

Gambling is a vice, and as such attracts other vices resulting in more crimes, robberies, prostitution, drug sales and money laundering for example. For evidence of this one only has to look at the crime statistics around the Hayden Island "Lottery Row" in Portland.

What I see on the horizon if the prohibition against gray machines is dropped is Sweepstake or Internet Cafés. These establishments offer video line games and card games under the guise of a sweepstakes. The promoters of sweepstake games believe they have found a loophole in the gambling laws. To explain I have quoted from a sweep stakes industry website:

(<http://www.sweepstakesmachines.com/faq>)

"In order for an activity to legally be considered "gambling", it needs to have three elements:

Prize

Chance

Consideration

The prize is, of course, something that you win. Sweepstakes have that. The chance means that there is a random element involved. This, too, is a part of any sweepstakes game. Consideration means that the participant pays directly to enter into the game. Here's the catch... when you play the McDonald's Monopoly game, which is a sweepstakes, you don't buy game pieces. You buy a Big Mac with fries or an order of chicken McNuggets. When you buy the food, you get a free entry into the Monopoly game.

This is exactly how sweepstakes gaming works in the Internet cafe business. The customers don't actually purchase entries into the sweepstakes. They purchase time on the computer (Internet time) or, in some cases, long-distance phone time. When they purchase this "product" they are given free entries into the sweepstakes. Instead of placing game pieces on a Monopoly board they go to the sweepstakes gaming systems to reveal whether or not they have won. Simply put, the sweepstakes machines are our Monopoly game and the Internet or phone time is our cheeseburger. This makes it legal."

Oregon has not had to argue the validity of this reasoning because of our gray machine prohibition. The draw of these sweepstake cafés is the casino style games, which are currently illegal in Oregon. However this is a multibillion dollar business that could quickly set up mini casinos throughout the state.

I have enclosed a white paper produced by the American Gaming Association written by David O. Stewart, Ropes & Gray, LLP, which does a very good job of describing the issues surrounding internet cafés. As Mr. Stewart writes *"Internet sweepstakes cafes can be established with minimal capital investment, yet they siphon billions of consumer dollars away from state lotteries and those licensed and regulated gambling businesses that statutorily provide funding for public education, health care and programs for the elderly."*

An article in U.S. News, by Steve Eder, August 21, 2012, reported *"Such Internet sweepstakes cafes have proliferated across the county, thanks to loyal patrons like Ms. Sayre. In recent months, though, the cafes have come under siege from state and local authorities in a number of states, including Ohio, South Carolina, Michigan, Texas and North Carolina. Dozens of cafes have been raided and branded illegal gambling parlors. Some state lawmakers are trying to ban such cafes or impose hefty taxes."*

"Mark Keel, the chief of the South Carolina Law Enforcement Division, which has assisted local police in raids in about a dozen counties that resulted in the seizing of about 250 terminals, says the cafes are "ripe for corruption." The cafes have very little, if any, oversight, unlike legal gambling operations, which are heavily regulated, he said."

When talking about the money involved Mr. Eder reports *"It is difficult to estimate how large the industry has become. Gambling experts say cafes first sprouted up several years ago, but their growth has accelerated in the past year. In North Carolina, researchers estimate the industry's total annual sales in the state are between \$4.6 billion and \$13 billion before payouts."*

I have reviewed a sweepstakes café industry web site. This site run by Sweeps Coach assists business in getting started and supplies the software for sweepstakes cafes. Their website <http://www.sweepstakesmachines.com> advertises

*"Every day people spend millions of dollars playing sweepstakes games that resemble slot machines and casino gambling devices. And every day the people that own the businesses with **sweepstakes machines** make hundreds of thousands of dollars. Why not you?"*

Their website is professionally put together and includes advertising videos, Webinars and photos of some of their installations. They offer installation packages of up to 100 stations, for \$33,000.00. They also offer stand alone kiosks or "Totems" that offer the sweepstakes as Keno, Slots or card games. In their informational video they say these can be put in stores, bars and truck stops. Our gray machine laws largely prevent this now because as Sweeps Coach says in their web site *"However, sweepstakes terminals that resemble casino gaming devices have an added allure."*

Again this would be more attractive to many business owners than the Lottery as they would keep a much greater share of the profits and their business would be unregulated.

Meaning:

There are no background checks of owners or distributors.

There are no age restrictions.

There are no OLCC requirements

There is no monitoring of the fairness, integrity or honesty of the games.

There is no limitation on the number of machines at any one business.

There is no support of compulsive gambling treatment or awareness.

A October 30, 2012, article in the Columbus Dispatch written by Lydia Coutre reports about 40% of people seeking help for problem gambling at Maryhaven (An addition recovery center in Ohio) that sweepstakes cafes have contributed to their problems. The Florida Council on Compulsive Gambling has also reported an increase in calls related to Sweepstakes Cafes.

In short a Gray Machine is a device in a public establishment which plays or emulates a casino game (Poker, line games, dice games, etc.). Gray machines can and were used as gambling devices in the past. A player would feed money into the machine and play the games, when he/she wanted to "cash out" they showed their current score to the bartender. The bartender would pay the player his/her winnings out of the till and then reset the score of the machine for the next player.

Grey machines are currently illegal per ORS 167.164

167.164 Possession of a gray machine; penalty; defense. (1) On and after December 1, 1991, a person commits the crime of possession of a gray machine if the person manufactures, sells, leases, transports, places, possesses or services a gray machine or conducts or negotiates a transaction affecting or designed to affect the ownership, custody or use of a gray machine.

(2) Possession of a gray machine is a Class C felony.

(3) Violation of, solicitation to violate, attempt to violate or conspiracy to violate subsection (1) of this section constitutes prohibited conduct for purposes of ORS chapter 131A, and shall give rise to civil in rem forfeiture as provided in ORS chapter 131A. A judgment providing for forfeiture may direct that the machine be destroyed.

(4) It is a defense to a charge of possession of a gray machine if the machine that caused the charge to be brought was manufactured prior to 1958 and was not operated for purposes of unlawful gambling. [1991 c.962 §5; 1999 c.59 §33; 2009 c.78 §58]

They are defined by **ORS 167.117 (9)(a) "Gray machine"** means any electrical or electromechanical device, whether or not it is in working order or some act of manipulation, repair, adjustment or modification is required to render it operational, that:

(A) Awards credits or contains or is readily adaptable to contain, a circuit, meter or switch capable of removing or recording the removal of credits earned by a player, other than removal during the course of continuous play; or

(B) Plays, emulates or simulates a casino game, bingo or keno.

(b) A device is no less a gray machine because, apart from its use or adaptability as such, it may also sell or deliver something of value on the basis other than chance.

If the Gray machine prohibition were to be removed there are potential issues. Current enforcement actions against illegal gambling (Card rooms and gray machines) is low, as local authorities are unfamiliar with the gambling laws and do not have the extra personnel to tackle the problem. If the gray machines were legal it would add to the difficulties for law enforcement. It would require undercover officers in the businesses witnessing the payouts before any action could be taken.

The use of gray machines to facilitate illegal gambling would present a great temptation to both legitimate and criminal business owners as the gaming would be far more lucrative than the Oregon State Lottery. The retailer would keep 100% of the net as opposed to about 20% with the Lottery. This would undoubtedly have the effect of siphoning funds from the Oregon State Lottery.

Register Guard Nov 9, 91

Businesses decry lottery poker plan

■ **Criticism:** Plans to cut private owners out of video poker has merchants crying foul at a public meeting.

By **JOE MOSLEY**
The Register-Guard

The Oregon Lottery Commission has lost touch with its aim of economic development and has become a self-perpetuating monopoly, tavern owners and operators of coin-operated games said Friday at a public hearing in Eugene.

"I've read the lottery can change your life," said Denny Nixon, a game operator from Days Creek. "Well, it's changing thousands of lives today."

Nixon and other merchants testified that they will be run out of business or will have to lay off employees if the lottery commission eliminates private operators from the state's planned video poker network.

"Establishing a state monopoly is a shameful breach of faith," Nixon told Lottery Commission Chairman Debbs Potts and hearings officer Gary Williams.

In all, 31 people testified at Friday's video poker hearing — all against the commission's plan to omit private operators. The meeting was the fourth of seven to be held around the state before the full commission meets Nov. 25 in Salem

to finalize video poker rules.

Lobbyists working for tavern owners and game operators teamed with the lottery during this year's legislative session to successfully push for approval of video poker, speakers said Friday.

But the tavern owners and operators say they were cut out of the picture two months ago when the lottery commission accepted Attorney General Dave Frohnmayer's recommendation that the lottery take charge of the games. Frohnmayer pointed to the illegal payoffs on so-called "gray" poker games as an indication that using private operators in the state network could result in corruption.

"The attorney general has taken a few isolated examples of renegades in our business, and because of that said we need to be eliminated as an industry," said Cheryl McCown, owner of Charlie's Recreation & Vending and three taverns in Eugene and Springfield.

Leaving the private operators out was a stab in the back, she said. "The lottery said, 'Hey guys, you did great,'" McCown said. "You got our (poker) program for us. Now hand over the keys and get out of the way."

The business owners expected to

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for economic development," said Jan Steeprow, owner of the Buckhorn Tavern in Dexter.

Steeprow said she's had to lay off one bartender and reduce the hours of others since she eliminated the "gray" poker games that were located in her tavern. In laying groundwork for a state video poker network, the 1991 Legislature outlawed all "gray" games after Dec. 1, and many merchants already have gotten rid of the games.

"Is the Oregon Lottery economic development?" Steeprow said. "Is it? When I have to lay people off? Where

Terry Fitzpatrick, owner of Fitzpatrick's tavern in Eugene, said he had to lay off four people because of the ban on "gray" games and the lapse of four months before the start of the state's network on March 30.

"I really wanted Frohnmayer or (Gov. Barbara) Roberts to come down and do it for me," Fitzpatrick said of the layoffs. "By taking away the poker machines, you are putting those people out of work."



Lottery commission member Gary Williams hears testimony on Friday. Staff photo by Chris Pietsch

earn as much as \$75 million per year for operating the state's poker network, but the Oregon Restaurant Association predicts that 1,200 people may now lose their jobs because of the lottery's change of plans.

McCown and other tavern owners said they rely on game revenue for 40 percent or more of their income. The

lottery's plan to pay them just 4.2 cents for every dollar played on state-run games located in their taverns will be a huge blow to their businesses, the tavern owners said.

"Excuse me if I'm wrong, but I thought the Oregon Lottery was designed

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CRITICISM

Video poker idea has senators checking hole cards

□ The lawmakers question to what degree the state of Oregon should become involved in gambling

By JEFF MAPES
of The Oregonian staff

SALEM — The prospect of state-run gambling on video poker machines has excited a variety of business interests and offered the revival of an Oregon Lottery that has gone flat in sales.

But a bill allowing the lottery to proceed with video poker has suddenly run into a surprising amount of opposition in the Oregon Senate as lawmakers fret about how deeply they want the state government to get into gambling.

The latest hurdle rose Friday when the

Senate Judiciary Committee started discussing an amendment that simply would ban all video poker machines in the state — whether controlled by the lottery or not.

"I'm not sure anybody knows how they are going to vote today," said Senate Judiciary Chairman Joyce Cohen. D-Lake Oswego. "It's fascinating."

Sen. Jeannette Hamby, R-Hillsboro, said one lobbyist for a gambling machine manufacturer complained that he had counted 25 yes votes a week ago out of the 30 senators. Now he had only five sure votes with the other "25 people searching for something else to vote for," she said.

Under current law, video poker machines are not illegal, but gambling payoffs from them is. House Bill 3151 would authorize payoffs and split the revenues between distributors, bar and tavern owners and the state.

"I'm not sure anybody knows how they are going to vote today. It's fascinating."

— Joyce Cohen,
Senate judiciary chairwoman

HB 3151 moved through the House on a 36-22 vote and had a huge head of steam as it moved into the Senate — in large part because legislators already had figured out how to spend the estimated \$50 million a year that video poker would bring in to state coffers.

Video poker also faced little organized opposition — and plenty of lobbyists supporting the bill. In large part, that's

because as much as three-fourths of the take from video poker would go to the private sector instead of the state.

These major out-of-state gaming companies have hired lobbyists to push for video poker in the hopes they can win the contract for the central computer that would control the games. They are Video Lottery Consultants of Bozeman, Mont.; International Games Technology of Reno, Nev.; and Grech Corp. of Providence, R.I.

These companies, along with several other machine manufacturers, also are seeking to grab a big share of the market for the video poker machines themselves. The Lottery estimates that about 10,000 machines — at \$5,000 each — eventually will be placed around the state.

On top of that, the bill also is supported

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Video poker: Varied groups support plan

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by an association of amusement game operators who hope to place and service the machines in bars and taverns. Also, the Oregon Restaurant Association is pushing for video poker as a way to increase their members' business.

A number of lawmakers have seen video poker as the way out of the increasingly tight financial vise they find themselves in with the lottery.

The problem is that lottery sales declined from about \$168 million in 1988 to \$151 million in 1990. After paying prizes and expenses, about a third of that money goes to the state to spend on economic development.

Sales have begun to swing up again in 1991. But legislators and lottery officials say it is clear the state can't expect to net much more than about \$50 million a year from the current offerings of scratch-off tickets and numbers games.

"The lottery is sort of tapped out in a sense," said Joe Cortright, executive officer of the Legislative Committee on Trade and Economic Development.

At the same time, cash-strapped legislators have been turning to the lottery to finance an increasing number of programs. When the lottery started in 1985, it was seen as a source of money for one-time economic development projects that were difficult to pay for through the regular budget.

But obligation has piled upon obligation to put a tighter squeeze

They also worry that the heavy presence of the private sector would lead to the presence of organized crime in Oregon.

"We're going to sell the soul of our state through gambling to finance our needs," said Sen. Jim Hill, D-Salem.

Hill promoted the idea of a lottery when he first ran for the Legislature in 1980 — it was finally approved by voters in 1984 — and said he dismissed criticism that the Lottery would be the first step toward widespread gambling in the state.

Opinion changed

"Now I think they are right," said Hill. "I did not think it would go this far."

However, supporters of video poker say these concerns are misplaced because gambling on these machines is widespread in Oregon. While the machines are supposed to be used for amusement only, a number of police investigations have uncovered widespread illegal payoffs.

"The reality is," said Senate Majority Bill Bradbury, D-Bandon, "that if you go into any bar or tavern in my district, you will see somebody at a video poker machine non-stop."

In fact, the main point of HB 3151 is to ban video poker machines that are not controlled by the Lottery. The Legislature gave the lottery approval to go into video poker in 1989, but the plan fouled when counties said they had enough law-

enforcement problems with the current machines.

"Thus, supporters of the bill say, the bill really just cleans up the existing video poker business and makes sure the state gets a cut of the profits. Lottery Director Jim Davey said the machines will be strictly controlled through telephone link-ups and that game operators will be screened to weed out criminal elements.

However, the Judiciary Committee is studying the other alternative of simply eliminating all video poker machines.

Cohen said she is committed to sending the bill to the floor. But she said members of the committee likely will ask the full Senate to consider the alternative of just banning video poker machines, as does California.

Cortright said that would bring at least a modest financial boost to the lottery, which says sales of its current games are hurt by competition from illegal gambling on video poker.

But such a move would anger owners of drinking establishments who would not have any video poker machines to draw customers. Also, it would upset amusement game owners who would lose a big source of revenue.

The end result, said several senators, is an unpalatable decision that would matter how they vote. "There's a lot of dissent about it," said Sen. Bob Shoemaker, D-Portland, saying he doesn't know what side he will come down on.

6-17-91

Senators deal With poker bill

Panel tackles video business

The Associated Press

A bill to put the state lottery in the video poker business will get more attention as the Oregon Legislature begins the week.

The Senate Judiciary Committee is scheduled to continue work today on the measure, which so far has had an orderly trek through the legislature.

The bill has been approved by the House and the Senate Trade & Economic Development Committee. Not all lawmakers are enthusiastic, but the lure of the money is great.

Officials estimate that the state could rake in as much as \$50 million a year from the machines, which isn't much less than the yield from all the lottery's current games.

The 1989 Legislature passed a law allowing video poker as part of

the lottery. But the project never got off the ground because numerous counties wouldn't go for it.

Other money-related issues remain as lawmakers wind down to what many observers think could be the last week or two of the session.

An accounting mistake disclosed last week left budget leaders \$49 million short of what they thought they had, so they're juggling figures trying to plug the hole.

Meanwhile, school officials from districts that stand to lose under the Senate-passed version of a school aid distribution bill are urging the House Revenue Committee to find more money.



Jan Steeprow (left), owner of the Buckhorn Tavern in Dexter, talks with customers Cheryl Cunningham and Ray Walker.

Tavern owners rap lottery plan

her soft, worn hands on her face, flashes a look of doubt and says, "I can hope."

Two weeks ago, vendors removed five leased video poker machines that had been fixtures at the Buckhorn Tavern. Beginning Dec. 1, the machines will be outlawed to make way for a new system of video poker machines to be run by the Oregon Lottery starting at the end of next March.

Since the machines were removed, business has been cut in half, Steeprow says. She already has laid off one bartender.

Dozens of tavern owners and coin machine operators are expected to voice the same kinds of complaints at a public hearing today in Eugene about the lottery's new video poker plans.

The 10 a.m. hearing at Harris Hall, 125 E. Eighth Ave., is one of several that the lottery is holding around the state.

The 1991 Legislature decided to ban privately run games and hand the keys to video poker to the lottery, which plans to install 10,000 machines in about 2,600 bars, taverns and restaurants around the state.

Originally, the lottery had proposed that the private distributors and operators who now lease machines to tavern owners and others serve as middlemen and collect an estimated \$75 million a year to run the games.

But Oregon State Police and Attorney General Dave Frohnmayer, citing the past involvement of some operators in making illegal payoffs and the fear of organized crime, recommended excluding private operators.

The tavern owners say they'll lose money in two ways: First, they must suffer several months with no video poker income until the lottery's system goes online next year; second, the state's plan to give them only 4.2 percent of the take from each machine is a big cut in profits.

"We're supposed to take all of the risks, and the state takes all of the money," says Dick Stafford, owner of JJ's Tavern on Roosevelt Boulevard in Eugene.

Stafford says bar owners have to pay for labor, rent on their buildings, insurance and other overhead and should get a larger cut for having the lottery's machines in their bars.

Stafford bought JJ's seven years ago and says he put \$2,000 a month into keeping the bar afloat during the first three months he was open. Then he decided to lease some video poker games, and his profits rose dramatically.

By JENNIFER PINKERTON
The Register-Guard
11-1-91

Jan Steeprow had been working seven days a week to keep her bar running. Handling a shift alone, she pours beer, cooks, cleans, answers the phone, does dishes and monitors whether her patrons are drinking too much.

Steeprow, owner of the Buckhorn Tavern in Dexter, says she's built a good business in the five years since she bought the bar. But ask her whether the piece will be open a few months from now and she puts

"What can I say if they were dependent on illegal gambling for money? Should people be allowed to break the law to keep their businesses going?" Davey asks.

The Oregon Restaurant Association, a trade group that represents many area tavern owners, predicts that as many as 1,200 people will lose their jobs if the lottery proceeds with its state-run network.

Steeprow hopes she can hold out until the lottery installs its new video poker network next March. She'll get a smaller cut from the machines than the one she leased, but she says every nickel counts.

"It's like the bum scraping bottles in the gutter," she says. "You've got to take what you can get."

He says he will leave the business rather than deal with the hassle of a state-run lottery.

Lawmaker would deal private operators in on video poker

The Associated Press

A legislator is raising legal doubts about the state Lottery's plan to deal private machine operators out of its video poker operation.

Rep. Randy Miller, R-Lake Oswego, says private operators were considered to be an integral part of the 1991 Legislature's plan when lawmakers passed a measure in June authorizing state-run video poker.

"As a legislator who has been supportive of the Lottery Commission, it was somewhat shocking to learn that the lottery felt somehow compelled and justified to be the exclusive operators of video poker," Miller said at a hearing Thursday before lottery representatives in Bend.

The Lottery Commission, on recommendations from Attorney General Dave Frohnmayer and State Police Superintendent Reg Madson, has proposed rules to exclude private machine operators from the poker network.

The Bend hearing was one of several that are being held on the rules.

"Those of us who supported this measure would have not supported it if we believed in any way that the state would be running it," Miller said.

He said the draft rules don't follow the legislative mandate that the lottery maximize net revenue. Private operators would run a more efficient game that would return more money to the state, Miller said.

He also said the Lottery is subject to review of its rules by a legislative panel.

"Agencies tend to forget that we (the Legislature) created them," Miller told *The Bulletin of Bend*.

He said security concerns raised by Frohnmayer can be dealt with by rules to license bars and taverns where games will be played.

Miller, a member of the Legislative Counsel Committee, said the panel is on record opposing the commission's rules. The committee reviews proposed regulations from state agencies and advises when the panel believes the rules don't comply with the intent of the Legislature.

Miller said the panel believes the rules don't comply with the intent of the Legislature.

11-9-91
STREMAN

Lottery video poker not viewed as cure-all

By JEFF MAPES

of The Oregonian staff

SALEM — Giving the Oregon State Lottery a monopoly over video poker won't end the law-enforcement problems associated with the gambling machines, an expert on organized crime said Wednesday.

"Legalized video gambling would also be tremendously difficult and tremendously time-consuming" to police, said Peter Shepherd of the attorney general's organized crime unit.

Shepherd told the House Trade and Economic Development Committee that bar and tavern owners might offer higher payouts to video-poker players to entice more customers into their establishments. He also said that officials would have to carefully regulate distributors to make sure the machines were fairly distributed to bars and taverns.

However, Lottery Director Jim Davey countered that South Dakota has not had any corruption problems since it started state-controlled video poker. He said he thought that bar and tavern owners and machine distributors would be careful to play by the rules to avoid losing their contracts with the Oregon State Lottery.

The testimony came as lawmakers are deciding whether the lottery should proceed with a video-poker network that could almost double the state's take from gambling.

The Legislature decided in 1989 to put the lottery in the video-poker business, but the program foundered after all but one county rejected the machines.

Several county sheriffs said that lottery-sponsored video poker would only exacerbate the law-enforcement problems they were already having with privately controlled poker machines. Undercover investigations have shown that bar and tavern owners frequently offer illegal payoffs on the private machines.

This time, lawmakers are considering a bill that would ban video-poker machines that are not operated by the lottery. They are also deciding whether counties should be allowed to opt out of lottery video poker.

Marla Rae, executive assistant to

"We offer no endorsement one way or another."

— Russell Spencer,
State Sheriffs Association

Attorney General Dave Frohnmayer, said that Frohnmayer wants to ban the private video-poker games and is opposed to the lottery getting involved in this type of gambling.

But Rae said that Frohnmayer would prefer to give the lottery control over video poker than to continue the current situation.

* Russell Spencer of the Oregon State Sheriffs Association said that the county law-enforcement officials also want a ban on the private games. But he said that "we offer no endorsement one way or another" on whether the lottery should run its own video-poker games.

Spencer was closely questioned by lawmakers critical of video poker.

"Would you have taken the same position if we had legalized pot?" asked Rep. Vera Katz, D-Portland.

Spencer responded that the sheriffs would uphold the law, but that they would oppose legalizing marijuana.

"I have not had one constituent from my towns say, 'I wish I could have video poker in my town,'" said Rep. Cedric Hayden, R-Fall Creek, adding that legalized gambling has brought a host of social problems to Nevada.

The Oregon State Lottery proposes to allow video poker only in establishments off-limits to people younger than 21, and limit to five the number of machines in each location.

Shepherd said he has not seen any evidence that video-poker distributors are tied into out-of-state crime syndicates.

But he said that some of the operators caught by undercover investigations "have many of the traditional aspects of organized crime" and that it is "indeed possible we have that kind of influence."



Internet Sweepstakes Cafes: Unregulated Storefront Gambling in the Neighborhood

Executive Summary

By David O. Stewart, Ropes & Gray, LLP

In recent years, thousands of “Internet sweepstakes cafes” have sprung up in storefronts, gas stations and convenience stores in more than a dozen states. Carefully designed to take advantage of state sweepstakes laws and to avoid state antigambling laws and gambling licensing restrictions, the Internet sweepstakes cafes are estimated to earn more than \$10 billion a year with games that closely mimic the experience of traditional slot and video poker machines. The cafes advertise and sell a product — usually Internet time or long-distance telephone minutes — that the gambler does not actually want. Along with that unwanted product, the customer receives a supposed bonus of “entries” in the Internet sweepstakes. With those entries, the customer can participate in Internet-based games at the cafe’s specially-programmed personal computers. Based on a random allocation of winning and losing entries, the customer may or may not win cash prizes through those games. According to the cafes that are reaping unregulated profits, this elaborate masquerade is not gambling, but a sweepstakes. According to every appellate court that has decided a case involving similar games, it is incontestably gambling.

Nevertheless, through aggressive litigation tactics and high-powered lobbying at state legislatures, the cafes have managed to forestall effective law enforcement against them in many jurisdictions. The result is that many neighborhoods now house gambling venues that are free of the legal restraints that Americans have traditionally demanded for gambling businesses:

- Cafe owners and managers are neither licensed nor subject to criminal background checks.
- No one regulates the fairness and integrity of cafe games.
- The results of cafe gambling are not reported publicly.
- Cafes siphon gambling revenue from state lotteries and state-licensed gambling businesses such as commercial casinos and racetracks, thereby reducing the funds that go to public education, health and social programs.

Many neighborhoods now house gambling venues that are free of the legal restraints that Americans have traditionally demanded for gambling businesses.

- Yet cafes pay no gaming taxes whatever.
- Cafes need not exclude underage gamblers, nor are they required to give their customers information about compulsive gambling counseling options.

The viral growth of Internet sweepstakes cafes marks a signal failure of public policy. State legislatures and law enforcement officials should eliminate these unregulated gambling venues, which injure publicly-approved forms of gambling and reduce their contributions to essential public programs.

Introduction

Every day, Internet sweepstakes cafes — storefront operations that provide slot-machine-like gambling through specially-programmed personal computers — are challenging the rule of law in strip malls and neighborhoods across the country. At thousands of locations, those cafes attempt to pass off their gambling businesses as innocuous product promotion, claiming they are no different from sweepstakes offered by major consumer companies like Coca-Cola and McDonald's. Yet Internet sweepstakes games replicate the look, sound and feel of slot machines. Virtually all customers pay for the opportunity to play them — sometimes paying thousands of dollars — and win prizes based on the laws of chance.

Many local law enforcement agencies have attempted to close down the sweepstakes cafes in their communities, meeting with some successes and some failures. The failures derive from several sources. Some lower court judges have misunderstood the cafes' legal arguments, including the claim that anti-gambling laws unfairly restrict their constitutional right to free speech. In other instances, statutes have proved an awkward fit for new technologies and business practices ingeniously crafted to skirt the law. Also, the widespread nature of the Internet sweepstakes phenomenon often makes localized enforcement inadequate to the task. In these circumstances, state governments should aggressively exercise their traditional powers to control which gambling businesses may operate, to insist that gambling businesses meet strict regulatory standards, and to ensure that they pay appropriate tax rates.

The threat from Internet sweepstakes businesses can be framed by considering the responsibilities those businesses do not have to meet in most communities where they operate:

- Their owners and principal managers are not licensed by any public agency, so they are not subject to criminal background checks or investigation as to their business integrity.
- Their games and programs are not subject to any meaningful public oversight to ensure that they are fair to customers. If a

customer believes she has been cheated, there is generally no public agency to which she can complain.

- They are not regulated by local zoning ordinances, so in many communities they may locate in any retail or commercial district.
- They need not report their results to any public entities.
- They have no obligation to exclude underage customers from gambling.
- When customers have difficulty controlling their gambling, the cafes have no obligation to provide information about treatment options.
- They do not pay gaming tax at the level that a commercial casino or other publicly-licensed business would have to pay.

That last point bears further consideration. Internet sweepstakes cafes can be established with minimal capital investment, yet they siphon billions of consumer dollars away from state lotteries and those licensed and regulated gambling businesses that statutorily provide funding for public education, health care and programs for the elderly.

Because Internet sweepstakes cafes are largely unregulated, statistics about their true dimensions are difficult to assemble. Nevertheless, this paper presents the information that is publicly available in addressing the following five questions:

1. What are Internet sweepstakes cafes and how do they operate?
2. How many of them are operating and what are their revenues?
3. Do they offer gambling?
4. What is the status of law enforcement efforts against them?
5. What public policies should apply to Internet sweepstakes cafes?

What are Internet Sweepstakes Cafes and How Do They Operate?

Although thousands of Internet sweepstakes cafes follow business models that may vary in small ways, their basic elements have been described in numerous court cases and journalists' reports.¹ The cafe is ordinarily a storefront, though some are wedged into gasoline service stations and convenience stores. They prominently advertise "Internet sweepstakes" both outside and inside. The facility includes a control area where employees operate and receive payments. Personal computers are ranged in rows on tables for the customers. The number of computers may range from only a few to over 100. Some cafes offer free food and drink to prolong customers' play.

The product ostensibly for sale is usually long-distance telephone time

Internet sweepstakes cafes can be established with minimal capital investment, yet they siphon billions of consumer dollars away from state lotteries and those licensed and regulated gambling businesses that statutorily provide funding for public education, health care and programs for the elderly.

or Internet access time, but that ostensible product is often not even discussed with customers. Instead, the café employee carefully explains that customers receive a specified number of “entries” into the Internet sweepstakes. In many versions of Internet sweepstakes, \$1.00 earns the customer 100 entries. In those instances, the customer ordinarily can acquire her first 100 entries (worth \$1.00) for free, a feature of the business model that is intended to shoehorn the cafes into the definition of legal sweepstakes. In some cafes she can simply request those free entries; others require that she mail away for them. Those cafes that award the 100 free entries on the spot will make only one such award per day to each customer.

The customer can discover the outcome of the sweepstakes in one of three ways. She can ask the café employee to determine for her whether her entries yield any prize money. Alternatively, the customer can use, for free, one of the computers for that purpose. At the computer, the customer must either enter a unique access code or swipe her card to determine whether she has won. In finding out that information, she can choose between a “simple reveal,” which instantly discloses any prizes, and a program that discloses the outcome after simulating the sights and sounds of slot machines (for example, spinning wheels with different types of fruit or characters) or video poker play (such as dealing cards). The “games” have themes similar to slot machine games, such as “Lucky Larry Leprechaun,” “Blazing 7s” or “Pot of Gold Poker.”²

Customers may interact with the games they play — for example, by stopping the spinning wheels at a certain point. Those interactions, however, have no impact on whether they win or lose. (One commentary describes the games as “pseudo-interactive.”)³ The outcome is determined by a randomized allocation of sweepstakes prizes that was performed according to a program connected to the issuance of the card or access number; the computer only “reveals” that outcome.

The computer records the player’s wins as additional entries or points with which she can continue to play. The player determines the size of each win by choosing how many “lines” to play per spin; some games permit play on as many as 45 lines. By playing more lines at a time per play, the customer can multiply the value of any win but also increases the deduction in her entries if she loses. Customers may purchase additional entries either directly at the computer or from the café employee. Customers routinely spend several hours at a sweepstakes café. If the customer has a positive balance when she leaves, she can redeem those entries for cash.

Through different means, the storefronts make the Orwellian proclamation that the activity on their premises is not gambling. This message may be embodied in posters on the window that state “You are not

gambling!” It may be asserted in a waiver form that the customer must sign before using a computer. Despite these protestations, sweepstakes games are designed to replicate the experience of gambling and the screens seen by players mimic slot machine screens, featuring “paytables” and “paylines,” along with multiple “win lines” to which players may apply “multipliers.”⁴

No state currently regulates Internet sweepstakes cafes, though a few have expressly banned them. In many jurisdictions, an operator need simply acquire a business license from the local government. A few local governments have enacted their own bans, or approved special fees for Internet sweepstakes cafes, which range from \$1,000 to \$7,500 per year, along with annual per-machine fees of \$100 to \$600.⁵ As the cafes have proliferated, their operations have matured, adopting more sophisticated and more casino-like marketing. For example, many offer free food and drink to encourage customers to remain on the premises, and some are rolling out customer loyalty programs.

Despite the cafes’ insistence that they do not offer gambling, some of their customers seek counseling to control their gambling at cafes, as reported by the Florida Council for Compulsive Gamblers. Cafe customers who want treatment for gambling problems must find it on their own; unlike licensed gambling businesses, the cafes have no obligation to make available information about treatment resources. Similarly, the cafes have no legal obligation to exclude customers who are under the legal age for gambling or who might wish to self-exclude from the gambling venues.⁶

How Many Internet Sweepstakes Cafes Are Operating And What Are Their Revenues?

Because Internet sweepstakes cafes are almost entirely unregulated businesses, no central repository of information tracks how many are in operation or what revenues they generate. From pieces of information available from different states, it looms as a multi-billion dollar industry. One supplier of Internet sweepstakes systems, Hest Technologies of Texas, claims to have installed 4,000 terminals for its systems. Another supplier, Figure Eight Technologies of North Carolina, claims to have equipment at 2,000 installations. Citizens in Florida are estimated to spend more than \$1 billion a year at Internet sweepstakes cafes.⁷ A 2011 report in *Business Week* magazine estimated that between 3,000 and 5,000 Internet sweepstakes cafes were operating then, and that a search on Google Maps identified 2,823 such facilities in North America.⁸

In at least three states, Internet sweepstakes cafes are widespread. Seven hundred eighty-two have registered with the Ohio Attorney General’s office, 79 in Cuyahoga County alone. Florida is widely

A leading consultant to the Internet sweepstakes industry estimated last year that its annual revenues are at least \$10 billion. He also reported that each terminal generates between \$1,000 and \$5,000 per month.

estimated to have more than 1,000 such storefront operations. And an informal survey in North Carolina found 34 facilities with 1,140 computers, or an average of 34 computers per location.⁹ Law enforcement efforts have found Internet sweepstakes cafes operating in a dozen other states, including Pennsylvania, California, Texas, New Mexico, Arkansas, Indiana, Michigan, Virginia, South Carolina, New Jersey, Massachusetts and New Hampshire.¹⁰ Even Utah, the most anti-gambling state in the nation, found Internet sweepstakes cafes within its borders.¹¹

Estimating the revenues of Internet sweepstakes cafes is problematic. Recently, two Internet cafes in Massachusetts paid \$750,000 to the state to represent their profits, though the settlement announcement did not indicate over what period of time those profits were earned.¹² In recent raids on only two cafes, New Jersey authorities seized \$60,000 in cash. The County Prosecutor of Cuyahoga County, Ohio, has stated that a single vendor of Internet sweepstakes systems (VS2 Worldwide Communications of New Jersey) earned \$48 million in profits from February 2008 to May 2012.¹³ A leading consultant to the Internet sweepstakes industry estimated last year that its annual revenues are at least \$10 billion. He also reported that each terminal generates between \$1,000 and \$5,000 per month.¹⁴

The best financial snapshot of a single Internet sweepstakes cafe comes from the analysis of the financial reports for a single location in Palm Harbor, FL. The financial reports covered six weeks of operation from June 1 to July 15, during which the cafe sold telephone access time at 3 cents per minute; customers purchasing telephone time also received sweepstakes entries. The analysis of this report determined that:

- Of 640 customer visits, on 171 occasions the customer purchased at least \$100 of telephone time; \$100 translated into more than 55 hours of telephone time,
- Twelve of those customer visits involved the purchase of more than \$1,000 of telephone time, or more than 550 hours.
- One customer purchased more than 231,000 minutes of telephone time, or almost 4,000 hours. To use that telephone time, the customer would have to talk on the telephone — nonstop, 24 hours per day — for more than 160 days.

A New Mexico case found a similar pattern of customer indifference to the product supposedly being sold by an Internet cafe; the cafe sold 140,000 hours of Internet time, but customers used only 330 of those hours, or less than 0.25%.¹⁵

Some Internet sweepstakes cafes have associated themselves with charitable purposes. For example, in a Florida lawsuit challenging the state's antigambling laws, the first plaintiff listed is a cafe sponsored by a veterans' organization; the for-profit suppliers of the sweepstakes

equipment and other cafe owners are listed thereafter. (A newspaper investigation of that veterans' organization discovered that it reported only \$600,000 of annual revenue to the IRS for one recent year even though it claimed to take in \$100,000 per week and operates dozens of cafes.) In Columbus, Ohio, the Guiding Light Spiritualist Church opened an Internet sweepstakes cafe in its building. A New Hampshire storefront claimed it was a donation center for charities though it never explained how that was related to its sweepstakes business.¹⁶

The cash at Internet sweepstakes cafes, which are often small and isolated establishments, attracts the attention of robbers. In a single month — July 2012 — at least two violent robberies were reported at North Carolina cafes and a 71-year-old customer at a Florida cafe opened fire on two robbers and wounded them both.¹⁷ The cash attracted by Internet sweepstakes cafes also is finding its way into the political process through direct candidate contributions and the hiring of lobbyists to head off legislative restrictions.¹⁸

Do Internet Sweepstakes Cafes Offer Gambling?

In claiming that the cafes are not involved in gambling, their advocates offer two types of arguments. First, they appeal to everyday experience with the sweepstakes mounted by major consumer companies like McDonald's and Coca-Cola. As one California cafe manager said, "On your coke and your fries, you get sweepstakes tickets." The same, he argued, was true for the Internet time and phone cards he sold.¹⁹ The cafes also employ a highly legalistic argument based on the traditional legal test for whether an activity is gambling, which asks if the customer, in order to gain an advantage (a "prize"), pays something ("consideration") for the possibility ("chance") of winning. Internet sweepstakes advocates insist that their activity involves neither consideration nor chance.²⁰

Every appellate court that has decided these questions has concluded that both types of argument are wrong.

First, there are crucial factual differences between a McDonald's sweepstakes promotion and the offerings at an Internet sweepstakes cafe, as illustrated by the following analysis:

	Traditional Sweepstakes	Internet Sweepstakes
Duration	A traditional sweepstakes promotion is a limited-term event designed to attract consumer attention to a product or a business, and ordinarily expires after a few weeks or months. Because they are of limited duration, most states have exempted them from general bans on gambling.	For Internet sweepstakes cafes, the sweepstakes games run perpetually, and are the reason the business exists.
Promotion	In a true sweepstakes promotion, the company seeks to increase consumer awareness of its products and, ultimately, to increase sales of those products — such as hamburgers, soft drinks and the like.	Internet sweepstakes cafes essentially ignore their supposed products (online time and phone cards). Signage promotes the sweepstakes, not the supposed products. Customers rarely use the supposed products, often amassing gigantic totals of unused telephone minutes or Internet time. Cafe employees often do not mention the supposed products to new customers.
Reward	The prizes offered represent a trivial share of the revenue earned by the company, because the sponsor's business is selling its other products, not offering a sweepstakes. Indeed, the odds of winning the sweepstakes are so remote that few customers purchase the basic product in order to have a chance at the sweepstakes prize.	Internet sweepstakes cafes ordinarily pay out in prize money more than 80% of their revenues; notably, slot machines at commercial venues also pay out between 85 to 95 percent.

For all of these reasons, no appellate court has found that the games conducted by Internet sweepstakes cafes bear any significant resemblance to traditional sweepstakes.

Moreover, Internet sweepstakes cafes plainly satisfy the three-part legal test for gambling. Even cafe advocates concede that the cafe customers receive prizes, thus satisfying the first leg of the legal test. They insist, however, that the customers do not pay any consideration for the sweepstakes “entries” they play on the computers. Rather, cafe advocates contend that the customers are truly buying Internet minutes or telephone minutes, and simply accept the sweepstakes entries as a bonus. The New Mexico Court of Appeals recently explained the error in this claim when it affirmed the criminal conviction of a cafe operator on gambling charges. Pointing out that the cafe paid most of its revenues as prize money and that most customers were entirely uninterested in the Internet time they received, the court concluded:

Defendant's cafe operation was structured as a guise for commercial gambling. Based upon these facts and the casino-style display of Defendant's ongoing sweepstakes promotion, ... the controlling inducement for the monies being paid by customers for Internet time was in fact consideration to participate in a lottery that was disguised as a legitimate business promotion.²¹

Other appellate courts have reached the identical conclusion on similar facts. In a 2006 decision, the Alabama Supreme Court concluded that the sale of Internet time was a masquerade, and that customers were paying to play an associated sweepstakes game on dedicated terminals. The Alabama court stressed the uncontested factual finding that few customers cared about the Internet time they acquired, which meant that their payment (consideration) was to play sweepstakes games. The U.S. Court of Appeals for the Fifth Circuit reached a similar decision in August 2012; the appellate court stressed the trial evidence that “the sale of Internet time at the defendants’ cafes was an attempt to legitimize an illegal lottery”: customers did not use the Internet time that ostensibly was the cafe’s main product; over two months, the cafe generated only \$400 of sales of services other than sweepstakes; and the court emphasized the “casino-like atmosphere at the cafes, complete with tinted windows and free food and drink.”²³

Some cafe advocates also point to the ability of customers to acquire a very limited amount of free sweepstakes entries — \$1.00 worth in many current sweepstakes games — as proof that they pay no consideration. The National Indian Gaming Commission in 2003 rejected a similar claim concerning the play of a phone card sweepstakes machine (a technological ancestor of today’s cafes), stressing that although a few games could be acquired for free, “virtually all of the games are played in the traditional way: a player pays by inserting a bill.” The Texas Court of Appeals similarly rejected that argument when it was offered to justify the sale of phone cards that were linked to play on a gambling machine. The Texas court found ample evidence that the defendant “structure[d] the business to entice players to exchange money for chances to pay, which they did; and that the telephone cards were not the primary subject of the transaction, but mere subterfuge.”²³

When they try to deny the role of chance in their sweepstakes games, cafe advocates emphasize that whether the customer wins or loses is already determined at the moment the customer acquires her swipe card or access number.²⁴ Even if the customer plays the sweepstakes game on the computer, the argument goes, nothing about the playing of the game changes the predetermined outcome.

In making this hyper-technical argument, cafe advocates seize on a feature of the games which does not support their contention. That the random allocation of wins and losses is performed before the player acquires her phone card or access number in no way changes the randomness of those outcomes, which are still the result of “chance.” Indeed, in one lawsuit the cafe submitted a sworn description of its product that drives this point home (emphasis added):

That the random allocation of wins and losses is performed before the player acquires her phone card or access number in no way changes the randomness of those outcomes, which are still the result of “chance.”

Because Internet sweepstakes cafes are selling games that involve prize, consideration, and chance, the cafes are engaged in the business of gambling.

*Each finite self-replenishing pool associated with the Gateway Sweepstakes system is pre-created, containing sweepstakes entries with assigned prize values. These pre-created sweepstakes entries are randomly selected from the static self-replenishing pools without replacement, until the entire pool has been exhausted.*²⁵

Because the cafes do not report their operating practices or results to any public regulator, of course, we do not know what percentage of the amount spent on the games is returned in prizes, nor how much money that actually involves.

The claim that chance plays no role in Internet sweepstakes games has never prevailed with an appellate court. As the Mississippi Court of Appeals explained in a recent en banc ruling, “the element of chance is considered from the player’s point of view,” and the consumer purchasing the telephone card was engaged in a game of chance because she “did not know whether the card contained a winning or losing sweepstakes points.”²⁶ In other words, the customer is making a gamble. The Mississippi court’s emphasis on the player’s point of view is reinforced by a separate phenomenon — that customers at Internet sweepstakes cafes seek counseling to help them control their gambling at the cafes. Internet sweepstakes games are not only designed to deliver the experience of gambling, they plainly do so.

Because Internet sweepstakes cafes are selling games that involve prize, consideration, and chance, the cafes are engaged in the business of gambling.

What is the Status of Law Enforcement Efforts against Internet Sweepstakes Cafes?

Some local law enforcers have made it a priority to shut down the Internet sweepstakes cafes, while others have not. Police in several states — such as Virginia, New Mexico, and Texas — have encountered little difficulty in their efforts. A recent series of arrests in Texas targeted the senior executives of Hest Technologies, a major supplier of Internet sweepstakes systems.²⁷ In the three states with the most active cafe industries, however, police and prosecutors have encountered setbacks.

This summer, a multi-front legal war erupted in the Cleveland area when a Cuyahoga County grand jury indicted 10 individuals and seven companies involved in the Internet sweepstakes cafe business, charging them with 70 counts of violating Ohio’s gambling laws. Some of the defendants struck back, filing a civil suit that sought to restrain the county prosecutor from pursuing those charges. The local judge, in a finding

contrary to every appellate decision on the question whether Internet sweepstakes cafes are engaged in gambling, entered the requested injunction, writing that “the business activity is not gambling.” Similar rulings were entered by a Toledo municipal court in 2009, though an Akron municipal court entered a conviction on similar charges in the same year.

Enraged that a trial court would enjoin a criminal prosecution — an order that is disfavored in the law — the Cuyahoga County prosecutor filed his own action against the trial judge, demanding that the Ohio Supreme Court enjoin her from enforcing her orders.²⁸ The state attorney general has joined the county prosecutor in that lawsuit, which has not yet been resolved. In the midst of the courthouse donnybrook, the Ohio legislature adopted a one-year moratorium on the opening of new Internet sweepstakes cafes, stalling for time while it tries to figure out what to do about the almost 800 already open in the state.²⁹

A comparable stalemate has arisen in North Carolina, where Internet cafe owners have pursued a novel legal strategy which is gaining popularity: to claim that their businesses are engaging in protected First Amendment speech that cannot be shut down under state anti-gambling laws. A divided panel of the North Carolina Court of Appeals accepted this argument in March 2012 in a case brought by Hest Technologies, a major supplier of Internet sweepstakes cafe products. The state statute at issue, enacted in 2010, barred the promotion of sweepstakes that employ an “entertaining display.”³⁰ The two judges in the majority noted that the U.S. Supreme Court recently held in *Brown v. Entertainment Merchants Association* that video games are a means of expression entitled to First Amendment protection.³¹ The majority concluded that the state ban on sweepstakes featuring “entertaining displays” was unconstitutionally overbroad and should be struck down. The dissenting judge, however, found the law rationally related to the legitimate government purpose of protecting the morals of North Carolinians by banning a form of gambling. He emphasized that the law did not prevent the cafes from making their games available to the public — and thus expressing themselves — but prevented them only from making the games part of a sweepstakes. The case will be argued before the state supreme court in December.

The First Amendment argument has become a favorite of cafe advocates, who have raised it in pending cases in Florida, Ohio, South Carolina and Arkansas.³² Two federal district judges in Florida have considered the free speech claim and rejected it. In *Allied Veterans of the World, Inc., Affiliate 67 v. Seminole County*, an Orlando judge refused to grant a preliminary injunction against enforcement of a county ordinance which banned “simulated gambling devices.” Because the ordinance “regulates conduct rather than speech,” the court denied that the ordinance is a content-based restriction on speech and also is overbroad. “The

Ordinance in no way prohibits access to the Internet,” the court explained; “it only regulates the simulated gambling devices.” When the cafe owner appealed the ruling, the U.S. Court of Appeals for the Eleventh Circuit affirmed the trial judge. Another Florida federal judge reached the same conclusion in a case filed by a different Florida cafe owner.³³

Despite these pro-enforcement outcomes, prosecutions of Internet sweepstakes cafes in Florida have encountered obstacles. As detailed in a lawsuit filed by an Internet cafe owner, officials in Marion County brought several prosecutions in 2009, but after pro-defendant verdicts in two cases, they elected to dismiss charges against twelve other defendants.³⁴

Several state legislatures have acted to support law enforcement by adopting new laws designed to address the sweepstakes cafe phenomenon. Ironically, Massachusetts recently adopted legislation patterned on the North Carolina statute that was found to violate the First Amendment.³⁵ In view of the decision in the North Carolina case so far, it may be problematic for states to use the term “entertaining display” to define the sweepstakes games that the statute prohibits. That term seems to have focused the North Carolina court on the images portrayed on the sweepstakes screen, which arguably is the only potentially expressive part of the game. Nevertheless, the dissenting judge and the Florida federal courts properly pointed out that the state laws ban conduct — gambling — that cannot claim First Amendment protection.

The Pennsylvania Legislature took a more promising approach in recent legislation barring citizens from offering a “simulated gambling program” in return for “direct or indirect consideration, including consideration associated with a related product, service or activity.”³⁶ The Pennsylvania legislation properly focuses on the activity it prohibits: providing a “simulated gambling program” in return for consideration. That course should make clear that the law addresses conduct only, not expression.

What Public Policy Should Apply to Internet Sweepstakes Cafes?

The analysis in this paper yields some basic conclusions:

First, Internet sweepstakes cafes are in the gambling business, as concluded by every appellate court to review that question.

Second, in most communities in which they currently operate, cafes are subject to no regulation (i) of the background and integrity of owners and managers, (ii) of the fairness of the games they offer, (iii) requiring the exclusion of customers who are too young to go to licensed commercial gambling venues, (iv) imposing special zoning standards or (v) requiring that information be provided about counseling and other treatment options available for those unable to control their gambling.

Third, cafes do not pay any special gaming tax of the type that applies in every state to commercial casinos, racetracks and other state-licensed gambling businesses.

Fourth, they have experienced viral growth throughout the country; because their businesses require so little investment, they can open swiftly and inconspicuously in many communities.

Fifth, because they now enjoy commanding market positions in many communities, as well as annual revenues estimated to exceed \$10 billion, the sweepstakes cafes are siphoning off revenues from state lotteries and state-licensed gambling businesses that employ thousands and make major capital investments. That reduces revenues from lotteries and gambling taxes, which reduces the education, health and environmental programs they support.

Sixth, because of their commanding market positions and large revenues, the sweepstakes cafes spend heavily to protect their uniquely favored position as a largely unregulated and undertaxed gambling business. They spend that money freely on litigation to confound law enforcement, contribute generously to state-level campaigns in order to support legislators who support the industry, and lobby to obstruct legislation.

In these circumstances, the only responsible public policy is to enact and enforce effective prohibitions on this unintended sector of the gaming industry. That the Internet sweepstakes cafes are well-financed and resourceful is no reason to abandon America's longstanding policies that legalized gambling businesses must be strictly regulated to protect consumers and that a significant portion of their revenues must be allocated to the public good. For Internet sweepstakes cafes today, neither policy currently applies.

Endnotes

¹ This description is assembled from a variety of sources, including Christopher W. Derrick, *It Ain't Over 'Til It's Over: Video Gambling Returns to North Carolina*, Family North Carolina 5 (Spring 2010); *Moore v. Mississippi Gaming Comm'n*, 64 So.3d 537, 541 (Miss. Ct. App. 2011) (en banc); Affidavit of James Wentz, *Florida v. Crisante*, No. CRC1207398CFANO (Pinellas Cty. Cir. Ct. April 17, 2012) (submitted as part of "Direct Information" along with Felony Information); Order, *Allied Veterans of the World v. Seminole County, FL*, No. 6:11-cv-155-Orl-28DAB (M.D. Fla. May 6, 2011); Jon Greenberg, N.H. faces tough odds in bid to ban Internet sweepstakes, *Seacoastonline.com*, May 27, 2012; Affidavit of Chase Brooks, *J&C Marketing, LLC v. Mason*, No. CV-12-784234 (Cuyahoga Cty. Ct. of Common Pleas June 4, 2012); Miriam S. Wilkinson & Kelly B. Mathis, *Internet Cafes: Much Ado about Nothing—A Legal Analysis of Electronic Sweepstakes in Florida*, 16 Gaming L. Rev. & Econ. 278 (2012); Noelle Phillips, *Sweepstakes cafes arrive in Richland The State*, May 21, 2012.

² Wentz Aff., *supra* note 2; SweepstakesReviews Webpage, <http://www.sweepstakesreviews.com> (last visited Aug. 15, 2012); VS2 Worldwide Communications Webpage, <http://www.vs2wwc.com> (last visited Aug. 15, 2012).

³ Wilkinson & Mathis, *supra* note 2.

⁴ Expert Report of D. Robert Sertell, *Crisante v. Coats*, No. 8:11-CV-2007-T-17TBM (M.D. Fla. Oct. 12, 2011); Wentz Aff., *supra* note 2.

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⁶ Felix Gilette, *The Casino Next Door*, *Bloomberg Business Week Magazine*, April 21, 2011.

⁷ Hest Technologies Webpage, http://www.hesttech.com/who_is_hest.php (last visited Aug. 15, 2012); Figureeight Technologies Website, <http://www.figure8tech.com/about/> (last visited Aug. 15, 2012); Don Van Natta, Jr., *Worries About 'Convenience Casinos' in Florida*, *NY Times*, May 6, 2011.

⁸ Felix Gilette, *supra* note 8.

⁹ Alan Johnson, *'Strip Mall Casinos,' Internet cafes spreading across Ohio offer a form of gambling that no one oversees or regulates*, *The Columbus Dispatch*, July 29, 2012; Don Van Natta, Jr., *supra* note 8. The North Carolina survey is a proprietary document shared with the AGA on condition of confidentiality.

¹⁰ *Kern County judge pulling plug on gambling at Internet cafes*, *BakersfieldNow.com*, July 24, 2012 (California); Dave Marquis, *Sacramento police bust 'sweepstakes' Internet cafe* (Mar. 9, 2012), <http://southsacramento.news10.net/news/crime/94609-sacramento-police-bust-sweepstakes-internet-cafe> (California); *State v. Vento*, No. 30,469, 2012 N.M. App. LEXIS 78 (Ct. App. July 26, 2012) (New Mexico); *United States v. Davis*, No. 11-40265, 2012 U.S. App. LEXIS 15875 (5th Cir. Aug. 1, 2012) (Texas); *Cancun Cyber Cafe and Business Center, Inc. v. City of North Little Rock*, 2012 Ark. 154 (2012) (Arkansas); *Indiana v. Lincoln Plaza Internet Sensations*, No. 02D05-1204-FD-000594 (Allen Cty. Sup. Ct. DATE) (Indiana); Bryan Cohen, *Judge keeps sweepstakes cafe closed*, *Legalnewslines.com*, June 21, 2012 (Michigan); Press Release, Michigan Attorney General Bill Schuette, *Schuette Orders Nine Additional "Internet Sweepstakes Cafes" To Halt Illegal Gambling Operations* (May 3, 2012) (announcing agreement to close nine Internet sweepstakes cafes in Michigan); Noelle Phillips, *Sweepstakes cafes arrive in Richland, The State*, May 21, 2012 (South Carolina); Meg Kinnard, *Sumter sweepstakes cafe owner suing SLED*, *The State*, Aug. 9, 2012 (South Carolina); *Internet Sweepstakes Cafes Raided in VB*, *WAVY.com*, Sept. 22, 2010 (Virginia); Louis C. Hochman, *Pequannock mayor: We were 'duped' by alleged gambling front*, *NJ.com*, July 21, 2012 (New Jersey); Dan Ring, *Cyber cafes, facing possible ban, struggle to survive in Western Massachusetts*, *Masslive.com*, July 16, 2012; Jon Greenberg, *N.H. faces tough odds in bid to ban Internet sweepstakes*, *Seacoastonline.com*, May 27, 2012 (New Hampshire); Joseph G. Cote, *BIGS Cafe said to lack regulation*, *Nashua Telegraph*, July 18, 2012 (New Hampshire).

¹¹ Felix Gilette, *supra* note 8.

¹² Press Release, Massachusetts Attorney General, *Two Internet Cafes Agree to Pay \$750,000 for Allegedly Facilitating Illegal Gambling* (July 25, 2012).

¹³ Press Release, Cuyahoga County Prosecutor, *Illegal Internet Cafe's Will No Longer Exist In Cuyahoga County* (May 30, 2012); Louis Hochman, *Management company: We didn't know about alleged gambling front*, *NJLive.com*, July 26, 2012.

¹⁴ Felix Gilette, *supra* note 8 (quoting James Mecham of SweepsCoach, a Sacramento company).

¹⁵ Vento, 2012 N.M. App. LEXIS 78, at *5.

¹⁶ Alan Johnson, *supra* note 10; Order, *Allied Veterans of the World, Inc.*; Felix Gilette, *supra* note 8; Joseph G. Cote, *supra* note 11.

¹⁷ Don Van Natta, Jr., *supra* note 8; 2 Arrested for armed robbery at Charlotte sweepstakes parlor, www.wcnc.com (July 25, 2012); Gunman robs Internet sweepstakes cafe, Rocky Mount Telegram, July 11, 2012; by Gray Rohrer, Oclala shooting intersects 'stand your ground,' Internet sweepstakes issues, *The Florida Current*, July 19, 2012.

¹⁸ Felix Gillette, *supra* note 8; John Kennedy, Internet cafes pour money into political campaigns to maintain gambling foothold, TC Palm, Aug. 7, 2012.

¹⁹ Dave Marquis, *supra* note 11; Wilkinson & Mathis, *supra* note 2, at 278; Felix Gillette, *supra* note 8; Vento, 2012 N.M. App. LEXIS 78.

²⁰ Wilkinson & Mathis, *supra* note 2.

²¹ Vento, 2012 N.M. App. LEXIS 78, at *23.

²² *United States v. Davis*, 2012 U.S. App. LEXIS 15875, at *24-25; *Barber v. Jefferson County Racing Ass'n*, 960 So. 2d 599 (Ala. Sup. Ct. 2006).

²³ *Jester v. State*, 64 S.W.3d 553, 559 (Tex. Ct. App. 2001); Letter from Penny J. Coleman, Acting General Counsel, NIGC, to Bill Langley, Chairman, Cherokee Nation Gaming Commission (Oct. 17, 2003). The same conclusions were reached in decisions handed down by other appellate courts in evaluating sweepstakes products that were antecedents to the current Internet sweepstakes cafe games. In each instance, the court found the supposed product being sold was a subterfuge or guise for the real product – gambling. *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 34 S.W.3d 360 (2001); *F.A.C.E. Trading, Inc. v. Department of Consumer and Industry Services*, 270 Mich. App. 653, 717 N.W.2d 377 (2006); *Mississippi Gaming Comm'n v. Six Electronic Video Gambling Devices*, 792 So. 2d 321 (Miss. Ct. App. 2001); *People ex rel. Lockyer*, 82 Cal. App. 4th 699; *Sun-Light Prepaid Phonecard Co., Inc. v. State*, 360 S.C. 49, 600 S.E.2d 61 (2004).

²⁴ Memorandum in Support of Motion for Temporary Restraining Order, *J&C Marketing, LLC v. Mason*, No. CV 12 784234 at 6-7 (Cuyahoga Cty. Ct. of Common Pleas June 4, 2012); Wilkinson & Mathis, *supra* note 2, at 291; *Moore v. Mississippi Gaming Comm'n*, 64 So.3d 537, 541-42 (Miss. Ct. App. 2011) (en banc).

²⁵ Brooks Affidavit ¶19, *supra* note 2.

²⁶ *Moore*, 64 So.3d at 541.

²⁷ "Executives at Halton City sweepstakes company are arrested," www.star-telegram.com (Aug. 17, 2012)."

²⁸ This extraordinary sequence in Cuyahoga County is laid out in the prosecutor's Petition and Complaint for Writ of Prohibition and Application for Immediate Alternative Writ, *State ex rel. Mason v. Russo*, No. 12-1128 (Ohio Sup. Ct. June 3, 2012). The decisions in the municipal courts of Akron and Toledo are described in Adam Ferrise, *Are cafes criminal?*, www.TribToday.com (Mar. 18, 2012) and *State v. Dabish*, No. CRB-08-25138 (Toledo Munote Ct. 2009). According to one press account, the Akron judge concluded that there was no "risk" in Internet sweepstakes cafe games because the customer who did not win the sweepstakes would still have her telephone card. That reasoning – which was in effect a finding that the customer paid no consideration to play the games – is contrary to the many appellate rulings discussed in this paper.

²⁹ H.B. 386, 129th Gen. Assemb. (Ohio 2012); Alan Johnson, *supra* note 10.

³⁰ *Hest Technologies, Inc. v. North Carolina*, 725 S.E.2d 10 (N.C. Ct. App. Mar. 6, 2012).

³¹ 131 S. Ct. 2729 (2011).

³² The Arkansas Supreme Court declined to decide the question in *Cancun Cyber Cafe*, *supra*, and the Ohio case was dismissed in July 2012. *Dabish v. State of Ohio*, No. 3:12-cv-00146-JZ (N.D. Ohio filed Jan. 20, 2012). No decision has been entered yet in the South Carolina case, *Land v. South Carolina*, No. 3:12-cv-02134 (D.S.C. filed July 30, 2012), and Florida decisions on the First Amendment question are discussed in text.

³³ For the Orlando litigation, see *Order, Allied Veterans of the World v. Seminole County*, No. 6:11-cv-155-Orl-28DAB (M.D. Fla. May 6, 2011); *id.* at *Order* (Sept. 8, 2011); *Allied Veterans of the World v. Seminole County*, 468 Fed. App'x 922 (11th Cir. 2012) (unpublished opinion). For the Tampa case, see *Crisante v. Coats*, No. 8:11-cv-2007, 2011 U.S. Dist. LEXIS 154760 (M.D. Fla. Nov. 18, 2011) (report and recommendation of Magistrate Judge); *Crisante v. Coats*, No. 8:11-cv-2007, 2012 U.S. Dist. LEXIS 61209 (M.D. Fla. May 20, 2012) (adopting report and recommendation of Magistrate Judge). In yet another Florida case attempting to raise the First Amendment issue, a magistrate judge recently denied Hillsborough County's motion to dismiss the complaint filed by several Internet sweepstakes cafes. There has been no decision on the merits of that case, however. *Order, JWS Samuel, LLC v. Hillsborough County, Florida*, No. 8:11-cv-02803-T-MAP (M.D. Fla. Aug. 13, 2012).

³⁴ Verified Complaint for Declaratory, Injunctive, and other Relief and Demand for Jury Trial ¶¶ 59-68, *Crisante v. Coats*, No. 8:11-cv-02007-EAK-TBM (M.D. Fl. Sept. 2, 2011).

³⁵ H.B. 3765, 187th Gen. Ct. (Ma. 2012).

³⁶ H.B. 1893, Gen. Assemb. (Pa. 2012).

About the Author

David O. Stewart joined Ropes & Gray as a partner in 1989 to begin a litigation group in the Washington, D.C. office. His experience in complex litigation includes appellate and Supreme Court litigation, antitrust and commercial disputes, white-collar criminal defense work, health care law, gaming law and a variety of challenges to government regulation and enforcement.

David has served as principal counsel in federal jury trials, state court trials, administrative proceedings, numerous appeals, and the impeachment trial of Judge Walter L. Nixon, Jr. before the U.S. Senate. David argued before the Supreme Court in *Ludwig v. Variable Annuity Life Insurance*, 115 S. Ct. 810 (1995), concerning the power of national banks to sell annuities, and also argued for the petitioner in *United States v. Nixon*, 506 U.S. 224 (1993).

David lectures to professional groups on topics including antitrust, gaming law, health care law, money laundering, cable television litigation and white-collar criminal issues.



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