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REMEDYING THE LOSE-LOSE GAME OF COMPULSIVE GAMBLING: VOLUNTARY EXCLUSIONS, MANDATORY EXCLUSIONS, OR AN ALTERNATIVE METHOD?

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INTRODUCTION

Compulsive gamblers present a serious problem to the casino industry. They represent threats to industry integrity, political viability, legal standing and commercial success. This Article reviews some of these threats as well as suggested remedies that might mitigate the dangers pathological gambling poses to casinos and society as a whole.

This Article first looks at the expansion of casino gaming over the past two decades. Then it reviews assessments of the prevalence of troubled (pathological and problem) gaming, along with costs associated with troubled gaming. Next, it looks at a range of "solutions," including prohibition of casino gaming and major law suits against gambling operators, and major changes in casino operations, including the games offered to players. The major portion of the Article examines solutions focused upon troubled players: voluntary banning, mandatory banning, and creation of a list of "un-welcomed" players.

I. THE CASINO-IZATION OF AMERICA

At some moment during the late 1980s or the early 1990s, a corner was turned. Casino gaming quite suddenly became an acceptable leisure time industry in North America (the United States and Canada).

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Perhaps it was the moment on October 17, 1988, when President Ronald Reagan took a pen into his hands and signed the Indian Gaming Regulatory Act.¹ The Act declared in effect that casino gaming could be a tool for Indian tribes to promote “tribal economic development, self-sufficiency, and strong tribal governments.”² Never before had the heretofore scornful federal government given its official praise to gaming activities anywhere by anyone.

Maybe it was a month later when the voters of South Dakota embraced a “limited” form of casino gaming for the revival of tourism in the town of Deadwood.³ Or, perhaps it was in 1989 when the Iowa legislature gave authorization for casino gaming operations on riverboats as a means to promote good family fun on quests to feel the excitement Mark Twain had experienced over one hundred years before.⁴ Maybe it was when the first Iowa casino boats began their excursions in 1991, or when the Governor of Louisiana, Edwin Edwards, signed the law permitting licensing of a large land-based casino in New Orleans.⁵

A case could also be made that the moment came in Canada in December 1989 when the country’s first permanent (everyday and year-around) casino was opened by the Manitoba Lottery Foundation at the Fort Garry Hotel in Winnipeg.⁶ Then again, the moment might have occurred in Nevada in 1993 as the legislature then gave approval to all the state’s casino license holders to pursue casino licenses elsewhere without first having to get approval from the Nevada Gaming Commission.⁷

1. Indian Gaming Regulatory Act, Pub. L. No. 100-497 (1998).

2. *Id.* § 2702(1). Prior federal acts pertaining to gambling had carried a very negative and punitive tone. See WILLIAM N. THOMPSON, *GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY* 120, 120-22 (2001). A series of lottery acts were designed to impede operations of lotteries by forbidding using mail for advertising or selling tickets or using broadcast media to promote lotteries. *Id.* In 1876, President Grant signed into law an act imposing penalties on persons using the mail to advertise lotteries. *Id.* In 1894, legislation was passed prohibiting importation of lottery tickets from other countries, while in 1895, Congress passed an act suppressing lottery traffic in national or interstate commerce. *Id.* The laws were used in attempts to end sales of Irish Sweepstakes tickets in the mid 20th century. *Id.* In 1934, the new Federal Communications Act banned advertisements of lotteries on radio stations. *Id.* Later, the law applied to television stations. *Id.* State government run lotteries did win an exemption to the 1934 act in 1975. *Id.* The Federal Wire Act of 1961 imposed prison sentences as well as fines on individuals using any wire communication for transmitting bets on sports events across state lines. *Id.*

3. ANTHONY CABOT, *South Dakota*, *INT’L CASINO LAW*, 138 (3d ed. 1999).

4. LORENZO D. CREIGHTON, *Iowa*, *INT’L CASINO LAW*, 39 (3d ed. 1999).

5. HAROLD A. BUCHLER, CONRAD BUCHLER, WILLIAM CREDO, & ROBERT RAYMOND, *Louisiana*, *INT’L CASINO LAW*, 42-63 (3d ed. 1999).

6. BILL FUNK, *Manitoba*, *INT’L CASINO LAW*, 180-185 (3d ed. 1999).

7. WILLIAM N. THOMPSON, *Nevada Goes Global: The Foreign Gaming Rule*

While one or more of these events might have been the “spark” or the “catalyst” for an unparalleled expansion of commercial, tribal and government casinos in America (which before 1988 were confined to the state of Nevada and Atlantic City, New Jersey), casinos were soon the “rage.” Within fifteen years (that is, up to the present point in time), commercial casino gaming was present in twelve states, Native American (U.S.A.) casinos in at least thirty states, First Nations (Canadian) casinos in five provinces, and government casinos (some with private operators) in seven Canadian provinces.⁸

The growth of commercial casino gaming in eleven American states is illustrated on Table 1. In 1990, revenues for these casinos amounted to \$8.3 billion.⁹ This represented less than one-third of all gaming revenues (32% of \$26.6 billion).¹⁰ The few Native American casinos then operating did not alter the basic statistics much. By contrast, in 2005, commercial casinos produced \$30.3 billion in gaming revenues, while Native American casinos added another \$22.6 billion. All casinos together took in 63% of the \$83.7 billion wagered and held by gaming operators.¹¹

and the Spread of Casinos, THE GRIT BENEATH THE GLITTER, 347-62 (H. Rothman & Mike Davis eds., Univ. of Cal. Press 2002). In 1959, the Nevada Gaming Commission adopted Rule 3.060, which prohibited Nevada casino license holders from being involved in any gaming activities outside the state even if the outside activities were otherwise legal. In 1977, the state legislature repealed the rule, and in its place imposed a provision requiring that the Nevada Gaming Commission give prior approval before a Nevada operator could seek an outside license. If all permissions were granted, that Nevada Commission retained a right to oversee all aspects of the outside gaming. The change was prompted by the approval of casino gaming for Atlantic City in New Jersey. Several Nevada casino licensees expressed interest in having casinos on the East Coast. The rule still inhibited Nevada casinos from becoming involved in campaigns to legalize casinos elsewhere, and it also imposed delays and barriers to entry for gaming elsewhere. With several states legalizing casinos in the early 1990s, Nevada had a change of heart and the restrictions were totally removed in 1993 and all at once Nevada interests became movers and shakers in efforts to legalize and establish casinos throughout the United States.

8. Patricia McQueen, *North America Gaming at a Glance*, INT'L GAMING WAGERING BUSINESS, Nov. 2005, at 17, 20, 22; CASINO CITY'S GLOBAL GAMING ALMANAC, 245-46, 271-77 (Casino City Press 2006).

9. See INTERNATIONAL GAMING AND WAGERING BUSINESS MAGAZINE, <http://www.americangaming.org/industry/factsheets/statistics.cfm>, (providing revenues drawn from statistics in annual reports) (last visited August 15, 2007).

10. *Id.*

11. *Id.*

Table 1¹²

Year	Commercial Casino Revenue (Billions)	Total Gaming Revenue (Billions)
1990	\$8.3	\$26.6
1991	\$8.6	\$27.1
1992	\$9.6	\$30.4
1993	\$11.2	\$34.7
1994	\$13.8	\$39.8
1995	\$16.0	\$45.1
1996	\$17.1	\$47.9
1997	\$18.2	\$50.9
1998	\$19.7	\$54.9
1999	\$22.2	\$58.2
2000	\$24.3	\$61.4
2001	\$25.7	\$63.3
2002	\$26.5	\$68.6
2003	\$27.0	\$72.9
2004	\$28.9	\$78.8
2005	\$30.3	\$83.7

While we can debate exactly what the “spark” was behind this growth, there were political, social, and economic forces at work as well. Casinos make a lot of money from their games, albeit individual casinos do not always reap wonderful net profits. The casino industry lobbies and pushes hard-to-win new authorizations for more casinos.

After one co-author testified to Pennsylvania legislative committees regarding a law to permit casinos at racetracks, Frank Farenkopf was called to testify.¹³ He is the President of the American Gaming Association. The AGA represents the large casinos of America, and it has a budget of \$25 million per year to promote the interests of casinos.¹⁴ One of its interests is to gain

12. *Id.*

13. Frank Farenkopf, Address at the Pennsylvania General Assembly (Apr. 30, 2003).

14. Diana Marrero, *Influence Comes at a Price*, LAS VEGAS SUN, May 3, 2007, at 3. The creation of the American Gaming Association came in direct response to President Clinton’s initiative to impose a national 4% tax on all gambling winnings. Heretofore critical gaming issues such as taxation issues were fought out at the state and local government level. Now the arena for battle was Congress and the Office of the President. Casinos could not accept this new tax without a fight. They organized, they mobilized, and they fought. The tax was defeated. While that was the outcome, a battle lost in 1994, President Clinton won a major war in the process. The move to institute a

legal status for commercial casinos in as many venues as possible.

A pull factor bringing about the expansion of all gaming, including casino gaming, is the federal budgetary system and the general economy. In the early 1980s a recession caused state governments to encounter major budgeting shortfalls. Many states responded by adopting state-operated lotteries.¹⁵ The 1980s also witnessed a turnabout in federal spending policies. The Nixon Administration had introduced revenue sharing mechanisms at the beginning of the 1970s.¹⁶ The federal government of the United States passed large sums of money to state and local governments using a formula based upon population, poverty and tax efforts of the states. The revenue sharing policies were initiated at a time when the federal government had a very small operating deficit. (In 1968 the federal government had a balanced budget).¹⁷

By the Reagan years, the federal deficit was growing rapidly. Reagan cut taxes. He also made bold moves to cut all non-defense spending. He eliminated the revenue sharing program entirely in 1986; it had been declining sharply up until that time.¹⁸ But he did more that devastated state budgets. He (via congressional action) eliminated several federal social service programs, and he mandated that the states deliver the services from their own

national gaming tax was one of the most brilliant political moves ever launched by a president. Casinos were now organized, and they were now engaged in the national political process. Gaming interests led by the A.G.A. became a major player in the 1996 reelection campaign of President Clinton. He reaped large contributions from commercial casinos and Native American casinos. Casinos stayed around to make large contributions to all subsequent national election campaigns as well.

15. See JOHN DOMBRINK & WILLIAM THOMPSON, *THE LAST RESORT: SUCCESS AND FAILURE IN CAMPAIGNS FOR CASINOS*, 126 (Univ. of Nev. Press 1990) (discussing state operated lotteries). Dates of adoption of lotteries by popular vote (with %age number of voters in favor – if by election) or legislative action (1970 to 1990): Virginia 1970, 63% (not implemented); New Jersey 1976, 81%; Connecticut 1972; Pennsylvania 1972; Washington 1972, 62% (Implemented in 1982); Iowa 1972, 67% (not implemented); Michigan 1972, 73%; Maryland 1972, 77%; North Dakota 1972, 58% (not implemented); Maine 1973, 72%; Ohio 1973, 64%; Rhode Island 1973, 76%; Illinois 1974; Vermont 1976; Colorado 1976; Arizona 1981; West Virginia 1984, 66%; Oregon 1984, 66%; California 1984, 58%; Missouri 1984, 68%; South Dakota 1986, 60%; Montana 1986, 69%; Idaho 1986, 60% (not implemented); Kansas 1986, 64%; Florida 1986, 64%; Virginia 1987, 57%; Wisconsin 1987; Idaho 1988, 52%; Idaho 1988, 52%; Minnesota 1988, 59%; Kentucky 1988, 61%; Indiana 1988, 62%. *Id.* at 189.

16. Robert Kuttner, *Revenue Sharing, Anyone*, BOSTON GLOBE, Nov. 19, 2001.

17. See, e.g., Lyndon Johnson, Annual Budget Message to Congress (Jan. 24, 1967); Clay Chandler, *After Decades of Deficits, Expectations of Surplus*, WASH. POST, Feb. 1, 1998, at A-01.

18. John Kincaid, *The State of American Federalism 1986*, 17 THE JOURNAL OF FEDERALISM 1, 1-33 (1987).

funding sources.¹⁹ This budget double-whammy soon met up with another recession in the early 1990s producing a “perfect storm” pulling at state policy makers. The storm pulled them toward endorsements of more casino gaming as a means for gaining needed government revenues.

The public had been quite skeptical about embracing casinos before the late 1980s.²⁰ However, the same public was adamant in its opposition to new taxes. A major issue leading to the re-election defeat of President George H. W. Bush in 1992 was his breaking of a pledge to have “no new taxes.”²¹ The public also began to see casinos near their communities. While opponents continued to make noise about their negative qualities, the public heard good stories too. They experienced the effects of the win-win game.²²

The casino industry has a great advantage over every other industry. Casinos offer the win-win game to customers, and this allows them to realize the best word-of-mouth advertising anywhere. Quite simply, “winners talk, and losers walk.” Tales of wins spread like wildfire and spread loudly as they leave the lips of lucky (or even occasionally lucky) players, while stories of losses are muted and hidden among more vocal expressions of satisfactions with great buffets, shows, room bargains, near misses, and for Las Vegas casinos, great weather.²³

Other industries suffer with a fact of life that complainers become more noticeable. For every bad customer story coming out of a department store, or auto dealership, etc., the entrepreneur needs twelve good stories to make up for the damage.²⁴ Many

19. Robert W. Rafuse, Jr., *Fiscal Federalism in 1986: The Spotlight Continues to Swing Toward the States and Local Governments*, 17 THE JOURNAL OF FEDERALISM 35 (1987).

20. DOMBRINK, *supra* note 15 (documenting the public rejection of casinos from 1964 through 1988). Voters did approve of casinos for Atlantic City by 56% in 1976, although two years earlier casinos were defeated in New Jersey with a positive vote of only 40%. *Id.* Casinos received positive votes of only 27% in Florida in 1978; 32% in Florida in 1986; several advisory votes in Pennsylvania and Michigan with the support levels being between 20% and 41%; only 39% in Arkansas in 1964 and 29.5% in 1984; and 33% in Colorado in 1984. *Id.* In the 1980's, legislative defeats of casinos were experienced several times in Massachusetts, Connecticut, New York, New Hampshire, Pennsylvania, Michigan, Louisiana, and Ohio. *Id.*

21. Read My Lips: No New Taxes, Wikipedia Encyclopedia, http://en.wikipedia.org/wiki/No_new_taxes (last visited Oct. 5, 2007).

22. See WILLIAM THOMPSON & MICHELE COMEAU, CASINO CUSTOMER SERVICE: THE WIN WIN GAME (1993).

23. William Thompson, *To Keep the Winning Formula*, 1 CASINO EXECUTIVE 57, 57-58 (1995); W. Dorn, *Blue Chip Specials: Insights Shared over Many a Club Sandwich*, 1 CASINO EXECUTIVE 11, 11-12 (1995).

24. THOMPSON, *supra* note 22, at 26.

advantages and many factors account for the dramatic rise of the amount of casino gaming in our society.

II. A SNAG TO THE SUCCESSFUL GAME: IT'S NOT ALWAYS A WINNING ONE

Casinos have a win-win game, but they can lose the game. The game is lost if players ever feel that they were cheated, or if the games were dishonest.

A. *Bad Service Is a Game Killer*

The game is lost if the "losers" encounter bad service delivery. The game is lost when people believe that the casinos have exploited the players. Everywhere, government regulators and internal security personnel work very hard to keep all the games honest. Casino managers who have any good sense at all work overtime to maintain top levels of customer service in the casinos.

B. *Exploitation Makes Casinos Losers: Compulsive Gaming Is a Lose-Lose Game*

The one remaining area that can destroy the Win-Win game is exploitation, and here our casinos and our gaming venues need to step-up and do a better job. Exploitation may be tied to pathological and problem gambling. Stories about troubled gamblers losing all their wealth spread by word-of-mouth, and they are also spread in sensationalized media accounts. As these stories of losses grow, they are embellished with images of embezzlements at work places or offices of charities, or families broken apart and put in distress, and, of course, of suicides. It is in the vital interest of casinos that these stories not spread, that these stories not exist, and that the cases of problem gaming and the effects of problem gaming be mitigated and reduced as much as possible.

III. HOW MANY COMPULSIVE GAMERS ARE THERE?

There have been well over one hundred studies seeking to determine the prevalence of troubled pathological and problem – gaming in society.²⁵ Most find that about one percent of the adult population consists of pathological gamers, while twice that many adults are deemed to be problem gamers. The first study was completed by a University of Michigan Research team in the mid-1970s.²⁶ The study concluded that 0.77% of the population could

25. Howard J. Shaffer, Matthew N. Hall & Joni Vander Bilt, *Estimating the Prevalence of Disordered Gambling Behavior in the United States and Canada: A Research Synthesis*, Harvard Medical School (1999).

26. Maureen Kallick-Kaufman, *The Micro and Macro Dimensions of Gambling in the United States*, JOURNAL OF SOCIAL ISSUES, 7-26 (1979). The

be designated as pathological. Problem gamers were 2.33% of the population. In 1997 Harvard Medical School researchers constructed a “meta-study” of 120 existing studies. Their study was funded by the casino industry’s National Center for Responsible Gaming. Combining the 120 studies, they concluded that 1.14% of adults were in a category comparable to “pathological” gamers, while 2.80% were in the “problem” category. The pathological prevalence rate had increased from 0.84% (1977 to 1993) to 1.29% (from 1994 to 1997).²⁷

The National Gambling Impact Study Commission asked the National Opinion Research Center to conduct its prevalence study in 1999. The NORC found 0.6% met the criteria of current-year pathological, while 0.7% were deemed to be current-year problem gamers.²⁸

One of the congressionally authorized Commission studies also concluded that the prevalence rates doubled where casinos were found to be within fifty miles of a community.²⁹ Hence it was not unexpected that Rachel Volberg’s 2002 study of Nevada residents found that 3.5% were pathological and 2.9% were problem gamers.³⁰

studies used in this study were typically based upon general population surveys which asked respondents if they exhibited certain gaming behaviors. If they said “Yes” to a number of the questions, they were labeled as being a “problem,” or a “pathological” gambler. Often, the studies asked if a person displayed a number of symptoms from a list provided in an edition of the American Psychiatric Association’s Diagnostic and Statistical Manual (DSM). More typically, they would use questions from the South Oaks Gambling Screen (SOGS), a survey used by treatment professionals to determine the severity of one’s gambling affliction. The SOGS questionnaire included the following items: (1) a list of gambling activities and how often a person participated in them, (2) how large one’s bets had been, (3) other persons in family who had gambling problems, (4) if a person returned to gamble after having a losing session, and how soon they returned, (5) lying about gambling wins, (6) if the person felt they had a gambling problem, (7) if one gambled more than they intended to gamble, (8) if others had criticized the person for gambling, (9) if the person felt guilty about the way he or she gambled, (10) if the person wanted to stop gambling but could not do so, (11) if the person had hidden gambling tickets or other information about their gambling, (12) if they argued with others about money (13) if they argued with others about gambling, (14) if they had borrowed money in order to gamble, (15) if they had ever lost time from work, school, or family events because of gambling, and (16) if they borrowed money to pay back gambling debts and the sources of money borrowed. See RONALD M. PAVALKO, PROBLEM GAMBLING AND ITS TREATMENT, 47, 47-50 (2001).

27. Shaffer, *supra* note 25.

28. National Gambling Impact Study Commission Final Report, 4-5 to 4-6 (June, 1999) [hereinafter NGISC].

29. *Id.* at 4-4.

30. Rachael A. Volberg, GAMBLING AND PROBLEM GAMBLING IN NEVADA: REPORT TO THE NEVADA DEPARTMENT OF HUMAN RESOURCES, NV Dept. Human Resources (March 22, 2002).

IV. THE SOCIETAL COSTS OF TROUBLED GAMING

Several studies have assessed the costs of troubled gambling for society.³¹ The studies have interviewed self-defined compulsive gamblers, most often members of Gamblers Anonymous (“G.A.”) groups. To be sure, these problem gamblers were likely to have encountered (or caused) more severe consequences than the problem gambler on the street. Actually other researchers found that the “on-the-street” compulsive gambler (measured by the South Oaks Gambling Screen, a tool widely accepted in the research community) exhibited costs which were 51% of those exhibited by typical G.A. members. Hence, one seeking to project costs to a full population in an area could discount the numbers appropriately.

One study of southern Nevada compulsive gamblers found that they had lost work-time amounting to 8.69 hours per month, while 22.9% quit work, losing 4.2 months of employment due to gambling, and 24.2% were fired, losing 2.4 months of employment. Only 3.4% accepted welfare because of gambling, whereas 5.8% accepted food stamps. Nearly 15% of compulsive gamblers were hospitalized because of health problems related to gambling, while 23.0% had outpatient treatments. Nearly two-thirds (65.9%) planned suicides, while 27.7% attempted suicide.³²

Before joining G.A., they had average debts (because of gambling) of \$60,714., with 45.4% having incurred personal bankruptcies, and 15.1% had been sued in court over debts. A majority (63.3%) had stolen property because of gambling, with the average thefts (spread over all the respondents) amounting to \$13,517. Nine had been arrested, with the average respondent serving 0.16 months in jail or prison, and 0.10 months on probation.³³

This self-reported information helped in formulating a cost profile. The collective costs were annualized with an assumption that they had occurred over a four-year period of gambling. As

31. William N. Thompson, Ricardo Gazel, & Dan Rickman, *The Social Costs of Gambling in Wisconsin*, WIS. POLICY RESEARCH INSTITUTE (1996); WEFA Group, *A Study Concerning the Effects of Legalized Gambling on the Citizens of the State of Connecticut* (June 1997); James Westphal, *Estimating the Social Cost of Gambling for Louisiana*, LOUISIANA STATE UNIVERSITY MEDICAL CENTER (1999); William N. Thompson & F. Quinn, *An Economic Analysis of Machine Gambling in South Carolina*, EDUCATIONAL FOUNDATION OF THE SOUTH CAROLINA POLICY COUNCIL (1999); William N. Thompson & Keith R. Schwer, *Beyond the Limits of Recreation: Social Costs of Gambling in Southern Nevada*, 17 JOURNAL OF PUBLIC BUDGETING, ACCOUNTING AND FINANCIAL MANAGEMENT 62 (2005); EARL L. GRINOLS, *GAMBLING IN AMERICA: COSTS AND BENEFITS*, 131-74 (Cambridge Univ. Press).

32. Thompson, *supra* note 31, at 77-79.

33. *Id.* at 75-77.

shown in Table 2, the study found an annual cost figure for one pathological gambler to be \$19,711 per year.³⁴

Table 2
Impact Profile of the Average G.A. Gambler Annualized

<i>Cost of Missed Work</i>	\$2,364*
<i>Cost of Quitting Jobs</i>	\$1,092*
<i>Cost of Fired Jobs</i>	\$1,581*
<i>Cost Unemployment Comp</i>	\$87 G
<i>Debt / Bankruptcy</i>	\$9,493
<i>Costs of Thefts</i>	\$3,379
<i>Cost Civil Suits</i>	\$777 G*
<i>Costs of Arrests</i>	\$95 G*
<i>Costs of Trials</i>	\$85 G*
<i>Costs of Jail Time</i>	\$80 G*
<i>Costs of Probation</i>	\$170 G*
<i>Costs of Food Stamps</i>	\$50 G
<i>Costs of Welfare</i>	\$84 G
<i>Costs of Treatment</i>	\$372*
TOTAL	\$19,711

The costs are defined as the disamenities borne by persons other than the gambler. However, we acquiesce with critics who indicate that these are not all “deadweight” costs that subtract wealth for the entire economy, but instead many are costs that are merely transferred from one person to another. Therefore, those costs are marked with an asterisk (*). They total \$6616, or 33.6% of the total. Costs to government (whether transfer costs or deadweight economic costs) are marked as “G” and total \$1428, or 7.2% of the total.³⁵

The cost profile did not factor in several costs that are quite real, yet very illusive, when it comes to placing a real dollar figure on them. These include stresses that reduce on the job productivity, as well as social costs of disruption to normal family activities (e.g., long term costs of child neglect and lost college funds for future education, lost resources resulting from divorce or separation of spouses). Also, the profile does not put a cost on suicide. Of course, the researchers cannot interview troubled gamers who have committed suicide. However, the survey of G.A. members found twenty-five of ninety (37%) say they actually attempted to commit suicide. Research suggests that disturbed

34. *Id.* at 83.

35. *Id.* at 89-90.

gamers are more likely to commit suicide than any other category of addicted persons.³⁶

If only 4% of the suicide attempts were “successful,” we could expect that there would be at least one suicide for each one hundred pathological gamers. That would be costly to society, in a deadweight economic manner, because that person’s productivity would be lost forever. The average G.A. member in the survey was forty-seven years old and hence had a remaining work-life of eighteen years. Their average income was \$52,000. One suicide would result in an economic loss of \$930,000 over eighteen years. If the cost were assigned to the profile, it might represent an additional \$520 to that amount.³⁷

Mitigations of the severity of troubled gaming and solutions reducing the numbers of troubled gamers in society will help eliminate very large economic losses felt by society.

V. MITIGATION OF TROUBLED GAMING

A. *Prohibit Gambling*

While it is almost axiomatic to say that “prohibition failed,” the statement is used in reference to the prohibition of drinking alcoholic beverages between 1919 and 1933 in the United States.³⁸ There is no need to argue that point either way; the statement is simply accepted whether or not it is true. However, to make a similar analogy with prohibition of casino gambling activities is another matter. During the first three decades of the Twentieth Century, there was a virtual prohibition on casino gambling in the United States. To be sure, there were many illegal gambling outlets, however, they were not nearly as plentiful as drinking outlets during the Prohibition (of alcohol) Era. Moreover developments of machine gambling were in their infant stages, hence, machines whether legal or not, did not permeate all communities. They were not ubiquitous.

The Prohibition Era of casinos did witness the development of certain “sin” cities where gambling was tolerated in an atmosphere of corrupt relationships between operators and law enforcement authorities. In communities such as Newport, Kentucky, Hot Springs, Arkansas, Galveston, Texas, and Phenix City, Alabama,

36. *Id.* at 88-89; *see, e.g.*, GRINOLS, *supra* note 31, at 141-42; PAVALKO, *supra* note 26; Charles C. Thomas, *Problem Gambling and Its Treatment*, 24-25 (2001).

37. Thompson, *supra* note 31, at 88-89.

38. *See* U. S. CONST. amend. XVIII (instituting prohibition in 1919); *see also* U.S. CONST. AMEND. XXI (repealing prohibition in 1933).

illegal casinos flourished in the open.³⁹ But casino gaming did not flourish throughout the country as did drinking activity.

Moreover, the years after Nevada broke the national prohibition on casinos with the 1931 legalization of "wide-open" casinos, found a distinct heightening of enforcement against casinos in other jurisdictions. National anti-crime campaigns focused upon casinos operated by organized crime "mob" elements. The Mobsters took notice and actively sought to remove themselves from the new scrutiny of the law. The solution to their problems was easy: Move to Las Vegas.⁴⁰ The leaders of organized crime (names such as Meyer Lansky may be used here) aided the cause of all illegal operators and also the commercial interests of Las Vegas as they declared the City to be an "open city," that is, a city that welcomed establishment of new casinos by anyone.⁴¹ Gangsters associated with the "New York" mob families could come to Las Vegas, so too could operatives from the "Philadelphia family," the "Chicago and Los Angeles family," the "Kansas City and Detroit family," or even those who were not "mobsters," people with no organized crime connections at all. As the illegal operators from elsewhere abandoned Hot Springs, Newport and Galveston for the legal security of Las Vegas, casino prohibition became much more effective nationwide; that is, nationwide, minus Nevada. And so it remained effective in forty-nine states until Atlantic City's legal casinos emerged in 1978, and in forty-eight states prior to the events of 1988.

But could a casino prohibition work today? Probably not. First, the condition of prohibition could not be achieved in the current political atmosphere. In 1919, liquor was legal in half the states, as now casinos are operating in about two-thirds of the states (states with 90% or more of the national population). Moreover, now gambling is a product that reaches into every state. Legal casinos, lotteries and charity games and race betting operations are in forty-eight states (all except Utah and Hawaii).

39. DOMBRINK, *supra* note 15, at 139; MARGARET A. BARNES, *THE TRAGEDY AND TRIUMPH OF PHENIX CITY, ALABAMA* (1998).

40. WILLIAM N. THOMPSON, *GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY* 83, 209 (2001).

41. Interview with Jack Binion in Las Vegas, Nev. (Sept. 20, 2003). The policy adopted by "the Mob" has had tremendous positive economic impacts for Las Vegas. The "Mob" endorsed wide-open capitalism. Everyone was welcome to come to town, make their investment in casinos, and compete for customers. In so competing they embraced Say's Law, which was simply stated: "Demand will rise to meet supply." Say's Law was more simply put forth by actor Kevin Costner in the film "Field of Dreams": "Build it, and they will come." More and more casinos in Las Vegas resulted in more and more customers, and in turn more and more casinos. And so the game of open entry and free competition has continued down to the present day which finds 40,000,000 visitors coming to Las Vegas each year spending nearly \$9 billion on gambling activities and more than that on hotel rooms, meals, shows, and shopping.

In all fifty states, players can be connected to casino-type games through their personal computers, albeit such play is illegal (but tolerated as the "laws" are not enforceable against players, or, to put it another way, nobody seeks to enforce the laws against the players).

A large majority of the members of Congress represent populations that gain substantial revues from taxation of casinos or from lottery operations. The will to impose a prohibition on casino activity and hence see states they represent lose public revenues is quite lacking whatever their moral position on the subject may be.

Moreover, gambling is quite advanced. PCs and machines are ubiquitous even where they are illegal. The machines are much more sophisticated and they can be easily disguised as legal video game machines where they are illegal.⁴²

The difficulty of repealing authorization for casino-style gaming is illustrated by the fact that only two times in the last fifty-five years has there been a statewide repeal of a form of such gaming. In 1953, the Idaho Supreme Court rendered unconstitutional a 1947 statute that had made slot machines legal.⁴³ In 1999, the highest court of South Carolina interpreted a statute from the same year to mean that slot machine gaming had to end in that state.⁴⁴

42. For instance, the video machines may award winners only points and new games to play rather than money prizes. However, an operator will pay the player for the points and new games and adjust the machine so that the points and credits disappear. This is of course done outside the presence of law enforcement personnel or other "strangers." Machines may also have mechanisms that call for player interactions, and thereby the operator will claim that the machines are devices for skill not luck play. Some degree of luck is usually required in the definition of gambling.

43. *State v. Vill. of Garden City*, 265 P.2d 328 (1953). In this case, Idaho Supreme Court Justice Keeton played the role of John Marshall. *Id.* In 1947, the state legislature had passed a law authorizing slot machines, as well as other gaming activities such as punchboards and "chance spindles." *Id.* A group of citizens believed that the gaming constituted a public nuisance and was injurious to the public morals. *Id.* They sued the Village of Garden City, as the municipality had licensed the machines and had agreements with the operators of machines to share in their profits. *Id.* They claimed that the machines were in their essential aspects actually lotteries. *Id.* Idaho Constitution article III, § 20, stated that the "legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatever." *Id.* Justice Keeton, writing for the Supreme Court, agreed stating that it is for the court and not the legislature to determine the meaning of the constitution. *Id.* However, the justice did overrule a lower court that had seized possession of the machines and placed a lien on the business property where they were located. *Id.* The Justice instead enjoined further gaming activities in which the machines were used. *Id.* The Court held that the businesses had acted in good faith as they had received licenses to operate the machines and they had paid fees required by the state. *Id.*

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

While one who is genuinely concerned about the effects of expanded gambling upon people drawn into compulsive behaviors may indeed believe that an effective prohibition will help these people, that goal is beyond the realm of political feasibility anytime soon. The two cases mentioned above involved court action that was unexpected, and in the latter case certainly very unusual.

Such being the case, those who accept the negative social costs scenario can still represent a major force opposed to further expansion of gaming legalizations. They can make their opposition felt in local and state political venues, and they can also urge policy makers to follow the guidelines of the National Gambling Impact Study Commission as it recommended that proposed new gaming venues be required to make complete socio-economic studies of how the new gaming would impact their citizenry.⁴⁵ They may also note NGISC recommendations that urged that gaming not be placed near residential areas of urban communities, and that machine gaming in neighborhood stores (convenience stores and bars) not be permitted.⁴⁶

B. Law Suits to Stop Gaming Industry

The successful prohibition efforts in Idaho and South Carolina resulted from judicial actions. While a national prohibition, or even a new statewide prohibition, is unlikely to come from the bench or from the political branches of government,

This case teaches a valuable lesson for all attorneys: Think long and hard before you go to court. You may be seeking a judgment that could destroy your client. Slot machines proliferated throughout South Carolina during the 1990s. Their authorization was based upon vague legislation that seemed to impose severe limitations on the way they operated. Operators found loopholes around the limitations, and in many cases simply ignored the limitations. Finally, in response to a public outcry the legislature decided that reforms in the law were necessary. They enacted a bill containing the reforms, but they went a bit further. They said that before the reforms would be set into place, the voters would have to approve the machines. If the voters did not vote in favor of the reforms in a November ballot vote, all machine gaming would cease in the year 2000. One major operator feared a negative public vote, so he sued to have the legislation voided. The South Carolina constitution had no provisions authorizing the legislature to refer their duties (law-making) to the public for a vote. The Supreme Court carefully reviewed the constitution and the legislation, and they agreed 100%. Well, maybe 99%. They ruled that the legislature could not refer any matter of legislation to the voters. Therefore that provision of the law was unconstitutional. They cancelled the November ballot vote. But they didn't stop there. They decided that the remainder of the bill was still intact. Hence, since the people could not vote in favor of the reforms, they would not vote in favor of the reforms, and therefore all machine play would cease in the year 2000. The case effectively shut down 30,000 slot machines.

45. NGISC, *supra* note 28, at 7-30, 8-5.

46. PAVALKO, *supra* note 26, at 138.

court actions could make a severe impact that could restrict gaming operations.

Law suit judgments against the tobacco industry have soared into the billions of dollars. Similar results from cases involving casinos could have a major impact upon industry desires to expand and enter new venues. Some see it coming. In April 2007, Windsor, Ontario attorney William Sasso addressed the 11th Annual Canadian Gaming Summit and offered a very unwelcomed opinion. He claimed that "if a known gambling addict sued a casino for not taking steps to control the behavior, the gambler would likely win."⁴⁷

Sasso's words were not exactly new ones, but a successful law suit has yet to be filed. Then again, gaming law authority I. Nelson Rose (along with co-author Martin D. Owens) wrote:

Gaming is in the same position today that bars were in 40 years ago. The big lawsuits are just waiting to happen. No bar owner would allow a drunk to be served alcohol, yet casino owners and other operators allow gamblers who are obviously out of control to continue to bet.⁴⁸

Rose and Owens continued, "The growing conflict in the law over how to deal with compulsive gambling is coming to a head in cases involving legal gambling. The legal gambling industry would suffer a terrible blow if it were generally accepted that compulsive gambling is a true disease."⁴⁹ They suggested:

The scenario for a breakthrough case requires the gaming operator had notice and, ignoring the warning, took action that proximately caused the injury. Notice can be of the 'should have known' type, or more direct notice in the form of a phone call or e-mail from a wife, asking the operator not to give her husband credit because he was compulsive and suicidal.⁵⁰

Then they suggested that if a casino gave the credit anyway, "and the husband killed himself over his gambling problem, a judge might conclude the operator owed a duty to the wife or gambler, the operator caused the death, and a jury could return a verdict of tens of millions of dollars in punitive damages."⁵¹

Law professor John Warren Kindt sought a different analogy. He saw casinos as being a ripe target for state-initiated "mega-law suits similar to the tobacco cases."⁵² Kindt offered a scenario of

47. John Stoddard, *Odds Are Gamblers Would Win Lawsuit, Experts Say*, TORONTO STAR, Apr. 21, 2007.

48. I. NELSON ROSE & MARTIN OWENS, *INTERNET GAMING LAW* 135 (2005).

49. *Id.* at 133.

50. *Id.* at 139.

51. *Id.* at 139-40.

52. John W. Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, 22 *MANAGERIAL AND*

state attorneys general coming together to sue casinos for deception and fraud in their gaming operations. He brushed off a potential casino defense that state governments encouraged gambling with awards of licenses in order to gain tax revenues.⁵³ He claimed that the case could be made that states were duped by an industry (acting like the tobacco industry did) that engaged in disseminating false information and sponsoring bogus studies which negated the effects of troubled gambling.⁵⁴

Rose, Owens and Sasso suggest that several major cases have been settled out of court, and plaintiff gamblers or victims of their actions have been granted large payments by casinos.⁵⁵ However, the terms of these agreements have been confidential.⁵⁶

Three notable cases on tort liability for allowing impaired patrons to make wagers at casinos were filed in New Jersey. A 1989 case was generated when a gamer named Aboud refused to pay a gaming loan he had received from the Atlantic City Golden Nugget casino.⁵⁷ When he was sued for recovery of the loan, he counterclaimed seeking damages covering all of his gaming losses. He alleged that the Golden Nugget had engaged in negligence, fraud and malicious conduct for allowing him to make bets while he was intoxicated. Moreover, the casino continued to serve him drinks while he was playing and losing.

A federal court interpreting New Jersey law concluded that the casino owed Aboud a duty to "protect him from foreseeable risks and refraining from knowingly permitting an invitee to gamble when that patron is obviously and visibly intoxicated."⁵⁸ Nevertheless, a jury held that Aboud did not establish a preponderance of the evidence to prove his contention that he was sufficiently intoxicated to meet the standards set forth by the judge.⁵⁹

In 1993 the case of Leonard Tose was adjudicated on the same issue. Tose was a prominent businessman who had been the owner of the Philadelphia Eagles football team. But he loved to play his favorite games in Atlantic City casinos. He lost more than \$3 million between 1983 and 1987. Tose sued the Sands casino with a claim that he had been "given an endless supply of free

DECISION ECONOMICS 17, 17-63 (2001).

53. *Id.* at 30-31.

54. *Id.* at 20-21, 30-31.

55. Stoddard, *supra* note 47; ROSE, *supra* note 48, at 135.

56. Attorney General Report, Maryland, The House Never Loses and Maryland Cannot Win: Why Casino Gaming Is a Bad Idea, at n.28 (citing *President Casino Settles Lawsuit*, THE SUN HERALD, June 27, 1995, available at <http://www.oag.state.md.us/Reports/casinogambling.pdf>).

57. GNOC v. Aboud, 715 F. Supp. 644 (D.N.J. 1989).

58. *Id.* at 655.

59. *Id.* at 657.

drinks and allowed to gamble while drunk.”⁶⁰ The judge allowed the case to go to a jury, which was instructed to consider Tose’s role in his losses, and if they accepted his contentions, to apportion the damages accordingly. The jury could not agree on a conclusion. He was unable to recover any of his losses.⁶¹

In the 1995 case of *Hakimoglu v. Trump Taj Mahal Association*,⁶² the federal court did not allow a similar case to go to the jury. The player, Hakimoglu, sued two Atlantic City casinos seeking to recover his gaming losses. He claimed that the casinos “intentionally and maliciously enticed him” to make wagers by offering him free alcoholic beverages even after he became intoxicated. The judge examined New Jersey dram-shop laws and found a clear distinction as to how they would apply to taverns and bars, on the one hand, and casinos, on the other.⁶³

The judge accepted that players come into casinos with the intention to gamble. They intend to gamble before the casinos give them drinks, hence the alcohol cannot be said to remove the player’s inhibitions.⁶⁴ Moreover, a tavern patron does not intend to cause an accident after drinking, while a player clearly intends to gamble, even knowing odds and risks. Moreover, the alcohol cannot clearly be associated with winning or losing, as that is determined in most games by chance with very sober people losing as well, and very intoxicated persons on occasion winning. The judge also found that accidents following tavern drinking happen very closely in time with the drinking, and that the drinker’s blood-alcohol level is typically checked at the time of the accident. The player’s blood is not checked while he is in the casino playing,

60. ROSE, *supra* note 48, at 136.

61. *Id.* at 136; Tose v. Great Bay Hotel, 819 F. Supp. 1312 (D.N.J. 1993). The story of Tose is one of the saddest in sports annuals. He lost ownership of the team as he was forced to sell the Eagles in order to pay his casino debts. Have you ever wondered how Detroit could win the right to hold the Super Bowl in the middle of the winter? They have done so twice. Even though they have a covered stadium, many feel it is absurd to subject tens of thousands of fans to the snow and brisk air of Michigan just because Detroit wants a game. Detroit won the right to have a game because Detroit owner William Clay Ford was willing to “pay the price.” He was befriended by Tose, and he became “a friend in need,” a friend indeed. Ford bailed Tose out of casino debts with personal loans, which were made in violation of appropriate league rules, stating that one owner cannot loan or give money to another owner for any purpose whatsoever. The Ford loans carried a little bit of interest. Tose had to organize the campaign and gain the votes of other owners in favor of having the Super Bowl in Detroit (actually Pontiac), Michigan. Tose was very well liked (most compulsive gamblers have warm and loving personalities), and besides that the other owners probably appreciated that fact that Ford got Tose off their backs as compulsive gamblers tend to hit on everyone for money.

62. *Hakimoglu v. Trump Taj Mahal Assoc.*, 876 F. Supp. 625 (D.N.J. 1995), *aff’g* *Hakimoglu v. Boardwalk Regency Corp.*, 70 F.3d 291 (3d Cir. 1995).

63. *Hakimoglu*, 70 F.3d at 293-94.

64. *Hakimoglu*, 876 F. Supp. at 636.

whether he is winning or losing. Hence, months later it is very difficult to establish just "how intoxicated" the player was. The judge ruled in favor of the casino.⁶⁵

The tort liability arguments as outlined above were not successful. Therefore, players turned to another line of reasoning, namely that by giving players drinks, the casinos were removing the players' rational will to freely enter into contracts for debts to the casinos. Here, the argument is that the gamers were "incompetent to make a contract" at the time the casino gave them credit.

In *Lomonaco v. Sands Hotel Casino & Country Club*, the gamer made such a contract claim.⁶⁶ He actually informed the casino that he was a compulsive gambler, and the casino was aware that his line of credit had been cancelled by another casino. Nonetheless, the Sands loaned him money to wager. While the New Jersey court recognized that his will to make a contract may indeed have been impaired, it still could find nothing in New Jersey casino legislation indicating that a "disorder of compulsive gambling" was a legal claim that one's capacity to make a contract was "void."⁶⁷

In a more recent case, *Poulos v. Caesars World, Inc.*,⁶⁸ a federal district court in Nevada negated the opportunity for gamers to file a class action suit against makers and operators of electronic gaming machines, slot machines and video poker machines. The plaintiffs claimed to represent "hundreds of thousands" of individuals who had played the machines.⁶⁹ The court denied that they could be a class because their play was the result of individual actions.⁷⁰ Some were quite rational recreational players seeking only fun and entertainment, and others were quite knowledgeable about how the electronic machines worked and played anyway. Many won money as a result of their play, and wins and losses were determined at random, while indeed others had been fooled into thinking that their chances were greater than they were by the way the machines operated in contrast with other mechanical slot machines.⁷¹

Those in the latter category would have to file cases as individuals, and they would have to demonstrate how they as individuals had been deceived by the manufacturers and the

65. *Hakimoglu*, 70 F.3d at 294.

66. 614 A.2d 634 (1992).

67. *Id.* at 639.

68. 379 F.3d 654 (9th Cir. 2004).

69. *Id.* at 662.

70. *Id.* at 672.

71. *Id.* at 660-61, 664-66.

casinos operating the machines.⁷² For instance, they might have to demonstrate that they knew precisely how mechanical machines operated, and they had played such machines, and then they were drawn to the electronic machines deceptively, having been given the belief that they operated in the same manner.⁷³ Such a set of events would not be easy to prove, and because it could not be proven in a collective manner that could lead to very large damages (and attorney rewards), the costs of making the case would not be worth the possible benefits.⁷⁴

C. *Changing the Standard Operating Procedures*

While a general or even new local prohibition of gaming is only a very remote dream of casino critics, as are hopes that a law suit may accomplish the same ends, there may be hope in pursuing changes in the way gaming venues and establishments operate in hopes that troubled gaming can be more limited. There are suggestions for changes in the atmosphere surrounding casino gaming, and there are changes that can be recommended regarding how casinos operate internally.

Environmental changes may focus upon education and awareness campaigns for schools, as well as for the general public.⁷⁵ Many suggest that schools and government agencies specifically educate people about the dangers of troubled gaming and the nature of odds and the games. Notably people should be informed that the house (casino) has odds advantages in every

72. *Id.* at 665-66.

73. *Id.* at 665.

74. *Id.* at 665-66; Bradley S. Fiorito, *Calling a Lemon a Lemon: Regulating Electronic Gambling Machines to Contain Pathological Gambling*, 100 NW. U. L. REV. 1325, 1348-50 (citing Gary Rivlin, *The Chrome-Shiny, Lights Flashing, Wheel-Spinning, Touch-Screened, Drew-Carey-Wisecracking, Video Playing, Sound-Events-Packed, Pulse-Quickening Bandit*, NEW YORK TIMES, May 9, 2004, at 42, available at <http://facstaff.uww.edu/bertozze/game/readings/bandit.html>). Rivlin quoted designers of slot machines expressing disdain for players. One watched a losing player and said, "Gotcha." A celebrity hired by the slot machine company to promote play exclaimed, "Step right up . . . We need another sucker." A graphic designer explained: "It's not just push the red button and watch the reels spin. Make people want to sit there. Use sight and sound and everything at our disposal to get people's juices going." The "deeper a player gets into a game, the quicker and louder the music." A designer added, "I'm not sure players even notice, but the effect is to get them more excited." Rivlin quoted a professor of psychiatry as saying, "The slot machine is brilliantly designed from a behavioral psychology perspective No other form of gambling manipulates the human mind as beautifully as these machines . . . I think that's why that's the most popular form of gambling with which people get into trouble."

75. See, e.g., PAVALKO, *supra* note 26, at 137-51; Fiorito, *supra* note 74; Frank L. Quinn, *First Do No Harm: What Could Be Done by Casinos to Limit Pathological Gambling*, 22 MANAGERIAL AND DECISION ECONOMICS 133; NGISC, *supra* note 28, at 4-20.

game, and therefore it is quite unlikely that a person can participate in most games with any realistic expectation of winning. They should look upon the gaming as entertainment. Also, people should be made aware that in randomized games, essentially games using randomizing devices (decks of cards, dice, roulette wheels, and slot machines), the device does not remember its past activity. Each throw of the dice or spin of a wheel is a new event totally independent of previous events.⁷⁶

There should also be societal education about the signs of troubled gaming. Many troubled gamers are unaware of their affliction. Others may be aware, but they deny that their problem is a serious one. Often people do not know how widespread the affliction is, and they feel that they are alone and that no other people would "understand." People should be informed that there are help sources available. Education campaigns can discuss 800-helplines and also that G.A. groups exist in the community. A first step in treatment of troubled gaming is destroying ignorance and/or denial.⁷⁷

Within casinos, many things can be done to mitigate the prevalence and severity of pathological and problem gaming. Casinos can participate in the activities suggested above. Many states have requirements such as those mandated by the Nevada Gaming Commission in 1998.⁷⁸ All casinos should follow suit and have brochures and information sheets for ready distribution in prominent locations of the casino. The brochures should provide the information suggested and should also inform players about 800 numbers.

A plethora of ideas about games and gaming include some that are quite feasible and should be considered, as well as others that would have no reasonable chance for adoption. In the latter category is Frank Quinn's recommendation that there be minimal advertising about casinos, and that casinos eliminate or drastically reduce stimulation effects that lead to more gaming: bright colors,

76. Robert Ladouceur & Michael Walker, *Motivation and Cognition in Gambling* 9 J. OF NAT. ASSOC. FOR GAMBLING STUDIES 12 (1997); Robert Ladouceur, Marie Mayrand & Yves Tourigny, *Risk-Taking Behavior in Gamblers and Non-Gamblers During Prolonged Exposure*, 3 J. OF GAMBLING BEHAVIOR 115 (1985); MICHAEL WALKER, *THE PSYCHOLOGY OF GAMBLING* 241 (1992). Michael Walker offers this comment toward the end of his text on gambling, "the regular and heavy gambler makes greater use of irrational thinking than the occasional or 'social' gambler." *Id.* His concluding observation is that "[p]erhaps the most radical approach to therapy is simply to correct the mistaken beliefs and defective strategies of gamblers by training the gambler in good money management and optimal gambling strategies." *Id.* at 243.

77. PAVALKO, *supra* note 26, at 104-05.

78. Nevada Gaming Control Board, § 5.170 (1998).

flashing lights, and exciting noises.⁷⁹ Quinn also suggests that slot machines be configured in arrangements that enable a player to easily find the exit doors. He has certainly identified artificial factors that probably do cause people to game more than they planned to or wished to do. But then so do yellow boxes in grocery stores that cause people to buy more cereal than they may have wanted to buy. And the grocery stores also hide the milk, so that once you find it you are surrounded by confusing pathways toward the exit and also many other products that are begging you to “buy, buy, buy.” Stimuli are part of the entrepreneurial world and are here to stay.⁸⁰

In the G.A. cost study referenced above, respondents were asked about other addictions – addictions to alcohol, drugs, tobacco, shopping, and food.⁸¹ The cost profiles of those with other addictions were compared to those without extra addictions. Those who had alcohol, tobacco, and food addictions experienced behaviors that led to higher cost profiles. Only with alcohol were the higher costs significant. Many gaming critics, including Quinn, have proposed that casinos totally ban drinking and smoking.⁸² Others call for partial bans that require drinking (or smoking) to take place in separate bar areas, and that drinks not be given freely to players.⁸³ While these substances stimulate gaming, the requirement that a player absent himself/herself from the game to imbibe or smoke would create a time barrier that might cause the urge to game to subside.

Several critics suggest that casinos not be allowed to operate on a twenty-four-hour basis. Among the symptoms of troubled gaming is the gaming “binge,” a long period of time during which a

79. Quinn, *supra* note 75, at 137.

80. VANCE PACKARD, *THE HIDDEN PERSUADERS*, CH. 7 (1957). Grocery stores are seeking to trap a person until he or she buys things they may not want. In doing so they are acting much like the casinos that hide their restroom knowing that a person feeling physical anxiety will be likely to gamble faster and with a bit less rationality. Doors are disguised or hidden behind banks of slot machines. Exit ways are difficult to negotiate. Caesars Palace in Las Vegas is famous for a moving sidewalk that covers several hundreds of yards. However, the sidewalk only moves toward the casino; one must leave under the own power of his or her legs. The fear that the casinos in a competitive venue like Las Vegas have is that players will not just leave, but that they will leave and go to another casino.

81. William N. Thompson & Keith R. Schwer, *Nevada and the Win-Win Game, Compulsive Gamblers and Alcohol*, 3 *CASINO LAWYER* 16-18 (Summer 2007).

82. Quinn, *supra* note 75, at 137; Americans with Disabilities Act, Pub. L. No. 101-336 (1990).

83. See Press Release, The Methodist Church Media Service (Apr. 7, 2004), available by e-mail request at mediaservice@methodistchurch.org.uk (regarding opposition to a relaxing of drinking rules in English casinos).

player is unable to stop.⁸⁴ If there were closing hours at a casino the players would be “forced” to stop play, and during the “down time” they could get over their urge to make bets. Quinn goes another step: He advocates that casinos stop the gaming for five minutes each hour. He also recommends that players have to stand during all play, so that the urge to sit down could interfere with the urge to continue play. These recommendations would find little chance for adoption by the casinos, and the latter one would certainly engender opposition from persons concerned with the Americans with Disabilities Act.⁸⁵

Several authorities have suggested that casinos not be allowed to give loans (credit) to players or be allowed to cash checks of any kind. It is quite unlikely that these ideas could ever take hold in Las Vegas. On the “strip,” about one-half of all table play is made by players using casino credit. However, the ideas could be taken seriously in smaller casino venues.⁸⁶

Other issues of credit can also be addressed. Credit card machines and Automatic Teller Machines (“ATMs”) flourish in casinos. They should be removed from gaming floors, and also they should be reprogrammed if they are near casino floors. Casino credit card machines actually take a fee of 10 to 25% of each loan, in addition to regular card interest. It can be surmised that only a desperate person would use such a machine to gain funds – a troubled gamer. ATMs provide a safe way for gamers to access money. They need not carry large sums of cash to the casino. However, the machines will typically allow a person to take an advance (loan) on their bank account.⁸⁷ The machines could be programmed so that players can only take funds from accounts that actually have the funds in them. Moreover, the ATM machines should allow players to make deposits. In this way the machines would add to general security, as winners (who are very obvious by their demeanor and behavior) will not need to leave the casino with large amounts of cash on their persons. Also, by taking deposits, the machines might give the player a convenient opportunity to end their play and leave, when otherwise the urge to keep gaming beyond the time they had planned to will remain.

Many machine players use plastic cards that identify themselves and track their play. The cards could be programmed to indicate limits on the amount of time or money a person wishes

84. Quinn, *supra* note 75, at 136; Thompson, *supra* note 31.

85. Quinn, *supra* note 75, at 137-38.

86. Interviews with unnamed casino personnel in Las Vegas.

87. Personal observation of ATMs and Credit Card machines in Las Vegas casinos. It is also observed that casino ATMs tend to give out only large denomination bills in contrast to ATMs in non-gaming locations. NGISC, *supra* note 28, at 7-30; PAVALKO, *supra* note 26, at 140.

to use at a machine. When the limit is reached, the person could not continue play. Quinn recommends these limits and also supports general loss limits that are now in effect only at Missouri casinos (where a player must end play when he or she has lost \$500).⁸⁸ While these ideas have merit vis-à-vis the troubled player (in some or even most cases), they lack merit for serious non-troubled players. A limit removes a player from the opportunity to remain in a game while he or she waits for a turn in luck and a chance to regain funds already lost.⁸⁹

Bradley Fiorito focused attention on machine gaming.⁹⁰ He and others suggest that electronic gaming machines ("EGMs" or "slots"), are designed to specifically deceive players and entice them to gamble irrationally. They wish the player to remain rational so that the player can exercise free will choice about play.⁹¹ On one hand, this may be absurd because no rational player would designate machine play as a rational activity in the first place. Rational players know that the odds almost always favor the casinos (there are certain times when a major jackpot machine will use money already lost by players to form a jackpot that can now be won with odds in favor of players).

88. Quinn, *supra* note 75, at 136; Missouri, *supra* note 15, at 92.

89. Casinos are almost always winners in games because they have large bankrolls which permit them to overcome short term runs of luck which may favor the players or the casinos. If they go "up" by \$500, they can stay in the game; if they go down by \$500, they also can stay in the game. Players rarely win in the long run, however, players can do well by adopting strategies involving money management. They can impose self limits which are adjusted to their own financial resources. Mandatory loss limits (as opposed to win and loss limits) negate their abilities to do so. Also, players may adopt other strategies. One is called the Martingale. It is a progressive loss strategy involving doubling bets when one loses. It has many downsides, and in the long run, a player will have to confront a losing streak that will destroy their play. General limits on tables interfere with the possibilities of achieving the ultimate win. However, pre-set limits on the overall amount a person can play in a session almost negates use of the system totally.

90. Fiorito, *supra* note 74, at 1325.

91. *Id.* at 1346. There is a phenomenon in major gaming centers of "slot gangs." These people move in and dominate a full bank of machines that are tied to a progressive jackpot. The major prize may be won only, for instance, one in 10,000 times. The prize may be set initially at \$5,000. If one dollar must be played in order to win, it is easy to see that the machine is against the player. However, if each time a player loses one dollar at a play, some money is put into the super prize – say ten cents, then the jackpot grows. After 50,000 losing plays, the big jackpot is now \$10,000. The machine begins to favor the player. The casino is not concerned because the bulk of the prize is money that has already been lost by players. The gang controls play at all the machines until the big prize is won. The odds are on their side. While from a strict playing situation the casino may be happy to have the play of slot gangs, the play interferes with a casino's notion of fair play and good customer service. Casinos usually block off some of the machines for use by players they know are not part of gangs.

Moreover, much of the excitement of gaming is in a fantasy akin to that of a child in Disneyland. Like children can indulge in a fantasy, so can players indulge – and without dire consequences following. Be that as it may, suggestions are offered that machines be slowed down in order to de-stimulate the gamer. The phenomenon of showing the player an artificially created “near miss” when the player loses is also considered unfair.⁹² In fact, the state of Nevada has ruled that “near misses” constructed in an artificial manner may not be used in machines.⁹³ Fiorito also is disturbed that the reels on the machine give the player an impression that machine odds are much better than they are. In “reality” a “reel” may contain hundreds of “virtual” stop places, rather than the 20 or so symbols shown. Hence it is more difficult (or even impossible) for a player to calculate odds.⁹⁴ Nonetheless, the odds on machines are generally known, and a player can sense if they are higher (over 90% returned to player) or lower by the money the player gets back. Competitive casinos even advertise the general payback odds of their machines and where the information is advertised it must be accurate.

Quinn goes a bit further and suggests that all machines in a casino have the same payback odds.⁹⁵ The “rational” player in a casino is one who very willingly accepts that for fun and fantasy he or she pays a price. The “real” rational players wish to buy fun. A uniformity of payback odds represents a major step away from fantasy play.

D. Take the Player Out of the Casino

1. Voluntary Exclusion Programs

In its June 18, 1999 report, the National Gambling Impact Study Commission reached a number of conclusions and made numerous recommendations, including: (1) states are best equipped to regulate gambling within their borders except for tribal gaming and internet gaming; (2) legal gambling should be restricted to persons who are at least twenty-one years of age; (3) warnings about the dangers and risks of gambling and information on how help can be obtained for a gambling problem should be posted in prominent locations in all casinos; (4) state gambling regulatory agencies should require licensed commercial casinos to adopt a clear mission statement regarding the establishment’s policy on problem and pathological gambling and train management and staff to recognize and address compulsive

92. *Id.* at 1341-44.

93. *Id.* at 1344; JEFF BURBANK, A LICENSE TO STEAL 104, 104-27 (2000).

94. Fiorito, *supra* note 74, at 1344-46.

95. Quinn, *supra* note 75, at 138.

gambling behavior; (5) states should enact “hold harmless” statutes permitting licensed commercial casinos to refuse service to any customer whose gambling behavior “convincingly exhibits indications of a gambling disorder” without fear of litigation by the customer; and (6) gambling facilities should implement procedures for self-exclusion that enable gamblers to ban themselves from the gambling facility.

Exclusion from commercial casinos has, in turn, evolved into two fundamentally different forms of exclusion – state mandated exclusion and self-exclusion. As noted below in Table 3, all twelve states that have legalized commercial casino style gambling have adopted state mandated exclusion procedures, and nine out of the twelve jurisdictions have adopted state regulatory procedures for self-exclusion by problem gamblers. The remaining three jurisdictions, Nevada, Colorado, and South Dakota, permit the individual commercial casino to adopt and implement self-exclusion procedures.

Table 3

<i>Jurisdiction</i>	<i>State Mandated Exclusion</i>	<i>Self-Exclusion</i>
Colorado	•	
Illinois	•	•
Indiana	•	•
Iowa	•	•
Louisiana	•	•
Michigan	•	•
Mississippi	•	•
Missouri	•	•
Nevada	•	
New Jersey	•	•
Pennsylvania	•	•
South Dakota	•	

Nine of the twelve states that permit commercial casinos within their borders have express statutory or regulatory procedures establishing the process by which a person can seek self-exclusion from commercial casinos within the state.⁹⁶ This is a self-driven process.

96. Nevada, Colorado and South Dakota do not have state sponsored self-exclusion programs. However, the commercial casinos in each of these states have the right to implement and enforce a casino specific self-exclusion program.

In 1996, Missouri became the first state to adopt specific self-exclusion procedures. The one common denominator that exists with all of the self-exclusion statutes and regulations is that the individual who seeks to be self-excluded must be the person seeking and obtaining the self-exclusion. Spouses, parents, brothers, sisters, other family members, family friends, and business associates do not have the power or authority to initiate or impose self-exclusion on an individual. This is consistent with case law that has declared that commercial casinos cannot be required to ban a person from the casino at the request of a family member.⁹⁷

As shown in following Table 4, self-exclusion procedures vary by state. Most of the states that have adopted and implemented self-exclusion procedures have followed the National Gambling Impact Study Commission's recommendation and adopted processes that release the commercial casino from any liability associated with the enforcement of a self-exclusion order, including protection from liability in the event a self-excluded person nonetheless enters a casino and gambles. The length of the self-exclusion varies from state to state and ranges from one year to a lifetime exclusion. Some states permit subsequent removal from a self-exclusion list, while others do not permit removal from the list even where the self-exclusion is a lifetime exclusion. Inherent in the self-exclusion process is the recognition that a person who has a gambling problem must recognize that the problem exists and must have internal motivation to address the problem.

As shown in following Table 5, violation of the self-exclusion order by the self-excluded person exposes the individual to a variety of penalties. The sanctions imposed range from placement on the state's Excluded Person List (the involuntary list initiated by state action), forfeiture of winnings, to being charged with criminal trespass. In addition, the commercial casino is exposed to state gambling agency sanctions.

97. See *Brown v. Argosy*, No. 02-CV-0209-SEB/WGH, 2003 WL 133266; *Merrill v. Trump Ind., Inc.*, No. 2:99-CV-292, 2002 WL 1307304 (N.D. Ind. 2002), *aff'd* 320 F.3d 729 (7th Cir. 2003).

Table 4

<i>Self-Exclusion Procedure</i>	<i>State</i>									
	IL	IN	IA	LA	MI	MS	MO	NJ	PA	
I. Appear in Person	•	•		•	•	•		•	•	
II. File Application	•	•		•	•	•	•	•	•	
III. Regulatory Auth. Verification of App.					•		•			
IV. Written Ack'mt, Affirmation or Aff't				•	•		•	•	•	
V. Waiver and Release	•	•		•	•	•	•	•	•	
VI. Surrender Player Club Cards						•				
VII. Removal from Self-Exclusion List	•	•		•					•	
VIII. Length of Self-Exclusion	5 Yr. Min.	1 Yr. 5 Yr. Life		5 Yr. Min.	Life	5 Yr. Min; Life Max.	Life	1 Yr. 5 Yr. Life	1 Yr. 5 Yr. Life	

Table 5

<i>Sanctions Against Self-Excluded Person</i>	<i>State</i>									
	IL	IN	IA	LA	MI	MS	MO	NJ	PA	
I. Criminal Trespass		•		•	•	•	•			
II. Forfeiture of Winnings ≥\$1,200	•	•		•	•		•	•	•	
III. Forfeiture of Chips and Credits	•	•		•			•	•		
IV. Placement on Involuntary Excluded Persons List						•				

2. Mandatory Exclusion Programs

a. Nevada and the United States

In just about every casino jurisdiction some persons are banned from the premises against their own desires. In Nevada, the official bans are not related to troubled play, but rather to criminal activity of the potential patron. The state's List of Excluded Players places upon all of the casinos of the state the obligation to bar entrance of listed persons from any part of their properties – rooms, restaurants, shops, showrooms, as well as gaming floors.⁹⁸ Casinos may be fined if they permit the person to enter its property. The person is subject to arrest for trespassing. The list is not extensive, having only thirty-five persons at present time.⁹⁹ Most are notorious figures from the past who are very old if not already dead. New Jersey has a longer list with over three hundred persons included.¹⁰⁰

There is also an informal exclusion list that is followed by most larger casinos in Las Vegas. It is called "The Griffin Book." The purpose of the list is to keep cheaters out of the casinos. Included on the list are persons known to be "card-counters." These people engage in legal behaviors allowing them to gain an odds advantage over the casino in games of Blackjack. While their activity is not illegal, Nevada casinos can choose to ban these people from their premises. As with the state's List of Excluded Persons, those on the list know they are on the list, and know they can be arrested for trespass if they enter casinos that ban them. The casinos are not fined if the excluded "Griffin Book" people enter.¹⁰¹

b. Korea

Around the world, casinos keep lists of people who may not enter their particular casino for a variety of reasons.¹⁰² Decisions to place people in the excluded category are ad hoc and based upon individual circumstances for each case. Certainly thieves and cheaters are banned almost everywhere that they are known. Troubled gamers are also subject to being excluded many places. In most European jurisdictions, casinos respect requests of family members to ban certain players. In some cases, the ban might be

98. Nevada Gaming Control Board, §§ 28.010-.090; see, e.g., R. FARRELL & C. CASE, *THE BLACK BOOK AND THE MOB* (1995); M. Bowers and C. Titus, *Nevada's Black Book: The Constitutionality of Exclusion Lists in Casino Gaming Regulation*, 9 WHITTIER L. REV. 313 (1997).

99. Nevada Gaming Control Board, List of Excluded Persons (2007).

100. New Jersey Casino Control Commission, List of Excluded Persons (2007).

101. L. Benston, *Griffin Book Producer Files for Chapter 11*, LAS VEGAS SUN, May 23, 2007, at 3.

102. See generally CABOT, *supra* note 3 (providing a list of locations).

automatic; in most cases, the request for a ban is reviewed to establish if it is valid before the person is notified he or she is not welcome anymore. The length of such bans is also determined in individual cases, as are conditions for removing the bans.¹⁰³

Two venues have formalized procedures for mandatory bans – the casino at Kangwon Land Korea, and the nineteen casinos of Switzerland. The Kangwon Land casino is the only Korean casino (of fourteen) that lets Koreans gamble, albeit they must reside outside of Kangwon Province (except for one day per month).¹⁰⁴

The philosophy behind Kangwon Land developed out of national legislation passed in December of 1995 to bring economic development to a depressed coal mining region. Officials of the Ministry of Culture and Tourism thought a casino could be a catalyst for development of tourist attractions such as ski resorts and golf courses. But Kangwon Province was isolated, and it would be difficult to draw in foreign gamblers, especially because these players would first arrive in Seoul or Pusan, where casinos catered to visitors. Hence, special permission was given to allow Koreans to play.¹⁰⁵

The casino now welcomes 4,500 players per day. Each player loses an average of \$389 per visit, making the annual win of the casino in excess of \$600 million.¹⁰⁶ Essentially all of the players are Koreans. Therefore, the government takes a protective view toward the players.¹⁰⁷ Players register identities, showing addresses as they pass through metal detectors. There is a 5,000 won (\$4.50 U.S.) entrance fee. While residents of the Province of Kangwon are banned from daily play (they are allowed to play on one Tuesday each month only—on that day 7,000 patrons enter the doors), just about all of the players have made a treacherous drive of four to five hours from Seoul or Pusan over mostly two lane twisting mountain roads. They crowd into the casino, which is open from 10:00 a.m. until 6:00 a.m. the next morning, except on Saturday evenings, when it remains open all night long (other Korean casinos are open twenty-four hours per day).¹⁰⁸

There is no credit play. However, the players need not carry cash to the casino. They simply go to their bank for bank checks that they can use to purchase chips. The casino has a full-service

103. WILLIAM N. THOMPSON, *GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY* 111-17 (2001).

104. W. Thompson, H.E. Yang, & I. Tanioka, *Two Koreas: Walker Hill and Kangwon Land*, 9 *GAMING L. REV.* 144; W. Thompson, *Gaming Erupts in Asia: Korea Deficient in Casino Knowledge*, 2 *CASINO LAWYER* 21, 21-23 (Summer 2006).

105. Thompson, Yang, & Tanioka, *supra* note 104, at 148.

106. *Id.* at 148-51.

107. *Id.* at 149.

108. *Id.* at 148-49.

bank branch inside the facility. In addition, no alcohol is permitted in playing areas.¹⁰⁹

The casino also has a policy for dealing with problem gamblers. Kangwon Land may be the only casino in the world that has a gambling treatment center *inside*. Players are observed to see if they have compulsive traits. Certain players are approached by casino officials and given a green, yellow, or red card. The green card is for a player who exhibits some warning signs of troubled play. The player is told about problem gambling and urged to be careful. The yellow card is given to players with more serious evidence of problems, and they are urged to limit their gambling and to seek counseling provided at the treatment center. Red cards go to those with the most serious traits, and they are urged to seek counseling and banned from play at the casino for some period of time, which is flexible for the individual. Players also may exclude themselves from play, and there are procedures that allow family members to have someone banned from play.¹¹⁰

c. Switzerland

When voters approved modern Swiss casinos in a 1993 vote, they did not exactly approve all gambling. In a way, they rejected the widespread prevalence of slot machines by requiring that all gambling (with the exception of the lottery) be inside the new casinos.¹¹¹ Moreover, as a part of the licensing process, the casino applicants had to show that they would have a specific program for controlling problem gambling and play by troubled gamblers.¹¹² After the nineteen casinos finally opened in 2002, they formed a

109. *Id.* at 149-50. It was observed that much of the play at the casino was quite frantic. A casino manager was asked what the playing limits were – meaning what was the minimum and maximum bet a player could make at a single play. “On the main floor,” it is \$90 (10,000 won), and in the V.I.P. room, it is \$900.” “But sir,” the researcher asked, what precisely is the minimum and what is the maximum.” “That is irrelevant, my man. It is \$90, and that is what every player bets on every hand.” Not only did the player at the seat make that bet, but so too did many players standing behind the seated player – on that one player’s hand, or roulette spin. Players would place wooden matchsticks into the space behind a slot button and the machine. In that way, all the player had to do was feed the machine 10,000 won bills, and the machines would just keep playing them at 50 won (\$4.50) a clip. Players would control two or three machines at a time. The casino win and player visits (which are recorded in terms of numbers) indicated that the average player visit resulted in a casino win of \$375 – about four times the loss experienced by a player in a full day in Las Vegas. There is a reason that Kangwon Land casino has a program of help for troubled gamblers.

110. *Id.* at 149.

111. W. Thompson, *Switzerland’s Casino Renaissance*, 3 CASINO LAWYER 13, 13-15 (Winter 2007).

112. *Id.* at 14.

national association that standardized the programs now identified as the Swiss "Social Concept."¹¹³

The operation of the programs is monitored by the national gambling commission. Casinos keep extensive records of Social Concept activity. Each casino has a Social Concept Committee that consists of administrators, supervisors and front-line employees such as dealers. The committee has a trained psychologist or psychiatrist as an advisor. All employees are given an extensive training course on the nature of problem gambling and signs of troubled gambling that they must report to management and ultimately the committee.¹¹⁴

Players must show identification at casino doors where they are given information about troubled gambling. Each casino has a brochure listing problem signs such as the twenty items on the Gamblers Anonymous questionnaire.¹¹⁵ Employees report signs of troubled gambling to management. The signs are considered either critical or serious. Three critical signs include (1) player verbalization about "suicide;" (2) tantrums – yelling, cursing, throwing objects; and (3) a player's "failure" to use a restroom when necessary. Any exhibit of these behaviors results in an immediate report to the committee, and upon verification (the player is given notice and opportunity to respond), the player is given a mandatory ban from all nineteen casinos for life.¹¹⁶

Less critical but serious signs include things like changing appearances (from clean-cut to disheveled for example), acting as if one had not slept in a long time, acting nervous, looking about suspiciously, and changing bets in unusual ways. In these situations, employees make a written report describing the action observed and give it to management. This process can also be initiated by a third party such as another player or a family member. The report generates a period of several weeks of observations of the player. If the behaviors persist, the matter is referred to the committee where the player may be subject to a mandatory ban for life. Alternatively, the player could be given restrictions limiting play to a few times per month.¹¹⁷

The players may appeal a committee action. After one full year, a player may request that a ban be lifted. The request must indicate that the problem has ended, that the player has a job and a source of income, that all debts have been paid, and that his or her family situation is stable. The Swiss have very strict banking secrecy laws, but they are set aside here. Bank accounts must be

113. W. Thompson, *The Swiss Social Concept: Something for Las Vegas*, 3 CASINO LAWYER 12, 12-14 (Spring 2007).

114. *Id.* at 12.

115. *Id.*

116. *Id.*

117. *Id.*

revealed or the player may not return. Players must demonstrate that they underwent a treatment program.¹¹⁸

Players who are banned from the casinos are referred to counselors for treatment. Several casinos even pay for initial visits to the counselors.¹¹⁹ Swiss gaming attorney R. Luka Muller-Studer indicated in his May 2007 presentation to the International Masters of Gaming Law conference in Chicago that definitive research studies have yet to assess the specific effectiveness of the Swiss Social Concept. However, a general positive public perception of casinos seems to flow from its use. Moreover, there have been no player lawsuits regarding excessive or uncontrolled play since the casinos opened.¹²⁰

E. Deficiencies in Voluntary and Mandatory Bans

Official bans of players from casinos introduce a range of issues. Although the regulation of the bans often indicate that no liability to the player will fall on the Casino if they are deficient in enforcing the bans, they do certainly place obligations for certain actions on the casinos. If players on a ban list are permitted into a casino, the gaming commissions may impose fines or other disciplinary actions against the casinos. Because players try to “sneak” in to play, and because most North American casinos have open door policies and do not check identities at the entrance, it is quite difficult to stop all banned players from entering. Indeed, a study by Nowatzki and Williams that surveyed banned players found that over one-third had entered the casinos during the period of their ban.¹²¹

The institute of a ban policy would also give attorneys a motivation to pursue law suits against casinos on behalf of banned players who entered casinos and gambled to their detriment. Although the cases to date have not resulted in judgments for players, there have been “settlements,” and attorneys continue to seek out the perfect case that Rose and Owens referred to above.

In the case of *Merrill v. Trump Indiana*¹²² the plaintiff gambler (Merrill) had entered a clinic in 1996 for treatment of his pathological gambling. In the same year, his counselor informed the Trump Indiana casino that he was not in control of his playing. The counselor “won” an oral agreement that the casinos would keep Merrill out of its facility, and in turn the clinic would

118. *Id.* at 12-13.

119. *Id.* at 13.

120. Presentation of I. Luka Mueller-Studer, *Problem Gambling and Gambling Addiction in Switzerland*, Presentation to the International Masters of Gaming Law Conference, Chicago, IL (May 25, 2007).

121. N. Nowatzki and R. Williams, *Casino Self-Exclusion Programmes: A Review of the Issues*, 2 INT'L GAMBLING STUDIES 1, 3-24 (2002).

122. *Merrill*, 320 F.3d 729.

promote the goodwill action of the casino. Merrill also wrote to the casino and asked that he be banned from play. The casino put him on its list of banned persons – persons who would be ejected if they entered the casino.¹²³

However, in 1998, Merrill's treatment ended, and he again felt the urge to play. He returned to the casino. Instead of being evicted, he was allowed to remain, and subsequently he incurred very large losses. In a desperate financial condition, he resorted to robbing several banks. He was arrested and sentenced to a federal prison. He initiated a civil suit asking for \$6 million dollars in damages claiming that the casino was negligent and had breached an implied contract causing his losses.¹²⁴

In 2002, after Merrill was in prison, Indiana passed a casino regulation requiring casinos to keep a list of banned players, and allowing persons to voluntarily place themselves on the list. The Trump casino had a list prior to that time. In the lawsuit, the federal courts held that Indiana civil law did not recognize a contract for Merrill's exclusion. Moreover, the judges indicated that the casino did not have a legal obligation to look after Merrill's good interest beyond providing him with personal safety. The court ruled that even if his request to be banned had come after Indiana required casinos to have the exclusion lists, Trump Casino's violation of the procedures allowing Merrill to come into the casino would not give Merrill a right to recovery of civil damages. Rather, only the state gaming commission would be permitted to seek disciplinary action against the casinos with fines or other penalties.¹²⁵

Disciplinary action was precisely what the Louisiana Attorney General's Gaming Division sought against the Casino Rouge of Baton Rouge when they allowed a person on the banned list to continue to play. In June of 2005, the casino was fined \$50,000. The casino's slot machine department discovered the player when he won a \$1,250 jackpot that required his identification before payment. The casino refused to pay the prize, and the player was arrested. However, an investigation revealed that the player had cashed many large checks, and also had received twenty-two credit card advances after giving the casino proper identification. At the time, the fine was the largest one imposed on a casino anywhere in the United States for allowing a self-excluded person to play.¹²⁶

While recognizing the heretofore futility of American civil court actions against casinos that do not abide by the letter of the

123. *Id.* at 731.

124. *Id.*

125. *Id.* at 732-33.

126. Press Release, Louisiana Attorney General, Charles C. Foti (June 20, 2005).

self-exclusion policies in their venues, Andy Rhea, a Special Assistant Attorney General in Mississippi suggested that such may not be the case in the future. He wrote about two actions that lead to results adverse to the interests of the casinos. In an Austrian court, a player known to have severe financial problems won a \$600,000 judgment covering his losses during visits when he should have been banned.¹²⁷

In Ontario, Canada, a player placed herself on the self-exclusion list. Within weeks, she returned to the casino where she had played before, and she engaged in a fifty-two hour gaming binge. While driving home from the casino she wrecked her car. She sued for moneys lost at the casino as well as for the value of her car. The Ontario Lottery and Gaming Corporation, owners of the casino, did not want to risk their day in court. They settled her claim.¹²⁸

Rhea accepts that self-exclusion policies create contracts that can and should be enforceable by civil court actions. He finds certitude that the player and casino fulfill two conditions in contract making. There is a clear offer and an acceptance. The third element of the contract process is a bit more elusive, yet he feels that there is a consideration given that "seals the deal." He points out that the player (potential player) is giving consideration as he or she foregoes regular casino privileges, including the opportunity to win large prizes, to be given complimentary services, and the permission to cash checks. Rhea also recognizes that casinos use their self-exclusion policies to advertise that they have good intentions and are good corporate citizens, ergo, the policies have value to the casinos. He expects future courts to find that these agreements are contracts and that contract law can be applied to the law suits that the gamers will win. Accordingly, he urges that the casinos use all their means, including whatever technology they have at their command, to assure that persons who are self-excluded do not enter their facilities and engage in gaming.¹²⁹

Besides liability, either through government discipline or in a potential law suit, exclusion policies present practical problems to casinos. Casinos must seek to give outstanding customer service for the reasons set forth at the onset of this paper. However, with a general ban policy resulting in hundreds or thousands of patrons being placed on a list, every casino employee must be trained to observe patrons to determine if they are on a list. When young people are "carded" to make sure they are twenty-one at the casino bar, the server will be obligated to assure that the patron is not

127. A. Rhea, *Voluntary Self-Exclusion Lists: How They Work and Potential Problems*, 9 GAMING L. REV. 462, 463, 468-69 (2005).

128. *Id.* at 463.

129. *Id.* at 463, 468-69.

banned. Persons checking into hotels may have to go through further checks. Employees will be trained to observe excluded persons “sneaking in” to the casino. In the process, the casino may find that it is becoming more and more like an airport and less and less like a friendly place of entertainment. The answer lies in an alternate method.

F. An Alternative Method: Tell Them They Are NOT WELCOME

Las Vegas (and the surrounding metropolitan area of Clark County) has 162 casinos (with gaming revenues over one billion dollars per year), as well as perhaps one thousand or more other “restricted” gaming locations – bars, grocery stores, and restaurants – with fifteen or fewer slot machines.

Can bans of players work in Las Vegas, whether mandatory or voluntary? One word answers the question: “NO.” A policy of mandatory exclusion could not be enforced, if it contemplated exclusion from all these facilities. To be sure, individual casino companies have “played” with the idea of having bans enforced on their own properties. The Hilton-Caesars’ operations (now part of Harrah’s) announced a plan that included exclusions even against the will of the player two years ago. However, there have been no reports on how the plan has been instituted, or whether bans have been imposed since the merger of Harrah’s and the Hilton-Caesars group. Harrah’s itself, the largest casino conglomerate in the world, has been a pioneer in recognizing the need for a responsible gambling program. Harrah’s was the first casino organization to post warning signs and to distribute literature about problem gambling and where to get help (now a requirement for all Nevada casinos), and Harrah’s has instituted voluntary bans. Several casino venues (not Nevada) in the United States require that casinos have a voluntary ban system. The Swiss notion of compulsory bans jurisdiction-wide has thus far been beyond the mindset of American casino operators and their regulators.

The plain truth is that a policy for mandatory bans for troubled gamblers could not be enforced beyond the doors of individual casinos. Even at specific casinos, bans would be difficult to enforce. The experience of voluntary bans shows the difficulty of effective implementation. It is too easy for banned players to enter the casinos.

American casinos thrive only with open door policies that permit flows of thousands, indeed tens of thousands, of patrons every day. Identity checks at doors would require major interferences with needed flows of customers. Moreover, the multiple casinos and other gambling spots in Las Vegas would preclude opportunities to seriously cut off gambling opportunities from any troubled gambler who seriously attempted to find a friendly table or slot machine.

So can anything be done along the lines of what is being done in Switzerland or Kangwon Land, Korea or even in the voluntary ban venues? Here the answer is also clear: "YES." The following suggestions are drawn from co-author William Thompson's study first presented in *Casino Lawyer Magazine*.¹³⁰ They are given as points of discussion for policy makers who should be concerned that casinos keep the face of integrity on their operations, and in turn avoid situations that may lead to future litigation.

Thompson suggested that Las Vegas might possibly institute a "list of unwelcome patrons." This should be an official list kept by public authorities. Patrons for the list would be nominated by the casinos, but could also be nominated by other interested parties, including appropriate family members, bankruptcy courts and other judicial authorities. The casinos would be required to have officials and committees such as those in Swiss casinos. They would monitor players and observe behaviors such as the ones on the list of factors examined in the Swiss casinos. Warning signs such as used at Kangwon Land (green, yellow, and red cards) could be employed. At critical times, observations would lead to recommendations that persons be put on the list. The Swiss critical factors (tantrums, talk of suicide, "forgetting to go to the bathroom") would certainly earn a player a place on the list.

The decision to put a person on the list would be made by a government committee. However, before the decision was to be made, the patrons involved would have a clear opportunity to make a presentation indicating why he or she should not be put on the list. Due process considerations would be involved, and the decision to place a person on the list would occur only after good evidence suggested that the person's behavior at gambling activities could result in considerable harm to the person or to others dependent upon him or her. A person would remain on the list for a set minimum time, perhaps one year. After that time, the gamer could be removed from the list upon application. The committee would consider factors such as those considered in Switzerland when decisions to remove the person would be made.

The list would be computerized and delivered to every gambling venue in the state. The person would be photographed, and their finger prints would be taken, albeit they would give fingerprints voluntarily.

Those persons placed upon the list would not be banned from any casino. However, they would not be "welcome" at the casino. Accordingly, all casinos would agree to remove the person from any promotion list. They would be removed from all players' clubs. No advertisements would be sent to them at any address. They would receive no promotions or deals – specials related to

130. Thompson, *supra* note 113.

gambling. They would be permitted to participate in deals for shows and dinners as long as the activities were unrelated to gambling (in states where casinos are not essential as part of the community social fabric, meal and show promotions could also be restricted from such persons). These players would have no credit at the casinos. Use of credit card machines would be restricted. They could not cash checks at the casino. These persons would be notified that they could not win prizes that would require identification – that is, slot machine jackpots of over \$1,200. They would not be allowed to make cash transactions of over \$10,000 because these would require identifications for the I.R.S. Any such prizes would be held by the casino and given to a state fund to support the program and other programs for treatment of problem gamblers.

The players on the list would be given a certified letter explaining policies. They could be asked to leave casino premises at any time by casino authorities without any legal recourse.

VI. CONCLUSION

American casino gaming operates under rules quite different than rules in Europe. Nonetheless, American casinos should show the same concern for troubled gamblers that is shown by the Swiss Social Concept. The above ideas regarding a “list of unwelcome patrons” are offered as ideas for discussion and consideration.

