

Pursuing Problem Gamblers

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Abstract

There have been several recent lawsuits in which problem gamblers (or those affected by problem gambling) have sued casinos or other gaming companies for damages relating to bankruptcies, suicides, and other negative consequences of compulsive gambling. Although the legal cases have been decided in favor of the gaming companies, it can seem as though there is a moral residue in some of these cases: perhaps some of the actions of the gaming companies, though legal, have been morally problematic. This case invites students to explore this possibility by introducing them to the facts surrounding the lawsuits and highlighting some of the most salient moral considerations. Students will also be asked to reflect on the public policy implications, if any, of their findings.

Learning Outcomes

By the end of this case study, students should be able to:

- Summarize the extent and impact of problem gambling in the U.S.
- Illustrate the tension between personal responsibility (on the part of individuals who gamble) and a duty of non-injury (on the part of gaming companies).
- Present and evaluate the arguments that current gaming company practices sometimes involve moral wrongdoing.
- Explore regulations and other public policy strategies that strike a balance between promoting a free market and facilitating the well-being of vulnerable consumers.
- Reflect on the similarities (and dissimilarities) to other important public health debates, such as the longstanding debate over cigarettes (including recent controversies over vaping) and the newer debate over the addictiveness of video games and related technologies.

Introduction: Williams, Kephart, and Stevens

Between 1996 and 2000, David Williams lost approximately \$180,000 at Aztar Casino, a riverboat casino near Evansville, Indiana.¹ The bulk (\$160,000) of Williams's losses came between 1996 and 1998, and in March of 1998 both Williams and Aztar took action:

Williams checked himself into a mental health facility and Aztar notified Williams that he was banned from visiting the casino until he could provide written evidence that continuing to gamble would not bring him harm. This mutual distancing worked well for about a year, as Williams continued to receive outpatient treatment, but in February 1999 Williams had a sudden relapse. He began gambling at Aztar again (without being asked for any proof of mental health), which prompted a series of promotional mailings from the casino, and he proceeded to lose another \$20,000 before being banned again in August 2000.

Williams later sued Aztar, claiming that the casino was guilty of a scheme to defraud him by sending him misleading promotional mailings. Williams, represented by a lawyer named Terry Noffsinger, also accused Aztar of a failure to evict a compulsive gambler, arguing that casinos have a duty to prevent individuals who are known to be compulsive gamblers from patronizing their establishment. The U.S. Court of Appeals for the Seventh Circuit dismissed the lawsuit, arguing that the mailings were simply standard marketing fare ("nothing more than sales puffery") and that, according to state law, it was up to Williams to protect himself from his compulsion to gamble. Among other considerations, the court pointed out that Aztar maintained a state-mandated self-ejection program that allowed gamblers to put themselves on an eviction list—a program that Williams had not taken advantage of. The judgment of the court appears to have been that Aztar could have done more to protect Williams, but was not legally obligated to do so.

In 2000, around the time that Williams was finally able to stop gambling, Jenny Kephart's own gambling habits were becoming much more regular.² Her parents were experiencing health problems, and she felt abandoned by her family and friends. Partly as a result of these struggles, her occasional blackjack outing became a regular affair; playing blackjack was the fastest way to forget about all of her troubles. As she started playing more regularly, she started playing larger hands: \$25 per hand minimum, at least two hands at a

¹ The background information on this case comes from (*Williams v. Aztar*, 2003).

² The background information on this case comes from Duhigg (2012, ch. 9). Duhigg's book also contains reference to numerous articles on gambling and addiction (and related topics).

time. The size of her (occasional) wins and (frequent) losses also increased, often reaching the multiple thousands of dollars. By the end of 2001, Kephart declared bankruptcy and resolved to stop gambling.

Three years later, Kephart's parents died within two months of each other, and Kephart inherited almost \$1 million. She used about \$300,000 to buy her family a home and cover moving expenses. Then, in the throes of the anxiety she felt while moving the last of her parents' belongings from their old home, Kephart and her husband decided to visit the casino. It felt good to have someone who would listen to her (one of the managers, who remembered her from years earlier), and playing blackjack had the same pain-killing effect that it used to have.

After this visit, Harrah's Entertainment (which owned the casino) apparently began an aggressive marketing campaign directed at Kephart. This marketing campaign was aided by a sophisticated customer-tracking system, which, like many rewards programs in retail and other industries, used data analytics to predict and increase spending at the casinos. Harrah's offered free limo services to Mississippi, free flights to Lake Tahoe (among other places), free lodging in expensive guest suites, free tickets to concerts and sporting events, additional money to gamble with, rounds of golf for her husband, and shopping sprees in the casino gift shop. During this time period she started playing hundreds of dollars per hand, occasionally winning tens of thousands but usually losing—sometimes as much as \$100,000 in a weekend. When she would try to slow down, the marketing would become more aggressive, with casino hosts calling her to complain that she had not been gambling very much lately (even though they had paid for free trips and events for her and her family), and even going as far as to say that their job depended on her coming in to gamble (Glass, 2012).

Things came to a head in 2005, when Kephart experienced the loss of another loved one, this time in her extended family. The night before the service, Kephart lost \$250,000 in 12 hours of gambling. This loss was the beginning of a downward spiral, as Kephart kept gambling more and more in attempt to win back the money she had lost. (She had gambled away approximately \$900,000 all told, including a line of credit on the house she had bought with her inheritance.) Finally, on March 18th, 2006, Kephart lost the last of her money—plus an additional \$125,000 that she borrowed from the casino when her cash ran out.

Harrah's (now Caesars) sued Kephart to recover the \$125,000, and also asked for \$375,000 in damages.³ Kephart countersued, claiming that Caesars knew that Kephart was a compulsive gambler, and took advantage of that fact in order to extract hundreds of thousands of dollars from her. (Kephart was represented by Noffsinger, the lawyer who represented Williams in his suit against Aztar.) Kephart's case reached the state Supreme Court, but the justices decided in favor of Caesars, arguing that the casino did not have a legal duty to treat compulsive gamblers differently from any other type of customer: "There is no common law duty obligating a casino operator to refrain from attempting to entice or contact gamblers that it knows or should know are compulsive gamblers" (*Caesars v. Kephart*, 2009). As in the Williams case, the court in this case also cited the voluntary exclusion program as evidence that the responsibility for protecting compulsive gamblers rested on the gamblers themselves. One judge, however, did criticize the behavior of Caesars on moral grounds: "From a moral standpoint, Caesars' predation and prosecution of a pathological gambler is repugnant" (*Caesars v. Kephart*, 2009).

In 2006, around the time that Kephart was gambling away the last of her inheritance, Scott Stevens was introduced to casino gambling during a trip to Las Vegas for a trade show.⁴ He quickly became hooked. Stevens and his wife began playing slot machines on a regular basis—mostly at the West Virginia casino that was within driving distance of their home in Ohio, but also in Vegas, which they visited several times a year. Sometimes they would turn a Vegas trip into a family vacation, bringing along their three daughters and visiting the Grand Canyon, the Hoover Dam, or Disneyland.

Stevens's life was, by all accounts, a success: he had built a career in finance (rising through the ranks to become the COO of the Louis Berkman Investment Company), he had helped raise a family of three daughters, and he had been deeply involved in his community. Unfortunately, his exposure to gambling led to an addiction that eventually ruined his life. As the hobby started becoming an addiction, Stevens started hiding the extent of his gambling from his family and friends. He started playing with larger and larger amounts, and when he ran out of money he started embezzling from his employer. (All told, he stole almost \$4 million from Berkman.) He occasionally won big, but more often lost big—losing almost \$5

³ In March of 2006, the casino was named Ceasars Riverboat Casino; it is now the Horseshoe Southern Indiana casino. Ceasars and Horseshoe are both owned by Harrah's Entertainment (Friedman, 2009).

⁴ The background information on this case comes mostly from Rosengren (2016).

million in one year. He was eventually fired, in January of 2012, but kept gambling. He maxed out his credit cards, he took out loans, he took money from his 401(k), and he took money from savings accounts belonging to his wife and his daughters. As his situation became increasingly desperate, Stevens began to despair; he became convinced that there was no recovering from the predicament he had put his family in. So, in August of 2012, he put his affairs in order and then killed himself with a shotgun.

Stevens's wife subsequently sued the casino (Mountaineer Casino) and the company (International Game Technology) behind the slot machines that Stevens played so frequently. This case was also led by Terry Noffsinger, who had represented both Williams and Kephart. Although in broad strokes the complaint was the same (that Mountaineer Casino had knowingly exploited a compulsive gambler), in this case Noffsinger also took a product liability angle—arguing that slot machines are designed to deceive gamblers and thus that when used as intended they are harmful. The West Virginia Supreme Court of Appeals was not convinced. They argued, much as the Indiana court had, that it is not up to casinos to protect gamblers, even compulsive gamblers, from themselves: “No duty of care under West Virginia law exists on the part of manufacturers of video lottery terminals, or the casinos in which the terminals are located, to protect users from compulsively gambling” (*Stevens v. MTR*, 2016).

Questions to consider

The bankruptcies and suicide mentioned above appear to be representative. The National Center for Responsible Gaming, which is funded by the gaming industry, acknowledges that 1.1 to 1.6% of U.S. adults (3–4 million people) have a gambling disorder; the National Council on Problem Gambling, which receives partial funding from the gaming industry, estimates that one in five gambling addicts attempts suicide; and multiple independent studies estimate that problem gamblers generate between 30% and 60% of total gambling revenues (Rosengren, 2016).

Although the courts have been clear that the legal fault for the consequences of problem gambling lies with the individuals themselves, at least one judge (as mentioned above) did claim that “predation and prosecution of a pathological gambler is repugnant.”

This claim raises the question: Did the gaming companies mentioned above do something morally wrong in their conduct toward Williams, Kephart, Stevens, and others? At first blush, the answer might seem like an obvious *No*. How could it be wrong for a gaming company to pursue its target market? If some gamblers do end up going bankrupt (or worse), are they not the ones responsible for that? They had the freedom to choose whether or not to gamble, and they chose to gamble; thus, they are responsible for any negative consequences that might arise from those choices. (It is, after all, no secret that the odds favor the casinos.)

On the other hand, there is at least some intuitive plausibility to the idea that something about the behavior of the casinos described above is at least somewhat morally problematic. Consider an analogy: Would it not be morally problematic if the manager of a local bar handed out drink coupons to people who were leaving a meeting of Alcoholics Anonymous? Perhaps aggressive pursuit of a compulsive gambler is not sufficiently analogous to aggressive pursuit of an alcoholic, but there are at least some parallels (which we will briefly explore below).

At least on the surface, then, we are pulled in different directions when we consider cases such as the three mentioned above (and cases similar to it). In order to help crystallize the relevant considerations, in the next section of this case study we will ask whether there might be good reasons in favor of the claim that there *was* something wrong with how the gaming companies conducted themselves. If the judge was right that some of their conduct was repugnant, then what are the factors that *made* it repugnant?

In the end, it may turn out that there was nothing wrong with the actions of the gaming companies in the cases mentioned above; both the legal and moral fault might lie with the individuals who did the gambling. But if there is something wrong with pursuing the business of problem gamblers, then that wrongness might trace back to *exploiting addiction*.

The *exploiting addiction* argument

As mentioned above, it seems wrong for a bar manager to engage in marketing tactics that intentionally target alcoholics. And if such tactics are wrong, then they are probably wrong because they cause injury by knowingly exploiting an addiction. If we were to lay out this

reasoning in premise form (using the Kephart case as a representative example), it might look something like this:

1. It is wrong to knowingly exploit the addictive tendencies of someone with an addictive disorder.
2. Caesars knowingly exploited the addictive tendencies of Jenny Kephart, an individual with a gambling disorder.
3. Therefore, Caesars did something wrong in their treatment of Kephart.

Although the first premise has some initial plausibility, there is room to object to it.⁵ For those who are not convinced of its truth, we can adjust the argument so that it generates a conditional conclusion: *If* what Caesars did was wrong, then it was wrong in virtue of the fact that they were exploiting Kephart's gambling addiction.

But even if we accept the first premise for the sake of argument, and turn our focus to the second premise, questions remain. This premise relies on two crucial notions: *gambling disorder* and *knowing exploitation*. Thus, in order to evaluate the premise we need to spend a little bit of time getting a better handle on those notions.

Gambling disorder

According to the fifth edition of the *Diagnostic and Statistical Manual* (DSM-V) of the American Psychiatric Association (APA), there are nine behaviors that are relevant to an addictive gambling disorder ("Substance-Related and Addictive Disorders," 2013). These behaviors approach clinical significance if an individual exhibits four or more of them in a 12 month period. In other words, there is evidence of a gambling disorder when, on a regular basis, someone⁶:

- Needs to gamble with increasing amounts of money in order to achieve the desired excitement.

⁵ For example, there might be possible situations in which someone exploits someone else's addictive tendencies for their own good. In such a situation, exploiting addiction arguably might not be wrong.

⁶ The descriptions of these disorders are taken verbatim from the DSM-5.

- Is restless or irritable when attempting to cut down or stop gambling.
- Has made repeated unsuccessful efforts to control, cut back, or stop gambling.
- Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble).
- Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed).
- After losing money gambling, often returns another day to get even (“chasing” one’s losses).
- Lies to conceal the extent of involvement with gambling.
- Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling.
- Relies on others to provide money to relieve desperate financial situations caused by gambling.

Thus, insofar as we can appeal to the authority of the APA, an addiction to gambling is a genuine phenomenon and there are some problem gamblers whose compulsion is extreme enough to be described as an addiction.⁷

Although a reliable diagnosis of a gambling disorder would require an expert, it does seem as though Kephart (and also Williams and Stevens) exhibited most, if not all, of the behaviors from the list above. So it would seem that at least some gamblers possess addictive tendencies that are capable of being exploited. The second premise above, however, claims that not only was Kephart addicted to gambling but that Caesars *knowingly exploited* this addiction. The next question, then, is what counts as knowing exploitation.

⁷ It is also worth noting that the DSM-5 (“Substance-Related and Addictive Disorders,” 2013) distinguishes between a gambling disorder and other so-called behavioral addictions for which there is not yet enough evidence to qualify them as a genuine disorder: “Other excessive behavioral patterns, such as Internet gaming, have also been described, but the research on these and other behavioral syndromes is less clear. Thus, groups of repetitive behaviors, which some term behavioral addictions, with such subcategories as ‘sex addiction,’ ‘exercise addiction,’ or ‘shopping addiction,’ are not included because at this time there is insufficient peer-reviewed evidence to establish the diagnostic criteria and course descriptions needed to identify these behaviors as mental disorders.”

Knowing exploitation

Return for a moment to the hypothetical situation in which a bar manager offers a coupon to someone leaving an Alcoholics Anonymous meeting. It seems fair to refer to this as knowing exploitation of an addiction in part because addiction to alcohol is a real thing and the reality of addiction to alcohol is common knowledge. The reality of gambling addiction, however, is not as widely known. In fact, it is only in recent decades that the APA has officially recognized a gambling disorder.⁸ So perhaps the casino host or hosts responsible for encouraging Kephart to continue gambling were not aware that she was addicted to gambling.⁹

This possibility, however, is unlikely. And even if it is true that the relevant parties were not aware of Kephart's addiction, it could be argued that they *should* have known. Casinos (and in particular the casino hosts) do make it their business to know a lot about the clients who visit the most (Rosengren, 2016), and it is hard to believe that they would be unaware of the expert consensus on gambling addiction. Kephart claims that the casino knew about her bankruptcy, Noffsinger claims that they knew Kephart was a compulsive gambler, and a former pit boss has acknowledged that he often served gamblers who he knew to be addicted (Glass, 2012).

Thus, it seems at least likely that casino managers and hosts sometimes know that the gamblers they interact with are addicted to gambling. If pursuing these gamblers (through marketing techniques and other strategies) sometimes counts as knowing exploitation of addiction, and if it is wrong to knowingly exploit addictive tendencies, then pursuing these gamblers is sometimes wrong.

The engineered to harm argument

As mentioned above, the lawsuit filed by Noffsinger on behalf of Scott Stevens's wife claimed that the electronic gaming machines (EGMs) Stevens played were intentionally designed to cause behavior that would predictably lead to significant harm. In pursuing this strategy, Noffsinger was borrowing a page from successful lawsuits against the tobacco industry

⁸ For more on the history of the gambling disorder designation, see Griffiths (2012).

⁹ As explained in Rosengren (2016) and Glass (2012), casino hosts are employed to befriend frequent gamblers and encourage them to spend more.

(Rosengren, 2016). This type of argument overlaps in certain ways with the *exploiting addiction* argument, but it is distinct enough that it is worth considering separately. Whereas the former argument draws a conclusion about moral wrongness, the *engineered to harm* argument draws a conclusion about liability:

4. If a product is intentionally engineered to have addictive properties that reliably lead to harms, then the designer or seller of that product is at least partially liable for the harms generated by unhealthy use of the product.
5. EGMs are intentionally engineered to have addictive properties.
6. Therefore, those who make or profit from EGMs are at least partially liable for harms generated by unhealthy use of their product.

Here again the first premise (#4) is open to question. But it does have some initial plausibility, and a full treatment of it would take us beyond the scope of this case study. Let us focus, then, on the second premise (#5).

How is it, exactly, that EGMs are supposed to be designed to have addictive properties? The answer to that question traces back to the 1980s, and a technological breakthrough known as virtual reel mapping.¹⁰ Traditional slot machines had physical reels with straightforward odds. For example, the odds of a jackpot on a traditional three-reel machine with 22 stops per reel would be 1 in 22^3 , or 1 in 10,648. Machines today, however, are controlled by a computer, and each spot on a physical reel is mapped to a virtual reel position. Not only is it impossible for the patron to tell the odds just from looking at the machine, but the odds against a jackpot are much greater—as much as 1 in 134 million.¹¹

More important, however, is the fact that virtual reel mapping allows uneven distributions of outcomes. If triple 7s delivers a jackpot, then two 7s plus the item next to the third seven seems close to a win; it is a “near-miss.” With virtual reel mapping, near misses can be delivered more frequently than other types of misses, giving the illusion of almost

¹⁰ The effects of virtual reel mapping are described in Duhigg (2012), Glass (2012), and Rosengren (2016), all of which cite, among other articles, Habib & Dixon (2010).

¹¹ There could be as many as 512 stops on a virtual reel, for odds of 1 in 512^3 , or 1 in 134,217,728. For an explanation of how contemporary slot machines work, see Harris (2002).

hitting the jackpot. Research has shown that an increase in near misses produces an increase in the amount of time gamblers spend playing (Rosengren, 2016). And whatever effects the near miss has on the average person's psychology, those effects are even more pronounced in compulsive gamblers. As Duhigg (2012) reports, citing Habib & Dixon (2010): whereas the brain of the average person experiences a near miss as a loss (albeit a more exciting loss than usual), the brain of a compulsive gambler experiences a near miss as a win.

If near misses are particularly enticing to compulsive gamblers, and if EGMs are programmed to deliver an increased number of near misses, then it seems that EGMs are intentionally engineered to have addictive properties. Given the recency of the research on how near misses affect compulsive gamblers differently, it is unlikely that EGM designers have been targeting compulsive gamblers. Nevertheless, it does seem as though an increase in the number of near misses is designed to make playing slot machines harder to resist and harder to stop doing once started.¹²

An objection based on the doctrine of double effect

We have briefly touched on some reasons to resist the arguments presented above, but there is one objection, often discussed in the ethics literature, that would apply to both arguments and is thus worth mentioning. The objection is that, according to the doctrine of double effect (see McIntyre (2019)), it might not be wrong to knowingly exploit addictive tendencies or to engineer a product to have addictive properties. According to one formulation of the doctrine (Masek, 2006), an action that causes a bad effect might not be wrong if (1) there is nothing wrong with the intentions of the agent performing the action and (2) there is a sufficient reason for allowing the bad effect.

The doctrine of double effect is controversial and not universally accepted by ethicists, but suppose that something like it is correct. If we apply this doctrine to the actions of gaming companies, what is the result? These actions (for example, gaming company marketing practices or slot machine programming practices) might be permissible, even if they end up causing harms like bankruptcy (or worse), as long as (1) there is nothing wrong

¹² A phenomenon related to the near miss is the "false win": an apparent win in which the amount won is less than the amount wagered (such as a \$2 win after a \$5 play on a slot machine). False wins also tend to produce a distorted perception of the gambler's actual situation.

with the intentions involved and (2) there is a sufficient reason to allow the harms. Harms such as bankruptcy are unlikely to be intended, since they would remove an individual from the gaming company's customer base; so even the most aggressive marketing practices would seem to satisfy the first condition. The weight of this response, then, rests on whether the relevant gaming companies have a sufficient reason to allow harms such as bankruptcy—more specifically, on whether the continuing profitability (and therefore survival) of a casino is a sufficient reason to allow bankruptcies and other negative outcomes.

Decision point

After looking at the details of the cases above, and after looking at the *exploiting addiction* argument and the *engineered to harm* argument, do you think that Aztar Casino was guilty of wrongdoing in their dealings with David Williams? What about Caesars, in the Jenny Kephart case? Is Mountaineer Casino or International Game Technology at least partly liable for what happened to Scott Stevens? What are the relevant similarities and differences between the three cases? If you were responsible for crafting regulations and other public policy instruments governing the gambling industry, how would you try to strike a balance between preserving consumer liberty and protecting compulsive gamblers?¹³

Discussion Questions

1. How would you evaluate the analogy between a bar pursuing a problem drinker and a casino pursuing a problem gambler? Did one or both of the arguments considered above (the *exploiting addiction* argument and the *engineered to harm* argument) convince you that there was some wrongdoing on the part of the gaming companies? If not, what would it take for the conduct of a gaming company to count as morally wrong?

¹³ I am grateful to the following individuals, all of whom made this case study better than it would have been otherwise. Jalen Frantal provided valuable research assistance; Jared Ashworth, Jooho Lee, Julia Norgaard, and other participants in the PEP Talks Research Seminar provided helpful comments on an earlier draft; an anonymous reviewer provided additional helpful comments; and the editors of SAGE Business Cases provided valuable feedback and suggestions for improvement.

2. When a company is marketing a potentially addictive substance or activity, it is always possible that someone with an addiction to that substance or activity will encounter those marketing efforts and as a result experience negative effects from their addiction that they would not have experienced otherwise. To what extent are consumers responsible for protecting themselves from their addiction, and to what extent are companies responsible for protecting consumers from themselves?
3. In light of the moral conclusions arising from the previous two questions, are there any implications for the laws and regulations governing the gaming industry? For example, should there be stronger protections for problem gamblers so that they are less likely to be exposed to gambling products or advertising? If it is true that 30–60% of total gambling revenues come from problem gamblers, does that indicate a deeper problem with the gaming industry?
4. Some authors (e.g., Jabr (2019)) have drawn a parallel between the design of contemporary slot machines and the design of contemporary video games. The World Health Organization has recently designated (video) gaming disorder as a disease (Yin-Poole, 2019); and a recent lawsuit claims that Epic Games, the creator of Fortnite, knowingly and intentionally designed a game with addictive properties but failed to inform users of the potential danger (Blake, 2019). Is it possible to be addicted to a video game (or gaming in general)? Why or why not? Does the classification of gaming disorder risk creating a slippery slope in which almost any hobby or interest can become an addiction, or are there significant differences between gaming and other types of hobbies?

Further Reading

- For additional detail on the Kephart case, see Duhigg (2012) and Glass (2012).
- For additional detail on the Stevens case, see Rosengren (2016).
- For a detailed explanation of how slot machines work, see Harris (2002).

- For an insightful exploration of the legal and ethical issues surrounding addiction, see Watson (2004a, 2004b). For a survey of recent developments in the science of addiction, see Jabr (2019).
- For a discussion of the doctrine of double effect, see McIntyre (2019).

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