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Leveraging the ‘Power’ of Big Data in the Production of ‘Responsible Gamblers’: a Foucauldian Perspective

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Leveraging the ‘Power’ of Big Data in the Production of ‘Responsible Gamblers’: a Foucauldian Perspective

This article examines the big data practices employed by the online gambling industry to illustrate the wider societal power structures involved. As well as using data for commercial ends, gambling operators in the UK market are obligated by law to utilise gamblers’ data to protect problem gamblers. This paper argues that the use of data in this way can be interpreted as a form of social control when observed through a Foucauldian lens. Contrary to the dominant narrative of free and informed choice, gamblers’ behaviour is arguably being governed both at an individual level through disciplinary mechanisms of surveillance and correction, and at the level of the population through governmentality techniques applied to the gambling environment. Through big data practices and industry discourse, these mechanisms of power are used to frame the choices of individuals and shape them into a productive population of ‘responsible gamblers’.

Keywords: Foucault; governmentality; discipline; big data; online gambling; power.

1. Introduction

The commercial gambling industry in Great Britain has grown enormously over the past decade. Since the Gambling Act 2005 came into force in 2007, operator profits² have risen from £8.3bn in 2008 to £14.5bn in 2018.³ This has been contributed to largely by the significant growth of the online gambling market, which has increased from £817m in 2008 to £5.6bn in 2018⁴ and now represents the majority sector, with an overall market share of 38.8 percent.⁵ Moreover, since online gambling attracts a Remote Gaming Duty of 21 percent of operator profits, the contribution that gambling has made to the economy since the market was 'liberalised' under the 2005 Act is self-evident.⁶

² This is referred to in the industry as Gross Gambling Yield (GGY) and is roughly calculated as the amount of stakes received less the amount of winnings paid out. Gambling Commission, 'How to Calculate your Gross Gambling Yield (GGY)'

<<https://www.gamblingcommission.gov.uk/for-gambling-businesses/Apply-for-a-licence/How-to-calculate-your-gross-gambling-yield-GGY.aspx>> accessed 31 July 2019

³ Gambling Commission, 'Industry Statistics' <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Statistics-and-research/Statistics/Industry-statistics.aspx>> accessed 9 July 2019.

⁴ *ibid.*

⁵ Gambling Commission, 'Industry Statistics April 2016 to March 2016 (Updated to Include October 2017 to September 2018)' (2019) 2. This surge in income is exaggerated somewhat, however, by the inclusion of overseas operators from 2014 onwards, which previously were not required to hold a UK licence.

⁶ Gambling is regularly recognised as a contributor to the economy 'both as part of local tourism and leisure offers and as a significant employer nationally': Media and Sport

The Gambling Act 2005 represents a major shift in the state's approach to regulation of commercial gambling in Great Britain. In removing numerous barriers for market entry and advertising for gambling operators, the Act purports to ensure that individuals are given greater freedom of choice as to how, where and when they gamble, as facilitated through increased competition within a liberalised market.⁷

By applying the work of Foucault on discipline and governmentality, this article aims to demonstrate, however, that gamblers are, perhaps, not as free to choose how to conduct their gambling activities as is claimed. Instead, techniques which utilise gamblers' data are applied to individuals and to the gambling population more widely to govern gambling behaviour through indirect means and ultimately frame the choices of individuals, shaping them into 'responsible gamblers'.

The commercial use of big data in online services more generally is now ubiquitous and the online gambling industry is no different. In fact, big data practices in the online gambling industry are particularly well developed; 'for years the online gaming industry has been harnessing the power of immense data sets to drive effective, targeted marketing'.⁸ Transactional data which is collected through the gambler's interactions with the website provides detailed behavioural insights into, amongst other things, betting

Department for Culture, *Government Response to the Select Committee Report: The Gambling Act 2005: A Bet Worth Taking?* (CM 8531, 2013) 3.

⁷ David Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (2011) 15 *Gaming Law Review and Economics* 93, 100.

⁸ Alex Brennan, 'Online Gambling's Unique Personalisation Opportunity' (*Hudson Sandler*, 2017) <<http://hudsonsandler.com/online-gamblings-personalisation-opportunity>> accessed 9 July 2019.

and wagering behaviour, account management, preferred types of gambling and financial information, allowing granular profiles to be constructed for each customer.⁹ Thus, big data is seen as a powerful tool¹⁰ that can be utilised by operators to ‘optimise each step of the gambling experience’ through the use of so-called ‘dark nudges’;¹¹ enabling personalised, targeted online advertising¹² and informing website and product design in order to influence the user-journey to ultimately maximise profits. The data is also used by operators to algorithmically predict their most valuable customers, known as ‘VIPs’,¹³ and tailor the gambling experience of those players in the interests of customer retention and, naturally, increased profits.¹⁴

⁹ Responsible Gambling Trust, PricewaterhouseCoopers LLP and Responsible Gambling Council, ‘Remote Gambling Research - Interim Report on Phase I’ (2016) 8–10.

¹⁰ Luke Massey, ‘Bet On Brazil Leverages Power of Big Data with Hello Soda’ (*SBC News*, 2017) <<https://sbcnews.co.uk/sportsbook/2017/03/24/bet-brazil-big-data-hello-soda/>> accessed 15 August 2019.

¹¹ Philip WS Newall, ‘Dark Nudges in Gambling’ (2019) 27 *Addiction Research and Theory* 65.

¹² Julia Hörnle and others, ‘Regulating Online Advertising for Gambling—Once the Genie Is out of the Bottle ...’ (2019) 28 *Information and Communications Technology Law* 311.

¹³ This term is referenced in the Licence Conditions and Codes of Practice: Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2019)’ (2019) 47, SR Code 3.4.1 <<https://www.gamblingcommission.gov.uk/PDF/LCCP/Licence-conditions-and-codes-of-practice.pdf>> accessed 31 October 2019.

¹⁴ Mattha Busby, ‘Revealed: How Bookies Use AI to Keep Gamblers Hooked’ (*The Guardian*, 2018) <<https://www.theguardian.com/technology/2018/apr/30/bookies-using-ai-to-keep-gamblers-hooked-insiders-say>> accessed 9 July 2019.

Building on these big data capabilities, the state regulator (the Gambling Commission) now requires, as a regulatory obligation, that gambling operators also use customer data for an apparently contradictory purpose: to protect ‘at risk’ customers by identifying players who may be exhibiting signs of problem gambling and delivering effective customer interactions, informed by the customer’s data, following this identification.¹⁵ Operators are obliged to use all sources of data to identify customers ‘who may be experiencing, or at risk of developing, problems with their gambling’ through the monitoring of a variety of indicators (including time and money spent, cancelled withdrawals, use of responsible gambling tools, and erratic betting patterns) in order to assess changes in activity based on what is ‘normal’ for those customers as well as what is typically considered to be ‘responsible gambling’ behaviour. This should then be used to determine when and how to interact with those who have been identified as ‘at risk’ and thus requiring some form of intervention (the interaction being the point at which the operator makes contact with the customer and takes an ‘appropriate’ action).¹⁶ Operators must essentially ‘demonstrate they know their customers and use what they know to protect them’.¹⁷ The regulatory guidance emphasises the importance of the

¹⁵ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2019)’ (n 13) 47, SR Code 3.4.1.

¹⁶ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note Under SR Code 3.4.1’ (2019) <<https://www.gamblingcommission.gov.uk/PDF/Customer-Interaction-Formal-Guidance-Remote-July-2019.pdf>> accessed 15 August 2019.

¹⁷ Gambling Commission, ‘Raising Standards for Consumers - Enforcement Report 2018/2019’ (2019) 5 <<https://www.gamblingcommission.gov.uk/PDF/2604-GC-Enforcement-Report-2018-19-1.pdf>> accessed 9 July 2019.

intervention stage once a gambler's behaviour falls outside of what is 'normal' and recommends the use of tailored interactions constructed from insights gained from the player's data to encourage a greater level of 'self-awareness'.¹⁸

On a broader level, industry policy also recommends that operators embed 'responsible gambling practices' for all players into the gambling experience.¹⁹ Suggestions include applying behavioural insights from gamblers' data to implement 'ethical behavioural/social nudges'²⁰ and website design which reduces 'friction' in the access of responsible gambling tools, to encourage 'responsible gambling' behaviour from all customers.²¹

This article seeks to demonstrate that the use of data in this way is one of the multiple 'apparatuses of security'²² which are applied to individual gamblers and the gambling population more widely to govern gambling behaviour. In drawing a parallel between the evolution of gambling legislation in Great Britain and the development of mechanisms of power according to Foucault, it illustrates that the methods of governing gambling behaviour have changed from a system of prohibitive rules and juridical power,

¹⁸ Gambling Commission, 'Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note Under SR Code 3.4.1' (n 16).

¹⁹ Becky Rowe and others, 'Responsible Gambling: Collaborative Innovation Identifying Good Practice and Inspiring Change' (*Revealing Reality*, 2017) 13.

²⁰ *ibid* 46.

²¹ The Behavioural Insights Team in partnership with GambleAware, 'Can Behavioural Insights Be Used to Reduce Risky Play in Online Environments?' (2018) 4.

²² Michel Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (Michel Senellart and others eds, Graham Burchell tr, Palgrave Macmillan UK 2007) See, for example, lecture two.

to a modern form of ‘bio-power’ concerned with governing the lives of individual gamblers and the gambling population more widely to enhance their productive force.

This modern form of bio-power applies ‘disciplinary’ mechanisms of surveillance and correction at an individual level, for example through the monitoring of gambling activity, using algorithms created by the industry to identify gamblers who are not satisfying the ‘responsible gambling’ norm, and applying an appropriate intervention to bring their behaviour back in line with this norm. Notably, embedded within these algorithms are the prevalent societal assumptions regarding what constitutes responsible or problematic gambling, thus contributing to the maintenance of a particular gambling culture. At the same time methods of governmentality, which seek to govern conduct by acting upon external elements and their relation to the population, are present within the recommended uses of data for website design, for example, to facilitate a more ‘responsible’ user journey and encourage the use of ‘responsible gambling tools’ by all gamblers.

This is also supported by wider industry discourse, such as the ‘When the Fun Stops, Stop’ campaign²³ that defines and promotes the type of behaviour which falls within the ideal of ‘responsible gambling’, a norm which gamblers ultimately internalise and regulate their own behaviour in line with. This approach supports and legitimates the gambling market itself, as well as the broader narrative on neoliberalism, by directing and transferring responsibility away from the point of production (the industry and the state), where the risk of harm is arguably generated through the gambling products and practices,

²³ Senet Group, ‘Senet Group wins Marketing Society Excellence Award for When the Fun Stops, Stop campaign’ (2018) <<https://senetgroup.org.uk/senet-group-wins-marketing-society-excellence-award-for-when-the-fun-stops-stop-campaign/>> accessed 31 July 2019

to the point of consumption: the individual gambler – ‘a device of legitimation that allows the reproduction of the gambling industries’.²⁴ Thus the individual is responsible for making informed choices which fall in line with the norm of ‘responsible gambling’, and the risk of harm is located within a socially constructed category of ‘problem’ gamblers who are incapable of rational decision making.

This article posits the view, therefore, that gamblers in modern times do not actually have more freedom, as it is commonly understood, than they did during periods of prohibitionism; the ‘freedom’ granted under the current legislative framework is a necessary condition for an alternative form of governance through mechanisms of discipline and governmentality. Individuals are instead free to act within a predefined field of action and are governed through this freedom. Freedom should instead be understood as an essential element in the application of power. Moreover, since power can be regarded not only as a repressive force, but as a productive one, the relationship between power and freedom can instead be understood as the productive apparatus governing the bodies of individual gamblers and the gambling population for a particular end - in this case, the production of a ‘population of responsible gamblers’.

2. Evolution of power

As mentioned, to illustrate the development of the mechanisms of power which are arguably used to control the behaviour of gamblers (both individually and in society more widely), a helpful parallel can be drawn with the evolution of gambling legislation in

²⁴ Martin Young, ‘Statistics, Scapegoats and Social Control: A Critique of Pathological Gambling Prevalence Research’ (2013) 21 *Addiction Research and Theory* 1.

Great Britain.²⁵ According to Foucault, the way in which power is exercised has evolved from a sovereign, juridical form of power, with an end internal to itself, concerned with protection of the security of a territory and the perpetuation of the sovereign line, to a modern form of power focused on governing the life of individuals and the life of the population as a whole ('bio-power').²⁶ Where the mechanisms of the earlier 'juridico-legal' power are primarily the use of laws to prohibit a certain action, with a punishment being applied to those who break the law,²⁷ the modern exercise of power involves a vast array of techniques (including laws) that are 'conceived to dominate the body of the individual emerged, aiming at enhancing the body's "productive force"'.²⁸ The shift of the focus has therefore moved from the government of the territory itself to the government of the population making up the territory. Importantly, these techniques work in a supplementary way; rather than a series of successive elements which replace the former, there is a 'system of correlation between juridico-legal mechanisms, disciplinary mechanisms and mechanisms of security'.²⁹ These mechanisms of power, and their

²⁵ In particular, Foucault's later work, notably: Foucault, *Security, Territory, Population* (n 22).

Michel Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979*

(Michel Senellart and others eds, Graham Burchell tr, Palgrave Macmillan UK 2008).

²⁶ Foucault, *Security, Territory, Population* (n 22); Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 25).

²⁷ Foucault, *Security, Territory, Population* (n 22) 4–5.

²⁸ Jacopo Martire, *A Foucauldian Interpretation of Modern Law* (Edinburgh University Press 2017) 4 citing; Michel Foucault, 'Society Must Be Defended': *Lectures at the Collège de France, 1975-76* (Mauro Bertani, Alessandro Fontana and François Ewald eds, David Macey tr, Picador 2003) 242.

²⁹ Foucault, *Security, Territory, Population* (n 22) 8.

application to the governance of gambling behaviour, will be considered within this section.

2.1 The exercise of 'juridico-legal' power through prohibition of gambling

For hundreds of years, gambling behaviour has been subject to various methods of state regulation or prohibition.³⁰ One of the earliest pieces of legislation, the Unlawful Games Act 1541, prohibited the playing of certain games, as well as the offering of gaming houses, due to the resultant deflection of time and energy away from more valuable activities, which, at the time, was archery.³¹ One of the most significant more recent examples of private law that prohibits gambling transactions is the Gaming Act 1845, which provided that gaming and wagering contracts were unenforceable at law.³² The Act was the result of widespread calls for reform of gambling legislation in the nineteenth century, when discourses of the time portrayed gambling as an activity which was inherently immoral. 'The view of a Reverend from Cheltenham commenting on the approach of the town's annual races in 1827 was not atypical' of the era:³³

³⁰ David Miers, *Regulating Commercial Gambling: Past, Present, and Future* (Oxford University Press 2004) 1. citing Department for Culture, Media and Sport, *Draft Gambling Bill: The Policy* (2003) Cm 6014-IV, 2.2

³¹ Stephen Monkcom, Gerald Gouriet and Jeremy Phillips (eds), *Smith and Monkcom: The Law of Gambling* (4th edn, Bloomsbury Professional 2017) 5–6.

³² A prohibition which remained in force until the Gambling Act 2005 became enforceable in 2007; Gaming Act 1845, s.18; Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 30) 17.

³³ Jim Orford, *An Unsafe Bet?* (John Wiley & Sons, Ltd 2010) 125.

Gambling is...a vice which appears to be growing in our land, though it be a vice which is more pre-eminently destructive both of body and soul, than any other which Satan ever devised for the ruin of mankind. Every vile passion of our corrupt nature is excited and inflamed by it; envy, malice, revenge, the lust of money, pride, contention, cruelty...³⁴

The reformed legal position thus reflected the dominant attitude of the time, certainly in relation to the affluent middle class, that gambling by the 'lower classes' in particular was 'a great social vice eating in the hearts of Englishmen',³⁵ which was 'counter to the demands of thrift, industry, and the rational pursuit of leisure'.³⁶ There was also an increased interest shown by the middle classes of Victorian Britain in controlling the leisure outlets of the 'lower class' and to 'direct them to "better" use'.³⁷ The Gaming Act 1845, together with the Betting Act 1853, therefore served these purposes by removing state protection for recovery of debts under gambling contracts and promoting the value of 'work ethic', which gambling as an activity clearly contravened.³⁸ The activities of commercial gambling in gaming and betting houses (betting in particular had proliferated in line with the increased popularity of horse racing)³⁹ were therefore prohibited;⁴⁰ an

³⁴ *ibid* citing; Carl Chinn, *Better Betting with a Decent Feller: Bookmakers, Betting and the British Working Class, 1750-1990* (Harvester Wheatsheaf 1991) 60–61.

³⁵ Miers, *Regulating Commercial Gambling : Past, Present, and Future* (n 30) para 55. citing William Boulton, *Amusements of Old London* (London, J. Nimmo, 1901), 192

³⁶ *ibid* 55.

³⁷ *ibid* 61.

³⁸ *ibid* 55–61.

³⁹ Betting Act 1853; Betting Houses Act 1853

⁴⁰ Though it was still lawful to place bets at the race track which of course only the wealthy could afford to frequent: Monkcom, Gouriet and Phillips (n 31) 15–16.

action which predominantly affected the working class since the gambling activities in which the upper classes indulged were largely untouched:

It was announced as an attempt to deal with problems associated with working-class gambling without infringing on betting facilities enjoyed by those higher on the social scale. Therefore, the prohibitions introduced did not apply to betting amongst members of a club or to credit betting by correspondence (and later, by telegraph or telephone), which did not involve 'resorting' to premises.⁴¹

This approach to controlling behaviour through prohibition can be seen as a manifestation of the more elementary form of power, which Foucault referred to as 'juridico-legal' power, in that it seeks to prevent a certain type of behaviour, specifically commercial gambling, by applying prohibitive rules in advance of the behaviour taking place.⁴²

The prohibitive gambling legislation was mostly ineffective, however, and failed to stifle demand, certainly in relation to off-course betting. Horseracing in particular 'had always been an integral part of social life, and not only for the leisured elite'.⁴³ 'Bookies did not disappear, instead they avoided and evaded the law'.⁴⁴ The vast majority of betting with bookmakers became cash betting, given the unenforceability of gambling contracts,⁴⁵ and the effect of the prohibition on gaming and betting houses was to drive

⁴¹ David Dixon, *From Prohibition to Regulation: Bookmaking, Anti-Gambling, and the Law* (Clarendon Press 1991) 39.

⁴² Foucault, *Security, Territory, Population* (n 22) 4–5.

⁴³ Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 30) 241.

⁴⁴ *ibid* citing; Carl Chinn, *Better Betting with a Decent Feller, Bookmakers, Betting and the British Working Class, 1750–1990* (Harvester Wheatsheaf 1991) 77.

⁴⁵ Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 30) 237.

working class betting onto the street.⁴⁶ As further legislative attempts to prohibit street gambling through by-laws, town improvement Acts and the introduction of the Street Betting Act 1906 continued to fail,⁴⁷ there was a broad acceptance in the 1920s and 1930s ‘across all social classes of gambling as a normal, if for many only occasional or, as in the popularity of whist drives, financially modest pastime’.⁴⁸ This meant that at the time that the Royal Commission was first appointed to make recommendations on the form that future gambling legislation should take, ‘off-course cash betting was so routine a social activity for working-class men that it was, from that perspective, almost unremarkable. Street bookmakers ran their businesses in so commercially settled a manner that, but for its illegality, bookmaking might have been any other service industry’.⁴⁹ Notably, this led to the beginnings of a change in approach as regards the role of the state, with the Commission rejecting the pre-existing policy ethos:

The general aim of the State in dealing with facilities for organized or professional gambling should be to prohibit or place restrictions upon such facilities, and such facilities only, as can be shown to have serious social consequences if not checked.⁵⁰

⁴⁶ *ibid* 240.

⁴⁷ *ibid* 271.

⁴⁸ *ibid* 273.

⁴⁹ *ibid* 275.

⁵⁰ Royal Commission, ‘Final Report of the Royal Commission on Lotteries and Betting 1932-3 (1933)’ Cmd 4341, para 233.

There were three Royal Commission Reports prepared during the mid-twentieth century which all ultimately endorsed a loosening of the restraints of Victorian prohibitionism.⁵¹ The Royal Commission, in its 1949-1951 report, supported the broadly libertarian stance of the preceding 1933 Report, and also constituted a landmark in the government's understanding of gambling as a 'pan-class leisure activity':⁵²

We are left with the impression that it is extremely difficult to establish by abstract arguments that all gambling is inherently immoral, without adopting views as to the nature of good and evil which would not find general acceptance among moralists. Our concern with the ethical significance of gambling is confined to the effect which it may have on the character of the gambler as a member of society... we can find no support for the belief that gambling, provided that it is kept within reasonable bounds, does serious harm either to the character of those who take part in it... It is the concern of the State that gambling, like other indulgences such as the drinking of alcoholic liquor, should be kept within reasonable bounds, but this does not imply that there is anything inherently wrong with it.⁵³

The recommendation ultimately signalled the demise of the government's official view that it was the role of the law to enforce, through prohibitive measures, a certain moral

⁵¹ Roy Light, 'The Gambling Act 2005: Regulatory Containment and Market Control' (2007) 70 *Modern Law Review* 626, 627; Royal Commission, 'Report of the Royal Commission on Betting, Lotteries and Gaming 1949-1951 (1951)' Cmnd 8190; Royal Commission, 'Final Report of the Royal Commission on Gambling 1976-77 (1978)' Cmnd 7200; Commission, 'Final Report of the Royal Commission on Lotteries and Betting 1932-3 (1933)' (n 50).

⁵² Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (n 7).

⁵³ Commission, 'Report of the Royal Commission on Betting, Lotteries and Gaming 1949-1951 (1951)' (n 51).

stance on how an individual chooses to spend their leisure time:⁵⁴ ‘the object of gambling legislation should be to interfere as little as possible with individual liberty to take part in the various forms of gambling but to impose such restrictions as are desirable and practicable to discourage or prevent excess’.⁵⁵ This new approach, it would appear, is one which has been maintained and is still as applicable over 50 years later, under the current legislative regime.

As a result of the Commission’s recommendations, the Betting and Gaming Act 1960 lifted the prohibition on commercial gambling, introducing a strict system of regulation as a constraint on the supply and demand for gambling products.⁵⁶ The new regime under the 1960 Act permitted betting and gaming in licensed establishments, though stronger regulation of commercial gaming was subsequently required (under the Gaming Act 1968) to address apparent industry exploitation and close various loopholes in the legislation.⁵⁷ Importantly, the new legislative framework was premised on the principle that the libertarian function of government was to provide opportunities for individuals to gamble, though only to the limited extent that the opportunities would meet

⁵⁴ (In the field of gambling at least.) Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 7).

⁵⁵ Commission, ‘Report of the Royal Commission on Betting, Lotteries and Gaming 1949-1951 (1951)’ (n 51).

⁵⁶ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 7).

⁵⁷ *ibid*; Light (n 51).

demand (which would otherwise be satisfied by an unregulated market) and they should not go beyond that to stimulate the market.⁵⁸

In the following decade, this regime of restricted liberalism, in the form of unstimulated demand, began to shift in relation to lotteries, which started to be seen as a contributor to the local economy. This marked a turning point in government policy towards lotteries being regarded as a legitimate means of raising money for local public goods,⁵⁹ foretelling the important role that economic concerns would arguably come to play under the present legislative framework.⁶⁰ Otherwise, the policy remained unaltered with regard to betting and gaming until the 1990s, coinciding with the introduction of the National Lottery in 1994. The introduction of the National Lottery implicitly contributed to the further normalisation of gambling, marking a radical transformation in gambling policy: it was now in the public interest to promote mass participation in gambling for ‘good causes’. In direct contrast to the requirement that gambling opportunities should only exist to meet pre-existing demand, the operating principle underlying the National Lottery was precisely to create a demand for this single gambling product;⁶¹ an indication, perhaps, that a new method of governance, concerned with redirecting conduct to certain ends, was beginning to ensue.

⁵⁸ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 7).

⁵⁹ *ibid.*

⁶⁰ Light (n 51).

⁶¹ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 7).

2.2 – The Gambling Act 2005 and the liberalisation of gambling?

Foreshadowed by the National Lottery, what followed was a movement by the end of the twentieth century towards gradual relaxation of gambling laws in Great Britain in line with changing views and pressure from the trade to remove ‘unnecessary restrictions’ and allow competition.⁶² ‘The gaming sector in particular was no longer a pariah industry, run by the least attractive of capitalism’s wealth creators...but part of the “mainstream leisure industry”’.⁶³ Excited by prospects of increased revenue from an expanded industry and online gambling,⁶⁴ a further government review was commissioned⁶⁵ to address the apparent change in attitude, as well as the concerns over the impact of new technology (primarily the internet) on the British economy, and the incoherence resulting from a myriad of deregulation that had developed in a piecemeal fashion.⁶⁶ The report ultimately recommended a simplification of gambling regulation and an extension of choice for adult

⁶² Light (n 51).

⁶³ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 7).

⁶⁴ David Miers, ‘The Gambling Review Report: Redefining the Social and Economic Regulation of Commercial Gambling’ (2003) 66 *Modern Law Review* 604, 605; Light (n 51).

⁶⁵ Department for Culture Media and Sport, ‘Gambling Review Report (2001)’ Cm 5206.

⁶⁶ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 7).

gamblers⁶⁷ through the replacement of the demand test with a ‘free-market, commercially moulded model’⁶⁸ which facilitated competition.⁶⁹

2.2.1 – *Freedom to gamble?*

The Gambling Act 2005 followed the deregulatory and free market recommendations of the review, considering gamblers to be ‘valued as consumers in the New Labour government’s vision of a service economy in which citizens have yet greater choice in how they spend their leisure time and money’.⁷⁰ The 2005 Act consolidated all existing legislation governing commercial gambling (save the National Lottery), and significantly removed a number of obstacles to market entry to enable competition between regulated operators so that individuals could be given greater choice in how, where and when they gambled.⁷¹

Notwithstanding the liberalising agenda of the new framework,⁷² there was still a role to be played by regulation for the protection of those individuals who are considered to fall within the constructed category of ‘vulnerable persons’,⁷³ and the report

⁶⁷ Department for Culture Media and Sport (n 65).

⁶⁸ Light (n 51).

⁶⁹ Department for Culture Media and Sport (n 65).

⁷⁰ David Miers, ‘Regulation and the Management of Risk in Commercial Gambling in Great Britain’ (2015) 15 *International Gambling Studies* 422, 423.

⁷¹ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 7).

⁷² Light (n 51).

⁷³ Gambling Act 2005, s.1; David Chandler and Julian Reid, *The Neoliberal Subject : Resilience, Adaptation and Vulnerability* (Rowman & Littlefield International 2016).

acknowledged that ‘in allowing greater freedom for the individual to gamble in ways, at times and in places than is permitted under current legislation... “the familiar dilemma [arises] between the desire to permit free choice and the fear that such choice may lead to harm either to the individual or to society”’.⁷⁴ Thus the legislation has three primary objectives: preventing crime in gambling, ensuring gambling is conducted in a fair and open way and protecting children and other ‘vulnerable’ people from harm or exploitation.⁷⁵ The underlying ethos of the Act, however, is ‘facilitative’ rather than ‘restrictive’ as regards the granting of operating licences, and the explicit aim of the new body set up to regulate gambling in Great Britain (the Gambling Commission)⁷⁶ is essentially permissive: the regulator shall ‘aim to permit gambling, in so far as the Commission thinks it reasonably consistent with pursuit of the licensing objectives’.⁷⁷

Certainly, the 2005 Act represented a dramatic shift away from a ‘juridico-legal’ form of prohibitive control, to an outwardly liberalising programme increasing choice for gamblers and providing operators with ‘freedom to increase the attractiveness of their offerings’, allowing ‘the market “to facilitate” individuals to gamble’.⁷⁸ There are, however, a number of provisions (which align in particular with the third licensing objective: the protection of children or vulnerable persons from harm or exploitation from

⁷⁴ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 7); Department for Culture Media and Sport (n 65).

⁷⁵ Gambling Act 2005, s.1

⁷⁶ The Gambling Commission: <https://www.gamblingcommission.gov.uk/home.aspx> accessed 30 July 2019

⁷⁷ Gambling Act 2005, s.22(b)

⁷⁸ Light (n 51).

gambling),⁷⁹ which arguably exert an alternative form of control over the behaviour of gamblers - one that is less direct and explicit, though impacts indirectly upon an individual's freedom as it is commonly understood.

One example of such control being exercised is the requirement under Social Responsibility ('SR') Code 3.4.1, which imposes an obligation on operators to monitor the behaviour of their customers through their data using modern forms of technology, and deliver necessary interventions where the gambler is perceived to be at risk of 'problem gambling'.⁸⁰ This regulatory obligation on operators, and its implications for the exercise of governance over the population through an overarching 'network of relations',⁸¹ to cumulatively affect gambling behaviour, will be considered in detail in the following section.

2.2.2 – *Disciplined gamblers*

An alternative view to the position that individuals have more freedom in relation to gambling is that gamblers' behaviour is now subject to greater levels of control, though not in a primarily prohibitive, juridical sense as formerly observed with the previous forms of legislative power. Gambling behaviour, it is argued, is now governed using a combination of more diffuse, indirect techniques which Foucault referred to as mechanisms of discipline and governmentality.⁸² Each of these techniques will now be

⁷⁹ Gambling Act 2005, s.1(c)

⁸⁰ Gambling Commission, 'Licence Conditions and Codes of Practice (October 2019)' (2019)

47, SR Code 3.4.1 <<http://www.gamblingcommission.gov.uk/pdf/Latest-LCCP-and-Extracts/Licence-conditions-and-codes-of-practice.pdf>> accessed 5 November 2019.

⁸¹ Foucault, *Security, Territory, Population* (n 22) 239.

⁸² *ibid* 8.

considered in turn in the context of the requirement to utilise gamblers' data to protect the 'vulnerable'.

2.2.2.1 The Regulatory Requirement under SR Code 3.4.1

As outlined above, as a licence requirement, operators are obliged to identify 'customers who may be at risk of or are experiencing harms associated with gambling' and interact with those customers in a way which minimises this risk.⁸³ Having been updated on 31 October 2019, the regulation emphasises the importance of three 'key outcomes' which operators are expected to meet: identifying 'at risk' customers, interacting with those customers and understanding the impact of the interaction.⁸⁴ The licence code also requires that operators take into account the Commission's detailed guidance on this provision,⁸⁵ and be able to demonstrate that they have done so.⁸⁶ Accordingly, pursuant to this guidance, operators are expected to use automated and manual data processing methods to analyse all available sources of data and be able to identify markers which could indicate that their customers are experiencing 'gambling related harm'.⁸⁷ The markers recommended by the regulator in its guidance, based on

⁸³ Gambling Commission, 'Licence Conditions and Codes of Practice (October 2019)' (n 13).

⁸⁴ Gambling Commission, 'Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note Under SR Code 3.4.1' (n 16).

⁸⁵ Gambling Commission, 'Licence Conditions and Codes of Practice (October 2019)' (n 13).

⁸⁶ Gambling Commission, 'Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note Under SR Code 3.4.1' (n 16) 2.

⁸⁷ *ibid* 3–7.

‘research,⁸⁸ experience and shared practice’⁸⁹ include certain behavioural indicators (such as time and spend, cancelled withdrawals, use of responsible gambling tools, and erratic betting patterns)⁹⁰ and individual customer indicators (such as affordability, personal difficulties, demographics, situational difficulties and access issues).⁹¹ Operators are thus expected to build knowledge of their customers through the monitoring of activity in detail to ensure the prompt identification of behaviour which may indicate that the customer is gambling in a ‘problematic’ way, and then intervene accordingly.⁹²

In support of this provision it is clear from wider industry policy documents that there is an expectation that operators ‘obtain and analyse data for the purposes of ensuring that their social responsibility policies and procedures are fit for purpose, taking into account the state of the art and currently available techniques’ to meet this regulatory obligation.⁹³ Moreover, multiple studies have been undertaken over the past decade

⁸⁸ GambleAware, PricewaterhouseCoopers LLP and Responsible Gambling Council, ‘Remote Gambling Research: Interim Report of Phase II’ (2017) 68.

⁸⁹ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note Under SR Code 3.4.1’ (n 16) 4–5.

⁹⁰ *ibid.*

⁹¹ *ibid* 5–6.

⁹² *ibid* 4.

⁹³ Gambling Commission, ‘Gambling Regulation and the General Data Protection Regulation (GDPR)’ (2018) 5 <<https://www.gamblingcommission.gov.uk/PDF/Gambling-regulation-and-GDPR.pdf>> accessed 9 July 2019.

which have demonstrated that algorithms can be used to reliably identify patterns of internet gambling behaviour which predict the development of ‘disordered’ gambling.⁹⁴

This obligation is further strengthened by regulatory enforcement that operators are subject to in the event that they do not carry out ‘proper identification and engagement with those who may be at risk of or experiencing harms’.⁹⁵ Operators must ‘demonstrate

⁹⁴ Debi A LaPlante and others, ‘The Bwin.Party Division on Addiction Research Collaborative: Challenges for the “normal Science” of Internet Gambling’ in Robert J Williams, Robert T Wood and Jonathan Parke (eds), *Routledge International Handbook of Internet Gambling* (Routledge 2012); Robert T Wood and Robert J Williams, ‘A Comparative Profile of the Internet Gambler: Demographic Characteristics, Game-Play Patterns, and Problem Gambling Status’ (2011) 13 *New Media & Society* 1123; Ziming Xuan and Howard Shaffer, ‘How Do Gamblers End Gambling: Longitudinal Analysis of Internet Gambling Behaviors Prior to Account Closure Due to Gambling Related Problems’ (2009) 25 *Journal of Gambling Studies* 239; J Braverman and HJ Shaffer, ‘How Do Gamblers Start Gambling: Identifying Behavioural Markers for High-Risk Internet Gambling’ (2012) 22 *The European Journal of Public Health* 273; Simo Dragicevic, George Tsogas and Aleksandar Kudic, ‘Analysis of Casino Online Gambling Data in Relation to Behavioural Risk Markers for High-Risk Gambling and Player Protection’ (2011) 11 *International Gambling Studies* 377; Christian Percy and others, ‘Predicting Online Gambling Self-Exclusion: An Analysis of the Performance of Supervised Machine Learning Models’ (2016) 16 *International Gambling Studies* 193; Responsible Gambling Trust, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 9).

⁹⁵ Gambling Commission, ‘Raising Standards for Consumers - Enforcement Report 2018/2019’ (n 17) 4.

they know their customers and use what they know to protect them’.⁹⁶ During 2018-19, the enforcement action carried out by the Gambling Commission has increased, resulting in £19.6 million in penalty packages against operators,⁹⁷ and recently Ladbrokes Coral received a fine of £5.9m as a consequence of having ‘ineffective controls to identify and interact with customers who may have been suffering gambling harm’.⁹⁸

2.2.2.2 Disciplining the gambler

This requirement for customer observation and intervention can notably be framed as the use of disciplinary mechanisms in the exercise of control over gamblers. The disciplinary mechanism positions its focus on the individual, applying tools of surveillance and corrective action to those who do not fall within a specified norm.⁹⁹ Using ‘adjacent, detective, medical, and psychological techniques...which fall within the domain of surveillance and diagnosis’,¹⁰⁰ the individual is not only being punished but is

⁹⁶ *ibid* 5.

⁹⁷ *ibid* 3.

⁹⁸ Gambling Commission, ‘Ladbrokes Coral Group to pay £5.9m for past failings in anti-money laundering and social responsibility’ (2019)

<<https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/ladbrokes-coral-group-to-pay-59m>> accessed 31 July 2019

⁹⁹ Michel Foucault, *Discipline and Punish : The Birth of the Prison* (Allen Lane 1977).

¹⁰⁰ Foucault, *Security, Territory, Population* (n 22) 5.

being corrected¹⁰¹ to encourage conformity to the rules in future.¹⁰² The goal is to influence individuals, not just through punishment but using rewards and other methods, so that particular behaviours are normalised,¹⁰³ and ultimately, with the support of techniques of governmentality, which will be considered in further detail below, the individual is transformed into a self-regulatory being.¹⁰⁴

This element of surveillance is evident in the requirement that operators undertake monitoring of their customers' data to supervise gambling behaviour.¹⁰⁵ Algorithms are then applied to ultimately categorise gamblers as problematic or not; algorithms created by the gambling industry on the basis of the current dominant assumptions – presented by the regulator as objective, neutral forms of 'knowledge'¹⁰⁶ – about what 'responsible gambling' or 'problem gambling' is (which, as illustrated in section 2, is not set in

¹⁰¹ Foucault, *Discipline and Punish : The Birth of the Prison* (n 99) 179.

¹⁰² Helen E Miller and others, 'Surveillance, Responsibility and Control: An Analysis of Government and Industry Discourses about "Problem" and "Responsible" Gambling' (2016) 24 *Addiction Research & Theory* 163, 164.

¹⁰³ Foucault, *Discipline and Punish : The Birth of the Prison* (n 99) 183; Miller and others (n 102) 164.

¹⁰⁴ Martire (n 28) 4–5.

¹⁰⁵ The matter of customer surveillance of course also raises important issues in relation to user privacy, however, this is not the focus of the present article.

¹⁰⁶ danah boyd and Kate Crawford, 'Critical Questions for Big Data: Provocations for a Cultural, Technological, and Scholarly Phenomenon' (2012) 15 *Information Communication and Society* 662, 665–666; Danielle Keats Citron and Frank Pasquale, 'The Scored Society: Due Process for Automated Predictions' (2014) 89 *Washington Law Review* 1, 14.

stone).¹⁰⁷ Consequently, these prevalent values become embedded within the algorithms and effectively ‘written into the system’¹⁰⁸ driving the production and perpetuation of a particular gambling culture by shaping the behaviour of gamblers through disciplinary mechanisms applied at an individual level. Once a gambler is identified as having exhibited behaviour which is considered to be problematic, therefore, it is necessary for some form of correcting intervention to be applied, in order to ‘exercise power [and] alter the behaviour of those who are deemed to be “problem” gamblers’.¹⁰⁹

Significantly, the regulatory guidance emphasises the importance of intervention where a gambler’s behaviour falls outside of the norm in highlighting the importance of ‘monitor[ing] customer activity, so that [operators] can interact early and quickly’.¹¹⁰ The guidance also promotes the use of tailored interactions constructed from insights gained from the player’s data to encourage a greater level of self-awareness.¹¹¹ This is based on research which found that personalising feedback with enhanced ‘normative’ and ‘self-

¹⁰⁷ This ‘knowledge’ is gained through observation of the gambling population itself, obtained by various means, including research and surveillance. This will be considered further in section 2.2.2.

¹⁰⁸ boyd and Crawford (n 106).

¹⁰⁹ Miller and others (n 102) 165.

¹¹⁰ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note Under SR Code 3.4.1’ (n 16) 3.

¹¹¹ Gambling Commission, ‘Customer Interaction Guidance for Remote Gambling Operators’ <<https://www.gamblingcommission.gov.uk/for-gambling-businesses/Compliance/General-compliance/Social-responsibility/Customer-interaction-guidance-for-remote-gambling-operators.aspx>> accessed 9 July 2019.

appraisal’ content can improve impact with customers,¹¹² and ‘that messages that get customers to think and make their own decisions based on the information they are given can be more effective, than messages that seem to be “nagging”’.¹¹³ The guidance provides a range of suggested methods of intervention: ‘for some customers, making them aware of their behaviour may be enough to *prompt them to change* [emphasis added]... You should choose the type of interaction based on the extent of the potential harm – from automated responses to human contact – and adapt your messaging to try to get the best outcome.’¹¹⁴ The guidance also recommends a self-assessment questionnaire to ‘help customers think about their own behaviour. Their shared responses, alongside their gambling behaviour, can help you work out the right kind of help and support to offer’.¹¹⁵

Interestingly then, with the exception of the most extreme cases where ‘punishment’ along the lines of suspension of the gambler’s account access may be recommended,¹¹⁶ there appears to be an emphasis on corrective action which increases ‘self-awareness’ in order to prompt or nudge players to change their own behaviour

¹¹² Michael M Auer and Mark D Griffiths, ‘Testing Normative and Self-Appraisal Feedback in an Online Slot-Machine Pop-up in a Real-World Setting’ (2015) 6 *Frontiers in Psychology* 1.

¹¹³ Gambling Commission, ‘Customer Interaction Guidance for Remote Gambling Operators’ (n 111) citing; Rowe and others (n 19). The Revealing Reality report was contributed to by the Gambling Commission, GambleAware, the Responsible Gambling Strategy Board (which has since been renamed Advisory Board for Safer Gambling (ABSG)) and a number of online gambling operators.

¹¹⁴ Gambling Commission, ‘Customer Interaction Guidance for Remote Gambling Operators’ (n 111).

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

‘autonomously’.¹¹⁷ This approach is supported by industry policy documentation, which promotes a ‘player-centric’ theoretical model of responsible gambling based on three user-centred pillars: (1) enabling informed choice; (2) improving self-awareness; and (3) creating supportive environments.¹¹⁸ The first and second pillars, in particular, encourage a user-centred approach which involves ‘providing appropriate tools and support to ensure that players are able to stay in control whilst gambling’ and are able to make ‘informed decisions’, that are ‘in line with their priorities’ as well as ‘critically reflect on cues and messages’ to help ‘them to avoid regretting their choices’.¹¹⁹ The report recommends the use of ‘social responsibility messaging that encourages self-awareness and provides practical tips/strategies to help players stay in control whilst gambling (helping players to notice messages, think about them and do something as a result)’.¹²⁰

The ultimate goal, it appears, is therefore to promote certain ‘responsible’ behaviours, with the ultimate expectation that gamblers internalise these standards and modify their own gambling behaviour accordingly.¹²¹ Those that don’t will inevitably be identified by the algorithm and their behaviour corrected accordingly.

2.2.3 - A population of ‘responsible gamblers’

In addition to the regulatory requirement under SR Code 3.4.1, there are a number of ways in which customer data use is encouraged in the gambling industry at a policy level, in combination with wider industry discourse, to support the usage of disciplinary

¹¹⁷ Rowe and others (n 19) 46.

¹¹⁸ *ibid* 13.

¹¹⁹ *ibid*.

¹²⁰ *ibid* 15.

¹²¹ Miller and others (n 102) 173.

frameworks of power. These additional methods can be described as mechanisms of ‘governmentality’.

2.2.3.1 Governing the gambling population

Mechanisms of governmentality aim to modify the actions of the gambling population more widely, rather than being limited to those whose behaviour requires correction.¹²² Thus, industry policy documentation recommends that operators proactively embed responsible gambling practices for all players; ‘not waiting for individuals to show signs of problems before RG [responsible gambling] becomes relevant; instead, moving away from reactive and medical models of ‘gambling addiction’, towards more inclusive and pre-emptive approaches’.¹²³ Such approaches which are currently being researched by industry bodies include using behavioural insights from gamblers’ data to reduce ‘risky play’,¹²⁴ for example by altering websites in a way which reduces ‘friction’ in the access of responsible gambling tools (which encourage self-control)¹²⁵ and the use of ‘ethical behavioural/social nudges’ to encourage responsible gambling behaviour from all customers.¹²⁶ This also relates to the third pillar of the theoretical model of responsible gambling: to create a supportive environment for all gamblers.¹²⁷

¹²² Foucault, *Security, Territory, Population* (n 22) 108.

¹²³ Rowe and others (n 19) 13.

¹²⁴ The Behavioural Insights Team in partnership with GambleAware (n 21).

¹²⁵ *ibid* 4.

¹²⁶ Rowe and others (n 19) 46.

¹²⁷ *ibid* 7.

Governmentality, as a method of exercising power, for Foucault, is not a replacement for the sovereign and disciplinary mechanisms, but is employed in support; ‘in fact we have a triangle: sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism’.¹²⁸ As mentioned, the object of this technique of power is not the single body of an individual; ‘population will appear above all as the final end of government...not just to govern, but to improve the condition of the population, to increase its wealth, its longevity and its health’.¹²⁹ Governmentality therefore seeks to regulate the population, rather than discipline an individual, in accordance with a particular standard or norm; ensuring in this case that gamblers engage in gambling activity at a ‘normal’ level and avoid behaviour which is considered excessive and therefore ‘harmful’.¹³⁰ The ‘norm’ is itself not externally posited,¹³¹ or ‘limited to the moral, ethical or legal realm’,¹³² but arises through knowledge and observation, the object of which is, again, the population.¹³³

2.2.3.2 Knowledge of the gambling population

Knowledge is a theme which is central to Foucault’s theory of power. The relevant knowledge in relation to the population as an object¹³⁴ is gained through observation,

¹²⁸ Foucault, *Security, Territory, Population* (n 22) 107–108.

¹²⁹ *ibid* 105.

¹³⁰ Heather Wardle and others, ‘Measuring Gambling-Related Harms: A Framework for Action’ (2018).

¹³¹ Foucault, *Security, Territory, Population* (n 22) 57.

¹³² Martire (n 28) 7.

¹³³ Foucault, *Security, Territory, Population* (n 22) 106.

¹³⁴ *ibid* 350.

analyses, reflections and calculations, in other words: research, of the object and its reality.¹³⁵ This is used to inform both the norm in relation to a particular phenomenon, as it applies to the population, and the workings of the relevant factors which impact upon it. Statistics can be applied to the analyses to determine the ‘normal’ or average rates of a certain phenomenon and plot a curve of ‘normalities’ which illustrates the different levels of ‘normal’. This analysis is then used in the process of ‘normalisation’ to identify and bring the most deviant examples on the curve in line with the norm,¹³⁶ through mechanisms of both discipline and governmentality. The norm, therefore ‘functions both as a scheme that allows us to efficiently categorise reality and also as a parameter by which to regulate it’.¹³⁷

The Gambling Commission’s gambling participation study, which is conducted annually, represents one way in which the state gains the required knowledge of gambling behaviour in Great Britain. It sets out statistics on the gambling participation rate, online gambling behaviour, consumer awareness of gambling management tools, perceptions and attitudes towards gambling, and rates of problem, moderate and low-risk gambling.¹³⁸

Prevalence studies such as this have been critically described as a strategy used to identify, quantify and socially locate the risks associated with commercial gambling within the minority category of problem and pathological gamblers¹³⁹ in order to transfer

¹³⁵ *ibid* 108.

¹³⁶ *ibid* 62.

¹³⁷ Martire (n 28) 8.

¹³⁸ Gambling Commission, ‘Gambling Participation in 2018: Behaviour, Awareness and Attitudes - Annual Report’ (2019) 4.

¹³⁹ The most recent study, for example, reports a problem gambling rate of 0.7%: *ibid* 3.

the responsibility away from the producers of harmful products to the consumers.¹⁴⁰ The studies can be described as the ‘epistemological vehicle’ which socially constructs, identifies and enumerates a clearly distinct category of the problem and pathological gamblers,¹⁴¹ as defined and measured according to the medicalised measures of the PGSI screen and the DSM-5;¹⁴² thus responsibility is placed on the individual gambler to self-regulate their own mental illness.¹⁴³ In this way, prevalence surveys can be viewed as a manifestation of:

the need to control a statistically deviant population – one that provides a clearly demarcated subject of governance and intervention... the pathological gambler is deployed by the industry and government as a way to absolve themselves of responsibility for gambling harm. The pathology is transferred away from the product towards the aberrant individual...¹⁴⁴ The need to control and manage this deviant tail of the bell curve (social control), combined with the epistemological tools of the psy-sciences (the statistics produced by the PGPS) has produced a pathologized minority (the pathological gambler scapegoat).¹⁴⁵

This concept of the transfer of responsibility and risk will be returned to below. In addition, the required knowledge is gained through the surveillance of customer behavioural data,¹⁴⁶ in particular to observe and analyse the behaviour of the ‘minority’

¹⁴⁰ Young (n 24).

¹⁴¹ *ibid.*

¹⁴² Gambling Commission, ‘Gambling Participation in 2018: Behaviour, Awareness and Attitudes - Annual Report’ (n 138) 17.

¹⁴³ Young (n 24).

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ GambleAware, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 88).

category of problem gamblers as compared to the overall gambling population. This ‘knowledge’ is then used to train the algorithms to predict future problem gamblers which, as discussed in the preceding section, drives the creation and perpetuation of the dominant gambling culture and its inherent values with regard to desirable gambling behaviour.

2.2.3.3 The normalisation of ‘responsible gambling’

As for the process of normalisation, in addition to disciplinary techniques which are applied directly to the deviant individuals, supplementary techniques of governmentality will be applied indirectly to the surrounding elements, variables and environment which make up the reality of the population and can be modified artificially.¹⁴⁷ As well as being an end in itself, then, population is also used as an instrument for governing: ‘it is the subject of needs and aspirations, but also the object of government manipulation; vis-à-vis government, [population] is both aware of what it wants and unaware of what is being done to it.’¹⁴⁸ Therefore mechanisms of security will target the gambling population indirectly via external factors, for example through the manipulation of a website user journey based on behavioural insights from the data in order to more easily facilitate the uptake of responsible gambling self-management tools.¹⁴⁹

The techniques themselves are also informed by the knowledge which has been gathered from the analyses of a certain phenomenon, and the ‘natural’ factors which

¹⁴⁷ Foucault, *Security, Territory, Population* (n 22) 21–22.

¹⁴⁸ *ibid* 105.

¹⁴⁹ The Behavioural Insights Team in partnership with GambleAware (n 21) 111–112.

influence it in order to understand the relationship between each factor and their relationship to the population.¹⁵⁰ The currently ongoing research programme which is being conducted by GambleAware in relation to how problematic gambling can be identified and the behavioural insights which can be used to reduce risky play will therefore assist in building knowledge of the ‘natural’ factors which affect online gambling behaviour, and how these can be altered to encourage more ‘responsible’ gambling.¹⁵¹

During the process of normalisation, multiple mechanisms for intervention and manipulation are grafted onto the framework of ‘natural’ factors in an attempt to rearrange the reality from various angles in a way which will effect change indirectly on the population to gradually compensate, check, limit and eventually nullify the more deviant examples on the curve, ultimately imposing the more dominant norms.¹⁵² The mechanisms described above, which seek to use behavioural insights from gambler data, will therefore operate in support of other mechanisms of governmentality present within

¹⁵⁰ Foucault, *Security, Territory, Population* (n 22) 36–37.

¹⁵¹ Phase 1 and 2 of the ‘Remote Gambling Research’ are now complete: Responsible Gambling Trust, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 9); GambleAware, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 88). The 3rd and final phase of the research is focused on applying behavioural insights to reduce problem gambling. GambleAware is also currently conducting research into techniques to augment online gambling sites and apps with a responsible gambling layer that uses persuasive, real-time and interactive behaviour change elements:

<https://about.gambleaware.org/research/research-projects/> accessed 30 July 2019.

¹⁵² Foucault, *Security, Territory, Population* (n 22) 37.

society, such as the wider industry discourse which promotes a certain type of gambling, ubiquitously referred to as ‘responsible gambling’.

This ideal of ‘responsible gambling’, which is presented in the discourse, is characterised, as illustrated by the first two pillars discussed above, by a focus on ensuring that gamblers are able to remain fully self-aware so that they can make informed ‘responsible’¹⁵³ decisions and remain ‘in control’ of their gambling¹⁵⁴ – in order to be seen to support the liberal ideal of individual freedom of choice which formed the basis of the Gambling Act 2005 and the ‘liberalisation’ of the gambling market.¹⁵⁵ Thus operators are required to have dedicated pages on their website which provide gamblers with information on ‘how to gamble responsibly’ as well as access to tools ‘to help individuals monitor or control their gambling, such as restricting the duration of a gambling session or the amount of money they can spend’.¹⁵⁶ The recent GambleAware ‘multi-layered, public-health based campaign’, Bet Regret, seeks to promote self-reflection through identification of ‘environments and situations that can lead sports bettors to make impulsive bets *they know they shouldn’t* [emphasis added]’ such as ‘betting while drunk or bored or chasing losses’.¹⁵⁷ The campaign is designed to

¹⁵³ Gerda Reith, ‘Reflections on Responsibility’ [2008] *Journal of Gambling Issues* 149, 153.

¹⁵⁴ Rowe and others (n 19) 13.

¹⁵⁵ Reith (n 153) 150.

¹⁵⁶ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2019)’ (n 13) 45, SR Code 3.3.1. For example of a responsible gambling page, see Sky Betting and Gaming, ‘Responsible Gambling: When the Fun Stops, Stop’ <https://support.skybet.com/s/article/Keeping-Gambling-Fun> accessed 31 July 2019.

¹⁵⁷ GambleAware, ‘Press Release - Largest National Safer Gambling Campaign, “Bet Regret”, Launches During Man Utd Vs Liverpool Game’ (*GambleAware*, 2019)

‘encourage moderation’ by ‘driv[ing] self-reflection, as well as help[ing] friends and partners recognise the warning signs’.¹⁵⁸ These techniques are used collectively to promote certain ‘responsible’ behaviours, with the expectation that gamblers internalise these normative standards, monitoring and modifying their own gambling behaviour accordingly to comply.¹⁵⁹

2.2.3.4 Freedom to gamble ‘responsibly’?

A central concept in the exercise of governmentality is that the process of normalisation is performed without losing the condition of ‘naturalness’:

These interventions will not necessarily, or not as a general rule, and very often not at all take the form of rules and regulations. It will be necessary to arouse, to facilitate and to *laisser faire*, in other words to manage and no longer control through rules and regulations. The essential objective of this management will be not so much to prevent things as to ensure that the necessary and natural regulations work, or even to create regulations that enable natural regulations to work. Natural phenomena will have to be framed in such a way that they do not veer off course...that is to say it will be necessary to set up mechanisms of security, or...state intervention with the essential function of ensuring the security of the natural phenomena of ... processes intrinsic to the population. This explains, finally, the insertion of freedom within governmentality, not only as a right of individuals legitimately opposed to the power, usurpations and abuses of the sovereign or the government, but as an element that has become indispensable to governmentality itself.¹⁶⁰

<<https://about.gambleaware.org/media/1907/2019-02-21-bet-regret.pdf>> accessed 31 July 2019.

¹⁵⁸ *ibid.*

¹⁵⁹ Miller and others (n 102) 173.

¹⁶⁰ Foucault, *Security, Territory, Population* (n 22) 353.

It is vital, for Foucault, therefore that freedom is seen to be respected in order to govern properly in this way.¹⁶¹ By working within the ‘reality’ rather than trying to prevent it in advance, the phenomenon is addressed in a way which appears natural, and not the result of an external construct which imposes itself on the population artificially.¹⁶² This paradoxical position is reflected in industry policy documentation which stresses the ‘need for both autonomy and carefully considered ethical behavioural/social nudges’ to promote ‘autonomous decision making’.¹⁶³ It is the proposition of industry bodies that individuals have a preference ‘for engaging in behaviour derived through autonomous values and desires rather than being consciously shaped though external influences...[which] explains why interventions that harness support and autonomy are more effective than information-only interventions’.¹⁶⁴ In this way, people feel that they are freely choosing to act in a certain way or refrain from a particular course of action, in accordance with a set of norms which they have internalised whilst assuming responsibility for governing their own conduct.

The dominant narrative which is presented by gambling industry discourse maintains that the core of a ‘responsible gambling’ initiative relies on consumers being fully informed, in order to facilitate rational reflection and decision making,¹⁶⁵ though

¹⁶¹ *ibid.*

¹⁶² *ibid* 37.

¹⁶³ Rowe and others (n 19) 46.

¹⁶⁴ The Behavioural Insights Team in partnership with GambleAware (n 21) 108–109.

¹⁶⁵ Newall (n 11) 2; Alex Blaszczynski and others, ‘Informed Choice and Gambling: Principles for Consumer Protection’ (2008) 2 *The Journal of Gambling Business and Economics* 103, 104.

this official position patently ‘ignores how the gambler’s behaviour is as much driven by their immediate context’,¹⁶⁶ for example through potentially exploitative targeted online advertising.¹⁶⁷ This approach, in turn, assists in supporting the wider neo-liberal discourse which advocates a reduction of external governance accompanied by an emphasis on individual self-control.¹⁶⁸ The neoliberal ideal of the ‘sovereign consumer’ is reflected in the gambler who is controlled, self-limiting, autonomous and responsible in their consumption of gambling products.¹⁶⁹ ‘Consumers are assumed to make informed decisions, and to be essentially rational. The discourse of responsibility is promulgated to ensure that gamblers exercise self-surveillance to demonstrate rationality, control and responsibility’.¹⁷⁰

The emphasis within such neoliberal policies represents a shift in focus away from ‘production side issues, concerned with, for example, supply, availability, accessibility, and the formats of products’ towards ‘consumption side issues, concerned with, for example, the choices, freedoms, preferences, and habits of individual consumers.’¹⁷¹ The result is that responsibility and risk in relation to the activity of gambling is transferred away from the industry, to the individual gambler: ‘the responsible gambling tropes that

¹⁶⁶ Gerda Reith and Fiona Dobbie, ‘Gambling Careers: A Longitudinal, Qualitative Study of Gambling Behaviour’ (2013) 21 *Addiction Research and Theory* 376, 387; Newall (n 11) 2.

¹⁶⁷ Hörnle and others (n 12).

¹⁶⁸ Reith (n 153) 151.

¹⁶⁹ Gerda Reith, ‘Gambling and the Contradictions of Consumption. A Genealogy of the “Pathological” Subject’ (2007) 51 *American Behavioral Scientist* 33, 35.

¹⁷⁰ Miller and others (n 102) 165.

¹⁷¹ Reith (n 153) 151.

are found in these kinds of discourses reflect a continued focus on the individual as both the site of gambling problems and their resolution'.¹⁷²

To fully effect this shift, the activity of gambling has to be 'normalised, specifically through the deployment of the notion of recreation, where gambling is recast as a desirable leisure pursuit'.¹⁷³ As illustrated above, societal attitudes towards gambling have shifted significantly. Commercial gambling is no longer considered deviant; it is pursued by a large proportion of the population, and encouraged by the state¹⁷⁴ as a mainstream leisure activity.¹⁷⁵ So often, gambling is described as an activity which is 'deeply engrained in British life' and a 'source of *fun* for most [emphasis added]',¹⁷⁶ a notion which is reinforced by 'responsible gambling' campaigns such as the renowned 'When the Fun Stops, Stop' consumer information programme.¹⁷⁷ In creating a binary between 'normal' recreational gamblers (who should be revered in a society based on free choice and consumer sovereignty) and a minority of problematic gamblers who are situated at the epicentre of harm, 'stand[ing] in the way of rational, normal recreation by the well-adjusted majority of the citizenry', responsibility is transferred from the societal

¹⁷² *ibid.*

¹⁷³ Young (n 24).

¹⁷⁴ Reith (n 153) 150.

¹⁷⁵ Reith (n 169) 35.

¹⁷⁶ Neil McArthur, 'Chief Executive (Gambling Commission) Speech' (*GambleAware Conference*, 2018) <<https://www.gamblingcommission.gov.uk/PDF/Neil-GambleAware-speech-final.pdf>> accessed 31 July 2019.

¹⁷⁷ Senet Group, 'Senet Group wins Marketing Society Excellence Award for When the Fun Stops, Stop campaign' (2018) <<https://senetgroup.org.uk/senet-group-wins-marketing-society-excellence-award-for-when-the-fun-stops-stop-campaign/>> accessed 31 July 2019

scale to the level of the individual.¹⁷⁸ The object of government becomes the player, through self-regulation and other forms of intervention,¹⁷⁹ such as the intervening action taken by the operator to correct the ‘problematic’ gambling activity which has been algorithmically detected. Further, the location of risk of gambling harm within a deviant population is part of a ‘device of legitimation that allows for the reproduction of gambling industries’,¹⁸⁰ serving ‘the economic interests of the powerful players – industry and the state’.¹⁸¹

At the same time, and perhaps most significantly, the online gambling market is presented as one of the most liberal, where gamblers are free to choose when and how they gamble. Yet it is the understanding of freedom which is the central issue at stake, for Foucault:

This freedom, both ideology and technique of government, should in fact be understood within the mutations and transformations of technologies of power. More precisely and particularly, freedom is nothing else but the correlative of the deployment of apparatuses of security. An apparatus of security...cannot operate well except on condition that it is given freedom... the possibility of movement, change of place, and processes of circulation of both people and things. I think it is this freedom of circulation, in the broad sense of the term...that we should understand the word freedom, and understand it as one of the facets, aspects, or dimensions of the deployment of apparatuses of security. The idea of government of men that would think first of all and fundamentally of the nature of things and no longer of man’s evil nature, the idea of an administration of things that would think before all else of men’s freedom, of what they want to do, of what they have an interest in doing, and of what they think about doing, are all correlative elements...A

¹⁷⁸ Young (n 24).

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

power thought of as regulation that can only be carried out through and by reliance on the freedom of each, is, I think, something absolutely fundamental.¹⁸²

The point is not that the individual gambler is only apparently free ‘while in fact secretly manipulated by the cunning of power’ to gamble responsibly.¹⁸³ Instead, the dynamics of the relationship between power and autonomy need to be understood differently. Power, in modernity, is not only capable of repression – it can be productive. ‘Power and freedom are almost coextensive. Power does not subjugate the individual; rather it activates certain patterns of behaviour and thinking that follow power’s own impersonal discourse and that need a certain space of freedom to flourish and be effective’.¹⁸⁴

3. Conclusion

This article has sought to demonstrate that although gambling is no longer prohibited by law, this does not necessarily mean that gamblers now have greater freedom, as it is commonly understood, in how they choose to gamble. Notwithstanding the ‘liberalising’ agenda of the Gambling Act 2005, gambling behaviour can be perceived as being governed instead through the Foucauldian mechanisms of discipline and governmentality. The activity of the wider gambling population is thus conducted towards a particular end – a ‘responsible’ standard of gambling - through the management of external elements, which are informed by the knowledge arising from the gambler’s data, amongst other things, to ensure that gamblers internalise this standard and ultimately transform into a self-regulatory individual who is responsible for their own gambling

¹⁸² Foucault, *Security, Territory, Population* (n 22) 48–49.

¹⁸³ Martire (n 28) 2.

¹⁸⁴ *ibid.*

behaviour. Individuals who do not ‘autonomously’ conform to the responsible gambling norm are identified by algorithms which are themselves inevitably embedded with dominant assumptions and values regarding what constitutes desirable and undesirable forms of gambling; thus the prevalent gambling culture is maintained. The identified individuals are accordingly disciplined through personalised interactions, which are again informed by the knowledge gained from the data, in order to correct this deviant behaviour and encourage the required ‘responsible’ form of gambling.

This approach supports the wider neoliberal narrative on the transfer of responsibility to the individual; the rational gambler who is fully informed and therefore responsible for autonomously exercising self-control in their consumption of gambling products, notwithstanding the effects of their immediate context and the impact, for example, of potentially exploitative personalised advertising¹⁸⁵ and other so called ‘dark nudges’¹⁸⁶ on their behaviour.¹⁸⁷ Accordingly, responsibility is directed away from the producers of risks arising from gambling, the industry and the state - since gambling is apparently a legitimate, mainstream leisure activity which is the source of ‘fun’ for most. The risk of harm from gambling is instead shifted to the ‘minority’¹⁸⁸ of problem gamblers, a category of deviant individuals who are unable to exercise self-control over their gambling in the way that the majority of rational British citizens do. As a result, the

¹⁸⁵ Hörnle and others (n 12).

¹⁸⁶ Newall (n 11).

¹⁸⁷ Reith (n 153).

¹⁸⁸ Young (n 24); Gambling Commission, ‘Gambling Participation in 2018: Behaviour, Awareness and Attitudes - Annual Report’ (n 138).

gambling industry is legitimised and the economic interests of the most powerful players – again, the industry and the state – are served.

The Gambling Act 2005, and the ‘liberation’ of gamblers, is a significant feature of this approach, given that freedom is an indispensable element of governmentality itself. The ‘freedom’ which is granted to individuals under the Act is necessary to enable these apparatuses of power to operate. When power is also understood as being productive, rather than solely repressive, it is possible to appreciate the extent of the relationship between power and freedom as part of the structure which produces a population of responsible gamblers who know that when the fun stops, they should stop.

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