].

groups,”³²⁷ and even intimidation tactics against local businesses.³²⁸ When petitions were required, pro-gambling interests had millions of dollars to back petition drives, paying those circulating the petitions \$2 to \$3 for each signature obtained from a registered voter.³²⁹ Critics frequently attacked these petition drives as being misleading and including fraudulent signatures—as typified by pro-gambling petition drives in Florida (1994),³³⁰ Arkansas (1996),³³¹ and Missouri (1998).³³² Furthermore, when pro-gambling interests fail in their votes to expand gambling, they have huge financial coffers to support multiple revotes.³³³

³²⁷ See, e.g., John Carlson, *Only Two Members: Citizens' Group Paid by Argosy*, DES MOINES REG., Oct. 20, 1994, at A1 (a \$100,000 advertising budget to promote a gambling proposition was paid by a casino company via a “citizens group” consisting of two people). See generally *When Gambling Comes to Town*, supra note 326, at 36, 37 (“follow the money”).

³²⁸ See, e.g., Tim Buckwalter, *East Towne Store Evicted*, NEW ERA (Lancaster, Pa.), Oct. 16, 1995, at A1 (eviction notice arrived just days after a business owner expressed concerns in a news article about the off-track betting parlor proposed for a nearby section of the mall). For instances involving the intimidation of academics, see *Congressional Gambling Hearing 1994*, supra note 271, at 4, 12.

In another example, during the Nov. 4, 2003, election, pro-gambling interests were accused of pressuring citizens and businesses to support a casino in French Lick, Indiana:

Some Orange County residents say they have been threatened for refusing to support a proposed casino in the French Lick area. They charge that casino backers—including state Rep. Jerry Denbo, who led the legislative push to bring gambling to Orange County—have used their clout to threaten loss of county contracts and to otherwise apply pressure.

³²⁹ Grace Schneider, *Some Hoosiers Feeling Pressure to Back Casino*, COURIER-J. (Louisville, Ky.), Oct. 20, 2003, at 1A, available at 2003 WL 65380910. Orange County Sheriff Doyle Cornwell chaired the pro-gambling group, Citizens for the Future of Orange County, and carried “a box of signs in the trunk of his squad car and said he delivers them—while on duty—to supporters” after being assured he could. *Id.*

John Warren Kindt, *U.S. National Security and the Strategic Economic Base: The Business/Economic Impacts of the Legalization of Gambling Activities*, 39 ST. LOUIS U. L.J. 567, 571 n.24 (1995) [hereinafter *Strategic Economic Base*].

³³⁰ *Id.* Martin Dyckman, Column, *Misleading the Public*, ST. PETERSBURG TIMES, Nov. 1, 1994, at 13A, available at 1994 WL 54329601.

³³¹ Michelle Hillier, *Many Signatures Forged on Petition Expert Says*, ARK. DEMOCRAT-GAZETTE (Little Rock, Ark.), Oct. 4, 1996, at 1B, available at <http://library.ardemgaz.com>; Michelle Hillier, *Inquiry Considered into Forgery Claims on Amendment Petitions*, ARK. DEMOCRAT-GAZETTE (Little Rock, Ark.), Oct. 5, 1996, at 1A, available at <http://library.ardemgaz.com>.

³³² Paul Sloca, *Scores of Signatures, Supposedly of . . .*, ASSOCIATED PRESS POL. SERVICE, July 17, 1998, available at 1998 WL 7430312, reprinted in *False Signatures Are Found on Gambling Amendment Petitions*, ST. LOUIS POST-DISPATCH, July 18, 1998, at A3.

³³³ *Follow the Money*, supra note 174, at 94.

In Missouri, there were two statewide votes rejecting or restricting casinos within a period of only one and a half years before the third vote permitted them.³³⁴ In Parkville, Missouri, casino interests lost three votes before winning the fourth referendum in two years by seventy-five votes.³³⁵ In Detroit, casinos were rejected three times by voters during the 1980s and 1990s before the casinos won the fourth referendum.³³⁶ Ethicists pondered whether there ever *could* be another referendum that might oust any of these casinos, or was there a de jure or de facto prohibition against the voters ever having such a vote.³³⁷ Would these scenarios destroying the electoral process be patently unconstitutional?

In this historical context, *Loontjer* held that there could be no finessing of the Nebraska constitutional safeguards³³⁸ requiring a sworn statement of the names of the individual sponsors and monetary contributors³³⁹ to the petition initiative.³⁴⁰ Writing for the court, Justice Connolly sanguinely concluded that “knowing the petition’s sponsor could affect the public’s view about an initiative petition. . . . [A] petition sponsored by a large casino might have less appeal to some members of the public than a petition sponsored by local citizens.”³⁴¹ Philosophical support to Ms. Pat Loontjer, the plaintiff, was supplied by Gambling with the Good Life, a remarkably successful anti-gambling group, represented by Dan Hazuka, Lyle Japp, and Jon Krutz, who gave national recognition to the Nebraska Supreme Court’s strong stand in reaffirming policy provisions safeguarding the public welfare.³⁴²

³³⁴ *Id.*; Terry Ganey & Mark Schlinkmann, *GOP’s Tidal Wave Crushes Democrats: Hancock II Out: Slot Games In*, ST. LOUIS POST-DISPATCH, Nov. 9, 1994, at A1, available at 1994 WL 8208472.

³³⁵ *Follow the Money*, *supra* note 174.

³³⁶ See *supra* notes 141-43 and accompanying text.

³³⁷ See generally *Follow the Money*, *supra* note 174.

³³⁸ NEB. CONST. art. III §§ 2, 4.

³³⁹ 1939 Neb. Laws, ch. 34, sec. 13, at 184-85.

³⁴⁰ *Loontjer v. Robinson*, 670 N.W.2d 301, 307-308 (Neb. 2003).

³⁴¹ *Id.* at 309.

³⁴² Comments of Dan Hazuka, Lyle Japp, Jon Krutz, and Pat Loontjer, National Coalition Against Legalized Gambling Annual Conference (Sept. 25-27, 2003).

E. Gambling Interests as Saviors or Exploiters of Native American Sovereignty?

Under the 1988 Indian Gambling Regulatory Act³⁴³ [hereinafter IGRA], the pursuit of expanded Native American gambling resulted in a plethora of cases during the 1990s. Driven by the enormous profits in Native American gambling and by sovereign hubris, numerous test cases were filed by Native American gambling interests after the enactment of IGRA. The most significant test cases were developed with the goals of: (1) expanding the scope of Native American sovereignty in multiple legal issue areas, (2) acquiring new lands and assets either adjacent, or even non-adjacent to tribal lands (collectively known as “after-acquired property” issues), (3) expanding or even forcing, gambling into new geographic feeder markets,³⁴⁴ and (4) expanding, or even forcing, new types of gambling into pre-existing feeder markets (e.g., illegal Internet gambling).³⁴⁵

In this context, the *Time* cover story on December 16, 2002, was a scathing exposé on rampant abuses perpetrated by gambling interests on the overall welfare of U.S. Native American populations.³⁴⁶ IGRA is “so riddled with loopholes, so poorly written, so discriminatory and subject to such conflicting interpretation that 14 years [after IGRA’s enactment], armies of high-priced lawyers are still debating the definition of a slot ma-

³⁴³ 25 U.S.C. §§ 2701-21 (1994). The IGRA was enacted to regulate tribal gambling after gambling interests won their test case which opened the door to widespread tribal gambling. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

³⁴⁴ Although there were no Indian reservations or recognized tribes in the state of Illinois, in 2000 the Miami tribe filed test cases in Illinois claiming much of the land in fifteen Illinois counties. Flynn McRoberts, *Tribe Stakes Claim to Illinois Land*, CHI. TRIB., June 14, 2000, § 1, at 1, available at 2000 WL 3675191. Eventually, it was revealed that a New England developer was funding the test cases being filed by the Miami—apparently in hope of settling the test cases for one or more casinos. *Developer Funds Case*, PANTAGRAPH (Bloomington, Ill.), Jan. 10, 2001, at A1, available at 2001 WL 6497374. The Miamis desired to locate the initial casino on lands to be acquired near Paxton, Illinois, which was in the center of a thirty-five-mile feeder market encompassing several large Illinois population bases. A Paxton citizens group, largely coordinated by Richard and Donae Porter, was influential in defeating the Miami tribe’s proposals by exposing embarrassing elements of those proposals. The Miamis eventually dropped their test cases.

³⁴⁵ See, e.g., Bill Lambrecht, *Missouri Fights to Pull Plug on Internet Lottery*, ST. LOUIS POST-DISPATCH, June 8, 1997, at A1, available at 1997 WL 3346723.

³⁴⁶ Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44, available at 2002 WL 102387053 [hereinafter *Wheel of Misfortune*].

chine.”³⁴⁷ Instead of regulating Native American gambling, IGRA established an abusive and chaotic system which “dispersed oversight responsibilities among a hopelessly conflicting hierarchy of local, state and federal agencies.”³⁴⁸

One of IGRA’s statutory mandates was to promote tribal economic development.³⁴⁹ However, since IGRA’s enactment in 1988 there was no evidence of widespread sustainable economic benefit. In fact, the “[r]evenue from gaming [was] so lopsided that Indian casinos in five states with almost half the Native American population—Montana, Nevada, North Dakota, Oklahoma and South Dakota—account[ed] for less than 3% of all casino proceeds.”³⁵⁰ Furthermore, an Associated Press study in 2000 concluded that “[d]espite an explosion of Indian gambling revenues—from \$100 million in 1988 to \$8.26 billion a decade later—an Associated Press computer analysis of federal unemployment, . . . and public-assistance records indicates the majority of American Indians have benefited little.”³⁵¹ Although there were “new gambling jobs, unemployment on reservations with established casinos held steady around 54 percent between 1991 and 1997 as many of the casino jobs were filled with non-Indians, according to data the tribes reported to the Bureau of Indian Affairs.”³⁵²

The evidence demonstrated that Indian gambling did not even comply with the relatively weak regulatory scheme of IGRA. As early as 1993, a report by the auditor general for the U.S. Department of Interior discovered numerous legal violations and regulatory problems:³⁵³

[The] review identified 37 [of 117 Indian] gaming operations that . . . were operating in apparent violation of the Act. Also, 18 management contracts required . . . excessive fees totaling \$62.2 million In addition, 13 leasing contracts existed for video gaming equipment that could have been purchased for \$3.2 million but which instead was leased for \$40.3 million. [Moreover] . . . from 1988 through 1992 the U.S. Attorney . . . identified several instances where tribes involved in gaming

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ 25 U.S.C. § 2702(1) (1994).

³⁵⁰ *Wheel of Misfortune*, *supra* note 346, at 47.

³⁵¹ David Pace, *Casino Boom Bypasses Indians*, AP ONLINE, Aug. 31, 2000, available at 2000 WL 25992632, reprinted as *Casino Boom a Bust for Most Members of Indian Tribes*, NEWS-GAZETTE (Champaign, Ill.), Sept. 2, 2000, at A1.

³⁵² *Id.*

³⁵³ *Follow the Money*, *supra* note 174, at 85, 92.

operations lost approximately \$500,000 through theft and embezzlement.³⁵⁴

By 1996, the National Indian Gaming Commission (NIGC), which was charged with overseeing Indian gambling was reporting that 84 percent of Indian gambling activities were in ‘non-compliance;’ that is, 84 percent of the tribal gambling activities were operating illegally or violating federal regulations.³⁵⁵

As the twenty-first century began, however, it appeared that Native American gambling interests had achieved significant advances in reaching their sovereignty goals by filing test cases and the trends were toward continued political and legal efforts in pursuit of these goals. One setback to these goals was the 2003 case of *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*.³⁵⁶ The case developed on May 11, 2001, when Wisconsin Gov. Scott McCallum (R) filed a notice of non-concurrence with U.S. Secretary of the Interior Gail Norton’s determination on February 20, 2001, that Chippewa tribes could “conduct gaming on lands to be acquired in trust [i.e., after-acquired property] . . . and [that the gaming] would not be detrimental to the surrounding community.”³⁵⁷ The tribal interests filed a lawsuit challenging the IGRA requirement of gubernatorial concurrence as unconstitutional.³⁵⁸

This case highlighted the Interior Department’s negligent disregard, or even ignorance, of the basic socio-economic principles of gambling: Gambling activities are almost invariably “detrimental to the surrounding community” (which gambling marketers designate the “feeder market”³⁵⁹).³⁶⁰ More importantly, the Interior Department apparently did not even reference the nationally authoritative and relevant study on precisely this issue, *The Economic Impact of Native American Gaming in*

³⁵⁴ OFFICE INSPECTOR GEN., U.S. DEP’T INTERIOR, AUDIT REPORT: ISSUES IMPACTING IMPLEMENTATION OF THE INDIAN GAMING REGULATORY ACT, REPORT NO. 94-I-113, at 4 (1993).

³⁵⁵ NAT’L INDIAN GAMING COMM’N, REPORT TO THE SECRETARY OF THE INTERIOR ON COMPLIANCE WITH THE INDIAN GAMING REGULATORY ACT (1996).

³⁵⁶ 259 F. Supp. 2d 783 (W.D. Wis. 2003).

³⁵⁷ *Id.* at 787. See IGRA, 25 U.S.C. § 2719(b)(1)(A) (1994).

³⁵⁸ *Lac Courte Oreilles Band*, 259 F. Supp. 2d at 786.

³⁵⁹ See *Gambling’s Crime Multiplier Effect*, *supra* note 169. See also *The Case of Casinos*, *supra* note 316; *Casinos and Crime*, *supra* note 197; *Suit to Shut Down Video Gambling*, *supra* note 312.

³⁶⁰ *Lac Courte Oreilles Band*, 259 F. Supp. 2d at 787.

Wisconsin.³⁶¹

Furthermore, the *Final Report* of the 1999 U.S. Gambling Commission recommended that “comprehensive gambling impact statements” be required before legalizing or authorizing any proposals to expand gambling.³⁶² Accordingly, it could be convincingly argued that a comprehensive gambling impact statement is required before any tribal gambling activities are allowed and that those tribal gambling activities that did not perform this requirement are in violation of IGRA. Even nontribal gambling operations could be required to file a comprehensive gambling impact statement.

In a similar context, the National Environmental Policy Act of 1969³⁶³ requires an “environmental impact statement” for any major federal action which could significantly affect the quality of the human environment³⁶⁴—which obviously includes gambling facilities on tribal lands under Interior Department auspices or gambling riverboats under the U.S. Army Corps of Engineers. To determine if the environmental impact statement can be waived via a “finding of no significant impact,”³⁶⁵ an initial “environmental assessment” is prepared.³⁶⁶

For example, in the environmental assessment prepared in February 2002 for the proposed Huron Band-Potawatomi casino in Calhoun County, Michigan,³⁶⁷ there was no single mention of the academic literature relating to the socio-economic cost/benefit ratio of 3:1 in the gambling facilities’ feeder markets.³⁶⁸ Accordingly, the finding of no significant impact issued July 31, 2002, by the Interior Department should not have been issued

³⁶¹ William Thompson et al., *The Economic Impact of Native American Gaming in Wisconsin*, WIS. POL’Y RES. INST. REP., Apr. 1995 [hereinafter WIS. POL’Y RES. INST.].

³⁶² NGISC FINAL REPORT, *supra* note 77, rec. 3.18, at p. 3-19; Laurence Arnold, *Panel Favors Gambling Regulations*, AP ONLINE, May 18, 1999, available at 1999 WL 17804745, reprinted as *Panel Favors Mandatory ‘Gambling Impact’ Reports*, DAILY HERALD (Arlington Heights, Ill.), May 19, 1999, at A9 [hereinafter *Mandatory ‘Gambling Impact’ Reports*].

³⁶³ 42 U.S.C. §§ 4321-4347 (1994).

³⁶⁴ *Id.* § 4332(2)(c) (1994); 40 C.F.R. § 1501.4 (2001). See also *Mandatory ‘Gambling Impact’ Reports*, *supra* note 362.

³⁶⁵ See 40 C.F.R. §§ 1501.4, 1508.27 (2001).

³⁶⁶ See 40 C.F.R. § 1508.9(a) (2001).

³⁶⁷ EDAW, INC., ENVIRONMENTAL ASSESSMENT: NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS: CALHOUN COUNTY GAMING FACILITY (Feb. 2002).

³⁶⁸ For a summary of studies, see *The Case of Casinos*, *supra* note 316, at 153 tbl.2. See also WIS. POL’Y RES. INST., *supra* note 361.

for both procedural and substantive reasons.³⁶⁹ Primarily on other grounds, the Citizens Exposing Truth About Casinos, a Michigan nonprofit corporation, filed a lawsuit challenging the Interior Department's decision-making processes.³⁷⁰

In an example involving Caesars Riverboat Casino in Harrison County, Indiana, the Corps of Engineers issued a finding of no significant impact that was similarly remiss, both procedurally and substantively, in not addressing the academic literature/studies quantifying the 3:1 cost/benefit ratio in the gambling facilities' self-identified feeder markets.³⁷¹ Skeptics could note that pro-gambling interests would not want to address the 3:1 cost/benefit issue because almost all gambling proposals would fail this shibboleth.

Finally in 2003, in *TOMAC v. Norton*, the U.S. District Court for the District of Columbia overruled a U.S. Bureau of Indian Affairs environmental assessment and finding of no significant impact.³⁷² Significantly, the court held that "[t]here is a certain common sense appeal to TOMAC's argument that a 24-hour-a-day casino attracting 12,500 visitors per day to a community of 4,600 residents cannot help but have a significant impact on that community."³⁷³ The U.S. Bureau of Indian Affairs was ordered to analyze "secondary [feeder market?] growth issues"³⁷⁴ because the court could not decide "whether BIA's decisionmaking process was rational based on the conclusory statements in the record about extensive growth-inducing effects of the casino."³⁷⁵

F. The Gambling Industry's PR Legerdemain: Laying False Predicates for the U.S. Judiciary?

On December 5, 2003, the U.S. Seventh Circuit issued its decision on the appeal in *Williams v. Aztar*.³⁷⁶ The court indicated

³⁶⁹ U.S. DEP'T INTERIOR, FINDING OF NO SIGNIFICANT IMPACT: PROPOSED NOT-TAWASEPPI HURON BAND OF POTAWATOMI INDIANS GAMING FACILITY IN EMMETT TOWNSHIP, MICHIGAN (July 31, 2002).

³⁷⁰ Verified Complaint, *CETAC v. Norton*, No. 1:02CV01754-TPJ (D.D.C. filed Aug. 30, 2002).

³⁷¹ See U.S. ARMY CORPS OF ENGINEERS, ENVIRONMENTAL ASSESSMENT: STATEMENT OF FINDINGS ID No. 199600554-PMR (1998); Press Release, U.S. Army Corps of Engineers, Corps of Engineers Issues Gaming Boat Permit (Feb. 10, 1998).

³⁷² *TOMAC v. Norton*, 240 F. Supp. 2d 45, 52-53 (D.D.C. 2003).

³⁷³ *Id.* at 52.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 52-53

³⁷⁶ *Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003).

that during oral argument the plaintiff's counsel did "not point to one RICO case on which he relied, . . . (much less an analogous case)."³⁷⁷ However, the court ignored the thirty-seven related cases listed in plaintiff-appellant's brief,³⁷⁸ as well as the fact that the RICO civil issues in *Williams* were obviously *de novo* for the Seventh Circuit, but were being pursued in multiple venues throughout the United States.³⁷⁹ Furthermore, the court expanded its purview beyond the Seventh Circuit's jurisdiction with such a statement but then overlooked the well-known federal case *Johnson v. Collins Entertainment Co.*³⁸⁰ involving RICO, as well as similar filings³⁸¹ including the leading-edge *Poulos* case in Nevada federal district court.³⁸² The industry's arguable delaying tactics involving cases such as *Poulos*, which was almost a decade old when *Williams* was argued, appeared to be working in keeping precedent from the U.S. Courts of Appeal.

In addition, the court grouped the casino's sales promotions as "nothing more than sales puffery" which demonstrated the court's fundamentally flawed assumptions involving the marketing of gambling products³⁸³ as well as the medical parameters delimiting pathological and problem gambling via the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.³⁸⁴

Once the casino receives actual or constructive notice of the plaintiff's pathological gambling, would not further enticements from the casino be more than "puffing"—indeed designed to take the plaintiff's property unfairly via the re-entrapment of the "hooked" gambler (i.e. fraud)? Thereby, such allurements and

³⁷⁷ *Id.* at 300.

³⁷⁸ Brief of Appellant at iii-v, *Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003) (No. 03-1822) [hereinafter *Williams Appellant Brief*].

³⁷⁹ For a summary of multiple issues and cases involving federal civil RICO actions, see for example, *The Merger of Law and Politics in Gambling*, *supra* note 303. See also R. Randall Bridwell, *Comment on John Kindt, The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, forthcoming in *MANAGERIAL & DECISION ECON.* (2003).

³⁸⁰ *Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir. 1999), *rehg. denied*, 204 F.3d 573 (4th Cir. 2000); *Johnson v. Collins Entm't Co.*, 564 S.E.2d 653 (S.C. 2002).

³⁸¹ *Gentry v. Yonce*, 522 S.E.2d 137 (S.C. 1999); see also *Poulos v. Caesars World, Inc.*, No. CV-5-94-1126-DAE (RJJ) (D. Nev. order entered Dec. 19, 1997).

³⁸² For just one aspect of the complicated *Poulos* case (i.e., certification of the class), see *Poulos v. Caesars World, Inc.*, 2002 WL 1991180 (D. Nev. June 25, 2002).

³⁸³ For marketing fliers, see *Williams Appellant Brief*, *supra* note 378, at Apdx B.

³⁸⁴ AM. PSYCHIATRIC ASSOC., *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* § 312.31, at 615-18 (4th ed. 1994).

the “taking intent” behind these allurements should satisfy RICO and the policies behind its draftsmanship, because the pathological gambler, by definition and diagnosis, is helpless to resist as in drug addiction (and expert testimony should so demonstrate).

Most importantly, the court made the fundamental mistake of effectively discounting the civil remedies and concomitant policies behind RICO as enumerated by one of RICO’s primary authors, Notre Dame Law Professor G. Robert Blakey:

[W]hen elements opposed to RICO suggest that its subject matter be returned to the states, they really mean that it be enforced inadequately or not at all, as most state and local agencies lack the interest or expertise to do sophisticated organized or white-collar crime investigations or prosecutions, and state legal systems were primarily designed to deal with nineteenth century type crimes and torts. Similarly, when elements opposed to RICO suggest that its subject matter be enforced only or mainly criminally, they really mean that it be enforced inadequately or *not at all*. If our markets are free, it is not because of the work of public agencies enforcing the antitrust statutes, as important as they are. Private enforcement is, in fact, the linchpin of the antitrust statutes. When civil rights legislation was under consideration in the 1960s, many critics emphasized states’ rights, which were then, at least for some, only a smoke screen behind which to hide a rotten system of segregation. Criticism of RICO based on federalism also looks like a smoke screen behind which the swindlers and others seek to hide.³⁸⁵

The RICO nonenforcement policy pervades the tenor of the Seventh Circuit’s killing and chilling-effect decision in *Williams*. Accordingly, the Seventh Circuit’s decision ran counter to the trends in other U.S. circuits,³⁸⁶ and the court appeared to have been misdirected by the mythical assumptions³⁸⁷ promulgated by the gambling industry’s PR campaigns.³⁸⁸

Also in December of 2003, the *Pappas* case was appealed via the firm of Jenner and Block to the U.S. Supreme Court.³⁸⁹ The

³⁸⁵ G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform*, 43 VAND. L. REV. 851, 921-24 (1990) (emphasis added) [hereinafter *Myths to Rewrite RICO*].

³⁸⁶ See, e.g., *The Merger of Law and Politics in Gambling*, *supra* note 303, at 660-92.

³⁸⁷ Compare *id.*, with *Myths to Rewrite RICO*, *supra* note 385, at 851-924.

³⁸⁸ Compare *The Merger of Law and Politics in Gambling*, *supra* note 303, at 660-92, with *Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003).

³⁸⁹ Letter from Harry Pappas to Tom Grey, Exec. Dir., Nat’l Coalition Against

pivotal issue was “whether *casinos* and *topless clubs* will be considered ‘public use’ as defined by the Fifth Amendment³⁹⁰ to the United States Constitution.”³⁹¹ As in *Poulos*,³⁹² which was filed in 1994, the 1993 *Pappas* case had been delayed for over a decade,³⁹³ which made gambling industry litigators vulnerable to allegations of utilizing litigation patterns interposing for delay.

Under the Fifth Amendment the power of eminent domain is limited by the “takings clause” which states: “nor shall private property be taken for public use without just compensation.”³⁹⁴ Until the *Pappas* case “public use” included such facilities as highways, public schools, and government buildings.³⁹⁵

Harry Pappas summarized his family’s case from its 1993 inception as follows:

The Pappas family filed suit in Las Vegas District Court claiming that casinos and topless clubs *are not* a “public use,” and therefore this constituted an unconstitutional taking. The court agreed and ordered the property returned. The city of Las Vegas and the casinos filed an appeal to the Nevada Supreme Court. Ruling the taking was a “constitutional use of eminent domain,” the court sided with Las Vegas and the casinos and overturned the district court. It should be noted that enormous amounts of “campaign donations” are given to Nevada Supreme Court justices from the casino industry.³⁹⁶

The Nevada Supreme Court decision was appealed to the U.S. Supreme Court in December 2003 and the stakes were large. Pappas noted the significance of the issues at bar:³⁹⁷

If the city of Las Vegas, casinos, and topless clubs should prevail at the United States Supreme Court, these vice industries, which are now considered privileged and regulated, will be elevated to a constitutional standard and level of power they could only have dreamed of in the past. The ramifications for American society will be devastating and long-lasting.³⁹⁸

The practical impact of the gambling industry winning the *Pap-*

Legalized Gambling (Dec. 9, 2003) (on file with author) (detailing reasons *Pappas* was appealed) [hereinafter Pappas Summary].

³⁹⁰ U.S. CONST., amend. V.

³⁹¹ Pappas Summary, *supra* note 389 (emphasis in original).

³⁹² See footnotes 18-31, 382 *supra* and accompanying text.

³⁹³ See footnotes 252-70 *supra* and accompanying text.

³⁹⁴ U.S. CONST., amend. V.

³⁹⁵ See Pappas Summary, *supra* note 389.

³⁹⁶ *Id.* (emphasis in original).

³⁹⁷ *Id.*

³⁹⁸ *Id.*

pas case would be to allow “eminent domain to be used to seize small business, mom & pop businesses, homes and property for casinos and topless club expansions [and] would finally give casinos and topless clubs a constitutional standing that they have never enjoyed before.”³⁹⁹ Combined with virtually unlimited monetary resources the use of eminent domain by pro-gambling interests would enthrone those interests as sovereign entities at odds with the public health, safety, and welfare.

The predictions and historical observations regarding decriminalized organized gambling made a decade earlier were becoming truisms by 2003. These points were summarized during the 1995 U.S. Congressional hearings:

[L]egalized gambling interests are utilizing millions of dollars to misdirect the debate and cause government decisionmakers and the public to reach invalid conclusions. First, there is the incorrect assumption that legalized gambling activities are like other business activities. Instead, legalized gambling activities have large industry-specific negatives, resulting in a cumulative negative economic impact. Second, the industry’s tendency to focus attention on specialized factors provides a distorted view of the localized economic positives, while ignoring the large business-economic costs to different regions of the United States. Third, the extraordinary amount of money which is legally used to overwhelm any opposition leads to *unbalanced decisionmaking processes* by elected officials, regulatory agencies, and *even the court system*. Almost by definition, there can be little compromise, that is, either the national economy is a non-gambling one, or it is a legalized gambling economy which will eventually “bust.”⁴⁰⁰

By the beginning of the twenty-first century, the U.S. judiciary appeared to be increasingly vulnerable to the PR myths promulgated by pro-gambling interests.

G. Gambling Interests as Dogmatists: Reinventing the Wheel of Misfortune

The historical record indicates that decriminalized organized gambling activities invariably lead to new addicted gamblers, new bankruptcies, and new crime and corruption. Despite the dogma of pro-gambling lobbyists to the contrary, decriminalized organized gambling cannibalizes pre-existing local, regional, and

³⁹⁹ *Id.*

⁴⁰⁰ *Congressional Gambling Hearing 1995*, *supra* note 173, at 519-20 (statement of Univ. of Ill. Prof. John Warren Kindt) (emphasis added).

national economies and continues to increase the socio-economic negatives that necessarily accompany the expansion of gambling.

The inordinate monies associated with decriminalized organized gambling activities have historically corrupted not only local, state, and national administrative and legislative decisionmaking, but also judicial decisionmaking.

In the United States, gambling activities were criminalized during most of the twentieth century—and the prohibition of gambling was successful. Even during the most desperate economic period of the twentieth century, the Great Depression, President Franklin D. Roosevelt and his economic advisors did not consider decriminalizing organized gambling activities because its dogmatists would invariably catalyze destructive economic policies.

During the 1990s and early twenty-first century, the social, economic, legislative, and judicial trends created by the U.S. flirtation with decriminalized organized gambling activities continually contributed to destructive results outweighing any benefits. History dictates that gambling activities are recriminalized in cycles as the negative consequences of decriminalized organized gambling activities eventually manifest themselves in sufficient magnitudes to demand political backlash.

Looking to the impacts of decriminalized organized gambling on future generations while the governor of Texas, President George W. Bush (R) summarized the negative conclusions of the Texas Task Force on Illegal Gambling:

To allow casino style gambling to continue and spread in places where children play not only offends [those] who have not approved casino style gambling . . . , but it also sends a terrible message to our children that gambling is okay. Casino gambling is not okay. It has ruined the lives of too many adults and it can do the same thing to our children.⁴⁰¹

In 1999, the U.S. Gambling Commission unanimously called for a moratorium on the expansion of *any type of gambling anywhere* in the United States.⁴⁰² The recriminalization of U.S. gambling will eventually occur in its historical socio-economic cycle. The sooner that recriminalization occurs, the sooner U.S. society and

⁴⁰¹ GOVERNOR'S TASK FORCE ON ILLEGAL GAMBLING IN TEX., REPORT OF THE GOVERNOR'S TASK FORCE ON ILLEGAL GAMBLING IN TEXAS cover (1999).

⁴⁰² NGISC FINAL REPORT, *supra* note 77, at introduction by Kay C. James.

the economy will be pump-primed into healthy growth.⁴⁰³

⁴⁰³ *Gambling Facilities Transformed into Educational Facilities*, *supra* note 158. See also *Gambling's Destabilizing of Economies*, *supra* note 155; *Strategic Economic Base*, *supra* note 329.