

2008

## Commentary on the Law of Poker

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### Recommended Citation

Charles R. Nesson & Andrew M. Woods, *Commentary on the Law of Poker*, 8 Rich. J. Global L. & Bus. 11 (2008).  
Available at: <http://scholarship.richmond.edu/global/vol8/iss1/4>

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## COMMENTARY ON THE LAW OF POKER

*Remarks* by Charles R. Nesson, B.A., J.D.,<sup>1</sup> and  
Andrew M. Woods, B.A. J.D.<sup>2</sup>

Given at *Richmond Journal of Global Law & Business Symposium: Online Vice: Legal Issues in Online Gambling*, conducted at the University of Richmond School of Law, Richmond, Virginia, March 19, 2008.

*Transcribed by:*  
*Richmond Journal of Global Law & Business Staff*

### INTRODUCTION BY PROFESSOR MELANIE HOLLOWAY<sup>3</sup>

Charles Nesson is a professor at Harvard Law School, where he founded and is faculty advisor for the Birkman Center of Internet and Society. He is a graduate of Harvard and Harvard Law. Professor Nesson is leading efforts to legitimize using poker as a way to teaching strategy and life skills. Professor Nesson has publicly criticized Massachusetts Governor Patrick's Casino Bill that makes it a crime for individuals to play poker on the Internet. Professor Nelson is president of the Global Poker Strategic Thinking Society.

Andrew Woods is the Executive Director of the Global Poker Strategic Thinking Society and a graduate of Harvard Law School. While an undergrad at UCLA, Mr. Woods founded the first officially run student organization devoted to the teaching of poker in the United States.

The Global Poker Strategic Thinking Society views poker as an exceptional game of skill, which can be used as a powerful teaching tool in all areas of academia and in secondary education. The concept is to use poker to teach life skills, strategic thinking, geo-political analysis, risk assessment, and money management. The goal is to create an online curriculum centered on poker that will draw the brightest minds together, both within and outside the traditional university setting, to promote open education and internet democracy.

It is my pleasure to introduce Charles Nesson and Andrew Woods.

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## NESSON AND WOODS COMMENTARY

**Professor Charles Nesson:** It would seem so logical for the economists, especially, to distinguish games of skill from games of chance. The games of chance are played against the house and the games of skill are played against people around the table. Why wouldn't the economists be careful, not to just sweep poker along with all those casino games? What I hear [some] saying is, beware of the machines, beware of the slots, and beware of this video, audio, visual, musical industry that has as its objective the addiction of the people to poke the button until their wallets are empty. That does not describe poker. Why don't we see the economists making a distinction carefully between different kinds of gambling, especially when the distinction is so obvious in front of them?

**Andrew Woods:** I think this is a very important question. This is actually something Professor Nesson and I were, just yesterday, at the Massachusetts State House testifying on a casino gaming bill that is pending before the legislation there, were discussing. One of the issues that were brought up was the fact that gambling is often seen as kind of this lump thing. But there are so many nuanced versions of it, whether it's State Lottery, Bingo, or slot machines. I think what you are saying is "Do not be tricked by the enormous amounts of PR and advertising that the casino industry puts into increasing TOD or Time on Device." This advertising is meant to increase the amount of time that a player sits in front of a slot machine, putting money into it. They hire psychologists and statisticians and everyone else in the world to maximize the amount of time that somebody sits in front of a slot machine putting in money. I think that was the concern and is a valid concern relating to poker. I do run the Poker Strategic Thinking Society, so I have about as many dogs in this fight as you could have. For our purposes, we look at the game as existent in a zero-sum environment, maybe even a negative-sum environment if you want to include the interest rate charged by the facility to provide the game. The skill of the individual player determines who wins or loses over any period of time. When I look at a game like that, I think it makes people uncomfortable because it takes all the elements of our society and brings them to the absolute forefront. In the stock market, when you buy something, you are hoping to get it at a good price so you can sell it later. When you speculate in real estate, you are hoping that the person you buy it from does not realize its value until later. Poker takes all of those elements and brings them to the front. It teaches you that lying is sometimes a necessary element of life. But at the very least, being able to recognize a lie is an absolute imperative element of life. I think that poker brings those to such a forefront in this closed environment that it makes people just feel uncomfortable. But I think when you deal with that, and you deal with the fact that poker has grown up

in this neighborhood of craps and slot machines and everything else, that you run into a situation where just it feels kind of wrong, right?

**Nesson:** Alright, now you get to ask me a question.

**Woods:** I would love to. See this is the best part, by the way, of coming back to a law school with one of your professors. With the Socratic Method, you very rarely get to ask your professors questions. Professor, today we have watched a propaganda film and we have listened to Professor Rose take us through the history of gambling. We saw where gambling is coming from, where it is, and some very specific projections of where it is going. We heard a warning voice from Professor Kindt. But what do you think? You are mixed up in a lot of things. You have been mixed up in a lot of things throughout a lot of your career. Why poker? Why now?

**Nesson:** I think it has to do with the truth and a way of seeing truth. It also has to do with an acceptance of an idea of truth that has two sides or a willingness to see sides from a different point of view. I think that is the idea of poker thinking. It is a form of strategic thinking. It is just a wonderful game. It is a lot of fun. It is profound and amazingly accessible. You can teach people to play it within an hour and it appeals to everyone, every age, race, and gender. It just has such a nice balance of judgment and interplay of thought. It is just a marvelous game. It also pays its way. Poker is a good business. Bottom line, poker is an excellent business. It is a three billion dollar business, bottom line. We are waiting for the government to solve the puzzle of the illegality of poker in the United States.

**Woods:** But, at what cost? I mean, we have heard a lot about social costs and undeniably there are some. People will lose money. There are some people who will be compulsive. It would be negligent if we did not talk about that.

**Nesson:** Well, the first cost you think about is addiction. And once again, that seems to be a problem of confusion. It does not make sense to me, as a poker player, that somehow you become habituated to losing everything and you are just addicted to doing it. It just does not make a lot of sense to me. Maybe some people are just that crazy, but I doubt that this is a serious social problem. And there is so much benefit to be derived by using poker to drive the curiosity of students.

**Woods:** Wait, let's back up a second to one of the larger issues that keeps being brought up. We're here to talk about gambling and the law. Is poker illegal?

**Nesson:** It depends on whether you have any balls. The Department of Justice says it is illegal. It says it is illegal based on a legal analysis that is so unsatisfactory that it puts directly in issue questions of prosecutorial misconduct. Prosecutors are threatened to indict when they do not have a clear statute to use as a guideline. That is fundamentally against the idea of due process. Yes, the prosecution has gotten very used to using these indictment threats, with huge long jail

terms and RICO charges as coercive means for obtaining guilty pleas and fines and using this mode of intimidation. That is why I'm curious as to who is actually behind this. I would like to speak to them. I would like to be able to identify them. We've just been through this thing in Massachusetts – we are still very much in the middle of it – where Governor Patrick introduced three resort casinos as a proposal. Buried down in this resort casino bill is a provision making it a crime punishable for up to two years in prison to play online poker. It does not just target explicit poker. Instead, they broad brush and go after all online wagering. No distinction is made between games of skill and games of chance. This is buried in the bill and was not mentioned when the bill is presented to the legislature. The Governor's aides did not even know about it. The bill provision was put in there at the behest of a state Attorney General with, I suspect, a connection to this incubus in Washington that is somehow after online poker.

**Woods:** I guess what we are facing here is a situation. We have the Federal Wire Act that appears to hit sports pretty square on. It may or may not attach to poker. I think, as Professor Rose indicated, no poker player has ever been indicted or prosecuted under the Federal Wire Act. There is the UIGEA, which simply blocks financial transactions and somehow bars them as we saw in our video and heard from Professor Rose. Now we have these state efforts, but we do not really know from where this pressure is coming. You say there is no danger? So, I guess the question remains. What did you say? There is no social danger and no addiction? It doesn't make sense that there would be people addicted?

**Nesson:** No, I do not think I said there was no social danger. . .

**Woods:** Excuse me, I misquoted.

**Nesson:** But I would like to be able to see the dangers articulated. With the amazingly rich databases of information that are now available about a variety of different forms of gambling, there should be a study completed on the social dangers of gambling. Howard Shaffer is the first guy who has come close to any kind of actual data work. There is a tremendous amount to be known. We should not start from the idea that we are talking about gambling. We should start with the idea that we are talking about the Internet and its highest and best use. The premise is that the best use is for teaching and education. When we figure out how to put out a stimulus into that network environment and get a response that comes back in a way that one can integrate and aggregate and then respond back to, that will be a powerful communications environment. It is exactly the opportunity to try and use that medium to teach poker thinking, and to actually use the environment to get the message out in the form with which people can connect. That is the driving interest.

**Woods:** So I guess I have one final question for you before time is up here. Why should we care? Why should anyone here care about this at all?

**Nesson:** I do not know. There are so many different reasons. First of all, I think that this is a wonderful set of issues. People like to think about gambling. People have experience with gambling. People have feelings about it because it is a totally accessible subject. I would love see Presidential candidates actually talk about an accessible issue that involves the kind of judgments that these gambling issues pose. So it is just a wonderfully fun issue in which to be involved. At the personal level, I am a teacher and this is what I teach. Alright?

**Woods:** Alright.

**Nesson:** Alright, I'd love to get the audience in. Go.

**Audience Member:** I've got a question for Professor Nesson. I definitely agree with the point that you cannot have this game without some money being involved and I am all for playing poker online. I have never heard this argument that it can be differentiated between the slot machines. If there is a skill factor, I find that it is more prevalent in face-to-face poker. I was wondering if you could make that distinction based on the feedback that you are getting. To me, online poker seems more like the slots because you are not getting the instant feedback. But, in face-to-face poker, you are getting recognition from another player.

**Nesson:** I think Andrew may be better than I to answer this question, but my feeling is that the two are quite different. Face-to-face poker definitely has this interpersonal, confrontational element to it. This makes it a really traumatic emotional experience. During online poker, you are not looking for tells. Online poker serves as a kind of school, in the sense that you can play for tiny money and earn your way forward. You get to basically practice and become familiar with the game. It is quite remarkable training. It is a very well-gradated process of advancement as you earn your way forward.

**Woods:** If I could add on to that, I would say that the primary difference between poker and playing any other house game is quite simply that word "house." When you play a poker game, you are playing in a game against other people. When you are playing against the house, you are mathematically guaranteed to lose, unless you employ some sort of advantage play. In poker, no one has a mathematical edge on you. The game is fundamentally played between two people who both have an equal opportunity to win and the advantage changes as the game goes on. But it has always been played between interested players with a disinterested house that is simply charging a fee for providing the game. They have no incentive in anyone losing. In fact, their interest would be in everyone breaking even every day because they take a percentage of the pot as the game goes on. If people are losing, then they are losing customers. Their ideal would be for everyone to

play every day and not make or lose any money, because every time somebody makes money, somebody else loses money. Just like in the market, if you sell a stock, somebody else has to buy the stock. So that is how poker works. The way to distinguish it from online poker and a slot machine is that precise distinction: you are not playing the house, therefore you are not guaranteed to lose.

To answer the second part of your question, the degree of skill required for online poker is probably greater than that required for face-to-face poker. I believe this because it requires a much more disciplined application of mathematical principles in order to be successful. In real world poker, people often put a disproportionate value on the information they have. They think because a guy's face twitched, he has got a royal flush and they have to fold. Or they think they know the type of player the guy is because they have seen him play three hands over the last hour. People put huge value on basically worthless information when they are playing face-to-face. Online people know they do not have that information, so they have to gather what stimuli they can. They have to play to mathematics and probabilities. Any successful player has to become fluent in a form of communication that is becoming more and more prevalent in today's world: the ability to discern what information you can from faceless communication. You are get signals from emails, IM chat room, how long it takes to get responses back, etc. What it really comes down to is a player's employment of the basic strategies and strategic thoughts behind poker playing.

**Nesson:** Can I make a suggestion? Can we get Frank into this somehow? I hate that he is sitting over there and we have not heard anything from him.

**Professor Frank Vandall:**<sup>4</sup> I would like to say that I think that there may be a distinction between the house poker and online poker in that it seems that online poker is entirely unpredictable. The house changes its percent and may not even pay out. You have these variables that Andrew was talking about, but it seems to be that the concern is fraud. I believe that the big push by reformers is for the legalization of all casinos and tribes in the United States to run Internet gambling.

**Woods:** There is another difference that goes along with the danger of addiction. I know somebody who plays eight hands at a time. Set up two monitors who can have four on each one and he is playing Internet poker about the same way someone would be playing video poker. That is a video poker machine. It is much easier to get addicted to something when you are playing four and eight hands at a time. It is

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<sup>4</sup> B.A., J.D., L.L.M., S.J.D. Professor of Law, Emory University School of Law, Atlanta, Georgia.

like playing a slot machine. There are more stories about people getting addicted to video poker because people get addicted to the Internet and gambling on the Internet. There are more people addicted to online poker than face-to-face poker.

**Vandall:** I do not think you can say that playing eight screens is like playing slot machines. The reason I do not think you can say that is because with the slot machine, if you were playing the equivalent of eight screens, you would be poking the button eight times faster. There is no skill whatsoever involved. You cannot purposefully win or lose because you can only push the button. With eight screens, you are making lightning judgments of a probabilistic nature, assessing an environment, and you're using your brain. The two situations are totally different.

**Woods:** Let me add to that by just saying one thing. I do not think we are necessarily arguing the exact same thing here. It is certainly possible to play poker without thinking about it or learning from it. I do not want to oversell our point by saying that poker is a magic bullet and we can all go home now instead of finishing the rest of law school and you will still be fine on the Bar. All I'm saying is that. . .

**Vandall:** Bill Gates did pretty well. He did not take the bar, that's true, but he apparently played his way through Harvard until he got thrown out for playing poker.

**Woods:** [laughter] He didn't get thrown out for playing poker.

**Vandall:** Well what did he do? No, no, not for playing poker. . .

**Woods:** No, I know.

**Vandall:** But he didn't . . . well, never mind. Just real quick, I was comparing playing a video poker machine to playing face-to-face poker. I do think that there are societal issues that have affected policy.

**Woods:** There are certainly speed issues. Now, I think in a regulated environment, there would be a potential to certainly deal with those issues. I know for instance right now if you log onto Full Tilt Poker, they have deposit limits of like \$600. The maximum that you can put in is \$600 per month for the first year that you have account. Also, you cannot spend more than \$100 a week for the first month. This is because Full Tilt Poker is trying to become legalized. They are trying to self-regulate to show how responsible that they are. They are trying to slow it down because they recognize that speed is a particular concern. That is not to say that it is impossible to play quickly, skillfully or that people who play quickly are necessarily addicted. I just think that it is a valid concern that needs to be addressed.

**Audience Member:** I am really interested in why you are dissecting one point in particular. This is from earlier. There is a point in transition that we were discussing between playing poker for chips and playing poker for money. What are the benefits of this transition? What can you learn from poker with money that you cannot learn from poker without money?



**Woods:** We run this organization called Global Poker Strategic Thinking Society, which is a really short name that really rolls off the tongue. We tossed around several names for this organization. We were going to call it “Poker University,” but that did not really capture what we were trying to do because “Poker University” sounds like we are going to teach you how to play better poker and that is not what we are interested in. “Strategic Thinking School” just sounds nerdy and not fun. The Poker Strategic Thinking Society really captured what we were doing. Since we wanted to do it online, we called it the Global Poker Strategic Thinking Society. I thought this was a horrible name, but by the time I told Professor Nesson that I did not like it, he had already ordered the stationary. In our organization, no one gambles. We do not allow gambling because we were concerned about the social problems. We have not had adequate time within our organization to figure out ways to maximize protection for our students. This is partially because the political climate in the United States would not be amenable to us starting chapters of our organization at campuses from coast to coast if we were gambling. What we have found is that students will play poker, will take it very seriously, and will spend a great deal of time thinking about what they are doing if you attach appropriate value to their success. We have poker tournaments and we build the collegiate rivalries between the two poker teams so that winning becomes something that is desirable. We bring media attention to it. However, it takes a tremendous amount of effort to do that in order for the students to get enough feedback to justify really putting in time and thought to the skills that they are developing, why they are developing those skills, and how the poker situations help them. If you input the tiniest bit of money, nickel, dime, students’ attitudes change immediately. Even though the money aspect certainly increases all the other social concerns that are very valid, it is the cheapest way possible to communicate these lessons.

When you play only for chips, you have no capacity to put another player’s position at risk in a way that person actually cares about. So, you cannot bluff. Without the bluff, the game evaporates. As soon as you introduce some value in the chip, it does not even have to be money, people begin to care. As soon as you are playing for something that puts value on the chips, the essential element of the game is there. It can be just a few pennies or a lot of money. Any value will establish this competition and this competition brings a lot to the game. You can learn things from both methods. It a very valuable lesson to learn that you cannot bluff when you are just playing for chips.