

INTRODUCTION TO SOCIAL GAMING — GAMBLING IN SUBSTANCE, BUT NOT FORM

*Michael S. Alires**

I. INTRODUCTION

In Japan, gambling is technically illegal.¹ However, a pinball-like game called “pachinko” manages to skirt regulation through a narrow interpretation of gambling and various legal loopholes.² The pachinko industry, which at one time had revenues exceeding those of the Japanese automobile industry, often produces the same social ills of gambling such as corruption, tax evasion, personal bankruptcy, and parental negligence.³

Pachinko originated in post-World War II Japan, when aircraft manufacturing firms sought to find new ways to use surplus ball bearings.⁴ In a pachinko parlor, players purchase a supply of tiny metal pinballs that they drop through a vertical maze of pins.⁵ As the balls bounce down, they will either hit jackpots or fall into the gutter.⁶ The jackpots result in additional balls for the player to use; any balls falling in the gutter are lost.⁷ Just as a child turns in tickets in an arcade, the player trades the balls in for prizes at the exchange counter in the pachinko parlor.⁸

The pachinko parlor circumvents Japanese law, as pachinko does not constitute criminal gambling because cash is not exchanged.⁹ The practice becomes questionable when the player sells his or her newly-acquired, easy-to-handle prize to a suspiciously “independent” shop around the corner, which provides the player with money in exchange for their nominal pachinko

* J.D. Candidate, May 2015, William S. Boyd School of Law, University of Nevada, Las Vegas; Master of Arts, Organizational Leadership, 2011, Lincoln Christian University. I dedicate this note to my brother and wife. Tomas, your humor and strength amidst insurmountable circumstances inspire me daily. Natalie, without your constant support and sacrifice, none of this would have been possible. Thank you both for always pushing me to be a better man. Finally, a special thanks to editors Andrew Dunning and Ryan Saxe for their moral support throughout the writing process.

¹ Eric C. Sibbit, Recent Development, *Regulating Gambling in the Shadow of the Law: Form and Substance in the Regulation of Japan's Pachinko Industry*, 38 HARV. INT'L L.J. 568, 568 (1997).

² *Id.*

³ *Id.*

⁴ *Id.* at 568–69.

⁵ *Id.* at 569.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 572.

prizes.¹⁰ The pachinko parlor then repurchases the prizes from said shop and redistributes them to new clientele.¹¹ To many, although not technically illegal under Japan's legal definition of "gambling," this set of transactions would highly suggest gambling in substance.¹²

In the United States, Congress, through the Unlawful Internet Gambling Enforcement Act of 2006, enacted legislation seeking to curb online gambling by restricting the transferring of funds necessary to facilitate the gambling endeavor.¹³ A 2011 U.S. Department of Justice opinion, however, concluded that federal laws did not limit states from offering online gambling that did not include sports betting.¹⁴ States, using this rationale, sought to allow access to online lotteries and eventually expanded their horizons to creating opportunities for slot-machine games and blackjack as methods to generate revenues to support state functions.¹⁵

The United States' seemingly conflicting rules create federalism issues, as the federal government allows the individual states to govern themselves while it simultaneously prevents wide expansion of gambling activities. Despite this allowance, lottery directors point out that most in-state lotteries "have matured and are no longer an area of growth."¹⁶ The issue becomes how to circumvent the process and access a larger market to generate revenue from gaming activities.

Notably, online casino-style gaming sites, often referred to as "social gaming," are drawing millions of users.¹⁷ Worldwide, the revenue generated by the social gaming/casino industry is expected to grow from nearly \$1.8 billion in 2012 to \$2.5 billion in 2015.¹⁸ In the United States alone, social casino revenues are expected to jump from roughly \$659.8 million to over \$1 billion during the same timeframe.¹⁹ Gambling companies and casino operators, seeing an opportunity to grow their business, are acquiring Internet-based firms to develop games for mobile devices and online play.²⁰ For instance, slot machine developer International Game Technology purchased Double Down Interactive in January 2012 for \$250 million in cash, and Caesar's Entertainment Corpora-

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–67 (2012). See also 2 GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET §14.10 (3d ed. 2013).

¹⁴ DELTA & MATSUURA, *supra* note 13.

¹⁵ *Id.*

¹⁶ Alexandra Berzon, *States Up the Online Ante*, WALL ST. J., Apr. 26, 2012, at A3, available at <http://online.wsj.com/articles/SB10001424052702303978104577362121444589922>.

¹⁷ Cheryl Miller, *An Update for Practitioners on Social Gaming*, 29 ENT. L. & FIN. NEWSL. (ALM L.J. Newsl., Phila., Pa.), Sept. 1, 2013, at 3.

¹⁸ Paul Matthews, Co-Founder and COO, PlayStudios, Inc., Presentation at Gaming Law Conference: iGambling and Social Casino Gaming (Nov. 8, 2013) [hereinafter *Matthews Presentation*].

¹⁹ *Id.*

²⁰ Spencer E. Ante & Alexandra Berzon, *Gambling Industry Bets Virtual Money Turns Real*, WALL ST. J., Dec. 12, 2012, at B1, available at <http://online.wsj.com/articles/SB10001424127887324731304578191741064162164>.

tion bought Playtika, the developer of a popular smartphone game called Slotomania.²¹

While Internet gambling is still illegal in many states, online gamers can play virtual slot machines, Texas Hold ‘Em, and blackjack with virtual chips, points, or tokens.²² Players can pick from a number of sites that offer games of chance utilizing the “freemium” business model: there is no cost to play, but by spending real money, players can get benefits such as faster access to higher game levels²³ or more chips.²⁴ While this model does not involve real money bets, for these virtual gaming companies, the pay-off is becoming substantial—casino games on mobile devices and social networks like Facebook have brought in \$1.1 billion in 2011 and roughly \$1.7 billion in 2012.²⁵ Currently, analysts are projecting roughly \$2.5 billion in revenue by 2015.²⁶ Morgan Stanley estimates that roughly “170 million people play simulated casino games on social networks, more than triple the number of real money online gamblers.”²⁷ While some may argue that only an estimated 2% of players make regular payments for credits, even that estimation represents nearly 3.4 million paying customers.²⁸ This burgeoning industry remains largely self-regulated, as state and federal regulators seem content to view social gaming as mere entertainment.²⁹ Currently, most regulation is only from each respective site’s terms of service or the platform provider’s (i.e., Facebook or Apple) agreement with the developer.³⁰

Social gaming sites, like myVEGAS.com, provide incentives to players who continue to play the casino games.³¹ These incentives can include the accumulation of “Loyalty Points” for various activities including sharing your in-game achievements on Facebook, “liking” aspects of the game, and playing for a specified duration.³² The “specified duration” method of accumulating “Loyalty Points” has a direct correlation between the amount of credits a person has available to play with because the more credits one has, the longer she can play to accumulate “Loyalty Points.” MyVEGAS.com allows users to play with an initial daily amount of credits, but also gives the player the option to supplement those credits by purchasing more with actual money.³³ Intuitively, players can avoid needing to resort to spending actual money by winning, which would prolong their opportunities to earn “specified duration Loyalty Points.” Thus, similar to a more traditional gambling situation, players must

²¹ *Id.*

²² Miller, *supra* note 17.

²³ *Id.*

²⁴ Ante & Berzon, *supra* note 20.

²⁵ *Id.*

²⁶ Miller, *supra* note 17.

²⁷ Ante & Berzon, *supra* note 20.

²⁸ *Id.*

²⁹ Miller, *supra* note 17.

³⁰ *Matthews Presentation, supra* note 18.

³¹ Playstudios, *Terms of Service*, MYVEGAS.COM, <http://www.myvegas.com/terms-service-myvegas> (last modified Apr. 9, 2014) [hereinafter *MYVEGAS Terms of Service*].

³² *Id.*

³³ *Id.*

either purchase credits or receive more credits by winning to continue earning “Loyalty Points.”

Like Japan’s pachinko parlors, social gaming sites are starting to blur the lines of what it means to “gamble.” A player can transfer the virtual “Loyalty Points” accumulated on myVegas.com into real-life “Rewards.”³⁴ These “Rewards” are affiliated MGM Resorts International’s Las Vegas properties and include tickets to shows, meals at restaurants, hotel rooms, access to clubs and lounges, and retail merchandise.³⁵ The tagline on the M life players club website directing players to myVEGAS.com reads, “REEL Fun. REAL Rewards,” thus highlighting the physical nature of the prospective winnings.³⁶ In effect, the accumulated “Loyalty Points,” which result through either payment for additional credits or winning as noted above, produce real-life tangible items possessing monetary value.³⁷ Just as the pachinko player takes his nominal prize to the nearby merchant, the online social casino player can convert her nominal winnings into real items of value.

The focus of this note will be on the quasi-gambling nature of social gaming, highlighting the social gaming site, myVEGAS.com, as a key example of businesses attempting to enter this burgeoning industry. This note will highlight relevant examples from myVEGAS.com’s terms of service and other aspects of the site. The analysis of social gaming’s quasi-gambling nature will consider the nature of gambling in Nevada that is relevant to social gaming. Further, this note will look at the growth of secondary markets, which are generating substantial income in the digital marketplace, and e-currency, like Bitcoin, that are flourishing in the real world while existing only digitally. Additionally, this note will briefly consider other policy considerations that would seem to align social gaming with more traditional gambling.

Ultimately, the purpose for this note is to advocate further regulation of the social gaming sphere. Providing proper oversight for this type of activity will allow the industry to flourish appropriately by protecting the consumer and providing guidelines for those companies wishing to enter the social gaming realm.³⁸ Regulation would provide clarity to companies wanting to establish social gaming sites, and would limit potential unknown repercussions from state or federal enforcement, such as the forced shutdown of sites like traditional online gambling’s Internet Black Friday.³⁹

³⁴ *Id.*

³⁵ *Id.* In order to redeem these real-life rewards, a player must be a member of “M life,” the players club affiliated with MGM Resorts International properties. *Id.* See also MYVEGAS.COM, <http://www.myvegas.com/> (last visited Nov. 17, 2013) [hereinafter *MYVEGAS Home*].

³⁶ *M life*, MGM RESORTS INT’L, <https://www.mgmresorts.com/players-club/> (last visited Jan. 4, 2015).

³⁷ *Id.*

³⁸ It is the author’s opinion that online gaming should be allowed across the board with appropriate legislation. The author does not believe that social gaming, as a subset, should be allowed to exist separate from other gaming. There should be consistent treatment of all gaming and quasi-gaming activity.

³⁹ Among poker players, “Black Friday” is the name for the day federal authorities unsealed an indictment against three online poker companies and effectively shut down online poker. See, e.g., Chad Holloway, *The Black Friday Timeline: One Year Without Online Poker*,

II. DIGITAL ASSETS AND SECONDARY MARKETS

A. *Growth of Digital Assets*

Physical items are no longer the only ones with value. Anyone with an iTunes account or digital movies can vouch for the value of items lacking a physical, tangible structure. It is estimated that each individual Internet user in the United States owns approximately \$55,000 worth of digital assets.⁴⁰ As such, it is becoming important for estate planners to consider the value of these digital assets when advising clients.⁴¹ Today, most people do not even see their physical paycheck. Instead, they trust its digital representation on their account statements. Intangible products undoubtedly have value.

B. *Emergence of Digital Secondary Markets*

A number of online games lack a clear win or lose scenario—rather, they allow players to build up characters or accounts by earning virtual currency or developing skills.⁴² Upon earning the currency or skills, the player can “level up” and increase the value of the account.⁴³ Manufacturers will often allow people to purchase digital items to be used in the game.⁴⁴

Not all gamers want to spend the time developing their characters; conversely, those with the time to play the game will often reach a level where some of their digital items would be pure surplus. At this intersection lay secondary markets available to cater to these individuals.⁴⁵ Gamers can buy and sell digital goods, property or avatars for differing, and sometimes substantial, amounts of actual money on various e-commerce sites, like eBay or PlayerAuctions.com.⁴⁶

In certain cases these items have sold for significant sums, as demonstrated by a virtual island that sold in *Project Entropia* for \$30,000, a virtual representation of Amsterdam in the game *Second Life* that sold for \$50,000, and a virtual space station that also sold for \$100,000 in *Project Entropia*. Some research has stated that last year alone approximately one billion dollars traded hands as part of this secondary market.⁴⁷

POKERNEWS (Apr. 15, 2012), <http://www.pokernews.com/news/2012/04/the-black-friday-timeline-one-year-without-online-poker-12445.htm>.

⁴⁰ Kendal Dobra, *An Executor's Duty Toward Digital Assets*, 59 PRAC. LAW. 21, 22 (Oct. 2013).

⁴¹ *Id.*

⁴² Sean F. Kane & Benjamin T. Duranske, *Virtual Worlds, Real World Issues*, 1 LANDSLIDE 9, 9 (2008).

⁴³ *Id.*

⁴⁴ *Id.* at 9–10.

⁴⁵ *Id.* at 10.

⁴⁶ *Id.*; see also *About Us*, PLAYERAUCTIONS, <http://www.playerauctions.com/help/about-us/> (last visited Dec. 22, 2014) (allowing players of games like World of Warcraft (“WoW”) and other massive multiplayer online games (“MMO”) to buy and sell items accrued while playing the games).

⁴⁷ Kane & Duranske, *supra* note 42, at 10.

In some places, enterprising individuals have even set up digital sweatshops where laborers are paid to play games and accrue digital properties and goods for sale.⁴⁸

Secondary markets are becoming a significant reality in the digital sphere and warrant attention. In early 2014, *Diablo III*, a popular online game, changed its policies and systems regarding item transfers.⁴⁹ Initially, the developers had created “auction houses” to provide “a convenient and secure system for trades.”⁵⁰ However, the creators soon found that the success of the auction house system undermined *Diablo*’s core game play—killing the monsters to get items—because players rather sought to collect items through real life purchases.⁵¹ The idea to enhance game play via trading items simply became too successful, to the detriment of the game itself.

This discussion relates to the larger scope of social casino gambling in several ways. First, digital items and currency have value. People will pay sums of money, great and small, for other people’s digital items or accounts housing those items. Social casinos should not be surprised if people want to sell, and just as importantly try to sell, their credits, account, or other portions of their account to other people for actual cash without their knowledge. The terms of service for myVEGAS.com currently restrict the transfer of digital assets.⁵² If this is in fact to be enforced, measures should be in place to notify account managers. Second, these secondary digital markets are growing and becoming large economies of scale. The rampant success of *Diablo*’s auction house system underscores people’s desire to transact in digital goods. Social casinos should not expect to cover their eyes to this development. The brick-and-mortar casinos backing these social gaming sites would be wise to anticipate regulation in an industry wrought with apparent quasi-gaming activity.

III. THE NATURE OF GAMBLING

A. Nevada’s Interest in Regulating Gaming Activity

Nevada Revised Statute section 463.0129 outlines the public policy of the state regarding gaming and gaming activity.⁵³ The statute recognizes gaming’s importance to the economy and the general welfare of the state.⁵⁴ Additionally, the State recognizes the importance of public confidence and trust in gaming activities and associated devices and machines by ensuring that gaming is free of potentially corruptive elements.⁵⁵ In Nevada, a gaming license is a revocable privilege subject to affirmative commission approval.⁵⁶ Because of this power

⁴⁸ *Id.*

⁴⁹ John Hight, *Diablo III Auction House Update*, BATTLE.NET (Sept. 17, 2013), <http://us.battle.net/d3/en/blog/10974978/>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *MYVEGAS Terms of Service*, *supra* note 31.

⁵³ NEV. REV. STAT. § 463.0129 (2013), available at <https://www.leg.state.nv.us/NRS/NRS-463.html>.

⁵⁴ *Id.* § 463.0129(1)(a).

⁵⁵ *Id.* § 463.0129(1)(b).

⁵⁶ *Id.* § 463.0129(2).

dynamic, and to help ensure public confidence, the State has determined that strict regulation of all persons, locations, practices, associations, and activities related to the operation of gaming establishments and associated equipment is necessary.⁵⁷ By regulating the gaming industry, the State of Nevada hopes to protect the “general welfare of the inhabitants of the State, to foster the stability and success of gaming and to preserve the competitive economy” of the state.⁵⁸

B. *Gambling Defined*

The federal definition of gambling per se is: “a game of chance where the participant risks something of value for the chance to gain or win a prize.”⁵⁹ Similarly, the Unlawful Internet Gaming Enforcement Act of 2006 (UIGEA) includes this definition:

- (1) **Bet or wager** – The term “bet or wager”
 - (A) means 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.⁶⁰

The State of Nevada defines a wager as “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.”⁶¹ These definitions share the common elements of an initial offering of value, a game of chance or risk, and the opportunity to receive a prize or something of value. Some have referred to these three elements of gaming as consideration, chance, and prize.⁶² Consideration and prize will receive further discussion later through a deeper analysis of the terms “wager” and “representative of value.”⁶³ Thus, the initial focus will be on the element of chance.

C. *Chance*

A game of chance is often differentiated from a game of skill. One court aptly described the distinction between the two:

Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of chance because at times . . . their result is determined by some unforeseen accident, usually called ‘luck.’ The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?⁶⁴

⁵⁷ *Id.* § 463.0129(1)(c).

⁵⁸ *Id.* § 463.0129(1)(d).

⁵⁹ 41 C.F.R. § 102-74.395 (2014).

⁶⁰ Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362(1)(A) (2012).

⁶¹ NEV. REV. STAT. § 463.01962 (2013).

⁶² Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197, 199 (2004).

⁶³ *See infra* Part III.D.

⁶⁴ *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904).

Considering the dominant element of the game is often referred to as the “dominant factor test.”⁶⁵ State courts, under the UIGEA, are asked to determine whether the outcome of the game is determined by chance dominating skill or if skill dominates chance, in defining whether the activity falls under impermissible gambling.⁶⁶

The State of Nevada considered the notion of the wager and the balancing of chance and skill in the context of a public offer to pay \$5,000 to any person paying \$0.50 for the opportunity to shoot a hole-in-one on a local golf course.⁶⁷ The Court had to determine whether to consider the activity a gambling transaction.⁶⁸ The Supreme Court of Nevada looked to the reasoning of other courts and stated that:

[A]ccording to the definition of ‘wager,’ there must be two or more contracting parties, having mutual rights in respect to the money or other thing wagered or, as sometimes said, ‘staked,’ and each of the parties necessarily risks something, and has a chance to make something upon the happening or not happening of a certain event. But a purse or prize offered by a party, and to be awarded to the successful competitor in a contest in which such party does not engage, nor has any chance of gaining, but only, perhaps, of losing, is without the element of chance of gain or a risk of loss which characterizes the wager agreement. The distinction has been stated thus:

In a wager or bet, there must be two parties, and it is known, before the chance or uncertain event upon which it is laid or accomplished, who are the parties who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event.⁶⁹

The Supreme Court of Nevada determined there is a distinction between a contest and a gambling contract.⁷⁰ This distinction differs from the more typical dominant factor test as it focuses more on the responsibilities of the parties leading up to and after the moment of the chance event. While recognizing the standard policy of determining the dominant element in a game of chance, the Court concentrated on whether the offering party had any opportunity to gain after the moment of the potential chance event.⁷¹ The Court determined that the offeror—the party offering the chance to sink the hole-in-one for cash—had the only opportunity to lose in this instance.⁷² There was no chance, after collect-

⁶⁵ Steven D. Levitt et al., *Is Texas Hold ‘Em A Game of Chance? A Legal and Economic Analysis*, 101 *GEO. L.J.* 581, 583 (2013).

⁶⁶ *Id.*

⁶⁷ *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86 (Nev. 1961).

⁶⁸ *Id.*

⁶⁹ *Id.* at 86–87 (quoting *Misner v. Knapp*, 9 P. 65, 66 (1885) (internal citations omitted)).

⁷⁰ *See id.* at 87.

⁷¹ *Id.*

⁷² *Id.*

ing the initial \$0.50, for the offeror to gain from the transaction.⁷³ Thus, the offer for a chance to make the hole-in-one was a valid contract enforceable at law and not an invalid gambling transaction.⁷⁴

Determining whether skill or chance was involved became irrelevant to the Court, because the post-event gain by either party distinction mooted the question of skill or chance.⁷⁵ At first glance, this would seem to side with social gaming sites like myVEGAS.com. The site operator, upon collecting the money for additional credits, no longer has a chance to win or gain from the transaction with the user. The site operator has already received the money just as the *Gibson* golf course operator had.⁷⁶ It seems site operators only have the ability to potentially lose as the user accrues “Loyalty Points” through continued play.

However, the source logic relied upon by the Court through *Misner* seems somewhat circular as it returns back to the original premise of skill versus chance by stating that a “premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event.”⁷⁷ An “act done” implies a more skill-based determination while “an uncertain event” implies more of a chance-determined outcome. The “act done” would seem to require an affirmative act by the party hoping to win the prize. An “uncertain event,” on the other hand, would often imply a very limited ability of either side to affect their outcomes at the moment of the event. Thus, it would appear that the very distinction advocated by the Court is still premised on a dominant factor test and not as a matter of responsibilities after the event.

In relation to the context of the social gaming realm, the “act done” by the user is rather inconsequential when compared to the “uncertain event” nature of the parties’ interactions. A user’s acts during a session on myVEGAS.com are often simply clicking buttons with little else. The determination of their result is more largely governed by an uncertain event utilizing the randomizing logic of the operator’s program. While internal computer logic is never truly random,⁷⁸ it is doubtful that either party is affirmatively calculating their acts to specifically target and exploit the inability for truly random generation (or if either party is even capable of doing so). Thus, the interactions between the user and the operator of social gaming sites should be viewed under the dominant factor test and not under the method described in *Las Vegas Hacienda, Inc. v. Gibson*.⁷⁹ Under this test, social gaming sites are more appropriately considered games of chance than skill.

⁷³ *Id.*

⁷⁴ *Id.* at 86.

⁷⁵ *Id.* at 86–87.

⁷⁶ *Id.*

⁷⁷ *Misner v. Knapp*, 9 P. 65, 66 (1885) (quoting *Alvord v. Smith*, 63 Ind. 58, 62–63 (1878)).

⁷⁸ Computers cannot generate completely random outcomes—they are bound by mathematical algorithmic logic that is made to appear random by utilizing a seed number and following a pattern. For further information, see Jason M. Rubin, *Ask an Engineer: Can a Computer Generate a Truly Random Number?*, MIT SCH. OF ENG’G (Nov. 1, 2011), <https://engineering.mit.edu/ask/can-computer-generate-truly-random-number>.

⁷⁹ 359 P.2d at 86–87.

D. *Wager, Representative of Value, and Assembly Bill 419 (1997)*

Under Nevada Revised Statute section 463.0152, gambling is a game played for “money, property, checks, credit, or any representative of value.”⁸⁰ Representative of value is defined as “any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash.”⁸¹ A wager, as noted above, is “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.”⁸²

The terms “representative of value” and “wager” have been contested before the Nevada legislature by members of the State Gaming Control Board and various members of the Nevada gaming community, including representatives of the Nevada Resort Association, and the Vice Presidents of The Mirage Casino and Caesar’s Palace.⁸³ The two groups were determining the tax implications of promotional or incentivized play by discussing what the term “gross revenue” encompassed.⁸⁴ Their understandings help to illuminate the discussion of the credits utilized in social gaming.

The State Gaming Control Board believed that promotional chips given to persons are complimentary chips and should not be deducted as losses from gross revenues.⁸⁵ Greg Gale, then-Chief of the State Gaming Control Board’s Audit Division, believed that “gross revenue” was cash received as winnings by the casino, less the amount paid out by the casino as losses to casino patrons.⁸⁶

A wager, according to Mr. Gale, only exists if there is a chance of loss—without the potential gambler risking anything, the casino is not engaging in a wager and should not be able to receive any tax benefits for this activity.⁸⁷ The example Mr. Gale utilized was one of a football bet.⁸⁸ He suggested the following scenario:

If he bet \$11 on a game, and he won the bet, the book would pay him \$21 as winnings. Then the \$11 wager would be taxable, and the \$21 would be deductible as gross revenue. If he lost the bet, the \$11 would be fully taxable since the sports book collected the money. In contrast, if the casino gave the patron a coupon worth \$11 at the sports book, that would be a free bet. It cost the patron nothing. If he won the bet, the casino would pay him \$21. The tax consequence of that action was that the coupon was not taxed, but the \$21 pay-out by the casino was promo-

⁸⁰ NEV. REV. STAT. § 463.0152 (2013), available at <https://www.leg.state.nv.us/NRS/NRS-463.html>.

⁸¹ *Id.* § 463.01862.

⁸² *Id.* § 463.01962.

⁸³ *Minutes of the Assemb. Comm. on Judiciary*, 1997 Leg., 69th Sess., at 1–2, 4 (Nev. May 20, 1997) [hereinafter *Judiciary Minutes*], reprinted in LEGIS. HISTORY OF AB 419, at 18–19, 21 (1997), available at <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/AB419,1997.pdf>.

⁸⁴ See generally *id.*

⁸⁵ *Minutes of the Assemb. Comm. on Ways & Means*, 1997 Leg., 69th Sess., at 1 (Nev. June 17, 1997) [hereinafter *Ways & Means Minutes*], reprinted in LEGIS. HISTORY OF AB 419, at 73 (1997), available at <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/AB419,1997.pdf>.

⁸⁶ *Id.* at 2.

⁸⁷ *Judiciary Minutes*, supra note 83, at 5–6.

⁸⁸ *Ways & Means Minutes*, supra note 85, at 2.

tional activity. Therefore, that \$21 could not be deducted from gross revenue.⁸⁹

Essentially, Mr. Gale was explaining that, by considering wagers made with promotional coupons as gaming activity, casinos were avoiding a significant amount of tax liability.⁹⁰

In regards to the “representative of value” discussion, Mr. William Bible, then-Chairman of the State Gaming Control Board, stated that the Board’s belief was that “the Legislature intended [the term ‘representative of value’] to apply to chips that had a negotiability aspect.”⁹¹ Meaning, if a patron received \$100 in chips from the casino operator, that player had the option of either cashing the chips in or gambling with them for the value of \$100.⁹²

Mr. Kevin Doty and Mr. Harvey Whittemore, lobbyists for the Nevada Resort Association, took an opposing position and stated that non-negotiable instruments still had a value.⁹³ Mr. Whittemore viewed the special chips as “seed” money to entice an individual to gamble at a particular casino.⁹⁴ Mr. Whittemore discussed an example in which Caesar’s Palace incentivized “high rollers” to play baccarat and the casino’s baccarat win increased from \$10 million to \$70 million during this period.⁹⁵ Allowing this type of behavior, in the Nevada Resort Association’s eyes, would result in greater revenues for the gaming industry and, in turn, greater tax revenue for the state.⁹⁶ The main policy argument is that this type of promotion increases play, ultimately increasing overall revenue and taxes.⁹⁷

Further, in the event that a patron won using the promotional chips, the casino would be responsible for the actual payout to the player and the loss should rightfully be deducted from the casino’s taxable income.⁹⁸ Mr. Doty suggested a hypothetical in which a person was given one chance for a \$1 slot machine pull of which there was a 90% payback: in this instance, even though the patron was receiving a free pull, there is a certain inherent value because of the patron’s possibility of winning, and the casino’s potential for loss.⁹⁹ Mr. Doty further mentioned that the Internal Revenue Service, in dealing with lottery tickets, believed that contingencies like this do have value and therefore constitute wagering.¹⁰⁰

⁸⁹ *Id.*

⁹⁰ *Id.* at 3. Mr. Gale did, however, acknowledge that casinos’ use promotional coupons to draw in business that, in turn, may increase overall gross revenue. *Id.*

⁹¹ *Minutes of the S. Comm. on Judiciary*, 1997 Leg., 69th Sess., at 1, 13 (Nev. June 25, 1997), [hereinafter *S. Comm. on Judiciary Minutes*], reprinted in LEGIS. HISTORY OF AB 419, at 84, 90 (1997), available at <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/AB419,1997.pdf>.

⁹² *Id.*

⁹³ *Id.* at 23–24.

⁹⁴ *Id.* at 16.

⁹⁵ *Id.* at 25.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 16.

⁹⁹ *Id.* at 24.

¹⁰⁰ *Id.*

Mr. Whittemore even seemed to suggest that there was value via a secondary market of promotional chips.¹⁰¹ He offered the following example to the Nevada Senate Judiciary Committee:

If somebody in the room was one of the people who got 50, \$1000 chips as promotional play, he asked if there was anybody in the room that would not pay \$5 for one of those chips affording them the opportunity to bet \$1000 at Caesars Palace and perhaps win.¹⁰²

He suggested to the Nevada Legislature that there was value in the opportunity to win.¹⁰³ Even though there was no direct negotiable quality to the promotional chips, outside persons could realize the value.

In his testimony before the Assembly Judiciary Committee, Mr. Robert Faiss stated that, "a chance to win has value as a matter of law."¹⁰⁴ Mr. Faiss further testified that, "the value [of a wagering instrument], as stated by the courts, is the contract right to have the wager honored by the casino."¹⁰⁵ With this, Mr. Faiss spoke against negotiability as the hallmark of representative of value; instead, the value is the contract right to potential winnings.¹⁰⁶

Mr. Mark Lerner, then-Assistant General Counsel for Alliance Gaming Corporation, testified to the Assembly Committee on Ways and Means on the issue of free coupons to the 1995 Judiciary Committee. Mr. Lerner turned the tables on Mr. Gales's sports book bet hypothetical outlined above. He believed that the chips did have a demonstrable value.¹⁰⁷ Mr. Lerner suggested that:

If there was a market for or a weakness in promotion there were people who bought and sold those promotions or coupons. If someone had a coupon good for an \$11 bet at a sports book, and there was another person who was reasonably sure that bet would pay off even half the time, that person would pay \$4 for all the coupons he or she could buy.¹⁰⁸

The statements by Mr. Whittemore, Mr. Faiss, and Mr. Lerner suggest that value is not tied with the negotiability of the item, but with the rights afforded it. Players are not simply purchasing the promotional play amount, they are purchasing the right to have the casino recognize their winnings in the event they are winners. Take, for example, a hypothetical situation where a questionable individual sold the buyer a forged sports betting promotional ticket. The buyer of the ticket does not want a piece of paper denoting a certain point-spread for a game. The paper itself is inconsequential. What the buyer desires is

¹⁰¹ *Id.* at 19.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Robert D. Faiss, Counsel for the Nev. Resort Ass'n, Prepared Testimony Concerning Assemb. Bill 419, at 5 (May 20, 1997), reprinted in LEGIS. HISTORY OF AB 419, at 34 (1997), available at <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/AB419,1997.pdf>.

¹⁰⁵ *Id.* at 6; see also *In re Chomakos*, 69 F.3d 769, 771 (6th Cir. 1995) ("[T]he contractual right to receive payment in the event that [a gaming wager] turns out well is obviously worth something.").

¹⁰⁶ See *Faiss*, *supra* note 104, at 6.

¹⁰⁷ *Ways & Means Minutes*, *supra* note 85, at 6.

¹⁰⁸ *Id.*

recognition by the casino to have the paper honored. Thus, value, even in secondary markets for promotional items, would be based on contractual obligations by the casino recognized.

In the end, it is the gaming industry's interpretation stipulated in Assembly Bill 419.¹⁰⁹ Both sides seemed to agree that the issue at hand was ultimately a policy decision as to how taxation should occur. Mr. Gale, before the Assembly Committee on Judiciary, believed that not taxing this promotional credit could result in a loss of \$4 million in gross tax revenue a year.¹¹⁰ The casino industry held the position that not taxing the promotional play allowed casinos more opportunities to increase play and taxable revenue.¹¹¹ Mr. Lerner, before the Assembly Committee on Ways and Means, believed that the "more important fiscal effect" was not on the tax itself, but on the discouragement of promotions that generate revenue for the casinos and greater tax revenue for the state.¹¹² The idea being that taxing the fruits of the casino's labor rather than the method utilized to achieve those fruits can make more money for the State.

E. Wager, Representative of Value, and Nevada Attorney General Opinion No. 2000-38

On December 29, 2000, the Attorney General issued an opinion on promotional gaming conducted over the Internet.¹¹³ The opinion was issued in response to a question posed by then-Chairman of the State Gaming Control Board upon meetings with MGM Mirage, Silicon Gaming and its subsidiary WagerWorks, Inc.¹¹⁴ The businesses sought to create Internet websites for promotional gaming and characterized the proposal as a "rewards based scheme."¹¹⁵ The stated intent for the website was to create marketing opportunities for brand-name recognition in hopes of encouraging patrons to visit MGM properties.¹¹⁶ It is worth noting that myVEGAS.com directly references MGM properties.¹¹⁷ While the website referenced PlayStudios as the site's developer, not Silicon Gaming or WagerWorks, it seems as if myVEGAS.com is the present-day realization of the discussions referenced in the Attorney General's opinion.¹¹⁸

The proposal involved a system of incentives to support the interactive nature of the site including play credits, casino points, tickets, instant win

¹⁰⁹ Legis. Counsel Bureau Research Div., *Bill Summary: Assembly Bill 419*, 1997 Leg., 69th Sess., at 2 (Nev. 1997), reprinted in LEGIS. HISTORY OF AB 419, at 2 (1997), available at <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/AB419,1997.pdf>.

¹¹⁰ *Judiciary Minutes*, supra note 83, at 6.

¹¹¹ *S. Comm. on Judiciary Minutes*, supra note 91, at 25.

¹¹² *Ways & Means Minutes*, supra note 85, at 6.

¹¹³ 2000 Nev. Op. Att'y Gen. No. 2000-38 (Dec. 29, 2000), in OFFICIAL OPS. OF THE ATT'Y GEN, 2000, at 210 [hereinafter *AGO 2000-38*], available at http://ag.nv.gov/uploadedFiles/agnv.gov/Content/Publications/opinions/2000_AGO.pdf.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 211.

¹¹⁷ *MYVEGAS Home*, supra note 35.

¹¹⁸ See generally *id.*

awards, and instant sweepstakes qualification.¹¹⁹ Incentives would be offered for various activities including: visiting the website, responding to marketing inquiries, and playing free casino-styled games.¹²⁰

The proposed system involved four different elements: play credits, casino points, tickets, and instant incentives.¹²¹ Play credits are non-redeemable and issued at no cost to the patrons visiting the site.¹²² Patrons would use one to five play credits to play casino-styled games.¹²³ Patrons are “issued and reissued credits at no cost as he or she lost them.”¹²⁴ The stated terms of “as he or she lost them” should imply that the original format intended to provide additional play credits immediately once a person has lost all of the credits without further delay. This is different from the “freemium” model that is currently being used by social gaming sites where persons are making purchases, in which the intention is to offer a core product for free and sell premium products to a smaller portion of the users.¹²⁵

In the proposed system, casino points were intended to accumulate free of charge and be redeemable for awards consisting of rooms, entertainment, food, and merchandise among other options.¹²⁶ These casino points are different than play credits and accumulate based upon the time spent on the site playing a game.¹²⁷ The casino points are never at risk of being lost.¹²⁸ These casino points mirror the functionality of myVEGAS.com’s Loyalty Points.¹²⁹

Under the proposed “rewards based scheme,” tickets are accumulated and redeemed for prizes and awards just like casino points, “except that game outcome is determinative of the award.”¹³⁰ The number of tickets available to win on a particular outcome, such the player achieving a royal flush, depends upon the number of play credits bet by the player.¹³¹ Similar to casino points, the tickets would be used in sweepstakes, drawing, other contests, or redeemable for other items.¹³²

Finally, the proposal discussed the use of instant incentives.¹³³ These instant incentives would be awarded as player engaged in activities similar to those that earned the player casino points, and allow for entry into contests,

¹¹⁹ AGO 2000-38, *supra* note 113, at 211.

¹²⁰ *Id.*; *see also supra* Part I.

¹²¹ AGO 2000-38, *supra* note 113, at 211–13.

¹²² *Id.* at 212.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Peter Froberg, *What is Freemium?*, FREEMIUM.ORG, <http://www.freemium.org/what-is-freemium-2/> (last visited Nov. 9, 2014); *see also MYVEGAS Terms of Service, supra* note 31 (exemplifying a freemium model).

¹²⁶ AGO 2000-38, *supra* note 113, at 212.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See supra* text accompanying notes 31–34.

¹³⁰ AGO 2000-38, *supra* note 113, at 212.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 213.

sweepstakes, and drawings.¹³⁴ Instant wins would be randomly given to website users.¹³⁵

The Attorney General's opinion began its consideration of the proposal by determining whether, under applicable law and gaming regulations, MGM could provide patrons with free "play credits" with no cash redemption value to accumulate "casino points" that are redeemable.¹³⁶

In forming its opinion, the Attorney General discussed *State Gaming Commission v. GNLV Corp.*,¹³⁷ where the Nevada Supreme Court held that a wager required at least two parties who faced a risk of loss and a chance of gain.¹³⁸ Accordingly, the *GNLV* Court held that free 50-cent tickets given out automatically for every 75th dollar wagered were not part of a wager.¹³⁹ Rather, the redeemable tickets were merely prizes that the casino had no chance to win back, and the awarding of the tickets were mandated by a slot club contract, not the uncertain outcome of the game.¹⁴⁰

The Attorney General's analysis begins with, "[h]ere, the Internet games will be available without charge to patrons."¹⁴¹ The opinion is clearly addressing a model in which there is no monetary transaction between the site and the participant. As previously discussed, use of the freemium model shifts the scope of MGM's originally-anticipated marketing plan in which users would seemingly receive play credits upon losing them.¹⁴² The scope of social gaming no longer focuses solely on generating brand recognition. Instead, the focus has shifted towards creating an additional revenue stream for the casinos through strikingly similar gaming activity. The site asks patrons to purchase more credits or wait a specified period for their credits to be renewed.¹⁴³ To renew their funds, patrons collect play credits from various casinos and can only collect more after a specified time has passed.¹⁴⁴ By forcing patrons to wait rather than offering credits directly upon hitting a minimal threshold, there is a desire for immediate gratification that is naturally built into the game to generate income for the operators and affiliated casinos that differs from the game's original scope.

Furthermore, in the *GNLV Corp.* case cited by the Attorney General, the underlying transaction of the \$75 wagered would constitute a gaming transaction.¹⁴⁵ The focus of the Attorney General's analysis is on the benefit of the 50-cent ticket conferred by the casino to the patron, not on the \$75 spent as part of

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 834 P.2d 411, 412 (Nev. 1992).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *AGO 2000-38*, *supra* note 113, at 214

¹⁴² *See supra* notes 118, 124–25 and accompanying text.

¹⁴³ *See MYVEGAS Terms of Service*, *supra* note 31.

¹⁴⁴ *See generally myVegas Slots*, FACEBOOK, <https://apps.facebook.com/playmyvegas/> (last visited Nov. 9, 2014) [hereinafter *myVegas Slots on Facebook*].

¹⁴⁵ *See AGO 2000-38*, *supra* note 113, at 214.

a gaming transaction to earn it.¹⁴⁶ Similarly, the amount spent by patrons purchasing play credits should constitute a form of gambling.

Finally, in its conclusion to this issue, the Attorney General's opinion highlights the disconnect between the proposed site and the implementation of myVEGAS.com. The opinion mentions that the "mere act of visiting a website or time spent at a particular website entitles the visitor or patron to accumulate redeemable 'casino points.'"¹⁴⁷ However, on myVEGAS.com, the user must constantly play the games to accumulate Loyalty Points.¹⁴⁸ There is no accrual of Loyalty Points by simply remaining logged into the site.¹⁴⁹ The fact remains that the accrual requires playing casino-styled gaming, and playing may result in persons paying money to achieve Loyalty Point accrual.

The second question addressed by the Attorney General's opinion is whether MGM could award tickets based upon the patron achieving a winning outcome with varying amounts of credits.¹⁵⁰ The Attorney General determined that the play credits do have value without being negotiable and "by risking play credits upon the chance or uncertain occurrence of a winning outcome that would entitle him or her to receive a ticket redeemable for cash and non-cash awards . . . a wager would exist."¹⁵¹ Since a wager would exist, the Attorney General determined that the MGM's plan would require prior approval of the Nevada Gaming Commission, or, alternatively, the plan could be approved as a promotional device under Nevada Gaming Commission Regulation 14.210.¹⁵² Under Commission Regulation 14.210, a "promotional device" may appear and function like a slot machine, but "is playable without a wager being made" or "always pays out an amount in either cash or prizes that is equal to or greater than the wager made."¹⁵³ As such, the opinion determines that if the tickets were "distributed on each and every play in an amount that is equal to or greater than the free credits being wagered," the tickets could likely be considered a promotional device.¹⁵⁴

On myVEGAS.com, although the developers removed the ticket system, the Loyalty Points program integrates some of the elements of this idea.¹⁵⁵ Each time a player plays, the player collects Loyalty Points.¹⁵⁶ The Loyalty accrual rate increases by the amount of credits played.¹⁵⁷ For example, in a particular game on the site, "*Lost in Time: Jewels Verne*," playing the minimum wager of twenty lines at two credits per line requires roughly twelve spins to generate loyalty points; playing the maximum of twenty lines with twenty

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 215.

¹⁴⁸ See *myVegas Slots on Facebook*, *supra* note 144.

¹⁴⁹ *Id.*

¹⁵⁰ *AGO 2000-38*, *supra* note 113, at 215.

¹⁵¹ *Id.* at 216.

¹⁵² *Id.* at 217.

¹⁵³ NEV. GAMING COMM'N REG. § 14.210(1) (2014).

¹⁵⁴ *AGO 2000-38*, *supra* note 113, at 218.

¹⁵⁵ See *MYVEGAS Terms of Service*, *supra* note 31; see also *myVegas Slots on Facebook*, *supra* note 144.

¹⁵⁶ See *MYVEGAS Terms of Service*, *supra* note 31.

¹⁵⁷ See *myVegas Slots on Facebook*, *supra* note 144.

credits reduced the number of spins to five or six.¹⁵⁸ Either method produced only 10 Loyalty Points.¹⁵⁹ Therefore, to earn the same 10 Loyalty Points, the player puts at risk anywhere between 480 to 2400 credits.¹⁶⁰ One can purchase play credits on the site at an exchange rate of roughly 1000 play credits per dollar or 1/10 of one cent per play credit.¹⁶¹ Thus, the approximate cost for the same 10 Loyalty Points, in this particular game, is somewhere between \$0.48 to \$2.40, since the value of a single Loyalty Point ranges from \$0.048 to \$0.24. Understandably, this cost to the player reduces as they gather free play credits. However, the fact remains that the value of the Loyalty Points seems to fluctuate based upon the wager made in contravention to the Commission Regulation.¹⁶² Additionally, by incentivizing the player to bet more play credits to accrue Loyalty Points faster, the game is set up to encourage users to bet more and increase the likelihood that the player will spend more of his or her own money.

Furthermore, the Loyalty Points do not seem to accrue during “Free Spins.”¹⁶³ Instead, the counter remains stagnant during this time.¹⁶⁴ If the intent was to provide Loyalty Points for merely being on the site or participating in the social game activity outside of any gambling activity, one would surmise that this participation should be equally valid in accruing the Loyalty Points. This activity is not included, and Loyalty Points are only offered for spins when a person puts play credits at risk. By denying all play and spins from equally accruing Loyalty Points, the notion that the game is playable without a wager being made, per Regulation 14.210, seems to be circumvented.¹⁶⁵

Finally, the value given to the patron per Loyalty Point is minimal in comparison to the overall potential cost for the Loyalty Point. One offer available for purchase using Loyalty Points allows \$20 off from a bill over \$40 at a local restaurant.¹⁶⁶ The cost in Loyalty Points is 15,000. Using the conversion scale noted above, with a range of \$0.048 to \$0.24 per Loyalty Point, the potential amount that could be spent is \$720.00 to \$3,600.00. This constitutes a range of 36 to 180 times the value of the item being sought. Thus, any purchases made do not correspond with a dollar for dollar outcome in the available winnings and would require significant Loyalty Point accrual to do so.

¹⁵⁸ See *Lost in Time: Jewels Verne*, MYVEGAS, <http://myvegas.com/games/lost-time> (last visited Nov. 29, 2014) (Set the “Bet” at “2”; then press the “Play” button twelve times; then change “Bet” to “20”; and then press the “Play” button six times).

¹⁵⁹ See *id.* The collection of Loyalty Points is represented by a circular progress meter in the lower left hand corner of the game, which, when full, will reward the player Loyalty Points as represented in the top right hand corner of the game, denoted by a gold coin icon. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* On the myVegas homescreen, select “Buy” from the upper right hand corner. The site offers 5,000 play credits for \$5.00, 9,000 play credits for \$9.00, and 19,000 play credits for \$19.00 with additional bonuses offered on top of the base amount. *Id.*

¹⁶² See *supra* note 154 and accompanying text.

¹⁶³ See generally *Lost in Time: Jewels Verne*, *supra* note 158 (demonstrating that Free Spins are awarded based on slot reel outcomes in course of play, awarding the player spins that do not cost the player any credits).

¹⁶⁴ See *id.*

¹⁶⁵ See NEV. GAMING COMM’N REG. § 14.210(1) (2014).

¹⁶⁶ See generally *myVegas Slots on Facebook*, *supra* note 144.

This entire discussion is undoubtedly complicated, and potentially undermined, by the reality that the site offers generously given free play credits. However, offering free credits to patrons using the site is not in contention, nor should it be. The problem arises when the site bombards the patron with opportunities to input credit card or PayPal information to purchase play credits. The site seeks to offer a number of incentives to buy play credits with additional play credits and Loyalty Points for the purchases.¹⁶⁷ The website encourages people to place money into their account and to utilize the money in gaming scenarios, which differs significantly from the proposed idea of strictly promotional activity to generate brand recognition.¹⁶⁸ This money is then masked in multiple levels of digital currency, including the play credits and Loyalty Points. Players can then transfer these Loyalty Points into real world items that have value and whose value may be significantly lower than the amount placed in by the customer. Gaming establishments, by allowing players to pay money and play casino games, are making money in a manner substantially similar to their actual operations. Once the patron places money on their account, the transactions become quite similar to gambling in substance if not necessarily in form.

IV. POLICY CONSIDERATIONS FOR SOCIAL GAMING

A. *Recent Developments with Bitcoin*

Recently, Bitcoin, a digital currency, has been making headlines: an unknown person—or groups of persons—using the alias Satoshi Nakamoto developed Bitcoin in 2009.¹⁶⁹ Bitcoin is not associated with any country and, as such, is not subject to any specific regulation.¹⁷⁰ To prevent Bitcoins from flooding the market, “people compete to ‘mine’ Bitcoins using computers to solve complex math puzzles.”¹⁷¹ Once mined, the Bitcoins are often sold on “Bitcoin exchanges” where people can use different currencies to buy and sell Bitcoins.¹⁷² Further, the transactions are completed anonymously without banks. Consequentially, there are no credit card or foreign exchange transaction fees. This could offer potential savings to smaller businesses and individuals.¹⁷³ The Bitcoin system reduces a government’s control of currency and the items purchased with the funds.¹⁷⁴ The lack of oversight has allowed people to fund illicit activities, like drug purchases, without regulators having the ability to trace the transaction.¹⁷⁵

¹⁶⁷ *Id.* For example, on October, 25, 2014, at 4:19 PM, the site was offering 5,000 play credits for the price of \$5, as well as an additional 250 Loyalty Points and a bonus of 5,725 play credits for a total of 10,725 play credits and 250 Loyalty Points for \$5.

¹⁶⁸ See AGO 2000-38, *supra* note 113, 210–19.

¹⁶⁹ Tal Yellin et al., *What is Bitcoin?*, CNN MONEY, <http://money.cnn.com/infographic/technology/what-is-bitcoin/> (last visited Nov. 9, 2014).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Bitcoin has moved into Las Vegas recently.¹⁷⁶ The D Las Vegas and Golden Gate casinos recently announced that they would accept Bitcoin for non-gaming transactions.¹⁷⁷ Customers can use Bitcoin at the front desk, gift shops, and restaurants in the casinos.¹⁷⁸ Outside of the gaming sector, Dream Racing—a company allowing customers to drive Ferraris and Lamborghinis on the Las Vegas Motor Speedway—announced that it would accept Bitcoins for purchases.¹⁷⁹ Because Las Vegas attracts many foreign visitors, there are suggestions that the lack of exchange fees may incentivize its use throughout Las Vegas.¹⁸⁰ An entirely digital item is showing its value in Las Vegas by offering tangible goods and experiences for its users.

Selling an account, where a person has put time in playing a game, saves someone else the time and effort of accruing the items themselves.¹⁸¹ As evidenced in the mining of Bitcoins and the selling of accounts, there appears to be value in the time and work put in to achieve the account status. In the social gaming sphere, achieving Loyalty Points takes a great deal of time and generates an inherent value to the player. The inherent value further increases as a result of the real world items available upon accrual through myVEGAS.com. Once a person puts money into a myVEGAS.com account, they are inputting tangible value and completing gaming scenarios in hopes of achieving value on the outcome. The transaction appears to possess the strikingly similar qualities of a gaming transaction.

Further, on a philosophical level, is there a significant difference between Bitcoin and the play credits and Loyalty Points on myVEGAS.com? Could two people not decide to sell and trade in play credits or Loyalty Points in the same way? Bitcoins and purchased play credits function in the same space. Both are purchased with real money, and exist only digitally. The only true difference is that, currently, a person can *only* spend play credits on the myVEGAS.com website, whereas one can spend Bitcoins in numerous places. With the emergence of Bitcoin, one has to consider the seemingly arbitrary manner of which we assign value to items in our world. This value is further complicated as we enter the gambling realm and may create gaming transactions that otherwise had not been considered prior in the digital sphere.

B. *Different Method, Same Potential for Problems*

As discussed previously, the nature of the gaming transaction shifts once a social casino player pays money. The player is putting something at risk in hopes of winning more play credits and accruing Loyalty Points. By risking actual money to win more play credits to accrue Loyalty Points, the transaction

¹⁷⁶ Howard Stutz, *Two Downtown Las Vegas Casinos Will be First to Accept Bitcoin*, LAS VEGAS REV.-J. (Jan. 21, 2014, 3:10 PM), <http://www.reviewjournal.com/business/two-downtown-las-vegas-casinos-will-be-first-accept-bitcoin>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Richard N. Velotta, *Bitcoin Debate: Is Online Currency Worth Its Weightlessness in Gold?*, LAS VEGAS SUN (Feb. 23, 2014, 2:00 AM), <http://www.lasvegassun.com/news/2014/feb/23/bitcoin-debate-online-currency-worth-its-weightles/>.

¹⁸⁰ *Id.*

¹⁸¹ See *supra* Part II.B.

only seems to add more “middlemen” to distinguish it from being a more standard gambling scenario. Simply because the transaction exists in a digital format does not remove the fact that value exists at the beginning and the end of the transaction. The standard player will hardly know the legal nuances that distinguish the social casino game from actual online gambling. Instead, the player experiences similar emotions and impulses that a gambler would, including the same drive to win. The benefit playing casino-styled games is substantially similar to the potential benefit in an actual casino.

In the United States, social casino revenues are expected to increase from roughly \$659.8 million in 2012 to over \$1 billion by 2015.¹⁸² This is not an insubstantial amount of money. This is money that could, theoretically, be diverted to other causes or purchases. Currently, there is nothing preventing a person from developing substantial debt on these in-game purchases. Like the pachinko industry, where societal ills abound for what is declared by the respective nation-state as non-gaming activity, social gaming runs the risk of similar personally corruptive behaviors like bankruptcy and parental negligence.¹⁸³ The problems associated with social gaming, however, risk being worse than those of the pachinko parlors or casinos because people spend this money without ever leaving their home. Any argument to be made against allowing standard online gaming should be equally applicable to persons paying for social gambling experiences. People never have to leave the comfort of their homes to participate in quasi-gambling activity that could cause their bank accounts deplete and credit card balances rise.

Additionally, there is no oversight regarding the odds of the online games played.¹⁸⁴ The players have no way of knowing whether the games are adjusted behind the scenes to their detriment. Without some oversight, players may be unknowingly placing money chasing a losing proposition. Aligning this activity with gaming would provide consumer protection in an otherwise loosely regulated arena. As noted above, the State of Nevada seeks to protect gaming to maintain public confidence.¹⁸⁵ Protecting the public’s confidence in gaming means also protecting people from what would appear to the untrained eye as gambling activity.

C. *Less Control of Accrued Digital Assets*

MyVEGAS.com’s terms of service declare that the purchaser of any digital coins or points does not own any of the virtual items.¹⁸⁶ Whether the credits are earned or bought, the player is only granted a limited license “to use the software programs that manifest themselves as Virtual Items.”¹⁸⁷ Per the terms of service, it appears that the buyer is not in fact purchasing credits. In more traditional games, the buyer purchases the game once and then owns the game.

¹⁸² *Matthews Presentation*, *supra* note 18.

¹⁸³ *See supra* Part I.

¹⁸⁴ State laws and gaming regulations generally set minimum pay out standards. *See generally*, e.g., NEV. GAMING COMM’N REG. 14.040; OHIO REV. CODE ANN. § 3772.20 (Lexis-Nexis 2014).

¹⁸⁵ *See supra* Part III.

¹⁸⁶ *MYVEGAS Terms of Service*, *supra* note 31.

¹⁸⁷ *Id.*

For most software, the buyer would at least have a license to use the game and the ability to possibly purchase the license to other add-ons. On myVE-GAS.com, players may be risking money to play a game with credits that they cannot remove from the game without further play.¹⁸⁸

Players are essentially drawn into a losing proposition with only the hope that they win enough times to cash out Loyalty Points in the end.¹⁸⁹ It seems as if the website wants to limit transfers to help minimize any similarities to a gambling or gaming site. This proposition works well to protect the site owners who keep the cash regardless, yet it is not in the best interest of the players themselves. The players get the worst of both worlds by not being able to cash out their money spent via transfer to another player and not being able to directly gamble their accrued Loyalty Points to cash them out. This multi-tiered system creates a “shell game” that does not benefit the players and seeks to solely benefit the site operators.

V. CONCLUSION

The social casino sphere has the potential to bring in great sums of money for casinos while limiting their risk. Casinos earn this money on the backs of many individuals through activity that is similar to gambling. Many are players who cannot appreciate the finer legal nuances between gambling and what is called social gaming or a social casino. Like pachinko, gambling seems to exist in substance if not form. By adding in layers of digital currencies, the developers and casinos seem to be camouflaging their intent to make money on strikingly similar gaming activity. The reality is that players are using actual money on their respective accounts hoping to win something of value after completing numerous gaming scenarios.

Governmental regulators should force social game sites to choose between functioning as free promotional sites or gambling sites. They should not be able to exist in the “freemium” space where players place actual money to work towards gaining tangible items through layers of digital credits.

In reality, digital assets are growing in value and influence on our economy.¹⁹⁰ It is not sufficient to only allow the sites to regulate themselves via their terms of service. Instead, governments should seek to embrace the development of digital assets and recognize that value can exist outside of tangible products. This realization helps to ensure that any interactions with these intangible products are properly regulated, particularly in the scope of potential gaming transactions. The lack of recognition of digital asset values is in part to blame for the shortsighted scope of gaming activity.

The games played on social gaming websites are chance-based, not skill-based. Winning is premised on the internal logic of the computer systems behind the games and not on the player’s special skills or abilities. The player is not structuring his or her play around “an act done” but is playing based the potential for an “uncertain event” to win more play credits to achieve Loyalty

¹⁸⁸ See generally *id.*

¹⁸⁹ See generally *myVegas Slots on Facebook*, *supra* note 144.

¹⁹⁰ See *supra* Part II.

Points.¹⁹¹ Once again, this supports the notion that the games are aligned with gaming activity.

The Nevada Legislature's decision on Assembly Bill 419 in 1997 shows recognition of value in secondary markets for gaming activity.¹⁹² Value, in the context of a gaming transaction, is a larger consideration than how much money something is worth. Value is further premised in the willingness of institutions to recognize the value. A gaming transaction's worth is premised in the contractual obligations requiring its enforcement. These positions align with the website's and casino's obligations to honor the accrual of Loyalty Points and their translation to actual tangible items.

Moreover, the Nevada Attorney General's opinion differs from the current implementation by MGM and PlayStudios. The opinion is premised on the notion that a social gaming site will be strictly for promotional purposes without any money being directly involved.¹⁹³ The analysis should change once money is entered into the equation, since, at that point, the website is no longer focused on brand recognition. Its focus becomes a money-making venture that should be properly regulated. The addition of people's money to the plan constitutes an impermissible scope shift. Additionally, masking the value in multiple levels of digital credits does not remove the fact that value is paid by the player and value is offered at the end by the organization with gaming activity in between.

Finally, policy considerations weigh in favor of additional regulation in the social gaming sphere.¹⁹⁴ Bitcoin's expansive growth over the course of the last year has shown the impact that digital assets can have on the real world economy.¹⁹⁵ Further, its use in Las Vegas provides an excellent opportunity to begin addressing digital value. Appropriate regulation of digital currencies could prove beneficial to the many foreign nationals wishing to limit currency transaction fees and offer those persons opportunities to spend more at the casino tables and slot machines. Social gaming and digital currency laws in Nevada should be developed in tandem and are worth future investigation.

Social casinos are vulnerable to the same arguments that one could mount against standard online gaming.¹⁹⁶ As a result, social gaming and online gambling should be treated similarly. Any regulation affecting one should affect the other. The minor nuances between the two are irrelevant to the typical player. Treating the two similarly could prove beneficial to both realms. Online gambling could be brought to the forefront and legalized. Social gambling will benefit with increased player confidence if appropriate regulation is devised.

Social gaming lies in the shadows of the gaming world. In form, it appears as a legitimate non-gaming business that provides persons with an opportunity to experience the thrills of Las Vegas. In substance, however, social gaming walks a fine line of actual gambling without any of the protections typically afforded to players. Once the prospective player adds actual cash, the scope of

¹⁹¹ See *supra* Part III.C.

¹⁹² See *supra* Part III.D.

¹⁹³ See *supra* Part III.E.

¹⁹⁴ See *supra* Part IV.A–C.

¹⁹⁵ See *supra* Part IV.A.

¹⁹⁶ See *supra* Part IV.B.

Fall 2014]

INTRODUCTION TO SOCIAL GAMING

247

the transaction changes, like the pachinko games of Japan, social casinos mask their gaming transactions by hiding the deal in layers. Legislators should address the quasi-gambling nature of social casino websites and force them to step in line with other gaming regulations or, in the absence of regulation, remove the ability for players to purchase play credits for money.

