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The Role of Ethics in Regulatory Discourse: Can Market Failure Justify the Regulation of Casino Gaming?

Neil M. Browne
Bowling Green State University, nbrown2@bgsu.edu

Virginia Morrison
University of Nebraska College of Law

Kara Jo Jennings
University of Nebraska College of Law

M. Neil Browne*
Virginia Morrison
Kara Jo Jennings

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* Distinguished Teaching Professor of Economics, Bowling Green State University; B.A., University of Houston; Ph.D., University of Texas; J.D., University of Toledo.

I. INTRODUCTION

Casino gaming, like any other exchange activity, is in the midst of a conflict among ideas that shapes the extent to which casino owners can design, market, and profit from their personal choices, free from any interference[1] from external voices that represent the various constituencies in the community who are affected by those choices. Our very representation of who we see ourselves to be either strengthens or weakens the arguments for casino gaming as just an ordinary set of transactions between willing sellers and equally willing, maybe even eager, buyers. If we view the self as solitary and atomistic, it follows that markets provide the superior process to effectuate the freedom and personal responsibility consistent with that view of the person.

However, other views of the self as embodied or interwoven[2] suggest a more communitarian approach to the provision of any good or service. Market transactions that focus on the benefit-cost calculations of prospective buyers and sellers are seen from this perspective as disappointingly narrow. Many people affected by whether a particular exchange occurs are ignored because the eventual price, output, and product quality decisions are presumed to be a private affair. The communitarian self, once it is accepted as descriptive, points to the market as an ethical step-child for some purposes, but antagonistic to ethics with respect to the buying and selling of other phenomena.[3]

Debates about public policy, however, rarely focus on ethical arguments. The prevalence of Enlightenment thinking in contemporary discourse all too often relegates ethical reasoning to the realm of the irrational. Economic arguments, on the other hand, are seen as calculating and definitive. As a result, those who advocate and resist additional regulation of gaming tend to word their claims in the rhetoric of commercial activity. Job creation, externalities,[4] and local economic

1. *See generally* David George, *The Rhetoric of Economic Texts*, 24 J. ECON. ISSUES 861 (1990) (discussing how the very use of the term "interference" suggests the legitimacy of untrammeled market freedom, thereby causing political and judicial voices to be seen as interlopers, disrupting the optimal level and form of commerce).
2. See AMITAI ETZIONI, THE MORAL DIMENSION 8-9 (1988), for a discussion of the self as an agglomeration of "meness" and "weness" by which he means an egoistic and a caring component.
3. See ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 68-109 (1997), for a discussion of the dangers of extending market logic into domains where the social impacts of the resulting exchanges would be damaging to our metapreferences.
4. As we will see later in the paper, even arguments about the addictive quality of casino gambling or allegations of increased crime activity tend to be phrased as "externalities," the economics term for impacts that spread out into the community, far beyond the effects on the primary parties to the exchange. More concretely, if I gamble repeatedly and consequently am pressured into antisocial behavior toward you, my gambling activity, although it may have looked on the

growth or deprivation constitute the language and thus the boundaries of the discussion.

This paper attempts to argue on behalf of greater attention to the ethical nature of markets and regulation. The strategy is to demonstrate the intellectual poverty of the economistic approach[5] to regulatory discourse, at least as it applies to casino gaming. The excitement of regulatory forces, who wish to restrict the market activities of casinos, at the recent victories of those wishing greater regulation of the tobacco industry are shown to be inappropriately extended to casino gaming. To make this point, we demonstrate that casino gaming is no more a justifiable regulatory target on economic grounds than would be shopping, an activity whose market legitimacy is taken for granted.

II. PUBLIC POLICY AND CASINO GAMING

If we were to create a list of words that describe gaming, we would surely include excitement, anticipation, entertainment, and chance. However, some would argue that we should add the following words to our list: moral hazard, crime, waste, and detrimental. Controversy surrounding gaming has existed for hundreds of years.[6] In the early 1960s gambling was illegal in all but a few states.[7] Today, three decades later, however, some form of gambling is legal in most states;

surface as just a personal decision between my friendly casino and me, can be said to have produced an externality. Whether such a result triggers regulation is discussed in terms of the comparative monetary impact of the regulation and the lack thereof. That such impacts can be discussed in terms of their enhancement and harm to particular value commitments should be readily apparent. But the resulting moral discourse is apparently much more jarring to our ears.

5. See J. Kevin Quinn & M. Neil Browne, *Economism, Pragmatism, and Pedagogy*, 30 EDUC. PHIL. & THEORY 163 (1998), for an explanation of economism as a general phenomenon by which the rhetoric of economics is applied to anything and everything, including schools, friendship, and body organs.
6. *See* WILLIAM N. THOMPSON, LEGALIZED GAMBLING 63-73 (1994). In 1835, "[a] vigilante committee [of gambling opponents] torch[ed] the gambling dens of Vicksburg, Mississippi and lynch[ed] five gamblers." *Id.* at 65; *see also* NATIONAL INST. L. ENFORCEMENT & CRIM. JUST., U.S. DEPT. OF JUST., THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976, at xxiii (1977). The reasons for early criminalization of gambling were diverse. One statute in 1541 sought to restrict gambling to promote the arts of war. *See id.* at 6-7. Then in the late seventeenth and early eighteenth centuries, statutes restricted collection of gambling debts and cheating at cards in an effort to protect the landed gentry. *See id.* at 13-16. In early New England, gambling was restricted to curtail idleness. *See id.* at 39-41. The authors note that "[t]he early colonists opposed any unproductive use of time," and game-playing was lumped with "dancing, singing, and . . . unnecessary walking on Sundays." *Id.* at 41-42. However, later statutes in Massachusetts, New York, and New Jersey in the early eighteenth century focused on other problems such as "the welfare of innocent families, public safety, and juvenile delinquency." *Id.* at 46.
7. *See* Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L. REV. 579, 586 (1997).

only Hawaii and Utah continue to outlaw all types of gaming.[8] Casino gambling, in particular, has expanded from Las Vegas and Atlantic City to riverboats in the Midwest and Indian reservations throughout the country.[9] Now present in twenty-nine states, casino profits and attendance continue to climb.[10]

Gambling[11] is now the number one entertainment attraction in the United States, far surpassing the movie and music industries in profits and cash flows.[12] An estimated sixty-one percent of the adult pop-

8. *See* Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 303-04 (1995). Hawaii and Utah will likely find the prohibition of gaming more and more difficult to enforce as the Internet brings the opportunity to gamble into people's homes. *See The Gambling Impact Study Comm'n, 1995: Hearing on S. 704 Before the Senate Comm. on Governmental Affairs*, 104th Cong. 73 (1996) [hereinafter *Impact Study Hearing*] (testimony of Robert Goodman, Dir., U.S. Gambling Study).
9. *See* Ranjana G. Madhusudhan, *Betting on Casino Revenues: Lessons from State Experiences*, 49 NAT'L. TAX. J. 401, 402 (1996) (noting that as of 1996, the six states that have river boat gambling are Illinois, Indiana, Iowa, Louisiana, Mississippi and Missouri); *see also Frontline: Gambling Facts and Stats* (visited Jan. 17, 1998) <http://www.pbs.org/wgbh/pages/frontline/shows/gamble/etc/facts.html> [hereinafter *Frontline Facts*] (on file with the University of Nebraska College of Law Library) ("The fastest growing industry in the world is Indian gambling. There are 150 Indian casinos in the U.S. as of May 1997. . . . Indian gaming is a $27 billion a year business in the U.S.").
10. *See United States Gaming at a Glance*, 18 INT'L GAMING & WAGERING BUS, Sept. 1997, at 19, 19 (surveying the types of gaming in each state: 16 states allow some form of casino gambling, and casinos located within American Indian jurisdictions are now in 24 states); *Las Vegas Convention and Visitors Authority*, (visited Feb. 7, 1998) <http://www.lasvegas24hours.com/general/gen_exsum1297.html> (on file with the University of Nebraska College of Law Library) (noting a 2.9% increase in visitor volume and a 10.6% increase in the "economic impact" of conventions).
11. *See* I. NELSON ROSE, GAMBLING & THE LAW 75 (1986). Nelson distinguishes between gambling, gaming, lotteries and wagers. *See id.* In the common law, gambling is identified by the presence of three factors: "1) a person pays [to another person] something of value . . . called consideration; 2) the outcome is determined at least in part by chance; and 3) the winnings are something of value." *Id.* In contrast, gaming is one form of gambling where the player must stake something to play an actual game against other players or the house. *See id.* at 76. Betting/wagering, as defined by Nelson, is the promise to give something of value upon determination of an uncertain event, whether or not skill is involved, and which involves forms of gambling that are not lotteries or gaming. *See id.* Nelson states that while such differences seem to be minuscule, the distinctions are significant under the law. *See id.* Notice, however, that if the courts were to interpret the definition of gambling literally, activities such as investing in the stock market and taking over another business would be illegal under common law. For simplicity, we use gaming and gambling interchangeably, as is convention.
12. *See* THOMPSON, *supra* note 6, at 41; *see also* Shannon L. Bybee, Jr., *Social, Economic, and Technological Trends Shaping The Future Of Gaming*, SC91 ALI-ABA COURSE MATERIALS June 25, 1998, at 479 ("In 1993, Casino Gaming Was The Beneficiary Of 3.6% Of Recreation Spending or .32% Of Personal Consumption Expenditures.").

ulation participates in some form of gambling each year.[13] The renewed prevalence of casino gambling in the past few decades is a result of a greater acceptance of the activity by the public[14] and an interest by policy makers who liken it to a pain-free tax.[15] Despite its popularity and burgeoning public acceptance, regulatory efforts to restrain the industry's growth remain zealous.

The National Gambling Impact Study Commission is the most recent example of such regulatory efforts. The purpose of the commission, established by Congress in 1996, is to examine the economic and societal impacts of gambling.[16] The commission had three years to prepare a comprehensive and unbiased report[17] and is scheduled to

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13. *See* Rose, *supra* note 11, at 169.
14. *See Harrah's Survey of Casino Entertainment* (visited Feb. 9, 1999) <http://www.harrahs.com/survey/ce97/ce97_acceptance.html> (on file with the University of Nebraska College of Law Library) (noting 92% of those surveyed feel that casino gaming is acceptable); Roberts, *supra* note 7, at 586; *Michigan Gaming Law* (visited Feb. 7, 1998) <http://www.michigangaming.com/overview.html> (on file with the Nebraska Law Review) (discussing how Michigan's public acceptance of gaming reflects the national trend).
15. *See* Roberts, *supra* note 7, at 586; *see also Frontline: Easy Money* (PBS television broadcast, June 10, 1997) (transcript on file with University of Nebraska College of Law Library) (quoting University of Nevada, Las Vegas Professor William Thompson: "There are phenomenal profits, phenomenal profits to be made. So there is a business incentive that is driving the spread of gaming. Also, politicians are greedy for what they consider to be free money. They consider gambling tax like money falling off of trees."). *But see* John Warren Kindt, *Legalized Gambling Activities as Subsidized by Taxpayers*, 48 Ark. L. Rev. 889, 891 (1995) (arguing that the "inherent characteristics of legalized gambling activities almost invariably create pressures for tax increases" due in part to increased social service needs).
16. *See National Gambling Impact and Policy Commission Act: Hearing Before the House Comm. on the Judiciary*, 104th Cong. 5-6 (1995) [hereinafter *Judiciary Hearing*]. Frank R. Wolf, a Representative from the State of Virginia, testified:

> The legislation is simple. It would charge the Commission to make an objective and comprehensive legal and factual assessment of gambling.
>
> This legislation does not outlaw gambling. It does not tax gambling. It does not regulate gambling. It merely recognizes that gambling is spreading throughout the country like wildfire . . . and it needs a hard look. This is our responsibility as Federal legislators to create a commission to bring together all the relevant data so that Governors, State legislators and citizens can have the facts they need to make an informed decision.

Id. at 15.

17. *See id.* at 6-7. Despite Mr. Wolf's proclaimed objective of providing an unbiased report, Barbara F. Vucanovich, a representative from the State of Nevada claims:

> The authors of this legislation go to great lengths to point out they want only to have a study to provide States with a much-needed, unbiased source of information before the voters or the legislature make the decision to legalize some form of gambling. What strikes me as odd, however, is the inflammatory statements which accompany this plea . . . .
>
> Despite the rhetoric to the contrary, the real agenda of this effort is a complete Federal prohibition of gambling.

report its findings this summer. While regulation comes in many forms, the most likely adverse outcome for the industry will be the imposition of federal taxes.[18]

Advocates of federal regulation argue that legalized gambling creates moral decay and destroys the lives of gamblers along with the gambler's families and loved ones. Many opponents cite gambling as a magnet that attracts corruption[19] and organized crime and encourages compulsive gambling and its accompanying social woes such as street crime, domestic violence, and bankruptcy.[20] Additionally,

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Id. at 38; *see also* Bruce Alpert, *Gambling Commission Infighting Slows Work*, THE TIMES-PICAYUNE, Sept. 7, 1997, at A36 (suggesting that the conservative make-up of the commission's members indicates that the report is not likely to be unbiased).

18. *See* Bronwen Maddox, *Hard Look at Both Sides of the Coin as U.S. Gambling Booms*, THE TIMES, Aug. 7, 1997, at 25. Heretofore, regulation of gambling has been relegated to the states via their constitutional authority to protect the health and welfare of their citizenry. *See* BLACK'S LAW DICTIONARY 1317 (4th ed. 1968). For a brief, concise account on how various states have chosen to regulate and legislate this activity, see Paul D. Delva, *The Promises and Perils of Legalized Gambling for Local Governments: Who Decides How to Stack the Deck?*, 68 TEMP. L. REV. 847 (1995). For a more comprehensive, historical compilation, see FLOYD J. FOWLER, JR. ET AL., GAMBLING LAW ENFORCEMENT IN MAJOR AMERICAN CITIES (1978).

19. *See* Stephanie A. Martz, Note, *Legalized Gambling and Public Corruption: Removing the Incentive to Act Corruptly, or, Teaching an Old Dog New Tricks*, 13 J.L. & POL. 453, 463-65 (1997) (arguing that corruption and the legalization of gambling go hand in hand). Martz warns that:

> Legalizing gambling will not eradicate this corruption, but instead will shift its focus from local law enforcement to state-level legislators and bureaucrats. Payoffs and gifts normally (although not exclusively) slipped into the pockets of corrupt police officers will decline, replaced by campaign contributions and promises of future benefits to licensing officials and other regulators. Whether legal or illegal, these practices still serve to undermine the public's faith in its elected officials. The important public policy point is that states need to be particularly concerned about gambling-related corruption because legalizing gambling allies the government with a seemingly corrupt industry.

Id.

20. *See* Rychlak, *supra* note 8, at 292. Rychlak discusses the impact casinos have had in Mississippi:

> On the negative side, personal bankruptcy is up, more Mississippians are becoming addicted to gambling, and crime is on the upswing. In some parts of the State the cost of living is on the rise, there are housing shortages, traffic problems have multiplied, drainage and sewage systems are strained, and social services are struggling to keep up with a growing homeless population. All the while the gaming industry is facing problems relating to over-saturation and is bracing for the impact of legalized gambling in neighboring states.

Id. (footnotes omitted). Rychlak also notes that "[t]here are at least five important non-economic impacts that the state must carefully consider when setting policy: the impact on people prone to compulsive behavior, the impact on children, the impact on poor people, the impact on crime, and the impact on the environment." *Id.* at 333 (citing DAVID WEINSTEIN & LILLIAN DEITCH, THE IMPACT OF many claim that casinos, which account for a large portion of the $550 billion wagered in 1996,[21] drain local economies rather than invest in them. Furthermore, opponents argue that gambling within a community causes crime to increase and leads to traffic congestion, results in skyrocketing of property values, and cannibalizes small businesses.[22]

These complaints are not exclusive to gaming. Indeed, some groups use similar arguments to support regulation of a variety of "questionable" activities, such as smoking. How good are these arguments for regulation? Should we be persuaded by these claims of moral decay or crime?

Why do we regulate any private market activity at all? This question can be answered by a review of market logic, which serves as the foundation for capitalism. Thus, in the first section of this paper, we consider the role of market failures in prompting regulatory efforts. Consequently, we can compare this set of reasons with the reasons offered for the regulation of gaming. We compare the reasons that *should be used* to convince us that gambling should be regulated to the

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LEGALIZED GAMBLING: THE SOCIOECONOMIC CONSEQUENCES OF LOTTERIES AND OFF-TRACK BETTING 8 (1974)). See *Frontline: Easy Money*, *supra* note 15, for an example of more extreme rhetoric and concerns regarding gaming. In this interview, Tom Grey of the National Coalition Against Gaming states:

> These guys are predators. I really believe that they've targeted the poor, they've targeted the elderly, they've targeted our young, all for the sake of making money. These are bottom-line guys and I'll tell you, the more I see of them, the more dangerous they become.
>
> . . . .
>
> Gambling's a predatory enterprise. It's come from the other side of the tracks and moved itself and put itself on Main Street.
>
> . . . .
>
> . . . They maximize the profit and they do nothing to minimize the pain because you and I, as citizens, have to take care of the pain.
>
> . . . The snake oil they peddle is economic development, painless revenue source and entertainment. They don't say, "But a lot of you are going to lose your lives. A lot of you are going to lose your homes." We're saying it's not good economics, it's not good public policy and it's not good for the quality of life.

Id.

21. *See* Madhusudhan, *supra* note 9, at 401-02 ("Casinos account for the bulk of total wagering in the United States. For instance, nearly 85% of the total wagered in 1994, or $407 billion, was on all types of casinos, including Indian casinos . . . . Since 1991, the number of states with some form of casino gaming has increased dramatically to 34."); *see also Frontline Facts*, *supra* note 9 ("Gambling has become a $40 billion dollar a year industry in the United States. . . . From 1974 to 1994 — 20 years — the amount of money Americans legally wagered has risen 2,800 percent, from $17 billion to $482 billion"); *Frontline: Easy Money*, *supra* note 15 ("Last year the wagers totaled more than $500 billion dollars, more than Americans spent on cars and houses combined.").

22. See M. Neil Browne & Nancy K. Kubasek, *Should We Encourage Expansion of the Casino Gaming Industry?*, 18 REV. BUS. 9, 10 (1997), for a brief overview of these alleged societal costs.

reasons that are used. Then, in the next section, we examine the arguments typically offered in support of regulating gaming.

We extend this examination of reason for regulation by arguing that typical reasons offered for regulating gambling could also be used to support the regulation of shopping. We make this analogy to demonstrate the problematic nature of the typical reasons given for the regulation of gambling. If gaming adversaries are convinced by their reasons supporting the regulation of gaming, they should be convinced by the same reasons that consumer consumption should be regulated. We conclude this paper by reviewing the burden of proof that must be met to regulate casino gambling.

III. MARKET FAILURE: WHY DOES IT PROMPT REGULATION?

Society faces the daunting task of answering three questions. How will resources be allocated? How will resources be distributed? Who has the power to make these decisions? Society may answer these questions through two methods: markets or the political process. We have chosen the market mechanism. Specifically, we look to capitalism, the economic system that relies on markets for resolving conflicts caused by scarcity.

Several assumptions about markets are characteristic of capitalism. Most importantly, the market is viewed as perfect, in the sense that consumers hold the power while the invisible hand guides market transactions.[23] As long as this perfect market functions, there is no need for government regulation. We can consequently enjoy the variety of benefits associated with the market.[24] This is so because consumers, rather than producers or the government, define the quality and value of products and services.[25] Furthermore, if producers want to be successful, they must be responsive to consumers.[26]

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23. Capitalist theory is "premised on the idea that the ultimate beneficiary of the economic process should be the consumer." M. NEIL BROWNE & JOHN H. HOAG, UNDERSTANDING ECONOMIC ANALYSIS 81 (1983). The authors further explain that:

> [P]rices represent *consumer* signals to producers concerning how many resources should be devoted to production of a particular good or service. Prices also provide consumers with information concerning the availability of resources for production. Consumer sovereignty refers to consumer control over what is produced and the form the production will take.

Id.

24. See JOHN H. MCMANUS, MARKET-DRIVEN JOURNALISM: LET THE CITIZEN BEWARE? 4-5 (1994), for a description of the benefits of markets.
25. *See id.*
26. *See id.*

However, if market failure occurs, the assumption of a perfect market is violated. Consumers no longer have the power assumed in the perfect market.[27] Consequently, regulation is needed.

Market failure is present when consumers, as a collective, do not receive what they desire because the market has not provided the optimal solution for them. Several market failures stimulate intervention, including: externalities,[28] asymmetrical information,[29] market power,[30] public goods,[31] and the unfair nature of the initial distribu-

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27. *See generally* Robert L. Heilbroner, Behind the Veil of Economics (1988) (discussing the hidden power dimensions in the market); *see also* John Kenneth Galbraith, *Power and the Useful Economist*, 63 Am. Econ. Rev. (1973).

28. *See, e.g.*, Christopher D. Stone, *What To Do About Biodiversity: Property Rights, Public Goods, and the Earth's Biological Riches*, 68 S. Cal. L. Rev. 577 (1995). Mr. Stone presents the positive and negative externalities as applicable to the environment and also discusses the idea of the earth as a public good. *See id.* Consequently, a gaming antagonist could argue there are negative externalities that result from participation in gambling activities. *See* discussion *infra* Part VI.B.

29. For a discussion of how preferences are formed as opposed to given, as assumed by neoclassical economists, *compare* Cass Sunstein, Free Markets and Social Justice 5, 7, 14-16 (1997) (arguing that peoples' decisions are based on whims, second-order preferences, aspirations, judgments, drives, and roles), *with* Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and other Economic Institutions*, 36 J. Econ. Lit. 75, 104 (claiming that preference endogeneity gives rise to a kind of market failure), *and* Kuttner, *supra* note 3, at 42-48 (discussing the multi-layered and often irrational preferences of consumers).

For an example of economic and legal analysis of asymmetrical information as it is applicable to the Rent-To-Own industry, see Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates vs. The Rent-To-Own Industry: Reaching A Reasonable Accommodation*, 34 Am. Bus. L.J. 385 (1997). Martin and Huckins also implicitly raise the issue of the unfairness of the initial distribution of assets because the poor are the primary customers of rent-to-own retailers (RTOs).

30. When a firm has the extent of control that allows them to earn economic profits, they have market power. In other words, when a firm earns anything beyond a minimal profit, it has market power. *See, e.g.*, Thomas G. Donlan, *Editorial Commentary: The Pursuit of Power*, Barron's, Mar. 9, 1998, at 63 (discussing Microsoft's battle with the Justice Department concerning allegations made by Senator Hatch that the software company is, indeed, a monopoly).

Opponents could also claim some states have created oligopolies by granting only a limited number of gaming licenses, thereby giving the license beneficiaries excessive market power. *See* Thomas Easton, *The Schumpeter Factor*, Forbes, Nov. 20, 1995, at 176, 176 (elaborating on the economic strategy for casinos that Mississippi has chosen, which is to allow a competitive market: "The strategy is in sharp contrast to other states that regulate casinos tighter than nuclear power plants, making them more like utilities than free-market businesses."). Some cities, like Detroit, have granted only a limited number of casino licenses, thereby creating an oligopoly, where the select firms have market power by virtue of their fewness. *See Michigan Gaming Law* (visited May 19, 1999) <http://www.michigangaming.com/detarc97.html> (on file with the University of Nebraska College of Law Library) (discussing the city of Detroit's selection process of the three casinos to be licensed for operation).

tion of assets. In economic thought, any market not purely competitive breeds inefficiencies and inflated prices for consumers. If a state is going to create this market power, then it should also intervene on the part of its citizens to ensure the business does not exploit its patrons.[32]

Consequently, strong reasons to regulate gaming should stem from market failures. Is this line of reasoning typical from those who wish to regulate gaming? What arguments *are typical* from those who wish to regulate gaming?[33] It is valuable to identify and examine the soundness of arguments used in determining gambling regulations in order to assure that gaming regulations reflect sound reasoning, respecting both public and private interests. As a means to this end, the next section of this paper will examine the arguments on one side of the gambling debate: those favoring tight regulation or prohibition of the casino gaming industry.

IV. COMMON ARGUMENTS USED IN SUPPORT OF THE REGULATION OF GAMING

This section, organized in five parts, begins by documenting arguments that explore the prevalence and impact of compulsive or prob-

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31. *See, e.g.*, Alan Randall, *The Problem of Market Failure*, 23 NAT. RESOURCES J. 131, 133-34 (1983) (arguing that the concept of nonexclusiveness and nonrivalry are more concise and understandable substitutes for the concept of a public good). For a more radical view of what constitutes a public good, see Nancy Folbre, *Children As Public Goods*, 84 AM. ECON. REV., May 1994, at 86; *see also* SYLVIA ANN HEWLETT & CORNEL WEST, THE WAR AGAINST PARENTS 93 (1998) ("[society] increasingly expect[s] parents to spend extraordinary amounts of [time], money and energy on raising their children when it is society at large that reaps the material rewards. The costs are private; the benefits are increasingly public.").
32. *See* George Sawyer Springsteen, Note, *Government Regulation & Monopoly Power in the Electric Utility Industry*, 33 CASE W. RES. L. REV. 240 (1983).
33. *See* J. Fred Giertz, *High-Stakes Game: Though Gambling Has Grown in Social and Economic Importance, State Leaders Haven't Found a Rational Policy to Regulate Legal Gaming*, ILLINOIS ISSUES, May 1996, at 33, 33-34. Giertz describes the various players in the gambling debate and their relative positions:

> [T]he politics of gambling is an exceedingly complex high-stakes game, fraught with conflicting claims by proponents and foes.
>
> . . . .
>
> . . . [T]here is little agreement among the parties about the magnitude of the costs and benefits of gaming.
>
> . . . .
>
> . . . Gambling opponents consist of a mixture of those who oppose gaming on moral grounds (such as church groups) and those who are presently benefiting from current gambling activities in the state. The existing riverboat license holders do not want their protected positions eroded by the entry of new ventures. Similarly, race track and off-track betting facilities, which have already been hurt by casinos, do not want additional competition for the gambling dollar.

Id.

lem gamblers. Compulsive gaming arguments identify populations at risk of becoming addicted to gambling as well as exploring the impact on those who are affected by problem gamblers, including addicts, family members, and surrounding communities. This discussion of compulsive gaming will segue into discussions of white collar and petty crime, followed by arguments that link casino gaming and organized crime. This section will conclude by documenting the economic impact of casino gambling, along with a brief discussion of the impact of casino gaming on the environment and politics.

A. Populations Affected: The Addict & the Family; Populations at Risk: Teens and the Elderly

Some of the most heart-wrenching arguments against casino gaming detail the repercussions of compulsive or pathological gambling.[34] Suicide, violence, child abuse, and neglect are all said to result from such addictions.[35] Statistics estimating the portion of the population susceptible to addictive gambling behavior vary significantly and range from one to eleven percent.[36] While the proportion of the popu-

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34. *See The Nat'l Impact of Casino Gambling Proliferation: Hearing Before the House Comm. on Small Bus.*, 103d Cong. 42 (1995) [hereinafter *Small Bus. Hearing*] (prepared statement of Jeffery L. Bloomberg, State Attorney, Lawrence County, South Dakota). Mr. Bloomberg tells the story of a pizza store manager with no previous record, who embezzled $45,000 and later committed suicide, and a sergeant in the U.S. Air Force "who, prior to gaming, [had] an exemplary ten-year military career . . . became hooked on slot machines and eventually murdered a casino operator in a desperate attempt to retrieve four hundred dollars in bad checks he had written to the casino." *Id.* at 47.
35. *See Small Bus. Hearing*, *supra* note 34, at 84 (prepared statement of Valerie Lorenz, Executive Director, Compulsive Gambling Center, Inc.) ("[C]osts resulting from compulsive gambling are broken homes, physical and mental health problems, increase in social and welfare services, indebtedness, bankruptcies, and crime."); *Of Suicides, Pawn Shops and Casinos*, TAMPA TRIBUNE, Dec. 20, 1997, at 14 (noting current statistics and studies which indicate the suicide rate is four times higher in casino towns than towns without casinos); *see also* WILLIAM THOMPSON ET AL., WISCONSIN POLICY RESEARCH INSTITUTE, THE ECONOMIC IMPACT OF NATIVE AMERICAN GAMING IN WISCONSIN 41-42 (April 1995); E.L. Grinols & J.D. Omorov, *Development or Dreamfield Delusions?: Assessing Casino Gambling's Costs and Benefits*, 16 J.L. & COM. 49, 54 (1996) ("Nevada has the highest suicide rate in the nation according to the 1995 U.S. Statistical Abstract, more than double the national average. It has among the highest divorce rate and rate of child death by abuse in recent years and among the highest rate of accidents per vehicle mile driven. Nevada is also notable in other problem statistics including school dropout rates and crime.").
36. *See* Martin Koughan, *Easy Money*, MOTHER JONES, July-Aug. 1997, at 32, 36 ("[H]aving a casino nearby has been shown in at least one state to increase the number of people with compulsive gambling problems from about 1 percent of the general population to 5 percent."); *see also Small Bus. Hearing*, *supra* note 34, at 83 (prepared statement of Valerie Lorenz) ("[A]dult gambling addiction has increased from .77% of the adult population . . . to as much as 11% in some states in 1993.") (citation omitted); Rychlak, *supra* note 8, at 338 (comparing industry esti-

lation addicted to gaming is relatively small, their numbers and impact on society, economically and socially, are quite extensive.[37]

According to Henry Lesieur, President of the Institute on Problem Gambling, five to six percent of the United States population has a gambling problem.[38] The President of the American Gambling Association, Frank J. Fahrenkopf Jr., offers a similar statistic, only in much more favorable guise. He states that ninety-five percent of this country's population does not have a gambling problem.[39] So what does it mean to have a "gambling problem"? Most often it is referred to as compulsive or pathological gambling. In 1980, the American Psychiatric Association updated its *Diagnostic and Statistical Manual* to include gambling as an impulse/control disorder not otherwise classified.[40] According to the Association, pathological gambling is a chronic and progressive failure to resist impulses to gamble, and includes gambling behavior that compromises, disrupts, or damages personal, family, or vocational pursuits.[41] Pathological gam-

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mates of a two to six percent addiction rate to other non-industry estimates as high as 15% of the population); Loretta Fairchild, *Gambling: Who Wins, Who Loses,* Bus. Neb., June 1996, at 1 ("Most spillover costs associated with gambling come from a small percentage of the population that gambles. Between 30 percent and 50 percent of the population never, or almost never, gambles. Most people who gamble can be considered occasional-bettors. The remaining 10 percent consists of heavy bettors, problem gamblers (2 to 3 percent of the overall population), and pathological gamblers (1 to 2.5 percent)"); *Small Bus. Hearing, supra* note 34, at 80-81 (prepared statement of John Warren Kindt) (asserting that increases in the number of pathological gamblers accompanies the increase in availability). In 1989 only 1.7% of Iowa's adults were gambling addicts, but after riverboat casinos were legalized, the rate of addiction more than tripled to 5.4%. *See* Rachael A. Volberg, Gambling and Problem Gambling in Iowa: A Replication Study 17, 31 (July 28, 1995).

37. *See Small Bus. Hearing, supra* note 34, at 83-84 (prepared statement of Valerie Lorenz); *see also* Robert M. Politzer et al., Task Force on Gambling Addiction in Maryland, Final Report 2 ("There are 50,000 pathological gamblers in Maryland . . . [and] another 80,000 problem gamblers in Maryland."); *see also* Rychlak, *supra* note 8, at 340-41 ("The problems associated with compulsive gambling are not limited to the personal downfall of the gambler. 'Economic losses from work absenteeism, bad debts, and crime [due to gambling problems] have been estimated at over $34 billion annually to our society.' According to some reports, every problem gambler negatively impacts between seven and seventeen other people and costs society approximately $52,000 per year.") (footnote omitted).
38. *See* S.C. Gwynne, *How Casinos Hook You,* Time, Nov. 17, 1997, at 68, 69.
39. *See id.*
40. *See* Richard E. Vatz & Lee S. Weinberg, *Refuting the Myths of Compulsive Gambling,* USA Today, Nov. 1993, at 54, *reprinted in* Gambling 167, 168 (Andrew Riconda ed., 67 The Reference Shelf No. 4, 1995).
41. *See* Henry Lesieur, *Compulsive Gambling,* Soc'y, May-June 1992, at 42, *reprinted in* Gambling 153, 155 (Andrew Riconda ed., 67 The Reference Shelf No. 4, 1995). A person is diagnosed as a compulsive gambler if he or she demonstrates at least four of these ten characteristics:

bling is possibly the most widely researched behavioral addiction today.[42]

While addicts are found among many demographic groups,[43] teens and seniors are said to be some of the fastest growing groups of problem gamblers. Studies exploring the prevalence and impact of compulsive gambling have found that among teens, gambling is considered one of the fastest growing addictions.[44] For older populations, this addiction can be particularly difficult, as many seniors are

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> 1) preoccupation with gambling . . . ; 2) needs to gamble with increasing amounts of money in order to achieve the desired excitement; 3) is restless or irritable when attempting to cut down or stop gambling; 4) gambles as a way of escaping from problems or relieving . . . feelings of helplessness, guilt, anxiety, depression; 5) often returns another day in order to get even . . . after losing; 6) lies to family or others to conceal the extent of involvement with gambling; 7) engages in illegal acts . . . in order to finance gambling; 8) has jeopardized or lost a significant relationship, job, educational or career opportunity because of gambling; 9) relies on others to provide money to relieve a desperate situation caused by gambling . . . ; 10) repeats unsuccessful efforts to control, cut back, or stop gambling.

Id. at 155; *see also National Council on Problem Gambling, Inc.*, (visited Jan. 19, 1997) <http://www.ncpgambling.org/> (on file with the University of Nebraska College of Law Library) ("Pathological, or 'Compulsive' Gambling, [i]s a progressive addiction characterized by increasing preoccupation with gambling, a need to bet more money more frequently, restlessness or irritability when attempting to stop, 'chasing' losses, and loss of control manifested by continuation of the gambling behavior in spite of mounting, serious, negative consequences.").

42. *See* Mark Griffiths, *An Exploratory Study of Gambling Cross Addictions*, 10 J. GAMBLING STUD. 371, 371 (1994).

43. *See Small Bus. Hearing*, *supra* note 34, at 83 (prepared statement of Valerie Lorenz) (noting that until the 1970s, compulsive gamblers were primarily white, middle-aged and middle-class males, but now are composed of more women, teens, elderly, and persons of various ethnic background and classes).

44. *Cf.* Richard M. Buchta, *Gambling Among Adolescents,* 34 CLINICAL PEDIATRICS 346 (1995) (indicating that 61% of female adolescents and 83% of male adolescents surveyed reported gambling); *see also* Darryl Zitzow, *Comparative Study of Problematic Gambling Behaviors Between American Indian and Non-Indian Adolescents Within and Near a Northern Plain Reservation,* 7 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 14, 14 (1996) (noting that "perhaps due to socioeconomic status, cultural issues, increased direct and vicarious exposure to gambling and gambling availability, that American Indian adolescents displayed greater frequency of gambling involvements, earlier onset of gambling experiences and greater tendency to exhibit problematic gambling behaviors"); B.A. Mordecai, *Lieutenant Governor's Legislative Council: Let's Promote Gambling, Kids* (visited Jan. 17, 1998) <http://www.siteone.com/religion/gcc05/g0596009.htm> (on file with the University of Nebraska College of Law Library) (referring to surveys made by the Harvard Medical School Center for Addiction Studies which showed: 1) that 70 percent of seventh graders in Massachusetts had bought lottery tickets illegally, and by their senior year, 90 percent had done so; 2) that 64 percent of high school students in Atlantic City had gambled illegally at local casinos; and 3) that children are twice as likely to become compulsive gamblers as adults); *see also* EXECUTIVE OFFICE OF THE GOVERNOR, CASINOS IN FLORIDA: AN ANALYSIS OF THE ECONOMIC AND SOCIAL IMPACTS 78 (1994).

on a limited income. Consequently, gambling can have a particularly harsh effect on their living standards.[45]

Whereas the impact of compulsive gamblers on themselves and society is quite negative, the gambling industry may be the one benefactor of this condition. Some estimate that compulsive or problem gamblers account for twenty-five percent of gaming profits.[46] It is likely that this significantly contributes to anti-gambling sentiment, particularly since the larger community primarily shoulders the costs of problem gambling. As addicted gamblers search for a means to continue gambling, costs associated with white collar and petty crime become the burden of the community. Therefore, proponents of regulation cite the problems within families and communities that stem from compulsive gambling.

B. Increased Crime Rates

The crime associated with gambling can be categorized into two types: 1) crime resulting from compulsive gambling behavior involving white collar crimes, personal property and other related crimes and 2) the infamous involvement of organized crime in the industry. Nearly every region that has acquired a casino has experienced an increased crime rate.[47] While some attribute this to increased traffic and tour-

45. *See* Rychlak, *supra* note 8, at 354 ("At least a quarter of casino patrons are estimated to be retired people. If they gamble away their income, they are left with no options but to sell their possessions to buy life's necessities.").
46. *See Frontline Facts*, *supra* note 9 ("Experts outside the gambling industry estimate that people with gambling addictions account for about 5% of all players — but 25% of casino and state lottery profits."); *see also* Fairchild, *supra* note 36, at 2 (noting a conservative assumption that the most active 10% of bettors in the population account for 65% of revenues); Grinols & Omorov, *supra* note 35, at 60 (noting that 52% of casino revenues come from the 4.11% of the population who are pathological and problem gamblers).
47. *See* Rychlak, *supra* note 8, at 331 ("A gas station owner said he has had to make everyone pay for gas ahead of time because people who lost all their money gambling would try to fill up their tanks for free in order to get home. . . . He told us that whereas last year the area had one bank robbery, this year there have been seven." (quoting *New Port Should Be a Blend of Both Old and New*, ST. PETERSBURG TIMES, May 16, 1994, at A9)); Carl G. Braunlich, *Lessons from the Atlantic City Casino Experience*, 34 J. TRAVEL RES., Winter 1996, at 46, 55 ("In 1977, before the first casino opened, the Atlantic City Metropolitan Statistical Area (MSA) ranked 50th among the nation's 257 MSAs in per capita violent and property crimes. In 1981 the Atlantic City MSA was ranked first."); Priscilla Painton, *Boardwalk of Broken Dreams*, TIME, Sept. 25, 1997, at 64 (noting that the crime rate in Atlantic City has increased to first in the state); *see also Maryland Attorney General Curran's Executive Summary on Casino Gambling* (visited March 1, 1999) <http://cecilmagazine.com/features/curran.htm> (on file with the University of Nebraska College of Law Library) (noting the crime rate increase in Mississippi, including fraud, embezzlement, violent youth crimes, and alcohol-related accidents; Atlantic City; New Orleans; Black Hawk, Co; and Deadwood, South Dakota); *see also* Carroll Bogert, *Fool's Gold in Black Hawk?*, NEWSWEEK,

ism, others find that explanation insufficient.[48] White-collar crime, such as insurance fraud, cannot be easily explained by increased traffic or tourism. This crime results most directly from the compulsive gambling behavior. Consequently, proponents of regulation suggest that the existence of crime in areas where gambling occurs is an adequate reason for creating regulations regarding the gaming industry.

Gaming has traditionally been associated with organized crime,[49] and although measures have been taken to assure the industry is free from the mob,[50] such fears linger in the minds of many. The shadow of organized crime continues and is reinforced with every report of alleged mob involvement in the gaming industry.[51] In spite of attempts

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Mar. 28, 1994, at 22, 23. ("Black Hawk expected a higher crime rate, and the town hired 22 new cops (up from one half-time marshal in the old days). But the residents weren't prepared for the kinds of crimes they are getting; in addition to assault and criminal mischief, says police spokeswoman Dixie Lovinger says '[w]e have an inordinate amount of urinating in public.'"); James Popkin, *A Mixed Blessing for "America's Ethiopia": Big-Time Gaming Helps But Is No Cure-All*, U.S. NEWS & WORLD REP., March 14, 1994, at 52, 56 (noting arrests for drunken driving were up 500% in Tunica, Mississippi since casinos arrived). Ed Looney, from The Council on Compulsive Gambling on New Jersey, states that "[t]eenage girls are forced into prostitution when they can't pay their gambling debt to the loan sharks. In 1976 Atlantic City had no prostitution problem, today it is a public health problem." *National Coalition Against Legalized Gambling* (visited Jan. 17, 1998) <http://www.ncalg.org/pages/ncalg01.htm> (on file with the University of Nebraska College of Law Library).

48. *See* Grinols & Omorov, *supra* note 35, at 55-56 (noting that the crime statistics for three of the largest U.S. tourist attractions (Disney World in Orlando Florida, the Mall of America in Bloomington, Minnesota, and Branson, Missouri, a country and western music tourist attraction) do not account for an increase in crime rate based simply on tourism and suggesting that the type of visitor or tourist impacts this data as well).

49. *See Statement on Casino Gambling* (visited Feb. 7, 1998) <http://www.flacathconf.org/B5/C3/D3/B5c3d324.htm> [hereinafter *Bishops' Statement*] (on file with the University of Nebraska College of Law Library) (containing a letter of opposition to legalized gambling written by Florida's Catholic Bishops).

50. *See* Roberts, *supra* note 7, at 593-94; *see also Frontline: Easy Money*, *supra* note 15 ("There was a time when casinos could not get bank loans because of their shady associations, but now the Mob is gone, tough regulation is in place and loans from institutional investors are pouring in.").

51. See *National Coalition Against Legalized Gambling*, *supra* note 47, for a significant sampling of anecdotal evidence regarding the continued existence of organized crime in casino gaming. The report quotes James Moody, former chief of the Organized Crime section of the FBI who states "[g]ambling itself . . . is probably the biggest producer of money for the American *la Cosa Nostra* [that] there is." *Id.* (citing *60 Minutes* (CBS television broadcast, Dec. 13, 1992)). The coalition also cites a 1991 report from the Illinois State Police Division of Criminal Investigation Intelligence Bureau:

> The commission's report provides examples of organized crime figures being involved in legalized gambling. The report refers to the conviction of three Chicago mob men . . . along with the leaders of the Milwaukee and Kansas City mob families for skimming money from Las Vegas casinos. . . .

by the casino industry to deflect the correlation between crime and casinos,[52] the connection remains in the minds of many, strengthening the idea that the gaming industry needs regulation.[53]

C. Economic Hazards of Casino Gaming

Those supporting and those antagonistic to the industry often hotly debate the economic impact of casino gambling. Those who prefer tight regulations, or even a ban of gaming, provide evidence of its negative impact on the national and local economies.[54] These figures

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> Another example cited involved two Chicago mob men who . . . were indicted in 1990 by federal authorities in Maryland for money laundering at a commercial bingo parlor. . . .
>
> In 1991, a reputed San Diego mobster and nine other men including the alleged bosses of the Chicago mob were charged with trying to infiltrate Indian reservation gambling operations in Northern San Diego County in order to skim prowl profits and launder illegal money. The indictment stemmed from a lengthy investigation by the FBI.
>
> Besides involvement in the management and investment areas of casino gambling, vending businesses have historically been a target for organized crime and often unscrutinized and unregulated. Obviously relationships with ancillary and vending services can affect key casino operations through influencing casino ownership, investment, management and finances. By controlling the supply of: alcoholic beverages, food and nonalcoholic beverages, garbage handlers, vending machines providers, linen supplies, maintenance service and construction companies. Casino management can be placed in a compromising position by organized crime.

Id.; see also Thomas Moore, *Regulator Still Vigilant Against Organized Crime*, LAS VEGAS BUS. PRESS, Feb. 17, 1997, at 6 (quoting Bill Bible, chair of the Nevada Gaming Control Board). In his interview with Thomas Moore, Mr. Bible warns against relaxing gambling regulations.

> Casinos are cash-rich institutions. So the industry requires an extra degree of diligence to keep organized crime away from them.
>
> . . . .
>
> I think you can say it's no longer at the core of the industry like it was years ago. It's probably more on the periphery of the industry involved in street crimes like loansharking. So those are areas where we need to increase our diligence.

Id.

52. *See* JEREMY MARGOLIS, ET AL., AMERICAN GAMING ASSOC., CASINOS AND CRIME: AN ANALYSIS OF THE EVIDENCE 68, *available at* <http://www.americangaming.org/> (on file with the University of Nebraska College of Law Library) (concluding that casinos have no meaningful impact on crime rates and evidence that indicates otherwise results from statistical alterations and anecdotal research).
53. *But see* Roberts, *supra* note 7, at 593 ("There appears to be no recent proof that organized crime, presumably existing in the form of large hotels and other publicly traded corporations, still infests the legal gaming business."). Roberts also proffers state control and federal government reporting and auditing requirements to prevent and deter any resurgence of organized crime. *See id.* at 594.
54. John Warren Kindt, *U.S. National Security and the Strategic Economic Base: The Business/Economic Impact of the Legalization of Gambling Activities*, 39 ST. LOUIS U. L.J. 567, 575-76 ("[W]idespread legalized gambling activities are . . . theoretically crippling the national economy. . . . [and] are inherently recession-

often include social costs associated with gaming, which include various expenses resulting from compulsive gambling behavior such as bankruptcy, petty crime, and family violence and unrest.[55] For example, Grinols and Omorov, who argue that gambling is a public policy issue and a regulatory matter because gambling addiction leads to direct costs on others,[56] estimate the social costs of pathological gamblers range between $15,000 and $33,500 per addict, or between $112 and $338 per adult each year.[57]

The costs extended to the community are not limited to social costs associated with problem gambling. Some argue, for example, that the negative economic impact of casinos includes increased cost-of-living expenses, housing expenses, and potentially devastating competition for local business vying for discretionary dollars.[58]

Even without the inclusion of social costs when calculating gambling's economic impact, some argue that gambling does not generate significant economic expansion in most communities and, at times, negatively affects local economies. *US News and World Report,* for ex-

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ary in nature. . . . [because of] modest increases in infrastructure costs, relatively high increases in regulatory costs, large costs to the criminal justice system, and social welfare . . . . These business/economic costs can easily translate into recessionary pressures . . . .") (footnotes omitted); *see also* Grinols & Omorov, *supra* note 35, at 58 (describing the economic impact of casino gaming specifically among Minnesota gamblers seeking help for gambling problems). Grinols and Omorov note, for example, that 66% of those surveyed attributed their problems to casinos, compared to only 5% who attributed their gambling problems to the lottery. *Id.*

55. *See* Grinols & Omorov, *supra* note 35, at 49 ("The social costs of expanded casino gambling . . . are between $112-$338 annually per adult. . . . Producer, consumer, and tax benefits are no greater than $56. Based on available data, therefore, casino gambling fails a cost-benefit test."); *see also* Politzer et al., *supra* note 37, at 2 ("Pathological gamblers cost Maryland and its citizens about $1.5 billion annually in lost work productivity and embezzled, stolen or otherwise abused dollars"); Kindt, *supra* note 15, at 898 ("[F]or every dollar legalized gambling activities actually contribute in tax revenues, taxpayers are really losing three dollars or more.") (footnote omitted). Kindt has also noted that the socio-economic costs associated with casinos are so large "that the drains on society could easily translate into a net loss of jobs . . . ." *See Small Bus. Hearing, supra* note 34, at 81 (footnote omitted); Fairchild, *supra* note 36 (documenting a study which estimated the social costs of compulsive gambling to range between $15,000 and $33,500 for each pathological gambler, for a U.S. total that exceeds $40 billion).
56. *See* Grinols & Omorov, *supra* note 35, at 51.
57. *See id.* at 56-57.
58. *See id.* at 64. The authors note that:

> [G]ambling is really a bundling of activities that includes a restaurant meal, entertainment, and a night out, as well as the gambling activity itself. Many of those who occasionally gamble, such as retired individuals, report that they do so because of the cheap food and drinks. The bundled activities compete with an abundant supply of close substitutes including restaurants, movies, concerts, sports events, excursion rides, the lottery and horse racing.

Id.

ample, analyzed fifty-five counties where casinos were established and found the economic growth that resulted was comparable to the rest of the nation.[59] A similar phenomenon has been documented in relation to employment: studies outside the industry have found there to be little or no net increase in jobs.[60] More significant may be the arguments that suggest the addition of gambling to a community merely funnels money into a black hole, actually draining local revenues and businesses.[61] This may result, in part, from an analysis of the source of gambling revenues. When local discretionary dollars account for a large portion of the money wagered, rather than tourist dollars, there is likely to be a reverberating impact on the local community.[62]

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59. *See* Joseph P. Shapiro et al., *America's Gambling Fever*, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 52, 56.
60. *See* Grinols & Omorov, *supra* note 35, at 76. After analyzing the effects of casinos on employment and unemployment by looking at data for 8 casino markets in Illinois, the authors note that in principle casinos had the potential, to reduce unemployment, increase employment, or both, but in practice had little or no effect, except in one or two cases. *See id.*
61. *See* Koughan, *supra* note 36. Koughan opines that:

    [Gambling is] a black hole that eats money without returning a socially useful product to the community. Take Joliet, Illinois, home to riverboat gambling since 1992. Unlike Las Vegas, where the vast majority of the gambling take comes from out-of-staters, in Joliet, 82 percent comes from the locals—who can then no longer spend that money in the area stores buying clothes or furniture or groceries.

    Id. at 36; *see also* Rychlak, *supra* note 8, at 331. Rychlak questions whether locals benefit from casinos at all:

    The [owners of the] casinos have not helped the local people very much. The owner of the motel where we stayed said that he could not get anyone to work for him because the casinos and big national hotel chains paid such high wages that older, small motels were being forced out of business. A gas station owner . . . sells almost no groceries or soft drinks because in the casinos, they are free. . . . The casinos are ruining local businesses . . . .

    Higher prices [push] people out of the housing market. . . . [T]he number of people in homeless shelters has grown, and Biloxi's soup kitchens are turning out more meals than ever before.

    To a certain extent, these negative economic impacts are nothing more than natural market adjustments to the birth of a new and vigorous industry in the state. It is now harder to hire people to build homes in the state, but one can hardly complain about full employment in the construction industry. Similarly, it is hard to feel bad about casinos hiring people at good salaries and thereby driving up the cost of labor for other employers. If rental prices are artificially high in some areas today construction will eventually meet the demand and prices will come back down. If certain industries are now less profitable, that is just a reflection of the market at work. These adjustments are simple economic growing pains, inconvenient and undesirable to those who are directly impacted, but not a valid basis for challenging the gaming industry. Social issues, however, are an altogether different matter.

    Id. (footnotes omitted).
62. *See* Fairchild, *supra* note 36, at 4-5. Fairchild cites the major reasons that casinos generate few local jobs:

Some argue against casinos based on the disproportionate impact they impose upon those with a lower socioeconomic status. Although existing evidence indicates that while lower-income people do not, in absolute amounts, spend more than middle-income people do on gaming, they do spend a higher percentage of the income.[63]

Other economic arguments against gaming are motivated by concerns of market saturation and its effects on local governments and communities.[64] Casinos have generated significant tax revenue upon which some states have become dependent to meet basic budgetary requirements.[65] As access to casinos increases with casino growth, the resulting market saturation can cause a decrease in casino profit and tax revenue, making casino tax revenues an unstable source of revenue.[66] Moreover, some fear that states will become desperate for revenue and may relax gaming regulations in order to expand the gaming industry whose success increasingly depends on cannibalizing dollars from other businesses and whose expansion will create serious future problems for other businesses and governments.[67] Thus, governments are at risk of motivation due to budgetary requirements rather than social or public benefit.[68]

> Riverboat-type casinos typically cater to local markets. Providing gambling to local residents simply transfers money from one local business to another and does not lead to a net increase in jobs.
>
> Casino revenues must be spent locally to have an effect on the local economy. Casinos that obtain large flows of revenues from regional and national markets but remove equally large flows do not enhance the local economy.
>
> Even when casinos spend locally, as is usually the case with payroll expenditures, it is possible that many employees may reside outside the local areas, hence, this spending is lost to the local economy.
>
> Workers hired may have come to the labor market from outside the area so casino jobs, while geographically local, are not necessarily held by locals who were residents before casino introduction.
>
> . . . .
>
> Private interests would find casinos profitable, but the public interest is best served by having none at all.

Id.

63. *See* Madhusudan, *supra* note 9, at 408.
64. *See* Rychlak, *supra* note 8, at 323; *see also Return of the Small Caps*, CASINO J. (visited Jan. 16, 1998) <http://www.casinocenter.com/journal/dec97/html/small_caps.html> (on file with the University of Nebraska College of Law Library) (discussing the impact of saturation concerns on the market).
65. *See* Giertz, *supra* note 33, at 33.
66. *See* Rychlak, *supra* note 8, at 323-25.
67. *See Small Bus. Hearing*, *supra* note 34, at 63 (prepared statement of Robert Goodman, Dir., U.S. Gambling Study).
68. *See* Kindt, *supra* note 54, at 578. Kindt sees a growing dependency on gambling revenues:

> A major result of market saturation has been a tendency towards more lax government gambling regulation and public subsidies to help competing private gambling operations survive. . . . [S]tate and local governments have been enticed by the initial tax revenues without considering

Many of these economic arguments against casino gaming note the Beggar-Thy-Neighbor politics and the Prisoner's Dilemma problems associated with the establishment of casinos in a community.[69] States must compete with each other to hold onto available discretionary dollars, as do localities within states.[70]

Identifying and weighing the costs against the benefits becomes quite complicated when many of the figures are unquantifiable and the ideas abstract, yet larger economic issues are at stake, according to Goodman and Kindt. Goodman suggests the increasing cash flow that funnels into the gambling industry impacts upon the financial well-being of the country as funds are diverted from savings and investments.[71] Kindt, however, frames this issue in more urgent terms, claiming our economic health and national security are at stake if wagers continue at current rates.[72] Ultimately, most would agree on the importance of considering economic and social costs in order to logically and effectively implement a policy regarding gaming.[73]

D. Environmental Costs of Casinos: Concern for the Environment

Casinos have a vast impact on the environment, just as they do on the economy. Concerns arise in regard to casinos' impact on wetlands,

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> the social and economic consequences. Funding specific state programs with gambling revenues has tended to make them gambling-dependent.

Id. (footnotes omitted); see also Rychlak, *supra* note 8, for a discussion of the necessity of monitoring gambling revenues:

> The decision to let the free market fix the number of casinos in Mississippi seems reasonable on its face. States do not usually limit other industries; competition will do that. However, the profitability of the early casinos will continue to lure more casinos into the state. With the dramatic impact that these casinos have had in given areas, there will be significant displacements as old ones close and new ones open. In addition, due to the regulatory scheme, it may be necessary to ultimately limit the number of casinos in order to maintain proper supervision. If the displacement issue becomes more serious, and especially as the industry begins to face competition from other states, look for pressure on the legislature to statutorily limit the number of casinos in Mississippi, as is done in most other states. There may be valid reasons to establish such a rule, but economic theory would suggest that consumers — patrons of the casinos — are best served by the wide open competition that now exists in Mississippi. This is an issue which needs to be monitored as the Mississippi gaming industry matures.

Id. at 325-26 (footnotes omitted).

69. *See* Grinols & Omorov, *supra* note 35, at 67.
70. *See Impact Study Hearing*, *supra* note 8, at 72 (testimony of Robert Goodman, Dir., U.S. Gambling Study) (noting the increasingly intense competition among states to attract each other's gambling dollars across state lines).
71. *See id.* at 73.
72. *See* Kindt, *supra* note 54.
73. *See* Grinols & Omorov, *supra* note 35, at 81-82.

flood planes, and local wilderness.[74] Conservationists argue that the costs of environmental destruction and degradation be included when determining the benefits of casinos.[75]

E. Political Contributions and Lobbying on Behalf of the Gambling Industry

Gambling opponents also note industry's extensive political contributions and lobbying activities as evidence of the powerful and controlling nature of the enterprise.[76] The number of lobbyists has grown from the pool of large casino interests in Vegas to include smaller riverboat owners and various Indian tribes. Each attempts to limit gaming in order to secure and protect their clientele from competition.[77] At times, opponents of gambling find themselves working with other gambling interests in an attempt to keep legal gambling out of certain jurisdictions. Most troubling may be the gambling industry's

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74. *See* Rychlak, *supra* note 8, at 331 ("The casinos . . . are simply swallowing up that entire beautiful coastline. The beach is going to disappear under casinos.") (footnote omitted).

75. *See id.* at 354 (noting a casino's impact is comparable to that of a small town, significantly straining the surrounding environment).

76. *See Frontline Facts, supra* note 9 ("Gambling interests have contributed $4.5 million to political parties and candidates at the federal level since 1991." (citing CENTER FOR PUBLIC INTEGRITY, 1996 REPORT)). The *Frontline* report notes that the money spent on federal lobbying is dwarfed by the amount spent at the state-level, as most of the laws regulating gambling are state laws. *See Frontline: Easy Money, supra* note 15; *see also* Koughan, *supra* note 61, at 35. Koughan reports that:

> A 1996 study by the Center for Public Integrity found that between 1991 and 1995, gambling contributions to federal politicians and soft money accounts amounted to $4.5 million. And gambling contributions are growing dramatically. The industry ponied up nearly $5 million for the 1996 election alone, a sum evenly distributed between Democrats and Republicans. But gambling money going to federal elections is only a small part of the story. . . . [T]he individual states (rather than the federal government) [primarily regulate gambling] and that is where the industry has handed out the bulk of its influence money. A Mother Jones investigation has found that over the past five years the gambling industry has spent more than $100 million in political contributions and lobbying fees to influence state governments.

Id. Koughan has also found that:

> Every move to regulate California gambling has been shadowed by an army of industry lobbyists. In just five years, gambling interests spent more than $7 million to lobby the regulation bills. The fight has been going on so long, in fact, that the players keep switching teams. This is Gene Irbin. Three years ago he was one of the authors of the attorney general's bill. This year he's a lobbyist for a Las Vegas casino.

Frontline: Easy Money, supra note 15; *see also Bishops' Statement, supra* note 49.

77. *See Frontline: Easy Money, supra* note 15 ("Native Americans are newcomers to the regulation debate. They support limits on gambling elsewhere in the state to protect the new and hugely profitable monopolies on their sovereign lands.").

attempt to cover all their bases and buy political influence from both major political parties.[78]

V. ARGUMENTS OFFERED BY PROPONENTS OF A MARKET APPROACH TO GAMING

As described in the previous section, in an attempt to argue for the regulation of gaming, some people cite problems ranging from compulsive gambling to deleterious effects on the environment. In discussions about gaming, certain analysts, eager to restrict casino gaming, have latched onto the social antagonism towards the tobacco industry. The argument made by these opponents is applicable to any addiction. The reasoning is that tobacco is now understood as the evil it is. Because society has finally recognized this, regulation has ensued. Gambling also is evil; *mutatis mutandis*, it should similarly be regulated.

To the credit of gambling opponents, certainly it is possible to find commonalties in the social ills associated with these two activities. Both are potentially addictive and produce negative externalities.[79] Likewise, both have moralistic opponents. Additionally, neither activity meets a clear social need.[80] Furthermore, gambling, like tobacco, is thought to be more prevalent among the poor.[81] There is one important distinction between gambling and tobacco, however, that makes the analogy deficient, especially for the purposes of arguing for regulation of the gambling industry.

78. *See* Meredity O'Brien, Center for Public Integrity, Place Your Bets: The Gambling Industry and the 1996 Presidential Election (1996). Steve Wynn, Chairman and Chief Executive Officer of Mirage Resorts, Inc., helped raise more than $1 million for presidential candidate Bob Dole and the Republican Party and also appeared with Bill Clinton at a fund-raising event in Las Vegas that raised approximately $500,000. Wynn reportedly pledged to raise or contribute a six-figure amount to the Democratic Party to support Clinton's re-election campaign. *See id.* at 1-2, 6-7.
79. For a discussion of the negative externalities associated with gambling, see *supra* Part III. *See also* Anita Bartholomew, *What You Don't Know About Secondhand Smoke*, Reader's Digest, July 1997, at 140, 142 (detailing the especially egregious side effects of secondhand smoke on infants and children, including asthma and ear infections).
80. *See* Paul A. Samuelson, Economics 398 (11th ed. 1980) ("[Gambling] involves simply *sterile transfers of money or goods* between individuals, creating no new money or goods. Although it creates no output, gambling does nevertheless absorb time and resources. When pursued beyond the limits of recreation, where the main purpose after all is to "kill" time, gambling subtracts from the national income."). The same criticism can be made of other recreational activities such as movie going and camping. Neither of these activities creates output, other than the utility (satisfaction) they create for their participants. Yet it is difficult to imagine someone suggesting these activities serve no purpose in society and should therefore be banned.
81. *See* Todd A. Wyett, Note, *State Lotteries: Regressive Taxes in Disguise*, 44 Tax Law. 867 (1991).

Unlike tobacco consumption, gambling does not cause lethal diseases, nor is there any harmful substance ingested into the body at the craps table.[82] Despite efforts by opponents to classify gambling as a chemical addiction, thus far the theory remains largely unaccepted. Sirgay Sanger, former president of the National Council on Problem Gambling, has admitted that "[p]athological gambling 'has the smell of a biochemical addiction in it, but. . . .there is no research proof.'"[83]

What is also problematic about comparing gambling to tobacco is that gambling adversaries face the difficulty of proving causality between gambling and its alleged social ills. Although gambling is believed to increase the level of crime within the community in which it operates, the reasons for the increase are not easily explained.[84] Unlike gambling, doctors can prove tobacco causes lung and mouth cancer through empirical research and analysis. The tar build-up on the lungs of a smoker is visible. However, it is not as simple to directly relate gambling to, for example, crime or family and marital distress because it is uncertain whether these problems would exist even if gaming opportunities did not. Therefore, claims that an addition to gambling is similar to a tobacco addiction are, for now, precarious. Ardent opponents of the gaming industry must do more than use weak, faulty analogies to meet the regulatory burden of proof.

VI. WHY AREN'T WE ARGUING FOR THE SIMILAR REGULATION OF SHOPPING?

In the previous section, we demonstrated that the arguments associated with the regulation of tobacco are not necessarily transferable as arguments for the regulation of gaming. Still, many people strongly support the regulation of both tobacco and gaming. In this section, we examine other behaviors that could be regulated *if* one accepts the reasoning typically given by the proponents of gaming regulation. Specifically, we suggest that many of the problems often associated with shopping are similar to the problems associated with gaming. Yet, we do not hear arguments supporting the regulation of shopping. Instead of arguing for the regulation of shopping, many

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82. *See generally The War Against Smoking: Has It Gone Too Far?*, CURRENT EVENTS, Sept. 5, 1994, at 2a-2d (specifying reasons for regulating smoking).

83. Vatz & Weinberg, *supra* note 40, at 169 (reporting on a 1989 study published in *The Archives of General Psychiatry*, which "found that 17 heavy gamblers had neurochemical elevations correlated with their 'extroversion.'"); *see also* Alec Roy et al., *Extraversion in Pathological Gamblers*, 46 ARCHIVES GEN. PSYCHIATRY 679, 681 (1989). However, Roy's study, is not convincing because it does not compare the elevations of compulsive gamblers with those of normal gamblers. *See id.* at 679.

84. *See infra* Part VI.B.

critics proffer arguments about the need to "downshift" from the consumer culture.[85]

Consumption is so fundamental to our culture and economy that to suggest regulation of it based on its similarities to gambling seems to place the foundation of our society in peril. Nonetheless, in the pages that follow, shopping will be presented in a light in which many people have never viewed it. Consequently, upon comprehension of the social ills and benefits of consumer consumption,[86] the legitimacy of such a bizarre analogy should become apparent.

Not surprisingly, shopping has not received the plethora of attention as an addiction that gambling has. Yet, its recognition as problematic can be traced back to Emil Kraeplin, who named compulsive shopping "oniomania," and called it a pathological impulse.[87] Incidences of the presence of addictive buying date as far back as Mary Todd Lincoln, who was infamous for spending far beyond even a presidential income.[88] Yet in spite of Kraeplin's recognition and research, oniomania has yet to be classified as a formal mental disorder by the American Psychiatric Association. Nevertheless, numerous scientists

85. *See, e.g.,* JULIET B. SCHOR, THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER 22-24, 113-142, 149-152 (1998). Schor comments on modern efforts to eschew consumerism.

> The pressures for upscale consumption, and the work schedules that go along with it, created millions of exhausted, stressed-out people who started wondering if the cycle of work and spend was really worth it. And some concluded that it wasn't. So they started downshifting, reducing their hours of work and, in the process, earning and spending less money.

Id. at 22. Schor further notes the positive effects of this downshifting.

> In contrast to the fashionable ideology that a "free market" is the best response to society's needs because it allows the freest expression of the public will, in these examples the self-control of a group of people leads to a better outcome for everyone. Voluntary restrictions on individual liberty can make sense.

Id. at 150.

In contrast to Schor's suggestion that people work less, Robert Lane argues that individuals should stop viewing work as a means for consumption. *See* ROBERT E. LANE, THE MARKET EXPERIENCE 3-5 (1991) (suggesting that work should be primary because work, not consumption, encourages development—cognitive complexity, self-efficacy, and happiness).

86. See THE CONSUMER SOCIETY (Neva R. Goodwin et al., eds., 1997), for a general discussion of the problems resulting from the emphasis on consumption in our society.

87. *See, e.g.,* Gary A. Christenson et al., *Compulsive Buying: Descriptive Characteristics and Psychiatric Comorbidity,* 55 J. CLINICAL PSYCHIATRY 5 (1994) (citing EMIL KRAEPELIN, PSYCHIATRIE 409 (8th ed. 1915)).

88. *See* Donald W. Black, *Compulsive Buying: A Review,* 57 J. CLINICAL PSYCHIATRY, Supp. 8, at 50 (1996). Black also cites other famous compulsive shoppers such as Jacqueline Kennedy Onasis and the former First Lady of the Philippines, Imelda Marcos. *See id.*

have recognized its perilous nature and commenced to study its prevalence.[89]

Currently, compulsive shopping is defined as "chronic, repetitive purchasing that becomes a primary response to negative events or feelings."[90] It is suspected that approximately five to ten percent of

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89. *See e.g.*, Christenson et al., *supra* note 87, at 5. Christenson and his colleagues "investigated the demographics and phenomenology" of compulsive buying. *Id.* The doctors conducted interviews of both compulsive and normal buyers. Their results indicated that "[t]he typical compulsive buyer was a 36-year-old female who had developed compulsive buying at age 17 1/2 and whose buying had resulted in adverse psychosocial consequences." *Id.* Furthermore, the study found that "[c]ompared with normal buyers, compulsive buyers had a higher lifetime prevalence of anxiety disorders, substance use disorders, and eating disorders and were more depressed, anxious, and compulsive." *Id.* The authors concluded that compulsive buying demonstrates characteristics of both an impulse control disorder and an obsessive/compulsive disorder. "[C]ompulsive buying is a definable syndrome that causes significant personal, social, and economic disability . . . ." *Id.* at 10. The particular strengths of this study, as compared to others, are: 1) it compared compulsive to normal buyers, and recruited through a newspaper ad, which provides for a more random sample than, for example, recruitment through a clinic that already treats compulsive shoppers who have sought professional help; and 2) the compulsive buyers were matched by sex and age to normal buyers to eliminate possible characteristic biases. One weakness of the study that speaks to the professional indifference towards oniomania is that the study assessed interviewees using the Minnesota Impulsive Disorders Interview (MIDI). *See id.* at 6, 10. The authors of this study were forced to use this method because of the lack of other assessments within the profession. The authors aptly point out that the MIDI "has not yet been studied in terms of validity and reliability." *Id.* at 10.

Susan McElroy and other's conducted a study that showed of those patients studied, 95% had lifetime diagnoses of major mood disorders, 80% had anxiety disorders, 40% had an impulse control disorder, and 35% also had eating disorders. *See* Susan L. McElroy et al., *Compulsive Buying: A Report of 20 Cases*, 55 J. CLINICAL PSYCHIATRY 242, 242 (1994). They studied 20 psychiatric patients diagnosed with problematic buying behavior to assess the characteristics of their behavior and discover other disorders, which might exist in tangent. These percentages are compelling. However, because of the biased sampling process, (patients were recruited through clinician referrals), they may not be representative of compulsive buyers at large. *But see* Susan L. McElroy, et al., *Treatment of Compulsive Shopping with Antidepressants: A Report of Three Cases*, ANNALS OF CLINICAL PSYCHIATRY, Sept. 1991, at 199:

> [t]he apparent response of compulsive shopping to . . . medications with documented antidepressant effects . . . raises the possibility that compulsive shopping is related to depression. This speculation is supported by the fact that all three patients met DSM-III-R criteria for a mood disorder, as well as evidence that some of the associated disorders in these patients (panic disorder, obsessive-compulsive disorder, and bulimia nervosa) may, in turn, be related to depression.

Id. at 202-03 (footnote omitted); *see also* Michel Lejoyeux et al., *Study of Compulsive Buying in Depressed Patients*, 58 J. CLINICAL PSYCHIATRY 169 (1997).

90. Helen S. Kuo, *Compulsive Buying Widespread Among College-Age Consumers*, THE BAYLOR LARIAT, Apr. 25, 1996, at ¶ 11 <http://www.baylor.edu/~Lariat/

United States' consumers suffer from oniomania.[91] Several studies have been conducted to determine the characteristics and consequences associated with compulsive buying.[92] Research, studies, and successful treatment of oniomania with antidepressants have prompted psychiatrists to conclude compulsive buying is a definable clinical syndrome, which can cause its sufferers significant distress.[93]

Unfortunately for our society's future, oniomania is not only present in mature adults. Marketers purposefully and diligently breed spenders, and their efforts are paying off. According to the International Council of Shopping Centers, teens make almost forty percent more visits to the malls than other shoppers.[94] In 1997, teens were predicted to spend $84 billion.[95] For the past forty-four years, teen spending has increased every year, despite the occurrence of eight recessions and the decreasing size of this population segment during the Generation X teen years.[96] A report by Interep Research forecasted teen income to hit $119 billion in 1998 and that spending by this group will continue to soar.[97]

Also alarming is that young adults are spending more time in malls than any prior generation. Dr. James Roberts, assistant professor of marketing at Baylor University, comments that shopping centers are becoming hangout places where adolescents seek entertainment and socialization amongst friends.[98] Female adolescents are estimated to spend eleven hours per weekend at the mall.[99] From a young age, female children are socialized to find pleasure in shopping. Cool Shoppin' Barbie,[100] plastic shopping carts with little

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Archives/1996/19960425/05—dldl.html> (on file with the University of Nebraska College of Law Library) (quoting Dr. James Roberts).

91. *See* Jeannine Mjoseth, *What Triggers our Penchant for Overzealous Shopping?*, AM. PSYCHIATRIC ASS'N MONITOR, Dec. 1997, at 13, 13. *But see* McElroy et al., *Compulsive Buying: A Report of 20 Cases*, *supra* note 89, at 242 & n.18 (reporting that the prevalence of compulsive shopping appears to be between 1.1% to 5.9% of the normal population (citing R.J. ABER & T.C. GUINN, BEYOND PHENOMENOLOGY: EMERGING THEORETICAL NOTIONS ON COMPULSIVE BUYING, PRESENTATION BEFORE THE AMERICAN PSYCHOLOGICAL ASSOC. CONFERENCE, 1991) and noting the lack of research and attention to oniomania, which probably accounts for discrepancies in the prevalence estimations).
92. *See e.g.*, Christenson et al., *supra* note 87; McElroy et al., *Compulsive Buying: A Report of 20 Cases*, *supra* note 89.
93. *See, e.g.*, Black, *supra* note 88, at 54.
94. See Nina Munk, *Girl Power!*, FORTUNE, Dec. 8, 1997, at 132, 133.
95. *See id.* (citing a report by Teenage Research Unlimited, a market research firm based in Northbrook, Illinois).
96. *See* Matthew Klein, *Teen Green*, AM. DEMOGRAPHICS, Feb. 1998, at 39 (citing a Rand Youth Poll report).
97. *See id.*
98. *See* Kuo, *supra* note 90, at ¶ 18.
99. *See id.* at ¶ 19.
100. *See Barbie Gets Her First Credit Card*, CREDIT CARD MANAGEMENT, Jan. 1998, at 6. (discussing the inclusion of the MasterCard brand with a child's toy). Master-

girls pictured on the packaging, and games with shopping as their goal abound the toy aisles of stores. The effects of socialization become evident into adulthood. A study of 300 Texas college students revealed that nineteen percent of those interviewed between the ages of eighteen and twenty-four were considered compulsive buyers.[101] Of those nineteen percent, sixty-seven percent were females.[102] It seems inevitable that the incidence of compulsive shopping will continue to proliferate into the twenty-first century, particularly among females.[103]

A. Social Benefits of Gambling & Shopping: The Promise of Economic Prosperity

So, why are marketers so ravenously targeting teenagers to buy their products? Is there any good that comes from excessive spending? The answer to the later question is "yes", and economists refer to the concept as "economic development." Simply stated, the term refers to the creation of jobs and income within a community. According to Pittman and Culp, a more rigorous definition of economic development may provide a better assessment of an establishment's value to the community. "The key for sustained community growth is to bring in expenditures from outside of the area and not simply redistribute expenditures that are already present in the area."[104] Conceivably, both

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Card has stated that, despite the fact the payoff from the Barbie promotion will be far into the future, it is willing to wait because it believes adults will buy those brands they were introduced to as children. *See id.*

101. Kuo, *supra* note 90, at ¶ 3.

102. *See id.*

103. *See* Munk, *supra* note 94, at 134 ("Boys spend money too. But its girls who move markets."). In Munk's article, Randy Hild, head of Roxy, the female division of Quicksilver, Inc., states, "[a] guy will buy one, maybe two, [surf] board shorts each summer . . . . But a girl goes through four or five pairs a summer . . . ." *Id.* Quicksilver is just one company that has recognized and preyed upon the increasingly large spending patterns of teenage females. *See id.* Other companies such as Pacific Sunwear of California, Inc., were lagging in sales until they started targeting teen girls. *See id.*

104. Robert H. Pittman & Rhonda P. Culp, *When Does Retail Count as Economic Development?*, ECON. DEV. REV., Spring 1995, at 4, 4. According to the Pittman & Culp, a "simple litmus test" can determine true economic development.

> [An establishment] counts as economic development when it increases the amount of money available in the community. This occurs when [the establishment] brings outside expenditures into the community, that is, when it is a basic economic activity. In addition, . . . establishments which entice residents to buy locally what they had been buying outside the community, thereby reducing . . . leakage and keeping more income in the community, also counts as economic development.

Id. at 5. The latter criterion is especially applicable to casinos. Policymakers are pressured to pass legalized gambling legislation when surrounding communities have already done so; otherwise, their constituents who choose to gamble will take their money outside of the community. *See, e.g.,* GOVERNOR'S OFFICE OF casinos and malls could create permanent jobs and entice income from outside the local area. Thus, both types of establishments could be used as economic development strategies.

Several communities have welcomed malls as a stimulus for economic growth. Between the years of 1957 and 1988, shopping centers in the United States increased in number by over 1325%, from 2000 to 28,500.[105] The obvious benefits of malls are the revenues they generate in the form of sales and property taxes. Additionally, their existence is likely to attract shoppers from outside the immediate community and thus malls bring in expenditures from abroad. So far as they can be deemed a source of economic development, as defined by Pittman and Culp,[106] it is true that communities benefit financially from the existence of malls.

Communities' and economists' faith in the money-making and revitalizing power of shopping centers is evident in the story of Silver Springs, Maryland. Since 1988, over 220 businesses have moved out of this small city, located outside of the nation's capital.[107] To combat this bleak economic downturn, town leaders have proposed a $585 million renovation to the city's shopping district in the hope that the makeover will rejuvenate the local economy.[108]

This strategy was seemingly prosperous for a city in rural Ohio. The addition of a regional mall located in Beaver Creek, a suburb of Dayton, has made Green County one of the fastest growing counties in the State of Ohio.[109] Besides the jobs and taxes generated by the mall

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PLANNING AND RESEARCH, STATE OF CALIFORNIA, CALIFORNIA AND NEVADA: SUBSIDY, MONOPOLY, AND COMPETITIVE EFFECTS OF LEGALIZED GAMBLING (1992). The report notes the tremendous transfer of wealth across state lines:

> In the midst of continued (and justified) concern over emigration of businesses and productive taxpayers out of California, another, long-standing migration has been overlooked. That is the migration of *dollars* out of California to the casinos of Nevada.
>
> . . . .
>
> Gambling by Californians pumps nearly $3.8 billion per year into Nevada, and probably adds about $8.8 billion—and 196,000 jobs—to the Nevada economy, counting the secondary employment it generates. This is a direct transfer of income and wealth from California to Nevada every year.

Id. at ES-5.

105. *See* Linda Weber, *Protect Yourself from Shopping Mall Crime*, GOOD HOUSEKEEPING, Mar. 1, 1998, at 191-92.
106. *See* Pittman & Culp, *supra* note 104, at 5.
107. *See The Mall of Dreams*, THE ECONOMIST, May 4, 1996, at 23, 23.
108. *See id.*
109. *See* Michael Hartnett, *Ohio Markets Shine With New Shopping Centers*, STORES, Jan. 1997, at 118, 118 & 120. The 1.2 million square feet mall has five anchor stores and is equipped with marble floors and skylights. *See id.* at 118. It is considered an upscale mall. Vincent Ferrini, Ohio Director for the International Council on Shopping Centers, believes upscale malls and value malls are the only two viable opportunities available in the mall industry. *See id.* at 120.

itself, over one million square feet of adjacent retail space was occupied by companies such as Wal-Mart, Best Buy and Applebee's in less than a year after the mall opened in 1993.[110]

In addition to the aforementioned advantages, an article in *Occupational Outlook Quarterly* suggests another societal benefit of malls. Building the human capital of its employees is another way malls can contribute to their respective communities and to society at large. Mall management staff cite career opportunity as an aspect they like about their jobs. Corporate management often pays the education expenses for enterprising mall management staff who take courses relevant to their work.[111]

Supporters of the gambling industry also tout economic gains in the form of job creation and tax revenue. Revenues generated by lotteries helped finance construction expenditures for such prestigious universities as Yale, Harvard, Princeton, Dartmouth and Columbia in the nineteenth century.[112] Today, forty-eight states and the District of Columbia allow some form of gambling.[113] Only Hawaii and Utah have resisted the temptation.[114] These two states are missing out on a piece of the more than $2 billion state tax revenue pie generated by the industry in 1995.[115] Casino gambling, in particular, has expanded from Las Vegas and Atlantic City to riverboats in the Midwest and Indian reservations throughout the country.[116] Now present in twenty-nine states, casino profits and visitations continue to climb.[117] Similarly, forecasts for the industry suggest it will continue to grow.

In recent years gambling activities have exceeded even liberal expectations. Nationwide bets increased fourteen percent from 1994 to 1995.[118] Job creation within the industry also continues to increase without precedent. The American Gaming Association estimated that in 1996, the U.S. gaming industry employed over 1.5 million peo-

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110. *See id.*

111. *See* Kathleen Green, *It's a Mall, Mall, Mall World: Jobs in Shopping Malls*, 40 OCCUPATIONAL OUTLOOK Q. 10, 16 (1996).

112. *See* Matthew Mariani, *Jobs in Legal Gambling: A New Giant of an Old Industry*, OCCUPATIONAL OUTLOOK Q., Fall 1996, at 2, 3.

113. *See id.* at 2.

114. *See supra* note 8 and accompanying text.

115. *See* Eugene M. Christiansen et al., *The Gaming Industry: Current Legal, Regulatory, and Social Issues*, SC91 ALI-ABA 489, 509 (1998); *cf.* Easton, *supra* note 30, at 176-77 (reporting the economic success Mississippi has experienced since legalizing casino gambling: the Mississippi casino industry employs over 27,000 citizens, pays approximately $180 million a year in taxes, and casino revenues accounted for about three percent of the state's total economic product in 1995).

116. *See supra* note 9.

117. *See supra* note 10 and accompanying text.

118. *See* Maddox, *supra* note 18.

ple.[119] Michael Evans, a professor at Northwestern University, estimates that direct employment within the industry should grow 7.5% percent annually through the year 2005, creating an additional 696,000 jobs.[120] Assuming these businesses do not go bankrupt, or if they do, other establishments take their place, casino gambling is also a source of economic development.

The recent affinity towards gambling[121] has resulted from a greater acceptance of the activity by the public,[122] political interest by policy makers who liken it to a pain-free tax,[123] and American Indian nations that have discovered a means to pull themselves out of poverty.[124] However, as a skeptic might suspect, the societal perks of both gambling and shopping do not come without costs.

B. Social Ills of Gambling & Shopping: Benefits Have Their Price

When an activity with a large demand is introduced into a community or region, it is not uncommon for various adverse economic consequences to emerge as well. Congestion, industrial pollution, and rapid

119. *See id.* (reporting on a study conducted by Arthur Andersen, which concluded that casinos directly created almost 300,000 jobs in 1995); ARTHUR ANDERSEN, AMERICAN GAMING ASSOC., ECONOMIC IMPACTS OF CASINO GAMING IN THE UNITED STATES 3, 7 (1996) (noting that indirectly, casinos have spawned 400,000 more jobs).
120. *See* THE EVANS GROUP, A STUDY OF THE ECONOMIC IMPACT OF THE GAMING INDUSTRY THROUGH 2005, at 1-1 (1996); *see also* Mariani, *supra* note 112, at 9 (detailing the Nevada Department of Employment, Training and Rehabilitation estimate that casino gaming employment will increase by 69% in Nevada from 1994 to 2005).
121. *See* ROSE, *supra* note 11, at 1. According to Rose, legalized gambling in the United States' history has progressed through three waves. *See id.* at 1-2. The first wave began during the colonial period, when public lotteries helped to finance the new colonies. *See id.* Horse racing was also allowed as a holdover from earlier times when "skills of war" matches were considered vital for military preparedness. *See id.* at 70. Nelson argues the first wave ended to divert men's attention to the war. *See id.* In contrast, the second wave began in the South for the purpose of generating funds to pay for war losses. *See id.* at 1. That wave ended in a series of scandals, the largest of which was the Louisiana Lottery Scandal of the 1890s, in which private lottery owners attempted to buy the state legislature. *See id.* Only after years of paying for Louisiana's folly, did the gambling industry rise once again in 1964 with the New Hampshire sweepstakes. *See id.* at 2. This was the beginning of the third wave which continues to thrive in 1999.
122. *See supra* note 14.
123. *See* Roberts, *supra* note 7, at 586. *But see* Kindt, *supra* note 15.
124. *See* The Nat'l Indian Gaming Assoc., *Where the Proceeds Go: Helping Indian Nations Recover from Centuries of Economic and Social Neglect* (visited Jan. 16, 1998) <http://www.dgsys.com/~niga/proceeds.html> (on file with the University of Nebraska College of Law Library) ("Gaming holds some hope for reducing Indian poverty, but is not a panacea.").

change diminish the quality of life for some. Businesses that offer competing products might suffer.[125] This statement suggests other possible repercussions of gambling and shopping, in addition to crime, which is the externality most often studied in the gambling context. We will now discuss these undesirable spillovers and argue they are so similar for the two activities that to proffer regulation of gambling necessitates support for regulation of shopping.

Adverse and arguably unintended consequences result from both gambling and shopping. Not only are the compulsive members of each group harmful to themselves,[126] but their actions are also cumbersome to their families, communities and the aggregate society. Because both excessive shopping and gambling affect more than just the compulsive buyer and pathological gambler, their actions are said to produce negative externalities. Therefore, the argument for regulation of each industry can be made by addressing their respective undesirable spillovers.

Consumer debt is one of the most often cited consequence of insatiable consumer desires because of its quantifiability. Estimates regarding consumer debt vary, but all conclude it is on the rise, totaling $1.23 trillion as of February 1998,[127] up almost forty percent over the

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125. *See* William R. Eadington, *Contributions of Casino-Style Gambling to Local Economies*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 53, 56 (1998) (arguing that much of the literature regarding the social benefits of gambling has ignored its non-monetary value to consumers of the service, and offering a methodology to analyze the difficult-to-quantify benefit—consumption of an intangible good).

126. This side effect of gambling and shopping does not give much credence to regulation in economic ideology because it impinges upon the idea of individual freedom so fundamental to our culture and the discipline. In economic jargon, the consumer, *Homo Economicus*, is assumed to be rational. He evaluates each of his intended actions, assessing their marginal benefits and costs, and only engages in those, which make him better off. *But see* Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 261 (1997) (proposing that rational consumers can spend beyond their means and leave themselves in financial peril because they "systematically underestimate the extent of their current and future credit card borrowing and, using these underestimates, make suboptimal decisions regarding the choice and usage of credit cards") (footnote omitted). In neoclassical economics, preferences are assumed to be logical and are, therefore, largely ignored. Because of this presumption, the economic rationale for regulation does not deal with the gambler's or shopper's choice to engage in the respective activity or whether or not it is the best choice to make. It is only when the choice made by the gambler/shopper affects others, producing an externality (market failure), that neoclassical economic thought is evoked in favor of market intervention.

127. *See* Frances B. Smith, *Are Consumers Sinking in a Sea of Debt?*, CONSUMERS' RES. MAG., Feb. 1998, at 10, 10. Smith argues that alarms sounding over consumers' increasing levels of debt are unfounded and inadequate for governmental intervention regarding credit decisions.

> Unconsidered calls for action, such as [the Consumer Federation of America's] exhortation for lenders to limit families' credit card lines to 20% of a household's income and their cries that lower-income people are

last five years alone.[128] Similarly, figures regarding credit card debt vary from an average of "four cards and roughly $4000 in high-interest debt,"[129] to seven cards with more than $2000 on each.[130] Of course, these credit card statistics could be the result of changes in the ways consumers use credit cards.[131] However, the data on consumer debt cannot be so easily rebutted.

The culmination of excessive consumer debt resulting from shopping negatively impacts more than just the individual shopper's bank account. Bankruptcies in 1997 were estimated to have left lenders with $40 million in bad debt.[132] These lenders include credit card

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> over-using credit cards, often are seized upon by opportunistic policy makers [sic]. Alarmist headlines and anecdotal scare stories about credit card debt may trigger legislative or regulatory action that could endanger the free flow of information that led to the democratization of credit.

Id. at 13. Smith's argument is persuasive in so far as she fears regulation of consumer credit because of increasing amounts of consumer debt. But would such regulation really be unfounded? As I argue, economic reasoning for regulation is founded when the decisions of one consumer affect the well being of another, resulting in a negative externality. For a discussion of how the aggregate of consumer debt could affect all consumers, see *supra* Part IV.2C.

128. *See A Statistical Look at Consumer Debt*, USA Today (visited Apr. 21, 1998) <http://www.usatoday.com/money/consumer/budget/mdebt005.htm> (on file with the University of Nebraska College of Law Library) (noting that consumer debt is now over $1 trillion); *see also* William Pesek Jr., *As Household Debt Keeps Soaring, So Do the Dangers for the Economy—and Stocks*, Barron's, Dec. 22, 1997, at MW15 (reporting that in 1997, consumers racked up over $1.2 trillion in installment debt, which represents an increase of 50% from four years earlier).

129. Pesek, *supra* note 128, at MW15.

130. *See Deck the Halls With Consumer Debt* (last modified Dec. 23, 1996) <http://www.essential.org/hightower/1996/ht961223.html> (on file with the University of Nebraska College of Law Library).

131. *See* Smith, *supra* note 127, at 11. Smith notes:

> [p]eople use credit cards differently today than they did 10 or 20 years ago. Some people who in the 1970s would have had to take out a small loan to purchase furniture or appliances are now using their credit cards instead for an 'instant loan,'. . . . Many consumers use credit cards for convenience . . . .

Id. Yet, Smith's argument does not address the issue of consumers increasingly living beyond their means. Maybe consumers do use credit cards in place of loans, but the point is consumer debt is rising to untold levels every year. *See* Ausubel, *supra* note 125, at 270. Ausubel further reports that:

> [r]evolving credit is now the single largest component of United States outstanding consumer credit, totaling $435.7 billion at year-end 1995. By contrast, at the same year-end, automobile loans totaled $354.1 billion and other consumer loans—such as personal loans, mobile home loans and education loans—totaled $342.2 billion.

Id. at 254 (footnotes omitted).

132. *See Consumer Debt in America* (CNN television broadcast, Oct. 21, 1997) (transcript on file with the University of Nebraska College of Law Library); *see also* Pesek, *supra* note 128, at MW15 (reporting that late payments for the third quarter of 1997 were 5.31%, up from 5.03% in the third quarter of 1996); Susan Reda, *Consumer Bankruptcy*, Stores, Sept. 1997, at 20, 20 (reporting on statistics from

companies, such as Visa and MasterCard; department stores that offer their own credit cards, such as J.C. Penney and Dillards; and banks, such as Huntington and Bank One. These companies will be forced to recoup this lost profit. One way they will do this is by passing the loss onto the consumer. Therefore, interest rates charged by credit card companies will increase, interest rates offered by banks will decrease, and inflation will result from firms raising prices. Of course, these occurrences cannot be explained this simplistically.[133] However, increasing amounts of bankruptcies and delinquencies are certainly causal factors of inflation and interest rates.

In addition to the adverse economic impact of consumer debt, loan delinquencies, and bankruptcy, crime is also a social cost of shopping. Malls present criminals with a prime opportunity for theft. Shoppers are likely to carry larger sums of money and more credit cards while shopping. Furthermore, upon exiting malls, consumers are likely to

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the Administrative Office of the U.S. Courts that the number of personal bankruptcies hit an all-time high of 321,242 in the first quarter of 1997). Additionally, Reda reports that approximately one of every 94 consumers filed for personal bankruptcy in 1996, and this number is expected to continue to escalate. *See id; see also id.* at 21 (discussing the causes of the rise in bankruptcies, one of which is the destigmatizing of personal bankruptcy). Reda attributes this destigmatizing of bankruptcy to "the media routinely reporting the financial perils of celebrities, and debtor advocate lawyers boldly advertising bankruptcy as a means of debt consolidation," and, as a result, "the social mores that once made bankruptcy a shameful last resort have crumbled." *Id.* However, notwithstanding social perceptions, the financial wound of filing for bankruptcy still takes time to heal. Lenders still have an antipathy towards persons who have filed for bankruptcy, and with the prospering economy, lenders can afford to discriminate when choosing borrowers.

133. Inflation has numerous causes, *inter alia*, restrictions in supply or excess expenditures in the economy. *See* David C. Colander, Macroeconomics 177 (3rd ed., 1998). Consequently, intense competition within an industry is thought to keep prices low. *But see* Ausubel, *supra* note 126, at 261 ("The economic puzzle surrounding the credit card market of the 1980s was why competition among the more than four thousand card-issuing banks did not lead credit card interest rates to follow decreases in the cost of funds.") (footnote omitted). Ausubel explains this phenomenon by arguing credit card users can be divided into two classes: consumers who intend to borrow at the onset of obtaining a card and will repay, and those consumers who intend to borrow but have less than sufficient means to repay and thus will shop around for lower interest rates. *See id.* at 262 (quoting Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, Am. Econ. Rev., March 1991, at 50, *reprinted in* Advances in Behavioral Finance 527-82 (Richard H. Thaler ed., 1993)). From a lender's point of view, the former class are the more desirable customers because they are less likely to default. Additionally, these are also the consumers who have the more inelastic demand, i.e., they are not very responsive to an increase in interest rates of cards. Thus, "[g]iven this environment of consumers, banks will be hesitant to compete in the interest rate dimension, as a lower price on credit would disproportionately draw the [poorer] class of consumers, who plan to utilize their credit cards." *Id.*

be carrying purchased goods with them that cannot be traced to the thief upon seizure.

One survey conducted by the American's Research Group of Charleston, South Carolina, found fear of crime has resulted in more than thirty-three percent of consumers changing their shopping patterns.[134] Another study conducted in 1996 by Roper Starch Worldwide, the American's Research Group, and Management Horizons, discovered that, compared to 1990, twenty percent fewer shoppers make purchases at night.[135] These polls have also found that about one-third of shoppers have discontinued shopping in malls that they perceive to be unsafe.[136]

Although criminal activity in and around malls has been given relatively little scholarly attention, its existence is well-documented within popular culture[137] and retail literature.[138] This obliviousness by the academic community, aside from the professional marketing/

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134. *See Fear of Crime Has Some Altering Shopping Habits*, JET, May 16, 1994, at 40, 40 [hereinafter *Fear*] (surveying a random sample of 1003 Americans, 43% of whom said they no longer shop after dark, 15% now shop with someone else, 50% expressed concerned about getting to their cars safely, and 28% carry some form of personal security, such as mace). It is important to note that there can be significant differences between perceptions and reality. For example, such differences are illustrated in one study on the link between gambling and crime. *See generally* Patricia A. Stokowski, *Crime Patterns and Gaming Development in Rural Colorado*, J. TRAVEL RES., Winter 1996, at 63, 68-69 (conducting interviews with residents of three Colorado towns and finding that their perceptions of crime after casinos were established were significantly higher than the actual statistical increases).
135. *See* Richard Halverson, *Crime Steals Shoppers' Confidence*, DISCOUNT STORE NEWS, May 6, 1996, at 70 & 72 (noting that the two largest groups of consumers who have discontinued shopping after dark are women and people over 60 years of age; 12% of women and 17% of people over 60 stated they have stopped shopping after dark).
136. *See id.*
137. *See, e.g.*, *Fear*, *supra* note 134.
138. *See generally Always Vigilant: Security Shifts to Strips*, CHAIN STORE AGE, Apr. 1997, at 100 (discussing the contemporary methods to reduce crime at shopping centers, such as surveillance cameras and increased numbers of security guards possessing chemical deterrents); Teresa Anderson et al., *Minimizing Mall Mayhem*, SECURITY MGMT., Nov. 1994, at 20 (discussing the security system installed by Huntington Beach Mall in response to mounting concerns of patrons over the possibility of victimization); James V. Fernando, *Safety Management in Modern Shopping Centers*, PROFESSIONAL SAFETY, Jan. 1995, at 35 (detailing how architects can design malls to be less accessible to criminals and criminal activity); Brian R. Johnson & Greg L. Warchol, *Giving Security Space at the Mall*, SECURITY MGMT., June 1997, at 87 (discussing ways malls can minimize liability in consumer victimization cases); *Keeping Centers Safe: Managing Security Needs*, CHAIN STORE AGE EXECUTIVE, Apr. 1995, at AM15 (discussing how the media and non-store retail formats have been exploiting the increasing crime in and around shopping malls and suggesting ways in which shopping center managers can fight back); Darren Maloney, *Legal Field May be Leveled for Shopping Center Owners*, CHAIN STORE AGE, May 1997, at 98 (discussing a case then pending

sales community, could be the result of consumption, unlike gambling, not being deemed a vice, and consequently, not attracting scholarly inquiry.

In fairness to both industries, however, it is important to note economic growth strategies that result in economic development, whether they are in the form of malls or casinos, are likely to experience increases in crime because of the increase in tourism. Studies of communities where gambling has been established indicate crime rates have increased upon the introduction of gaming.[139] So, are these increases in crime where casinos are located caused by the increase in visitors or the presence of gaming?[140]

According to Patricia A. Stokowski, there are five primary explanations that could account for increases in crime statistics in gaming towns.[141] These explanations are: 1) increases in tourism; 2) more

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before the Supreme Court regarding mall owners' liability in cases such as *Clohesy v. Food Circus Supermarkets*).

139. *See supra* note 47 and accompanying text.

140. *But see supra* note 48 and accompanying text. Yet, what Grinols and Omorov did not report is that Las Vegas, the leading casino capital of the country, ranked 82nd, 80th, and 80th, respectively, on the 1990, 1991, and 1992 Uniform Crime Reports compiled by the FBI. *See Judiciary Hearing*, *supra* note 16, at 438. The crimes reported include "violent crimes (murder, rape, robbery, and aggravated assault) and property crimes (burglary, larceny, motor vehicle theft, and arson)." *Id.* at 426 (prepared statement of Jeremy D. Margolis, Former Asst. U.S. Attorney and Dir. Illinois State Police). According to these reports, Orlando, Florida (ranked 26th) was considerably ahead of Las Vegas in the 1990 report. *See id.* at 436. This contradiction is just one illustration of the ambiguous data presented in the Grinols and Omorov article. For a more in-depth criticism of this article, see William R. Eadington, *Calling the Bluff: Analyzing the Legalization of Casino-Style Gaming: A Comment on "Bluff or Winning Hand? Riverboat Gambling and Regional Employment and Unemployment,"* in *Judiciary Hearing*, *supra* note 16, at 462.

141. *See* Stokowski, *supra* note 134, at 64 (citing Jay S. Albanese, *The Effect of Casino Gambling on Crime*, FED. PROBATION, June 1985, at 39, 41; W.S. Roehl, *Gambling as a Tourist Attraction: Trends and Issues for the 21st Century*, *in* TOURISM: THE STATE OF THE ART 156 (A.V. Seaton ed., 1994)). Stokowski compared crime rates in three Colorado towns: Black Hawk, Central City and Cripple Creek. *See id.* at 63. All three towns introduced gaming in 1991. *See id.* Stokowski compared crime statistics prior, during and after gambling establishment were opened. *See id.* at 64. She found that crime increased in all three towns when casinos began operation. *See id.* at 66. The largest increase was in property crimes such as burglary, larceny-theft, and car theft. *See id.* However, this data is misleading, as are many crime statistics, because the statistical calculations are based on the permanent population. For example, despite the increase in the actual number of crimes, in all three towns a citizen's chance of being victimized actually decreased because the tourist population increased faster than the number of crimes. *See id.* at 68. Furthermore, preliminary data available for the after assessment suggested that crime in all three locations and all categories was on a downward progress. *See id.* at 66; *see also Judiciary Hearing*, *supra* note 16, at 438 (prepared statement of Jeremy D. Margolis, Former Asst. U.S. Attorney and Dir. Illinois State Police) (reporting on the Uniform Crime Report rankings by city for

law enforcement staff; 3) increases in the number of at-risk properties; 4) the flow of larger amounts of money; and 5) more opportunities for crime.[142] After analyzing her data, Stokowski concluded it was not evident whether gaming or tourism was the cause.[143]

Upon reviewing extensive amounts of literature on the supposed link between crime and gambling, we do not find this conclusion surprising. Determining what causes the crime increases resulting from both gambling and shopping is not easy because the causes themselves are not that simplistic. It is likely that the number of tourists does affect crime rates. Additionally, communities usually hire more law enforcement personnel to accommodate the increase. As Stokowski argues, more police also means more rigorous or exact crime reporting, as stronger standards are likely to be enforced with larger police staffs.[144] Moreover, since many of the new officers are drawn from outside the community, not from the residential population, and many have been trained in larger metropolitan areas, their methods of operation are more professional (objective) than once was common.[145] These assertions were confirmed by her interviews with residents of some Colorado towns who complained the new officers had little respect for old-timers and failed to uphold the flexible law enforcement standards enjoyed in pre-gaming times.[146]

William J. Miller and Martin D. Schwartz, professors of sociology at Ohio University, suggest another cause for crime escalation:

> [O]ne of the reasons why there is more crime in tourist areas is that tourists themselves are the targets for crime. . . . [T]ourists who leave cameras on

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the City of Las Vegas from the years, 1979-1991). In 1979, Las Vegas ranked first among U.S. cities in Part I Crimes per 100,000 population. With each year passing during this time span, Las Vegas slipped farther down in ranking. *See id.* In 1991, Las Vegas was 80th, behind such cities as Orlando, Florida; Sacramento, California; and Toledo, Ohio. *See id.* at 436. This data suggests that once communities have had time to adjust to and accommodate the increase in tourism, crime rates decline significantly.

142. *See* Stokowski *supra* note 134, at 64.
143. *See id.* at 68.
144. *See id.* at 67.
145. *See id.* Please note that I am aware that these additions to the local payroll and, similarly, incarceration and court fees associated with prosecuting apprehended criminals represent a financial burden to the local gaming community. I, however, was unable to locate convincing data on estimations of these costs and furthermore, it is questionable whether or not the citizens of the community are even responsible for these costs. To the extent that the costs exceed the tax revenues generated by the casinos, it is likely local citizens might have to bear these costs. However, community officials have the authority to increase gaming taxation levels to compensate for the excess. Moreover, these costs are also associated with crime in and around malls. Criminals apprehended prowling in mall territory also must be incarcerated and prosecuted. Therefore, these additional social costs are not convincing as a factor distinguishing between gambling and shopping, which would argue for regulation of gaming and not consumption.
146. *See id.*

beach towels while swimming are more likely to be theft victims; tourists who are out carousing and heavily drinking in the early hours in dangerous neighborhoods are more likely to be robbed or raped; and tourists who leave expensive valuables in anonymous and loosely guarded hotel and motel rooms are more likely to be the victims of burglary.[147]

Besides the proliferation of criminal activity, two other negative externalities result from both gambling and shopping. The first is the traffic congestion that results from the increase in tourism. Conceivably, areas most desperate for economic development are usually those areas most ill-equipped for the increase. Browne and Kubasek discuss this consequence and suggest that better planning prior to the introduction of casinos (and malls) could alleviate the costs associated with accommodating the increase in community visitation.[148]

The other and final outcome[149] of both gambling and shopping is the cannibalization of existing businesses. Malls have been known to

147. William J. Miller & Martin D. Schwartz, *Casino Gambling and Street Crime*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 124, 127 (1998).

148. *See* Browne & Kubasek, *supra* note 22, at 11-12 (noting that infrastructure costs incurred by Atlantic City included "new sewer lines, more police service, and frequent street repair and maintenance").

149. The reader questions why I chose not to include a discussion of organized crime within the gambling industry or a more in-depth discussion of the social costs associated with compulsive gambling. I have two reasons for excluding a discussion on organized crime. First, the continued perception of gambling as a social vice by some affluent and raucous members and groups in society distinguishes it from the socially acceptable activity of consumption. If organized crime within the gambling realm does exist, its goal is probably to expand the legalization of gambling. It is not absurd to imagine that if shopping were also widely recognized as a social ill, organized crime would develop within this arena also. Hence, I exclude a discussion of organized crime because I found no compelling evidence that it even exists. Furthermore, I doubt whether any would exist if legalization were not so cumbersome in this society for private firms. For an example of an anti-consumption movement, which would argue that consumption/shopping is indeed a vice, see *Affluenza* (visited Sept. 25, 1997) <http://www.econet.org/bullfrog/affl.html> (on file with the University of Nebraska College of Law Library). Affluenza is defined as: "1. The bloated, sluggish and unfulfilled feeling that results from one's efforts to keep up with the Joneses; 2. An epidemic of stress, overwork, shopping and debt caused by dogged pursuit of the American Dream; 3. An unsustainable addiction to economic growth; 4. A film that could change your life." *Id.* The final definition is in reference to a television program with the same title. *See Affluenza* (PBS television broadcast, Sept. 15, 1997). Second, I did not include a more in-depth discussion of the negative externalities associated with gambling because essentially they are the same as those for compulsive shopping. Both types of persons can incur substantial amounts of debt and the consequences of doing so are detailed in the section regarding the ills of shopping. There are also social costs in the form of public spending on resources for compulsive gamblers, but the same is also true about consumption. Agencies such as Consumer Credit Counseling Service, Genus Credit Management, and American Consumer Credit Counseling exist to help those who find themselves in financial peril. Interestingly, casinos and retailers themselves fund many of these organizations. Notice, however, the personal distress experienced by both compulsive shoppers and pathological gamblers is not discussed within this context because

leave existing downtown shopping areas desolate. Similarly, casinos attract recreational patrons who might have vacationed or visited elsewhere and casinos usually offer cheap buffet meals. This outcome, however, is not persuasive for purposes of arguing for regulation of gambling and not shopping for two reasons. First, as mentioned before, malls also cannibalize businesses. Second, economic reasoning explains cannibalization as simply a shift in consumer preferences. The microeconomic argument that consumers know best how to allocate their dollars has some merit in the case of a casino. For occasional gamblers, the shift from any previous consumption item to gambling is no different from shifting their preferences from moviegoing to dinner in a restaurant.[150] Of course, this shift is not so facile if employees within one industry do not possess the skills necessary for employment in the feasting, new business. Yet it is arguable that recreational and retail employees have similar talents, as do waiters or waitresses in any restaurant, and thus the transition between businesses should be smoother.

Communities where casino gambling is well established, such as Las Vegas, have experienced lucrative economic prosperity. Furthermore, Las Vegas' crime rates are well below those for numerous other tourist cities.[151] Seemingly, there are preparations and actions communities can take to make legalization of gaming a promising source of economic development.

The economic case for regulating casino gaming is not currently persuasive. The analogy with shopping demonstrates the strength of the libertarian argument *on economic grounds* for allowing casino gaming to continue under its current regulatory regime.

VII. CONCLUSION

A. Ethical Dimensions of Casino Gaming

We suggest in this final section that certain ethical dimensions of casino gaming should be the focus of regulatory discussions. When we consider who we are, we certainly would hope to include as part of the portrait a sense of caring. But just what would we mean by this aspirational characterization? What does it mean to care? About whom should we care?

The regulatory background is shaped by a struggle among loyalists to one or another approach to allocation of resources. For many reasons, both substantive and symbolic, markets are elevated by some

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it is not a negative externality nor any other market failure that would necessitate governmental regulation.

150. *See* Richard Gazel, *The Economic Impacts of Casino Gambling at the State and Local Levels,* 556 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 78-79 (1998).

151. *See supra* note 134 and accompanying text.

and reviled by others as the preferred conflict resolution mechanism. Mavens of markets see the profit motive as a wondrously smooth, efficient avenue for achieving social welfare. On the other hand, those distrustful of markets recall their putative role in encouraging soil erosion, unsafe products, and destruction of the rainforest, and are immediately skeptical of market responses to human dilemmas.

In general, what are the attributes of a human problem that nestles comfortably in the market realm? Asking this question has a confused quality to it in our culture. The allocation and distribution of all material goods and services are simply presumed to be market responsibilities in our context *unless someone can demonstrate the contrary*. The burden of proof is on those who would urge limits on market choices. Markets appear to maximize personal freedom, especially if we do not look too deeply into more positive forms of liberty, many of which are represented by capabilities that require monetary resources. For instance, a tiger farm in India is not a relevant vacation site for an animal lover who, while possessing the legal right to travel there, lacks the income and wealth to finance the use of that particular market opportunity.

Fundamentally, market choices by both buyer and seller are consistent with a worldview dominated by individualism. Suppose that the major determinant of our condition in life is the congeries of choices we make. These choices have outcomes that are deserved because we are presumed to make them as reflective calculators, aware of our objectives and cognizant of both the identity and ramifications of relevant options. Then it would seem to follow that we should presume the aptness of markets, that decision-making framework that permits us, as individuals, to act on personal preferences. *Pari passu*, the community's preferences will be fulfilled in certain regards in certain institutional arrangements. What results is a private sphere, a domain where goods and services are bought and sold in an optimal fashion.

Yet, even the most vigorous market romance is limited by the realization that at times the presumption on behalf of markets can be overcome. For instance, we would be jarred to see a shop in a strip mall urging us to avail ourselves of the current sale on "friendship." But why? Why are certain dimensions of the human experience regarded as forbidden exchanges? What happened to the dominant rhetoric about freedom of contract in such situations? What are the parameters of the public sphere?

The pervasiveness of individualism elevates the individual's interests over those of the collective.[152] The result is a cultural[153] habit of

152. *See generally* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1987) (stating that individualism is a fundamental belief of those with an atomistic view of human nature; it holds that each

mind that sees personal needs as preeminent and social needs as secondary.[154] Individualists downplay their ties to others, viewing themselves as essentially atomistic.[155] Consequently, individualism holds that "each individual is the controlling factor in shaping personal destiny."[156] This perception of reality leads to their valuing self-reliance, freedom from regulation (negative liberty),[157] rationality,[158] and personal choice.

A community from this perspective is an aggregation of egos. Social wisdom emerges from the nurturing of the virtues associated with the individualistic worldview. To speak of a community as an organic endeavor is, from this perspective, a confusion. Hence, language of unification and communal responsibility such as claims that it takes a

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individual is the controlling factor, through his or her choices, in shaping personal outcomes and that personal responsibility is both the prescription and description for human behavior).

153. Culture is implicit in the expectations and judgments of participants. Harry C. Triandis offers the following useful definition of its source and power:

> Culture emerges in interaction. As people interact, some of their ways of thinking, feeling, and behaving are transmitted to each other and become automatic ways of reacting to specific situations. The shared beliefs, attitudes, norms, roles, and behaviors are aspects of culture. . . .
>
> Culture is to society what memory is to individuals. It includes things that have "worked" in the past.

HARRY C. TRIANDIS, INDIVIDUALISM & COLLECTIVISM 4 (1995).

154. *See generally* JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 190-204 (4th ed. 1984). Galbraith discusses what he calls social imbalance and the immersion in private lavishness in the midst of social squalor. His point is that absorption with individual preferences and their fulfillment in markets establishes a quite understandable fascination with the fulfillment of certain kinds of needs. For purposes of our argument, the fact that neither children nor endangered species are either owned or permitted to be commodities suggests an awareness that there is something more than individual valuation at work in designing the parameters of politics.

155. Atomism assumes that the makeup of the individual is given independently from society. It "postulates independent disembodied entities volitionally charting their own paths in pursuit of personal well-being." Andrea Giampetro-Meyer et al., *Advancing the Rights of Poor and Working-Class Women in an Individualistic Culture,* 2 LOY. POVERTY L.J. 41, 41 n.2 (1996) (holding that the only purpose of society is to benefit the individual, atomism places a high value on negative liberty (the absence of government interference in the lives of its citizens). Atomistic psychology had a strong influence on the development of classical liberal thought. *See* E.K. HUNT, PROPERTY AND PROPHETS: THE EVOLUTION OF ECONOMIC INSTITUTIONS AND IDEAS 39-40 (7th ed., 1995). This influence remains evident in the market-oriented thought of neoclassical economists today.

156. Giampetro-Meyer et al., *supra* note 155, at 42 n.3.

157. *See* BELLAH ET AL., *supra* note 152, at 23 ("Freedom is perhaps the most resonant, deeply held American value. . . . To Americans, freedom is often defined as the freedom from an oppressive authority and from having others' views and lifestyles forced upon them. . . . [However, w]hat it is that one might do with that freedom is much more difficult for Americans to define.").

158. *See id.* at 148-49 (discussing middle class individualism and its emphasis on rationality and success).

whole village to accomplish a goal is seen as misguided in that it detracts from personal responsibility and thereby weakens social character.

Alexis de Tocqueville was among the first scholars to label such thought patterns as "individualism." In *Democracy in America*, he wrote,

> Individualism is a novel expression, to which a novel idea has given birth. Our fathers were only acquainted with egotism. Egotism is a passionate and exaggerated love of self which, leads a man to connect everything with his own person, and to prefer himself to everything in the world. Individualism is a mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellow-creatures; and to draw apart with his family and friends; so that, after he formed a little circle of his own, he willingly leaves the society at large to itself. Egotism originates in blind instinct: individualism proceeds from erroneous judgment more than from depraved feelings; it originates as much in the deficiencies of the mind as in the perversity of the heart. Egotism blights the germ of all virtue; individualism, at first, only saps the virtues of public life; but, in the long run, it attacks and destroys all others, and is at length absorbed in downright egotism. Egotism is a vice as old as the world, which does belong to one form of society more than another: individualism is of democratic origin, and threatens to spread in the same ratio as the equality of conditions.[159]

The United States that Tocqueville analyzed almost two centuries ago is today the primary site where individualistic thought flourishes.[160] Evidence of individualism's strength in the United States includes its reliance on a market-driven economy,[161] and its dominant form of religion.[162]

The link between individualism and markets is especially important for thinking about casino gaming because casinos see themselves as just another service like a bakery or a laundry, in business to meet a need of others. This stance is at its core an ethical perspective. It makes claims to advance the efficiency, comfort, and stability of the community. From this perspective, markets offer private pleasure that is threatened by democratic political judgments and the statutes they encourage. In that regard, markets are the venue in which the fruits of personal responsibility can be rewarded.

But the condition of the community is everyone's concern, and as such lacks value in a domain that responds to personal preferences

159. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 366 (Henry Reeve trans., Henry Steele Commanger ed., World Classics ed., 1946) (1835).

160. *See, e.g.,* George C. Lodge, *Introduction to* IDEOLOGY AND NATIONAL COMPETITIVENESS: AN ANALYSIS OF NINE COUNTRIES 10 (George C. Lodge & Ezra F. Vogel eds., 1987).

161. See HUNT, *supra* note 155, at 38-45, for a discussion of the individualistic assumptions and attitudes that encouraged the development of a market culture.

162. *See* GERRY C. HEARD, BASIC VALUES AND ETHICAL DECISIONS: AN EXAMINATION OF INDIVIDUALISM AND COMMUNITY IN AMERICAN SOCIETY 5 (1990) (viewing American religious individualism as being closely related to the Protestantism that is dominant in the United States).

only. Hence, those who wish to protect the virtues of an endangered community look to political discourse as their best chance to activate their priorities.

Contrary to individualistic thought, communitarianism or any form of political activity that elevates the needs of the collective above the needs of the individual recognizes the need for a separate sphere of activities delimited by their joint preference and consumption.[163] Collectivists frequently define their well-being in terms of the group's well-being. Rather than emphasize individual rights, as individualists do, collectivists view their duties to the group as paramount. They value interdependence and close relationships.[164]

Because collectivists tend to see themselves as interconnected with other members of their society, they are more likely to implement economic policies that rely on forces other than the supply and demand. Hence, they would view gaming in terms of its impact on dominant community values. This method of discussion is not a substitute for economic arguments, but as along as we see ourselves as a community that stands for certain ethical principles, those principles deserve to be a major component in the public discussion of the regulation of casino gaming.

163. *See supra* note 14 and accompanying text.
164. *See, e.g.*, AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA 1-14 (1993).