

**GAMBLING GRANNY: THE ELDERLY'S
PROPENSITY FOR GAMBLING ADDICTION
AND THE NEED FOR EFFECTIVE LEGAL
AND LEGISLATIVE REMEDIES TO PREVENT
IT**

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Formerly limited to a few states, the gaming industry's presence has become increasingly noticeable across the United States, with casinos and gaming in almost every state. Many states have moved toward a relaxed stance in their gaming laws, largely influenced by the subsequent economic benefits states experience. However, this step back from strict regulation of gambling adversely impacts the elderly population in the United States because elderly individuals, due to a variety of psychological and social factors, are oftentimes at a higher risk of developing compulsive gambling addictions. Recognizing the market value, gaming industries capitalize on the elderly's propensity to gamble and aggressively market towards the elderly population. If left unchecked, gambling addictions may lead elderly gamblers to a life of crime to fuel their gambling addiction.

This Note surveys the history of gaming in the United States and the current condition of the gaming industry. It further provides an analysis on the elderly's propensity for gambling addiction and the issues addiction causes. This Note recommends a liberal intervention that centers on providing the elderly with increased knowledge on the consequences of gambling and proposes a voluntary exclusion program, like that of drug courts, to target the underlying issue of gambling addiction. This Note further advocates for an increased number of gambling courts which would work to rehabilitate the elderly who commit crimes due to their addiction.

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I. Introduction

It was a long fall from grace for sixty-six-year-old Maureen O'Connor, San Diego's first female mayor.¹ She was well-known for her public outreach efforts; even posing as a homeless woman for over forty-eight hours to gain first-hand insight into the effectiveness of local city programs.² O'Connor's brief homelessness was a stark contrast to her daily life, as she was the wife of millionaire Robert O. Peterson, founder of the fast-food chain Jack in the Box.³ Upon his death in 1994, Peterson left O'Connor an estimated \$50 million.⁴ However, in mid-February of 2013, O'Connor, at the age of sixty-six, faced charges in a San Diego federal courtroom for the misappropriation of "more than \$2 million from [her] late husband's [charity] foundation to fund a casino gambling habit with which [O'Connor] allegedly won and lost \$1 billion over 9 years."⁵

O'Connor's story is not an unusual one when considering the elderly and gambling addictions.⁶ The elderly may have increased risk factors for susceptibility to gambling addiction and consequently have become popular targets for casinos and other actors in the gaming industry.⁷ Notably, many casinos work with nursing homes and elderly organizations to provide free transportation and perks to elderly visitors.⁸

There are a few reasons why the elderly tend to gravitate towards gambling.⁹ First, the elderly generally have more expendable time and

1. Greg Moran & Kristina Davis, *O'Connor's Rise and Fall*, SAN DIEGO UNION-TRIB. (Feb. 16, 2013, 12:18 AM), <https://www.sandiegouniontribune.com/sdut-maureen-oconnor-mayor-gambling-san-diego-2013feb16-htmlstory.html> [hereinafter Morgan & Davis].

2. *Id.*

3. Michael Martinez, *Former San Diego mayor admits misusing charity to fund \$1 billion gambling habit*, CNN (Feb. 15, 2013, 6:11 PM), <http://www.cnn.com/2013/02/15/justice/california-ex-mayor-gambling/index.html> [hereinafter Martinez].

4. Morgan & Davis, *supra* note 1.

5. Martinez, *supra* note 3.

6. See generally Timothy W. Fong, *The Vulnerable Faces of Pathological Gambling*, 2 PSYCHIATRY 34 (2005) [hereinafter Fong] (discussing groups, including the elderly, that are at risk of developing into pathological gamblers).

7. Peter Jaret & Bill Hogan, *Losing Everything to Gambling Addiction*, AARP BULL. (Jan./Feb. 2014), <http://www.aarp.org/health/brain-health/info-01-2014/gambling-addiction.html> [hereinafter Jaret & Hogan].

8. *Id.*

9. See generally Lynn Stuart Parramore, *How the gambling industry preys on senior citizens*, SALON (Jan. 7, 2014, 6:49 PM), <https://www.salon.com/2014/01/>

money than younger generations.¹⁰ Second, gaming can facilitate a youthful feeling by instilling a sense of energy and thrill, oftentimes triggering a change in brain chemistry that gives gamblers a more intense urge to gamble.¹¹ Third, many older people have experienced some kind of emotional loss, and subsequently use gambling as a way to fill this void, often called “grief gambling.”¹² Fourth, casino simulations have a higher impact on deteriorating minds.¹³ Moreover, “experts predict that the trend of baby boomers retiring, coupled with factors like the rise of casinos explicitly marketing to seniors, multi-state Powerball lotteries, proliferating slot machines, and a massive online betting surge, [that] the crisis is only just getting started.”¹⁴ When gambling addiction goes unchecked, elderly people may turn to crime to fuel the habit,¹⁵ much like what Maureen O’Connor did.

The negative effects of gaming on the elderly are at odds with the current trends in the gaming industry and are exacerbated by the overall lack of legal protection for elders.¹⁶ The prevalence and popularity of the gaming industry has generally increased across the United States.¹⁷ Once thought to have played a major role in only a few cities like Las Vegas and Atlantic City, the gaming industry now has a presence in almost every state.¹⁸ There is a trend among many states toward a relaxed stance on state gaming laws, most frequently citing economic benefits as the reason for this change in perspective.¹⁹ Ultimately, the interests of the elderly have been overlooked as state laws change, leaving the elderly increasingly vulnerable to exploitation from the gaming

07/how_the_gambling_industry_preys_on_senior_citizens_partner/ [hereinafter Parramore] (explaining why senior citizens are a growing population of gamblers).

10. *Id.*

11. *Id.*

12. Jaret & Hogan, *supra* note 7.

13. Parramore, *supra* note 9.

14. *Id.*

15. See JIM EMSHOFF ET AL., GAMBLING AND OFFENDING: AN EXAMINATION OF THE LITERATURE 2 (2008) [hereinafter EMSHOFF ET AL.] (“[R]esearch indicates that approximately two-thirds of pathological gamblers commit crimes directly related to gambling.”); Morgan & Davis, *supra* note 1.

16. See generally David Surface, *High Risk Recreation – Problem Gambling in Old Adults*, 9 SOC. WORK TODAY 18 [hereinafter Surface] (discussing the unique risks associated with older adult gamblers, as compared to younger gamblers).

17. See generally AM. GAMING ASS’N, 2016 STATE OF THE STATES (2016) https://www.americangaming.org/sites/default/files/2016%20State%20of%20the%20States_FINAL.pdf [hereinafter STATE OF THE STATES] (discussing growth in the gaming industry).

18. See *id.* at 4–6.

19. *Id.*

industry. With a lack of adequate and appropriate legal remedies, there is a growing gap in the protection of the elderly population in the United States.

Part I of this Note introduces the issues experienced by the elderly as the United States adopts a more liberal stance on gambling. Part II provides background information that discusses the history of gaming in the United States and the current state of affairs for the gaming industry. Part III analyzes the elderly's propensity for gambling addiction and resulting issues. Finally, Part IV recommends a solution that endorses targeted government intervention and improved legal remedies for the protection of elderly individuals with gambling addiction.

II. Background

A. Federal History

The regulation of gambling has a long history in America, as many of the original colonies enacted laws prohibiting it,²⁰ although, ironically, the Revolutionary War was partly funded by lottery tickets.²¹ Gambling has traditionally been left to the states to regulate, guided by the powers reserved to the states under the Tenth Amendment to the United States Constitution.²² Thus, Congress has mostly used a "hands-off approach" for issues concerning gaming.²³

Until the 1990s, much of the gaming industry's history was characterized by Congress's hands-off approach.²⁴ Many states, specifically Nevada, repeatedly lifted and later reinstated prohibitions on gambling.²⁵ The federal government can choose to pass legislation affecting gaming directly by regulating interstate commerce over state protest.²⁶ The federal government's first significant change in gaming law was the Johnson Act in 1951.²⁷ The Johnson Act, now repealed, prohibited "possession, operation, transportation, or repair of gambling devices

20. George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 GAMING RES. & REV. J. 65, 66 (1996) [hereinafter Fenich].

21. *Id.*

22. Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 GAMING L. REV. 393, 394 (2001) [hereinafter Rodefer].

23. *Id.*

24. Fenich, *supra* note 20, at 66-70.

25. *Id.*

26. Rodefer, *supra* note 22, at 394.

27. 15 U.S.C. § 171 (1951) (repealed 1968).

unless the individual State passed a law that made them or their transportation legal."²⁸ In the 1960s and early 1970s, Congress became concerned with fighting organized crime²⁹ because criminal families or gangs were frequently using illegal gambling to fund their enterprises.³⁰ Congress responded by passing the Interstate Wire Act ("IWA")³¹ and the Racketeer Influenced and Corrupt Organizations Act ("RICO").³²

At the time, Las Vegas was the only city that allowed individuals to legally bet on sports.³³ Crime families made money by placing sports bets over the phone ("by wire"),³⁴ so the IWA sought to directly address this problem by imposing a fine or imprisonment if someone used a wire to transmit bets in interstate commerce.³⁵ Similarly, RICO punished individuals who engaged in certain racketeering crimes.³⁶

It was not until 1980 that the American Psychiatric Association ("APA") listed pathological gambling as a mental disease, a factor that possibly motivated Congress to further address gambling.³⁷ APA's categorization of gambling would later have important consequences for gamblers claiming addiction as a defense to their crimes.³⁸

Congress's second significant legislation was the Indian Gaming Regulatory Act ("IGRA"), passed to safeguard tribal economic development.³⁹ The IGRA states that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."⁴⁰ The IGRA gives Indian tribes broad freedom to operate casinos without federal or state interference.

28. Fenich, *supra* note 20, at 71.

29. Rodefer, *supra* note 22, at 394.

30. *Id.*

31. 18 U.S.C. § 1084 (1961) (current version at 18 U.S.C. § 1084 (2018)).

32. 18 U.S.C. § 1963 (1970) (current version at 18 U.S.C. § 1963 (2018)).

33. *U.S. Gambling Laws and Online Regulation*, GAMBLINGSITES.COM, <https://www.gamblingsites.com/online-gambling-jurisdictions/us/> (last visited Mar. 1, 2019) [hereinafter *U.S. Gambling Laws*].

34. *Id.*

35. 18 U.S.C. § 1084 (1961) (current version at 18 U.S.C. § 1084 (2018)).

36. 18 U.S.C. § 1963 (2018).

37. Fenich, *supra* note 20, at 73.

38. *See infra* Part C(ii).

39. 25 U.S.C. § 2701 (1988) (current version at 25 U.S.C. § 2701 (2018)).

40. 25 U.S.C. § 2701(5) (1988) (current version at 25 U.S.C. § 2701(5) (2018)).

Technological advancement, like the Internet, has increased accessibility and since individuals can now engage in gaming across state lines, Congress has had difficulty in continuing its hands-off approach.⁴¹ The federal government initially believed that gambling over the Internet was in violation of the IWA.⁴² Ultimately, courts ruled against this theory, stating that the IWA was intended to apply only to sports betting and questioning whether Internet connection falls under the definition of a “wire communication.”⁴³

Congress eventually responded by passing the Unlawful Internet Gambling Enforcement Act (“UIEGA”) in 2006.⁴⁴ The UIGEA “bans acceptance of any financial instrument used for unlawful Internet gambling,”⁴⁵ causing a massive rift in the Internet gambling industry. There are large exceptions within UIGEA, as evidenced by contemporary fantasy sports betting.⁴⁶ States can still allow intrastate Internet gambling “as long as age and location verification reasonably prevent access by minors and persons located outside of the State.”⁴⁷ Indian tribes have a similar exception, “both intra and intertribal virtual gaming is allowed.”⁴⁸ Most of the rationales for passing the Act were money-related, “recognizing the use of credit cards in online gaming, recommendations to prohibit wire transfers, and debt collection problems tied to Internet gambling.”⁴⁹

A significant development occurred in Justice Alito’s 2018 opinion in *Murphy v. National Collegiate Athletic Association*.⁵⁰ In *Murphy*, the Supreme Court of the United States considered the constitutionality of the Professional and Amateur Sports Protection Act (“PASPA”) and New Jersey’s attempt to legalize sports gambling at casinos and

41. Rodefer, *supra* note 22, at 394.

42. Kraig P. Grahmann, *Betting On Prohibition: The Federal Government’s Approach to Internet Gambling*, 7 NW. J. TECH. & INTELL. PROP. 161, 167–68 (2009) [hereinafter Grahmann].

43. *Id.*

44. 31 U.S.C. §§ 5361–5367 (2006) (current version at 31 U.S.C. §§ 5361–5367 (2018)).

45. Grahmann, *supra* note 42, at 162.

46. *Id.* at 172.

47. *Id.*

48. *Id.*

49. *Id.* at 171–72.

50. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

horseracing tracks.⁵¹ The Court considered whether the New Jersey legalization was in violation of PASPA,⁵² which “generally makes it unlawful for a State to ‘authorize’ sports gambling schemes.”⁵³ The Court held in favor of New Jersey, concluding that PASPA was unconstitutional in view of the “anti-commandeering” doctrine because “Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”⁵⁴ Ultimately, Murphy explains that commandeering is not allowed as a form of regulation, but does not suggest that the federal government is unable to legislate on gambling because the federal government can still regulate under the Commerce Clause of the Constitution. Murphy may also give states even more support in the legality of relaxing sports gaming restrictions.

B. Current Approach to Gambling

Regional gaming has continued to grow since the 1990s.⁵⁵ In 2012, “gross gaming revenue in the United States exceeded \$137 billion, with over \$8.5 billion paid in gaming taxes . . . [and] [t]wenty-seven states have legalized commercial casino gaming, as opposed to just twenty-five years ago.”⁵⁶ In 2015, “nationwide consumer spending on casino gaming reach[ed] a total of \$38.54 billion.”⁵⁷ Overall, legislatures authorize gaming for two principal reasons: (1) to derive economic benefits from the gaming industry, and (2) to react to market competition.⁵⁸

States’ economic benefits flow from the regulation of the gaming industry in four main areas: “economic revitalization, employment opportunities, tax revenue and increased tourism.”⁵⁹ Plainly stated, when a state allows commercial casinos to open on its land, economic investment ensues.⁶⁰ Through regulation, states can “allocat[e] tax revenue for municipal infrastructure improvements, [can control] procurement

51. *Id.* at 1468-69.

52. 18 U.S.C. § 3702(1) (2018).

53. *Murphy*, 138 S. Ct. at 1468.

54. *Id.* at 1477.

55. Paul S. West, *Gaming Law Today*, GAMING L. LITIG. STRATEGIES, July 2014 at *1, 2014 WL 3689775 [hereinafter West].

56. *Id.*

57. STATE OF THE STATES, *supra* note 17, at 4.

58. Cory Aronovitz, *The Regulation of Commercial Gaming*, 5 CHAP. L. REV. 181, 182 (2002) [hereinafter Aronovitz].

59. *See id.* at 183-88.

60. *Id.*

of a percentage of goods and services from preferred vendors, and [can] assist . . . start-up businesses through grants or other credit support.”⁶¹

As a result of this economic growth, casino openings also generate jobs.⁶² For example, in 2015 “commercial casinos accounted for a total of more than 350,000 . . . jobs[,] [i]ndustry employees earned more than \$14.4 billion in wages, benefits and tips, with average annual compensation totaling more than \$41,000.”⁶³ Not only do citizens gain employment from the casino itself, but “casino jobs have a 1.7 multiplier . . . mean[ing] that every casino job creates 1.7 other, non-casino jobs.”⁶⁴

However, in cities with smaller populations, casino opposers have argued that these jobs are created only temporarily.⁶⁵ Eventually, “table games, which justified hiring locals, are gradually replaced by slots.”⁶⁶ In addition, depending on the area, it is unlikely that high rollers and wealthy tourists will visit the town.⁶⁷ How many six-figure high rollers would plan long, indulgent trips to “Leyard, Connecticut, or Tunica, Mississippi?”⁶⁸ Potentially, the only real clientele of these casinos are the elderly and the local gambling addicted population.⁶⁹

Unsurprisingly, states tend to tax the gaming industry very heavily, creating a significant amount of tax revenue.⁷⁰ For example, “Illinois impose[d] the highest gaming tax in the United States . . . [i]n 2000, this high tax rate yielded over \$512 million in gaming tax revenues.”⁷¹ More recently, in 2015, “commercial casinos contributed \$8.85 billion in gaming taxes for the benefit of state and local governments” across the United States.⁷² Commercial tourism is an inevitable result when there

61. *Id.* at 183.

62. *Id.*

63. STATE OF THE STATES, *supra* note 17, at 5.

64. Aronovitz, *supra* note 58, at 183 (“The addition of a casino creates employment opportunities in numerous industry sectors: public service, construction, entertainment, laundry, waste removal, local transportation, banking, food and beverage distribution, and social services.”).

65. Michael Brendan Dougherty, *Do you want to increase crime, poverty, and addiction in your area? Build a casino.*, THE WEEK (Sept. 5, 2014), <http://theweek.com/articles/444009/want-increase-crime-poverty-addiction-area-build-casino>.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Aronovitz, *supra* note 58, at 185.

71. *Id.*

72. STATE OF THE STATES, *supra* note 17, at 5.

is more leeway in a state's regulation of the gaming industry.⁷³ However, tourism depends on many factors like amenities, nearby restaurants, and casino quality because⁷⁴ "casino[s] today are frequently designed and built as multi-faceted, capital intensive resorts bringing with them convention centers, restaurants, retail and other leisure attractions that in turn become community assets for residents across the region."⁷⁵

The gambling market's growth has led to saturation⁷⁶ and competition across state lines.⁷⁷ For example, when Iowa deregulated riverboat gambling, Illinois feared it would lose revenue with Illinois citizens traveling to Iowa in order to gamble.⁷⁸ Competition with neighboring states is a "... primary reason that many states authorize gaming ... the state without gambling may suffer the adverse consequences that are caused by gambling, without receiving the benefit of increased revenue."⁷⁹ This trend results partly from the fact that "eighty percent of Americans have a casino within two hours of their homes ... [and] [w]ith commercial casinos in twenty-seven States, gambling has become commonplace."⁸⁰ Thus, the relaxation of gambling laws can have compelling economic benefits for states, at least in the short term. Although these state-wide trends may seem beneficial on aggregate, certain groups like the elderly can be left exposed and without proper legal protection.

III. Analysis

There is a noticeable tension between the economic benefits states receive when commercial gaming is allowed and the negative effect gambling has on the elderly. Typically, the role of the legislature is to

73. See Aronovitz, *supra* note 58, at 187.

74. *Id.* at 187-88.

75. STATE OF THE STATES, *supra* note 17, at 5.

76. West, *supra* note 55, at *2.

77. *Id.*

78. Aronovitz, *supra* note 58, at 187.

79. *Id.* at 188 (quoting Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L. J. 291, 326 (1995)).

80. West, *supra* note 55, at *2.

determine the will of its citizens to decide which laws to propose.⁸¹ Historically, gaming has been viewed negatively,⁸² but despite clear economic benefits, heavy regulation of the gaming industry is the most frequent suggestion.⁸³ These opposing considerations raise the question: why have little to no protections been implemented to help with the elderly's special vulnerability to gambling?

First, the elderly have always been regular customers in casinos.⁸⁴ A few reasons are commonly cited when addressing why elders have historically been drawn to casinos: "emotional pain[,] . . . retirement, . . . the social stigma once associated with gambling is gone[,] . . . [and] [i]t is now common for senior centers and even church groups to arrange outings for seniors at local casinos."⁸⁵ Second, casino businesspeople know the elderly are a reliable customer base, so they purposely cater to elderly customers⁸⁶—mostly done through "comping" elderly customers by providing free amenities and perks.⁸⁷ Third, despite the increase of elderly white collar crime commission (oftentimes associated with feeding gambling addiction),⁸⁸ insufficient safeguards have been implemented to warn or to protect the elderly from the dangers of the gaming industry. The following subsection outlines the problems the elderly face regarding the gaming industry, with special attention paid to addiction, tactics used by casinos, and the crimes the elderly commit to support their addiction.

81. Aronovitz, *supra* note 58, at 181.

82. *Id.* ("Many people fear that gaming will produce substantial negative impacts on society, either because gaming has a colorful past filled with unsavory individuals, or because it has the potential to wreak social havoc, absent direct and continuous oversight.")

83. *Id.*

84. Marc J. Randazza & Daniel Russell, *The Legal Status of Gambling in America's Senior Communities*, 8 MARQ. ELDER'S ADVISOR 343, 345 (2007).

85. *Id.*

86. *See generally*, Mario D. Garrett, *Casinos Preying on Older Adults*, PSYCHOL. TODAY (Feb. 14, 2014), <https://www.psychologytoday.com/blog/iage/201402/casinos-preying-older-adults> [hereinafter Garrett].

87. *Id.*

88. *See, e.g.*, Torsten Ove, *Woman Claims Gambling Addiction Fueled \$13M Embezzlement Scheme*, PITT. POST-GAZETTE (July 18, 2017, 12:21 PM), <https://www.post-gazette.com/local/city/2017/07/18/Cynthia-Mills-gambling-addiction-fueled-embezzlement-scheme-Matthews-International/stories/201707180119>.

A. The Elderly's Propensity for Gambling Addiction

As exemplified by Maureen O'Connor's story, various characteristics of the aging process make the elderly population more susceptible to gambling addiction.⁸⁹ Overall risk factors for pathological gambling are separated into biological, psychological, and social factors.⁹⁰ For the elderly, the psychological and social factors are most important in demonstrating their vulnerability⁹¹ because as a person ages, the decision-making parts of the brain begin functioning at a lower level.⁹² As a result, the elderly are less able to identify when their behavior is risky.⁹³ In the gambling context, it can become harder for the elderly to identify when they have spent too much time at the card table or the slot machine.⁹⁴

Dementia also poses a large problem for the elderly when it comes to gambling.⁹⁵ Similar to the decline of risk-taking functions of the brain, "[o]lder people with dementia are at especially high risk because they are unable to recognize limitations or use appropriate judgments."⁹⁶ This problem is exacerbated by the fact that many seniors suffer from dementia, and sometimes neither the affected seniors, nor their family members are aware of it.⁹⁷ Moreover, there can be significant consequences if the older person is unable to understand the rules of the game, or is unable to truly understand the value of the money they are betting.⁹⁸ With the advancement of gaming technology, the elderly may continue to face issues with merely understanding the game and how much they are paying.⁹⁹

Stimulations from machine gambling can have an adverse effect on the elderly as well.¹⁰⁰ Generally, "[c]asinos are full of sights and sounds where older people can feel safe."¹⁰¹ Slot machine gambling has been referred to as "the crack cocaine of compulsive gambling . . . [because its] mechanical rhythms lull players into a trance like

89. See Morgan & Davis, *supra* note 1.

90. Fong, *supra* note 6, at 2.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Jaret & Hogan, *supra* note 7.

96. *Id.*

97. *Id.*

98. Fong, *supra* note 6, at 2.

99. *Id.*

100. Jaret & Hogan, *supra* note 7.

101. *Id.*

state . . . [and] gamblers quickly lose tracks of daily worries, social demands and even their bodily needs."¹⁰² Gambling addiction is more common in women than men because "women tend to be 'escape' gamblers, drawn to games based on luck, like slot machines and lottery tickets."¹⁰³ Women are also more likely to engage in what has become known as "grief gambling"¹⁰⁴ – using gambling to cope with the loss of their spouses¹⁰⁵ – something Maureen O'Connor cited as one of the reasons she began gambling.¹⁰⁶ From the outset, the elderly have an increased susceptibility to the highs of gambling.

B. Casino Tactics and the Elderly

The gaming industry is well aware that the elderly comprise a large source of their revenue and thus make efforts to ensure that the elderly are returning customers.¹⁰⁷ For example, it is commonplace for casinos to "offer complimentary shuttles from senior centers and retirement housing complexes on the day they receive their Social Security checks."¹⁰⁸ "Comping" refers to the process by which casinos offer these free perks, "[it] might start off with a free room, meals, free drinks . . . no-limit ATM machines, sales tax exemptions, smoking exceptions, and many others."¹⁰⁹

As one university professor of gambling behavior observed, "[d]uring [his] research and visits to casinos, [he] noticed that the casino was supplying older adults with scooters and wheelchairs . . . [m]any even provided oxygen . . . [i]n the bathroom, there were boxes for diabetics to dispose needles . . . the casinos always remember their birthday, and if they stayed away too long, the casino would send them a card saying that they were missed."¹¹⁰ Casinos pay special attention to high-spenders like Maureen O'Connor, supplying them with "limos,

102. *Id.*

103. Tanya Mohn, *Fighting Compulsive Gambling Among Women*, N.Y. TIMES (Apr. 28, 2017), <https://www.nytimes.com/2017/04/28/business/retirement/fighting-compulsive-gambling-among-women.html?mcubz=1> [hereinafter Mohn].

104. Jaret & Hogan, *supra* note 7.

105. *Id.*

106. *Id.*

107. John Rosengren, *The Casino Trap*, AARP (2016), <http://www.aarp.org/money/scams-fraud/info-2016/casino-traps-older-patrons.html> [hereinafter Rosengren].

108. *Id.*

109. Garrett, *supra* note 86.

110. Surface, *supra* note 16.

helicopter and Learjet flights, interest-free loans, and lavish penthouse suites.”¹¹¹ Casinos are keenly aware of the importance of the elderly to their businesses and invest a lot in order to keep the elderly hooked in the gambling cycle.¹¹² Little to no regulation has been put in place in order to limit comping.¹¹³

C. Gambling Addiction and White-Collar Crimes

As gambling addiction becomes progressively serious, older people may turn to financial crimes or to defrauding their families to fund their addiction.¹¹⁴ Maureen O’Connor is not the only example. Marilyn Lancelot of Arizona was arrested at age sixty-one for “embezzling \$350,000 from her job and served nearly a year in prison.”¹¹⁵ Similarly, Stephanie Iacopino of New Jersey “stole money from family members, friends and clients in a travel business, ultimately [going] to prison in 2010 for embezzling about \$18,000 from her church.”¹¹⁶ Going to prison at an old age can have a tremendous impact on an elderly person.¹¹⁷ Lancelot left prison with no money, and as a convicted felon, had a hard time finding work to support herself.¹¹⁸

Generally, as the severity of problem gambling “increases, legal options of obtaining money tend to decrease . . . [o]nce legal options of obtaining funds no longer exist, many compulsive gamblers turn to criminal activities to finance their gambling.”¹¹⁹ In fact, studies show that nearly half of all pathological gamblers participate in criminal activity.¹²⁰ The costs associated with arrests, punishment, and property loss due to gamblers committing crime can be great.¹²¹ Generally, “most crimes committed by problem gamblers [are] white-collar and non-violent.”¹²² The most common crimes in this area are “fraud, forgery, embezzlement, larceny, selling drugs or stolen items, shoplifting, burglary

111. Garrett, *supra* note 86.

112. *Id.*

113. Knight Kiplinger, *Should Casinos Court Senior Citizens?*, KIPLINGER, <https://www.kiplinger.com/article/spending/T062-C013-S002-should-casinos-court-senior-citizens.html> (last visited Mar. 1, 2019).

114. Mohn, *supra* note 103.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. EMSHOFF ET AL., *supra* note 15.

120. *Id.* at 3.

121. *Id.* at 4-5.

122. *Id.* at 7.

and petty theft or robbery.”¹²³ Without treatment, the elderly who are incarcerated for a gambling related crime have a high rate of reoffending.¹²⁴

1. EMBEZZLEMENT

At the federal level, embezzlement is defined as “the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come.”¹²⁵ In federal law, the offense is separated between embezzlement of funds from the federal government and the general offense.¹²⁶ The crime itself may be separated into various degrees.¹²⁷ The separation is perpetuated through a number of factors including, “the value of the property or the amount of money involved, or the identity or capacity of the victim, and distinguishing the offense as a felony or misdemeanor.”¹²⁸ However, states may choose to aggregate the offense.¹²⁹ Aggregation can only be done when the embezzlement is seen more as a “continuing” offense, as opposed to when it occurred against various victims at different times and places.¹³⁰

Embezzlement and gambling addiction often go hand in hand.¹³¹ It is not uncommon to see addicted gamblers stealing money from their employers or family members to fund their addiction.¹³² A 2004 Justice Department study explained that compulsive or pathological gamblers “are those who sooner or later suffer heavy losses (often \$100 or more at a time), borrow or steal money or write bad checks to pay gambling debts, avoid or cannot pay their own gambling bills, and lie to their friends and therapists about the extent of their gambling.”¹³³

123. *Id.*

124. *Id.* at 10-11.

125. 29A C.J.S. *Embezzlement* § 3 (Sept. 2018).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Colin May, *When Gambling is More Than a Game: Theft & Embezzlement That Fuel Gambling Addictions*, STEVENSON U. ONLINE (Mar. 14, 2017, 9:00 AM), <http://www.stevenson.edu/online/blog-news-events/gambling-embezzlement>.

132. *Id.*

133. *Id.*

A heightened propensity for developing a gambling addiction among the elderly can lead to criminal activity.¹³⁴ For example, seventy-nine-year-old Annie Carbullido¹³⁵ pleaded no contest in March 2017 to two counts of theft by deception and two counts of tax evasion.¹³⁶ Carbullido worked as a bookkeeper for Travel Faire Inc.,¹³⁷ and during her time at Travel Faire, Carbullido embezzled more than \$1.2 million by writing checks for cash.¹³⁸ Carbullido later lost nearly all of this money through her gambling addiction.¹³⁹ Travel Faire was able to uncover the fraud only when it hired a temporary employee to replace Carbullido when she had to take a leave of absence for medical reasons.¹⁴⁰ The temporary employee discovered several of these fraudulent checks made by Carbullido.¹⁴¹

At the initial appearance, Carbullido's attorney repeatedly stressed her crippling gambling addiction and mental health problems by stating "[w]e are hoping that the judge recognizes that our client has not just been a good citizen but a great citizen her entire life . . . [g]iven her age and her medical condition . . . we're hoping that the judge decides that probation is the better option."¹⁴²

2. THE ADDICTION DEFENSE

The overlap between gambling addiction and white-collar crimes has become increasingly prevalent.¹⁴³ This overlap has become so common that lawyers – like Annie Carbullido's attorney – greatly stress the effects of the addiction on their client's decision-making abilities in hopes of either a reduced sentence or exoneration from the crime altogether.¹⁴⁴ Another recent example is illustrated by Andrew Caspersen's

134. *Police: Woman Embezzled More than \$1.2M and Lost It Gambling*, AP (Mar. 17, 2017, 4:07 PM), <https://www.usnews.com/news/best-states/Nebraska/articles/2017-03-17/woman-embezzled-more-than-12m-for-gambling-police-say>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. See Matthew Goldstein & Alexandria Stevenson, *Andrew Caspersen, Charged in \$40 Million Fraud, Had Gambling Addiction, Lawyer Says*, N. Y. TIMES (June 14, 2016), <https://www.nytimes.com/2016/06/15/business/dealbook/andrew-caspersen-charged-in-40-million-fraud-had-gambling-addiction-lawyer-says.html>.

144. *Id.*

case.¹⁴⁵ Caspersen was the son of a wealthy financier,¹⁴⁶ who had become a Wall Street executive and had attended Groton School, Princeton University, and Harvard law school.¹⁴⁷ Caspersen used his connections to concoct a scheme that defrauded his own investors of over tens of millions of dollars.¹⁴⁸ In addition to defrauding his investors, he also gambled over \$20 million of his own money, even taking about \$1 million from the family of his deceased girlfriend who died during the September 11 attacks.¹⁴⁹ At his arraignment in a New York federal court, Caspersen's lawyer repeatedly stressed his intense gambling addiction that led to the scheme by stating that "Mr. Caspersen's addiction . . . [caused] him to check his phone throughout the day for updates on the stock market's direction and his 'all in' bearish bets that ran into tens of millions of dollars."¹⁵⁰

Lawyers, like Caspersen's and Carbullido's attorneys, have frequently advocated for recognition of a pathological gambling defense,¹⁵¹ specifically considering contemporary studies that show the similarities of gambling addiction to substance addiction.¹⁵² After pathological gambling was formally recognized by the American Psychiatric Association in 1980, the disease "has provided a basis for insanity pleas."¹⁵³ According to the APA, a diagnosis for pathological gambling can occur when:

[A] The individual is chronically and progressively unable to resist impulses to gamble. [B] Gambling compromises, disrupts, or damages family, personal, and vocational pursuits, as indicated by at least three of the following:

- Arrest for forgery, fraud, embezzlement, or income tax evasion due to attempts to obtain money for gambling
- Default on debts or other financial responsibilities
- Disrupted family or spouse relationship due to gambling
- Borrowing of money from illegal sources (eg. loan sharks)

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. John A. Vitagliano & John Meringolo, *Can Gambling Disorder Be Used as a Criminal Defense?*, PACE CRIM. JUST. BLOG (Feb. 27, 2017), <https://pcjc.blogs.pace.edu/2017/02/27/can-gambling-disorder-be-used-as-a-criminal-defense/comment-page-1/> [hereinafter Vitagliano & Meringolo].

153. Louis A. McGarry, *Pathological Gambling: A New Insanity Defense*, 11 BULL. AM. ACAD. PSYCHIATRY L. 301, 301 (1983).

- Inability to account for loss of money or to produce evidence of winning money, if this is claimed
- Loss of work due to absenteeism in order to pursue gambling activity
- Necessity for another person to provide money in order to relieve a desperate financial situation
- And [C] The gambling is not due to Antisocial Personality Disorder.”¹⁵⁴.

Although pathological gambling has been used in successful arguments to reduce prison sentences (see Section III. C. 3),¹⁵⁵ it has been an unsuccessful insanity defense in criminal trials”¹⁵⁶ However, an attorney may still present the argument to a court for recognition of the gambling defense, although it is an uphill battle.¹⁵⁷

For pathological gambling to be successfully recognized as an insanity defense, it must be proven that the defense meets either the M’Naghten Test or the American Law Institute Test—the two major tests used in United States jurisdictions for an insanity defense.¹⁵⁸ The M’Naghten Test states that “an individual qualifies as insane if as a result of mental disease or disorder, he does not know that his conduct was wrongful.¹⁵⁹ Alternatively, the American Law Institute Test states that “a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect [.] he lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct.”¹⁶⁰

The two prominent cases where defendants attempted to use compulsive gambling evidence to prove an insanity defense are *United States v. Lewellyn*¹⁶¹ and *United States v. Torniero*.¹⁶² In *Lewellyn*, the defendant was indicted on charges of embezzlement, making false statements, mail fraud, and for converting over \$17 million from banks.¹⁶³ At trial, the defendant attempted to invoke the insanity defense by

154. *Id.* at 301-02.

155. *See infra* Section III.C.3.

156. Vitagliano & Meringolo, *supra* note 152.

157. *Id.*

158. *Id.*

159. Kate E. Bloch & Jeffery Gould, *Legal Indeterminacy in Insanity Cases: Clarifying Wrongfulness and Applying a Triadic Approach to Forensic Evaluations*, 67 HASTINGS L. J. 913, 916 (2016).

160. *Id.* at 916-17.

161. *United States v. Lewellyn*, 723 F.2d 615 (8th Cir. 1983).

162. *United States v. Torniero*, 735 F.2d 725 (2d Cir. 1984).

163. *Lewellyn*, 723 F.2d at 615.

showing evidence that he was a pathological gambler.¹⁶⁴ However, the trial judge granted the government's motion to suppress evidence related to his gambling addiction.¹⁶⁵

On appeal, the Eighth Circuit affirmed but did not address the ultimate question as to whether, as a matter of law, defendants are able to use evidence of gambling addiction to invoke the insanity defense.¹⁶⁶ The court held that the defendant did not make a sufficient evidentiary showing that "at least some pathological gamblers lack substantial capacity to conform their conduct to the requirements of laws prohibiting criminal activities like embezzlement."¹⁶⁷ The court reasoned that the APA's definition of compulsive gambling did not "establish that pathological gamblers lack substantial capacity to refrain from engaging in embezzlement and similar activities."¹⁶⁸ Moreover, the court found that there was not yet a general acceptance in the fields of psychiatry and psychology that gamblers lack substantial capacity to refrain from criminal conduct like embezzlement.¹⁶⁹ The Eighth Circuit left open the possibility that gambling addiction evidence could be used in the future for an insanity defense.¹⁷⁰ Today, an advocate of the defense has the added benefit of contemporary psychological research on their side.

In *Torniero*, the defendant was "indicted for interstate transportation of jewelry allegedly stolen from his employer."¹⁷¹ At trial, it became clear that the defendant intended to assert that his compulsion to gamble rendered him insane.¹⁷² The prosecution argued that no evidence related to compulsive gambling should be excluded.¹⁷³ The trial judge reasoned that, "admitting the gambling defense would expose the jury to extensive, technical, and contradictory expert evidence."¹⁷⁴ To that end, the trial judge excluded the evidence on the basis that the differing expert testimony would confuse the jury and that even if compulsive gambling was a mental disease, it was not relevant to the issue

164. *Id.*

165. *Id.*

166. *Id.* at 617.

167. *Id.*

168. *Id.* at 618.

169. *Id.* at 619.

170. *Id.* at 619–20.

171. *United States v. Torniero*, 735 F.2d 725, 727 (2d Cir. 1984).

172. *Id.*

173. *Id.*

174. *Id.* at 727–28.

whether the defendant was unable to restrain himself from committing the offense.¹⁷⁵

On appeal, the Second Circuit affirmed, stating that there was “ample basis in the record to warrant the conclusion that the trial judge did not abuse his discretion.”¹⁷⁶ The court reasoned that in order for the defendant to make a proper showing that pathological gambling was a mental disease, and therefore evidence of insanity, he would have to show that it was a “defect capable of making [him] unable to resist the urge to steal.”¹⁷⁷ Ultimately, the court decided that there was enough evidence in the record to support the trial judge’s conclusion, but the court was careful to note that it would not “foreclose admissibility of compulsive gambling in all circumstances.”¹⁷⁸ As far as the Second Circuit is concerned, the question of admissibility to show that compulsive gambling rose to the level of insanity is largely left to the discretion of the trial judge, leaving room for persuasive advocacy.¹⁷⁹ Thus, although pathological gambling has not been explicitly recognized as evidence of insanity, there is still a possibility for a court to acknowledge its persuasiveness.

3. SENTENCING

Judges may be fairly lenient in sentencing elderly offenders of white-collar crimes.¹⁸⁰ Overall, age can be a mitigating factor in sentencing, “at least with respect to minor criminal offenses.”¹⁸¹ Those who commit white-collar crimes tend to be in the upper to middle classes and “have the resources to present a sympathetic picture of their life while claiming that violations of the law were just aberrations from an otherwise exemplary life.”¹⁸² Accordingly, it is beneficial for elderly offenders’ attorneys to stress the psychological effects of gambling on their client at the sentencing hearing.¹⁸³

175. *Id.* at 727–28, 732.

176. *Id.* at 732.

177. *Id.* at 730.

178. *Id.* at 734.

179. *Id.*

180. Justin Dillon, *The Challenges of White-Collar Sentencing*, ABOVE THE LAW (Nov. 17, 2016, 9:59 AM), <https://abovethelaw.com/2016/11/the-challenges-of-white-collar-sentencing/>.

181. Ronald H. Aday & Jennifer J. Krabill, *Aging Offenders in the Criminal Justice System*, 7 MARQ.’S ELDER’S ADVISOR 237, 241 (2006) [hereinafter Aday & Krabill].

182. *Id.*

183. *Id.*

Moreover, judges may be hesitant to impose longer sentences on the elderly because the benefits of punishment and rehabilitation may be lower,¹⁸⁴ and the negative effects to the elderly being in prison are high because “[e]lderly inmates may be more vulnerable to self-harm, suicide, or victimization than their younger counterparts.”¹⁸⁵ Compounding these effects is the overall hierarchy of prisons: prisons bring a new “subculture” to the elderly, one that provides a new set of rules and language to abide by.¹⁸⁶ This can be very overwhelming for an elderly person, especially if they do not fully grasp why they are even in prison in the first place.¹⁸⁷ Another factor for judges is that recidivism rates for elderly offenders are extremely low. The “Department of Justice statistics show that prisoners fifty-five or older recidivate at a rate of just [two] percent.”¹⁸⁸ For an elderly offender who committed a non-violent white-collar crime, likely with no record, judges *should* be hard pressed to impose lengthy sentences.

At the same time, not all judges’ and lawyers’ attitudes towards sentencing the elderly fall on the lenient side of the spectrum.¹⁸⁹ In fact, “[t]hose imposing the harshest sentences on elderly law-breakers insist that these individuals have had longer to digest the laws; as a result, they should accept the consequences of their unruly behaviors.”¹⁹⁰ This sentiment seems to be most prevalent with crimes unrelated to gambling, as one study found, “[e]lderly criminals aged sixty and over were more likely than younger offenders to be incarcerated for crimes, such as aggravated assault with a weapon, negligent manslaughter with a vehicle, motor vehicle theft, dangerous drugs, molestation, disturbing the peace, and fraud.”¹⁹¹

To aide in a sentencing reduction, it is important for defense counsels to first assess the mental health of their elderly client.¹⁹² Typically, an elderly defendant will require a mental health professional to deter-

184. *Id.*

185. J. Vincent Aprile II, *Criminal Justice: Defending the Elderly*, 29 GPSOLO 70, 70 (2012) [hereinafter Aprile].

186. Aday & Krabill, *supra* note 181, at 245.

187. *Id.*

188. Aprile, *supra* note 185, at 71.

189. Aday & Krabill, *supra* note 181, at 241.

190. *Id.*

191. *Id.*

192. Aprile, *supra* note 185, at 70.

mine if they were even able to meet the requisite state of mind to commit the crime.¹⁹³ Defense counsels should stress the issues prisons face in housing the elderly: “[i]n addition to health care issues, work assignments, co-payments, nutritional requirements, concerns for victimization, end of life issues and appropriate staffing are concerns that will have to be addressed.”¹⁹⁴ Prisons are typically designed for the younger and more active population; “the design of the prison facilities themselves can create significant problems for older prisoners, especially those with mobility problems.”¹⁹⁵ There is also a concern that younger inmates will take advantage of the elderly, “[o]lder prisoners are necessarily wary of being victimized by younger and stronger inmates and view their advanced age as a significant factor marking them as potential victims.”¹⁹⁶ Thus, defense attorneys have a lot of fodder when it comes to obtaining the lowest sentence possible for their clients, and emphasizing the mental health effects of the elderly could be especially effective.¹⁹⁷

Most states have adopted some sort of “compassionate” or early release program.¹⁹⁸ In these programs, elderly inmates that are close to death can be released early.¹⁹⁹ Theoretically, “such programs afford the inmate the opportunity to prepare for death without simultaneously having to cope with the shackles, strip searches, and cold, damp cells commonly associated with prison life . . . giv[ing] the inmate the chance to reestablish meaningful connections with family and friends before it is too late.”²⁰⁰ There is no guarantee that elderly inmates will be able to participate in these programs, however.²⁰¹ They must apply for the programs and only a fraction are actually admitted.²⁰² A medical test must also be undergone in order to determine how imminent death is and if releasing the inmate would constitute a danger to the population at large.²⁰³ Compassionate release programs provide a reasonable avenue for elderly non-violent offenders near death to die with dignity.

193. Aday & Krabill, *supra* note 181, at 242-43.

194. Aprile, *supra* note 185, at 71.

195. Aday & Krabill, *supra* note 181, at 246.

196. Aprile, *supra* note 185, at 71.

197. *Id.*

198. Aday & Krabill, *supra* note 181, at 256.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

IV. Recommendation

There is a considerable absence of protections in place regarding the elderly and the gaming industry. This lack of appropriate legal protection is especially troublesome given the considerable profits the gaming industry obtains for states in the form of tax revenue.²⁰⁴ Due to these profits, states may be reluctant to impose formal safeguards to protect the elderly, perhaps instead preferring to fund private organizations that help fight gambling addiction.²⁰⁵ This approach allows states to keep the appearance of fighting addiction, while at the same time collecting taxes. States should be proactive, instead of reactive, in order to fully protect the elderly in this context.

A broad solution is likely unwarranted here because the tension between allowing the elderly freedom and state protectionism should always be a consideration. In other words, the elderly should be free to gamble if they so choose, but they should also be informed of the risks before they gamble. Casinos also should be deterred from overindulging seniors through the comping process.²⁰⁶

There are several ways to regulate gambling for the benefit of the elderly. These include (A) the Current Model, (B) Therapeutic Justice, (C) Illinois Causes of Action and Exclusion Program, and (D) Informational Regulation. This section outlines these various approaches, analyzes their costs and benefits, and provides a recommendation that will be most beneficial to the elderly. Overall, federal intervention (or individual state remedies) should include informational regulation, voluntary exclusion programs, and forms of therapeutic justice in order to combat elderly gambling addiction.

A. Current Model

States that do impose regulations on casinos only do so to ensure that they take their fair share of tax revenue.²⁰⁷ State involvement, or simply the belief that the state is involved, in gambling regulation brings consumers comfort, especially those who worry about the negative effects of gambling on society as a whole.²⁰⁸ State involvement in

204. STATE OF THE STATES, *supra* note 17, at 1, 4-6.

205. *Id.*

206. Rosengren, *supra* note 107.

207. Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 MD. L. REV. 217, 251 (2004) [hereinafter Eggert].

208. *Id.*

gambling regulation then leads to consumers believing that the casino itself is not actually cheating them, as the state assumes the role of the faithful watchdog.²⁰⁹ In the end, however, the main motivation behind extensive regulations is financially based, “designed to ensure that casinos do not skim off some of their winnings and deny the states their share of money.”²¹⁰

Most of the current regulations imposed by states attempt to ensure that casinos are behaving fairly and honestly.²¹¹ Fairness in this context is defined as “how much advantage the casino has over gamblers and whether the casino’s games have an appropriate or excessive hold percentage.”²¹² Honest casino games are ones where “the game is truly random and the casino cannot unfairly affect the outcome of the game.”²¹³ The most effective way to ensure that casinos are actually being honest and fair is for the player to have more information available to them while playing (see Part IV. F.). For example, it would be beneficial if casinos are required to disclose their hold percentages to the consumer before the individual sits down to play the game.²¹⁴ Hold percentages are essentially the amount of money a casino makes on aggregate over a period of time.²¹⁵ Hold percentages could be in the form of a pop-up window on a virtual game, or signs posted near playing tables.²¹⁶ Mandating this type of disclosure may influence gamers to rethink whether they want to take the risk of loss. The issue is, however, that states do not engage in this type of regulation.²¹⁷ Typically, states either engage in two regulatory models, either Command and Control or Laissez Faire.²¹⁸

1. COMMAND AND CONTROL

The Command and Control model is characterized by its paternalistic nature.²¹⁹ Here, the state takes into account the interests of its citizenry and decides how beneficial or detrimental gambling may be

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 250.

214. *Id.*

215. *Hold Percentage*, CASINOPEDIA, <https://www.casinopedia.org/terms/h/hold-percentage> (last visited Mar. 1, 2019).

216. Eggert, *supra* note 207, at 251.

217. *Id.*

218. *Id.* at 246–52.

219. *Id.* at 246.

to those enumerated interests.²²⁰ If the state determines that gambling would, as a whole, be bad for its citizens, the state bans the use of gambling outright.²²¹ This hands-on approach is not unique to the gaming industry because there are “laws requiring seatbelt use in automobiles and helmet use on motorcycles; laws for bidding recreational drug use, suicide and swimming in the absence of a lifeguard.”²²²

However, there are several issues with a purely Command and Control model. First, the model decreases individual liberty;²²³ the entire decision on whether to engage in gambling is taken out of the consumer’s hands.²²⁴ This all-or-nothing approach harms the liberty of recreational gamblers while it benefits pathological gamblers.²²⁵ A better approach would be for regulators to adopt a middle route, taking the interests of all parties into account.²²⁶ States continuously fail to embrace this approach simply by either prohibiting gambling outright or allowing it, but also failing to impose safeguards for the addicted. Paternalistic measures are generally best implemented when there is little to no information available to the consumer.²²⁷ Regulations in this sense should be limited to “those that are designed to restore pathological gamblers’ rationality.”²²⁸

Second, the model forces the state to find some quantifiable way to account for its citizens’ attitudes towards gambling.²²⁹ In order to do this, the state must figure out exactly what the social costs and benefits are to gambling, which are also hard to quantify in any meaningful way.²³⁰ The state must then deal in generalities, which necessarily will prejudice some of its citizens, as is noted above.

Third, even if the state were to ban gambling outright, gambling would undoubtedly persist by becoming an “underground” activity.²³¹ This result would be unsurprising considering there are underground

220. *Id.* at 246–47.

221. *Id.* at 250.

222. Bradley S. Fiorito, *Calling a Lemon a Lemon: Regulating Electronic Gambling Machines to Contain Pathological Gambling*, 100 NW. U. L. REV. 1325, 1350–51 (2006).

223. *Id.* at 1354.

224. *Id.* at 1354–55.

225. *Id.* at 1355.

226. *Id.*

227. *Id.* at 1354–55.

228. *Id.* at 1355.

229. Eggert, *supra* note 207, at 247.

230. *Id.*

231. *Id.*

gambling rings in states that already allow gambling.²³² Under a ban, the state necessarily loses the large tax revenues it could collect.²³³ Thus, it is in the state's best interest to allow gaming and enact appropriate regulations that protect the state's most vulnerable citizens.

2. LAISSEZ FAIRE

A Laissez Faire model is essentially the complete opposite of a Command and Control model.²³⁴ Under this model, "the state relies on the parties to gambling transactions to regulate themselves and each other, to the extent that they can or want to do so."²³⁵ A complete Laissez Faire model is no longer present in the United States.²³⁶ Before 1955, Nevada adhered to this model, which resulted in organized crime moving to Las Vegas.²³⁷

Although this model provides for the most individual liberty, a free market approach to gambling obviously would not benefit the elderly because casinos would be free to continue comping or using questionable methods to obtain customers. Accordingly, a complete lack of regulation should not be considered by state legislatures because a no regulation approach does not suit the best interests of the elderly.

B. Therapeutic Justice

Generally, there is no one-size-fits-all approach to providing treatment to pathological gamblers in hopes that they will cease playing.²³⁸ There are two approaches to a therapy-based remedy: private and public. In a private sense, the problem gambler will individually seek out some sort of "counseling, step-based programs like Gamblers Anonymous, online peer support, and prescription medications."²³⁹ Of course,

232. *Id.* at 247-48.

233. *Id.* at 247.

234. *Id.* at 248.

235. *Id.*

236. *See id.* at 249.

237. *Id.*

238. Hon. Janette A. Bertness, *Problem Gambling: Legal and Medical Issues*, 58 R.I. BUS. J. 13, 18 (2009).

239. *Id.*

rehabilitative treatment should be tailored to each person's characteristics.²⁴⁰ According to Judge Bertness of Rhode Island's Workers' Compensation Court, "the best treatment option may be a combination of medication and behavioral therapy."²⁴¹

The issue with this approach is that it relies upon the elderly's initiative to seek out help, but pathological gamblers frequently deny they have a problem.²⁴² Thus, some sort of legal remedy should be in place when it comes to therapeutic justice.

The public remedy comes in the form of gambling courts, which unfortunately are more of a hypothetical in America as opposed to an actual reality.²⁴³ Gambling courts function very similarly to drug courts. Drug courts focus on the treatment of the offender and "the most important matter for the judge in a drug treatment court is to set forth the treatment programs for offenders and hold them responsible for completing the programs."²⁴⁴ Judges in drug courts go through a process of "identifying the underlying problem (the addiction) rather than managing only the symptoms ([e.g.] larcenies to obtain money to buy drugs)."²⁴⁵ In order to determine a successful plan for the defendant in each case the judge confers with a number of parties, "lawyers, social workers, prosecutors, [and] health professionals."²⁴⁶ Overall, drug courts are generally considered to be successful and have low recidivism rates.²⁴⁷

Gambling courts have yet to grow in popularity like drug courts.²⁴⁸ The two programs function essentially the same, except treatment in gambling courts is predicated off the defendant first pleading guilty and giving up rights to a plea bargain.²⁴⁹ The supervising court then institutes a treatment program and if the defendant does not comply with the program, the court then has the option of "send[ing] [the

240. *Id.*

241. *Id.*

242. Steve Bressert, *Pathological Gambling Symptoms*, PSYCHCENTRAL, <https://psychcentral.com/disorders/pathological-gambling-symptoms/> (last updated Sept. 8, 2018).

243. Symposium, *From the Classroom to the Courtroom: Therapeutic Justice and the Gaming Industry's Impact on Law*, 74 *MISS. L.J.* 827, 838 (2005).

244. *Id.* at 837.

245. *Id.*

246. *Id.*

247. *Id.* at 838.

248. *Id.* at 839.

249. *Id.* at 840.

defendant] back to the criminal court and charg[ing] [them] with a felony.”²⁵⁰ Some other remedies include “surveillance of the offender’s activities, intensive supervision, home confinement . . . electronic monitoring equipment . . . [and] finances may be monitored.”²⁵¹ Gambling courts have the potential to work well for elderly defendants. If a judge considers age as a mitigating factor in sentencing, it is probable that a court-mandated treatment program with consequences of failure to comply could motivate the elderly to confront their addiction. Due to the success that drug courts have had, it is curious why states have not instituted more gambling courts (or have expanded the subject matter of drug courts to include gambling addiction), especially considering the similarities in the addictions.²⁵² Only three states—New York, Louisiana, and Nevada—have instituted some system of gambling courts.²⁵³ Judge Mark Farrell of New York created the first gambling court in 2001.²⁵⁴ Early statistics from the court showed that, of those who had completed their court-mandated program, only one-half were rearrested.²⁵⁵ The previous statistic included all offenders who had a gambling addiction, not just the elderly.²⁵⁶ Importantly, of the rearrests, none were gambling related.²⁵⁷ Overall, gambling courts could play a major role in treating elderly defendants who have turned to crime to feed their addiction. But there seems to be little state interest as far as actually implementing them into their systems.

C. Illinois Causes of Action and Exclusion Program

States generally have some regulations in place where it is possible to make out a cause of action against a casino.²⁵⁸ But as evidenced by Illinois’ scheme, these private causes of action have not provided compulsive gamblers with adequate private protection.²⁵⁹ There are

250. *Id.*

251. Amaia Guenga, *Improving the Odds: Changing the Perception of Problem Gambling and Supporting the Growth of Problem Gambling Courts*, 2 U. NEV. L.V. GAMING L.J. 133, 147 (2011) [hereinafter Guenga].

252. *Id.* at 143.

253. *Id.*

254. *Id.*

255. *Id.* at 144.

256. *Id.*

257. *Id.*

258. Matthew J. Dowd, *A New Leader in the World of Legalized Gambling: What the Illinois General Assembly Should Do to Protect Pathological Gamblers from the Rapidly Expanding Industry*, 31 N. ILL. U. L. REV. 439, 448 (2011) [hereinafter Dowd].

259. *Id.* at 456-57.

three Illinois causes of actions where a gambler can make a claim for recovery against a casino: the Illinois Dram Shop Act,²⁶⁰ the Loss Recovery Act,²⁶¹ and common law contract theory.²⁶²

The Illinois Dram Shop Act provides that “[e]very person who is injured within the State . . . by any intoxicated person has a right of action . . . against any person, licensed . . . to sell alcoholic liquor, who, by selling or giving Alcoholic liquor . . . causes the intoxication of such person.”²⁶³ The issue with this statute is that the gambler herself would be unable to bring a potential suit – it must be done through a third party, and the person must have been intoxicated while gambling.²⁶⁴ The gambler would have to bring a claim specifically through a “husband, wife, child, parent, guardian, employer or other person.”²⁶⁵ The plaintiff in one of these cases would have to show “(1) [they were] visibly intoxicated through the negligent sale or furnishing of alcohol by the casino; (2) that the money gambled was intended for supporting another, and (3) have the third party he or she was supporting bring the suit against the casino.”²⁶⁶ Gambling claims under the Illinois Dram Shop Act have proven tough to bring, particularly considering the specificity of the requirements.²⁶⁷

The Illinois Loss Recovery Act provides a possible avenue for gambling plaintiffs to take without having to sue through a third party or prove intoxication.²⁶⁸ In order to have a valid cause of action under this Act, the gambler would have to allege that “a duty of care was owed”²⁶⁹ by the casino to cut off the gambler from playing. A claim by a plaintiff under this Act would provide an uphill battle depending on

260. 235 ILL. COMP. STAT. 5/6-21 (2018).

261. 720 ILL. COMP. STAT. 5/28 (2018).

262. Dowd, *supra* note 258, at 455.

263. 235 ILL. COMP. STAT. 5/6-21 (2018).

264. Dowd, *supra* note 258, at 453.

265. *Id.*; 235 ILL. COMP. STAT. 5/6-21 (2018) (“‘Family’ includes spouse, children, parents, brothers, and sisters. The action, if the person from whom support or society was furnished is living, shall be brought by any person injured in means of support or society in his or her name for his or her benefit and the benefit of all other persons injured in means of support or society. However, any person claiming to be injured in means of support or society and not included in any action brought hereunder may join by motion made within the times herein provided for bringing such action or the personal representative of the deceased person from whom such support or society was furnished may so join.”).

266. Dowd, *supra* note 258, at 454.

267. *Id.*

268. 720 ILL. COMP. STAT. 5/28 (2018).

269. See Dowd, *supra* note 258, at n.454.

where the gambling occurred. The Illinois General Assembly added to this difficulty by exempting gambling establishments made under the Illinois Riverboat Gaming Act²⁷⁰ and the Illinois Video Gaming Act.²⁷¹

Finally, it is always possible for a gambler to pursue a common law contract theory in order to recover from a casino.²⁷² This cause of action would have to be premised off “(1) that each bet placed by the casino patron constituted a formation of a contract; and, (2) that the casino knew the intoxicated gambler lacked the capacity to enter into a contract.”²⁷³ Again, the plaintiff would be facing a tough battle under this theory, because “the relationship between the two parties may not be sufficient to establish definite terms of the contract . . . [the gambler] would have to prove . . . that he was incapable of understanding the nature of the transaction.”²⁷⁴ In other words, even if the plaintiff could somehow establish that a contractual relationship existed in the first place, it is highly unlikely that the plaintiff would be able to show that they did not understand that they could lose money by gambling.²⁷⁵ Illinois is just one example of the lack of state private legal remedies that are currently available to problem gamblers. On the other hand, a solution could be brought through lobbying state legislatures to institute exclusion policies, like the one Illinois has instituted.²⁷⁶

Through the Illinois self-exclusion program “people [can] issue a written statement to a casino, admit that they are a problem gambler and that they wish to be evicted from the casino if they ever show up to gamble . . . [the] document is then shared with all the casinos within the state.”²⁷⁷ If the person is found in a casino, they are “subject to arrest, and all of his or her winning[s] must be donated to a problem gambling charitable organization.”²⁷⁸ The program itself necessarily relies on pathological gamblers who bring themselves forward, rather than compelled to by the state.²⁷⁹ This could be problematic for elderly gam-

270. 720 ILL. COMP. STAT. 5/28-1(b)(11) (2018).

271. 720 ILL. COMP. STAT. 5/28-1(b)(12) (2018).

272. Dowd, *supra* note 258, at 455–56.

273. *Id.* at 455.

274. *Id.* at 456.

275. *Id.*

276. ILL. ADMIN. CODE tit. 86, § 3000.710 (2018).

277. *Id.*; see also Dowd, *supra* note 258, at 458.

278. Dowd, *supra* note 258, at 458.

279. See generally *id.*

blers who generally do not believe that they have an addiction. Exclusion programs could be a very effective means of regulation if coupled with therapeutic justice remedies.

D. Informational Regulation

Informational regulation is the best remedy available in order to balance the economic interests of the states with the vulnerability of the elderly. Not only does it provide a safeguard for the elderly, but it also ensures their right to make an informed choice on whether to gamble.²⁸⁰ Informational regulation is “designed to provide effective information about the true risks and costs to aid individual decision-makers.”²⁸¹

Informational regulation effectively acts as a “warning label” for potential gamblers, like Surgeon General warnings seen on packs of cigarettes.²⁸² Practically, the information must be available to gamblers actually while they are gambling.²⁸³ This makes sense when it comes to the elderly, considering the “cognitive shift” they experience while surrounded by the stimulations of a casino.²⁸⁴ Pathological gamblers believe that they have some semblance of control over the game; so providing them the facts before they gamble has the potential to stifle this erroneous belief.²⁸⁵

In his article *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*,²⁸⁶ Kurt Eggert discusses how informational regulation should best be implemented. He states that informational regulation could be implemented in two different ways: either with general warnings or by tailoring the remedy for each game played.²⁸⁷ General warnings are like the ones required for tobacco and alcohol products mentioned above.²⁸⁸ For example, if one sat down to play a slot machine, a window would pop up beforehand which would state something to the effect of, “[t]he chance of winning a maximum prize up to \$10,000 on a gaming machine is generally no better than 1 in 1,000,000.”²⁸⁹

280. See Eggert, *supra* note 207, at 245.

281. *Id.*

282. *Id.* at 258.

283. *Id.* at 259.

284. *Id.* at 258–59.

285. *Id.*

286. See generally *id.*

287. See generally *id.* at 265–69.

288. *Id.* at 265.

289. *Id.*

It is also possible to tailor the remedy to each specific game.²⁹⁰ Under this method casinos would be required to “provide on each machine the true cost of gaming on that machine . . . [s]uch a remedy would allow an individual patron to decide if the gamble is worth the price.”²⁹¹ In addition to using probabilities seen in general warnings, which at times may be difficult for gamblers to understand,²⁹² the possible loss to the gamer would also be expressed as an exact sum.²⁹³ Showing the average loss in terms of actual money could have a significant impact²⁹⁴ on the gambler’s decision to play the game, because this information directly influences the person’s cost and benefit analysis, forcing them to take a moment to think about how much money they could stand to lose by playing the game. This method could be particularly effective regarding electronic gambling machines, due to the ability to re-calculate the possible loss while the person is actually playing.²⁹⁵ For skill-based card games, however, the only likely remedy would be to use a general warning because of its dissimilar nature than that of video gaming.

Informational regulation could be done by each specific state, or it could be done through the federal government. Either way, these remedies are best able to balance the elderly’s individual liberties and states’ economic benefits. Informational regulation has the potential to

290. *Id.* at 266 (“A more effective informational remedy would be one which requires casinos to provide on each machine the true cost of gaming on that machine. Such a remedy would allow an individual patron to decide if the gamble is worth the price. In addition, the remedy may coerce casinos to compete on the basis of price, which would likely drive down the hold percentages of slot machines.”).

291. *Id.*

292. *Id.* at 267 (“Given the difficulty many consumers have with probabilistic information, the average loss should be expressed to customers not only as a percentage rate, requiring at times complex mental math, but also as an exact sum. It would likely be easier for a gambler to understand an average hold amount of three cents for each quarter bet than for them to understand a 12% hold percentage.”).

293. *Id.*

294. *Id.* (“Providing the average loss in terms of the amount of money rather than a percentage rate would have one great advantage. For traditional slot machines, the hold percentage of slot machines decreases as the denomination accepted by the slot machine increases. If a consumer were only given the hold percentage, the dollar slots may seem like the least expensive betting option. This apparent bargain would be an illusion if the consumer were most concerned about losing as little money as possible or playing for as long as possible on a given sum of money.”).

295. *Id.* at 268 (“Ideally, the slot machine’s disclosure of its average loss should be interactive, so that as a gambler wagers more coins or money, he can see how much his hold percentage changes and his average expected loss increases.”).

stop the elderly from falling into the continual cycle of pathological gambling to begin with.

E. Proposed Remedy

Comparing the different approaches evidences that any effective regulation should start with an informational remedy. Informational remedies attack the cognitive issues that make the elderly particularly susceptible to gambling addiction while still securing their ability to gamble if fully informed.²⁹⁶ Coupling informational regulation with the possibility of individuals to opt into voluntary exclusion programs would make for positive results in reducing unfortunate cases of pathological gambling.

Certainly, informational regulation will not be able to fully fix the issues that the elderly face with a proliferation of gambling, but a more stringent remedy would have serious effects for other gamblers, the casino industry, the elderly's freedom, and states' economic benefits. Thus, appropriate forms of therapeutic justice should be implemented as well. Specifically, either gambling courts should be separately instituted or combined within drug courts. Judges would then have a viable alternative (and presumably more resources at their disposal) when sentencing elderly defendants found guilty of white-collar crimes.

V. Conclusion

Many variables are at work in the gaming industry and its regulation. Post-recession, the gaming industry has slowly become a mon-eymaking force to be reckoned with.²⁹⁷ For this reason, states have become more and more liberal in allowing commercial gaming.²⁹⁸ A domino effect tends to occur once one state allows a form of gaming, its neighbors usually follow due to economic competition.²⁹⁹ Tax revenue, jobs, and tourism often follow and consequently, so does the re-election of public officials.³⁰⁰

The problem with compulsive gambling, however, is that it seems to get ignored.³⁰¹ This poses issues for the elderly, since compulsive

296. See generally *id.*

297. STATE OF THE STATES, *supra* note 17, at 1, 4-6.

298. Aronovitz, *supra* note 58, at 182.

299. *Id.*

300. Fenich, *supra* note 20, at 66.

301. See generally Parramore, *supra* note 9.

gambling is a mental illness that they are especially prone to.³⁰² Casinos use this vulnerability to their advantage, expending their resources to entice seniors to their bright lights.³⁰³ Federal and state governments have done little to protect the nation's elderly in this regard.³⁰⁴ As a result, white-collar crimes among the elderly have risen as a source of funding their addictions.³⁰⁵ Thus, a need has arisen to educate attorneys on how best to represent their elderly clients in order to lessen possible prison sentences³⁰⁶ as prisons are usually not equipped to properly care for the elderly.³⁰⁷

In order to avoid this result, intervention is needed. But it needs to be an intervention that still allows for elderly freedom.³⁰⁸ Providing the elderly with as much information as possible in order for them to fully understand the amount of money that they stand to lose is essential.³⁰⁹ Intervention should include some sort of voluntary exclusion program that problem gamblers can opt into, which would effectively ensure they do not take part in the activity.³¹⁰ Finally, some form of gambling courts should be implemented in order to rehabilitate the elderly who commit crimes due to their addiction.³¹¹ If a solution of this nature is implemented, there will be fewer stories like Maureen O'Connor's in the headlines.

302. *Id.*

303. Jaret & Hogan, *supra* note 7.

304. Grahmann, *supra* note 42, at 167–68; West, *supra* note 55, at *1; *U.S. Gambling Laws*, *supra* note 33.

305. EMSHOFF ET AL., *supra* note 15, at 2.

306. Vitagliano & Meringolo, *supra* note 152.

307. *Id.*

308. *See generally* Eggert, *supra* note 207.

309. *Id.*

310. *See generally* Dowd, *supra* note 258.

311. *See generally* Guenga, *supra* note 251, at 147.

