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# GO TO YOUR ROOM, FANDUEL AND DRAFTKINGS: DAILY FANTASY SPORTS, NEW YORK & PATERNALISM

JAMES E. HAVEL\*

## INTRODUCTION

On October 4, 2015, Ethan Haskell, an employee of DraftKings, the nation's second-largest Daily Fantasy Sports (DFS) website, won \$350,000 in prize money on FanDuel, the nation's largest DFS website.<sup>1</sup> At the time, the two companies attracted attention with their seemingly incessant national advertising campaigns that blanketed the internet, television and sports-talk radio, which promised exciting entertainment and prize money resulting from playing daily fantasy leagues without season-long commitment. Haskell's win was newsworthy, because he had access to pertinent and non-public DraftKings information that could have been used for his gain on FanDuel.<sup>2</sup> This potential insider-trading scandal gave New York an opportunity to first examine, and then try to shut down the two websites as illegal gambling operations.<sup>3</sup> In defense, the DFS websites claim they are games of skill and remind their critics that fantasy sports have a specific exemption under the Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006.<sup>4</sup>

DFS' position has not stopped New York from aggressively pursuing the companies in court and demanding that they return \$200 million as

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1. Patrick Redford, *DraftKings Employee With Access to Inside Info Wins \$350K at FanDuel*, DEADSPIN.COM (Oct. 5, 2015, 7:50 PM), <http://deadspin.com/draftkings-employee-with-access-to-inside-info-wins-35-1734719747>. The proprietary information he published was ownership and lineup data. This data is so valuable, because in order to win money in a DFS contest, it is important to have a player on your team that is not in the lineup of another team. In other words, a DFS player is looking to exploit "market inefficiencies" to help his team win at the expense of another team, while staying within the budget.

2. *Id.* DraftKings later determined that Mr. Haskell did not use the information to his advantage and won the \$350,000 without it.

3. See Schneiderman, *infra* note 6. This Note will focus mostly on New York's legal actions, because they have made the biggest headlines and New York was one of the first states to ban FanDuel and DraftKings as illegal gambling after the Ethan Haskell scandal. Nevada, Illinois and Texas have also declared DFS to be illegal gambling. Their arguments as to why DFS is a game of chance and not of skill are nearly identical to New York's arguments. To avoid repetition and for the sake of brevity, I focus exclusively on New York.

4. LIVING THE FANTASY (LPA Productions 2015). 28 of the 32 teams in the NFL have sponsorship deals with either DraftKings or FanDuel.

restitution to the numerous users in New York who lost money in 2015.<sup>5</sup> New York claims that every DFS player is a “victim,” because over 90% of prizes are won by just 1.3% of players.<sup>6</sup> Despite seemingly noble intentions, New York’s Attorney General is using paternalistic arguments to help shut down both of the billion-dollar startup companies to increase the state’s power over the decisions of free-thinking New York residents. The main test in the court system to determine whether a game is either illegal gambling (chance) or a legal game (skill) is the predominant elements test (described more fully below).<sup>7</sup> This test is arbitrary and subjective. Nevertheless, courts, regulators and legislators apply and use it inconsistently.

John Stuart Mill, the nineteenth-century English philosopher, would object to New York’s outright ban of DFS because of “public health” and “safety” concerns. Instead, he would argue, correctly, that adults who are fully capable of making their own decisions should be able to do what they choose with their time and money so long as they are not infringing on anyone else’s rights or liberties.<sup>8</sup> Mill’s analysis and beliefs are the most compatible with that of a free society. Rather than allow government to control their decisions, citizens should be able to decide for themselves whether DFS, as an entertaining game, is worth their investment.

Similarly, New York should have the ability to warn its citizens of the low likelihood of winning money playing DFS, and, further, the state should be able to collect tax revenue on winnings in an attempt to discourage play. However, the state should not have the right to use an arbitrary and inconsistent test to make a decision for its citizenry on an issue that has little to do with “public health” or “safety.”<sup>9</sup>

The first part of this Note examines fantasy football, generally. It begins with an explanation of how to play traditional fantasy football, the history of and how to play daily fantasy football, and the daily fantasy sports’ business model. The second part analyzes relevant United States

5. Associated Press, *In Latest Salvo, New York Attorney General Sues to Get DraftKings, FanDuel to Return Money*, U.S. NEWS (Jan. 1 2016, 3:42 PM), <http://www.usnews.com/news/sports/articles/2016-01-01/new-york-sues-to-get-draftkings-fanduel-to-return-money>.

6. Eric T. Schneiderman, *Notice to Cease and Desist of Proposed Litigation Pursuant to New York Executive Law § 63(12) and General Business Law § 349* (Nov. 10, 2015), [http://ag.ny.gov/pdfs/Final\\_NYAG\\_FanDuel\\_Letter\\_11\\_10\\_2015\\_signed.pdf](http://ag.ny.gov/pdfs/Final_NYAG_FanDuel_Letter_11_10_2015_signed.pdf). FanDuel and DraftKings received identical copies of this letter on the same day.

7. M. Christine Holleman, Note, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J.L. & TECH, 59, 68 (2006).

8. JOHN STUART MILL, *ON LIBERTY* 8 (Dover Thrift ed., Dover Publications, Inc. 2002) (1859).

9. Michael Trippiedi, Note, *Daily Fantasy Leagues: Do You Have The Skill To Win At These Games of Chance?*, 5 UNLV GAMING L.J. 201, 204 (2015).

gambling laws. This part also evaluates the rationale behind these gambling laws and considers the positive and negative externalities associated with gambling. The final part explores the 2015 “insider trading scandal” at DraftKings through John Stuart Mill’s paternalism lens, and leaves the reader with concluding remarks.

### I. HOW TO PLAY TRADITIONAL FANTASY FOOTBALL

A brief introduction to modern fantasy football in standard scoring leagues follows.<sup>10</sup> In standard scoring leagues, each team starts with one quarterback, one tight end, two running backs, two wide receivers, one kicker, one defense, and one “FLEX” player (any tight-end, wide receiver, or running back).<sup>11</sup> Each team also has seven bench spots to fill out the sixteen-man roster.

Before the season starts, each league holds a draft. There are two styles of drafting: “snake” or “auction.” In a “snake” style league, the order of the teams picking “flips” after the completion of each round, so the person who picks first in the first round picks last in the second round. The pattern repeats until the draft is concluded.<sup>12</sup> In an “auction” style draft, each team is given a budget to build a team. Once the draft is final, teams in the league can begin to offer trades, add players from the “waiver wire” and cut players from their own team. No one player can be on multiple teams at a given time.<sup>13</sup> For example, if a team in a league drafts Aaron Rodgers, quarterback of the Green Bay Packers, so long as Rodgers remains on that active roster, only that team may play him.

Each week, players and their teams are matched up in a head-to-head contest against an opponent in that league. The object of the game is to score more fantasy points than the opponent. It is possible for the top two scoring teams in the league to play each other in a week while the bottom

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10. In standard scoring, players do not earn points for the number of receptions they have during the course of game. Rather, scoring only includes yards gained and touchdowns scored, which vary by position. For example, a throwing touchdown (usually from a quarterback) earns four points, while running touchdown earns a full six points. There are many scoring varieties in fantasy football, such as Points per reception (PPR) or “touchdown only.” For more information, see *Scoring Settings for Standard Leagues*, ESPN.COM, <http://games.espn.go.com/ffl/resources/help/content?name=scoring-settings-standard>.

11. *Roster Settings*, ESPN.COM, <http://games.espn.go.com/ffl/resources/help/content?name=roster-settings-standard>.

12. Jon Bales, *Differences Between Season Long and Daily*, ROTOGRINDERS.COM (last visited Jan. 4, 2016), <https://rotogrinders.com/lessons/differences-between-season-long-and-daily-174278>. See also Trippiedi, *supra* note 9, at 207.

13. *Id.* A waiver wire, generally, is the pool in which unclaimed players reside until a team selects him.

two scoring teams play one another in the same week. One of those teams in each matchup will win and the other will lose. The second highest scoring team in this scenario might be happy with the points scored, but will be disappointed by losing the match, while the second lowest scoring team will feel lucky for their good fortune in winning against that week's lowest scoring team.

For serious players, managing a fantasy football team for a fourteen-week season (or longer if the team makes the playoffs) takes a significant amount of time and effort.<sup>14</sup> Serious players study match-ups, scoring trends, injuries and every possible statistic to try to beat their opponents. Television networks like ESPN, NFL Network, and NBCSN have hours of programming dedicated to fantasy football to help players get ready for each week's matchups.<sup>15</sup>

At the end of the season, the winner of a league could win significant prize money and bragging rights for an entire year.<sup>16</sup> Regardless, the odds of winning a twelve-man league are 1/12 when the season starts. Daily Fantasy Football (DFF) condenses this process into one week.

## II. HISTORY OF DAILY FANTASY FOOTBALL

DFF is the extension of the modern era of "instant gratification" in the world of fantasy sports and fantasy football. Nigel Eccles capitalized on this trend when he launched FanDuel.com in 2009, a daily fantasy sports website that offers users a chance to compete in contests/games on the website for cash prizes. There is no long-term commitment. The teams can be selected in less than thirty seconds, and by the end of the day, results are available. In traditional fantasy football leagues, it takes at least fourteen weeks to determine a winner and award prize money.

FanDuel started with five employees in a New York office. Eccles convinced angel investors and other financial backers to invest seed

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14. *Id.* at 207–08. I monitor Twitter frequently to read articles about certain players or to read updates from NFL "insider" journalists on the recent transactions or explanations of a coach's thinking process and matchups. Because I play in three to four leagues a year, I spend roughly 4 hours a week researching and making decisions to improve my teams to make the playoffs.

15. For three hours leading up to kickoff on NFL Sundays, ESPN 2 airs, "Fantasy Football Now," where the hosts talk fantasy football exclusively. The NFL Network's Redzone channel airs fantasy football advice an hour before kickoff.

16. The Commissioner of the league, with the members' approval, sets the prizes for the winner, second place and, occasionally, third place. The league dues (what each member contributes at the beginning of the season) determine the size of the pot. In the years I have won the championships in my league, the money is nice, but the bragging rights are far more important to me.

money to expand its operations.<sup>17</sup> His main sales pitch was the provision in the Unlawful Internet Gambling Enforcement Act (UIGEA) carving out an exemption for fantasy sports.<sup>18</sup> This exemption gave Eccles an opportunity to create his vision. Eventually, additional investors signed on to partner with and fund FanDuel, thereby subsidizing expanded operations and offerings.<sup>19</sup>

In 2012, FanDuel launched its first mobile app and earned over \$1 million in revenue while hosting tournaments with cash prizes worth \$500,000.<sup>20</sup> FanDuel has grown exponentially since 2012. The website now claims to pay out over \$75 million in prize money per week to its players.<sup>21</sup> Professional sports leagues have taken notice, too. The National Basketball Association, National Football League and Major League Baseball all have partnerships with FanDuel.<sup>22</sup> Additionally, the Leagues' broadcasting partners; NBC, CBS, FOX, ABC/ESPN, and Time Warner each have partnerships and ownership stakes in FanDuel.<sup>23</sup>

DraftKings.com was a small, Boston-based start-up at the time FanDuel became an industry leader in daily fantasy sports (DFS).<sup>24</sup> However, DraftKings grew rapidly, thanks to funding from hungry investors.<sup>25</sup> DraftKings now has many of the same partnerships with professional sports leagues (and their broadcasting partners) as FanDuel.<sup>26</sup> In addition, many professional teams in various leagues have an ownership stake in DraftKings and have exclusive advertising contracts with the website.<sup>27</sup>

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17. *History | FanDuel*, FANDUEL.COM, <https://www.fanduel.com/history> (Last visited Jan. 4, 2016).

18. 31 U.S.C. § 5362(1)(E)(ix) (2012) (definition of bet does not include "participation in any fantasy or simulation sports").

19. *See* Redford, *supra* note 1.

20. *Id.*

21. Gregg Easterbrook, *DraftKings and FanDuel Are Not Your Friends*, N.Y. TIMES, Oct. 5, 2015, [http://www.nytimes.com/2015/10/07/upshot/the-big-winners-in-fantasy-football-and-the-rest-of-us.html?\\_r=0](http://www.nytimes.com/2015/10/07/upshot/the-big-winners-in-fantasy-football-and-the-rest-of-us.html?_r=0).

22. Drew Casey, *DraftKings, FanDuel Make Millions, and Give Them Away, as Fantasy Revs Up*, CNBC (Sept. 20, 2015, 11:31 AM), <http://www.cnbc.com/2015/09/20/draftkings-fanduel-make-millions-and-give-them-away-as-fantasy-revs-up.html>.

23. *Id.*

24. Darren Heitner, *An Abbreviated History of FanDuel and DraftKings*, FORBES (Sept. 20, 2015, 9:41 AM), <http://www.forbes.com/sites/darrenheitner/2015/09/20/an-abbreviated-history-of-fanduel-and-draftkings/>.

25. *Id.* In 2014, the company acquired DraftStreet.com, the third largest player in the industry, to become the true number two daily fantasy sports website behind FanDuel.

26. *See* Redford, *supra* note 1.

27. LIVING THE FANTASY, *supra* note 4. The tournament featured 50 qualifying teams competing for a first place prize of \$1 million. To determine which 50 teams will compete, DraftKings held several "King of The Beach" qualifying tournaments during the course of the fantasy football season.

### III. HOW TO PLAY DAILY FANTASY FOOTBALL

Daily Fantasy Football (DFF) operates exactly how its name suggests. Players are given a chance to draft a completely new team every Gameday and potentially compete against thousands of new opponents at the same time.<sup>28</sup> The scoring is virtually the same as traditional fantasy football, but there are some significant differences concerning how the teams are drafted. Rather than drafting in a snake or auction style, players are given a salary cap as a budget to build a team.<sup>29</sup> Each player is assigned a specific dollar value.<sup>30</sup> However, there is a possibility every team in the league (contest) may have at least one common player. Again, using Aaron Rodgers to illustrate, it is possible in a contest on FanDuel consisting of 1000 teams, for all 1000 teams to draft Aaron Rodgers as its quarterback.<sup>31</sup> The only draft restriction is the salary cap.

Another difference is how winners are determined in DFF. Instead of competing against one opponent head-to-head to determine the winner that week, the teams compete against the entire pool [of teams].<sup>32</sup> Therefore, the object is to score the most points in the pool to defeat every team competing to win the league/contest that day.<sup>33</sup> Because the players draft a new team every week, DFF does not require the same “micromanaging” or commitment to the team as is necessary in a traditional fantasy football league. Rather, a player can simply wake up on Gameday morning, log in to DraftKings or FanDuel, and set a lineup in less than a minute.<sup>34</sup>

The biggest difference between DFF and traditional fantasy football (TFF) is the chance to win or lose money on a weekly basis in DFF, rather than only at the end of the season in TFF leagues. DFF players can wage any amount of money they desire each week.<sup>35</sup> In fact, the strongest players usually wage thousands of dollars each week for the opportunity to

DraftKings also has the largest tournament for its players, offering \$2.5 million dollars in prize money for a tournament in Bermuda.

28. Nathaniel J. Ehrman, *Out Of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 *SPORTS LAW. J.* 79, 85 (2014).

29. Bales, *supra* note 12. This is the most common DFF game and this Note will focus exclusively on those styles of DFF games.

30. *Id.*

31. Ehrman, *supra* note 28, at 104.

32. DraftKings and FanDuel have some “head to head” contests on their website, but these are the most basic DFF games and do not represent the real difference between DFF and Traditional Fantasy Football. It is far more common for DFF players to play 50/50 or “up down” games.

33. Ehrman, *supra* note 28, at 87. In a 50/50 game, the teams finishing in the top half (cumulative points) win money; the teams in the bottom half do not.

34. *LIVING THE FANTASY*, *supra* note 4.

35. *Id.*

win hundreds of thousands of dollars each week.<sup>36</sup> This is possible because there is no limit on how many teams one DFF player can enter in a given contest.<sup>37</sup> DraftKings and FanDuel games range anywhere from \$1 buy-ins to \$10,000 buy-ins.<sup>38</sup> These daily games attract hundreds to thousands of players per game on the website.<sup>39</sup> DraftKings and FanDuel host thousands of games per week.<sup>40</sup> Playing multiple teams weekly is not an overwhelming proposition for the player, since the players do not have to worry about making trades or “working” the waiver wire to acquire new players. As mentioned above, the rosters are filled one each week and the players are then left to enjoy the games. The most serious and financially successful players in DFF play on a “volume” basis, just like professional gamblers.<sup>41</sup> The more teams a player enters per game/contest, the greater the odds of winning some prize money or even the league.

#### IV. DAILY FANTASY SPORTS BUSINESS MODEL

DraftKings and FanDuel control 95% of the North American Daily Fantasy Football market.<sup>42</sup> Investors over the last six years have contributed a combined \$575 million into the two companies to make them giants of the industry.<sup>43</sup> Some experts say the Daily Fantasy Sports industry, on the whole, is worth billions of dollars.<sup>44</sup> The primary source of revenue FanDuel and DraftKings generate is derived from the entry fees players pay for games/contests. DraftKings, which is privately held, claimed they earned \$30 million in 2014 even after paying out \$300

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36. *Id.* A DraftKings executive, in the documentary, encouraged players to play more volume if they were struggling because the “law of big numbers” dictates players will have a better chance to win the more they play.

37. *Id.* In the documentary, one player had 25 teams in a \$1,000 per team buy in order to qualify for King of the Beach Tournament. Some players in the documentary called that unfair and encouraged DraftKings and FanDuel to change that policy.

38. *Id.*

39. LIVING THE FANTASY, *supra* note 4.

40. *Id.*

41. LIVING THE FANTASY, *supra* note 4, Sarah E. Needleman, *Storm of Criticism Engulfs DraftKings, FanDuel*, WALL ST. J. (Oct. 6, 2015), <http://www.wsj.com/articles/storm-of-criticism-engulfs-draftkings-fanduel-1444107475>, Ehrman, *supra* note 28, Casey, *supra* note 22, Similar to much of TFF, DFF is not a winner take-all proposition. DraftKings and FanDuel have multiple payout structures. For example, DraftKings and FanDuel host 50/50 games where the teams finishing in the top fifty percent win money. FanDuel is estimated to pay out more than \$10 million per week in prizes during football season.

42. Needleman, *supra* note 41.

43. *Id.*

44. *Id.*



million in prize money.<sup>45</sup> According to Eccles, cash prizes mostly come from entry fees.<sup>46</sup> Eccles describes his business as “self-funding” after considering the Company’s ten percent cut from entry fees.<sup>47</sup>

According to the Fantasy Sports Trade Association (FTSA), 56.8 million people play daily fantasy sports in North America.<sup>48</sup> Despite this large number, FanDuel and DraftKings continue to see an opportunity to grow and expand their market. There are over 228 million self-identified sports fans in North America.<sup>49</sup> Trying to capture this market, FanDuel and DraftKings have invested heavily in advertising on all available platforms. From January 1, 2015, to October 5, 2015, DraftKings and FanDuel spent an estimated \$206 million on advertisements.<sup>50</sup> However, this business strategy and volume of activity has brought unwanted attention to the industry.<sup>51</sup>

FanDuel’s and DraftKing’s business models are based on a “shark and fish” theory.<sup>52</sup> Essentially, the contests need a large number of players to participate to allow payout of even a small amount of money. Bigger prizes can only be offered by attracting even more people to play.<sup>53</sup> This is essentially how lotteries work as well. Since the companies are betting on increasing user traffic and attracting new players, the recent industry “insider trading” scandal noted above has been problematic from a consumer trust standpoint.<sup>54</sup>

45. See Casey, *supra* note 22. FanDuel made \$57 million in revenue while giving away \$564 million in prizes in 2014.

46. *Id.*

47. *Id.*

48. Research, FANTASY SPORTS TRADE ASSOCIATION, <http://fsta.org/research/> (last visited Jan. 4, 2016).

49. *Id.*

50. Ilan Mochari, *Why DraftKings and FanDuel Spent \$206 Million on Ads this Year*, INC. (Oct. 9, 2015), <http://www.inc.com/ilan-mochari/fantasy-sports-betting-startups-206-million-tv-ads.html>. DraftKings spent \$131.4 million, while FanDuel spent \$74.5 million on advertising during that period.

51. Darren Rovell, *Class Action Lawsuit Filed Against DraftKings and FanDuel*, ESPN (Oct. 9, 2015), [http://espn.go.com/chalk/story/\\_/id/13840184/class-action-lawsuit-accuses-draftkings-fanduel-negligence-fraud-false-advertising](http://espn.go.com/chalk/story/_/id/13840184/class-action-lawsuit-accuses-draftkings-fanduel-negligence-fraud-false-advertising). The lawsuit claims FanDuel and DraftKings’ commercials are false advertising, because they promise every day people can win money just by placing an entry into a contest.

52. Drake Baer, *Fantasy Football has been Infiltrated by a ‘Shark and Fish’ System that Crushes Most People’s Chances*, TECH INSIDER (Sept. 16, 2015, 12:09 PM), <http://www.techinsider.io/fantasy-football-favors-the-sharks-heavily-over-the-fish-2015-9>. 1,400 DFS players were surveyed and, “70% of fantasy sports players report losing money. Insiders call these casual players “fish,” since more advanced players—“sharks”—feed on their losses.” In an extreme case, one “shark” plays \$140,000 a week with an average of an 8% return on investment.

53. See Casey, *supra* note 22.

54. Daniel Roberts, *Everything you Need to Know About the DraftKings and FanDuel Data Scandal*, FORTUNE (Oct. 5, 2015 9:13 PM), <http://fortune.com/2015/10/05/draftkings-fanduel-data-scandal/>. If the DFS games are rigged in favor of DraftKings and FanDuel employees, then the entire

## V. HISTORY OF RELEVANT SPORTS BETTING LAWS

The three most pertinent laws to sports betting in the United States are the Interstate Wire Act (IWA), the Professional and Amateur Sports Protection Act (PASPA) and, most important for DFS, the Unlawful Internet Gambling Enforcement Act (UIGEA).

### A. *The Interstate Wire Act*

The IWA enacted in 1961, sought to end the operations of illegal sports books.<sup>55</sup> The law makes it illegal for a gambling enterprise to take bets on a daily basis using a wire service.<sup>56</sup> The IWA was specifically designed to deter organized crime, whose main source of funding was illegal gambling proceeds from control of illegal gambling rackets.<sup>57</sup> The law was rarely utilized by the government from 1970–1990, but has found new life in the age of the internet.<sup>58</sup>

### B. *PASPA*

The NFL aggressively pursued action against state lotteries in the 1970s for creating contests involving NFL games.<sup>59</sup> Though they were unsuccessful in stopping the lotteries through the court system, the NFL and the other professional sports leagues noticed a trend around the nation of legalizing some forms of sports betting.<sup>60</sup> Finally, by 1992, amidst perceived threats to the integrity of their games, the leagues went to Congress to seek relief.<sup>61</sup> The relevant language of PASPA reads:

It shall be unlawful for—(1) a government entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or

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business model is likely to collapse given that most of the players who lose money currently believe they lose it in an equitable fashion. Nobody would willingly give money to a contest they knew they had 0% chance of winning.

55. Ehrman, *supra* note 28 at 89.

56. Trippiedi, *supra* note 9 at 211.

57. *Id.*

58. Ehrman, *supra* note 28 at 89.

59. Trippiedi, *supra* note 9 at 212–13.

60. *Id.*

61. 28 U.S.C. §§ 3701–3704 (2012).

otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>62</sup>

Over time, professional and collegiate sports have suffered through serious scandals involving sports bets, such as the infamous Black Sox scandal of 1919.<sup>63</sup> A point shaving scandal even brought down one of the most notorious mobsters in in the 1980s, James Conway (aka Jimmy Burke), and inspired the movie “Good Fellas.”<sup>64</sup> It is not good business for the sports industry in the United States to have the fans question the integrity of the contests they are watching.<sup>65</sup>

### C. UIGEA

The internet provided an expanded avenue for casinos and gambling websites to promote their product. Poker sites, such as Pokerstars.net, began operating where players could use credit cards to get “virtual” chips and sit at virtual tables to play Texas Hold-em and other popular card games with people from across the country and around the world.<sup>66</sup> Congress attempted to regulate the industry and eventually passed UIGEA in 2006. According to Congress, gambling leads to and causes theft, societal disorder, identity theft, fraud and money laundering.<sup>67</sup> It is interesting to note, however, that the majority of Americans did not want

62. *Id.*

63. See generally ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (Owl Books ed., Henry Holt and Co., LLC 1987) (1963); *Black Sox Scandal*, BASEBALL REFERENCE (Nov. 7, 2:58 PM), [http://www.baseball-reference.com/bullpen/Black\\_Sox\\_Scandal](http://www.baseball-reference.com/bullpen/Black_Sox_Scandal). Several players on the Black Sox, far and away the odds on favorites to win the 1919 World Series, worked with gamblers to “fix” games against the Cincinnati Reds. To this day, this is the most significant gambling scandal in professional sports.

64. Rob Hohler, *When ‘Goodfellas’ Collided With BC Basketball*, BOSTON GLOBE (Mar. 16, 2014), <https://www.bostonglobe.com/sports/2014/03/15/and-goodfellas-sports-scandal-and-its-lingering-toll/nvIXKiXCYsGpUqBUtg9BRN/story.html>. Conway was suspected of pulling off the Lufthansa heist in 1978. While the FBI was never able to prove that definitively, they were able, with the help of Henry Hill, to convict him for fixing Boston College Basketball games in the late 1970s. Conway was sentenced to twelve years in prison for that crime. Robert De Niro portrayed Jimmy Burke in the film, *GoodFellas*.

65. Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 4–5 (2002).

66. Lawrence G. Walters, *On Second Thought . . . —What Does the UIGEA Really Mean for Internet Gambling?*, WALTERS LAW GROUP, <http://www.firstamendment.com/site-articles/UIEGA> (last visited Jan. 4, 2016).

67. Ehrman, *supra* note 28 at 111.

to prohibit internet gambling in any form when Congress first passed the UIGEA.<sup>68</sup>

Under UIGEA, no one can receive funds or credit transfers related to internet gambling.<sup>69</sup> However, the law did not have the intended effect, as shutting down internet gambling has proven to be impractical.<sup>70</sup>

The gaming industry did not willingly accept UIGEA's provisions, and instead challenged its constitutionality.<sup>71</sup> The Third Circuit ruled that the legality of the transactions covered by the act, "turns on how the law of the state from which the bettor initiates the bet would treat that bet."<sup>72</sup> Therefore, UIGEA has no power/effect unless the activity is punishable under state law.<sup>73</sup> Only six states at the time had outlawed internet gambling.<sup>74</sup> However, the gamblers' victory was short-lived, because the federal government turned to the IWA to deter internet gambling.<sup>75</sup>

On April 15, 2011, known as "Black Friday," the Department of Justice (DOJ), using UIGEA, shut down five of the world's largest poker websites, indicted their executives and owners, seized their domain names, and froze their assets in American banks.<sup>76</sup> A year later, however, the Department of Justice issued a statement indicating they would only prosecute sports betting under the IWA.<sup>77</sup>

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68. *Id.*

69. 31 U.S.C. § 5363 (2012). The UIGEA reads, "No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful internet gambling—

(1) Credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

(2) An electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;

(3) Any check, draft, or similar instrument, which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution."

70. Joe Falchetti, UIGEA, 6 Years Later, CalvinAyre.com (Oct. 15, 2012), <http://calvinayre.com/2012/10/15/business/unlawful-internet-gambling-enforcement-act-2006/>.

71. *Interactive Media Entm't & Gaming Ass'n v. Att'y Gen. of U.S.*, 580 F.3d 113, 114 (3d Cir. 2009).

72. *Id.* at 117.

73. *Id.*

74. The six states at the time were Washington, Montana, Oregon, South Dakota, Illinois and Indiana. Since then, Nevada, Louisiana, New Jersey, Maryland, and Wisconsin have joined the original six to ban internet gambling in their states. FanDuel and Draftkings no longer operate in these states.

75. Falchetti, *supra* note 70.

76. *Id.*

77. *Id.* This day is also known as "White Friday" in gambling circles.

While owners of casinos and poker websites may hate UIGEA, DFS owes its existence to the law.<sup>78</sup> Without the specific carve-out exemption for fantasy sports in UIGEA, Eccles and Robins would not have formed FanDuel and DraftKings, respectively. In fact, in their pitches to investors, the two companies relied heavily on and promoted the exemption in the law.<sup>79</sup>

## VI. HOW DOES THE FEDERAL GOVERNMENT CLASSIFY BETTING?

### A. *The Predominant Factor Test*

UIGEA defines a bet as: “The staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”<sup>80</sup> To determine whether an activity is considered a wager under UIGEA, the court looks to whether the bet is placed on a game of skill or a game of chance.<sup>81</sup>

The majority of states use the predominance (dominant factor) test to determine whether a game is skill or chance.<sup>82</sup> If the winner of the game is determined by “skill,” then it is not gambling. If the game is determined by “chance,” it is gambling.<sup>83</sup>

To determine whether an activity is gambling under the predominant elements test, courts ask two questions: (1) “Is the result of an activity separable from the element of chance, so that skill can be determinative, at least in some cases, and (2) is the result always sufficiently affected by the operation of chance that chance could always account for the result?”<sup>84</sup> Skill is defined as the exercise of “sagacity upon known rules and fixed probabilities where sagacity includes keenness of discernment or penetration with soundness of judgment; shrewdness; or the ability to see what is relevant and significant.”<sup>85</sup>

78. See Redford, *supra* note 1.

79. LIVING THE FANTASY, *supra* note 4.

80. 31 U.S.C. § 5363 (2012).

81. Trippiedi *supra* note 9, at 213.

82. Ehrman, *supra* note 28, at 96–97.

83. *Id.*

84. M. Christine Holleman, Note, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J.L. & TECH. 59, 68 (2006).

85. 38 Am. Jur. 2d Gambling § 4 (2015).

Naturally, courts disagree about the various degrees of skill in games.<sup>86</sup> The courts' disagreements lead to inconsistent results for those states that do not outlaw all gambling.<sup>87</sup> When courts apply the predominant test, they use a sliding scale. On one side of the scale is a game of pure "chance," an example of which is a slot machine. There is no real strategy to slot machines. The player simply pulls the lever and hopes the algorithm works in their favor. On the other side of the scale is a game of pure "skill," an example of which is chess.<sup>88</sup> When it comes to chess, both players have an ability to see the other's moves and develop a strategy that they believe will win the game. The courts generally agree chance is a determining factor in sports betting.<sup>89</sup>

One of the first issues with the predominant factor test is that most games, at some level, involve a mix of skill and chance. For instance, it takes skill to play poker. Players develop and utilize strategies on some level.<sup>90</sup> There are numerous books in the hobby section of major bookstores on how to be a better card player, suggesting that one can develop skills to be "better" than others.<sup>91</sup>

However, players cannot choose their own cards, rather they are dealt at random, thereby introducing an element of chance.<sup>92</sup> Unlike other games, poker is a game of imperfect information. Players typically do not know all of the cards held by their opponents. Judgment calls are necessary in determining whether an opponent is bluffing or whether the player's cards are strong enough to be the winning hand. This is the exact opposite from a game like chess. Chess is a game of perfect information. Players see every piece on the board, including the opponent's. Players design a strategy of play and then react to the opponent's moves.<sup>93</sup>

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86. Ehrman, *supra* note 28 at 103.

87. Aaron Levy, Note, *A Risky Bet: The Future of Pay-To-Play Online Fantasy Sports*, 39 CONN. L. REV. 325, 332 (2006).

88. LIVING THE FANTASY, *supra* note 4.

89. Trippiedi, *supra* note 9, at 219–20.

90. *How To Play Texas Holdem Strategy*, WSOP.COM, <http://www.wsop.com/poker-games/texas-holdem/strategy/>. Using a "Texas Hold Em" example, once a player has cards, that player has to make calculations about whether to see the "flop" or fold immediately. Then, during the hand, the player has to make calculations about what he or she thinks his or her opponent has in his or her hand. Furthermore, it takes great skill to know how and when to "bluff" or keep the opponent opponent in the hand long enough to win a bigger "pot."

91. I encourage anyone to go to Amazon.com or Barnes and Noble and look at the plethora of "how to play poker for a living" type materials in "poker books." There were up to 20 pages of results on Amazon.

92. Poker 101, DANNYSHERIDAN.COM, <http://www.dannysheridan.com/poker/basicsofpoker.php>.

93. LIVING THE FANTASY, *supra* note 4, *Chess Ratings—How They Work*, CHESS.COM (Aug. 23 2007), <http://www.chess.com/article/view/chess-ratings---how-they-work>. DFS advocates claim chess includes an element of chance because a coin flip determines which player will be white and which

## VII. DFF COMPARED TO TFF AND SPORTS BETTING

## A. TFF

While each state defines and treats games of skill differently, it is worth again mentioning that TFF is considered a game of skill under federal law.<sup>94</sup> Indeed, it is. Serious players prepare for weeks, if not months, before their drafts. Players only get one shot at building a team through the draft. They then have to manage the team through trades and waiver wire transactions. They have to follow the matchups and make sure to consider injuries and other potential differentiators.<sup>95</sup> While some players go with their “gut feeling,” many more complete various analyses to determine their roster each week. If a team starts with a bad draft, their season could be virtually doomed before it starts. In contrast, a good draft will position a team to be highly competitive for the season and the championship.

DFF shares many of the same techniques. DFF’s best players use regressions and other analyses to select their one-day lineups. Some say it takes more skill to play DFF than traditional fantasy football.<sup>96</sup> DFF, with its salary cap, introduces economic theory to fantasy football by encouraging players to use a “high-low” theory. Players may load up on expensive “studs,” but out of necessity then try to find value in cheap “sleeper” picks to fill the roster.<sup>97</sup>

While different in execution and theory, auction drafts in TFF generally operate in the same fashion as DFF games. Players are allocated

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will be black. While it is true white has a fifty-four percent chance of winning a chess match, chess employs a ratings system that ensures players of similar skill level play one another. Chess rankings use an extremely complicated mathematical formula to try to understand the “true” ranking. A Grandmaster may only have a 60% chance of beating another grandmaster, but has a 100% chance of defeating a neophyte regardless of whether the neophyte plays as white.

94. Redford, *supra* note 1.

95. Trippiedi *supra* note 9, at 208, 220.

96. See Bales, *supra* note 12; see also Ehrman, *supra* note 28, at 105–06. The snake draft in traditional fantasy football should provide some parity among the players in the league. Each team will have “studs,” middle-tier players and “sleepers.” In this way, snake drafts mimic the NFL draft.

97. LIVING THE FANTASY, *supra* note 4. See also Bales, *supra* note 12. The strategy in DFF is extremely varied and many players will choose to buy high priced studs and find value in players they think will “go off” in that particular week. DraftKings plays in to this theory in their commercials when they encourage players to find the “sleeper,” because “he is out there.” Winners on the sites usually have most of the high-priced studs and enough of the sleepers they find using regressions and statistical analysis (tools professional gamblers utilize) to beat their opponents by only a few points. Those few points represent thousands of dollars (in some cases).

an amount, say \$200, to spend purchasing a team, and can acquire “studs” anywhere from \$45-\$75 dollars, nearly a third of the budget.<sup>98</sup>

### *B. Why Regulators See Little Difference Between DFS and Sports Betting*

Ultimately, DFS cannot escape the many similarities it shares with sports betting. Sports betting involves predicting the outcome of the game and covering spreads. Meanwhile, DFF involves the outcome of individual player performances on the field.<sup>99</sup> Sports betting is considered illegal under several federal laws,<sup>100</sup> yet there is a great deal of skill involved in placing winning bets on sports.<sup>101</sup> There are similar skills necessary to successfully complete in both DFF and sports betting.<sup>102</sup>

DFS Executives like Jason Robins have a bad habit of describing their websites like previously-legal online poker websites such as,

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98. Jason Lisk, *Fantasy Football: Auction Draft Strategies, Including, Yes, Actually Nominating a Player You Want Early*, THEBIGLEAD.COM (Aug. 25 2015), <http://thebiglead.com/2015/08/25/fantasy-football-auction-draft-strategies-including-yes-actually-nominating-a-player-you-want-early-2/>. A player who buys two or three studs will be left with only a few dollars to fill the roster. Another player in the same league could choose to spend less money on studs and build a team of solid, mid-level, players.

99. Easterbrook, *supra* note 21.

100. Ehrman, *supra* note 28, at 91–93. It should be noted that Adam Silver, the commissioner of the National Basketball Association, has called for the legalization of sports betting. See, James Herbert, *Silver: Gambling ‘Good for Business, I Don’t Want to Hide From That’*, CBSSPORTS.COM (Apr. 20 2015, 10:58 AM), <http://www.cbssports.com/nba/eye-on-basketball/25155791/adam-silver-on-gambling-its-good-for-business-i-dont-want-to-hide-from-that>.

101. Ryan Rodenberg, *Documents Show DOJ, NFL have Argued that Sports Betting is Skill-Based*, ESPN (July 21, 2015), [http://espn.go.com/chalk/story/\\_/id/13268458/documents-show-justice-department-nfl-argued-skill-sports-betting](http://espn.go.com/chalk/story/_/id/13268458/documents-show-justice-department-nfl-argued-skill-sports-betting). United States Attorney General Loretta Lynch argued in 2013 that, “Sports betting . . . involves ‘substantial [not slight] skill.’ Sports bettors can employ superior knowledge of the games, teams, and players in order to exploit odds that do not reflect the true likelihoods of the possible outcomes.”

102. Similar elements of chance exist between sports betting and DFS. For example, assume Las Vegas sets a line for the number of points collectively scored in a game between the Green Bay Packers and the Chicago Bears at fifty-seven. After studying statistics, weather conditions, and matchups, a sports bettor may decide to wager the “over” or that the two teams will score more than fifty-seven points combined. If Aaron Rodgers throws a touchdown pass to Jordy Nelson, a Packers’ wide receiver, on the last play of the game and the Packers win 30–28, the sports bettor wins the wager because the two teams combined to score fifty-eight points. The wager, however, is currently illegal, outside of Las Vegas and a few other jurisdictions. Despite the amount of effort and skill it took to wager the over in the above example, there was a still an element of chance; Nelson fails to score on the final play or the teams combine to score fifty-seven or fewer points.

Now assume a DFS player researched the same statistics and data as the sports bettor and determined it was more likely than not Jordy Nelson would have a receiving touchdown and over 100 yards receiving for the game. Using this data, the player put Jordy Nelson in his lineup. Before the game-winning touchdown, assume the DFS player needed nine more points to win the million-dollar prize in a DraftKings contest. If the final touchdown were a ten-point play for Nelson, the DFS player would win the million-dollar prize. The result is perfectly legal. See <http://www.vegasinsider.com/nfl/odds/las-vegas/>. See also 31 U.S.C. § 5363, *supra* note 69.



pokerstars.net.<sup>103</sup> Finally, it may prove damning that FanDuel and DraftKings each has a gambling license in the United Kingdom (gambling is legal in the U.K.).<sup>104</sup> In the United States, the two websites spend millions of dollars on lawyers and advertisements to convince regulators and average Americans they are hosting games of skill, and not illegal gambling, in the United States.<sup>105</sup>

## VIII. RATIONALE FOR GAMBLING LAWS IN THE UNITED STATES

### A. Paternalism

The majority of gambling laws in the United States contain elements of paternalism.<sup>106</sup> Paternalism, as defined in the dictionary is, “the attitude or actions of a person, organization, etc., that protects people and gives them what they need, but does not give them any responsibility or freedom of choice.”<sup>107</sup> This cuts against John Stuart Mill’s principles and the United States’ founding principles. As President Ronald Reagan said, “[t]his is the issue of this election: whether we believe in our capacity for self-government or whether we abandon the American revolution and confess that a little intellectual elite in a far-distant capitol can plan our lives for us better than we can plan them ourselves.”<sup>108</sup> While not arguing for a hard-core, purist libertarian ideal, it seems disingenuous for a society based on freedom (not to harm others) to allow for certain vices, but not for others. In fact, John Stuart Mill, in his seminal essay, *On Liberty*, agreed that there were certain times when paternalism was effective and necessary:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of *children*, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are

103. LIVING THE FANTASY, *supra* note 4.

104. Ben Walsh, *If Daily Fantasy Isn't Gambling, Why Did DraftKings and FanDuel Apply for Gambling Licenses?*, HUFFINGTON POST (Nov. 24 2015, 1:49 PM), <http://www.huffingtonpost.com/entry/daily-fantasy->

105. *Id.*

106. The Gambling Instinct Test, which is used by about ten states, outlaws any game that appeals to the “gambling instinct.” For strong paternalistic language see *Dandy Products, Inc. v. FTC*, 332 F.2d 985 (1964).

107. Merriam-Webster, <http://www.merriam-webster.com/dictionary/paternalism> (last visited Sept. 6, 2016).

108. Audio/Video: *A Time For Choosing*, PRESIDENT RONALD REAGAN (Oct. 27, 1964), <http://www.presidency.ucsb.edu/youtubeclip.php?clipid=76121&admin=40>.

still in a state to require being taken care of by others, must be protected against their own actions as well against external injury.<sup>109</sup>

### B. Negative Externalities

Gambling can also create negative externalities. Organized crime was heavily involved in casino and other gambling operations throughout the twentieth century, and in particular by the 1960s. Reports indicate organized crime is still heavily involved in the gambling industry.<sup>110</sup> As mentioned above, the IWA was then Attorney General Robert F. Kennedy's plan to prosecute the mafia at the source of its money.<sup>111</sup> In addition, areas around casinos and other gambling operations often experience higher crime rates.<sup>112</sup>

Gambling has been linked to anxiety, suicide and inappropriate uses of welfare funds.<sup>113</sup> In addition, gambling can be an addictive activity, and a compulsive gambler can risk an entire life's fortune and destroy a family in a matter of hours.<sup>114</sup> Gambling, especially compulsive gambling, has also been linked to increased domestic violence.<sup>115</sup> Gambling can even have a negative impact on the economy.<sup>116</sup>

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109. MILL, *supra* note 8. Mill argues paternalism is acceptable in certain circumstances. Dealing with children, the mentally disabled or handicapped, or others unable to care for themselves, or make decisions in their own best interests, creates a need for paternalistic action. However, citizens of age (adults) who are mentally capable of making decisions for themselves should be left alone to make their own decisions so long as those decisions do not violate the rights or safety of others.

110. Jay S. Albanese, *Illegal Gambling & Organized Crime An Analysis of Federal Convictions in 2014*, American Gaming Association (2015).

111. Larry Josephson, *Betting History 101: The Story Behind the 1961 Wire Act*, COVERS (Jan. 3, 2012), <http://www.covers.com/articles/articles.aspx?theArt=260073>.

112. Melissa S. Kearney, *The Economic Winners and Losers of Legalized Gambling*, 8 NAT'L BUREAU ECON. RES. (Mar. 2005), <http://www.nber.org/papers/w11234.pdf>. In her paper, Kearney cites four ways in which crime is increased in areas near casinos: (1) harming economic development by draining the local economy and increasing illegal gambling and prostitution, (2) creating more opportunities for criminals to act, (3) increasing compulsive gamblers' opportunities to commit crimes to fund their addiction and (4) attracting the type of people who commit and are victimized by crime more so than others.

113. *Id.* at 5. Gamblers are more likely than non-gamblers to have been on welfare, declared bankruptcy and committed crimes. However, it should be noted that such data collected regarding suicide and crime cannot be directly linked to gambling, because the causes are not researched, just the numbers. Economists and social scientists have made arguments linking the two.

114. Trippiedi, *supra* note 9, at 217.

115. Ehrman, *supra* note 28 at 112; *See also* Trippiedi, *supra* note 9, at 220.

116. *See generally* Douglas M. Walker, *Overview of the Economic and Social Impact of Gambling in the United States*, [http://walkerd.people.cofc.edu/pubs/2012/OxfordCh\\_dist.pdf](http://walkerd.people.cofc.edu/pubs/2012/OxfordCh_dist.pdf) (2011). Walker's research shows that casino gambling has a neutral effect on State revenues. In addition, his research finds legal gambling has a net positive effect on tax revenues in the short-term, but a long-term neutral or negative impact on tax revenues.

Roughly one percent of the population is comprised of pathological gamblers.<sup>117</sup> A 2005 study claims, the average social cost is \$19,711.00 per gambling addict/year.<sup>118</sup> Those social costs include productivity losses, bankruptcy related costs, social service costs, and crime/criminal justice system costs.<sup>119</sup> Some economists question the veracity of that \$19,711.00 number because it is unclear whether such costs can be directly attributable to gambling.<sup>120</sup> For instance, forty percent of compulsive gambling addicts have a drug problem while seventy-five percent have a drinking problem.<sup>121</sup> There is little doubt gambling has achieved a stigma in our society, and known gamblers may experience shame and other anxieties associated with their actions.<sup>122</sup>

The intentions of those who desire to outlaw gambling often sound good in theory.<sup>123</sup> However, Mill argues it is highly unlikely that others can make better decisions for people than they make for themselves. After all, individuals are in the best position to know their own interests.<sup>124</sup> It is more likely than not that those who wish to dictate will misapply their good intentions, resulting in harm for others.<sup>125</sup>

### C. DFS—Positive Externalities

Traditional and Daily Fantasy Football may have positive externalities not normally attributed to gambling. Fantasy sports bring friends and family together. While sports betting is considered illicit gambling by professional sports leagues, those same leagues actively promote fantasy sports.<sup>126</sup> While most fans have a favorite team, they watch more games and take a more active interest in other teams because of fantasy

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117. *Id.*

118. *Id.* Walker believes this number is most likely inaccurate. The data used to create that number was highly selective. It is unclear what the true social or economic costs of gambling are.

119. *Id.*

120. Walker, *supra* note 116.

121. *Id.*

122. Ehrman, *supra* note 28, at 111–12.

123. Gambling is not the most productive use of one's money. It is a vice with potentially serious negative externalities and outcomes for those who cannot control themselves.

124. *See generally* MILL, *supra* note 8.

125. MILL, *supra* note 8, at 64. “The interference of society to overrule his judgment and purposes in what only regards himself, must be grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without.”

126. *See* Heitner, *supra* note 24.

implications.<sup>127</sup> The NFL already is the leader in terms of television ratings and viewership and the American sports world in general. The League's popularity has seen an increase in popularity with the rise of fantasy football.<sup>128</sup> The NFL's profits have never been higher.<sup>129</sup>

FanDuel and DraftKings are estimated to be worth more than a billion dollars each.<sup>130</sup> The two companies' ads are largely responsible for enhancing local television networks and raising the average price per commercial during football season.<sup>131</sup> People who take fantasy football seriously learn invaluable skills. They look at trends, analyze data, and look for statistical patterns and anomalies.<sup>132</sup> They look for the "right" matchups and take calculated risks when setting their teams.<sup>133</sup> These are skills people can use to enhance critical thinking and leverage to achieve greater success in the business world. Above all, DFF and TFF bring joy to people. Fantasy football can be extremely frustrating and heartbreaking, but at the same time, it can help facilitate friendships and give people a common interest over which they can bond.<sup>134</sup>

#### D. New York And Paternalism

New York's attorney general, Eric T. Schneiderman, declared FanDuel and DraftKings to be illegal gambling websites and claimed that playing DFS was not a victimless activity.<sup>135</sup> Schneiderman went on to use other

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127. Andrew Garda, *How Fantasy Football has Transformed the NFL*, BLEACHER REP. (June 12, 2013), <http://bleacherreport.com/articles/1670145-how-fantasy-football-has-transformed-the-nfl>. See also Shehan Peiris, *Fantasy Football: The Good and Bad Aspects*, BLEACHER REP. (Nov. 20, 2012), <http://bleacherreport.com/articles/1408486-fantasy-football-the-good-and-bad-aspects/page/5>.

128. Garda, *supra* note 127. The popularity of the NFL rose twelve percentage points from 2003 (47%) to 2013 (59%). Many attribute this to fantasy football's increased popularity.

129. Chris Isidore, *NFL Revenue: Here Comes Another Record Season*, CNN MONEY (Sept. 10, 2015), <http://money.cnn.com/2015/09/10/news/companies/nfl-revenue-profits/>. The NFL made \$13 billion in revenue in 2014 and had a record \$1 billion in profits. While 31 of the 32 NFL teams are privately owned, the Green Bay Packers, the league's only publicly owned franchise (of which I am one of the many proud owners), reported revenues of \$226.4 million from the league's revenue sharing scheme.

130. Needleman, *supra* note 41. FanDuel has an estimated worth of \$1.3 billion, while DraftKings has an estimated worth of \$1.2 billion.

131. Peter Kafka, *Those DraftKings and FanDuel Ads You're Already Sick of Are Keeping the TV Business Afloat*, RE/CODE (Sept. 18, 2015, 9:38 AM), <http://recode.net/2015/09/18/those-draftkings-and-fanduel-ads-youre-already-sick-of-are-keeping-the-tv-business-afloat/>.

132. Steve Cooper, *8 Ways Fantasy Football Can Boost Your Business Acumen*, FORBES (Aug. 22, 2012, 5:01 AM), <http://www.forbes.com/sites/stevecooper/2012/08/22/8-ways-fantasy-football-can-boost-your-business-acumen/#587126e71dc5>.

133. *Id.*

134. Trippiedi, *supra* note 9, at 221.

135. Schneiderman, *supra* note 6.

paternalistic language and arguments as further described below.<sup>136</sup> The challenge facing DFS is a naked power grab by New York under the guise of paternalism. If FanDuel and DraftKings are allowed to operate again in New York, will all DFS players still be victims? It appears more likely that New York is more interested in getting a portion of the revenue in the form of a tax, rather than protecting its residents.<sup>137</sup> Mill argues society (politicians and leaders) use paternalism as an excuse to tax something or limit people's choices.<sup>138</sup> Mill writes, "[s]ociety has expended fully as much effort in the attempt (according to its lights) to compel people to conform to its notions of personal, as of social excellence."<sup>139</sup>

Mill claims there might have been a time in the history where such control over an individual's life was necessary and justifiable.<sup>140</sup> However, those societies were not as free as modern-day America or nineteenth century England (Mill's time). Even with greater freedom than the "ancient commonwealths," society has still moved to restrict people's ability to make private choices for themselves. Mill blamed religious puritanism for the increased control over their lives<sup>141</sup> when he wrote:

The engines of moral repression have been wielded more strenuously against divergence from the reigning opinion in self-regarding, than even in social matters; religion, the most powerful elements which have entered into the formation of moral feeling, having almost always been governed either by the ambition of the

136. *Id.*

137. MILL, *supra* note 8, at 5. "Men's opinions, accordingly, on what is laudable or blamable, are affected by all the multifarious causes which influence their wishes in regard to the conduct of others, and which are as numerous as those which determine their wishes on any other subject . . . most commonly, their desires or fears for themselves—their legitimate or illegitimate self-interest."

138. *Id.*

139. MILL, *supra* note 8, at 9. This type of behavior is exemplified in the tax code in the United States. There is a "sin" tax placed on alcohol tobacco, and in some cities (New York), on "junk" food. The tax code is not just a revenue generating set of rules. It is also a tool used to regulate society's decisions regarding what is acceptable and what is not.

140. *Id.* That time in history was the ancient commonwealths. "The ancient commonwealths thought themselves entitled to practise (sic) . . . the regulation of private conduct by public authority on the ground that the State had a deep interest in the whole bodily of mental discipline of every one of its citizens, a mode of thinking which may have been admissible in small republics surrounded by powerful enemies, in constant peril of being subverted by foreign attack or internal commotion . . . they could not afford to wait for the salutary permanent effects of freedom." Our society, on the other hand is not a small republic that cannot afford to wait for the permanent effects of freedom. That is not to suggest our society should be completely free. Some vices are worthy of regulation and criminalization. For example, laws against drunk driving and drug use protect other citizens from the poor decisions of others.

141. *Id.*

hierarchy, seeking control of every department of human conduct, or by the spirit of Puritanism.<sup>142</sup>

Society's lawmakers/leaders use morality when it is convenient and apply it inconsistently in our lives.<sup>143</sup> Justifications for gambling laws in the United States have, for the most part, been grounded in what some would consider the puritanical morality Mill was describing. Look no further than the test mentioned above and the negative externalities linked to gambling. Regarding democracies such as ours, Mill refers to society's leaders on this issue as the "tyranny of the majority."<sup>144</sup> However, as Mill points out, "[t]here is a limit to legitimate interference of collective opinion with individual independence."<sup>145</sup> Mill advocates for the libertarian ideal that if an individual's conduct does not inhibit or interfere with another's liberty/rights, then the government, or tyrannical majority, has no business interfering with that conduct.<sup>146</sup> Expounding on that idea, Mill wrote,

But there is no room for entertaining any such question when a person's conduct affects the interest of no person besides himself, or needs not affect them unless they like (all persons concerned being of full age and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequence.<sup>147</sup>

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142. *Id.*

143. Some vices may be even more addictive than gambling, yet society has a higher tolerance for some than for others. The United States' treatment of tobacco and alcohol come to mind.

144. MILL, *supra* note 8, at 4. "The 'tyranny of the majority' is now generally included among the evils against which society requires to be on its guard . . . Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct from those who dissent from them." We see other examples of the tyranny of the majority recently in the cases of Democrat Attorneys General targeting energy companies for their stances on climate change or gun manufacturers and the Second Amendment. See Jim Copland, Rafael A. Mangual, *Left-Wing AGs Are Playing Politics with the Law*, NAT'L REV., Sept. 29, 2016 (last accessed Oct. 12, 2016).

145. *Id.*

146. *Id.* at 63–64. ON LIBERTY argues, generally, that individuality is more important than conformity to social norms. Specifically, Mill writes, "Everyone who receives the protection of society owes a return for the benefit, and the fact that living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists, first in not injuring the interests of one another, or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights; secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending society or its members from injury and molestation."

147. *Id.* at 64.

However, Mill acknowledges society's need to control the behavior of its citizens to a certain extent, "[i]t would be a great misunderstanding of this doctrine to suppose that it is one of selfish indifference which pretends that human beings have no business in each other's conduct in life, and that they should not concern themselves about the well-being of one another, unless their own interest is involved."<sup>148</sup> In addition, it is important for human beings to encourage each other to do what is "right" and dissuade them from making improper decisions.<sup>149</sup> For the purpose of argument, it is important to describe the merits of the Attorney General of New York's decision as it relates to his letter to FanDuel and DraftKings and whether the State has an argument a free society can accept.

## IX. CURRENT CONTROVERSIES

### A. "Insider Trading" Scandal

The "insider trading" scandal, mentioned in the introduction, which rocked DFS will be analyzed first under Mill's lens. Ethan Haskell, a DraftKings' employee, had access to and made public, proprietary information that would have given any competitor a distinct advantage when playing DraftKings' "Millionaire Maker" contest.<sup>150</sup> While Haskell apparently did not have access to the data before setting his winning lineup,<sup>151</sup> the fact Haskell ever had access to such information indicates a potential for impropriety, because with the information, Haskell would not have needed statistical algorithms or guesswork to set his winning lineup. Haskell entered a similar contest on FanDuel's website the day he released the information.<sup>152</sup> He placed a \$25 bet in the game, finished in second place, and won \$350,000.<sup>153</sup> After a firestorm of criticism and a lawsuit alleging fraud, DraftKings and FanDuel decided to ban their employees from playing fantasy sports for money on either website.<sup>154</sup> FanDuel even

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148. MILL, *supra* note 8, at 64. Mill goes on to write that there are other ways to enforce and promote the good behavior in people than "whips and scourges."

149. *Id.* Acceptable tactics, according to Mill would be taxing things we deem inappropriate and using moral punishments such as public humiliation and shame to convince others to not behave in such a fashion.

150. Redford, *supra* note 1.

151. *Id.*

152. *Id.* Even though they are competitors, FanDuel and DraftKings offer nearly identical contests on their websites.

153. *Id.*

154. Kevin Draper, *FanDuel Told Employees Not To Win Too Much Money on DraftKings Or People Would Get Suspicious*, DEADSPIN.COM (Nov. 20, 2015, 3:58 PM), <http://deadspin.com/fanduel->

told its employees to be careful about playing for money, because this would cause people to get “suspicious,” and would draw complaints from users, if their employees won too much money.<sup>155</sup>

DFS websites are generally self-regulated, thanks to the exemption provided within UIGEA. However, the Fantasy Sports Trade Association (FSTA), the governing body of fantasy sports, has a conflict of interest when policing DraftKings and FanDuel since the CEOs of both companies sit on FSTA’s board of directors.<sup>156</sup> Insider trading and the use of insider information would be an example of conduct Mill thought society had a legitimate interest in policing. It infringes on the rights of others because the use of non-public inside information gives the holder of the information a clear opportunity to take advantage of those without it to harm them for personal gain. Because these employees have a responsibility to uphold the integrity of their employer, Mill believes they should be held to a higher standard.<sup>157</sup>

Under Mill’s theory, it is possible to conclude nearly every action people take, in some tenuous way, has an effect on another or many member(s) of society.<sup>158</sup> With this logic in mind, governments have historically tried to increase their power and control over individual’s behavior:

There is also in the world at large an increasing inclination to stretch unduly the powers of society over the individual, both by force of opinion and even by that of legislation”, and as the tendency of all the changes taking place in the world is to strengthen society, and diminish the power of the individual, this encroachment is not one of the evils which tend to spontaneously

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told-employees-not-to-win-too-much-money-on-dra-1743814536. DraftKings employees have won an estimated six million dollars over the course of its operating history.

155. *Id.* FanDuel’s management essentially told their employees that they understood the employees would have access to proprietary data, but that they should not use it to draw negative attention to the company.

156. Redford, *supra* note 1. It should be noted that DraftKings employees won an estimated \$6 million on FanDuel.

157. MILL, *supra* note 8, at 69. “No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty. Whenever, in short, there is a definite damage or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.”

158. *Id.* at 67. “How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching to his near connections, and often far beyond them.”



disappear, but on the contrary, to grow more and more formidable.<sup>159</sup>

In recent years, there have been many high profile examples at all levels of government proving Mill's belief. New technology and entrepreneurial trends are changing the way our economy operates in many sectors and has caused disruption of the status quo. Government has responded with an attempt to either overregulate or use economic protection to maintain the status quo. One example is the high-profile fight between taxi unions, municipalities and the ride-sharing services, Uber and Lyft.<sup>160</sup> Another is the occupational licenses mandates for services for which there is very little established educational requirement (such as eyebrow threading).<sup>161</sup> Safety concerns and the well being of people are often used to justify overregulation.<sup>162</sup>

With these familiar and convenient arguments at hand, New York declared DraftKings and FanDuel to be illegal gambling, charging the activity to not be victimless.<sup>163</sup> Attorney General Schneiderman's cease and desist letter raises two important questions. The first is, who are the victims in DFS games? The second question is, if there are victims and the games are rigged, is it within the purview of the legislature or courts to declare the activity illegal?

159. *Id.* at 11–12. Mill continues, “The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power; and as the power is declining, but growing, unless a strong barrier of moral conviction can be raised against the mischief, we must expect, in the present circumstances of the world, to see it increase.”

160. Olivia Becker, *Taxi Drivers Are Trying To Take Down Uber*, VICE.COM (June 6, 2014, 3:20 PM), <https://news.vice.com/article/taxi-drivers-are-trying-to-take-down-uber>. The response from the government should not be to regulate Uber and Lyft to crush their entrepreneurial endeavors, rather it is time to loosen the regulations on the burdened taxi industry. Most governments have not chosen this path, instead they use economic protection to promote a service model that does not have the market popularity Uber enjoys.

161. George F. Will, *The 110 Year-Old Case That Still Inspires Supreme Court Debates*, WASH. POST (July 10, 2015), [https://www.washingtonpost.com/opinions/110-years-and-still-going-strong/2015/07/10/f30bfe10-2662-11e5-aae2-6c4f59b050aa\\_story.html?utm\\_term=](https://www.washingtonpost.com/opinions/110-years-and-still-going-strong/2015/07/10/f30bfe10-2662-11e5-aae2-6c4f59b050aa_story.html?utm_term=). I encourage those interested to also read Supreme Court of Texas Justice Don Willet's concurrence in *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015) (Willet, J., concurring) for an excellent example of the type jurisprudence of which Mill would have approved.

162. Becker, *supra* note 159. It is worth noting that every year the number of participants in DFS games increases.

163. Schneiderman, *supra* note 6.

### B. Are There Victims in DFS Games?

Some evidence suggests DFS is nothing more than a scheme to take people's money with the false promise that all a person needs to do is play to win. FanDuel and DraftKings had more losers in 2015 than ever before.<sup>164</sup> As mentioned above, FanDuel and DraftKings' business model is based on the shark and fish theory.<sup>165</sup> There are substantially more fish than sharks: 1.3% of FanDuel's and DraftKings' fantasy baseball players won ninety-one percent of the prizes.<sup>166</sup> FanDuel and DraftKings allow players to make "unlimited" numbers of entries in a particular game/pool.<sup>167</sup> Therefore, "sharks," with their greater understanding of the game and more money to risk/play, will create thousands of entries per day to maximize their odds of winning money and generating a positive return on their investment.<sup>168</sup> Many of these sharks are successful professional gamblers or former successful professional online poker players who migrated to DFS after "Black Friday" in 2011.<sup>169</sup>

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164. Joshua Brustein, *You Aren't Good Enough To Win Money Playing Daily Fantasy Football*, BLOOMBERG BUSINESSWEEK (Sept. 10, 2015, 7:00 AM), <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football>. Between 2013 and 2014, a Bloomberg Business report showed that 89.3% of users had a negative return on investment when playing these games.

165. Baer, *supra* note 57.

166. Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans Into Suckers*, N.Y. TIMES MAGAZINE (Jan. 6, 2016), [http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?\\_r=0](http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=0). I was not able to find data specifically related to fantasy football; however, it has been suggested that the numbers would be similar to those of fantasy baseball.

167. *Id.* FanDuel and DraftKings used to allow an unlimited number of entries until this recent crisis. Recently, the two companies have put a cap on the number of entries players create. The caps vary based on contest, but the maximum number of entries per player in a contest of 5,000+ players is 150 entries. *Contest Entry Limits*, FANDUEL (Nov. 7, 2016, 3:18 PM), <https://www.fanduel.com/entry-limits>.

168. Kang, *supra* note 166. Some may ask why FanDuel and DraftKings would allow this kind of activity. The reason is simple. In order to offer prize pools of \$1 million to the winner of the contests, the pot needs to be several million dollars in order to pay second place, third place and fourth place, etc. If every user were allowed to enter only one team, it would mean FanDuel and DraftKings would have to recruit tens if not hundreds of thousands of players. Since that is not feasible to attain, it makes sense to allow players to have multiple entries to solve the dual problem of increasing the pot while not having to attract an impossible number of players. Therefore, FanDuel and DraftKings' goal is to attract enough new players to enter into a pot with a number of sharks who have hundreds of entries.

169. LIVING THE FANTASY, *supra* note 4.

### C. *The Use of “Scripts”*

High rolling sharks do not generate thousands of entries a day by guessing or picking their lineups manually. Rather, they use algorithms, forecasts, regressions and other automated processes, known as “scripts” in the industry, to select and edit their entries.<sup>170</sup> There is no doubt players with access to scripts have a significant advantage over players who do not have similar access, in part because scripts dramatically cut down on the time it takes to change lineups.<sup>171</sup> In a way, sharks, armed with technology and valuable data, take full advantage of new and inexperienced players because scripts are also able to target the “weakest players” based on their entries.<sup>172</sup> DraftKings and FanDuel use this information to defend their websites as games of skill.<sup>173</sup> Nigel Eccles told a reporter from Bloomberg news, “We don’t make any apologies that it’s a game of skill, and you might go up against the best in the industry . . . Some of the people are really good.”<sup>174</sup> The websites are correct in that it takes a great deal of skill to create the scripts to use for their advantage.<sup>175</sup>

However, due to the uproar from the DFS community, DraftKings and FanDuel updated their terms of use policy to require players to submit their scripts for approval by the websites before using them.<sup>176</sup> When questioned why FanDuel did not completely ban scripts from competition, Justine Sacco, FanDuel’s Communications Director, admitted the company could not stop or detect every kind of sophisticated script.<sup>177</sup>

170. Kang, *supra* note 166. These scripts allow the top players as ranked by the website RotoGrinders.com (a website that ranks FanDuel and DraftKings players based on their winning percentages in the games they enter) to compare instantly, those players likely to be successful on a given day in relation to those players who are less likely to be owned (worth the bargain). This increases their odds to win money.

171. *Id.* Kang outlines a story where the most successful DFS player in the world Saahil Sud a.k.a. “maxdalury” adjusted hundreds of lineups an hour before games were scheduled to tip-off after learning a star player for the Orlando Magic would not be playing in the game. Maxdalury used his script to change his lineups to reflect this breaking news. Maxdalury went on to win hundreds of thousands of dollars that night.

172. Barry Petchesky, *Actually, Daily Fantasy is Good, Because I Won a Bunch Of Money On it*, DEADSPIN.COM (Jan. 7, 2016, 2:48 PM), <http://deadspin.com/actually-daily-fantasy-is-good-because-i-won-a-bunch-1751364903>.

173. *Id.* Many of these players acquired their large bankrolls from professional sports betting/gambling as well as having high-paying jobs outside of their gambling hobby before it became a profession for them.

174. Brustein, *supra* note 163.

175. Kang, *supra* note 165.

176. Petchesky, *supra* note 171. According to a representative from DraftKings, “anticompetitive” scripts will be banned. Before this update, DraftKings and FanDuel had policies banning scripts.

177. Kang, *supra* note 165. FanDuel says it has detected and removed anticompetitive scripts in the past.

Further, there is no incentive for FanDuel and DraftKings to stop players from using scripts.<sup>178</sup> As described above, FanDuel's and DraftKings' main source of revenue comes from the ten percent they take or "rake" from entry fees. Therefore, it is good business to allow players to create hundreds, if not thousands, of entries in each contest to increase the entry fees generated by the companies.<sup>179</sup> Furthermore, Sacco defended her company's new policy: "You want to allow people on the site to make their experience meaningfully better. So the idea that big players can't bring in features to improve their time, honestly—it feels a bit Orwellian."<sup>180</sup>

#### D. DFS Advertising

Every person who watches professional sporting events or listens to sports talk radio has seen/heard ads for FanDuel and DraftKings: the ads are almost impossible to miss.<sup>181</sup> Attracting new players every day is essential for FanDuel's and DraftKings' business models to sustain large prize pots.<sup>182</sup> New York, in addition to filing cease and desist letters to DraftKings and FanDuel, included language charging the websites' advertising as false, misleading and fraudulent.<sup>183</sup> New York is not the first entity to sue DraftKings and FanDuel over their ads.<sup>184</sup>

FanDuel's questionable ads depict "average Joes" usually sitting in front of the camera describing their experiences on the site. The commercials describe how FanDuel games work and the relative ease of picking a team.<sup>185</sup> The men and women in the commercials talk about how much fun it is to play, the adrenaline rush they receive from playing, how much more fun they have watching football since playing, and the money

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178. *Id.*

179. Petchesky, *supra* note 171.

180. *Id.* This comment is reference to allowing players to use scripts.

181. Kafka, *supra* note 131. See also Davey Alba, *DraftKings and FanDuel Scandal is a Cautionary Startup Tale*, WIRED.COM (Oct. 9 2015, 7:01 AM), <http://www.wired.com/2015/10/daily-fantasy-sports-scandal-fanduel-draftkings/>. At one point in August and September of 2015, DraftKings or FanDuel had a national commercial airing every ninety seconds.

182. Brustein, *supra* note 164.

183. Schneiderman, *supra* note 6.

184. Darren Rovell, *Class Action Lawsuit Filed Against DraftKings And FanDuel*, ESPN (Oct. 9, 2015), [http://espn.go.com/chalk/story/\\_/id/13840184/class-action-lawsuit-accuses-draftkings-fanduel-negligence-fraud-false-advertising](http://espn.go.com/chalk/story/_/id/13840184/class-action-lawsuit-accuses-draftkings-fanduel-negligence-fraud-false-advertising). This suit, which is still pending, is a class action lawsuit.

185. Television Commercial: FanDuel, "Win Big", iSPOT.TV (Nov. 23, 2015), <http://www.ispot.tv/ad/A7E9/fanduel-one-week-fantasy-football-leagues-win-big>. A voiceover lays out all of the features, such as no season-long commitments, cash payouts the next day, and even a controversial \$200 advancement when you sign up.

they have won.<sup>186</sup> One player, Scott H., a personal trainer, says he lost “a little” at first, but turned a thirty-five dollar deposit into more than two million dollars.<sup>187</sup> While these ads are fairly misleading, ads are specifically designed to encourage the purchase of whatever the advertiser is selling. They attract people to put their money down on a promise of a chance to win money. The ads appear to be effective because FanDuel and DraftKings are paying out record amounts of prize money every year.<sup>188</sup>

DraftKings’ commercials utilize a different style with a very similar message. Their commercials do not involve testimonials, but instead focus on the skill it takes to play fantasy football and how players should trust their numbers, their guts, or their “uncle Vito” to find the sleeper no one else has identified.<sup>189</sup> Their ads are seemingly less misleading, because the viewer feels less of a connection to a story of an average person proclaiming his newfound success from a \$5 entry fee.<sup>190</sup>

#### *E. Are DFS Players Victims?*

In short, DFS players are not victims of theft or fraud. There is nothing stopping individuals from acquiring or building their own scripts for use on the websites. These scripts are available to everyone who has the skill and time to make them or the finances to acquire them. Players who choose not to use scripts are normally making a conscious choice to play without them. Many players with the financial ability to create hundreds of entries already have adequate disposable income before joining the DFS community.<sup>191</sup> Even though the companies cannot stop all forms of “cheating,” the companies have taken steps to try to curb such behavior

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186. *Id.* The players do their best to sell how much fun they have had and how they will continue to play in the big tournaments and the small games. Some of the players have won a few hundred dollars all the way up to millions of dollars. One player says he turned \$125 dollars into over \$62,000, just from playing.

187. *Id.* Scott then looks in to the camera and says, “after I lost a few times, I won a tournament for \$15,000 on a \$5 entry fee.”

188. Casey, *supra* note 24.

189. Television Commercial: DraftKings, “*The Sleeper*”, iSPOT.TV (last aired: Jan. 10, 2016, 7:49 PM), <http://www.ispot.tv/ad/AVmZ/draftkings-the-sleeper>. Most likely, DraftKings does this intentionally to signal to government regulators that their games are games of skill and not illegal gambling.

190. DraftKings has a few commercials where they show live footage of a million dollar tournament with the competing players cheering and going wild after winning, but there are no testimonials from actual players.

191. LIVING THE FANTASY, *supra* note 4.

with their new script approval process.<sup>192</sup> Frankly, it might be considered “Orwellian” not to allow someone who has the means and skill to create a script to enhance the opportunity for winning these games. Sharks and others committed to playing DFS for significant money also spend a great amount of time watching and studying sports, with some players leaving their primary jobs to spend up to fifteen hours a day studying statistics and watching games.<sup>193</sup> In addition, FanDuel and DraftKings have created “Rookie/Beginner Leagues” for new players to acquaint themselves with the website and to learn how to play in a “safer” environment.<sup>194</sup>

Advertisers design ads to expand interest in their product and DFS ads are no different. Commercials normally highlight only the positive product aspects and tend to downplay or even hide any negative aspects. It is misleading when FanDuel’s ads say everyone can play and “anyone” can win at DFS, given only 1.3% of the players win ninety percent of the prize money. Think of DFS commercials like acne product commercials. The people in the “before” pictures usually aren’t smiling and have poor lighting in their photos drawing our eyes to their blemishes. In the “after” pictures the lighting is much better and the person is smiling. At the same time, this statistic provides FanDuel and DraftKings with evidence that they offer a game of skill. It is up to consumers to choose whether to buy/invest in the product. Even though many “fish” will lose money by playing DFS, the games are entertaining and exciting. Even many of those who rail against DFS and its business practices admit as much, saying they will continue to play.<sup>195</sup> Many DFS players understand they will not win money by playing DFS.<sup>196</sup> DFS players do not have to continue playing if they lose; they can walk away at any time. However, they often continue to play, because it is a source of entertainment.

Most people know it is generally not a good investment to play slot machines or gamble in a casino, yet people continue to do so because it is entertaining and exciting.<sup>197</sup> State lotteries advertise and encourage people to buy tickets. Lottery advertisements are not so different from DFS commercials as they attempt to convince people to play a game where they

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192. Brustein, *supra* note 163. The websites have even taken steps to outlaw “fish finders,” or tools that help sharks find weak players in games. Jason Robins, CEO of DraftKings called this type of script, “cancerous” to the long-term health of the industry.

193. *Id.*

194. *Id.* Some of these new players are “whales” (new players with big bankrolls) looking to become sharks in the future.

195. See Petchesky, *supra* note 172; See also Kang, *supra* note 166.

196. Petchesky, *supra* note 172.

197. Brustein, *supra* note 164.

have an extremely low chance of winning, while suggesting the possibility of life-changing riches.<sup>198</sup> Some Missouri lottery advertisements highlight the portion of the proceeds from each ticket directed to fund education, and ask Missouri citizens to “play it forward” to help their students in public schools.<sup>199</sup> The chances of winning a lottery are even lower than playing DFS.<sup>200</sup> The lottery is a game of chance and a form of gambling. Some call it a tax on the “poor” and “stupid.”<sup>201</sup> Yet, forty-four states have legalized the lottery and use it as a source of revenue to fund the state budgets.<sup>202</sup> If states or the federal government received some sort of tax/revenue stream from FanDuel or DraftKings, these companies may not be under attack as illegal gambling websites preying on the poor and stupid. In short, the winners of FanDuel’s and DraftKings’ contests are the websites and the sharks, while government is the real winner of the lottery.<sup>203</sup>

198. See generally lottery commercials.

199. Hint, *Missouri Lottery—Play it Forward*, YOUTUBE (Oct. 23, 2013), <https://www.youtube.com/watch?v=aCHvzldZIU>. Missouri lottery claims to have raised \$4 billion for Missouri public schools. See also Missouri Lottery, *Where The Money Goes* (last accessed Jan. 21, 2016), [http://www.molottery.com/where\\_the\\_money\\_goes/where\\_the\\_money\\_goes.shtm](http://www.molottery.com/where_the_money_goes/where_the_money_goes.shtm). Hunter Schwarz, *Money From the Missouri Lottery is Used to Pay for Schools. What Happens When it Doesn't Deliver*, WASH. POST: GOVBEAT (Oct. 8 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/10/08/money-from-the-missouri-lottery-is-used-to-pay-for-schools-what-happens-when-it-doesnt-deliver/>. In 2014, Missouri took in record revenues of \$1.15 billion, but the amount of state money used to fund education dropped from \$288.8 million in 2013 to \$267.3 million in 2014.

200. See Ana Becker, *One In 292 Million*, WALL ST. J. (Jan. 13 2016, 9:00 AM), <http://graphics.wsj.com/lottery-odds/>. The record Powerball jackpot odds were one in 292 million. If someone bought 146 million lottery tickets, they would only have a fifty percent chance of winning.

201. Dina Spector, Gus Lubin and Michael B. Kelly, *18 Signs That the Lottery Is Preying on America's Poor*, BUS. INSIDER: YOUR MONEY (Apr. 6 2012, 9:58 AM), <http://www.businessinsider.com/lottery-is-a-tax-on-the-poor-2012-4>. Poorer and less educated people tend to play the lottery more than the wealthy and educated play.

202. *Id.* They encourage people to continue to play, despite it being what some would call a predatory game designed to take money from those who need it most.

203. Jackie Wattles, *You Won the \$1.5 Billion Powerball! Here's Your Tax Bill*, CNN (Jan. 12, 2016, 12:39 PM), <http://money.cnn.com/2016/01/08/pf/taxes/powerball-jackpot-tax-bill/>. See also Cullen Roche, *I Already Know the Winner of the Next Powerball Drawing*, MKT. WATCH (Jan. 11 2016, 10:12 AM), <http://www.marketwatch.com/story/i-already-know-the-winner-of-the-next-powerball-drawing-2016-01-10>. The federal government takes twenty-five percent off-of-the-top of any lottery winnings. In addition, lottery winners will be placed in the highest possible federal income tax bracket (39.6%). They also still have to pay state and local income taxes, which vary. At the end of the day, the government (state, local and federal) could take in as much as two-thirds of any prize money won.

*F. Should The Legislature (State) Or Judicial System Step In?*

If there are genuine victims adversely affected from an insider-trading scheme, fraud or involuntary theft, the state and the judicial system should intervene and remedy the situation. Mill agrees, “Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual, or to the public, the case is taken out of the province of liberty and placed in that of morality or law.”<sup>204</sup> Theft, fraud and insider trading are crimes and there are laws at the federal and state levels protecting victims and punishing those responsible for committing such acts.

DraftKings and FanDuel have not committed any such crimes. People willingly participate in contests on their sites and effectively pay an entertainment fee. They do this of their free will; no one forces them to play. New York and several other states have called DFS illicit gambling. Gambling may be linked to negative externalities and give overzealous governments and courts a chance to use paternalistic “public health” and “safety” arguments to justify their position, but that does not mean their positions are justified.

Mill describes this type of state action as a “social right” theory; meaning if a person decides to engage in less than desirable behavior, it leads to social disorder and destroys the offended person’s primary right to security, because it creates unwanted temptations.<sup>205</sup> Mill fully explains the Social Right Theory in this way, “[I]t is the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whoever fails thereof in the smallest particular, violates my social right, and entitles me to demand from the legislature the removal of the grievance.”<sup>206</sup> Gambling is a less than desirable social behavior. It tempts people to give away their money on games of chance with little likelihood of winning. When the Powerball jackpot hit \$1.5 billion, people across the United States were inclined to give away a minimum of two dollars (generating an average of twenty-eight million dollars an hour) for a one-in-292.2 million chance to strike it rich.<sup>207</sup>

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204. MILL, *supra* note 8, at 69.

205. *Id.* at 75–76. Politicians in Mill’s time used this argument to legislate morality, arguing that it offends a person’s, “[F]ree moral and intellectual development, by surrounding [his] path with dangers, and by weakening and demoralizing society, from which [he] [has] a right to claim mutual aid and intercourse.”

206. *Id.* at 76.

207. Rick Rojas & Nate Schweber, *With No Winners in Powerball Drawing, Jackpot is Expected to Surpass \$1 Billion*, N.Y. TIMES (Jan. 9, 2016), [http://www.nytimes.com/2016/01/10/nyregion/new-yorkers-join-the-crush-for-tickets-as-powerball-jackpot-nears-dollar1-billion.html?\\_r=0](http://www.nytimes.com/2016/01/10/nyregion/new-yorkers-join-the-crush-for-tickets-as-powerball-jackpot-nears-dollar1-billion.html?_r=0).



Rather than use that money to help pay the mortgage, buy groceries or gasoline (more productive uses), adults chose to give that money away through the lottery. Nevertheless, forty-four states agree with, support and promote this decision.

Lotteries are games of pure chance, whereas winning a contest in DFS requires skill, time and effort. However, New York declared DFS a grievance and the State has to remove the grievance because, “[DFS] are creating the same public health and economic concerns as other forms of gambling, including addiction.”<sup>208</sup> Gambling addiction is a serious problem and has consequences for the addict and his or her loved ones as described above. Mill recognizes this issue when he writes, “I fully admit that the mischief which a person does to himself, may seriously affect, both through their sympathies and their interests, those nearly connected with him, and in a minor degree, society at large.”<sup>209</sup> That does not mean society should punish the grievance (DraftKings and FanDuel) as Mill says,

If, for example, a man, debts, or having undertaken the moral responsibility of a family, becomes unable to pay his debts, or having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobate, and might be justly punished; *but it is for breach of duty to his family or creditors, not for the extravagance.*<sup>210</sup>

People make negative life decisions every day. Investors make bad investments (not exclusively in ponzi schemes, but also pursuing legitimate investments) and lose their money in the market; alcoholics drink away their wages, and gamblers of all sorts give away their incomes. Yet, our society does not criminalize the stock market or brokerage houses, bars or liquor stores or casinos (in most states). Compulsive behavior often leads to poor decisions. If a compulsive gambler fails to take care of his children, defaults on loans, or does not take care of his responsibilities, the law should punish him.<sup>211</sup>

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208. Schneiderman, *supra* note 6.

209. MILL, *supra* note 8, at 68.

210. *Id.* meaning the individual should be punished for failing to live up to his obligations to his family, not for excess gambling or excess drinking.

211. MILL, *supra* note 8, at 82–83. Mill writes, “[A] man fails to perform his legal duties to others, as for instance to support his children, it is no tyranny to force him to fulfill that obligation, by compulsory labor, if no other means are available.”

Gambling is a vice. However, it can be very difficult to isolate the vice because states like New York, and their court systems, conveniently allow some games of chance to exist (the lottery, video poker machines), while challenging others such as DFS. With regard to moral vices, Mill suggests that society should punish those misbehaving members socially, rather than legally, “A person . . . [sic] who cannot . . . restrain from hurtful indulgences . . . [sic] must expect to be lowered in the opinion of others, and to have less share of their favorable sentiments, but of this he has no right to complain[.]”<sup>212</sup> Society already has a low opinion of addicts. The State may criminalize the act of gambling, but may have more tolerance for the gambler himself.

Not everyone who plays DFS will become an addict or a “victim,” even though eighty-five percent of players lose money. Mill’s solution to this perceived problem is to caution these fully capable adults of the risk they are taking, rather than being “forcibly prevented from exposing himself to it.”<sup>213</sup> Rather than legislate moral vices inconsistently based on an arbitrary predominant elements test, our society should do exactly what Mill would do and warn players their likelihood of winning contests on FanDuel or DraftKings is poor, and let the players make the decision of whether to play. Some players will continue to play, because they think it is entertaining.<sup>214</sup> Other players will leave the sites and use their money for other purposes.

However, if New York finds DFS morally reprehensible and chooses to discourage people from playing, it has another option, taxation. “Sin” taxes, or taxes on vices like alcohol and tobacco are not only a revenue stream for state governments, but also a way to discourage people from purchasing undesirable products.<sup>215</sup>

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212. *Id.* at 66.

213. *Id.* at 81. The full quote reads, “[W]hen there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk: in this case, therefore, (unless he is a child, or delirious or in some state of excitement or absorption incompatible with the full use of the reflecting faculty,) he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.”

214. Petchesky, *supra* note 172. Many people enjoy gambling and view their losses as the price of admission for entertainment.

215. MILL, *supra* note 8, at 85. “Taxation, therefore, of stimulants, up to the point which produces the largest amount of revenue (supposing the State needs all the revenue which it yields) is not only admissible, but to be approved of.”

## X. MISSOURI'S RESPONSE

NY led the charge against DFS and a mob of states followed their lead. The mob could not persuade Missouri. On June 10, 2016, Jay Nixon, Governor of Missouri, signed HB 1941 into law.<sup>216</sup> HB 1941 places DFS under Missouri Gaming Commission's regulatory authority, exempting DFS from gambling regulations.<sup>217</sup> HB 1941 imposes a, "\$10,000 annual license application fee or ten percent tax on applicant's net revenue from the previous year (whichever is less)."<sup>218</sup> HB 1941 also imposes an eleven-and-a-half percent annual operating fee based on the "licensed operator's net revenue from the previous year."<sup>219</sup> Mill would approve of Missouri's actions.<sup>220</sup> Inevitably, DraftKings and FanDuel will pass the cost of these new taxes and regulations onto consumers through raised entry fees. This may discourage some consumers from entering DFS contests; others will continue playing.

## CONCLUSION

The government's role in our society is not to be the citizenry's parents. People should be allowed to exercise their own will to avoid temptation and do what is best for them: "[People's] choice of pleasures and their mode of expending their income, after satisfying their legal and moral obligations to the State and to individuals, are their own concern, and must rest with their own judgment." New York can warn its citizens about DFS and possibly even tax it, but the state should not be allowed to ban DFS outright using inconsistent, subjective and arbitrary laws to increase its power. The people of New York are not "victims" when they enter contests on DraftKings and FanDuel. Players before, and especially after the Haskell "scandal", were aware that their odds of winning were slim. They play for the utility value of the entertainment. The state of New

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216. Missouri joined eight other states in allowing DFS to operate legally in their states through legislation. For the sake of brevity and repetitiveness, this Note will only highlight Missouri's approach. The Bill's official name is the "Missouri Fantasy Sports Consumer Protection Act."

217. John B. Greenberg, Carleen B. Griffith, Krista C. McCormick, *Daily Fantasy Sports Now Permitted in Missouri*, LEWIS RICE (June 2016), <http://www.lewisrice.com/publications/daily-fantasy-sports-now-permitted-in-missouri/>.

218. *Id.*

219. *Id.*

220. See Greenberg, *supra* note 217. Missouri's solution is superior to New York's. Missouri recognizes people enjoy playing these games and saw an opportunity to regulate the vice. Missouri's plan does not pretend to understand what is best for its citizenry. Instead, it recognizes its citizens are informed about the unlikely odds of success and the sharks waiting to take their money in DFS. HB 1941 includes an age restriction requiring players to be eighteen years or older.

York, asking for \$200 million in damages and restitution, seems more attention getting than grounded in the law.<sup>221</sup> Attorney General Schneiderman may be going after the websites to make a name or to facilitate his future political aspirations, which coincide with his paternalistic views.<sup>222</sup> It would behoove him to not waste precious tax dollars going after DFS with a paternalistic bend and instead investigate and prosecute real criminals.

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221. Luke Kerr-Dineen, *New York's Attorney General is Going Too Far in His Fight Against Daily Fantasy Sports*, USA TODAY: FOR THE WIN (Jan. 4 2016, 12:38 PM), <http://ftw.usatoday.com/2016/01/new-yorks-attorney-general-is-going-too-far-in-his-fight-against-daily-fantasy-sports>.

222. Michael Craig, *The Politics and Power of A.G. Schneiderman*, OBSERVER (Feb. 25, 2014, 4:13 P.M.), <http://observer.com/2014/02/the-politics-and-power-of-a-g-schneiderman/>.