

Ludic Gambling: The implications of gambling legislation on online gaming

Abstract

I will consider the history of gambling in early Roman and Greek culture, and how it has evolved as a widely accepted form of play. Further I will consider the modern forms of gambling, and how they are providing entertainment in return for money, in common with other forms of gaming, with the cost in this sense being derived by the expected value loss of traditional casino games. I will consider the professional gambler and whether these activities can be seen as unproductive in the Caillois sense, and indeed whether any form of play or game can truly be seen as unproductive, considering both modern online gaming and the economic principles of utility.

I will proceed to consider the recent court decisions in the USA, Denmark and UK concerning the classification of poker as a game of luck (vs. skill), how this meets with and indicates problems with the traditional Caillois definitions, and how in light of these it may be useful to consider the classification of gambling games as containing varying elements of luck and skill. I will continue to discuss how in light of the recent legislation passed in the US, a dangerous precedent has been set for other types of gaming, especially Massively Multiplayer Online games with Real Money Trading providing both a mediation for gambling and inherent problems in the design that could be likened to online gambling.

The Evolution of Gambling

Aaron Brown introduces the conclusion to his book, “The Poker Face of Wall Street” with the following:

“Why do people gamble? No one seems to have thought much about that until 100 years ago. It seemed obvious that people gambled because it was fun, or because they were trying to make money, or both. A lot of people disapproved: Some thought it was immoral or impious; others that it was dissipated and led to other forms of vice; still others that it created social problems. But most criticism was simpler: Gambling was a waste of time and money—useless, but not bad. However, then as now, most people gambled.” (p.309)

A commonly uttered phrase is “Life is a Gamble”. This statement is undoubtedly, at a very core level, true. When you cross the street, you are gambling that a car will not speed around that blind bend at 150mph. It is not this form of gambling that I wish to examine in this paper, but rather gambling as a source of entertainment, as a form of play, and how gambling used for entertainment can become a professional activity, and the dangers that attempts to legislate online gambling are setting as a precedent to other forms of gaming.

Gambling for entertainment can be found at the root of many ancient civilisations. Dice have been found, formed from the ankle bone of animals, dating back 40,000 years. Loaded dice have been found amongst the ruins of Pompeii, perhaps the earliest known form of cheating¹. Documentation exists of gambling amongst the Chinese in 2300 B.C, Egypt in 1500 B.C. and Greece in 1200 B.C.².

In the 16th and 17th century Britain’s Parliament enacted laws against gambling, which were eventually overturned in the 18th century.³ Gambling has since been ingrained in the British (and

¹ <http://www.daviddarling.info/encyclopedia/D/dice.html>

² <http://www.game-culture.com/newssites.html>

³ http://www.historylearningsite.co.uk/tudor_sports_and_pastimes.htm

subsequently, via the British Empire, Australian) culture, and continues to be a large part of life in both countries to this day.

In North America, Native Americans used gambling as a form of ritual to predict harvests, cure tribal members, and played games of chance with plum stones. The Continental Army in the Revolutionary war was financed by a lottery, as were many other developments in 18th and 19th century America, with George Washington buying the first ticket for a federal lottery in 1793. America made its first attempt to ban gambling with prohibition, Nevada notably making operating a gambling game a felony in 1910. This was overturned in 1931, and Horse Racing became popular. Atlantic City followed in 1978, and today most states have some form of legal gambling⁴.

Modern gambling comes in many forms, but has much in common with many other forms of gaming, and entertainment. In contemporary culture, we generally accept that there is a cost associated with gaming, be that the purchase of a board game, software, or a monthly subscription to a Massively Multiplayer Online game. Gambling is, despite the stigma associated to it, in reality no different. The average recreational player is paying for entertainment.

If we take Blackjack as an example, the mathematical house advantage on a recent survey of Las Vegas casinos ranged from 0.26% to 1.33%⁵. The average house advantage is around 0.5%. Based on that figure, per \$100 bet, a player using basic strategy would expect to lose approximately 50cents (the "expected value"). If playing at a table with 3 other people, a Las Vegas Casino would expect to play 84 hands per hour⁶. Whilst some casinos advertise blackjack tables with \$3 minimum bets, in practical terms it has been hard to get a game below \$20 in Las Vegas for a number of years. Using those numbers, somebody betting \$20/hand would expect to turnover \$1680 in an hour, losing \$8.40 (excluding free drinks, comps etc...). Whilst perhaps expensive compared to a MMO (at

⁴ http://christiancitizenship.com/pdfs/A__Gambling%20Background.pdf

⁵ <http://wizardofodds.com/blackjack/vegas.html>

⁶ <http://wizardofodds.com/askthewizard/136>

\$25/month or similar), when compared to other forms of entertainment, the cost does not seem excessive.

In the last decade or so these games have moved online. It is now possible to place a bet, to play blackjack, roulette or slots, and indeed to buy a National Lottery ticket from the comfort of your computer. These games have proven popular internationally, and have made the environment and games of a casino accessible to a wider audience.

The Ludic position of Gambling

It is widely accepted in the academic community that gambling is a form of play. In fact, I have yet to find an author that contends otherwise. Igor Kusyszyn summarises the common perception in "Psychology of Gambling" saying, "I view gambling as a functional play activity that provides a convenient means of satisfying two basic human needs. Gamblers play cards, play games, play the horses, and so forth. A wager is a play. Through play, gamblers confirm their existence and affirm their worth" (p. 136)

Roger Caillois defines play as "free and voluntary activity, a source of joy and amusement" (p. 6) He contends that it is "essentially a separate occupation, carefully isolated from the rest of life, and generally is engaged in with precise limits of time and space" (p. 6) He argues that play is "free activity" and "uncertain activity", saying "Doubt must remain until the end, and hinges upon the denouement. In a card game, when the outcome is no longer in doubt, play stops..." (p. 7). Of particular note is that he says play must be "Unproductive: creating neither goods, nor wealth, nor new elements of any kind; and, except for the exchange of property among the players, ending in a situation identical to that prevailing at the end of the game".

Similarly Johan Huizinga defines play as a "free standing activity standing quite consciously outside "ordinary" life as being "not serious", but at the same time absorbing the player intensely and utterly. It is an activity connected with no material interest, and no profit can be gained by it". (p. 13)

These definitions of play encompass a wide variety of games, and it is hard to think of a form of gambling to which it would not apply. Gambling is, in principle, zero-sum in any given session, assuming that we include the “house” (defined here as the casino, gambling establishment, or host) and thus unproductive in this sense. It may seem that a given player however may not meet that criteria, as in any session it is possible for a player to generate personal wealth. Under a strict interpretation for both Caillois and Huizinga, it would then seem the play element may be disputed. This is a topic to which I shall return.

Another of the theories widely put forward towards defining play is that it exists within a “Magic Circle”. This is a term often assigned to Huizinga (1955, p.10), but as I have argued previously in “Abandoning the Magic Circle”, in my opinion originates with Salen and Zimmerman (2003) and is defined as “a special place in time and space created by a game” (p. 95) Smith and Abt (1984) would seem to support this theory, claiming the racetrack and casino (and presumably other forms, though they do not go into detail with them) are special places; “...the race track embodies a formal and an informal system of rules defining the play of the game and distinguishing the serious or successful players from those less serious or successful...” (p.56), and “a gambling casino has its own particular sense of place and its own social structure that, in many ways, may be even more seductive to a player...” (p. 58). In this sense they argue that with the play taking place within a given space, it is separate from the real world. They say “a race track and a casino provide their own explanations of gambling behaviour. In this argument, the PLAY (game) really is the thing.” (p. 54). This is echoed by Kusyszyn, who stated “During gambling, money loses its economic value. The gambler is seen to be playing with money rather than for it” (p.134). Gambling then would seem to fit well with the concept of the magic circle, play taking place in an environment in which the artefacts of everyday life take on a special meaning. Indeed, I would say that gambling provides many of the better examples of the magic circle concept.

Roger Caillois, in “Man, Play and Games” states: “Whether it be a bet, lottery, roulette or baccarat, it is clear that the player’s attitude is the same. He does nothing, he merely awaits the outcome... the player of chess or hopscotch, on the contrary, work as hard as they can to win. It matters little that some games are athletic and others intellectual. The player’s attitude is the same: he tries to vanquish a rival operating under the same conditions as himself. It would thus appear justified to contrast games of chance with competitive games” (p. 12). This quotation echoes the public mindset, and more recently the judicial mindset, but I would argue that it is highly problematic.

This problem is evidenced when we delve deeper into the specific forms of gambling, and attempt to fit these into Caillois classification of *agôn* (skill) and *alea* (luck). Even if we are to exclude those activities which are not seen in the mind of the public as gambling, but do in fact share similarities with the logic and mindset of gambling, for example trading on a stock exchange, there are a wide variety of activities covered, from those such as HiLo, Roulette and many slots, through to games such as blackjack, poker or sports betting.

In “Gambling as play”, Smith & Abt summarise this situation, saying that “The combination of competition and chance, skill and luck, is characteristic of the games played by most Americans. Once play becomes formalized through the institution of rules leading to the inevitable naming of winners and losers, either superior skill or the blessing of fortune –or, more likely, some of each— will determine the outcome” (p. 125)

The question then arises, how should we classify gambling? My answer would be that we should not. Gambling has long been seen as a catch-all, but what matters is that we can classify each individual game. This is obvious in some situations, as Smith & Abt say; “... the most often played games – especially casino slot machines and lotteries – fall completely in the realm of Caillois *alea*” (p. 132), but is more difficult with many of the forms of gambling popular in contemporary casinos, such as blackjack and poker, where elements of skill and luck are found in varying balance.

I would disagree with Caillois that it is always necessary to contrast skill (*agôn*) and luck (*alea*). The presence of chance does not preclude the presence of skill. It is possible to think of games that are entirely skill, such as chess, and those that are entirely luck, such as a lottery. Thus I would argue that skill and luck should instead exist as either ends of a scale. This would lead to academics performing classifications, and the executive and judiciary in forming laws and adjudicating on cases, having to make a judgment on where a game should be placed about the scale, and how much skill is necessary to preclude a “game of chance” (which is a term commonly used in legislation to regulate contests, gambling and beyond), but is infinitely preferable to a failure to realise that the two can co-exist.

It is a failure to accept this that has led to many of the recent issues in the United States, United Kingdom and Denmark where courts were asked to adjudicate on whether poker was a game of skill or luck. In the United Kingdom case (*Regina v. Derek Kelly* [2008]), the chairman of a private poker club was trying to argue that it was a game of skill and thus should be exempt from the 1968 Gaming Act, and granted the same status as chess or bridge, meaning it would be legally allowed in members clubs as opposed to only licensed casinos. The Appeals court in the UK ruled that poker was a game of chance, and thus it was illegal to impose levies on winning and charge participation fees.

The contrast with Bridge here is interesting, as similarly to poker it is a game where both skill and luck play a role in the outcome, yet Bridge is acknowledged as a game of skill whilst poker is regarded as a game of chance. This contrast likely exists for historic reasons, in that Bridge has played a part in UK culture for some time, but is not useful for those of us trying to consider the ludic element of these games.

The United States ruling in *Joker Club, L.L.C. v. Hardin* (2007) offers an insight into the perspective of the judiciary, offering up the following conclusion; “In golf, as in bowling or billiards, the players are presented with an equal challenge, with each determining his fortune by his own skill. Although chance inevitably intervenes, it is not inherent in the game and does not overcome skill, and the

player maintains the opportunity to defeat chance with superior skill. Whereas in poker, a skilled player may give himself a statistical advantage but is always subject to defeat at the turn of a card, an instrumentality beyond his control. We think that is the critical difference.” This judgment acknowledges that the game can have an element of both, but returns in favour of a predominance of chance. In contrast to this, it is perhaps telling that Smith and Abt state, in 1984, long before the current online gambling situation arose that “Poker is a classic example of the fateful encounter... Though the deal and draw are governed by chance... the play of the game is ruled by skill and is a clear example of competitive play” (p. 129).

The question that arises here of course is whether you view this as an individual session or a long term proposition. Those supporting poker would argue that you don't decide the Premier League or Major League Baseball winner after one game, because skill comes to the fore over the course of the season, as with poker. Those against would argue that in any one game, the more skilful team is likely to win, because a level playing field lets them overcome the element of luck introduced. This eventually comes down to a question of approach, and how the skill and luck elements are balanced in any individual game.

Classification

The question that evolves from this discussion is whether it is possible to design a classification of gambling games. This can be a problematic exercise, as there are a number of borderline cases.

The first step I feel is necessary here is to distinguish the skill that I will be referring to in this classification from Caillois' agôn. Agôn requires as a prerequisite competition between two parties, in which “the adversaries divide the elements into equal parts and value”. Caillois goes on to say that “The search for equality is so obviously essential to the rivalry that it is re-established by a handicap for players of different classes... It is significant that such a usage exists in the agôn of a physical character (sports) just as in the more cerebral type (chess games...)” (p. 14)

In a casino, there is never a search for equality; the casino is always seeking to maintain an advantage over the player. No attempt is made to offer a handicap to players of lower ability, indeed the casino often tries to handicap them more (with alcohol for example) to gain a greater advantage. The casino's pure objective is to win, and to profit, as much as possible. Even in poker, in which the house does not take part as an active player, there is generally no attempt made by the participants to level the playing field. Thus, for this discussion I will use the generic definition of skill, "the ability, coming from one's knowledge, practice, aptitude, etc., to do something well"⁷

The easiest starting position here is to first deal with the games of pure luck. These are games in which the players' strategy does not alter the final outcome (at least when the game is played according to the rules, without the introduction of outside equipment), and would be classified as "alea" under the definitions offered by Caillois. The notable examples here would be slot machines, bingo, keno, roulette, lotteries, scratch cards and so-called "Instant Win Games", which are in effect electronic scratch cards. In these games, with no decisions to be made, the casino will hold the expected % in the long-run, regardless of player strategy.

It is worth contemplating here whether there are any games to which luck does not play a part. Even using Caillois example of competition, chess, there is an element of luck in that an advantage is gained by going first. In most cases, as Caillois states "These inevitable imbalances are negated or modified by drawing lots at the beginning..." (p. 15) and this introduces an element of luck. If we look to the world of sports, there is an element of luck in football in that the weather may benefit one team over another. If we exclude weather and look at indoor sports; injuries contain an element of luck in their timing and impact on the performance of a team or player. I would argue that an element of luck would be introduced in every game, if you take the analysis to a detailed level.

The second set of games I would look to classify is those to which the players' strategy has a significant impact on his final outcome. Included in this group of games would be poker and sports

⁷ <http://dictionary.reference.com/browse/skill>

betting. In these games there is an element of luck, but the player's decisions and mental aptitude will have a significant effect on the outcome achieved. These I would not hesitate to classify as primarily games of skill, with a luck element impacting on a single session. Poker is a special case, as the casino holds a constant rake (proportion of the money bet) with the profit and loss taking place player vs. player, but in sports the outcome for the casino can vary wildly depending on the skill of their lines makers, the speed with which they moved the lines, and of course an element of luck in how the games play out on the field, on the rink and so forth.

I would expect that both of these prior groups would be largely accepted at face value. The problems arise when trying to define the borderline cases. For example in Blackjack, a player using basic strategy will lose, as I stated earlier, about 0.26-1.33% of their stake per hand. Yet Steve Wynn, of the Wynn Las Vegas casino group stated in a Las Vegas Sun article in July 2007 that "Statewide the hold is about 15 percent" and at the Wynn "...the blackjack hold percentage doubled from 10 percent in the second quarter of 2006 to 20 percent this year"⁸. These figures are measured as the percentage of buy-ins held, and equate to a ~2.5% edge against the player base as a whole. This additional hold comes from the majority of players who are not even playing basic strategy. A player who is "card counting" (that is, keeping track of the cards dealt to the table in order to determine the cards left in the deck to be dealt) can expect to have a player (vs. house) advantage of ~1%. Thus the range of the hold between the best and worst players is almost certainly in the region of 3.5%, or expressed differently, whilst a card counter would expect to make about \$50 an hour on \$5000 of volume, an average player would expect to lose \$125, a \$175/hour differential. This I would conclude means we can firmly argue that blackjack can be classed as a skill based game.

Video poker is the one casino game where the casino will happily acknowledge it is possible for the player to have an advantage. There are many variations of video poker and new ones are being added all the time. If we take the most common forms, "Jacks or better" and "Deuces Wild", the

⁸ <http://www.lasvegassun.com/news/2007/jul/08/jeff-simpson-on-why-despite-all-the-criticism-wynn/>

house advantage on these when played optimally varies from -0.77% (A player advantage of 0.77%) to a house advantage of 0.46%⁹. Figures for the state-wide hold in Las Vegas are harder to obtain than for blackjack because of the variety of machines, but in South Carolina in 1997 \$2.1bn was fed into 30,000 video poker machines, each of which took an average profit of \$22,000¹⁰. Using these figures we can conclude the actual hold was around 3.1%, which seems in line with expectations. So again if we were to calculate these on a \$5000 turnover figure, a player using optimal strategy could expect to profit around \$38.50/hour, whilst your average player would be losing around \$155, a \$193.50/hour differential. Again, I would conclude that video poker must be classed as a game of skill, with an element of luck.

To give one final example. In craps, as with blackjack and video poker, the player makes decisions as to how they play. A player who plays perfectly in craps could get the house edge as low as 0.014% (Betting don't pass and 100X "laying the odds"). A player making the traditional pass bet in comparison would be conceding a house advantage of 1.41%. The worst bets on the table (Hard 4 or Hard 10) have a house advantage of 11.11%¹¹. Thus a player playing optimal strategy would expect to lose \$0.70/hour, and a player making the very worst bets to lose \$555.50/hr. This is obviously a substantial difference, and it would thus be impossible to argue that an element of skill does not exist in the game, but in contrast to the above examples, there is no chance of coming ahead in the long run (excluding dice setting, which remains unproven as of the time of this writing). In this sense you are paying for entertainment, and the skill is merely equivalent to price shopping for the best price on the DVD movie you wish to purchase.

It is not important when considering these games as a form of play that it is not possible for the player to turn a profit. As Malaby states (p. 14), an important part of games is that a game can have multiple outcomes, which it is open to the players to generate and interpret. In any short term

⁹ <http://wizardofodds.com/videopoker>

¹⁰ <http://edition.cnn.com/ALLPOLITICS/1998/05/25/time/gambling.html>

¹¹ <http://wizardofodds.com/craps>

session it is of course possible that the player will come out ahead, and the player could be inventing goals throughout the session, be that to come out of the session better than his friend playing next to him, or any other temporary objective.

The most apt way to classify these seems to be to utilise the approach of Malaby approach in "Beyond Play" (2003). Malaby suggests characteristics of games; notably the performative aspect and contingency. The performative aspect is defined as the "learned condition of mastery over the performative challenges of a game or task" (p.15) and contingency he defines as "that which could have been otherwise" (p.15). Contingency comes in three forms, of which the most significant in this context is stochastic contingency.

Malaby stays of stochastic contingency that "This is the randomness produced by, for example, a well-shuffled deck of cards or a tossed die. Here, unpredictable outcomes spring forth as the result of a process sufficiently complex as to produce chaotic results" (p. 16) He also introduces social contingency, defined as "the unpredictability of never being certain about another's point of view" and semiotic contingency, "the unpredictability of meaning that always accompanies attempts to interpret the game's outcomes". Semiotic contingency is of little relevance in gambling; because of the stakes involved the casinos go to great extents to make the player aware of the rules of the game.

I would suggest that, in the context of gambling, games can be placed on a continuum between these two characteristics. Games of pure luck would lie at the end of contingency and the games in which an element of skill is dominant would lie more towards the performative side. The extreme performative side would feature games like Chess and Backgammon. In the context of these games, and poker, I would include the ability to overcome the social contingency as part of the performative aspect of mastering the game, given that these games (at least when played in person, as opposed to electronically) require the ability to read and predict your opponents' moves to be victorious.

Whilst it is beyond the scope of this paper to identify and place all of the gambling games found in Las Vegas and beyond on this scale, I have included a few examples below. Roulette is a game of basically pure contingency where the players' skill has very little influence on the outcome. Craps is a game where the player can alter the house edge, but the impact of the player is limited to negating the house advantage, and the outcome of any one session is predominantly luck based, being decided on the roll of a die. In blackjack the player has the possibility to influence the outcome of any session depending on their decision, but there is still a significant element of luck contained in both the cards dealt to you and the dealers' cards over which you have no influence.

In poker, by contrast, regardless of the cards dealt it is still possible to outwit your opponent and force him to give up the "better hand". Here the performative element is more significant, and whilst an element of contingency exists, I would place it towards the performative side of the scale. Chess of course is the typical example of a performative game, with the only element of contingency probably being found in who plays first. As I have argued above, there will be social contingency found in the game of Chess, but the overcoming of this is part of the performative aspect of the game.

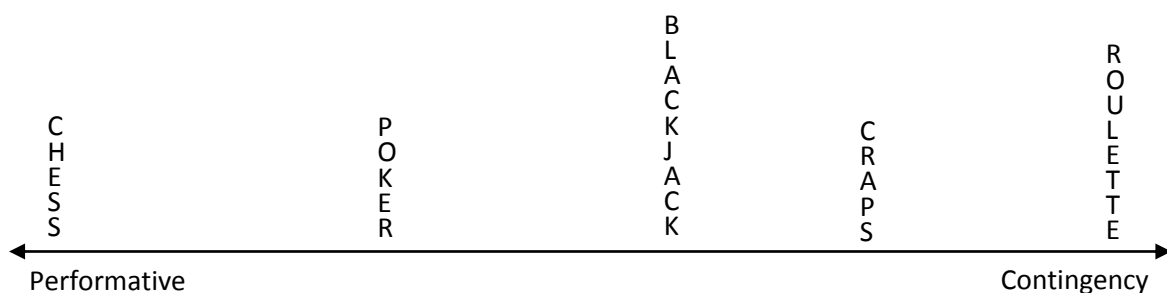


Figure 1: The Performative-Contingency Scale

Taking it professional

As detailed previously, Caillois has argued that play must be "unproductive" and Huizinga that it "no profit can be gained from it". I pointed out earlier that this could pose a problem when applied to a

specific player, if viewed from the perspective of Caillois. Professional gamblers would argue that they are gaining positive expected value (though of course the game itself is still zero-sum, the wealth generated by the players is lost by the casino), and it is these people, and for this reason, that the question of whether they are partaking of play could become an issue. This is not an issue unique to gambling but arises frequently whenever people are earning an income in a field that is predominantly regarded as a playful activity, for example computer gaming and professional sports.

My objection here is whether play can be argued in any sense to be unproductive. This is a topic that has been taken up by many authors in the past, particularly with regard to Massively Multiplayer Online (MMO) games. T.L. Taylor (2006), amongst others, argues that a function of play can be productivity, pointing to the numerous player created resources available for MMO's online, noting "the trend to enlist player communities in the explicit production of the game or additional game content is hitting its stride" (p. 145) She continues to say that "...the voluntary "free labor" being produced in these communities... has become central to the success of these companies, and, indeed, enjoyable to many players" (p. 146). I would argue that this is a clear case of play being productive, in utilising the game, the medium for play put forward by the original developer; the players are enticed to produce material items as a result of their play.

The other approach to this is to look at production from an economic perspective. In "Gambling is Productive and Rational", Steele (1999) states "After the end of the nineteenth century, leading economists no longer paid much attention to the classification of activities as productive or unproductive. The new theory of value based on marginal utility shone a flood of light on the question, and clearly exposed many of the old arguments as fallacious." (p. 227) He continued to say that "the conclusion of the new approach was that "production" meant "satisfaction of wants" (p. 227). The point here is that an activity is only productive if it satisfies somebody. Creating a physical object is only productive in the sense that somebody gains satisfaction by using, or wearing it. Steele

offers that “one way of describing want-satisfaction is to talk about “utility”. An activity is productive if it yields utility.” (p. 227)

Steele continues to say that “it is productive for a musician to give a recital, assuming that the audience likes it, but it is also productive for a group of friends to get together and perform music for their own enjoyment, or for an individual to perform alone for his own satisfaction”. Taking this argument, it is a logical extension to conclude that anybody playing any type of game, for profit or otherwise, must be generating some form of satisfaction, and thus it is a productive experience. The video game, the ball, or the money in gambling is just an intermediary agent used for the production of satisfaction.

In “Pervasive Games in Ludic Society”, Stenros, Montola and Mäyrä (2007) comment that, in contrast to Huizinga’s (1955) assertion that play does not yield material profit, “this does not hold true to all gamers. Professional sports, gambling and gold farming are ludic practices that show the blur in games as well. These people, whether they are top athletes getting superstar salaries or teenagers making real money in a virtual environment, cannot claim to pretend that the games they play were any less ‘real’ than ordinary life” (p. 33). Huizinga was of course writing in a period where gambling was still taboo, gold farming wasn’t even on the horizon and the vast majority of athletes remained amateur. That said I would liken Huizinga’s “without profit” to Caillois “unproductive” and reject them both for the same reason, namely that in contemporary society, play activities are widely accepted to be productive, whether that productivity be manifested in monetary profit, the generation of assets for oneself or a third party, or satisfaction.

I would thus conclude that there is no difference between the professional gambler and the amateur. Both are productive, though in different ways. The amateur is manifesting their production through satisfaction, whilst the professional seeks to manifest his through monetary profit. Both have the possibility to set their own goals for their play session, and they may be different and varied even when playing the same game. At the end of the session both the professional and the

amateur could face success or failure, depending on the goals they set themselves and elements of skill and luck in how the play session transpired.

Legislating Gambling

Recent years have seen governments become aware of the volume of gambling taking place on the internet, and both the potential taxation lost and the volume of money leaving the country towards offshore entities has seen them take action. This action has however varied by country, and has in many cases been contested by the offshore countries that were primary recipients of these funds.

If we were to address the responses to this phenomenon chronologically, the first would have come from the United Kingdom in 2001 where the government abolished the previous 9% tax on all bets and replaced it with a 15% tax on bookmakers' profits. This was in response to companies such as Stan James and William Hill moving their online betting operations to countries such as Antigua, Gibraltar and Malta in an effort to avoid the betting tax.¹² The UK has since established a gambling commission and has sought to attract companies to base their operations in the UK and market to a European or Worldwide audience.

By contrast, many European countries between 2004 and 2006 enacted barriers against international operators, leading to notable arrests including those of the operator of Unibet in Holland under a warrant from the French government¹³. This led in 2006 to the European Union instigating investigations against 9 European nations for breaching EU regulations that require a free market in goods and services. These countries were accused of adopting protectionist policies aimed at protecting their own national gambling monopolies, an issue that remains largely unresolved as of the writing of this paper.

The more problematic legislation, particularly from the perspective of the wider gaming industry is the U.S. legislation enacted in October 2006, entitled the "Unlawful Internet Gambling Enforcement

¹² http://www.theregister.co.uk/2001/03/12/uk_becomes_haven_for_internet/

¹³ <http://bingostreet.com/news-20071025/arrest-of-unibet-chief-spotlights-french-position-on-online-gambling-online-bingo-news>

Act of 2006”¹⁴ (hereafter UIGEA), which was passed through the U.S. legislature as part of the “SAFE Port Act”¹⁵.

The UIGEA makes it illegal for any company to accept a financial instrument in connection with internet gambling. That is, it makes it illegal for a company to accept credit cards, checks, bank drafts and so forth if those funds are to be utilised for online gambling. To quote Lawrence G. Walters Esq. (n.d.) “the Bill contemplates civil or criminal remedies against individuals and entities involved in assisting or facilitating online gaming transactions, who previously only faced liability under the criminal law concepts of “aiding and abetting” or ‘conspiracy.’”

The act proceeds to define a wager as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome” (§ 5362(1)(A)) and Walters continues, saying: “ Further, a “bet or wager” specifically includes a chance on a lottery or prize awarded predominantly by chance; a “scheme” as defined in Title 28, U.S.C. § 3702 [relating to government-sponsored amateur or professional sports betting]; and, “any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from, an account with the business of betting or wagering.” The law continues to exempt “participation in any game or contest in which participants do not stake or risk anything of value other than—(I) personal efforts of the participants in playing the game . . . or (II) points or credits that the sponsor of the game . . . provides to participants free of charge and that can be used or redeemed only for participation in games or contests offered by the sponsor. . . .” (§ 5362(1)(E)(viii))

This law’s application to traditional forms of online gambling is clear, and whilst it has yet to be enforced in a court of law, and its’ validity is still being hotly debated in the United States (due to

¹⁴ <http://www.govtrack.us/congress/billtext.xpd?bill=h109-4411>

¹⁵ <http://www.govtrack.us/congress/billtext.xpd?bill=h109-4954>

serious problems with its formation resulting from it being rushed through attached to security legislation), on a very real level the impact of it has been felt in the online gambling industry. Several major players in the online gambling industry have stopped taking customers from the United States, and numerous e-wallet providers that specialise in gambling transactions have stopped doing business with United States customers; in at least one case, that of the Isle of Man based “Neteller”, under significant duress and threat of prosecution from the US Attorney’s Office¹⁶.

What is less clear is to what extent the law will have application beyond the traditional online gambling venues, to sites that offer games of chance or skill as part of a wider offering, or even as an accidental part of game-play in a paid-for virtual environment.

The Wider Picture

Recent years have seen the movement of online gambling from the traditional one-purpose venues into virtual environments such as Second Life. This has posed many questions with regard to the legislation because for the first time these services were being mediated to a large audience from servers located within the United States.

In 2007, Mark Methenitis tackled these issues in his paper, “A Tale of Two Worlds: New U.S. Gambling Laws and the MMORPG”. He raised a number of points relating to the direct implementation of gambling within these environments, which I shall also consider here, but there are additional issues to be considered that come about from game play or features of Virtual Worlds that could be argued to bear a resemblance to gambling, in elements of chance.

Methenitis addresses two example worlds; World of Warcraft and Second Life, and these seem apt examples as they exemplify the two types of worlds commonly dominant in the US/European market at the current time. He argues that in the case of World of Warcraft, “At the present time [the] economy is entirely severed from the real world economy.... As a result, what was once an item with an arguable, albeit highly variable, real-world value via eBay auction is now merely virtual

¹⁶ <http://www.neteller-group.com/press/en/136.htm>

property that can only be acquired through efforts playing the game.” (p. 437) This is a debatable position, and is one that would be very much in agreement with that offered by Blizzard. It does not take account of what amounts to a sizable ‘black market’ in the trade of virtual items, characters and currency. It is of course yet to be tested how the courts will regard this, and whether they will consider Blizzard’s action against currency dealers sufficient to grant it an exemption. Perhaps as relates to the currency it would do so, but Methenitis asserts that “Their only “value” per se is in the effort it took to acquire the item, which speaks specifically to the exemption in point two. This seems like a prime example of “personal efforts of the participants in playing the game.” Wagering these items in playing the game should be specifically exempted. As such, the third point should not apply, even if Blizzard were to place casinos in the game.” (p.437)

This seems to me to be a highly contentious position. Whilst it seems unlikely that Blizzard would allow the re-introduction of casinos into the game, having previously banned them in 2005, doing so would provide a perfect backdoor for any online gambling operator to get access to a large client base, and if the transactions could be masked as gaming, as opposed to gambling, it would be a hugely advantageous development in terms of evading the authorities. I would find it hard to believe that a court would be hesitant in ruling that the back door avenues to acquiring virtual property or gold in-game is the responsibility of Blizzard, and as has been shown by the concerted effort Blizzard have made to ban Real Money Trading, preventing it is an almost impossible task in the current climate.

Methenitis brings up the case of Lineage II, who in 2004 specifically added in-game gambling as a feature, arguing that “it seems improbable that any regulator would attack these games as a target for a funding ban under the Unlawful Internet Gambling Enforcement Act” (p. 438). I would suggest the reason they haven’t been targeted is simply because the world, and/or gambling within the world, does not constitute a large enough market for the regulator to make a cost-effective prosecution. A quick Google search indicates there is no shortage of ways to buy in-game currency

for Lineage II, and at least a couple of sites where it is possible to sell it. To online gamblers currently purchasing and using phone cards to deposit to offshore casinos and sports books, using these types of currency exchange services is unlikely to prove a significant obstacle to transacting, should the game environment offer the services they desire.

Second life provides a far more clear-cut study. Linden Labs, the creators of Second Life provide an explicit currency exchange service on their own web site, buying and selling currency to anybody who is interested, much akin to any foreign exchange service when travelling between countries. He argues that whilst it is possible to exist in Second Life without either depositing or cashing out, the mere fact that the currency has a method of direct conversion to a real currency means that, when gambling with Linden Dollars, you are gambling with something of value, under the definition offered of a wager by the UIGEA. He likens it to betting in a casino, saying that the Linden Dollars have value, "just as gambling winnings that remain as chips have a value".

This is an argument I am very much in agreement with, however I do not feel it is possible to differentiate as he does between a legitimate and illegitimate currency exchange. To do so is no different than any existing gambling operator utilizing a third party currency exchange service to exchange real US\$ into an imaginary virtual currency of 1:1 value that is accepted at his sports book or casino, with the customer then using the same (or a different) operator to cash out at the end of the process. Whilst it may appear to mask the action, this is precisely the type of instrument that the UIGEA prohibited, and enforced successfully, albeit settled prior to any legal judgment, in the case of Neteller and e-gold.

In the case of Linden Labs, they responded to this possible threat by introducing a specific policy on wagering in July 2007, which in effect closed down the casinos that were previously found in game. The Linden Labs policy offers their own interpretation of the UIGEA, defining wagering as "any covered game or activity (i.e. game of chance, sports betting) in which a user contributes Linden dollars (or real-world money or things of value), whether into a pot, at a table game, at a house

game, for purchase of a card (such as Bingo), or in any way risks Linden dollars based on whether an event may or may not occur, such as whether a team will win a sporting event, or whether Barack Obama will win the Democratic primary.”¹⁷ Indeed they continue to offer their own interpretation on the skill vs. chance debate, saying “This policy only applies to wagering games that involve an element of chance. This includes, for instance, any game involving random number generation, simulated dice, cards, poker, lotteries, bingo, or any other "chance" game. Games of pure intellectual or physical skill, such as puzzles or other skill contests, may not fall under this definition.”

Thus Linden Labs banned all games involving an element of chance, regardless of where the organiser and participant lived, and the laws in their jurisdiction, to do what, in the worlds of their policy, “Linden Lab believes is [sic] must do in order to maintain an atmosphere in which all applicable laws are respected, as well as U.S. credit card association and other relevant rules and guidelines.” This means that this act and the responses to it from online gaming operators are going to be of crucial importance to any player, game designer or corporation who wishes to partake in or design a game that may be hosted on servers in the United States.

Methenitis goes on to suggest that the “alternative would be to make all in-game casino activities legal, but classify all income from any MMORPG as “gambling winnings” for tax purposes” (p.439). This would be highly problematic for a couple of reasons. The primary one that it would in effect be legalising and legislating internet gambling, which would be a complete contrast to the position taken so far by the United States, and would put them in further non-compliance with the World Trade Organisation (WTO), who have already authorised Antigua and the European Union to take sanctions against the United States for blocking Internet Gambling operations from their territories. The second problem is that it would result in the classification of all MMO earnings as gambling income, which of course would prove very unpopular for those running other types of businesses in these virtual environments, and would likely be a hindrance to the growth of platforms such as

¹⁷ <http://support.secondlife.com/ics/support/default.asp?deptID=4417&task=knowledge&questionID=4533>

Second Life, discouraging major corporations, lawyers and other professions from setting up offices in the environments, in turn having a substantive negative effect on the income growth of the creators of these platforms.

As Methenitis acknowledges (p.439), it would also add an immense reporting burden onto these environments, with the platform provider having to engage in substantial tracking of transactions into and out of the game, and possibly having a requirement to track gambling activity specifically in game. Additionally a complex age verification and personal identification system would have to be setup, and this is still very difficult to establish in an online environment. Finally of course there would be the issue of dealing with different tax regimes and legislative environments in other countries, which may well result in the isolation of players of certain nations from particular environments, defeating the reason that many partake in them.

He continues to suggest segregation of servers into cash and non-cash, akin to that suggested by several game scholars for dealing with players who are either for or against real money trading. He suggests that cash servers could support real money trading but would either have to seek a legitimate path for allowing gambling, or ban it outright. A non-cash server with no possibility of RMT could allow gambling in a for-fun environment. He acknowledges this as the more realistic of the two possibilities as it does not require legislative action.

What is not acknowledged in this paper, or indeed this debate in general is what I can see being a far more severe underlying problem when we consider the wording of the legislation. For me, the important part is the definition of a wager as involving chance. The exact wording offered by the UIGEA was ““the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome” (§ 5362(1)(A))

If we accept that in world currency has a value, be that either through an official exchange or otherwise, then many aspects of MMO's are akin to gambling; having much in common with games of skill and games of chance. Whilst collection and then sale of resources off of the environment in the style of herbs, ore and so forth in World of Warcraft could be compared to work, what happens when you start killing mob's (monsters) and collecting resources from them? The probability of a monster dropping a valuable item is in effect down to chance, there may be a 1% chance or a 20% chance of receiving a valuable item, and I would argue whether this is really any different from pulling a lever on a slot machine and checking the outcome. The money you would put in a slot machine is in this case replaced by another commodity, your time in attacking the monster, but the similarities remain in that time is a commodity widely accepted to have equivalence to money.

Beyond this there is the question of how trading the economy in a MMO would be regarded by legislature. When in Eve you are hauling items from one area of space to another, with the intention of selling your goods for higher than the purchase price, you are again risking something of value for which the return is dependent on the activities of others. The price at the station where you intend to sell your items is determined by the demand and supply from other players in that region, thus importantly it is not fixed, and is subject to fluctuations beyond your control. This is perhaps an extreme interpretation, but without the fall back of physical goods as would be found in real-world economic transactions of this nature, I would argue that the position is at least contentious.

Even beyond these examples, the very design of most MMO's opens them up to the possibility of gambling, even when not intended or controlled by the developer. The ability to freely transfer currency or virtual items that could have a real world value between players opens these worlds up to one-off or frequent arrangements between players utilising the platform as a financial provider mediating the gambling, which is a dangerous position for the developers to occupy under the regulations offered by the UIGEA. Whilst this may be no different in principle to two people making a casual bet in a bar, the fact that the virtual world could mediate the meeting of the players,

arrangement of the bet, payment of the bet and ultimately the transfer of the proceeds into a real currency puts them at real risk of being held responsible for these actions. I can see this problem growing as we move more towards virtual spaces than rule-based worlds. As Castronova suggests in "Exodus", "Many of us will find ourselves interacting in cyberspace much of the time" (p.xv) In this context, the virtual spaces of the future will be the public places of today, where we meet to have a conversation or a friendly wager with a colleague. The difference is that if those virtual spaces are owned by a corporation, that corporation will face being held responsible for the actions that take place within it.

Of course this is a situation that's largely isolated currently to the United States and Europe. Whilst the UK and Europe are now covered under European legislation protecting the right of foreign competitors (in some cases with licensing requirements; a matter currently before EU courts), and gambling has long been accepted as part of MMO's in China¹⁸, the gaming market continues to be dominated by American companies, or companies wishing to design their games to market to America, and so the implications of American legislation will concern all of us, deciding how the games we are going to spend our time in develop and evolve.

¹⁸ http://www.danwei.org/electronic_games/gambling_your_life_away_in_zt.php

References

- Brown, A. (2006). *The Poker Face of Wall Street*. New Jersey: John Wiley & Sons
- Caillois, R. (2001). *Man, play and games*. Champaign, IL: University of Illinois Press.
- Castronova, E. (2007). *Exodus to the Virtual World*. New York, NY: Palgrave MacMillan
- Huizinga, J. (1955). *Homo Ludens: A study of the play element in culture*. Boston: Beacon Press.
- Joker Club, L.L.C. v. Hardin (2007). *Gaming Law Review*. August 1, 2007, 11(4): 504-508.
- Kusyszyn, I. (1984). *The Psychology of Gambling: Annals of the American Academy of Political and Social Sciences*, pp. 133-145
- Malaby, T.M. (2003). *Gambling Life: Dealing in Contingency in a Greek City*. Urbana, Illinois: University of Illinois Press
- Malaby, T.M. (2007). *Beyond Play: A New Approach to Games, Games and Culture*, vol. 2, no.2, pp. 95-113
- Methenitis, M. (2007). *A Tale of Two Worlds: New U.S. Gambling Laws and the MMORPG*. *Gaming Law Review*. Aug 2007, Vol. 11, No. 4: 436-439
- McMillan, J. (1996). *Gambling Cultures: studies in history and interpretation*. London: Routledge
- Mäyrä, F, Montola, M. & Stenros, J. (2007). *Pervasive Games in Ludic Society: Proceedings of the 2007 conference on Future Play*, pp. 30-37
- Salen, K. & Zimmerman, E. (2003). *Rules of Play*. S.I.: The MIT Press
- Smith, J.F. & Abt, V. (1984). *Gambling as Play: Annals of the American Academy of Political and Social Sciences*, pp. 122-132
- Steele, D.R. (1999). *Gambling is Productive and Rational*. In R. Evans & M. Hance (Eds.), *Legalized Gambling: For and Against* (pp 224-234). S.I.; Greenhaven Press
- Taylor, T.L. (2006). *Play between Worlds: Exploring online game culture*. Boston, MA: MIT Press
- Unlawful Internet Gambling Enforcement Act (The). Retrieved from <http://www.govtrack.us/congress/billtext.xpd?bill=h109-4954>, 21 April 2008
- Walters, L.G. Esq. (n.d.). *Breaking down the UIGEA: Did Congress kill internet gambling?* Retrieved from http://www.firstamendment.com/breaking_down_the UIGEA.html, 21 April 2008