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**Northumbria
University**
NEWCASTLE

**Big Data in the Production of
'Safe Gamblers' and a
Sustainable Gambling Industry:
A Genealogy of Gambling Regulation
in Great Britain**

R Allsopp

PhD

**Big Data in the Production of
'Safe Gamblers' and a
Sustainable Gambling Industry:
A Genealogy of Gambling Regulation
in Great Britain**

Rachel Allsopp

A thesis submitted in partial fulfilment of the
requirements of the University of Northumbria
at Newcastle for the degree of Doctor of
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Business & Law

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Abstract

For hundreds of years in Great Britain, the state has been concerned with the regulation of commercial gambling. The methods of regulation, however, have varied significantly from prohibition under the criminal law to a free market approach allowing the natural laws of competition to operate. In recent years, advances in technology and big data analytics, originally developed by the industry for the maximisation of profits, have been welcomed as a novel approach to protecting gamblers from harm.

Despite the disparate nature of the various approaches to the regulation of gambling during the course of history, this thesis aims to show that there is a common thread which runs throughout. Applying a Foucauldian lens, in particular using Michel Foucault's later work on governmentality, this study argues that gambling regulation in Great Britain has, since the earliest official attempts to legislate on the activity, been concerned with the formation of a particular type of subject, who 'knows' certain 'truths' about gambling and behaves in accordance with those 'truths'. Whilst this subject naturally varies in form across different periods in time, it is well-illustrated by Sir Frederick Flood during a House of Commons debate in 1818, when gambling was regarded as a vice to be suppressed:

[...] nothing could be more injurious to property, reputation, and life than the vice of gaming. It had brought many individuals to ruin, had produced great private misery, and had deprived the country of many persons who might otherwise have been useful and valuable members of society.¹

Applying a genealogical approach, this research illuminates the ways in which gambling regulation has operated to create subjects who hold particular views about gambling and conduct their own behaviour in accordance with those views, so that they become 'useful and valuable members of society'. Each chapter examines one of the discrete approaches to gambling regulation since 1541, defined in this thesis as a 'regime' of government. Over time, the techniques used in this process of subjection have evolved into a complex

framework of mechanisms, which uses gamblers’ ‘freedom’ as a resource in the production of useful and valuable subjects. In this way, it is argued that notwithstanding the underlying ‘liberal’ ethos of the present statutory framework under the Gambling Act 2005, examined in Part II, gamblers today are subject to greater levels of regulation than when commercial gambling was unlawful. This is particularly true for online gamblers, whose conduct is regulated in increasingly intimate and pervasive ways through the application of continuous surveillance and big data analytics to facilitate a ‘safer’ form of gambling and protect ‘at risk’ gamblers from harm. The present regime, as examined in Chapter Four, thus operates to produce gambling subjects who autonomously gamble in a way which is considered ‘safe’. It also produces responsible operators who employ their data-driven technological capabilities to protect those gamblers who may be ‘at risk’, for example of spending more than they can afford. Though on the face of it, this appears to be a particularly caring, benevolent approach to regulation, this thesis seeks to problematise the apparently taken-for-granted assumption that the data-driven technologies, originally developed for commercial purposes, should be repurposed in this way. Instead, it is argued that in ‘protecting’ gamblers, these technologies also play a central role in their subjection. Thus, on closer examination of the present regime, this thesis identifies an inherent perversity whereby gamblers have effectively become a resource to be utilised in a safe, sustainable way in order to secure a sustainable gambling economy.

¹ HC Deb 19 February 1818, vol 37, col 567 (Emphasis added).

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Dedication

In loving memory of

My wonderful Granda, George Harvey

and

Michael Almond, an amazing friend who was taken far too soon.

Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved.

Approval has been sought and granted by the Faculty of Business and Law Ethics Committee on 21st May 2018.

I declare that the word count of this thesis is 83,151 words.

Name: Rachel Allsopp

Signature:

Date: 3rd June 2021

Introduction

‘Of the universality of gambling there is no doubt and it seems to be inherent in human nature.’¹

Gambling is an activity in which it seems human civilisation has always partaken. The use of dice as a gaming instrument, for example, can be traced as far back as 6000 B.C., to early civilisations who used dice in games of chance and early divination ritual, in particular in the casting of lots.² The Greeks and Romans utilised ‘astragali’ (six sided dice made from porcelain, ivory or marble) for gambling and lottery draws; ‘tabula’, a three-dice game which is thought to be a descendant of the game backgammon, was a favourite of the later Roman Empire and is believed to have been played for the garments of Christ at his execution.³ In this game, the players cast their dice and lost their wagers if they scored less than ten; a betting system closely resembling the game of ‘hazard’ which subsequently evolved, by the nineteenth century, into the modern casino game, ‘craps’.⁴

Just as there has always been participation in gambling, so too has there been a long-standing interest in the regulation of this activity by those in power: ‘in its different forms, gambling has been prohibited or regulated for hundreds of years’.⁵ Gambling was generally prohibited by the Roman Republic through the use of restrictive laws, save for during the end-of-year Saturnalia festivities,⁶ though such laws were repeatedly ignored; Roman emperors such as Claudius and Augustus were indeed well-known for their ‘excessive’ gambling habits.⁷ As I aim to demonstrate throughout this thesis, while attempts to regulate gambling in Great

¹ John Ashton, *The History of Gambling In England* (Duckworth 1898) 2.

² Gerda Reith, *The Age of Chance: Gambling in Western Culture* (Routledge 1999) 44–5.

³ *ibid* 47 (Citing the Bible, John 19:23-24).

⁴ *ibid*.

⁵ Department for Culture Media and Sport, *Draft Gambling Bill with Explanatory Notes, Regulatory Impact Assessment and the Policy* (Cm 6014, 2003) para 2.2.

⁶ Peter Ferentzy and Nigel E Turner, *The History of Problem Gambling: Temperance, Substance Abuse, Medicine, and Metaphors* (Springer 2013) 14.

⁷ Reith, *The Age of Chance: Gambling in Western Culture* (n 2) 46–7; FN David, *Games, Gods and Gambling: The Origins and History of Probability and Statistical Ideas from the Earliest Times to the Newtonian Era*. (Hafner Publishing Company 1962).

Britain may not have always been perceived as ‘successful’ in practice - particularly where success is defined in the stark terms of prohibiting commercial gambling (as explored in Chapter One) - gambling regulation has nevertheless played a central role in attempting to shape and direct gambling conduct in order to form a certain type of gambling subject.

1. The gambling landscape in Great Britain today

Gambling⁸ is currently regulated in Britain pursuant to the Gambling Act 2005 (‘the Act’), a piece of legislation enacted in 2007 which was introduced to liberalise commercial gambling and provide gambling consumers with greater freedom to spend their money participating in an increasingly competitive gambling market. Since the Act came into force, operator profits⁹ (excluding lotteries) have risen from £5.7bn in 2008¹⁰ to £10.2bn in (March) 2020.¹¹ This increase has been contributed to significantly by the growth of the online gambling market generally, and the inclusion of offshore remote gambling operators within the British regulatory regime since 2014.¹² Operator profits from online gambling have increased from £817m in 2008 to £5.7bn in 2020 and the remote gambling sector now represents the largest combined sector of the gambling market in Great Britain¹³ with a market share of 39.9 percent.¹⁴ Thus, online gambling was a significant player in the British gambling industry

⁸ While attempts to legislate on gambling can be traced to the twelfth century (Ashton (n 1) 13.), ‘gambling’ was not afforded a statutory definition until the enactment of the Gambling Act 2005 (‘the Act’). Under the Act, gambling includes: ‘gaming’, ‘betting’ and ‘participating in a lottery’ (s 3), and ‘remote gambling’ means ‘gambling which persons participate by the use of remote communication’ including ‘the internet’ (s 4). ‘Gaming’ means playing a game of chance (whether or not that chance is equal), which may include an element of skill, for a prize (being money or money’s worth), but does not include a sport. ‘Betting’ means making or accepting a bet on ‘(a) the outcome of a race, competition or other event [...], (b) the likelihood of anything occurring or not occurring, or (c) whether anything is or is not true’ (s 9). Finally, ‘lotteries’ are defined as arrangements where people are required to pay to take part; prizes are allocated to participants either by chance (simple lottery) or by a series of processes, the first of which relies wholly on chance (complex lottery) (s 14).

⁹ Referred to in the industry as Gross Gambling Yield. This is roughly calculated as the amount of stakes received less 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> 8 May 2021

¹⁰ Gambling Commission, ‘Industry Statistics - November 2020’ (2020) <<https://beta.gamblingcommission.gov.uk/statistics-and-research/publication/industry-statistics-november-2020>> accessed 7 May 2021.

¹¹ Gambling Commission, ‘Gambling Industry Statistics April 2015 to March 2020’ (2020) <https://assets.ctfassets.net/j16ev64qyf6l/7wgmPLdViatyOi3nEdHMxK/d1ddab9075feb3f7aa3078eff3ec57/Industry_Stats_November_2020_Static_.pdf> accessed 8 May 2021.

¹² Gambling (Licensing and Advertising) Act 2014, as discussed in Chapter Three.

¹³ By GGY.

¹⁴ Gambling Commission, ‘Industry Statistics - November 2020’ (n 10).

long before the COVID-19 pandemic required all land-based operators to close their doors to customers for a number of months.

The economic benefits of the liberalisation of commercial gambling have not only been enjoyed by the industry, they are also passed on to the state in the form of a UK gambling duty: remote gaming duty is currently set at 21 percent of an online gaming provider's profits from remote gaming with UK persons,¹⁵ with general betting duty charged at a rate of fifteen percent.¹⁶ As the Government regularly points out, the gambling industry 'makes significant contributions to the economy, employing nearly 100,000 people, paying approximately £3bn per year to the government in taxes, and accounting for £8.7bn or 0.5% of UK Gross Value Added (GVA). It also contributes significantly to other industries, including sport, racing and advertising'.¹⁷

The Act itself represented a major shift in the approach of the British state to the regulation of commercial forms of gambling, as compared with previous approaches. In removing numerous existing statutory barriers to market entry and competition, most particularly the 'unstimulated demand' requirement,¹⁸ the Government aimed to 'treat people like adults'¹⁹ and provide gambling consumers with greater freedom of choice as to how, where and when they could gamble. This would be facilitated under the Act through a permissive regime

¹⁵ HM Revenue and Customs, 'Excise Notice 455a: Remote Gaming Duty' (2019) <<https://www.gov.uk/government/publications/excise-notice-455a-remote-gaming-duty/excise-notice-455a-remote-gaming-duty#rgd-calculations>> accessed 8 May 2021.

¹⁶ HM Revenue and Customs, 'Excise Notice 451a: General Betting Duty' (2018) <<https://www.gov.uk/government/publications/excise-notice-451a-general-betting-duty/excise-notice-451a-general-betting-duty>> accessed 8 May 2021.

¹⁷ Department for Digital Culture Media and Sport, 'Review of the Gambling Act 2005 Terms of Reference and Call for Evidence' (2020) <<https://www.gov.uk/government/publications/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence>> accessed 7 May 2021.

¹⁸ Gaming Act 1968

¹⁹ Roy Light, 'The Gambling Act 2005: Regulatory Containment and Market Control' (2007) 70 *Modern Law Review* 626, 634 Citing Secretary of State's speech to the Business in Sport and Leisure annual conference, 19 November 2003.

which allowed increased competition within a liberalised market,²⁰ where gambling was regarded as ‘a leisure activity like any other’.²¹

In the last few years, however, there has been increased criticism of the Act and the underlying regulatory approach,²² most recently culminating in the launch of an official Government review.²³ At the time of writing, the outcome of this call for evidence is still outstanding, with a response expected in late 2021. Criticism of the Act has tended to centre around its inability to regulate ‘technological developments in gambling’²⁴ in the 15 years since it came into force, which have instead been ‘exploited’ by the industry for the increasingly efficient extraction of profit from gamblers:

A second revolution, unforeseen by policy makers at the time, was the almost universal adoption of the smart phone and other devices which enabled gambling 24/7 — whenever and wherever the gambler wanted, totally unsupervised. Gambling operators have made hay exploiting the laissez faire regime that has existed hitherto, while successive governments and regulators have failed to keep up with the revolution in the UK gambling sector. Our report demonstrates the wholly reactive nature of regulation since gambling was liberalised. The unscrupulous methods and ingenuity of some gambling operators makes for shocking reading.²⁵

The Government’s review seeks to address the changes to the gambling industry brought about by ‘smartphones giving opportunities to gamble online almost anywhere and at any time [and] fast-paced innovation in product design and advertising’, by making sure the Gambling Act 2005 is ‘fit for the digital age’.²⁶ One of the main proposed approaches to this, which is already a central feature of the present regulatory regime,²⁷ is found in the redeployment of the same technological developments. Player tracking and associated big data analytics are thus being presented as ‘new opportunities to harness technology for the

²⁰ David Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (2011) 15 *Gaming Law Review and Economics* 93, 100.

²¹ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20), *Gambling Harm — Time for Action* (HL 2019-21, 70) para 66.

²² *ibid* 67.

²³ Department for Digital Culture Media and Sport (n 17).

²⁴ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20) (n 21) para 67.

²⁵ *ibid* 6.

²⁶ Department for Digital Culture Media and Sport (n 17).

²⁷ Primarily under the Licence Conditions and Codes of Practice, SR Code 3.4.1, as examined in detail in Chapter Four.

protection of players’.²⁸ In online gambling, operators are presently required as a licence condition to track their customers’ patterns of gambling over time and use that data to ‘assess their risk of harm and intervene accordingly’.²⁹ This is normally facilitated by ‘harm detection algorithms’ allowing ‘tailored protections based on each individual’s circumstances, behaviour and choices’.³⁰ The Government’s review will address current online protections, considering whether changes are needed at a product or account level to improve player safeguards as part of its overall ambition to ‘see whether we have the balance of regulation right’.³¹ The balance in question here pertains to the conflicting objectives of ‘protect[ing] individuals, families and communities from the potentially life ruining effects of gambling-related harm’ and respecting ‘the freedom of adults to choose how they spend their money’.³² Indeed, respecting this ‘freedom’ to gamble was regarded as of paramount importance in justifying the radical shift in the regulation of gambling represented by the 2005 Act.

2. Original contribution

In this thesis I offer an alternative perspective, and in doing so seek to problematise the ‘joint state/researcher faith’³³ in data-driven, algorithmic solutions to gambling-related harm. Using the work of Foucault, which I introduce below, I aim to show that gambling regulation in Great Britain has, since the earliest official attempts to legislate on the activity, been concerned with the formation of a particular type of subject, who ‘knows’ certain ‘truths’ about gambling and behaves in accordance with those ‘truths’ (the process of ‘subjection’).³⁴ These subjects are at the same time ‘objects’ of knowledge, and are therefore ‘known about’

²⁸ Department for Digital Culture Media and Sport (n 17).

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

³³ Kate Bedford, *Bingo Capitalism: The Law and Political Economy of Everyday Gambling* (Oxford University Press 2019) 275.

³⁴ Michel Foucault, ‘The Subject and Power’ (1982) 8 *Critical Inquiry* 777.

in certain ways to facilitate this subjection. Thus, whilst the methods used to regulate commercial gambling activity in the past are starkly different in nature from those which apply under the present, apparently liberalising, legal framework (under which gamblers are presented as autonomous individuals with freedom to choose how to gamble), there is nevertheless this common thread which runs throughout the history of gambling regulation. Naturally, the ‘ideal type’ of gambling subject will be a ‘category of historical interpretation’.³⁵ In other words, the specific form that the subject will take - and the ‘truth’ that the subject ‘knows’ about gambling - will vary across the different periods in time, according to the dominant attitudes, discourse and rationalities underlying a particular regulatory regime. In general, however, I argue that the objective of the various forms of regulation over gambling can be illustrated by the following quote from Sir Frederick Flood during a House of Commons debate in 1818, when gambling was predominantly regarded as a vice to be suppressed:

[...] nothing could be more injurious to property, reputation, and life than the vice of gaming. It had brought many individuals to ruin, had produced great private misery, and had deprived the country of many persons who might otherwise have been *useful and valuable members of society*.³⁶

Thus, I suggest that gambling regulation seeks to create subjects who hold certain views about gambling and conduct their own behaviour in accordance with those views, so that they become ‘useful and valuable members of society’. The techniques used in this process of subjection have evolved significantly over time, into a complex regime of ‘government’³⁷ which, presently, utilises ‘freedom’ as a resource in the production ‘useful and valuable’ subjects. In this way, gamblers today are arguably subject to greater, and also more intimate, levels of regulation under the present ‘liberal’ framework than they were, for example, 100 years ago when most forms of commercial gambling were prohibited by law.

³⁵ Michel Foucault, ‘Questions of Method’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 80.

³⁶ HC Deb 19 February 1818, vol 37, col 567 (Emphasis added).

³⁷ In the Foucauldian sense, as defined below in section 6.

This, I argue, is particularly true in the case of online gambling, where technological developments in big data analytics have ‘turbo-charged’³⁸ the ability to shape gambling subjects. Indeed, big data practices are particularly well developed in the online gambling industry, which has ‘for years [...] been harnessing the power of immense data sets to drive effective, targeted marketing’³⁹ in order to optimise each step of the gambling experience for the maximisation of profits. Through continuous monitoring of online gamblers, detailed transactional data is collected during each interaction with a gambling website, providing operators with behavioural insights into betting and gaming activity, account management (and use of so-called ‘responsible gambling’ management tools), preferred types of gambling and financial information (amongst many other things), allowing granular profiles to be created for each gambler.⁴⁰

Under the current regulatory provisions, however, operators are now required to employ this technology for an apparently contradictory purpose: to ‘know their customers and use what they know to protect them’.⁴¹ Such measures of ‘protection’ include indirect, environmental mechanisms that ‘nudge’ gambling behaviour at a population-level towards a certain ideal standard (at the present time, this is described as ‘safe gambling’), together with direct interventions which algorithmically identify problematic or ‘at risk’ (potentially problematic in future) gambling activity of individual gamblers requiring correction. I have sought to visually portray this present regime in the form of the ‘Sustainable Gambling Model’:

³⁸ Gerda Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (Routledge 2018).

³⁹ Alex Brennan, ‘Online Gambling’s Unique Personalisation Opportunity’ (*Hudson Sandler*, 2017) <<https://www.hudsonsandler.com/insights/online-gamblings-unique-personalisation-opportunity>> accessed 9 July 2019.

⁴⁰ Responsible Gambling Trust, PricewaterhouseCoopers LLP and Responsible Gambling Council, ‘Remote Gambling Research - Interim Report on Phase I’ (2016) 8–10 <https://www.begambleaware.org/sites/default/files/2020-12/rgt-remote-gambling-research_pwc-phase-i_final.pdf> accessed 25 January 2018.

⁴¹ 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.

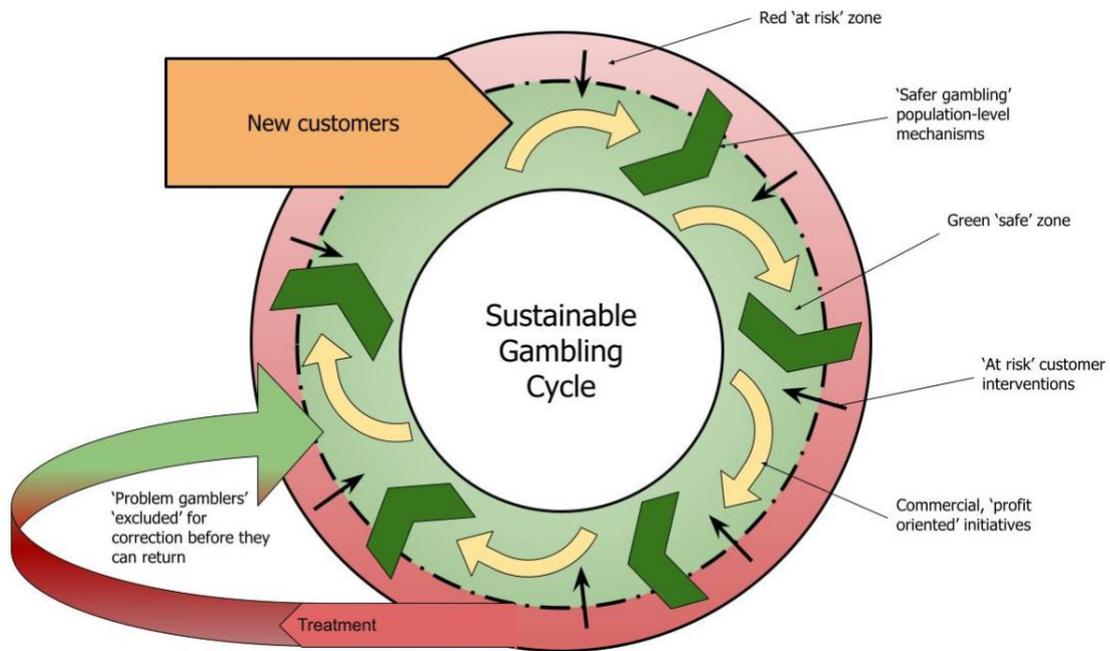


Figure 1 Sustainable Gambling Model

The current mode of gambling regulation depicted by this model (which I discuss in detail in Chapter Four) seeks to create ‘safe’ gambling subjects who ‘autonomously’ gamble in a way which is considered safe. It also produces ‘responsible’ operators who ‘protect’ their customers, ensuring for example that they don’t gamble more than they can afford, so that their gambling remains at a ‘sustainable’ level.⁴² While on the face of it, this appears a particularly caring, benevolent approach to the regulation of gambling, I would argue that there is also a certain perversity on closer examination, where the gamblers effectively become a resource which must be utilised in a safe, sustainable way in order to secure a circular, sustainable gambling economy. This perversity is somewhat compounded by the fact that the data-driven, player-tracking technologies central to the management of this ‘resource’ were originally designed for the extraction of increased profits from gamblers.⁴³

⁴² Gambling Commission, ‘Our Strategy for the next Three Years’ <<https://beta.gamblingcommission.gov.uk/about-us/guide/our-strategy-for-the-next-three-years>> accessed 30 April 2021.

⁴³ Bedford (n 33) 274–5; Natasha Dow Schüll, *Addiction by Design: Machine Gambling in Las Vegas* (Princeton University Press 2012) 69; Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (n 38) Chapter 6.

3. Significance of the research

As intimated above, there is a ‘taken-for-granted’ assumption by the state and the regulator, which is supported in much of the academic literature in the field of gambling,⁴⁴ that the data-driven, player-tracking technologies, originally developed for commercial purposes, can and should be re-purposed to ‘protect’ gamblers. In this thesis, I follow on from scholars such as Kate Bedford, Gerda Reith and Natasha Dow Schüll who are more critical of this approach.⁴⁵ I argue that the role played by these technologies is more complex than simply protecting gamblers. They are also employed to more closely surveil, shape and, where required, correct gamblers so that they conform with a particular standard in order to produce safe gambling subjects and secure a sustainable gambling economy.

Moreover, a significant proportion of the academic literature focuses on the extent to which gamblers have been disproportionately responsabilised under the 2005 Act for gambling in a way which is considered ‘responsible’. This literature condemns the underlying ‘neoliberal’⁴⁶ ideology of the regulatory framework, which, it is argued, also unfairly transfers responsibility for any harms caused by gambling away from the producers of certain gambling risks - notably the industry and the state - onto a minority of pathologised, problem gamblers who are represented as inherently incapable of gambling ‘responsibly’.⁴⁷ I propose,

⁴⁴ See for example: Linda Hancock and Garry Smith, ‘Replacing the Reno Model with a Robust Public Health Approach to “Responsible Gambling”’: Hancock and Smith’s Response to Commentaries on Our Original Reno Model Critique’ (2017) 15 *International Journal of Mental Health and Addiction* 1209; Sally M Gainsbury and others, ‘Strategies to Customize Responsible Gambling Messages: A Review and Focus Group Study’ (2018) 18 *BMC Public Health* 1; Michael Auer and Mark D Griffiths, ‘Personalised Feedback in the Promotion of Responsible Gambling: A Brief Overview’ (2014) 1 *Responsible Gambling Review* 27; 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); David Aro, Laura Jakob and Sally Gainsbury, ‘Use of Data Analytics for Responsible Gambling Regulatory Directives Final Report’ (*Ontario Problem Gambling Research Centre (OPGRC)*, 2015) <[https://www.greo.ca/Modules/EvidenceCentre/files/Aro_et_al\(2015\)Use_of_data_analytics_for_responsible_gambling_regulatory_directives.pdf](https://www.greo.ca/Modules/EvidenceCentre/files/Aro_et_al(2015)Use_of_data_analytics_for_responsible_gambling_regulatory_directives.pdf)> accessed 1 July 2020.

⁴⁵ Bedford (n 33); Schüll (n 43); Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (n 38).

⁴⁶ I acknowledge here that the term ‘neoliberalism’ is itself a loaded term, without a clearly defined, and universally accepted meaning. My understanding of the term, and the way in which I employ it in this thesis, is explained in Section 4.4.

⁴⁷ For example: Charles Livingstone and Richard Woolley, ‘Risky Business: A Few Provocations on the Regulation of Electronic Gaming Machines’ (2007) 7 *International Gambling Studies* 361; James Cosgrave, ‘Embedded Addiction: The Social Production of Gambling Knowledge and the Development of Gambling Markets’ (2010) 35 *The Canadian Journal of Sociology* 113; Fiona Nicoll, ‘Subjects in a State Cultural Economies of Gambling’ in Sytze F Kingma (ed), *Global Gambling: Cultural Perspectives on Gambling Organisations* (Routledge 2010); Gerda Reith, ‘Reflections on

however, that whilst this approach to regulation was certainly evident in the years following the Act's enactment, as examined in Chapter 3, the regulatory regime has moved on, now applying a precautionary 'public health' approach concerned with ensuring 'safety'. Though neoliberal values still form an integral part of this regime in the creation of subjects who 'autonomously' gamble in a way which is considered safe, I argue that the scope of responsibility has been widened to incorporate the industry, with gambling operators being increasingly disciplined into taking on a more 'pastoral' role as 'responsible operators' by the state regulator. As I've mentioned, however, this is justified to, and starting to be accepted by, the industry not only because it is apparently 'the right thing to do', but on the basis of securing a sustainable gambling economy.

4. Scope

This research focuses predominantly on commercial forms of gambling broadly and, where history permits (from Part II), online gambling more specifically. This is in order to analyse the role now played by data-driven technologies in regulating the activity of gamblers during the present time and examine how we have arrived here (as elaborated on in the following section). Consequently, because under the British regulations, lotteries can only be run for 'good causes' and not for private or commercial gain,⁴⁸ they largely⁴⁹ fall outside of the scope of this thesis.

Responsibility' [2008] *Journal of Gambling Issues* 149; Martin Young, 'Statistics, Scapegoats and Social Control: A Critique of Pathological Gambling Prevalence Research' (2013) 21 *Addiction Research and Theory* 1; Charles Livingstone and others, 'On Gambling Research, Social Science and the Consequences of Commercial Gambling' (2018) 18 *International Gambling Studies* 56; Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (n 38); Heather Wardle and others, 'Gambling and Public Health: We Need Policy Action to Prevent Harm' (2019) 365 *BMJ* 1; Jim Orford, *The Gambling Establishment: Challenging the Power of the Modern Gambling Industry and Its Allies* (Routledge 2020); Max Abbott, 'Gambling Control and Public Health: Let's Be Really Honest' (2020) 18 *International Journal of Mental Health and Addiction* 825.

⁴⁸ Gambling Commission, 'Lotteries: Sector Specific Compliance' <<https://www.gamblingcommission.gov.uk/for-gambling-businesses/Compliance/Sector-specific-compliance/Lotteries/Lotteries-sector-specific-compliance.aspx>> accessed 8 May 2021.

⁴⁹ Save that the impact of the introduction of the National Lottery will form a major part of the discussion regarding the transformation in commercial gambling regulation at the end of the twentieth century, in Chapter Three.

I also limit the scope of this research to gambling regulation in Great Britain (England, Wales and Scotland), though by virtue of the Gambling (Licensing and Advertising) Act 2014, this applies to all operators (wherever they are based) who provide gambling facilities to consumers in Britain. Gambling regulation in Northern Ireland falls out of scope of this thesis, being subject to its own distinct set of laws.

5. Methodological approach and objectives

5.1 Research journey and justification of methodological approach

At the outset of this research project, I had planned to examine the use of big data in commercial online gambling from a privacy and data protection perspective. I began by conducting six semi-structured interviews with gambling industry professionals, employed by one gambling company in September 2018 (see Appendix I for an in-depth explanation of this research design). The aim of conducting these interviews was primarily exploratory in nature, to gain a more practical understanding of how big data was used by operators, from the perspective of those who work in the industry.

At the time, the available literature on the use of big data in an online gambling context was relatively abstract, particularly in relation to commercial uses (which is perhaps unsurprising given that more ‘profit-oriented’ uses of big data tend to be commercially sensitive). It was therefore my intention to obtain information of a practical nature from participants, including: the type of data collected; the algorithmic models used and reports into which this data is fed; the profiling techniques employed; and the types of decisions made on the basis of the analysis. This, I anticipated, would enable me to gain a more concrete understanding of how big data is used by online gambling operators to complement the information publicly available in the (mainly grey) literature. The objective of this method was exploratory. It was not to produce replicable generalisable findings, but to obtain an ‘on-the-ground’

understanding of the different ways in which player data was being used by operators, to better inform my analysis of the relevant legal issues from a privacy and data protection perspective.

As the research evolved, however, I decided to pursue a different course moving away from a narrow privacy and data protection focus. This change in direction was strongly influenced by three themes which I identified within the interview data: knowledge, risk and sustainability. These concepts were identified as being significant during my subsequent analysis of the data, months after the interviews were conducted, due to the prominence they played within the participant gambling company's processes, as well as in official regulatory documentation given the direction that gambling regulation has taken in recent years (as discussed in detail in Chapter Four).

Admittedly, at the beginning of this project I had assumed that the focus of the research would be centred largely on more typically 'controversial', commercial data practices. However, my experience in conducting the interviews was that participants were significantly more willing to share information about their data practices concerning player protection and ensuring 'sustainable' and therefore 'responsible' gambling. Indeed, I learned at a later date that one of the participants I had been scheduled to interview, the Head of Marketing, had been substituted for a member of the Enhanced Customer Due Diligence team.

This preference for sharing information concerning the use of data for player protection, together with the three themes which emerged and the changes that I was observing in the regulatory climate (see Chapter Four), strongly influenced the direction of this research towards examining the use of gamblers' data for 'player protection'. Indeed, the fact that the use of data in this way was regarded as uncontroversial, and that it was somewhat taken-for-granted (as discussed above) by the regulator, and now, it appeared, the industry, that data *should* be used in this way, prompted me to investigate this area further.

During this time, I was also becoming familiar with the work of Michel Foucault as part of the process of developing the conceptual framework for this thesis. I began to, quite organically, identify parallels between the themes identified from my interviews, in particular knowledge and risk, and the work of Foucault, in particular his later work on governmentality (set out in section 6 of this Introduction below). Further, whilst examining the legal and political discourse concerning the history of gambling regulation, including, for example, legislation, case law, policy documents, Parliamentary inquiries, and Hansard records, I identified further parallels between gambling regulation in Great Britain and Foucault's genealogical analysis of the 'governmentalization' of the modern state (as expanded upon below in section 7 of this chapter).

For these reasons, I made the decision to redirect my research and instead apply Foucauldian concepts and a genealogical approach to deconstruct and problematise the taken-for-granted assumptions around the use of data in gambling regulation and in doing so provide a perspective on the ways in which power is exercised for the creation of particular types of gambling subjects. The interviews were therefore instrumental in determining the direction that I ultimately decided to take with this research, and indeed the theme of 'sustainability' became an integral component of the present 'regime' of government which I present in Chapter Four.

5.2 A genealogical approach

My aim, then, during the course of this thesis, is to examine the different modes by which gamblers are made subjects⁵⁰ across the history of commercial gambling regulation. To do this, I apply a Foucauldian lens using, in particular, Foucault's later work on

⁵⁰ Foucault, 'The Subject and Power' (n 34).

governmentality⁵¹ to draw a parallel between the evolution of gambling legislation in Great Britain and the development of various mechanisms of power, and their deployment, according to Foucault's genealogical analysis of the modern state, which he termed the 'governmentalization of the state'.⁵² In doing so, I too apply a genealogical approach, by which (employing Mitchell Dean's definition) I mean a 'critical and effective history' of gambling regulation, which serves as a 'diagnostic of the present by "problematizing" taken-for-granted assumptions and an anti-anachronistic refusal to read the past in terms of the present'.⁵³ This research seeks to ask a genealogical question: 'what kind of political relevance can enquiries into our past have in making intelligible the "objective conditions" of our social present, not only in its visible crises and fissures but also the solidity of its unquestioned rationales?'.⁵⁴ In the context of gambling, then, I analyse the ways in which gambling has been regulated historically, together with the underlying rationalities and the supporting discourse on gambling, to provoke questions around the taken-for-granted assertions which permeate gambling regulation in the present.

Whilst this genealogical approach represents a form of critique, its purpose is not to unveil the insidious workings or schemes of a particular group. As Foucault summarises:

The main objective of these struggles is to attack not so much 'such and such' an institution of power, or group, or elite, or class but rather a technique, a form of power. This form of power applies itself to the everyday life which categorises the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognise and which others have to recognise in him. It is a form of power which makes individuals subjects. There are two meanings of the word 'subject': subject to someone else by control and dependence; and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to.⁵⁵

⁵¹ 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); 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).

⁵² Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 109.

⁵³ Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, SAGE Publications 2010) 3–4.

⁵⁴ Colin Gordon, 'Afterword' in Colin Gordon (ed), Colin Gordon and others (trs), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977 by Michel Foucault* (The Harvester Press 1980) 233.

⁵⁵ Foucault, 'The Subject and Power' (n 34) 781.

Thus, the objective of this genealogy is to evaluate the ‘law of truth’ being imposed, though importantly it is not to determine whether certain regimes are universally right or wrong, as judged by today’s standards. This form of critique aims to show that a particular standard of ‘truth’ which is relied upon at a given time is contingent. It is as much about ‘critique, problematisations, invention and imagination, about the changing shape of the thinkable, as it is about the “actually existing”’.⁵⁶ My genealogical approach essentially consists of a history of gambling subjecthood, which challenges the idea of an essence or origin, demonstrating that subjectivity is a historical phenomenon with a contingent nature.⁵⁷ In employing a genealogical approach, I aim to show *how*⁵⁸ the processes of subjection have changed over time, and in doing so reveal the contingency of the present form of subjectivity: the ‘safe’ gambler.⁵⁹

5.3 *An analytics of ‘government’*

This methodological approach can be described, again borrowing from Dean, as an ‘analytics of government’.⁶⁰ An analytics of government is a type of study concerned with analysing the specific conditions under which particular regimes of practices⁶¹ of ‘government’ (in the Foucauldian sense, as I define in the following section) emerge, continue and change. ‘Regimes of practices’ are the programmes of conduct which both prescribe ‘what is to be done’ and codify ‘what is to be known’.⁶² In conducting an analytics of government, I aim to show that ‘our taken-for-granted ways of doing things and how we think about and question them are not entirely self-evident’.⁶³ An analytics of government examines:

⁵⁶ Colin Gordon, ‘Governmental Rationality: An Introduction’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 8.

⁵⁷ Susan James, ‘Michel Foucault and Knowledge’ in Suki Finn (ed), *Women of Ideas: Interviews from Philosophy Bites* (Oxford University Press 2021) 210.

⁵⁸ Foucault, ‘Questions of Method’ (n 35) 74.

⁵⁹ James (n 57) 211.

⁶⁰ Dean (n 53) 30–37.

⁶¹ Foucault, ‘Questions of Method’ (n 35) 75.

⁶² *ibid.*

⁶³ Dean (n 53) 31; Foucault, ‘Questions of Method’ (n 35) 76.

How such a regime gives rise to and depends upon particular forms of knowledge and how, as a consequence of this, it becomes the target of various programmes of reform and change. It considers how this regime has a technical or technological dimension and analyses the characteristic techniques, instrumentalities and mechanisms through which such practices operate, by which they attempt to realise their goals, and through which they have a range of effects.⁶⁴

As Foucault himself put it, the objective is to:

See how men govern (themselves and others) by the production of truth (I repeat once again that by the production of truth I mean not the production of true utterances, but the establishment of domains in which the practice of true and false can be made at once ordered and permanent) [...] this is neither a history of knowledge-contents nor an analysis of the advancing rationalities which rule our society, nor an anthropology of the codifications which, without our knowledge, rule our behaviour. I would like in short to restate the production of true and false at the heart of historical analysis and political critique.⁶⁵

Thus, an analytics of government is concerned with questions of ‘how’; how we govern and are governed under certain regimes, and how these regimes emerge, operate and become transformed.⁶⁶ As a result, an analytics of government provides a perspective or interpretation on questions of power and authority, aiming to deduce an intrinsic logic that is not explicitly put forward but can be understood by examining its ‘operation as an intentional but non-subjective assemblage of all of its elements’ towards a ‘particular matrix of ends and purposes’.⁶⁷ In doing so, it is possible to draw out the existence of any “inconvenient” dissonance between the claims and objectives of programmes and rationalities of government and the “intentional but non-subjective” characters’ of a particular regime.⁶⁸ The analytics of government approach challenges centralised conceptions of power by examining the existing assemblages of regimes of government, the various divisions and distributions, as being ‘constructed, assembled, contested and transformed from multiple and heterogenous elements’.⁶⁹ The analytics will therefore attend to what these assemblages entail, examining the various ‘technologies’ or mechanisms of power as well as the underlying rationalities in operation.

⁶⁴ Dean (n 53) 31.

⁶⁵ Foucault, ‘Questions of Method’ (n 35) 79.

⁶⁶ Dean (n 53) 33.

⁶⁷ *ibid* 32; Gordon (n 54).

⁶⁸ Dean (n 53) 4.

⁶⁹ *ibid* 37.

Although this approach purports to offer no more than a single perspective, which may be considered a limitation, Dean clarifies that ‘this does not mean that it is a subjectivist, “anything goes” enterprise’ given the consistent focus on questions of ‘how’ regimes of practices operate.⁷⁰ Moreover, this acknowledgement is fundamental in employing an analytics of government: ‘to admit its perspectival nature is to say that there is no absolute standard of truth by which this analytics can be judged’.⁷¹ Evaluation of such an interpretation can also still be achieved through comparison of the understanding it provides with alternative accounts, for example.⁷²

Relatedly, an analytics of government does not set out to provide recommendations or strategies for addressing the problems it identifies; a characteristic which can also be regarded as a limitation. Its fundamental purpose, however, is as a form of critique. It sets out to create a space where it is possible to think differently about certain practices which, as discussed above, appear to be taken-for-granted. In doing so, it provides an opportunity for evaluation of whether and how these taken-for-granted practices might be transformed.⁷³ This exercise of critique is of value notwithstanding the lack of prescription for the form of any such transformation, as Foucault strongly emphasises:

certain people, such as those who work in the institutional setting of a prison [...] are not likely to find advice or instructions in my books that tell them ‘what is to be done’. But my project is precisely to bring about that they ‘no longer know what to do’, so that acts, gestures, discourses which up until then had seemed to go without saying become problematic, difficult, dangerous. This effect is intentional. [...] it seems to me that ‘what is to be done’ ought not to be determined from above by reformers, be they prophetic or legislative, but by a long work of comings and goings, by exchanges, reflections, trials, different analyses. [...] Critique doesn’t have to be the premise of a deduction which concludes: this then is what needs to be done. It should be an instrument for those who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal.⁷⁴

⁷⁰ Dean (n 53) 33.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid 48.

⁷⁴ Foucault, ‘Questions of Method’ (n 35) 84.

Relatedly, a further important objection to this methodological approach, and to Foucault's work in this regard, is that the 'programmes' of government may not come to be reflected in reality. In Foucault's own words: 'you say to me: nothing happens as laid down in these 'programmes'; they are no more than dreams, utopias, a sort of imaginary production that you aren't entitled to substitute for reality'.⁷⁵ Foucault's famous application of Bentham's Panopticon,⁷⁶ for example, as a model for the prison does not accurately depict the 'real-life' prison system of the nineteenth century, not least because Bentham's projected prison was never built, the British government regarding it as expensive and impractical.⁷⁷ However, this objection misses the point somewhat. Foucault's intention was not to describe 'real-life', but to analyse - through genealogy - the role that a particular regime or programme has had in shaping the present. As he explains:

The fact that this real life isn't the same thing as the theoretician's schemas doesn't entail that these schemas are therefore utopian, imaginary, etc. [...] For one thing, the elaboration of these schemas corresponds to a whole series of diverse practices and strategies [...] For another thing, these programmes induce a whole series of effects in the real (which of course isn't the same thing as saying that they take the place of the real): they crystallise into institutions, they inform individual behaviour, they act as grids for the perception and evaluation of things. It is absolutely true that criminals resisted the new disciplinary mechanisms in the prison; it is absolutely correct that the actual functioning of the prisons, [...] was a witches' brew compared to the beautiful Benthamite machine. [...] These programmings of behaviour [...] aren't abortive schemas for the creation of a reality.⁷⁸

The concern is therefore to identify and understand past programmes for forming subjects as 'fragments of reality which induce such particular effects'⁷⁹ in the way that people 'direct', 'govern' and 'conduct' themselves and others, in order to appreciate their role in shaping the present. Indeed, one of these possible 'effects' may present in the form of resistance or refusal to conform, defined by Foucault as 'counter-conduct'.⁸⁰

⁷⁵ Foucault, 'Questions of Method' (n 35) 81.

⁷⁶ As explained below in section 6.4.

⁷⁷ David Garland, 'What Is a "History of the Present"? On Foucault's Genealogies and Their Critical Preconditions' (2014) 16 *Punishment and Society* 365, 375.

⁷⁸ Foucault, 'Questions of Method' (n 35) 81-2.

⁷⁹ *ibid* 82.

⁸⁰ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 201-2.

Foucault's concept of counter-conduct represents an active 'sense of struggle against the processes implemented for conducting others',⁸¹ spanning a wide range of activities from general disobedience to revolt, and can assist in understanding how regimes of government are transformed. In Part I of this thesis, for example, I use the concept of counter-conduct to analyse the transformation of gambling regulation from a 'prohibitive regime' to an 'administrative regime' taking into consideration the actions of working-class gamblers who, for instance, actively supported and protected street bookmakers from being apprehended by the police. Given that the focus of this thesis as a whole, and Part II most specifically, is online gambling, however, I have been unable to similarly consider or apply the concept of counter-conduct in analysing later transformations in regimes of government. During my research, I did not encounter examples of 'disobedient' forms of conduct in relation to internet-based gambling and whilst this may be a by-product of the general trend towards the standardisation of online gambling opportunities⁸² - which would indeed be useful in the formation of safe gambling subjects and a sustainable gambling industry⁸³ - I am unable to conclude that such examples do not exist. One possible example of counter-conduct in this context may, for instance, be if gamblers were to choose not to participate in online gambling, and instead gambled in a land-based setting using cash, to avoid or minimise player-tracking and the application of data-driven, algorithmic solutions. Further qualitative research targeting this area specifically would be beneficial to address this gap.

5.4 Research questions

In summary, in conducting a genealogical analytics of government in relation to the regulation of online gambling, my objective is to answer the following research questions for each 'regime':

⁸¹ *ibid* 201.

⁸² See, for example, Schüll (n 43).

⁸³ See Chapter Four.

- How is the activity of gambling framed within the main discourse at the time?
- By what mechanisms or techniques is gambling regulated?
- How is the programme of regulation rationalised by the state?
- How is the normative, ideal standard of gambling described (where gambling is not prohibited) by the state or regulatory body?

In asking these questions, I aim to understand *how* governing operates during a particular regime and in doing so, determine *how* certain subjects are formed as types of agents with certain capacities and possibilities of action.⁸⁴ I consequently arrive at the identity of the ‘useful and valuable member of society’ across, I propose, four distinct periods of regulation: the prohibitive regime; the administrative regime; the liberal regime; and the sustainable regime.

6. Conceptual framework⁸⁵

In this section, I will outline and define the various types of power advanced by Foucault, most particularly during his later work on governmentality.⁸⁶ This will then be used throughout the thesis to highlight the parallels which, I argue, can be found between the evolution of gambling regulation in Great Britain since the sixteenth century, and the process which Foucault refers to as the ‘governmentalization of the state’:⁸⁷ a process whereby the type of power which Foucault terms ‘government’ comes to dominate over, and effectively redeploy towards new objects the earlier forms of power known as ‘sovereignty’ and ‘discipline’.

⁸⁴ Dean (n 53) 40.

⁸⁵ It should be noted that while I refer to Foucault’s work as my primary conceptual framework, Foucault himself said that his is not to be taken as a philosophical theory in itself. Instead it should be viewed as ‘philosophical fragments put to work in a historical field of problems’. Foucault, ‘Questions of Method’ (n 35) 74.

⁸⁶ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51); Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 51).

⁸⁷ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 108–9.

6.1 A 'triangle'

Foucault identified three distinct forms of power, each with its own characteristic techniques, which play a particular role in the formation of subjects. As mentioned above, these are: sovereignty; discipline; and government. Before defining each type of power, it is important to stress that although Foucault maps the evolution of power from the Middle Ages, setting each form of power in its historical context, the three forms do not represent 'a series of successive elements, the appearance of the new causing the earlier ones to disappear'.⁸⁸ The more modern mechanisms do not replace the earlier; in fact they work together in a supportive manner. Thus, 'apparatuses of security', which are mechanisms associated with the governmental type of power, are used to support the sovereign (also referred to as juridico-legal) and disciplinary mechanisms. They operate in a coordinated manner, with the relevant phenomenon to be regulated being targeted through the milieu.⁸⁹ Sovereignty and discipline are not thus eliminated by the emergence of a new art of government: 'on the contrary, it is made more acute'. Discipline, for example, becomes valued for the management of the population not just as a collective mass, but in depth, 'in all its fine points and details'.⁹⁰

We should not see things as a replacement of a society of sovereignty by a society of discipline, and then a society of discipline by a society, say, of government. 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.⁹¹

Crucially, these techniques work in a supplementary way; rather than as 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'.⁹² The key change which takes place is the correlation and dominant feature between the systems of power. While the

⁸⁸ *ibid* 8.

⁸⁹ *ibid* 10.

⁹⁰ *ibid* 107.

⁹¹ *ibid* 107–8.

⁹² *ibid* 8.

sovereign and disciplinary techniques, rationalities and institutions are retained to a degree, government seeks to reactivate and transform them toward a new end: the population.⁹³

6.2 'The ugly word "governmentality"'⁹⁴

The term 'governmentality'⁹⁵ has been used in two broadly distinct ways in the literature.⁹⁶ When first formulated by Foucault, in the fourth lecture of the *Security, Territory, Population* lecture series in 1978, 'governmentality' was conceptualised as a specific form of power arising in Western history during the eighteenth century, which 'has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential instrument'.⁹⁷ This first, specific meaning of the term progressively shifted in Foucault's work to mean, in a more general sense, 'a way or system of thinking about the nature of the practice of government (who can govern; what governing is; what or who is governed), capable of making some form of that activity thinkable and practicable'.⁹⁸ Also referred to as 'governmental rationality', this second meaning concerns the complex relation between thought and government, as a practice. The use of governmentality in this sense highlights how the thought involved in practices of government is both explicit - being embedded in language and other instruments used - and yet, crucially, at the same time it is taken for granted and thus not open to questioning.⁹⁹ It can be said that the first characterisation of governmentality is a historically specific version of the second.¹⁰⁰ It will be in this first, more precise sense that this introductory chapter will present the term 'governmentality'. As the thesis progresses, however, to consider the various rationalities

⁹³ *ibid* 8-9; Dean (n 53) 29.

⁹⁴ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 115.

⁹⁵ *ibid*.

⁹⁶ Dean (n 53) 24.

⁹⁷ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 108.

⁹⁸ Gordon (n 56) 3.

⁹⁹ Dean (n 53) 25.

¹⁰⁰ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 28.

which are employed in the government of gambling throughout history, the broader term will also be employed.

Governmentality is concerned with the practice of governing. In this context, then, the term ‘government’ is conceived widely as the activity of governing (as a verb), rather than in the narrow sense of *the* government: a unified political agency which acts upon the society, of which it is also a part.¹⁰¹ More specifically, the activity of governing is understood here as ‘the conduct of conduct’, where the expression ‘conduct’ itself assumes two meanings: (1) ‘conduct’ as a verb, referring to the activity of leading, directing, shaping or guiding others, or indeed oneself; and (2) ‘conduct’ as a noun, meaning the actions, behaviour and comportment of a person or, again, of oneself.¹⁰² Government therefore involves any attempt to direct human conduct towards a certain end or ends, and this almost invariably takes place in accordance with particular sets of norms.¹⁰³

Government in this sense is not simply the exercise of force or domination by an authority in a transcendental manner, as is characteristic of the type of power referred to as ‘sovereignty’ (defined below). Instead, the practice of government (and its relation to the second, broader notion of governmentality) as a way of subtly directing the conduct of those who are governed through particular techniques and tactics, according to various prevailing forms of thought regarding the nature of rule, and towards a particular end, can be called an ‘art’.¹⁰⁴ The object of undertaking ‘an analytics of government’ is thus the art of government: ‘it is a study of the organized practices through which we are governed and through which we govern ourselves’.¹⁰⁵ In this thesis I will undertake an analytics of the various regimes of government of the gambling industry that have developed in Great Britain, in order to

¹⁰¹ Mitchell Dean and Paul Henman, ‘Governing Society Today : Editors ’ Introduction’ (2004) 29 *Alternatives: Global, Local, Political* 483.

¹⁰² Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 193; Dean (n 53) 17.

¹⁰³ Dean (n 53) 18.

¹⁰⁴ *ibid* 28.

¹⁰⁵ *ibid*.

illuminate the practices which, as part of a particular art of government, seek to direct the conduct of gamblers according to a certain rationality and towards a specific end.

Foucault broadly defines governmentality, with its composite elements and objectives, as an:

ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument.¹⁰⁶

Governmentality is a form of power which Foucault identifies as coinciding with the emergence of political economy in the eighteenth century. It is concerned with governing - that is, directing the conduct of - the population as a whole, in a way which is economical, both fiscally and in terms of the use of power.¹⁰⁷ In this context, the population is regarded as a distinct entity, a 'living organism' composed of a number of 'natural' elements and dependant on many different factors.¹⁰⁸ The concept of the population is central to this form of power: it is at the same time the object and the subject of government, as will be expanded upon below. The final end of government is securing the wealth, happiness, longevity and health of the population as a whole, and this is achieved by acting, either directly or indirectly, upon the population itself.¹⁰⁹

The distinctive features of this form of power will now be explored by contrasting the relation of governmentality to the two other key forms of power identified by Foucault: sovereignty and discipline. Each of these forms of power has its own characteristic techniques and rationalities, which are 'reactivated' and 'transformed' in the exercise of governmentality.¹¹⁰

¹⁰⁶ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 108.

¹⁰⁷ Dean (n 53) 29.

¹⁰⁸ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 367.

¹⁰⁹ *ibid* 75.

¹¹⁰ *ibid* 9.

6.3 A society of sovereignty: a state of justice¹¹¹

In his 1978 ‘governmentality’ lectures, Foucault mapped the evolution of power historically, relating sovereign power to the ‘state of justice’ style of ruling associated with the feudal regime of the Middle Ages.¹¹² A type of power exerted by the reigning authority figure, most typically a monarch, sovereign power is perhaps representative of the most stereotypical conception of the term ‘power’, in the form of a repressive, violent force exerted over others. The end purpose of this sovereign form of power is internal to itself. That is, in exercising power, the sovereign is concerned with maintaining his own safety and the safety of his territory.¹¹³ Power is thus employed in this context to maintain the connection between the individual monarch and his seat, a link which is ‘purely synthetic’, having been acquired through conquest or inheritance: ‘there is no fundamental, essential, natural, and juridical connection between the Prince and his principality’.¹¹⁴ The synthetic nature of this connection between the sovereign and sovereignty means that it is vulnerable to threats, both externally from enemy territories and internally from the sovereign’s subjects who have no *a priori* reason to accept his rule, given its artificial, external disposition.¹¹⁵ Thus in exercising power, the sovereign is seeking to maintain, strengthen and protect his fragile connection to that sovereignty, constituted by the territory and the subjects who inhabit it: in other words, to remain in power.¹¹⁶

In contrast with government, the population is only relevant to the extent that it is composed of a collection of individual subjects who constitute the sovereign’s territory in terms of its strength and security.¹¹⁷ Those subjects are therefore the target of the sovereign’s efforts in exercising power, through instruments which are legal or juridical in nature. The predominant

¹¹¹ *ibid* 107–8.

¹¹² *ibid* 6, 108–9.

¹¹³ *ibid* 65.

¹¹⁴ *ibid* 91.

¹¹⁵ *ibid* 92.

¹¹⁶ *ibid*.

¹¹⁷ *ibid* 96.

strategy used by the sovereign in employing this form of power is termed by Foucault the ‘juridico-legal system’¹¹⁸ and involves the setting of laws which provide a binary division between acts which are permitted and those that are prohibited. Prohibited actions are then typically coupled with a type of punishment, for example execution or a monetary fine, for those who fail to obey the laws.¹¹⁹ This simplistic strategy relies on a relationship of obedience between the sovereign and his subjects, where the sovereign achieves the ends sought by exercising his will transcendently over those subjects in a homogenous, continuous and exhaustive manner.¹²⁰ Overall, the aim of the sovereign is to achieve absolute obedience to its laws in order to secure its position as the sovereign authority over a territory, and it is the laws themselves which are employed to enable this. In this way, law and sovereignty are absolutely united. The end of sovereignty is internal to itself and it rules through legal instruments which it itself creates.¹²¹

*6.4 A disciplined society: the administrative state*¹²²

A second distinct type of power identified and developed by Foucault primarily in his seminal book, *Discipline and Punish*,¹²³ which preceded his lectures on governmentality, is that which he terms ‘discipline’. Disciplinary power is associated with the administrative state, corresponding to a society which is controlled through strict rules and regulation.¹²⁴ Foucault refers to a number of illustrative examples of disciplinary institutions prevalent throughout society, including prisons, military organisations, schools and workshops.¹²⁵

Unlike sovereign power, discipline is concerned with regulating the conduct of individuals insofar as they are living beings, and not simply subjects which make up a territory. This

¹¹⁸ *ibid* 6.

¹¹⁹ *ibid* 5.

¹²⁰ *ibid* 96.

¹²¹ *ibid* 99.

¹²² *ibid* 110.

¹²³ Michel Foucault, *Discipline and Punish : The Birth of the Prison* (Allen Lane 1977).

¹²⁴ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 110.

¹²⁵ Foucault, *Discipline and Punish : The Birth of the Prison* (n 123) 138–140.

general strategy of politics, concerned with the lives of subjects as individual members of a population of the human species, and individual conduct as it is connected with issues of national policy, is referred to by Foucault as ‘biopower’ or ‘biopolitics’.¹²⁶ However, the concept of population in the exercise of disciplinary power differs significantly from that which is central to governmentality. Whereas governmentality views the population as a distinct entity with its own regularities irreducible to its individual members, such as birth and death rates, disciplinary power is only concerned with the population as a collection of individual bodily forces, the aggregate of which can be optimised.¹²⁷

The objective of the disciplinary mode of power specifically is ‘the relation of docility-utility’:¹²⁸ the production of submissive, individual ‘docile’ bodies which can be ‘subjected, used, transformed and improved’¹²⁹ so that they become useful.¹³⁰ Through discipline, the bodies’ forces are increased in terms of utility and, at the same time, diminished to ensure obedience. In this way, ‘disciplinary coercion establishes in the body the constricting link between an increased aptitude and an increased domination’.¹³¹

The disciplinary method achieves its ends through strict rules and training exercises which seek to effect a subtle coercion over the active body’s mechanisms - its ‘movements, gestures, attitudes, rapidity’¹³² - in order to achieve an optimum standard and, ultimately, to normalise this standard of behaviour amongst all subjects.¹³³ This standard, referred to as the ‘norm’, is in this context a formerly and externally prescribed model of action which is considered optimal for achieving the relevant, desirable result.¹³⁴ This process of normalisation, later rephrased by Foucault as ‘normation’, utilises the instruments of

¹²⁶ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 1; Gordon (n 7) 4–5. Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 1; Gordon (n 56) 4–5.

¹²⁷ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 70.

¹²⁸ *ibid* 137. Foucault, *Discipline and Punish : The Birth of the Prison* (n 123) 137.

¹²⁹ Foucault, *Discipline and Punish : The Birth of the Prison* (n 123) 136.

¹³⁰ *ibid* 138.

¹³¹ *ibid*.

¹³² *ibid* 137.

¹³³ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 56.

¹³⁴ *ibid* 57.

‘hierarchical observation, normalizing judgement and [...] examination’ to reinforce and ensure the success of the rules and training exercises which demonstrate this optimal standard.¹³⁵

‘Hierarchical, continuous and functional surveillance’ operates as a means of coercion and is therefore an inherent feature of disciplinary power.¹³⁶ Through surveillance it is possible to retain a hold over the body without a recourse to force or violence, unlike the sovereign mode of power.¹³⁷ Foucault here utilises Bentham’s famous architectural conception, the Panopticon, to illustrate the mechanics of this arrangement. By virtue of this Panoptic arrangement, whereby each individual is supervised from a central point which is ‘visible’ but ‘unverifiable’ – meaning that the individual cannot know whether they are being supervised but will know that they can be at any time – ‘a state of conscious and permanent visibility’ is created to assure the automatic functioning of power.¹³⁸ The individual consequently becomes a part of the power relation – ‘they are themselves the bearers’ of disciplinary power.¹³⁹

To those who are not conforming with the correct standard, the ‘normalizing judgement’ aspect of the disciplinary mechanism is applied.¹⁴⁰ This may be a ‘disciplinary punishment’ which, in contrast with the juridico-legal model, is essentially corrective in nature. Thus, the type of punishments used are typically those which are also exercises in themselves, in order to reduce the gap between the actual, non-conforming behaviour, and the norm, being the required standard of behaviour.¹⁴¹ Punishments are, however, only one element of this ‘double-system’ of correction, referred to by Foucault as a ‘gratification-punishment’ system.¹⁴² As well as punishing non-conformance, then, there is an emphasis on rewarding

¹³⁵ Foucault, *Discipline and Punish : The Birth of the Prison* (n 123) 170.

¹³⁶ *ibid* 171–2.

¹³⁷ *ibid* 177.

¹³⁸ *ibid* 201.

¹³⁹ *ibid*.

¹⁴⁰ *ibid* 179.

¹⁴¹ *ibid* 179–180.

¹⁴² *ibid* 180.

‘good’ behaviour so that individuals are motivated not only by fear of punishment but also by a desire to be rewarded.

This mechanism, in defining behaviour and performance according to opposed values of ‘good’ and ‘bad’, can be contrasted with the juridico-legal system, which simply divides between actions which are prohibited and those which are permitted. This value-based system creates a distribution between a ‘positive pole and a negative pole’ where all behaviour will fall on the spectrum between ‘good’ and ‘bad’,¹⁴³ making it possible to measure, in quantitative terms, the level of conformity displayed by the individuals against the prescribed norm.¹⁴⁴ This ‘value-giving’ measure thus identifies ‘the constraint of conformity that must be achieved’¹⁴⁵ as well as indicating the ‘external frontier of the abnormal’¹⁴⁶ - those individuals who are not normal by virtue of their deviance and therefore should be excluded as being incapable of conformity. This is the process of normalisation:¹⁴⁷ ‘the perpetual penalty that traverses all points and supervises every instant in the disciplinary institutions compares, differentiates, hierarchizes, homogenizes, excludes. In short it *normalizes*’.¹⁴⁸

The final element of the disciplinary technique - examination - completes the process of disciplinary normalisation. By combining the techniques of surveillance and normalizing judgment, it functions as a ‘normalizing gaze’, through which individuals are made visible and can be judged, making it possible ‘to qualify, to classify and to punish’.¹⁴⁹ Through continuous examination, an exchange of ‘knowledge’ is guaranteed: a particular form of ‘knowledge’ of the rules is transferred to the individual and at the same time, knowledge of the individual is extracted from them. Examination introduces a mechanism which links ‘a

¹⁴³ *ibid.*

¹⁴⁴ *ibid* 183.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid* 184.

¹⁴⁸ *ibid* 183 (Original emphasis.).

¹⁴⁹ *ibid* 184.

certain type of the formation of knowledge’ to ‘a certain form of the exercise of power’.¹⁵⁰ In contrast with sovereign power, which must operate in a manifest way in order to retain its power, disciplinary power is exercised ‘through its invisibility’, though simultaneously requires the visibility of its subjects, in order to ensure the hold of power over them. ‘The examination is the technique by which power, instead of emitting the signs of its potency, [...] holds them in a mechanism of objectification’:¹⁵¹ it is the inversion of visibility which assures the exercise of disciplinary power.¹⁵²

The examination process also involves the administrative documentation of this knowledge in meticulous detail, making each individual a ‘case’ which ‘at one and the same time constitutes an object for knowledge and a hold for the branch of power’.¹⁵³ Thus, the process of ‘individualisation’ is realised, whereby it is possible to describe, judge, measure and compare the individual with others, ‘in his very individuality’.¹⁵⁴ At the same time, it is the individual who must be ‘trained or corrected, classified, normalized [or] excluded’.¹⁵⁵ The individual is therefore the ultimate object of disciplinary power, as well as the instrument:

[Disciplinary power] does not link forces together in order to reduce them; it seeks to bind them together in such a way as to multiply and use them. Instead of bending all its subjects into a single uniform mass, it separates, analyses, differentiates, carries its procedures of decomposition to the point of necessary and sufficient single units. It ‘trains’ the moving, confused, useless multitudes of bodies and forces into a multiplicity of individual elements [...] Discipline ‘makes’ individuals; it is the specific technique of power that regards individuals as both objects and as instruments of its exercise.¹⁵⁶

In contrast with the sovereign model of a society composed of individual, juridical subjects, who are mere ‘atom[s] of an “ideological” representation of society’, the disciplinary technique regards individuals in a society as ‘correlative elements of power and knowledge’.¹⁵⁷ Disciplinary power is the individual and, as a consequence, collective

¹⁵⁰ *ibid* 187.

¹⁵¹ *ibid*.

¹⁵² *ibid* 189.

¹⁵³ *ibid* 189–91.

¹⁵⁴ *ibid* 191.

¹⁵⁵ *ibid*.

¹⁵⁶ *ibid* 170.

¹⁵⁷ *ibid* 194.

regulation and coercion of the bodies' capacities¹⁵⁸ towards a particular ideal. In this way the nature of power is inverted: instead a violent, negative force, power becomes productive:

We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.¹⁵⁹

Thus, rather than treating individuals as subjects of the state over which a violent form of power will be transcendently exercised by the sovereign, the exercise of power becomes concerned with producing certain types of knowledge, behaviour and, ultimately, subjects. Each individual subject will be disciplined into conforming to a particular ideal standard and, as a result, a collective body of disciplined subjects is produced which uniformly conforms to this norm.

*6.5 Security: a state of government*¹⁶⁰

One of the main areas of focus in Foucault's 1978 lectures is the phenomenon of 'security' and its relation to sovereignty and discipline. Apparatuses or mechanisms of security are the main instruments which are used in the exercise of 'government' or 'governmentality',¹⁶¹ an activity which is entirely different in nature from the sovereign action of reigning, ruling, commanding, or 'laying down the law'.¹⁶² Under this distinct form of power, the population is not controlled by an exhaustive system of prohibition, regulation or coercion.¹⁶³ Instead, the main task of government involves 'employing tactics rather than laws' and 'as far as possible employing laws as tactics; arranging things so that this or that end may be achieved through a certain number of means'.¹⁶⁴ This, for Foucault, marks an important break:

Whereas the end of sovereignty is internal to itself and gets its instruments from itself in the form of law the end of government is internal to the things it directs (*diriger*); it is to

¹⁵⁸ *ibid* 169.

¹⁵⁹ *ibid* 194.

¹⁶⁰ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 110.

¹⁶¹ *ibid* 108.

¹⁶² *ibid* 115–6.

¹⁶³ *ibid* 366.

¹⁶⁴ *ibid* 99.

be sought in the perfection, maximization, or intensification of the processes it directs, and the instruments of government will become diverse tactics rather than laws. Consequently, law recedes; or rather, law is certainly not the major instrument in the perspective of what government should be.¹⁶⁵

It is these ‘tactics’ or techniques which Foucault refers to as mechanisms of security; types of governmental intervention which seek to work through and within the population, rather than being imposed from above. The concept of the population is thus central to the exercise of governmentality, as both its subject and its object.

6.5.1 The population

This approach regards the population as a living organism in itself, with its own ‘naturally-occurring’ elements. As a result it becomes possible to rationally analyse the extent of any dependence on multiple and, crucially, artificially modifiable, factors. The ‘mieu’, being the social environment or social context in which the population exists, becomes both the medium of an action or intervention and the element in which it circulates.¹⁶⁶ It is made up of the series of possible uncertain events which are to be controlled by the apparatuses of security.¹⁶⁷ The milieu appears as a field of intervention, but instead of affecting individuals as legal subjects capable of voluntary action (in the case of sovereign control) or as bodies capable of a certain performance (as with disciplinary methods) in the case of governmentality, the intervention is designed to take effect at the level of the population. The target of the interventions are the events which are created by the population and the ‘quasi-natural’ events which surround them.¹⁶⁸

The aim of this approach is naturalness of the human species within the ‘political artifice of power’.¹⁶⁹ The physical and moral existence of the population is governed through political and economic interventions which aim to alter the course of ‘things’ in a ‘natural way’, and

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid* 21.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid* 22.

the milieu becomes a determining factor of human nature.¹⁷⁰ Accordingly, this set of elements can be used to provide a ‘foothold’ for diverse types of concentrated interventions through mechanisms of security, the form of which is not limited to rules and regulations but will include non-legal methods, such as public campaigns. Ultimately the concerted interventions seek to modify attitudes, ways of living and ways of doing things in a way which encourages conformity with particular norms with regard to the living conditions of the population.¹⁷¹ This method of normalisation, which differs from the disciplinary ‘normation’, will be considered in further detail below. By treating the population as a living organism with particular features, it is ‘reinserted’ into the general framework of biopolitics, with its specific forms of knowledge and technique.¹⁷²

Instead of prohibiting and disciplining the circulation of a phenomenon through law, apparatuses of security are employed in a way so as to, firstly, allow freedom of circulation, with a diverse set of mechanisms to support and correct the circulation applied subsequently in a more indirect way.¹⁷³ In order to inform and determine the type of additional support required, detailed analysis of the phenomenon is undertaken but this analysis moves backward from the phenomenon in question in order to understand everything that happens to it in the ‘natural’ course of things.¹⁷⁴ The apparatus of security is then applied in a way which attempts to arrange the ‘natural’ elements, so as to compensate for a particular phenomenon, gradually correcting, checking, limiting and ultimately nullifying it.¹⁷⁵ Rather than prohibiting or preventing a particular phenomenon from occurring in advance, as in the case of a juridical or disciplinary system of power, the apparatus of security seeks to work within the ‘reality’ or ‘natural course of things’. The intervention is not therefore visible and the

¹⁷⁰ *ibid* 23.

¹⁷¹ *ibid* 366–7.

¹⁷² *ibid* 367.

¹⁷³ *ibid* 34.

¹⁷⁴ *ibid* 36.

¹⁷⁵ *ibid* 40.

change appears to occur naturally; unlike the juridical or disciplinary intervention which imposes itself in an artificial manner.¹⁷⁶

Governmentality requires an analysis of what happens ‘naturally’ and a program for what should happen.¹⁷⁷ This requires a broadened analysis, which must seek to identify and understand how and why the protagonists act in a certain way in relation to a particular phenomenon, in order to calculate and predict their actions in certain scenarios. In relation to a market environment, for example, the economic behaviour of the consumers and producers becomes central.¹⁷⁸

This approach is distinct from the disciplinary process, which seeks to artificially order bodies conceived as an ‘empty space’ to be ordered and acted upon so as to impose the norm.¹⁷⁹ The disciplinary model is described by Foucault as ‘centripetal’: it isolates a particular space upon which its power is concentrated and functions. Everything in this discrete space is strictly regulated; nothing is permitted to escape this tight form of regulation, which stipulates the standards according to which individuals are obliged to act.¹⁸⁰ In contrast, Foucault describes apparatuses of security as being ‘centrifugal’: organising and regulating an expanding field of pre-existing elements which are allowed to develop into wider ‘circuits’. A more *laissez faire*, liberal approach is therefore required, at least initially, in order to understand the events at the level of the ‘effective reality’. Value perceptions are also abandoned: the phenomenon of interest is no longer viewed as good or bad, but as an inevitable, natural process to be understood, and subsequently guided.¹⁸¹ The mechanisms of security are then designed to work on the basis of, and in support of, this ‘reality’ so that the two work together. Where juridical methods prohibit and disciplinary methods prescribe,

¹⁷⁶ *ibid* 36–7.

¹⁷⁷ *ibid* 40.

¹⁷⁸ *ibid*.

¹⁷⁹ *ibid* 19.

¹⁸⁰ *ibid* 44–5.

¹⁸¹ *ibid* 44–6.

governmentality seeks to regulate the phenomenon by responding to elements of the ‘reality’ and working *within* it, rather than *against* it, aiming to encourage the various components of the reality to work in relation to each other.¹⁸²

Taking the effects specific to population into consideration, making them pertinent [...] is, I think, a very important phenomenon: the entry of a ‘nature’ into the field of techniques of power, of a nature that is not something on which, above which, or against which the sovereign must impose just laws. There is not nature and then, above nature and against it, the sovereign and the relationship of obedience that is owed to him. We have a population whose nature is such that the sovereign must deploy reflected procedures of government within this nature, with the help of it, and with regard to it. In other words, with the population, we have something completely different from a collection of subjects of right differentiated by their status, localization, goods, responsibilities, and offices: [we have] a set of elements that, on one side, are immersed within the general regime of living beings and that, on the other side, offer a surface on which authoritarian, but reflected and calculated transformations can get hold.¹⁸³ [...]

The ‘population’ is thus regarded as a distinct, natural entity which is more than a sum of its parts. The features and regularities of the population must be known and acted *through* in the process of government to ensure that the regulation occurs ‘naturally’:

From one direction, then, population is the human species, and from another it is what will be called the public. [...] The public [...] is the population seen under the aspect of its opinions, ways of doing things, forms of behaviour, customs, fears, prejudices, and requirements; it is what one gets a hold on through education, campaigns, and convictions. The population is therefore everything that extends from biological rootedness through the species up to the surface that gives one a hold provided by the public. [...] we have here a whole field of new realities in the sense that they are the pertinent elements for mechanisms of power, the pertinent space within which and regarding which one must act.¹⁸⁴

The constitution of the population must therefore be understood in terms of its variables, such as laws, commerce, and material surroundings, upon which it is dependent. Though such variables appear removed from the individuals within the population, through analysis and calculation they are accessible to techniques of transformation and modification which aim to direct the interplay between these variables, and ultimately have an indirect, ‘natural’ effect on the population and its behaviour.¹⁸⁵ As well as informing the ‘natural’ variables which impact upon the population, observation and analysis techniques are used to understand and predict the events and phenomena of the population which otherwise would appear

¹⁸² *ibid* 47.

¹⁸³ *ibid* 75.

¹⁸⁴ *ibid*.

¹⁸⁵ *ibid* 71–2.

unpredictable; average rates of accidents or mortality, for example, can be calculated through observation and analysis.¹⁸⁶ Finally, the concept of desire becomes central to the management of the behaviour of the population:

The spontaneous and regulated play of desire will allow the production of an interest of something favourable for the population. The production of a collective interest through the play of desire is what distinguishes both the naturalness of the population and the possible artificiality of the means one adopts to manage it.¹⁸⁷

Governmentality seeks to address the unpredictability of individual behaviour by managing populations in part on the basis of their ‘desire’; a collective interest can be produced so that the behaviour of the population is shaped in a way which is considered favourable for that population. In other words, the population is choosing to behave in a certain way ‘autonomously’ because they want to. This is entirely opposite to the mode of sovereign governance, which is concerned with how to say ‘no’ to the subjects’ desire in a way which is legitimate. Governmentality, on the other hand, is concerned with ensuring the population says ‘yes’ to this desire, but in a way which produces the necessary benefit for all.¹⁸⁸

6.5.2 Normalisation

In contrast with the disciplinary process which Foucault called ‘normation’,¹⁸⁹ the norm - towards which the population is being indirectly guided - is located within the reality of the phenomenon itself. Instead of beginning with a predetermined optimum level as the norm, carrying out training to achieve this norm and bluntly distinguishing the normal from the abnormal,¹⁹⁰ governmentality utilises a norm which is deduced from within the population, through observation and statistical analysis of the ‘normality’ of the particular phenomenon.¹⁹¹ The analysis first identifies the probability of the phenomenon occurring at the general population level, in order to establish a ‘normal’ rate. Further analysis can then,

¹⁸⁶ *ibid* 74.

¹⁸⁷ *ibid* 73.

¹⁸⁸ *ibid*.

¹⁸⁹ Foucault, *Discipline and Punish : The Birth of the Prison* (n 115) 170.

¹⁹⁰ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 63.

¹⁹¹ *ibid* 60–1.

where required, break down the instances of the phenomenon categorically (for example: by age; location; occupation) to determine various different degrees of ‘normality’, as compared to each other and the general population rate.¹⁹² Those distributions which are considered to be most favourable in line with relevant governmental rationalities and objectives will then be prioritised as the ‘norm’, and techniques of intervention will be applied to the outlying distributions, which are accordingly considered to be unfavourable, or deviant, in an attempt to bring them in line with this norm. The interplay between the different distributions of normality is therefore the process of normalisation.¹⁹³

The notion of risk is also invoked at this stage.¹⁹⁴ Through this quantitative categorical analysis, it becomes possible to identify, by reference to the categorical analysis of the phenomenon, the probability or level of ‘risk’ for each individual based on their own characteristics. This analysis also reveals ‘zones’ of higher and lower risk to assist in identifying the most dangerous or ‘at risk’ categories.¹⁹⁵ The apparatuses of security can then be applied to the natural elements of the phenomenon in an attempt to regulate the flow of circulation so that the elements work in relation to each other, sifting the favourable elements from the unfavourable. The goal is that the elements which are inherently riskier act to cancel themselves out,¹⁹⁶ while allowing the continued circulation of the elements which are required or desirable.¹⁹⁷

Rather than imposing interventions upon an empty, artificial space, as with disciplinary methods, governmentality relies on the material ‘givens’ which already ‘naturally’ exist. It seeks to maximise the positive elements in existence and minimise those which are more

¹⁹² *ibid* 62.

¹⁹³ *ibid* 62–3.

¹⁹⁴ *ibid* 60.

¹⁹⁵ *ibid*.

¹⁹⁶ *ibid* 65.

¹⁹⁷ *ibid* 29.

risky or inconvenient, in the knowledge that they can never be fully suppressed.¹⁹⁸ Planning and working with natural ‘given’ elements, it is not possible to determine the future occurrence of a particular phenomenon to a certainty. Mechanisms of governmentality therefore work on the basis of estimated probabilities – an essential characteristic of this method.¹⁹⁹ In other words, apparatuses of security attempt to plan a milieu in terms of a series of possible events or elements, which will be regulated within a flexible framework.²⁰⁰

According to Foucault, the emergence and application of statistics to the perspective of the population was instrumental in enabling this mode of power to develop. Through statistical analysis, the specific phenomena of the population is able to be quantified, it being gradually revealed that ‘the population possesses its own regularities: its death rate, its incidence of disease, its regularities of accidents’.²⁰¹ Moreover, statistics are able to show that the population involves specific effects at an aggregate level: ‘major epidemics, endemic expansions, the spiral of labour and wealth’, and through its ‘movements, its customs and its activity, population has specific economic effects’.²⁰² The population therefore becomes the object which

government will have to take into account in its observations and knowledge, in order to govern effectively in a rationally reflected manner. The constitution of a knowledge (savoir) of government is absolutely inseparable from the constitution of a knowledge of all the processes revolving around population in the wider sense of what we now call “the economy”.²⁰³

Decisions as to how and when to intervene in relation to a particular phenomenon, through mechanisms of security, are governed by certain questions concerned with keeping the particular phenomenon to a level which is acceptable for the population, both socially and economically. This is based on the calculation of an average level which is considered to be

¹⁹⁸ *ibid* 19.

¹⁹⁹ *ibid* 20.

²⁰⁰ *ibid*.

²⁰¹ *ibid* 104.

²⁰² *ibid*.

²⁰³ *ibid* 106.

optimal for the functioning of the population.²⁰⁴ These decisions will, for example, take into account: the average rate of a particular phenomenon; statistical predictions regarding the rate of occurrence in a particular society; associated criteria which can affect this rate, either increasing or decreasing it; and the overall cost of this phenomenon to society as compared to the cost of repressing it. This will inform the calculation of how much can be tolerated.²⁰⁵

Above all, the population is the final *end* of government as well as the *instrument* of governance:

What can the end of government be? Certainly not just to govern, but to improve the condition of the population, to increase its wealth, its longevity and its health. And the instruments that government will use to obtain these ends are, in a way, immanent to the field of population; it will be by acting directly on the population itself through campaigns, or indirectly, by, for example, techniques that, without people being aware of it [...] direct the flows of population to this or that region or activity.²⁰⁶

Population thus appears as an instrument and end of government, rather than the source of the sovereign's strength:

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. Interest as the consciousness of each of the individuals making up the population, and interest as the interest of the population, whatever its individual interests and aspirations may be of those who comprise the population, will be the ambiguous fundamental target and instrument of the government of populations.²⁰⁷

As in the case of disciplinary power, then, the nature of power here is productive. Governmentality seeks to frame the population in apparatuses of security which ensure the optimal functioning of vital social and economic processes as determined to exist within the population. The forces and capacities of the population as a whole become resources which can be fostered, utilised and optimised.²⁰⁸ This leads to the concept of freedom as being integral to the functioning of governmentality.

²⁰⁴ *ibid* 4–5.

²⁰⁵ *ibid*.

²⁰⁶ *ibid* 105.

²⁰⁷ *ibid*.

²⁰⁸ Dean (n 53) 29.

6.5.4 Government and freedom

Freedom, both as an ideology and a technique of government, is understood by Foucault not as freedom from interference, but as a correlative of the deployment of apparatuses of security.²⁰⁹ It is an essential component for the proper functioning of this approach to governance:

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 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.²¹⁰

Government as the 'conduct of conduct' is an activity which seeks to shape a field of possible action, thus implying that the object of the governance – the person being governed – is an actor with some capacity to act. The activity of government therefore attempts to shape the exercise of this freedom.²¹¹

The population is governed from a distance, through the establishment of apparatuses of security, which indirectly guide the conduct of the population towards a limited number of possible ends. Foucault refers to Guillaume de le Perriere's text to describe governmental management as 'the right disposition of things arranged so as to lead to a suitable end'.²¹² As outlined, government, as an activity, is no longer related simply to the territory, but to the population as a 'complex of men and things'.²¹³ Those 'things' are the people in their

²⁰⁹ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 48.

²¹⁰ *ibid* 48–9.

²¹¹ Dean (n 53) 21–3.

²¹² Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 96 citing Guillaume de La Perriere (1499-1553), *Le Mirroire politique* (Lyon: Mace Bonhomme, 1555; 2nd edn, Paris: V Norment and J Bruneau, 1567; 3rd edn, Paris: Robert le Magnier, 1567); English edition: *The Mirror of Police* (London: Adam Islip, 1589 and 1599).

²¹³ *ibid*.

relationships and complex involvements with things such as ‘wealth, resources, means of subsistence, and of course the territory with its borders, qualities, climate, dryness, fertility, and so on’.²¹⁴ ‘Things’ are also people in their relationships with ‘customs, habits, ways of acting and thinking. Finally, they are people in their relationships with things like accidents, misfortunes, famine, epidemics and death’.²¹⁵ Moreover, since the purpose of government is to arrange ‘things’ towards ‘a suitable end’,²¹⁶ governmentality involves the arrangement of ‘things’ through apparatuses of security towards an end which is suitable for that particular ‘thing’, thus implying a ‘series of different finalities’ which are to be achieved.²¹⁷

The point is not that people are only apparently free ‘while in fact secretly manipulated by the cunning of power’.²¹⁸ Instead, the dynamics of the relationship between power and autonomy are conceptualised differently. Given that power can be productive, and not only repressive, ‘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’.²¹⁹

7. The ‘governmentalization’ of gambling regulation and thesis outline

In his 1977-78 lectures, Foucault gives a detailed account of a process he terms the ‘governmentalization of the state’. This, as discussed, is the process by which the state of justice of the Middle Ages (characterised by a reliance on predominantly juridical forms of

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ *ibid.* 98.

²¹⁷ *ibid.* 99.

²¹⁸ Jacopo Martire, *A Foucauldian Interpretation of Modern Law* (Edinburgh University Press 2017) 2.

²¹⁹ *ibid.*

power) was transformed into the administrative state (corresponding to a society of regulation and discipline) and gradually ‘governmentalized’ into the modern ‘state of government’²²⁰

that is no longer essentially defined by its territoriality, by the surface occupied, but by a mass: the mass of the population, with its volume, its density, and for sure the territory it covers, but which is, in a way, only one of its components. This state of government, which essentially bears on the population and calls upon and employs economic knowledge as an instrument, would correspond to a society controlled by apparatuses of security.²²¹

Importantly, this transformation was not a substitution from a ‘territorial’ state to a ‘population’ state; instead, it involved a shift in emphasis, and the appearance of new objectives and techniques.²²² The genesis of governmentality - as the conduct of conduct - is found by Foucault firstly in an archaic, and fundamentally benevolent, form of power which he calls ‘pastoral power’. This approach is characterised by a shepherd leading, watching and caring for their flock towards a specific objective: their salvation.²²³ The fifteenth and sixteenth centuries, according to Foucault’s genealogy, witnessed a general crisis of the pastorate and the emergence of *raison d’état* (reason of state) as a governmental rationality, passing from ‘an art of government whose principles were derived from traditional virtues [...] to an art of governing that finds the principles of its rationality and the specific domain of its application in the state’.²²⁴ It is here, with the rationality of *raison d’état*, that my genealogy of gambling regulation begins.

The thesis is presented in two parts. In Part I, I focus on gambling ‘then’: the historical legal regimes in force prior to the enactment of the present legislative framework (the Gambling Act 2005). This part comprises two chapters, in which I examine the early systems of regulation in their historical context. In doing so, I seek to determine the underlying rationalities of government which are applicable and, accordingly, illustrate the form that the subject should take in order to become a ‘useful and valuable member of society’.

²²⁰ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 51) 109–10.

²²¹ *ibid* 110.

²²² *ibid* 363.

²²³ *ibid* 364.

²²⁴ *ibid* 365.

Beginning in the sixteenth century, Chapter One examines the regime of gambling regulation pursuant to which most forms of commercial (particularly working-class) gambling were prohibited under the criminal law. I start with an overview of the dominant discourse during this period corresponding with the prohibitive regime: that gambling is an undesirable activity which ought to be avoided, particularly by members of the lower classes. I then analyse the mainly juridico-legal instruments used to control commercial gambling (through a Foucauldian lens), together with the multiple underlying rationalities for this approach. These rationalities, I argue, align with an early episode of the *raison d'état* governmentality. In the chapter, I go into further detail about the main features of this governmental rationality, which is most essentially concerned with protecting and maximising the strength of the state. Through this examination, I arrive at the identity of the subject - the 'useful and valuable member of society' - under this regime as being someone who *does not* gamble. Instead, the subject should participate in activities that contribute to the strength of the state (for instance, by practising archery or working), which according to the dominant narrative, gambling does not.

In Chapter Two, I analyse the subsequent regime of gambling regulation introduced from 1960. This legal framework was introduced to apparently 'liberalise' commercial gambling from the criminal law, instead subjecting commercial gambling activity to a set of strict rules and regulations. Whilst there had been, by this point, a remarkable shift in the dominant discourse around the gambling, with tropes framed around immorality becoming significantly less influential, the activity was still not regarded as desirable or something to be encouraged. This is most clearly illustrated by the central 'demand' principle underlying this regulatory regime: facilities for commercial gambling could only be offered to meet existing demand, and stimulation of new demand was not permitted. This mode of gambling regulation, I argue, aligns with the governmental rationality Foucault refers to as 'police state'; a

governmentality which is characterised by the administrative state. ‘Police’ is a technology which is ‘installed’²²⁵ upon the *raison d'état* rationality to manage its internal functions and continue to maximise the state’s strength. This rationality applies primarily mechanisms of ‘discipline’, including strict rules and regulations, and focuses upon the lives, activities and occupations of individual members of the population insofar as they contribute to the state’s strength. I use this analysis to again determine the identity of the subject being formed under this regime of government. A ‘useful and valuable member of society’ during this period, I argue, still ideally does not gamble, (since gambling is not, at this stage, seen to contribute to the state). However, if an individual is naturally inclined to do so, then their gambling activity is to be closely regulated so that it stays within acceptable, pre-defined forms. In this closely regulated form, gambling will be tolerated provided it is in moderation and does not impact upon the gambler’s ordinary occupation.²²⁶ In other words, the identity of the subject under this regime can be represented as the ‘tolerated’ gambler.²²⁷

I then move on to Part II, which is focused on gambling ‘now’ under the Gambling Act 2005, concentrating in particular on online gambling. In paying attention to online gambling specifically, I aim to show how internet technology - and in particular the developments in big data analytics - have come to play a significant, and intimate, role in the government of gamblers, from both a commercial and regulatory standpoint. In Part II, I also incorporate illustrative quotations taken from the interviews that I conducted with professionals within the online gambling industry. As explained above, whilst these interviews were primarily used for exploratory, scoping purposes towards the beginning of this research project, with observations subsequently followed up within the discourse itself, they were nonetheless instrumental in influencing the direction I ultimately chose to follow. Indeed, it was during

²²⁵ *ibid* 278.

²²⁶ Royal Commission on Gambling (1976-8), *Royal Commission on Gambling. Final Report. (the Rothschild Report). Volumes 1-2* (Cmnd 7200, 1978).

²²⁷ Borrowing from Department for Culture Media and Sport and Gambling Review Body, *Gambling Review Body Report (The Budd Report)*. (Cm 5206, 2001).

these interviews that I became aware of the importance of ‘sustainability’ in the current mode of regulation, as detailed in Chapter Four. (I provide further explanatory details regarding the interviews I conducted in Appendix I.)

In Chapter Three, I resume the genealogy at the turn of the new millennium, which saw a radical departure from the pre-existing regulatory position in the form of a new, comprehensive legislative framework: the Gambling Act 2005. I review the prevalent discourse during this period, in which the previously unfavourable character of gambling was completely reformed: gambling was instead deemed an ordinary leisure activity which consumers should be free to enjoy, and a legitimate industry which offered significant economic benefits to the state. The techniques used to govern gambling activity under this ‘facilitative’ regime, which regarded competition and the market as the most effective regulatory instruments, are examined (again through a Foucauldian lens). At this point, I argue that we have arrived at Foucault’s ‘governmentalized’ modern state. The rationalities represented during this period, I consider, align with ‘liberal’ governmentalities, including neoliberalism in particular, whereby the freedom to gamble within a newly competitive, data-driven market is respected while being shaped so that it is exercised in an informed, rational and responsible way in accordance with market principles. The ‘useful and valuable member of society’ under this regime, I propose, assumes the identity of the responsible gambler. The responsible gambler participates in the gambling market, while making sure they are fully informed of any risks involved and taking steps to ensure they remain in control of their gambling. Those that do not meet this standard are classified as ‘problem gamblers’, requiring clinical intervention to discipline and correct their deviant behaviour and beliefs.

In Chapter Four, I propose that we have now moved on from where Foucault left his genealogy of the ‘governmentalization’ of the state. The present regulatory approach represents a new regime under which gambling is framed in conflicting terms, as both an

enjoyable leisure pursuit for the majority and, at the same time, a public health issue necessitating greater levels of regulatory intervention, and a precautionary approach. This regime - which I represent visually in the form of the Sustainable Gambling Model - involves a complex framework of regulatory mechanisms, placing greater responsibility on the industry to ‘know their customers’ and ‘use what they know to protect them’.²²⁸ Thus, data-driven technology originally developed by the industry for the maximisation of gambling profits must now be re-purposed, to continuously monitor gamblers and identify those who are ‘at risk’ of harm from gambling, so that their behaviour can be corrected before it becomes problematic. These direct interventions are supported by mechanisms of security, which conduct all gambling behaviour towards ‘safety’ through the environment. I examine the multiple, potentially conflicting, rationalities in operation which seem to assume both a neoliberal character and, at the same time, a partial return to the ‘pastorate’. The outcome of this regime, I argue, is the production of a sustainable gambling economy which creates an industry of ‘responsible’ operators who ‘protect’ their customers and help them to stay on track. Fundamentally, however, it also produces a population of ‘safe’ gambling subjects who *know* that ‘when the fun stops’, they *should* stop.

I conclude this thesis by offering some reflections on the parallels between the way in which gambling is now regulated under the present regime, and the governmental approach to the current public health emergency during the Covid-19 pandemic. In particular, I consider the themes of safety, risk and the responsabilisation of commercial operators, as well as the importance assigned to data-driven solutions, as having been central to the pandemic response.

²²⁸ Gambling Commission, ‘Raising Standards for Consumers - Enforcement Report 2018/2019’ (n 41) 5.

Part I

Gambling *Then*

From 1541 to 2005

Chapter One

The Prohibitive Regime (1541-1960)

1. Introduction

In this chapter, I analyse the various forms of regulation which were introduced to control commercial gambling in Britain from the sixteenth century until the enactment of the Betting and Gaming Act 1960. The chapter begins by firstly considering the various but related ways in which the activity of gambling was regarded, contributing to the dominant narrative across this period: that gambling is an undesirable activity which ought to be avoided, particularly by members of the working class. I then examine, through a Foucauldian lens, the main instruments used to control, and predominantly prohibit, commercial gambling, together with their underlying rationalities. These, I suggest, align broadly with an early episode of the governmental rationality that Foucault refers to as *raison d'état* (reason of state). That is, I argue that these steps are taken to control, and primarily suppress, commercial gambling during this first period in order to protect and increase the strength of the state.

Through this examination, I arrive at the identity of the subject - the 'useful and valuable member of society' in this era – as being someone who *does not* gamble, instead engaging in activities that contribute to the strength of the state (which, according to the dominant narrative, gambling does not). Lastly, I consider the effects of this regime in practice in order to better understand its transformation to the administrative regime in Chapter Two. In practice, the various prohibitive measures were not particularly successful in suppressing working-class gambling. This, I suggest can be attributed in part to the absence of knowledge about the population as a whole; anti-gambling policies being based on unquestioned

assumptions regarding the nature of working-class gambling. This element - knowledge - is crucial for the management of the state to maintain and increase its strength *internally*, and is therefore a key factor in understanding the transition from a regime of prohibition, spanning well over 400 years, to one of regulation in 1960.

2. The 'horrid vice of gaming'¹

Gaming is an enchanting witchery, gotten betwixt Idleness and Avarice : An itching Disease, [...] It hath this ill property above all other Vices , that it renders a Man incapable of prosecuting any serious action , and make him always unsatisfied with his own condition , he is either lifted up to the top of mad joy with success , or plung'd to the bottom of despair by misfortune, always in extreams, always in a storm ; this minute the Gamester's countenance is so serene and calm , that one would think nothing could disturb it, and the next minute so stormy and tempestuous that it threatens destruction to itself and others ; and as he is transported with joy when he wins , so losing he is tost upon the billows of a high swelling passion , till he hath lost fight both of sense and reason.²

This quote from 1674 illustrates the diverse, colourful and predominantly negative ways in which gambling was characterised during this period. Historically, gambling was overwhelmingly represented as a fundamentally and inherently immoral, problematic activity which should be avoided. However, a varied selection of terms have been employed over the years to describe gambling, each with a related but distinct perspective. Moreover, whilst some of the descriptions now appear completely out-dated, others remain recognisable within the gambling discourse of today.

2.1 *Gambling as a sin*

The primary tone of historical anti-gambling opinion has been one of 'moralistic criticism',³ whereby gambling was represented as an activity which is inherently sinful.

The master sin of the week, the most frightful demon of this modern storm, remains to be noticed; the foul spirit of gaming! [...] Gambling is the very essence of the amusement; 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

¹ William Weare (Pseudonym), *The Fatal Effects of Gambling, Exemplified in the Murder of William Weare* (Thomas Kelly 1824) 1–2.

² Charles Cotton, *The Compleat Gamester* (R Cutler 1674) 1–2.

³ David Dixon, *From Prohibition to Regulation: Bookmaking, Anti-Gambling, and the Law* (Clarendon Press 1991) 48.

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 [...]⁴

Gambling was described as ‘essentially anti-social - [it] sears the sympathies, cultivates a hard egoism and so produces a general deterioration of character and conduct’,⁵ encouraging the sins of greed, idleness, blasphemy and superstition.⁶ Moreover, the transfer of property on the basis of the immoral concept of chance was thus regarded as illegitimate, barely distinguishable from stealing.⁷

This strong moral stance against gambling was not actually adopted by the Church until the Reformation, in combination with the emergence of the bourgeoisie. Prior to this, the Catholic Church never expressly forbade gambling, though disapproved of it due to its unproductive, wasteful character.⁸ The two approaches were ultimately merged, however, when the mid-eighteenth century saw a revival of societies for the reformation of manners, also known as ‘the evangelical police’.⁹ These societies had been formed during the previous century and their attention was focused on addressing the issues of idleness and immorality (specifically amongst the poorer classes), as evidenced by the ‘vices’ of drunkenness, profaning the Sabbath and, of course, gambling.¹⁰ Thus a resurgence of Protestant critiques of idleness and excess led to the framing of certain consumption activities, including gambling, as particularly unproductive and sinful.

[...] betting and gambling of every kind, is in itself wrong and immoral. I do not say that every man who bets is an immoral man. Far from it: many really honest men bet; but that is because they have not considered what they are doing. Betting is wrong: because it is wrong to take your neighbour’s money without giving him anything in return. Earn from him what you will, and as much as you can. All labour, even the lowest drudgery is

⁴ Rev F Close on Cheltenham’s annual racing event in 1827, cited in Carl Chinn, *Better Betting with a Decent Feller: Bookmakers, Betting and the British Working Class, 1750-1990* (Harvester Wheatsheaf 1991) 60–1.

⁵ Dixon (n 3) 49 citing Herbert Spencer (1874) *The Study of Sociology* (HS King 1873).

⁶ Gerda Reith, *The Age of Chance: Gambling in Western Culture* (Routledge 1999) 5.

⁷ Dixon (n 3) 50.

⁸ Reith (n 6) 5.

⁹ David Miers, *Regulating Commercial Gambling: Past, Present, and Future* (Oxford University Press 2004) 48 Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750; Volume 1: The Movement for Reform* (Stevens 1948) 160.

¹⁰ *ibid* 26.

honourable; but betting is not labouring nor earning; it is getting money without earning it, and more, it is getting money, or trying to get it, out of your neighbour's ignorance.¹¹

The activity of gambling specifically was thus perceived as one which 'divorced effort from reward and so undermined the Protestant work ethic¹² and destabilised social hierarchy'.¹³

This approach became increasingly institutionalised during the era of industrialisation of the nineteenth century, where 'time became a commodity only slightly less precious than money, and gambling squandered them both'.¹⁴

2.2 *Gambling as destructive and ruinous*

The 'sin' of gambling was also regarded as possessing a destructive character, described as 'an enchanting witchery' and itching disease'¹⁵ which impairs gamblers' self-control and ultimately leads to individual ruin.¹⁶ Accordingly, gambling on a commercial basis was an exploitative practice, from which the public (in particular the working classes) should be protected; a perspective to which we appear to be returning in current times.¹⁷ The preamble to the Gaming Act 1744 provided that:

many persons of ill-fame and reputation, who have no visible means of subsistence, do keep houses, rooms, and other places for playing, and do permit persons therein to play at cards, dice, and other devices, for large sums of money, by means whereof divers young and unwary persons, and others, are drawn in to lose the greatest part, and sometimes all their substance; and it frequently happens that they are thereby reduced to the utmost necessities, and betake themselves to the most wicked courses, which end in their utter ruin.¹⁸

Gambling was viewed as being responsible for 'increased nervous tension',¹⁹ and associated problems were widely characterised as 'a sort of hysteria', a 'form of insanity'²⁰ and

¹¹ Chinn (n 4) 90–1 Citing JT Gent, *Banker's Secret or the Old Wardrobe* (Leicester 1877); Charles Kingsley, 'On Betting and Gambling', in *Kingsley, Letters to Young Men* (London 1877), pp. 4–5.

¹² Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons tr, Charles Scribner Sons 1958).

¹³ Reith (n 6) 70.

¹⁴ *ibid* 5.

¹⁵ Cotton (n 2) 1.

¹⁶ Jim Orford, *An Unsafe Bet?: The Dangerous Rise of Gambling and the Debate We Should Be Having* (Wiley-Blackwell 2011) 132–3.

¹⁷ As explored in Chapter Four.

¹⁸ Gaming Act 1744 (18 Geo. II c.34) Preamble.

¹⁹ Dixon (n 3) 60 quoting NAGL bulletin - 2 (21) Bulletin (Nov 1990) p 192, which itself was quoting Dr Pye Smith.

²⁰ *ibid* quoting Dr Fairbairn in 2 YAGL Bulletin (May 1901).

potentially hereditary.²¹ Drawing from debates at the time about ‘neurasthenia’, gambling was described as involving:

The suppression of reason, will, conscience, and affections in favour of an overloading of the emotions: ‘The mental physiologists will tell us that this strain upon the emotions cannot but result in serious mischief to the brain and to the balance of man’s powers’.²²

Although gambling discourse today no longer applies these particular terms, the above criticisms continue to be broadly reflected in contemporary approaches to the regulation of gambling, as I will explore in greater detail during the course of this thesis. The later pathologisation of problem gambling in the late-twentieth and early-twenty-first centuries, for instance, retains the narrative of gambling as being destructive, but in a modified form whereby the moralistic approach is replaced by a clinical one which seeks to understand and cure individual instances of ‘deviance’ instead of outlawing them.²³

2.3 Gambling as irrational

In addition to its sinful and destructive qualities, the activity of gambling was considered fundamentally irrational, contravening a key marker of civilisation and human progress: reason.²⁴

The practice of gambling is thus exhibited as a deliberate reversion to those passions and that mental attitude which characterise the savage or pre-human man in his conduct and his outlook. There lurk in ‘civilised’ man the remnants of survivals of countless ages of pre-human and of savage heredity, anarchic passions inspired by barbarous superstitions. The order of civilisation claims to have killed or atrophied the grosser forms of these atavistic tendencies, but many of them are not dead; social control and education of individual habits keeps them in subordination or acquiescence, but on temptation they are ready to awake. [...] it is, however, quite evident that the widespread belief in ‘luck’ among gamblers is a reversion to a form of unreason which carries no sound instinct of direction with it. It is fair to adduce this belief in luck as an important testimony to the derationalising influences of gambling.²⁵

Providing an ‘unpleasant, social Darwinist emphasis to characterisations of the working class as the “lower orders”’,²⁶ the working class ‘mania’²⁷ was presented as a feature of earlier

²¹ *ibid* citing 4 (43) Bulletin (Feb 1911) 102.

²² *ibid* citing WD MacKenzie, *The Ethics of Gambling* (Sunday School Union 1895) 65.

²³ Reith (n 6) 6.

²⁴ *ibid* 5.

²⁵ John A Hobson, ‘The Ethics of Gambling’ (1905) 15 *International Journal of Ethics* 135, 138–9.

²⁶ Dixon (n 3) 49.

evolutionary stages of social progress in its ‘deliberate appeal to chance, which is opposed to the nature and dignity of a man as a rational, responsible being and to the basis of ordered human society’.²⁸ Not only did gambling contravene the criteria of Victorian leisure in its irrationality, it was seen as a rejection of all reason and thus in contrast to the process of civilisation itself.²⁹

Again, though the specific terminology used as part of this discourse is particularly abhorrent, the underlying narrative of irrationality can be found in present attempts under the legislative framework of today.³⁰ It is particularly evident, as will be explored in explored in Chapter Three, in efforts to address gambling-related biases, ‘such as the “gambler’s fallacy”, the “illusion of control” and superstitious thinking’,³¹ and encourage rational decision-making through the provision of information in an effort to create an informed, responsible gambler.³²

Until 1960, commercial gambling was predominantly controlled through strict measures of prohibition seeking to suppress and condemn the activity; however, these measures were not justified on the basis of the inherently negative character of gambling itself. Instead, the various legal measures of control during this time focused on the apparently inimical *effects* of gambling, and the associated threat posed to the order of society.³³ These measures, and their underlying rationalities, will now be considered.

²⁷ Reith (n 6) 5.

²⁸ Dixon (n 3) 49 citing SICCA, *Gambling: An Ethical Discussion. A Report of the Social and Industrial Commission of the Church Assembly* (Church Information Board 1950) 24.

²⁹ *ibid.*

³⁰ See Part II.

³¹ Orford (n 16) 129.

³² See Chapters Three and Four for further discussion of the responsible gambler.

³³ Reith (n 6) 81.

3. Defending the realm and maintaining social order: ‘putting these nuisances down’³⁴

From at least the sixteenth century until 1960, various methods were employed in an attempt to control most forms of publicly available commercial gaming and betting. As will be discussed in this section, some of these methods were disciplinary in nature, seeking to closely prescribe the forms of gambling which could take place. There is also evidence of early governmental efforts to regulate gambling indirectly, potentially heralding the increasing influence of liberal ‘governmentalities’ and a *laissez-faire* attitude which would later come to dominate (see, in particular, Chapter Three). By and large, however, gambling regulation during this period took the form of juridico-legal mechanisms which sought to suppress commercial - predominantly working-class - gambling through prohibition under the criminal law. Moreover, the concern at the centre of this ‘triangle’ of approaches was aligned mainly with protecting society from internal and external threat and, more broadly, promoting and ensuring the strength of the state.

3.1 Juridico-legal mechanisms of security

3.1.1 In defence of the realm: protecting the state from external threat

During the Middle Ages there were numerous attempts to suppress and prohibit gambling, especially amongst the working population. As discussed above, the Church disapproved of gambling, perceiving it as an activity which encouraged idleness. Individuals were instead directed to engage in moderate recreational activities which would improve their health and ensure they remained fit to work. This had the fundamental benefit to the country of maintaining a fit workforce who also functioned as a reserve army, a necessity during this violent era.³⁵ The legal instruments during the medieval period prohibited certain forms of gaming on political grounds to address the apparent threat that it posed to the English

³⁴ Select Committee on Gaming (1844), *Report from the Select Committee on Gaming; Together with the Minutes of Evidence, Appendix and Index* (HC 1844, 297-VI) vi.

³⁵ Reith (n 6) 48.

supremacy in the highly valued activity of archery: a ‘general skilfulness in which was deemed essential for the defence of the Realm’.³⁶

In the sixteenth century, Henry VIII enacted one of the earliest significant pieces of legislation governing gambling: the Unlawful Games Act 1541. The Act introduced the offence of keeping a gaming house and more generally prohibited the playing of certain games, including ‘tennis, tables, cards, dice, bowls and other unlawful diversions’ in order to ‘restrain this pernicious vice among the inferior sort of people.’³⁷ The prohibition applied to ‘all but gentlemen’,³⁸ specifying certain sections of the population in particular, including those who worked as an ‘artificer, or craftsman of any handicraft or occupation, husbandman, apprentice, labourer, servant at husbandry, journeyman, or servant of the artificer, mariners, fishermen, watermen, or any serving man’.³⁹ Though the Act did not outlaw the activity of gambling directly, it prohibited the venues and communal events which served as the required pretext for gambling transactions to take place.

This ‘Bill for the Mayntenance of Artyllarie and debarring of unlawful games’⁴⁰ has been described as one of the first examples of the state using anti-gambling law to protect itself by preserving the availability of competent archers.⁴¹ As well as protecting the state from threats to the security of the territory, however, scholars such as David Dixon point out the economic interests which were simultaneously at stake: ‘a brief inspection of the statute’s origins reveals it to have been granted as a measure of economic protection to the “Bowyers, Fletchers, Stringers and Arrowhead-makers”’.⁴²

³⁶ Select Committee on Gaming (1844) (n 34) iii.

³⁷ 4 BI Comm 171

³⁸ Ibid

³⁹ ‘Except at Christmastime’. Stephen Monkcom, Gerald Gouriet and Jeremy Phillips (eds), *Smith and Monkcom: The Law of Gambling* (4th edn, Bloomsbury Professional 2017) 5–6.

⁴⁰ Chinn (n 4) 13.

⁴¹ Dixon (n 3) 31.

⁴² *ibid* citing 33 H. 8 (1541), Bill for the maintaining Artillery, and the debarring of unlawful games c.9 .

3.1.2 Maintaining public order: preserving the internal strength of the state

Common gaming houses continued to be outlawed during the eighteenth century under proscriptive legislation,⁴³ which also banned the playing of specific card games for all but the higher classes of society: ‘The games forbidden are Ace of Hearts, Faro, Bassett and Hazard, except in Royal Palaces’.⁴⁴ The Gaming Act 1738, which sought to provide ‘more effectual preventing of excessive and deceitful Gaming’ imposed a penalty of £200 on those caught keeping a gaming house, and a penalty of £50 for those caught playing the games.⁴⁵ The 1844 Select Committee later referred to this branch of legislation as relating to the protection of ‘Public Morals’, being:

Those ... [laws] which prohibit common Gaming-houses and public Gambling as public nuisances, by which the peace of society may be disturbed, and by which simple and unwary men are liable to be led into dissolute and vicious habits, whereby the morals and interests of the community would be injured.⁴⁶

During this time, as discussed above, gambling amongst the poor was presented as a serious social problem which undermined the core Protestant values of family, thrift and a strong work ethic:

The effects of gambling on poor families were regarded as especially ruinous, for such families, reduced to destitution by the reckless play of their breadwinners, would be unable to pay their taxes and so become a burden on the state. The familial cohesion of the lower orders was thus regarded as a pressing moral problem in the eighteenth century, and one in which the activity of gambling had a particularly negative role.⁴⁷

As well as causing the poorer classes to become a financial burden on the state, gambling was seen as an inevitable precursor to the participation in criminal and disorderly conduct by ‘lower kinds of people’.⁴⁸ According to Magistrate Henry Fielding:

Could luxury be confined to the palaces of the great, the society would not, perhaps, be much affected with it [...] But when this vice descends downward to the tradesman, the mechanic, and the labourer, it is certain to engender many political mischiefs, and among

⁴³ The prohibition on gaming houses under the Unlawful Games Act 1541 remained in force and was supported by the Gaming Act 1738.

⁴⁴ Gaming Act 1738; John Ashton, *The History of Gambling In England* (Duckworth 1898) 59–60.

⁴⁵ *Ibid.*

⁴⁶ Select Committee on Gaming (1844) (n 34) iii.

⁴⁷ Reith (n 6) 70.

⁴⁸ T Roscoe (ed), *The Complete Works of Henry Fielding* (George Bell 1889) 763.

the rest it is most evidently the parent of theft and robbery, to which not only the motive of want, but of shame conduces.⁴⁹

As will be explored later in this chapter, in section 4, there was a clear belief that the ‘lower orders’ lacked the capacity to manage the ill-effects which gambling presented, unlike the upper classes who generally remained free to gamble without interference. This stratified system of governance was therefore put in place to maintain public order by addressing the ‘degrading effects of gaming and drunkenness on the vast, impoverished and potentially unstable underclass of the Metropolis’.⁵⁰ Arguably, an element of this narrative persists today in the regulation of gambling, which seems to focus predominantly on protecting gamblers from harms caused by, for example, gambling on fixed odds betting terminals in the local bookmakers or playing online slot games at home, while ‘the elites drunkenly disgracing race courses’,⁵¹ for instance, fall outside of enhanced gaze.

The state’s juridico-legal efforts against gaming houses, however, were generally ineffective and by the early nineteenth century, ‘the West End of London was literally swarmed with gambling houses’.⁵² This situation continued until 1844 when, brought about principally by the revelations in the case of *Smith v Bond*,⁵³ the ‘scandal was too grievous to be borne’⁵⁴ and a Select Committee was appointed to enquire into existing gaming statutes. The case centred on the ‘Minor St James’s Club-house’ of St George’s, Hanover Square; a gaming house where the play was ‘notoriously unfair, and the keepers had thriven in proportion to the number and wealth of the victims they had been able to fleece’.⁵⁵ The action was brought by four of its victims, all members of nobility, who had lost sums playing French Hazard. In the case, tried before Lord Abinger, it was decided that the keeper would be fined £3508, being treble the amount that was proven to be lost, ‘teaching a very useful lesson to the keepers of

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ Kate Bedford, *Bingo Capitalism: The Law and Political Economy of Everyday Gambling* (Oxford University Press 2019) 273.

⁵² Ashton (n 44) 132.

⁵³ *Smith v Bond* (1842) 11 M. & W. 849; 152 E.R. 102.

⁵⁴ Ashton (n 44) 139.

⁵⁵ *ibid.*

gaming-houses generally'.⁵⁶ Scandals such as this served to affirm the anti-gambling views held by the, progressively more influential, middle classes that gambling, by the 'lower classes' in particular, was 'a great social vice eating in the hearts of Englishmen'.⁵⁷

The House of Commons therefore appointed a committee to 'inquire into existing Statutes against Gaming of every kind; to ascertain to what extent these Statutes are evaded, and to consider whether any and what amendments should be made in such Statutes'.⁵⁸ On hearing evidence from a wide range of witnesses, including magistrates, commissioners for making a digest of the criminal law, commissioners of police for the City of London and for the Metropolis, and members of the horse-racing network, the Committee determined that the laws against gaming houses required strengthening so that 'these nuisances be effectively put down'.⁵⁹ It therefore recommended that the offence of keeping a gaming house be made easier to prove, and that the police be given additional powers to enable entry and search. Thus, to strengthen the existing juridical mechanisms in place to control gambling, the subsequently enacted Gaming Act 1845 provided greater powers of search and entry to the police⁶⁰ and made it easier to prove the offence of keeping a gaming house.⁶¹ The 1845 Act effectively converted the Act of 1541 into a modern piece of legislation which clearly prohibited the commercial provision of, mainly working class, gaming.

3.1.3 Increasing the strength and wealth of the state

What followed was a decline in the importance of gaming in British life, with gaming-houses becoming a tradition of the past for a number of years.⁶² Whilst this coincided with the enactment of the 1845 Act, it has been suggested that the decline can also be attributed to the

⁵⁶ *ibid* 140.

⁵⁷ Miers (n 9) 55 citing William Boulton, *Amusements of Old London* (London, J. Nimmo, 1901), 192. citing William Boulton, *Amusements of Old London* (London, J. Nimmo, 1901), 192

⁵⁸ Select Committee on Gaming (1844) (n 34) ii.

⁵⁹ *ibid* vi–vii.

⁶⁰ Gaming Act 1845, ss 3, 6, 7. These powers were further strengthened under the Gaming Houses Act 1854.

⁶¹ Gaming Act 1845, ss 5 and 8.

⁶² Ashton (n 44) 149.

social and economic conditions of an industrial Victorian Britain, which were not conducive to excessive gaming. During this period, an active interest was taken in the moral and physical conditions of the public for matters of national policy. More specifically, there was an interest now taken in regulating the lives of the ‘lower class’ in order to ‘direct them to “better” use’ based on a philosophy of ‘rational recreation’.⁶³ Many aspects of British society were affected by this era of industrialisation:

Factory masters rearranged the pattern of work and leisure for those whom they employed. They strove to enforce a time and work discipline on their ‘hands’, through which they sought to make them more amenable workers. Employers disdained leisure as a period which encouraged idleness and wastefulness, and their desire to reduce its length dovetailed neatly with the contemporaneous moral crusade of the Evangelicals. These aimed to eliminate bloody and immoral pastimes and to exorcize the working class of ‘roughness’.⁶⁴

The legal position under the 1845 Act thus reflected the dominant attitude of the time, certainly in relation to the affluent middle class, that commercial gambling by the ‘lower classes’ in particular was ‘counter to the demands of thrift, industry, and the rational pursuit of leisure’.⁶⁵ As will be expanded upon below, this concern for directing public conduct towards ‘better’ leisure pursuits became even more pronounced in the context of inter-state economic competition.

To some extent, however, gaming was simply supplanted by an alternative vehicle for commercial gambling: horse-race betting. Although the horse-race betting industry was well-established by this point in the mid-nineteenth century, there was a growth in the number of betting houses during the late 1840s providing opportunities for gamblers to bet on horse-racing away from the track.⁶⁶ The legal response, again juridical in nature, was the Betting Act 1853. In his movement for leave to bring the bill for the suppression of betting houses, the Attorney General recited the familiar dangers that working-class gambling posed to society, while making clear that this legislation must be approached in a way which would

⁶³ Miers (n 9) 61.

⁶⁴ Chinn (n 4) 59.

⁶⁵ Miers (n 9) 55.

⁶⁶ *ibid* 61, 234.

not interfere with upper-class betting at the race-track ‘which had so long existed [...] in connexion with the great national sport of horse racing’:

The mischief arising from the existence of these betting shops was perfectly notorious. Servants, apprentices, and workmen, induced by the temptation of receiving a large sum for a small one, took their few shillings to these places, and the first effect of their losing as to tempt them to go on spending their money, in the hope of retrieving their losses, and for this purpose it not unfrequently happened that they were driven into robbing their masters and employers.⁶⁷

The 1853 Act provided that no ‘house, office, room or other place’ should be ‘open, kept or used’ for the purpose of betting with persons ‘resorting’ to the premises.⁶⁸ Section 2 of the 1853 Act also provided that betting houses were to be deemed common gaming houses, so that the police could benefit from the enhanced powers of entry and search under the 1845 Act.⁶⁹ In response to the proscriptive legislative position, many betting and gaming houses were forced to close; however, this did not mean that working-class gambling was suppressed. The demand for betting, in particular, was not stifled: bookmakers avoided and evaded the law with the support of the communities which sustained them,⁷⁰ and operations circumvented the 1853 Act by continuing onto the street. The latter quarter of the nineteenth century witnessed an expansion in popular gambling and increased commercial exploitation of the activities upon which wagers could be placed.⁷¹

Nonetheless, the anti-gambling crusade continued and in 1902, a Select Committee was again appointed, on this occasion to ‘inquire into the increase of public betting’.⁷² The Committee’s discussions and resulting recommendations revealed an overwhelming tone of ‘authoritarian paternalism’⁷³ in support of the current legal position, which is well-illustrated in the evidence given by London Magistrate, Horace Smith:

⁶⁷ HL Deb 11 July 1853, vol.129, col 88.

⁶⁸ Betting Act 1853, s 1.

⁶⁹ Betting Act 1853, s 2.

⁷⁰ Chinn (n 4) 77.

⁷¹ Dixon (n 3) 41, 44.

⁷² Select Committee of House of Lords on Betting (1902), *Reports from the Select Committee of the House of Lords on Betting; Together with Proceedings of the Committee and Minutes of Evidence* (HL 1902, 379-V) iii.

⁷³ Dixon (n 3) 118.

Really it is for the protection of the poor who are misled – led away and enticed into betting when they otherwise would not do it; when they otherwise might be getting an honest living by honest labour they are led away by these various schemes of bookmakers and others to get them to bet. It is a law for the protection of the poor; as for the rich, they do not need any protection in such matters; they can help themselves; but the poor cannot [...] they ought to be getting their living by honest means, and instead of that they attempt to get a short cut to riches by the betting process.⁷⁴

It was still, therefore, considered that the lives of working class people needed to be directed away from vices such as gambling, for their own benefit. Instead, they should be spending their time during this industrial period making an ‘honest living by honest labour’ and not attempting to get a ‘short cut to riches’.⁷⁵ By this point in the late nineteenth century, the country’s profits were falling and Britain was being overtaken in terms of industrial competition by the USA and Germany. This was explained by anti-gamblers as being caused by the British workers who were less efficient due to their participation in gambling:

[Gambling produced] an amount of excitement incompatible with painstaking labour. Excitement unduly indulged in brings about its own penalty in making everything ordinary appear dull, insipid and uninteresting. If working men accustom themselves to sudden gains and losses, they cannot be expected to work steadily at their occupation when the profits are small and the work is hard.⁷⁶

The Committee heard in evidence that ‘if the betting craze goes unchecked, the sober youths of Germany will take the reins of the commercial world’.⁷⁷ An industry employer gave evidence that ‘I do not consider that a man who is interested in betting, however skilful he may be, is worth as much money to his employer as a man who is not; because he spends nearly all his time thinking about the races [...] it almost entirely destroys his usefulness as a workman’.⁷⁸ Moreover, as well as reducing a person’s usefulness as a worker, gambling was viewed as money which had been wasted; workers should instead be investing in Britain’s industry by spending in the new consumer markets.⁷⁹ Thus, as well as being couched in traditional anti-gambling terms, working class gambling was also now regarded as a threat to the security of the state in terms of its economic strength internationally.

⁷⁴ Select Committee of House of Lords on Betting (1902) (n 72) 29 question 584.

⁷⁵ Dixon (n 3) 56.

⁷⁶ *ibid* citing Seton Churchill, *Betting and Gaming* (James Nisbet & Co. 1894) 75.

⁷⁷ Select Committee of House of Lords on Betting (1902) (n 72) 176 question 3638 per Knight.

⁷⁸ *ibid* 132 questions 2848, 2861 (Mr Tannett-Walker).

⁷⁹ Dixon (n 3) 57.

Proposals for administrative regulation of gambling, as opposed to criminal prohibition, were rejected by the majority on the grounds that such an approach would imply state complicity in the activity and inevitably result in increased gambling. It was seen as the state's duty to set moral standards, a duty which would be breached by a regime of regulation.⁸⁰ The accepted strategy of reform during this period was predominantly criminal law, supplemented by 'individual moral persuasion'⁸¹ and a strategy of administrative regulation was regarded as fundamentally inappropriate: 'the aim was not to control working-class gambling, but to suppress it'.⁸² Accordingly, the existing juridico-legal, prohibitive approach was endorsed for street betting, with the Committee recommending that primary legislation be enacted to increase the severity of penalties against street bookmakers and provide the police with the increased powers of summary arrest that they sought.⁸³

The result was the enactment of the Street Betting Act 1906. The Act provided that any person found frequenting or loitering in streets or public places for the purposes of bookmaking or betting or wagering would be guilty of a criminal offence and would be subject to a sliding scale of penalties, ranging from a maximum £10 fine for a first offence to a £50 fine or imprisonment for a maximum of six months with hard labour for a third.⁸⁴ Police powers of arrest without warrant were provided for under the 1906 Act, which was widely drafted so as to apply to customers as well as bookmakers.⁸⁵ This was despite apparently being contrary to Parliament's intention: 'the object of the Bill was not to lock up the silly workman who put a shilling on a horse, but the professional bookmaker who

⁸⁰ *ibid* 120.

⁸¹ *ibid* 122.

⁸² *ibid* 123.

⁸³ Select Committee of House of Lords on Betting (1902) (n 72) vii.

⁸⁴ Monkcom, Gouriet and Phillips (n 39) 16.

⁸⁵ Dixon (n 3) 142–3.

afforded the opportunity and the temptation to do so in a public street' and 'to get at the bookmakers through their touts, the men whom they employed'.⁸⁶

This Act proved to be one of the final examples of a juridical attempt to control commercial gambling. As will be explored in Chapter 2, by the 1920s attitudes were beginning to change as regards the role of the state in the lives of the working class population, a shift which would significantly alter the state's approach towards the regulation of gambling.

3.2 In support of juridico-legal mechanisms: techniques of discipline and government

3.2.1 Disciplining upper-class gamblers

While the dominant approach to the regulation of commercial gambling was, by and large, juridical in nature, there were also examples of disciplinary attempts to strictly control and prescribe the forms of gambling which were permissible. These provisions, however, were less concerned with working-class gambling; their primary concern was protecting the economic interests of the upper classes – the wealthy 'leisured elite'⁸⁷ members of society - and maintaining the current social order.

The legislation in the eighteenth century adopted two distinct approaches to the regulation of gambling: proscriptive legislation which effectively outlawed working-class forms of gambling in common gaming houses (as discussed above) and 'sumptuary laws'. 'Sumptuary laws',⁸⁸ such as the Gaming Act 1710, were introduced to fundamentally protect the wealthy gambler from the risks of 'excessive and deceitful gaming'⁸⁹ by attempting to exercise control over the conditions around gambling.

The Act was introduced by Queen Anne to address economic concerns that existed with regard to the impact of uncontrolled exchanges of mortgages, conveyances and other

⁸⁶ HC Deb 10 December 1906, vol 166, col 1649-1650.

⁸⁷ Miers (n 9) 25-6.

⁸⁸ Select Committee on Gaming (1844) (n 34) iii.

⁸⁹ Gaming Act 1710, Preamble

securities on the existing social structure, as well as the widespread cheating which was apparently prevalent at the time.⁹⁰ It provided protection for the recovery of any sum lost in excess of £10 within three months (wagers over £10 were seemingly considered to constitute ‘excessive gambling’ within the meaning of the Act)⁹¹, introduced penalties for cheating and made securities for gaming debts unenforceable.⁹²

These eighteenth-century sumptuary legal provisions were primarily directed at upper-class wagering, though the concerns were not altogether altruistic:

[The] preoccupation with upper-class gambling was propelled not by religious or moral motives, but by a desire to protect the interests of their class and to secure its wellbeing. As Blackstone put it, ‘gaming was an offence of the most alarming nature... frequently attended with the sudden ruin and desolation of ancient families’.⁹³

Thus, these disciplinary efforts, which sought to control upper-class gambling by preventing ‘excessive’ losses and hindering the transfer of property, were motivated by a need to reduce the economic impact on the current social order. Illustrating this, the Gaming Act 1738 was later passed for the ‘more effectual preventing of excessive and deceitful gaming’ through the addition of the juridico-legal measures, as discussed above. The Act incorporated a penalty of £50 for ‘adventurers’,⁹⁴ or professional (working-class) gamblers - those ‘fortune-seekers [who] flocked to cash in on the predilection of the rich to gamble and to lose heavily’.⁹⁵ This served as a further attempt to support the disciplinary efforts to diminish aristocratic losses to adventurers, and thus reduce any transfer of wealth to the working class.⁹⁶

3.2.2 Replacing ‘sumptuary’ protections with the invisible hand

By the mid-nineteenth century, the increasing influence of liberalism, as an anti-paternalist political ideology concerned with ensuring the individual ‘right’ to freedom from state

⁹⁰ Miers (n 9) 27–8.

⁹¹ *Smith v Bond* (1843) 11 M. & W. 849; [559]; Select Committee on Gaming (1844) (n 34) iii.

⁹² Miers (n 9) 33.

⁹³ Chinn (n 4) 18 citing 4 Bl Comm 171 .

⁹⁴ Gaming Act 1738, s 3.

⁹⁵ Chinn (n 4) 19.

⁹⁶ *ibid* 19–20.

interference, was beginning to manifest in the context of non-commercial gambling. When considering the existing statutory position during their inquiry in 1844, the Select Committee on Gaming applied a decidedly liberal approach as regards the ‘sumptuary laws’, in contrast particularly with their proscriptive recommendations on commercial gambling in public gaming houses (detailed above). The Committee recommended that those ‘sumptuary’ provisions, which sought to protect wealthier gamblers, who were least in need of protection, from the effects of ‘excessive gaming’, be repealed, being ‘wholly inoperative’ and in any event ‘unsuited to the spirit of the age’:⁹⁷

In earlier periods of European civilisation it was thought to be the duty of Governments to exercise a minute superintendence and control over all those private actions of the members of the community [...] and for this purpose Governments thought themselves not only entitled but bound to restrain the imprudence of private persons, and to protect them against the consequences of their own improvidence. This notion was not confined to despotic Governments, but was shared by representative Legislatures; and thence arose the Laws on our Statute Book which prescribed to the different classes of people what apparel they should wear, what Games they should play at, what amount of money they might win or lose [...] and which established many other interferences with the free action of individuals in the management of their private concerns. Such Regulations are out of date; and nobody now disputes the opinion of Adam Smith, that Governments ought not to pretend to watch over the economy of private people, and to restrain their expense by Sumptuary Laws; but that if they look after their own expenses, they may safely trust private people with theirs.⁹⁸

Accordingly, the Select Committee recommended that the law take a step back and refrain from ‘arbitrary interference’⁹⁹ with private gaming and wagering (where engaged in under circumstances not otherwise prohibited by law): ‘If private individuals choose to make Wagers with each other, there seems to be no good reason why they should be prevented from doing so, or why they should be punished for so doing.’¹⁰⁰

Significantly, prior to the appointment of the Select Committee, the contemporary legal position was that generally, private wagers stood as valid ‘Legal Contracts; and the winner of such a Wager can, therefore, enforce his claim in a Court of Law’:¹⁰¹

⁹⁷ Select Committee on Gaming (1844) (n 34) iv.

⁹⁸ *ibid.*

⁹⁹ *ibid* v.

¹⁰⁰ *ibid* iv–v.

¹⁰¹ *ibid* v.

Indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country [...] in cases not specially prohibited by Act of Parliament, parties may wager or insure at pleasure. And this species of contract has, in fact gone to an extent that is much to be complained of. Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss: they have too long and too often been held good and valid contracts.¹⁰²

In the years preceding the inquiry, however, the courts had begun to question the effectiveness of the existing statutory position. The ‘exceedingly frivolous’¹⁰³ nature of cases that were routinely brought before the court for the enforcement of private bets contributed to a growing impatience which existed amongst the judiciary at the time.¹⁰⁴ The last quarter of the eighteenth century in particular saw a ‘craze for eccentric wagers’: ‘it seemed ‘there was nothing, however trivial or ridiculous, which was not capable of producing a bet. Many pounds were lost upon the colour of a coach-horse, the birth of a child, the breaking off of a marriage, and even a change in the weather’.¹⁰⁵

In its final report, the Select Committee applied a *laissez faire* approach towards the issue of private gambling transactions, concluding that there wasn’t ‘sufficient reason why the valuable time of the Courts of Law should be consumed by adjudicating disputes which may arise between individuals in consequence of such Wagers’.¹⁰⁶ Accordingly, it was recommended that gambling contracts be made unenforceable at law. The Lords’ Committee ultimately agreed that it was not ‘expedient that the Courts of Law should be occupied in the Investigation of these Transactions, but that all Persons who wager with honest Intentions should be compelled by Motives of Self-protection to use greater Vigilance and Care than

¹⁰² *Da Costa v Jones* (1778) 2 Cowper 729 at [734] - [735]

¹⁰³ Select Committee on Betting Duty (1923), *Report from the Select Committee on Betting Duty Together with the Proceedings of the Committee, Minutes of Evidence, Appendices and Index* (HC 1923, 139 V) para 3.

¹⁰⁴ Miers (n 9) 52.

¹⁰⁵ Ralph Nevill, *Light Come, Light Go: Gambling - Gamesters - Wagers - The Turf* (Macmillan and Company Ltd 1909) 103–5.

¹⁰⁶ Select Committee on Gaming (1844) (n 34) vi.

they now appear to be in the habit of exercising, and that they should refuse to lay Wagers with Men of whose Honour and Solvency they have not sufficient knowledge'.¹⁰⁷

This liberal attitude towards private gambling transactions became enshrined in law when the recommendations were accepted and enacted under the Gaming Act 1845. The Act provided that all contracts 'by way of gaming or wagering, shall be null and void; and that no Suit shall be brought or maintained in any Court of Law or Equity for recovering any Sum of Money or valuable Thing alleged to be won upon any Wager';¹⁰⁸ a provision that remained in effect until its eventual repeal under the Gambling Act 2005.¹⁰⁹ All contracts by way of gaming or wagering were, thus, not illegal, but were unenforceable at law: instead 'it remain[ed] a debt of honour'.¹¹⁰

Ordinary betting was treated as a thing of neutral character, not to be encouraged but, on the other hand, not to be absolutely forbidden, it leaves an ordinary betting debt a mere debt of honour, depriving it of all legal obligation, but not making it illegal.¹¹¹

This approach can be seen as a method which attempts to govern gambling conduct indirectly through the gambling environment; an approach to regulation which was to become significantly more prevalent over 150 years later, ironically when gambling contracts became legally enforceable again (see Chapter Three). By removing the protection of the courts (for private, non-commercial gambling), a form of liberal subject was being produced in this regard; gamblers had to regulate their own decisions on whether to gamble with 'greater vigilance and care' before entering into private wagers. The production of 'liberal' subjects will come to play a central role in the regulation of gambling following the enactment of the Gambling Act 2005, as will be explored in Chapter Three.

¹⁰⁷ Select Committee of House of Lords on Laws respecting Gaming (1844), *The Three Reports from the Select Committee of the House of Lords Appointed to Require into the Laws Respecting Gaming; and to Report Thereon to the House: With the Minutes of Evidence Taken before the Committee and an Index Thereto* (HL 1844, 604 VI) v.

¹⁰⁸ Gaming Act 1845, s.18.

¹⁰⁹ Gambling Act 2005, ss 334-335.

¹¹⁰ Select Committee on Betting Duty (1923) (n 103) para 3.

¹¹¹ *ibid.* citing: *Haigh v Town Council of Sheffield* [1874-5] LR 10 QB 102 [109]

Moreover, this provision indirectly supported the attempts to prohibit commercial, working-class gambling. The 1845 Act, in rendering gambling contracts unenforceable, meant that it became essential for bookmakers to take wagers predominantly on cash terms (unless they could be sure of the bettor's financial integrity).¹¹² The number of betting offices increased in correlation in the late 1840s before, as outlined above, being outlawed in the same way as gaming houses. Thus working class gamblers were left with no lawful outlet to engage in commercial forms of gambling, save for taking to the streets.

4. Controlling gambling in the interests of the state: *Raison d'état*

4.1 The governmental rationality of *raison d'état* - 'a first analysis'¹¹³

The approach to the regulation of gambling examined in this chapter aligns closely with the early 'episode in governmentality'¹¹⁴ identified by Foucault as *raison d'état*. The emergence of the European doctrines of *raison d'état*, or 'reason of state', at the end of the sixteenth century is identified by Foucault as the beginning of a modern governmentality 'as an autonomous rationality',¹¹⁵ different from the exercise of sovereignty or pastoral management.¹¹⁶ This reason for, and model of, governing is not found in God or in nature, but integrally within the state itself.

In his 1977-8 lecture series entitled *Security, Territory, Population*,¹¹⁷ Foucault formulates a genealogy of the modern state¹¹⁸ as a set of practices of government,¹¹⁹ which he refers to as

¹¹² Miers (n 9) 61, 234.

¹¹³ 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) 277.

¹¹⁴ *ibid* 248.

¹¹⁵ Colin Gordon, 'Governmental Rationality: An Introduction' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 9.

¹¹⁶ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 113) 243.

¹¹⁷ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 113).

¹¹⁸ Michel Senellart, 'Course Context' in Michel Senellart and others (eds), Graham Burchell (tr), *Security, Territory, Population: Lectures at the College de France 1977-1978* (Palgrave Macmillan UK 2007) 380.

¹¹⁹ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 113) 277.

the ‘governmentalization of the state’.¹²⁰ This is the process through which the state of justice was gradually transformed from, firstly, a ‘feudal type of territoriality [...] broadly corresponding to a society of customary and written law’, to, secondly, an ‘administrative state that corresponds to a society of regulations and disciplines’ before finally becoming a ‘state of government, which essentially bears on the population and calls upon and employs economic knowledge as an instrument [...] correspond[ing] to a society controlled by apparatuses of security’.¹²¹

Raison d'état is the point at which sovereignty and government become ‘stitched’ together;¹²² where the concept of ‘the state’ enters into the field of a reflected practice of government.¹²³ Importantly, Foucault’s conception of the ‘state’ is not ‘that kind of cold monster in history that has continually grown and developed as a [...] threatening organism above civil society’.¹²⁴ Instead, Foucault sees the state as something which is ‘both fragile and obsessive’ that has been organised by a ‘governmentalized’, civil society.¹²⁵ The various practices of government, such as those used to prohibit, proscribe and direct gambling activity, with their ‘relations of power that gradually take shape on the basis of multiple and very diverse processes, which gradually coagulate and form an effect’, are, according to Foucault, precisely the basis on which the state is constituted.¹²⁶ Foucault sees the ‘state’ as a stable form of ‘republic’, with the ‘republic’ being interpreted more widely than just a territory, composed also of a milieu of jurisdictions, laws and customs, and a set of institutions and individuals defined by their status.¹²⁷

¹²⁰ *ibid* 109.

¹²¹ *ibid* 110.

¹²² *ibid* 246.

¹²³ *ibid* 247.

¹²⁴ *ibid* 248.

¹²⁵ *ibid*.

¹²⁶ *ibid*.

¹²⁷ *ibid* 256–7.

In explaining the ‘general absolutist theory’¹²⁸ of *raison d'état* as a rationality of government, Foucault cites the historical definitions put forward by sixteenth century European writers Palazzo and Chemnitz:

[*Raison d'état*] is ‘a rule or an art’ [...] which makes known to us the means for obtaining the integrity, tranquillity, or peace of the republic’.¹²⁹ [...] It is ‘a certain political consideration that is necessary in all public matters, councils and plans, which must strive solely for the preservation, expansion, and felicity of the state, and for which we must employ the most ready and swift means’.¹³⁰

The essential objective of *raison d'état* as a rationality is ultimately the preservation of the integrity of the state.¹³¹ In other words, the end of the ‘reason of state’ governmentality is the state itself. In contrast with the objective of sovereignty - to preserve the sovereign’s relation of power to the territory - *raison d'état* is the ‘holding out’ of the state itself.¹³² This has both external and internal components.

4.2 Maintaining the internal and external components of the state

Raison d'état arises at a time historically in Western societies when there is recognition of the existence of a plurality of competing states internationally, as opposed to the belief in the ultimate unification of all kingdoms as one empire.¹³³ Thus externally, reason of state aims to maintain and reinforce its own strength, wealth and greatness in relation to other states through ‘diplomatico-military’ techniques such as the agreement of treaties and the development of a professional army.¹³⁴

We can clearly see this concern regarding external threats to the state in the early attempt to regulate gambling under the Unlawful Games Act 1541 (section 3.1 above). One of the

¹²⁸ *ibid* 278.

¹²⁹ *ibid* 257. citing Giovanni Antonio Palazzo, *Discourse du gouvernement et de la raison vraie d'état* (tr: Adrien de Vallieres) (De Bellire 1611) 14.

¹³⁰ *ibid.* citing B Chemnitz, *Intérêts des Princes d'Allemagne* (vol. 1, 1712) 8.

¹³¹ *ibid.*

¹³² Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, SAGE Publications 2010) 104.

¹³³ 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); Dean (n 132).

¹³⁴ Foucault, *Security, Territory, Population. Lectures at the Collège de France 1977-1978* (n 113) 196–305; Dean (n 132) 107.

primary reasons for this legislation was the ‘Mayntenance of Artyllarie’¹³⁵ and the preservation of competent archers, in order to ensure the availability of an army should it be required in defence of the realm. Later, in the late-eighteenth and early-nineteenth century, we can see a clear interest in preserving the competitive relationship between states in economic terms. Gambling was seen as a factor which negatively impacted upon the state’s wealth gained from industry, in comparison with other states such as Germany and the USA, because it caused workers to seek excitement and sudden gains instead of engaging in ‘honest labour’ for a small profit. There was a real concern that ‘the sober youths of Germany will take the reins of the commercial world’¹³⁶ if steps were not taken to address the betting ‘craze’. Accordingly, action was required to manage the internal affairs of the state in this regard to maintain Britain’s competitive relationship with other states.

Internally, then, reason of state must also maintain and ensure its strength in terms of the elements and forces of which the state is constituted. As well as promoting the internal elements which contribute to the wealth of the state, this component of the governmental rationality encompasses threats posed from within the state. These threats may arise, for example, from civil disobedience or disorder, which upset the stability of the present order.¹³⁷

We can identify a clear interest in preserving internal order, and promoting the strength of the state throughout the various forms of gambling regulation during this period. The state’s occupation with preventing idleness and ensuring that people remained productive, so as to contribute to the state’s wealth, as opposed to representing a burden on the state, is evident throughout the attempts to prohibit gambling by the ‘common people’. Moreover, gambling was regarded as an activity that would inevitably lead to criminal or disorderly conduct in the case of the ‘lower orders’, which would, of course, disrupt the internal strength of the state.

¹³⁵ Chinn (n 4) 13.

¹³⁶ Select Committee on Betting Duty (1923) (n 103) 176 question 3638 per Knight.

¹³⁷ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 113) 267–70.

The maintenance of the present social order was also a key concern in the regulation of gambling, particularly during the eighteenth century when a number of laws were enacted to effectively suppress the transfer of wealth from the aristocracy to the working-class ‘adventurers’. For these reasons, gambling was viewed as a clear threat to the internal strength of the state and therefore, during this period, the majority of forms of gambling available publicly to the working class were prohibited by the criminal law.

4.3 Governing the ‘common people’

The emphasis on the class-based nature of the effects of the anti-gambling legislation during this period of prohibition is important. The object of government, according to this ‘first analysis’,¹³⁸ early formation of reason of state as a governmental rationality, is the common people, as opposed to the nobility.¹³⁹ The whole population, as a concept, is not yet a central element, save for an indirect concern with the happiness and prosperity of ‘the people’ insofar as this reflects on the strength of the state.¹⁴⁰ It is when the ‘apparatus’ of police, as will be considered in further detail in Chapter 2, is ‘installed in order to make *raison d’état* function’, that the concept of population is further developed and comes to play a greater role in the art of government.¹⁴¹ For the purposes of this form of *raison d’état*, it is the ‘common people’ - the masses who may cause some form of internal disruption - who are the focus of efforts to maintain the strength of the state.¹⁴²

As regards the regulation of gambling, the legislative approach during this period essentially represented a ‘stratified system of governance’ which served to mainly suppress working-class instances of gambling.¹⁴³ Though gambling was permitted as a legitimate source of entertainment for the wealthy, leisured elite to enjoy in private luxurious settings such as the

¹³⁸ *ibid* 277.

¹³⁹ *ibid*.

¹⁴⁰ *ibid*.

¹⁴¹ *ibid* 278.

¹⁴² *ibid* 271–2.

¹⁴³ Gerda Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (Routledge 2018) 25.

homes of nobility, court circles, racing tracks, spas and private members' 'gold and silver' clubs, it was considered unsuitable for those at the other end of the social scale, who gambled in the precarious common gaming houses, known as 'copper hells', which were of course unlawful under the criminal law.¹⁴⁴

The prevailing view was that luxuries such as gambling were less dangerous when practised by the upper classes in comparison with the 'lower kinds of people':¹⁴⁵ 'gambling had much more fatal consequences, and was far more injurious to morals among the inferior classes than among the superior classes'.¹⁴⁶ Illustrating the extent of class differentiation in the context of gambling, London Magistrate Henry Fielding raised awareness of the 'degrading effects of gaming and drunkenness on the vast, impoverished and potentially unstable underclass of the Metropolis', while concerns raised with regard to upper-class gambling were mainly limited to the example set for the 'common people', to which this 'vice' would inevitably spread.¹⁴⁷ By the late-nineteenth century this way of thinking led to a trend in the metaphorical treatment of gambling as an 'illness', 'disease', 'virus' and 'contagious infection which was contaminating and impregnating' the social body, spreading through society from the aristocracy and 'infecting' the working classes:¹⁴⁸

Many clerical speakers recounted in the language of alarm how the passion for gambling is spreading among the working classes, especially in the North of England. That gambling is seriously on the increase among the working classes, and that its effects are even more disastrous amongst artisans and colliers than upon the rich, there seems no possibility of doubting. It would seem as if the moral disease of gambling which, though always capable of affecting individuals, is generally kept under restraint, were apt occasionally, and during certain stages of human development, to break out in the form of an epidemic.¹⁴⁹

The belief thus persisted more widely that working-class members of the population were more 'susceptible' to 'moral disease of gambling' than the upper classes. This perspective also laid the groundwork more generally for the later medicalisation of the 'pathology' of

¹⁴⁴ Reith (n 6) 69.

¹⁴⁵ Monkcom, Gouriet and Phillips (n 39) 12.

¹⁴⁶ HL Deb 8 February 1844, vol. 72, col. 338 per Lord Brougham.

¹⁴⁷ Roscoe (n 48) 763.

¹⁴⁸ Dixon (n 3) 60, 88.

¹⁴⁹ Chinn (n 4) 95 Citing 'The Growth of Gambling', *The Spectator*, 13 October 1888, 1386.

gambling in the twenty-first century,¹⁵⁰ as will be examined in greater detail in the forthcoming chapters.

The prohibition of common gambling houses, which was strengthened by the legislation of the mid-nineteenth century, served to further entrench the class divide: commercial gambling activities enjoyed by the working classes were fully prohibited under the law, while the gambling activities in which the upper classes indulged – such as betting on horse-racing at the track - went largely unaffected:

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.¹⁵¹

When, in response, working class betting continued onto the streets, the state's response remained unchanged, focusing efforts on gambling by the 'common people':

The Committee are convinced that it is impossible altogether to suppress betting, but they believe that the best method of reducing the practice is to localize it as far as possible on Race Courses and other places where sport is carried out [...] It has been proved conclusively to the Committee that the practice of Betting in the streets has increased very much of late years, and is the cause of most of the evils arising from Betting amongst the working classes. The fact that Bookmakers can ply their trade in the open street, and lie in wait to catch working men in their dinner hour outside factories and workshops in order to induce them to bet, is undoubtedly a great source of evil.¹⁵²

This era of gambling regulation was thus focused on strengthening the state by creating a large body of working-class subjects¹⁵³ who do not gamble. Instead, they were to become 'useful and valuable members of society' by contributing to the strength and wealth of the state, whether by practising archery or engaging in honest labour.¹⁵⁴

¹⁵⁰ Reith (n 6) 86.

¹⁵¹ Dixon (n 3) 39.

¹⁵² Select Committee of House of Lords on Betting (1902) (n 72) vi–vii.

¹⁵³ Yaojun Li, Mike Savage and Alan Warde, 'Social Mobility and Social Capital in Contemporary Britain' (2008) 59 *British Journal of Sociology* 391; Kim Allen, "'Blair's Children': Young Women as "aspirational Subjects" in the Psychic Landscape of Class' (2014) 62 *Sociological Review* 760; Emma Casey, 'Gambling, Status Anxiety and Inter-Generational Social Mobility: Findings from the Mass Observation Archive' (2020) 54 *Sociology* 380.

¹⁵⁴ Ross McKibbin, 'Working-Class Gambling in Britain 1880-1939' (1979) 82 *Past and Present* 147.

5. The ‘Real Life’ Effect of this Regime¹⁵⁵

As discussed in the Introduction,¹⁵⁶ Foucault himself acknowledged that the regimes or ‘programmes’ of government may not come to be reflected in reality; the objective of a genealogical analysis being to analyse the effects of a particular regime and to understand the role that such regimes have played in shaping conduct, not to describe ‘real life’.¹⁵⁷ In this regard, one of the possible effects is a refusal or resistance of forms of power, which Foucault defines as ‘counter-conduct’.¹⁵⁸ ‘Counter-conduct’ extends across a wide range of ways of acting which are counter to the normative standard, spanning general disobedience to revolt, and encompassing everything in between. It is an active ‘struggle’ against processes which have been implemented for conducting people and can help to understand how regimes of government are transformed.¹⁵⁹ As I will now explore, the regimes outlined above prescribing the ideal standard were certainly not descriptive of real life during this period; commercial gambling endured and evolved into new forms. Moreover, working-class gamblers appeared to engage in several forms of counter conduct, from gambling in hidden ‘copper hells’ to actively supporting and protecting street bookmakers from being apprehended by the police.

5.1 Enforcement difficulties

As alluded to above, the numerous attempts to suppress working-class gambling through primarily prohibitive, juridico-legal mechanisms were not particularly successful. The 1541 provisions failed in their objective to debar unlawful games: the lack of a formal police force at this time meant that legislation was to be enforced by the local gentry who demonstrated

¹⁵⁵ Michel Foucault, ‘Questions of Method’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 81.

¹⁵⁶ Section 5.2 of Introduction.

¹⁵⁷ Foucault, ‘Questions of Method’ (n 155) 82.

¹⁵⁸ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 113) 200–202.

¹⁵⁹ *ibid.*

an unsurprising reluctance to act, given their own interests in gambling.¹⁶⁰ Accordingly, the legislation was widely ignored.

The proscriptive legislation of the eighteenth century was also largely ineffective. Acts which sought to ban certain games were predictably circumvented through the invention of new forms of gambling: the dicing game ‘passage’ was invented and became popular following the implementation of the 1738 Act, before being prohibited by Parliament in 1739, along with any other game involving one or more die (save for backgammon).¹⁶¹ In response, the game of ‘roulet’ was developed, and subsequently outlawed under the Gaming Act 1744. Other legislative attempts, such as the Disorderly Houses Act 1751, were later enacted to encourage prosecution of those keeping ‘bawdy houses, gaming houses and other disorderly houses’.¹⁶² However, gambling remained a ubiquitous and socially pervasive activity in Britain.¹⁶³ In fact, during the first half of the eighteenth century in particular, there is evidence to suggest that many members of the gentry were unwilling in practice to ‘meddle with people’s affairs on the grounds of religion or morality’.¹⁶⁴ Insofar as it did not affect public order, gambling by the common people was more or less tolerated:

This toleration was made easier by the nature of the wagering among the common people. Though widespread, it was dispersed over various activities; much of it was ‘hidden’ amongst themselves, in their ale-houses or in their districts; and, for the main part, it was carried on without professional gamblers. More than this, it was felt that gambling and other popular activities kept the people happy and ensured their satisfaction with the status quo.¹⁶⁵

By the end of the eighteenth century, however, widespread concern was consistently raised by the members of the middle class regarding the ineffectiveness of the existing legislation in suppressing unlawful gambling. Despite informal policing efforts by the ‘evangelical police’ and other common informers, enforcement of the legislation was limited and gaming houses

¹⁶⁰ Chinn (n 4) 13.

¹⁶¹ Miers (n 9) 31.

¹⁶² Disorderly Houses Act 1751, s 5.

¹⁶³ Miers (n 9) 31.

¹⁶⁴ Chinn (n 4) 18. citing Robert W Malcolmson, *Popular Recreations in English Society 1700-1850* (Cambridge University Press 1973) 158,166.

continued to flourish. One of the key reasons for this was the absence of regular formal policing,¹⁶⁶ which was, according to the police, a result of the inadequate powers of entry and search provided by the law. The copper hells, the gaming houses in which the working classes gambled, were notoriously - and by design - difficult to access, with elaborate systems in place to warn the inhabitants of an impending raid:¹⁶⁷

The inferior houses of play are always situated in obscure courts [...] and, most frequently, are kept shut up during the day as well as at night, as if unoccupied, or some appearance of trade is carried on as a blind. A back room is selected for all operations, if one can be procured sufficiently capacious for the accommodation of forty or fifty persons at one time [...] To prevent the noise being heard in the streets, shutters, closely fitted to the window frames, are affixed, which are padded and covered with green baize : there is, invariably, an inner door placed in the passage, having an aperture in it, through which all who enter the door from the street may be viewed ; this precaution answers two purposes, it deadens the sound of noisy voices at the table and prevents surprise by the officers of justice.¹⁶⁸

In addition, the exclusive, higher class gold and silver private members' gambling clubs, though also technically unlawful, were frequented by leading politicians and members of the aristocracy, their elevated status making it virtually impossible to enforce the law there.¹⁶⁹ Moreover, corruption in the police force was widespread: 'large sums are often paid to police officers, as well as to the more imposing informers [...] Hush money varies according to the magnitude of the concern, from £250 to £1000 per annum'.¹⁷⁰

When the laws against gaming houses were strengthened in 1845,¹⁷¹ the masses turned to a different medium of gambling: horse-race betting. The state's response, the prohibition of betting houses in 1853,¹⁷² also failed to suppress working-class gambling, however, as betting operations simply moved onto the street. The final attempt to suppress working-class gambling, under the Street Betting Act 1906, was equally as ineffective and street betting continued to flourish.¹⁷³ United against the Act, which, by now, the working-class public felt

¹⁶⁶ Miers (n 9) 30, 49.

¹⁶⁷ *ibid* 51.

¹⁶⁸ Ashton (n 44) 133–7 citing Fraser's Magazine, August 1833.

¹⁶⁹ Monkcom, Gouriet and Phillips (n 39) 9.

¹⁷⁰ Ashton (n 44) 109.

¹⁷¹ Gaming Act 1845.

¹⁷² Betting Act 1853.

¹⁷³ Monkcom, Gouriet and Phillips (n 39) 16.

visibly targeted their culture¹⁷⁴ and created ‘one law for the rich and another for the poor’,¹⁷⁵ bookmakers were able to rely on the support and protection of the communities into which they were deeply integrated¹⁷⁶ in order to evade the law.¹⁷⁷ Accordingly, members of the working-class public were highly unlikely to cooperate with police efforts, who experienced great difficulty in gathering the necessary evidence: ‘The organization of betting was so well-diffused and so well-embedded in working-class society that it was simultaneously both relatively easy for a punter to make a bet and difficult for the police to check all the premises where bets might be taken’.¹⁷⁸ Moreover, the Act was easy to evade by those engaging in street betting, who had elaborate arrangements for warning and escape.¹⁷⁹ Thus, the legislation was rendered largely unenforceable.

5.2 *The evolution of raison d'état*

In summary, difficulties in enforcing this prohibitive regime of gambling regulation meant that it was not effective in creating ‘useful and valuable members of society’: working-class subjects who do not gamble. However, this regime of government aligned with the rationality of *raison d'état* was not fully developed in its approach, which was focused on imposing a particular attitude on the working class from above. A fully developed art of government, conversely, requires that subjects actively modify their own way of thinking and, accordingly, their behaviour:

[...] *raison d'état* must act on the consciousness of people, not just to impose some true or false beliefs on them [...] but in such a way that their opinion is modified, of course, and along with their opinion their way of doing things, their way of acting, their behaviour as economic subjects and political subjects.¹⁸⁰

¹⁷⁴ Miers (n 9) 278.

¹⁷⁵ Select Committee on Betting Duty (1923) (n 103) xiii.

¹⁷⁶ Chinn (n 4) 226–230.

¹⁷⁷ Dixon (n 3) 144.

¹⁷⁸ Miers (n 9) 278.

¹⁷⁹ Dixon (n 3) 220.

¹⁸⁰ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 113) 275.

During this early episode of *raison d'état*, individual subjects were instead viewed in 'purely passive terms': 'it is a question of giving individuals a certain representation, an idea, of imposing something on them, and not in the least of making use of their attitudes, opinions and ways of doing things'.¹⁸¹ Foucault explains that in order to properly manage the internal affairs of the state, and thus for the *raison d'état* governmentality to function effectively, an additional 'technology' must be applied. This additional technique, which is installed upon *raison d'état*, is called 'police'.¹⁸² The apparatus of police, as an internal set of techniques and a governmental rationality will be considered in greater detail in Chapter Two. For the present purposes, however, it is sufficient to highlight one of the crucial elements for the effective management of the internal affairs of the state, which was absent during this period of gambling regulation. That element is knowledge.

To function effectively, reason of state requires a full and precise knowledge of those elements that constitute the strength of the state in order to inform its actions and enable its preservation. Historically, this knowledge was made possible through the development of 'statistics'. 'Statistics', in this sense, represent knowledge of the resources and forces which characterise the state at a given moment in terms of, for example, the quantity, mortality and wealth of the individuals who make up the state; the potential wealth available in the circulation of trade, etc: 'a set of technical knowledges that describes the reality of the state itself'.¹⁸³ In essence, 'reason of state's problem of calculating detailed actions appropriate to an infinity of unforeseeable and contingent circumstances is met by the creation of an exhaustively detailed knowledge of the governed reality of the state itself, extending (at least in aspiration) to touch the existences of its individual members'.¹⁸⁴

¹⁸¹ *ibid* 278.

¹⁸² *ibid* 306.

¹⁸³ *ibid* 274.

¹⁸⁴ Gordon (n 115) 10.

5.3 Knowledge and the alternative approaches of the National Anti-Gambling League

5.3.1 A gambling policy based on opinions and assumptions

During the period of gambling regulation to which this chapter is dedicated, it was unquestionably accepted that gambling did not present an issue to the wellbeing of elite members of society. Meanwhile, it was equally assumed, without scrutiny, that gambling by working class people was inherently problematic for those individuals and for society. The dominant view was one of ‘moralistic individualism’: the working class were to blame for their own social problems (such as poverty), which were linked to their involvement with activities such as drinking and gambling:

Few of their friends speak pointedly and directly to them of these vices [...] there is a marked reluctance [...] to speak to the poor plainly of their duties to themselves; a want of courage in urging constantly the practice of thrift, temperance and foresight; a disposition to assume that the poor are to be passive recipients of benefits bestowed upon them by others, and that they are not to help to work out their own salvation.¹⁸⁵

Moreover, it was taken for granted that gambling was a significant cause of crime, as a matter of official expertise and also common sense:¹⁸⁶

It is an undoubted fact which can be established by overwhelming evidence from those who have the widest and most intimate experience of the working of the criminal law that a very large proportion of offences of dishonesty committed by first offenders [...] are attributable to excessive betting. No statistics are available in support of this proposition. Certainly there are no statistics which contradict it.¹⁸⁷

Similarly, street bookmaking was ‘undoubtedly a great source of evil’¹⁸⁸ and ‘the cause of most of the evils arising from Betting amongst the working classes’¹⁸⁹: it was simply a matter of ‘common knowledge’ that working-class gambling was a problem and ‘the time has come when we ought to begin to try to do something’.¹⁹⁰ The prevalent, but distorted, image of street bookmakers in anti-gambling discourse - as corrupt, exploitative “parasites living on

¹⁸⁵ Dixon (n 3) 56 quoting reports of a lecture by Rowntree on his findings. .

¹⁸⁶ *ibid* 194–7.

¹⁸⁷ *ibid* 194–5 quoting ‘Home Office Memorandum on the Proposed Tax on Betting’, July 1923; Select Committee on Betting Duty (1923) (n 103) 568 and 570 (questions 9972 and 9999).

¹⁸⁸ Select Committee of House of Lords on Betting (1902) (n 72) para 18.

¹⁸⁹ *ibid*.

¹⁹⁰ Dixon (n 3) 116.; 94 HL Deb (20 May 1901) c 541-2, per Lord Bishop of Hereford.

the fat of the land” from whom the working class had to be protected¹⁹¹ - was used to complement the prevailing image of the working class as ‘irrational, immoral and immature’.¹⁹² This constructed image of street bookmakers, embedded with a wider set of values and attitudes towards the working class more generally, ultimately meant that the legislation designed to suppress them - the Street Betting Act 1906 - was inappropriate and inadequate; it was aimed at the image rather than the reality.¹⁹³ As such, ‘policies were developed and laws made in conditions of virtual ignorance about the subject’,¹⁹⁴ contributing to the general ‘incomprehension of working-class life’.¹⁹⁵

5.3.2 An alternative understanding of the working-class problem and the National Anti-Gambling League

Knowledge about the conditions of urban life was, however, beginning to increase in a significant way as a consequence of ‘a new kind of social investigation’¹⁹⁶ in the late-nineteenth century. In 1889, Charles Booth began publishing his seventeen volume survey regarding the Life and Labour of the People of London,¹⁹⁷ which was followed up by a social study of York completed by Seebohm Rowntree, a social investigator, Quaker industrialist, and ‘figurehead’ of anti-gambling movement the National Anti-Gambling League (‘NAGL’).¹⁹⁸ These studies, and further studies of this type, contributed to the establishment of an alternative, structural understanding of the existing social problems, particularly poverty, experienced by the working class. There emerged a rising sympathetic, humanitarian concern for the ‘misery undoubtedly caused by excessive gambling’ at this time¹⁹⁹ and the

¹⁹¹ *ibid* 35.

¹⁹² *ibid* 36.

¹⁹³ *ibid* 37.

¹⁹⁴ *ibid* 9.

¹⁹⁵ *ibid* 10; McKibbin (n 154) 158.

¹⁹⁶ Dixon (n 3) 64.

¹⁹⁷ Charles Booth, *Life and Labour of the People of London Vol. I-IV* (Macmillan 1895-1904); Charles Booth, ‘The Inhabitants of Tower Hamlets’ (1887) 50 *Journal of the Royal Statistical Society* 326.

¹⁹⁸ B Seebohm Rowntree, *A Study of Town Life* (Macmillan 1901).

¹⁹⁹ Dixon (n 3) 64.

observations presented a challenge to the prevailing way of thinking - aligned with 'moralistic individualism' - by establishing 'environmentalist accounts', presenting the basis for a 'fundamental reordering of the debate'.²⁰⁰

The social survey research conducted by Rowntree provided an important background to his anti-gambling activity with the NAGL, which was original in that it viewed betting and gaming as a symptom: the product of a defective socio-economic structure.²⁰¹ Established in 1890, the NAGL was a coalition of Nonconformist Protestant Churches whose strategy was to 'offer a strenuous and uncompromising opposition to every form of Betting and Gambling' applying the somewhat novel approach of the 'equal application of the existing laws, and the promotion of [...] amending measures in Parliament'.²⁰² Rowntree was influential in promoting the, then original and highly controversial, position that the remedy to address the problem of gambling lay not only in criminal prohibition and individual moral reform, but also in socio-educational and wider structural reform.²⁰³

Personal influence, the creation of sound public opinion and an exposure of the despicable folly of those who expect in the long run to gain money from betting. The effort to interest as wide a circle of people as possible in work for others. The provision of adequate counter-attractions of the right kind; with better housing conditions, improved education, stricter legislation for the suppression of the evil, a higher tone in factories, shops and other institutions and lastly but underlying all, just as a vigorous root underlies a healthy tree, a deepening of the religious and spiritual life of the whole nation.²⁰⁴

Influenced by the knowledge gained from the social research, the NAGL thus promoted a multi-faceted approach to address the issue of gambling. Methods of government, in the Foucauldian sense, can be seen in the efforts advanced to bring about change through wider structural reform addressing what Rowntree viewed as the root of the issue. Accordingly, in the long term, the NAGL supported policies which sought to address the apparent

²⁰⁰ *ibid.*

²⁰¹ *ibid* 70.

²⁰² *ibid* 84.

²⁰³ *ibid* 70.

²⁰⁴ *ibid* 71 citing Rowntree 'Betting and Gaming : Lecture at the Meeting House York, 1 Nov 1903', BSR LEC 26/12.

preconditions for the prevalence of betting, including the creation and encouragement of interest in counter-attractions to betting and the provision of better housing.

Centrally, the League also strongly believed that the creation of an informed public opinion about gambling was of great importance to their cause. Much of their work therefore had a disciplinary element, being devoted to education and propaganda using ‘well-tested techniques’ to effectively teach people the ‘correct’ way to think about gambling. These included ‘the petition, the subscription list [...] the public meeting, the local branch, the reforming periodical, and the letter to the MP.’²⁰⁵ A wide range of literature was produced and distributed, including ‘simple leaflets and pledges for mass circulation, flysheets, pamphlets [...], re-prints of anti-gambling material from the Press, and more substantial expositions of the anti-gambling case’.²⁰⁶

Even the more juridical methods employed by the NAGL were different in nature: instead of focusing on moralistic arguments, the main concerns of the League were the social effects of gambling and the commercial exploitation of the working-class gambler. Thus, objections to the League’s activities on the grounds of individual liberty were addressed by clarifying that the NAGL sought legal action only against gambling promoters, while individual gamblers should be ‘dealt with by “example, persuasion, warning, entreaty – but no force”’.²⁰⁷

A central aspect of the NAGL policy involved a controversial campaign for the suppression of the upper-class activity of racecourse bookmaking; the class-discriminatory extent of the existing legislation was perceived by the League to be a major obstacle to its successful enforcement.²⁰⁸ This was based on ‘the thesis that the fish rots from the head’ that was once again put forward to explain working-class gambling as a result of the poor example set by

²⁰⁵ *ibid* 84.

²⁰⁶ *ibid*.

²⁰⁷ *ibid* 83 Citing a leading figure of the NAGL: John Hawke, *A Blot on the Queen’s Reign: Betting and Gambling: Appeal to the Prince of Wales* (Elliot Stock 1890).

²⁰⁸ *ibid* 87–8 Citing the NAGL’s publication: 1(8) Bulletin (May 1894).

the upper classes, which needed to be resolved first.²⁰⁹ Ironically, one of the main efforts of the NAGL, aimed at tackling the examples set by the upper classes in relation to gambling at the race course, ultimately culminated in the enactment of the Street Betting Act 1906, a statute which sought almost exclusively to prohibit working class gambling, while protecting the legality of race course betting. In *Hawke v Dunn*, a legal action brought by the NAGL against on-course bookmaker Richard Dunn, the justices controversially found that a betting enclosure utilised by bookmakers at the race course fell within the definition of a ‘place’ for the purposes of the Betting Act 1853, effectively rendering on-course bookmaking unlawful.²¹⁰ This ‘great triumph of social reform’²¹¹ for the NAGL was short-lived, however, when the decision was overruled four months later in the case of *Powell v Kempton Park*.²¹²

With no realistic prospect of success for the foreseeable future, the NAGL diverted its attention away from upper-class betting to street bookmakers. Their efforts involved campaigning for enforcement and reform of legislation governing street betting, with a particular focus on the suppression of the publication of betting odds and other betting material in newspapers due to the major role this was seen to have played in the growth of off-course bookmaking.²¹³ One of the consequences of the NAGL activities, however, was to inadvertently draw attention to, and ultimately encourage official action against, working-class street betting, despite this approach being described by the NAGL as ‘a veritable crusade [...] vigorously carried on by the magistrates, police and local authorities against the humble betting man’.²¹⁴

Though not ultimately persuasive, the diverse approach of the work of the NAGL provides an early example of attempts to govern indirectly by effecting change through the wider

²⁰⁹ *ibid.*

²¹⁰ *Hawke v Dunn* [1897] 1 QB 579.

²¹¹ Dixon (n 3) 94 Citing 2(14) Bulletin (May 1897).

²¹² *Powell v Kempton Park Racecourse Company* [1897] 2 QB 242, a case which was effectively engineered by upper class betting men and horse racing organisations in response to the outrage caused by the decision in *Hawke v Dunn*.

²¹³ Select Committee of House of Lords on Betting (1902) (n 72) paras 12–13.

²¹⁴ Dixon (n 3) 109 citing 2(18) Bulletin (May 1899).

environment and public opinion instead of relying on force - an approach which is arguably not too dissimilar to the current regime of gambling regulation (see Chapter Four). According to Rowntree, ‘the solution of the gambling evil, as of many other social evils, will never be permanently effected without a deepening of the moral and spiritual life of the nation’.²¹⁵ During the early twentieth century, the approach of the NAGL mirrored the political philosophy of ‘New Liberalism’, the evolution of which Rowntree was a key individual in. This philosophy, underscored by authoritarian paternalism, was concerned with the combination of state action and moral reform.²¹⁶ Although this approach was undeniably benevolent and sympathetic towards the working class, it lay ‘perilously close to patronage, a habit of mind the most well-intentioned reformers fought but seldom conquered’:²¹⁷

The working class were to be educated, coaxed, and, if necessary, compelled into virtue. Their culture was degenerate and inferior. Their resort to gambling might be understandable, but it was still grossly irrational. Parasitic bookmakers and unscrupulous newspapers enticed naive working people into gambling, an activity which was a product of recent exploitative commercialization without any deeper roots in popular culture. The criminal law could properly be used to remove these alien elements and to protect the working class against themselves, leaving the ‘natural’ working-class community responsive to the attractions of rational recreation and religion. [...] In the failure of middle-class reformists to appreciate working-class culture as anything other than a species inferior to their own, there was, despite the benevolent intentions, a failure of understanding which was as great as that of those who merely feared and despised the working class. [...] Notwithstanding the innovative aspects of his work, Rowntree remained part of the tradition in which reform was produced for, not by, the working class.²¹⁸

As Dixon alludes to above, this approach is still focused on effecting change from an authority ‘above’ upon a section of the population. Arguably, the mode of governance today - examined in Chapter Four - is in some ways returning to this more sympathetic, if patronage, approach whereby online gamblers are protected from themselves. This is effected, however, through a range of very different approaches which, facilitated by advances in data-driven technology, operate *through* the actions of the gamblers instead. The present approaches to government are also very much informed by an increased knowledge of individual gamblers,

²¹⁵ B Seebohm Rowntree, *Betting and Gaming: A National Evil* (Macmillan 1905) 188.

²¹⁶ Dixon (n 3) 71.

²¹⁷ *ibid* 71–2 citing S Meacham, *A Life Apart: The English Working Class 1890-1914* (Thames & Hudson, 1977) 8.

²¹⁸ *ibid* 72.

collected through their gambling data, and the whole of the gambling population. In the next chapter, I will consider the increasing importance of the population as a whole in the development of the governmental rationality known as 'police', and its application in the fundamentally different approach to the government of gambling from 1960: administrative regulation.

Chapter Two

The Administrative Regime

1. Introduction

In this chapter, I resume the genealogy of gambling regulation, and the formation of gambling subjects, during the first half of the twentieth century, when most forms of commercial (mainly working-class) gambling were still prohibited by law. Between 1923 and 1951, one Select Committee and two Royal Commissions were appointed to evaluate the existing position with regard to commercial gambling, all three bodies concluding that legal reform was required: the current approach was in fact perceived as having a damaging effect on the rule of law. I begin the chapter by examining the findings of these review bodies, together with their recommendations, to understand the rationalities underlying the transition from a predominantly juridical regime of gambling prohibition under the criminal law (though supported by disciplinary and mechanisms of security) to a primarily disciplinary framework which focused on permitting, but strictly controlling the commercial gambling activity of all members of the population, regardless of class. Indeed, the government review bodies explicitly acknowledged the damaging effect that the class-discriminatory legislation was having on the rule of law, which had to be addressed under the reformed regime.

I then turn to the mechanisms introduced under the Betting and Gaming Act 1960, as amended most particularly by the Gaming Act 1968. Under this legislative framework, gambling operators were subject to a ‘command and control’ style of regulation comprising mainly disciplinary methods to ensure compliance with the closely prescribed standards of

commercial gambling, which were to ultimately be normalised under this regime. The regulations imposed strict controls over almost all aspects of the gambling environment, through which gamblers' behaviour could be indirectly governed and restricted. The rationality underlying this regulatory regime was that the risks which the regulations sought to avoid lay in excessive gambling, rather than in the activity itself. Nonetheless, even though moral arguments condemning gambling had lost their influence in an increasingly secular society, the activity was not (yet¹) considered to be useful or productive. Thus, those who wished to gamble were provided with a lawful outlet to do so, to ensure that their gambling activity remained moderate and within certain 'reasonable bounds'; however, gambling was not to be encouraged as this could lead to excess. This translated to the key principle underscoring the regulatory framework, that commercial gambling facilities may be offered to satisfy demand which already existed, but there must be no stimulation of new demand.

This new approach to gambling regulation, I argue, corresponds with the 'installation' of the police state technology in Foucault's genealogy of the governmentalisation of the state. 'Police' in this sense is used to refer to the internal policy of the state, still (as in Chapter One) to ensure and maximise its strength according to the rationality of *raison d'état*. This involves the employment of primarily disciplinary practices, including strict rules and regulations, to manage the activity and wellbeing of all individuals within a population to ultimately ensure that it contributes towards the state's strength. According to this rationality, the real basis of the state's power and wealth lies in the strength and prosperity of 'all and each'.² Again, I use this analysis to determine the identity of the 'useful and valuable member of society' during this period of regulation. The normative standard under this regime is similarly a subject who ideally does not gamble, since gambling is still not yet perceived as

¹ See Chapter Three

² Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 10.

useful to the state's strength. Should they be inclined to do so, however, their gambling activity will be tolerated as long as it remains within the 'reasonable bounds' provided for under the closely prescribed and strictly controlled lawful gambling environment: in other words, the tolerated gambler. This will ensure that the gambling activity does not become 'excessive', and distract from 'real work'.³

Lastly, I consider the effect of this regime in practice as well as the ways in which it evolved, relaxing in line with the political shift towards neoliberalism at the end of the twentieth century. Despite an unstable beginning whereby commercial gaming was able to proliferate using a number of legislative loopholes, by the late 1970s it was considered by a subsequently appointed Royal Commission that the regulatory regime had been successful in establishing control over the suppliers of commercial gambling. Gambling activity was being governed indirectly through the surrounding environment under this regime; however, as identified by the Royal Commission, there was a serious lack of information about the incidence of gambling and excessive gambling amongst the population. What followed over the course of the next two decades was a gradual and piecemeal relaxation of gambling regulations, aligned with the overall climate of government inclination towards deregulation and competitive stimulation. The introduction of the National Lottery - a state endorsed gambling product for good causes, the goal of which was precisely to stimulate demand - proved to be a significant catalyst in the realisation of a new, autonomous gambling market economy in respect of which the restrictive controls of the present regime were no longer considered to be appropriate. In parallel with this gradual process of loosening restrictions, individual gamblers would, under future regimes (considered in Part II), come to play a much more direct role in the regulation of gambling as responsible gamblers. The birth of the

³ Royal Commission on Gambling (1976-8), *Royal Commission on Gambling. Final Report. (the Rothschild Report). Volumes 1-2* (Cmnd 7200, 1978) para 1.8.

‘pathological’ gambler in 1980 was a key step in relocating this responsibility from the industry to those individual gamblers.

2. From prohibition to regulation⁴

2.1 A threat to the rule of law

The period between 1900 and 1951 witnessed a drastic shift in the official attitudes of the British Government towards gambling itself and the appropriate mode of regulation which should be applied to regulate it. There were four official government enquiries into the regulation of commercial gambling conducted during this period. As discussed in Chapter One, the Select Committee of the House of Lords in 1902⁵ maintained the established position that prohibition was the appropriate method by which to control the practice of commercial, off-course betting which had ‘increased considerably of late years especially amongst the working classes’.⁶ The option of a licensing system to regulate betting was briefly evaluated by the Committee but, ‘after mature consideration’,⁷ was dismissed. The Committee were of the view that to legalise betting would be undesirable and that ‘the establishment of such a system would rather increase than lessen the amount of Betting prevalent at the present day’:⁸ ‘the evil of adopting this system would by its encouragement of the gambling instinct far outweigh any gain that might accrue’, and this was something that the state refused to be seen as complicit in.⁹ It ultimately proved to be the last British parliamentary inquiry committee to maintain this position.

⁴ David Dixon, *From Prohibition to Regulation: Bookmaking, Anti-Gambling, and the Law* (Clarendon Press 1991).

⁵ Select Committee of House of Lords on Betting (1902), *Reports from the Select Committee of the House of Lords on Betting; Together with Proceedings of the Committee and Minutes of Evidence* (HL 1902, 379-V).

⁶ *ibid* para 2.

⁷ *ibid* para 15.

⁸ *ibid* para 14–5.

⁹ *ibid* para 17.

Between 1923 and 1951, three further official inquiries¹⁰ were conducted and while their conclusions as to the form that any future gambling regulation should take were far from unanimous, they were wholly agreed that the present law was, in effect, unenforceable and in severe need of reform. As explored in Chapter One, the proscriptive regime, which in practice predominantly applied to working class forms of commercial gambling, taking place away from the race course for example, was largely ineffective and widely ignored by the public. By the 1920s, the unenforceability of the law was acknowledged even by the police: ‘sympathy and active assistance of the general public [...] is with the bettor, whether bookmaker or backer and against the police. No assistance is given to the police; on the contrary, obstacles are put in their way’.¹¹ The policing strategy by this point in time was one of discretion, through ‘differentiated rather than universal enforcement’,¹² foreshadowing a more disciplinary approach to regulation concerned with reducing and correcting examples of deviance rather than applying the blunt instrument of the criminal law:

The place and time of the behaviour, and the age, sex, status, and class of the actors determined in practice what was, and was not, permissible – so that, for example, adult male betting with bookmakers discreetly off the main street could be tolerated. What was treated as deviant in practice did not match the formal definitions of illegality: rather a compromise between law and community values was constructed through the use of police discretion.¹³

Accordingly, in contrast with their stance in 1902, when giving evidence in 1923 the police were unanimously in favour of abandoning the prohibitive approach in favour of a regime of regulation. The 1923 Committee agreed, concluding that enforcement of the existing law was ‘impossible’¹⁴ and declared in its recommendations that an alternative approach was required; a sentiment with which both Royal Commissions, subsequently appointed in 1932 and 1949, concurred. Fundamentally, it was the position of all three official review bodies that the lack

¹⁰ Select Committee on Betting Duty, *Report from the Select Committee on Betting Duty Together with the Proceedings of the Committee, Minutes of Evidence, Appendices and Index* (HC 1923, 139 V); Royal Commission on Lotteries and Betting, *Final Report of the Royal Commission on Lotteries and Betting 1932-3* (Cmd 4341, 1933); Royal Commission on Betting Lotteries and Gaming, *Report of the Royal Commission on Betting, Lotteries and Gaming 1949-1951* (Cmd 8190, 1951).

¹¹ Select Committee on Betting Duty (1923) (n 10) para 14.

¹² Dixon (n 4) 267.

¹³ *ibid.*

¹⁴ Select Committee on Betting Duty (1923) (n 10) para 14.

of enforceability of the present law represented a serious threat to the rule of law. According to the 1923 Select Committee:

[the] continual breaking of the law by millions of people by betting in the streets, the surreptitious passing of the slips and the constant endeavour to avoid the police must have a most demoralising effect on character and establish a general weakening of respect for the law.¹⁵

The Royal Commission (1932-3) agreed:

We are satisfied that the existing position cannot be allowed to continue. In reaching this conclusion we are influenced by the danger of allowing any branch of the criminal law to fall into disrespect, and by the consideration that police morale and discipline are bound to be adversely affected in the long run if the police are called upon to administer a law which cannot be effectively enforced [...]¹⁶

The Royal Commission (1949-51) described the existing law as ‘obscure, illogical and difficult to enforce’,¹⁷ leading to a situation whereby ‘the law is held in such contempt that the ordinary law-abiding person has no compunction about breaking it and helping others to break it’.¹⁸ In light of this unacceptable position, which was presented as a clear threat to the internal strength and order of the state, it was concluded in all three inquiries that the current, prohibitive approach to commercial gambling had to be reformed.

2.2 Towards regulating the gambling activity of all members of the population

As well as practical difficulties with enforcement, the Royal Commission (1949-51) identified three further reasons for the failure of ‘legislation which is designed only to prohibit or restrict particular forms of gambling’:¹⁹ it frequently becomes out of date; it leads to class distinctions; and it is ‘ineffective as a method of checking gambling generally’.²⁰ I will now explore each element to examine the context underlying the transition from a regime of prohibition to one of administrative regulation.

¹⁵ *ibid* 15.

¹⁶ Royal Commission on Lotteries and Betting (1932-3) (n 10) para 281.

¹⁷ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) para 10.

¹⁸ *ibid* para 219.

¹⁹ *ibid* para 188.

²⁰ *ibid* para 188.

2.2.1 Outdated views of gambling

Types of gambling which have been considered at one time to cause serious social evils may in course of time become relatively harmless, in which case the restrictions imposed on them are regarded as irksome and unnecessary, and ignored²¹

During the first half of the twentieth century, there emerged a distinct change in official attitudes towards gambling, whereby certain working-class forms of the activity - such as off-course betting - began being seen as more legitimate. Although gambling was clearly pervasive prior to 1914, following the First World War it was generally accepted that betting was becoming more popular than ever; the most reliable estimate is that the number of regular bettors in the 1920s was in the 'four millions'.²² As working-class wages increased in the late-nineteenth and early-twentieth century, members of the working class became more able to afford to partake in leisure activities; Seebohm Rowntree, previous leader of the National Anti-Gambling League ('NAGL'), identifying that 'a problem of poverty had become a problem of leisure'.²³

By the 1920s, betting was becoming widely accepted as an everyday activity, described by the Committee in 1923 as merely 'a foolish occupation or habit', 'pure luxury and a fitting subject matter for taxation':²⁴ 'practically every class in the community now bet'.²⁵ Indeed, the fact that in 1923, the Select Committee on Betting Duty was formed by the House of Commons 'to consider the question of imposing a duty on betting, and to report whether such a duty is desirable and practicable'²⁶ is in itself illustrative of the stark contrast in the official position regarding 'state complicity' in gambling, which had underscored the 1902 inquiry.

As David Dixon observes, this was 'one minor product in a constellation of major social changes and influences', including debates about poverty and the effects of the war.²⁷

²¹ *ibid* para 188.

²² Ross McKibbin, 'Working-Class Gambling in Britain 1880-1939' (1979) 82 *Past and Present* 147, 154.

²³ Dixon (n 4) 335; B Seebohm Rowntree and GR Lavers, *English Life and Leisure* (Longmans, Green 1951) xi-xii.

²⁴ Select Committee on Betting Duty (1923) (n 10) para 29.

²⁵ *ibid* para 29-30.

²⁶ *ibid* ii.

²⁷ Dixon (n 4) 209.

Economic developments were also influential: the working class were now expected to participate more actively in the market and circulation of money.²⁸ Moreover, this change in attitude was generally reflective of the broader social context in post-war Britain: the influence of anti-gambling groups, such as the NAGL (who had become increasingly associated with religious forces in society) was declining, its values and frame of reference no longer as relevant to British life following the two World Wars.²⁹ Thus, traditional anti-gambling arguments regarding the activity being inherently immoral were being rejected by the majority of the public.³⁰ This was observed in 1923 by the Select Committee: ‘the large mass of such public do not believe and will not consider a bet to be a crime, or even morally wrong’.³¹

When considering the ‘moral conception of betting’, the 1923 Committee emphasised the importance it attributed to public opinion, which, it acknowledged, did not align with the moralistic undertones of the existing law on gambling:

What is and what is not immoral must be a matter of individual opinion and conscience rather than one capable of proof or of logical definition. But it has been proved before Your Committee that in the present state of public opinion millions of persons who bet and large numbers of others incapable of estimation regard betting in no sense as either immoral or sinful. Your Committee [...] think that the latter view is the one which will appeal to the vast majority of the people of this country and to the large majority of truly Christian men, and that there is no moral objection in itself to the State imposing a tax on betting.³²

Similarly, the Royal Commission (1932-3) acknowledged ‘the opinion commonly held by a very large number of people, that gambling in moderation and within a man’s means is a pardonable habit, and one which may fairly be reckoned among his amusements’.³³ It also put forward the view that, although it could ‘not ignore the objections to gambling on ethical grounds’,³⁴ legal restriction could not be justified solely on such objections, highlighting the

²⁸ *ibid.*

²⁹ *ibid.* 300.

³⁰ *ibid.* 301–2.

³¹ Select Committee on Betting Duty (1923) (n 10) para 14.

³² *ibid.* para 26.

³³ Royal Commission on Lotteries and Betting (1932-3) (n 10) para 188.

³⁴ *ibid.* para 233.

importance of taking into account the opinion of the whole public in order that the law may be 'more reasonable', 'more workable' and thus 'more likely to be accepted generally than it is today':³⁵

the field of ethics is not co-extensive with that of the criminal law. On the one hand there are many forms of conduct which are generally considered to be morally wrong or reprehensible, but which are not contrary to the criminal law. On the other hand there are matters in regard to which the State has found it necessary to make laws, independently of any question of morality. In any case, public opinion generally would not support legislation based solely on ethical objections to gambling.³⁶

It was becoming increasingly clear that not only was there a question mark around whether the activity of gambling was morally wrong; more fundamentally the place of morality or ethical views (as regards gambling in this case) in the law was being queried. The 1949-51 Royal Commission took the official stance on gambling further and aligned itself with the attitudes of the majority of the population, constituting a landmark in the Government's understanding of gambling as a 'pan-class leisure activity':³⁷

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. [...] from our general observation and from the evidence which we have heard 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, or to their family circle and the community generally. [...] 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 in it.³⁸

Thus, the Commission rejected the view that gambling is an inherently immoral activity which inevitably causes social problems, and requires prohibition. Instead, it accepted that 'The spread of gambling is one of the symptoms of an age in which people have more leisure and cannot or do not know how to make good use of it'.³⁹ Gambling - in moderation - was now becoming officially regarded, at least by the state, as a feature of everyday life and a potentially acceptable form of leisure.

³⁵ *ibid* para 241.

³⁶ *ibid* para 233.

³⁷ David Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (2011) 15 *Gaming Law Review and Economics* 93.

³⁸ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) para 159.

³⁹ *ibid* para 185.

2.2.2 Knowledge of gambling: Challenging assumptions using statistical evidence

Relatedly, and as discussed in Chapter One, by the 1920s, the unsubstantiated, paternalistic assumptions regarding the negative social consequences of gambling for working-class members of society were becoming less and less influential. The Select Committee, in hearing the evidence presented before it in 1923, was explicit in its preference for evidence of a statistical or numerical nature over long-established assumptions, with the Chairman stating: ‘I prefer statistics to individual opinions’.⁴⁰ Illustrative of this preference was the Committee’s attempt to quantitatively test the assumption regarding the causal relationship between gambling and crimes of dishonesty, finding that:

it has been possible to test the accuracy of the repeated statement that betting is the primary cause of dishonesty. At the request of Your Committee a return was furnished by the Home Office for each year from 1906 to 1921, inclusive, of the persons (i) tried on indictment, and (ii) tried summarily for the following crimes of dishonesty—larceny by a servant, embezzlement, larceny of post letters, simple larceny and other frauds. If there was truth in the allegation, one would expect to find, with the enormous growth of betting between 1906 and 1921 a corresponding increase in the number of these crimes. [...] Your Committee find that so far from there being an increase there has been a decrease in these numbers.⁴¹

As expanded upon in section 4 below, the development of statistics was of fundamental importance in enabling the transformation in governmental approach which began during this period. The general lack of reliable statistical evidence at this time relating to the prevalence of betting in Britain,⁴² or the causal relationship between gambling and social issues, including poverty,⁴³ was also identified as problematic by subsequently appointed Royal Commission in 1932. The Commission accordingly applied a cautious approach to the existing assumptions regarding the ‘social evils’ which gambling had been taken to cause:

Since there are no public statistics dealing comprehensively with the causes of the types of social evil of which gambling is said to be a frequent cause, there can be no statistical proof of the extent of the social damage done by gambling. Any conclusion on this matter must necessarily be based on the evidence of experienced witnesses, and in particular of those with first-hand knowledge of social conditions [...] In weighing the evidence tendered to us on this point, it has been our endeavour to satisfy ourselves that the

⁴⁰ Select Committee on Betting Duty (1923) (n 10) 574 question 10,051. See also, for example: questions 6846-7; 6977-8; 8482-3; 8993-4.

⁴¹ *ibid* para 27.

⁴² *ibid* para 23-4.

⁴³ *ibid* para 27.

evidence was not based on isolated instances, but that it represented experience gathered over a wide field. In dealing with matters of this kind the judgment of even the most experienced observer may be at fault in some particular.⁴⁴

The Royal Commission (1949-51) was, to a greater extent, able to utilise evidence of a statistical nature about the volume and extent of gambling, relying heavily on sources of information such as officially published figures from the annual reports of the Racecourse Betting Control Board;⁴⁵ the National Income statistics;⁴⁶ and sample surveys of individual betting habits,⁴⁷ most significantly the Government Social Survey conducted in 1950.⁴⁸ Using this information, they arrived at the conclusion that, as regards the economic effects of gambling, ‘the present personal expenditure on gambling represents not more than 1% of total personal expenditure, and that gambling at present absorbs about ½% of the national resources’.⁴⁹ As regards the social effects of gambling, the Commission used this evidence, together with the witness statements, to form the conclusion that ‘the great majority of those who take part in gambling do not spend money on it recklessly and without regard to the effect of their expenditure on the standard of living of themselves and their families’.⁵⁰

Based on their statistical analyses, the Royal Commission rejected the previously commonplace assumptions regarding the damaging, direct effects of gambling, both socially

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While it is obvious that excessive gambling may and does cause poverty, we do not think that in present circumstances this is commonly so, or that gambling is usually the only or the principal factor responsible.⁵¹ [...] The conclusion we have reached, on the whole of the evidence, is that gambling is of no significance as a direct cause of serious crime, and of little importance, at any rate at the present time, as a direct cause of minor offences of dishonesty. We do not doubt there is not uncommonly a connection to be found between dishonesty and excessive gambling in persons of a generally dissolute character, but we should not regard this as evidence that gambling is, in itself, a cause of crime.⁵²

- and in terms of the national economic interests:

⁴⁴ Royal Commission on Lotteries and Betting (1932-3) (n 10) paras 209–10.

⁴⁵ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) paras 53–4.

⁴⁶ *ibid* para 76.

⁴⁷ *ibid* para 53–4.

⁴⁸ *ibid* para 56.

⁴⁹ *ibid* para 165.

⁵⁰ *ibid* para 180.

⁵¹ *ibid* para 173.

⁵² *ibid* para 177.

whatever the extent of the practice [of cash betting] in this country we have been unable to find any conclusive evidence to support the view that it interferes seriously with production.⁵³ [...] We conclude that gambling, on the scale on which it is indulged at the present time, cannot be regarded as imposing a serious strain on our national resources or manpower, and we see no justification in normal economic circumstances, for imposing special restrictions on these grounds.⁵⁴

In order to govern commercial gambling more effectively, it was clear that a greater importance was being assigned to obtaining a full and detailed knowledge - preferably of a statistical nature - of all aspects of the activity of gambling across the whole of the population. This process was clearly ongoing - 'we have had the greatest difficulty, with all the resources at our disposal, in finding the answers to many factual questions of great importance to our enquiry, and we think it is essential, if any further progress is to be made [...] to remove as many of these difficulties as possible'.⁵⁵ The importance of statistical knowledge was becoming increasingly crucial to the practice of government, not only for informing the state, but also for the development of an 'informed public opinion',⁵⁶ an approach which will continue to become increasingly prevalent under the regimes explored in Part II of this thesis.

As will be explored in the following section, the Royal Commission (1949-51) favoured a 'more positive approach'⁵⁷ which informed, educated and worked with public opinion, instead of imposing an alternative stance 'negatively'⁵⁸ upon it. Accordingly, the Commission recommended that:

As much information as is practicable should be made available to the public about the extent of gambling, and, wherever possible, the conduct of the various forms of gambling.⁵⁹ [...] We attach importance to [this] principle because we believe that gambling is more likely to be kept within reasonable bounds by the development of public opinion than by restrictive legislation.⁶⁰

⁵³ *ibid* para 169.

⁵⁴ *ibid*.

⁵⁵ *ibid* para 194.

⁵⁶ *ibid*.

⁵⁷ *ibid* para 187, 449.

⁵⁸ *ibid*.

⁵⁹ *ibid* para 189.

⁶⁰ *ibid* para 193.

Centrally, these three inquiries demonstrated that the views of working-class people now mattered, at least to a degree. They were no longer regarded merely as ‘dumb recipients of attempts at reform or coercion’⁶¹ and indeed the 1923 official inquiry represented the first serious official attempt to understand the attraction of gambling for working people.⁶²

2.2.3 Regulating all members of the population

The current law on gambling was criticised by all three bodies as being ‘confused, class-discriminatory, and responsible for “a strong feeling of resentment among large numbers of the population”’.⁶³ One of the key reasons for the failure of this prohibitory regime was thus located in the inequality in the application of the law across the whole of the population.

The working-class support of bookmakers over and above the rule of law was based largely on the abhorrence of a class law: ‘Consent to policing in liberal democracies relies heavily on the presentation and perception of the police as the enforcers of a politically neutral law: laws which are demonstrably partial and discriminatory can undermine this consent’.⁶⁴ Given that, as discussed above, betting in particular was beginning to be widely viewed as an everyday leisure activity, the prohibitory legal framework was resented by working-class gamblers who, by this time, were starting to be acknowledged as members of the ‘significant public’, from whom support for legal action was sought by the police:⁶⁵

It is open to this criticism — that a man of good credit or a rich man can bet to any extent without any penalty, while a poor man, if he bets at all, is liable to criminal penalties, as is the bookmaker with whom he bets. This result follows because the rich man can bet on credit but the poor man cannot obtain credit, cannot afford the money or time to attend a racecourse, must bet in the street, and at once renders himself liable to the criminal law. There is evidence that this inequality of the law produces a strong feeling of resentment among large numbers of the population⁶⁶

⁶¹ Dixon (n 4) 205.

⁶² *ibid* 205–6.

⁶³ Select Committee on Betting Duty (1923) (n 10) para 11; Dixon (n 4) 204.

⁶⁴ Dixon (n 4) 249.

⁶⁵ *ibid* 254.

⁶⁶ Select Committee on Betting Duty (1923) (n 10) para 11.

The 1932-3 Commission agreed that the uneven operation of the existing law amongst different classes within the population was one of the key reasons for the failure of the regime. It concluded that the widespread feeling that the betting laws were ‘unfair to the working man’ and represented ‘class legislation’ was, as explored above, having a seriously damaging effect on the rule of law.⁶⁷

The police get little support from the public in the areas in which street betting is rife. They feel no enthusiasm, but rather considerable distaste, for their duties under the law, and do not administer it vigorously. Further, some magistrates habitually inflict penalties considerably less than can be imposed under the Act of 1906, and thus show their lack of sympathy with the law. This tends to increase the difficulties of the police.⁶⁸

As identified by the 1932 Royal Commission, ‘the law requires to be rehabilitated in public opinion before it can be effectively enforced’⁶⁹ and accordingly the 1951 Royal Commission sought to ensure that its recommendations were ‘likely to be accepted as reasonable by the great majority of the community’.⁷⁰ To address this issue, the 1949-51 Royal Commission were clear that new legislation must be framed so that the law applies fairly to all sections of the community’.⁷¹ The Commission here acknowledged, as pointed out above, an informed public opinion must be developed and utilised properly in order to effectively regulate:

The importance of [this principle] lies in the fact that the enforcement of gambling legislation depends to a peculiar extent on the support of public opinion. If the law is to be observed we believe that it is necessary that it should afford the same freedom of choice to all sections of the community; we also think that in these circumstances measures designed to discourage or prevent excessive gambling would have very general support.⁷²

Successful enforcement of the law was now seen as dependent upon obtaining the support of public opinion. Indeed, in the view of all three official inquiry bodies, public opinion was a identified as a necessary component for the successful governance of gambling, and it was clear that the moralistic, paternalist tone of the existing legislative framework towards gambling was not aligned. As observed by the Select Committee in 1923:

⁶⁷ Royal Commission on Lotteries and Betting (1932-3) (n 10) para 279.

⁶⁸ *ibid.*

⁶⁹ *ibid* para 282.

⁷⁰ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) para 7.

⁷¹ *ibid* para 189.

⁷² *ibid* para 193.

It is impossible in a democratic country to enforce a law which is either antagonistic to public opinion or very much in advance of it. The millions who do now bet and regard betting as neither wrong or undesirable, and the impossibility of the prohibition of even one class of betting at the present time, are conclusive evidence that the prohibition of all betting is absolutely impossible.⁷³

2.2.4 Ineffectiveness of prohibition and the role of the state in permitting gambling activity

Finally, the persistent demand for gambling facilities led the Royal Commission (1949-51) to conclude that prohibition is ‘ineffective as a method of checking gambling generally’:

So long as there is a demand for gambling facilities, the ingenuity of those who provide them and those who use them will find ways of circumventing legislation of a purely prohibitive or restrictive character. Throughout the history of gambling legislation new forms of gambling have been found to take the place of those which the legislature has sought to repress in such a way as to stultify the general social object of the legislation.⁷⁴

All three official bodies acknowledged that to be more effective in regulating gambling activity across the whole population, the role of the state needed to change. As early as 1923, it had been identified that the authoritarian, paternalistic approach, whose tool was prohibitory legislation⁷⁵ ‘to protect men from being induced by others to bet or gamble beyond their means’⁷⁶ was no longer relevant to the contemporary British society. Illustrating the broader societal shift of the time towards a ‘social/liberal democratic philosophy’⁷⁷ the Royal Commission of 1932-3, somewhat radically, in the context of gambling regulation at that time, applied a broadly liberal stance as its starting point:

There is a sharp distinction between action which involves interference with individual liberty, and action directed against organised exploitation of the gambling propensity, often for private gain. Stated broadly we think that the general aim of the State in dealing with facilities for organised 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.⁷⁸ [...] In framing legislation with these objects in view, we regard it as of the utmost importance that not more prohibitions should be made than are absolutely necessary.⁷⁹

⁷³ Select Committee on Betting Duty (1923) (n 10) para 35.

⁷⁴ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) para 188.

⁷⁵ Dixon (n 4) 354–5.

⁷⁶ Select Committee on Betting Duty (1923) (n 10) para 10.

⁷⁷ Dixon (n 4) 354.

⁷⁸ Royal Commission on Lotteries and Betting (1932-3) (n 10) paras 232–3.

⁷⁹ *ibid* para 236.

This principle was wholly endorsed by the subsequent 1949-51 Royal Commission:⁸⁰

we consider that the State should not interfere with the amusements of its citizens, except in so far as it can be shown that these amusements involve serious social consequences.⁸¹ [...] we therefore consider that 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.⁸²

By 1951, the approach was perhaps less radical and it was clear that the fundamental issue was not whether, but how, the shift should be made from prohibition to administrative regulation.⁸³ The Royal Commission was clear that a prohibitive approach was no longer appropriate: ‘if the State restricts a form of amusement, it has no assurance that anything better will take its place. The remedy lies not in restrictive legislation but in education and the provision of facilities for more healthy recreation’.⁸⁴

To this end, the Royal Commission recommended that commercial gambling activity be effectively liberalised, though only to a limited extent in practice. Instead of the negative, prohibitive approach under the criminal law, the Commission formed the view that the activity of gambling could be regulated more closely and effectively through a system of ‘strict control over the provision on a commercial basis of all major forms of gambling facility, including the licensing or registration of all those who provide such facilities’.⁸⁵ This principle was viewed as the most important:

Without this form of control there is no reliable method of preventing undesirable persons from entering the business or of measuring the extent of gambling. Abuses of all kinds can without difficulty be concealed and the influence of healthy public opinion is ineffective.⁸⁶

Accordingly, through a strict framework regulating the supply of commercial gambling opportunities, greater control would be exerted over the activity of gambling itself to ensure that it remained within ‘reasonable bounds’.⁸⁷ Previous objections to regulation on the

⁸⁰ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) para 160.

⁸¹ *ibid* para 185.

⁸² *ibid* para 186.

⁸³ Dixon (n 4) 323.

⁸⁴ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) para 185.

⁸⁵ *ibid* para 189.

⁸⁶ *ibid* para 190.

⁸⁷ *ibid* para 159.

grounds of state complicity were addressed by drawing a distinction between normal and excessive gambling:

We do not consider that the imposition of control implies State approval in the sense that the State regards gambling as an activity which is to be encouraged, any more than the liquor licensing laws imply that the State wishes to encourage the drinking of alcoholic liquor. In either case it would be more accurate to say that the State recognises the activity as one in which its citizens may properly indulge in moderation, but that it also recognises that there are grave dangers in uncontrolled indulgence. It is on these grounds that liberty to participate and liberty to provide facilities for participation may justifiably be controlled. The application of this principle in the liquor licensing laws has been markedly successful [...] The attitude of public opinion towards excessive drinking has greatly changed, and a drunken man is no longer a joke but an object of disapproval. We see no reason why the application of the same principle to the problem of gambling should not have equally satisfactory results.⁸⁸

As set out above, in evaluating the appropriate form of gambling regulation, the concern of the Royal Commission was confined to the effect which gambling ‘may have on the character as a member of society’.⁸⁹ By closely regulating the provision of gambling facilities, the framework would seek to ensure that gambling activity was kept within ‘reasonable bounds’ in order to prevent excessive or ‘immoderate gambling’, which was where the ‘dangers’ were seen to lie: ‘an individual or a community in whose life gambling plays too prominent a part betrays a false sense of values which cannot but impair the full development of the personality or society’.⁹⁰

The Commission’s recommendations - to regulate organised forms of commercial gambling using a ‘positive’⁹¹ rather than ‘negative’ approach⁹² whereby all members of the population would be at liberty to gamble through the provision of strictly regulated facilities which catered to existing demand - were eventually enacted under the Betting and Gaming Act 1960. This new system of regulation, which essentially amounted to a strict regime of ‘social

⁸⁸ *ibid* para 191.

⁸⁹ *ibid* para 159.

⁹⁰ *ibid*.

⁹¹ *ibid* para 187, 449.

⁹² *ibid*.

discipline' enabling a 'closer surveillance of conduct' than the blunt tool of criminal sanctions,⁹³ will now be examined.

3. The machinery of gambling control

The year 1960 can be regarded as the beginning of a 'period of dramatic change in gambling policy'.⁹⁴ From 1960, the juridico-legal system of prohibition was abandoned in favour of a regime of close, administrative regulation which permitted, and closely regulated, certain forms of commercial gambling. The legalisation of commercial off-course betting and facilities for certain forms of gaming involved the creation of a brand new regulated outlet which would satisfy the existing demand for these services. This outlet was, however, to be closely managed by a framework of strict rules and regulations provided under the Betting and Gaming Act 1960, as amended by the Betting, Gaming and Lotteries Act 1963 and further strengthened in relation to gaming by the Gaming Act 1968.

The legislative framework did retain some juridical provisions with regards to forms of gambling deemed undesirable, such as gaming on streets or other public places,⁹⁵ for which a maximum fine of £500 could be imposed.⁹⁶ Commercial gaming generally was also technically prohibited under the 1960 Act, though due to a number of statutory concessions permitting gaming in proprietary and members' clubs this provision was wholly ineffective and commercial gaming in casinos and bingo clubs proliferated during the 1960s (as discussed further in Section 5 of this chapter). Street betting also remained unlawful and subject to a fine of up to £100 on the first conviction, £200 for the second and imprisonment in addition to, or in substitute for, a fine on the third or subsequent occasion.⁹⁷ The principal

⁹³ Dixon (n 4) 342; G Williams, 'Control by Licensing' (1967) 20 *Current Legal Problems* 81.

⁹⁴ Jim Orford, *An Unsafe Bet?: The Dangerous Rise of Gambling and the Debate We Should Be Having* (Wiley-Blackwell 2011) 17.

⁹⁵ Betting, Gaming and Lotteries Act 1963 s 34, as amended by Gaming Act 1968 s 5.

⁹⁶ Criminal Law Act 1977; Royal Commission on Gambling (1976-8) (n 3) para 17.9.

⁹⁷ Betting, Gaming and Lotteries Act 1963 s 8.

mechanism of power applied under this particular regime, however, was the exercise of discipline over the suppliers of gambling facilities.

Despite the apparently liberal starting point advocated by Royal Commissions, as detailed above, the new regime essentially represented a strict, disciplinary system which sought to permit certain commercial gambling activities to the limited extent that existing demand would be satisfied. In doing so, however, it sought to exert a greater degree of control over the forms of gambling being offered, providing some form of order to a previously unlawful gambling landscape.

This now ‘long-overdue’⁹⁸ legalisation of most forms of gambling arrived in the form of the Betting and Gaming Act 1960, which represented a measure which was both liberalising and at the same time sought to provide the state with more effective control.⁹⁹ Following subsequent amendment by the Betting, Gaming and Lotteries Act 1963 and the Gaming Act 1968, this new framework of gambling legislation represented a ‘major formulation of state control’¹⁰⁰ in relation to the activity, replacing the existing policy of criminal prohibition with a strategy of ‘constrained libertarianism’¹⁰¹ which permitted the provision of commercial gambling facilities but only to the limited extent that they would meet ‘unstimulated demand’. Instead, gambling was subject to a strict system of administrative regulation by the state at the point of offering and gambling operators were closely managed by official statutory authorities, such as the Gaming Board.¹⁰²

⁹⁸ HC Deb 27 October 1959, vol. 612, col. 75.

⁹⁹ Dixon (n 4) 339.

¹⁰⁰ *ibid* 1.

¹⁰¹ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 37).

¹⁰² Dixon (n 4) 2.

3.1 Accessing the market

In order to gain entry to the new lawful gambling market, there were a number of rigorous market entry controls which had to be satisfied by suppliers.

In relation to betting, the 1960 Act implemented a strict, and ultimately effective, regulatory framework to license bookmaking premises and grant permits to bookmakers.¹⁰³ In order to apply for a betting office licence, the bookmaker had to first obtain a permit, granted by a committee of justices for the petty sessions area in the relevant local area¹⁰⁴ to signify that they were a ‘fit and proper’ person. The application process for a permit was itself a complicated and convoluted affair: applicants were required to submit the prescribed form to the licensing authority, with copies sent to the local chief officer of police and HM Customs and Excise, following which they were required to publish notice by advertisement in a newspaper, providing the opportunity for objection (copies of which then had to also be sent to the licensing authority). Failure to abide by any step of the process within the required timeframes was fatal to the application.¹⁰⁵

Notwithstanding the extensive application procedure, by the end of 1976 there were over 8,000 bookmakers and 13,865 betting offices registered in Great Britain. This can be contrasted with the position in relation to commercial gaming following the enactment of the Gaming Act 1968, where at the same point in time there were 137 holders of certificates of consent to operate a casino and 1,634 registered bingo clubs in operation.¹⁰⁶ According to a subsequently appointed Royal Commission in 1978, the licensing of commercial gaming suppliers was inevitably more extensive: ‘the great differences between the two kinds of gambling and the sort of customers and entrepreneurs they attract means that the Gaming Board has to make much more extensive inquiries about an applicant for a certificate of

¹⁰³ Betting and Gaming Act 1960

¹⁰⁴ Royal Commission on Gambling (1976-8) (n 3) para 6.45.

¹⁰⁵ *ibid* para 6.49.

¹⁰⁶ *ibid* para 6.47.

consent than is necessary before the issue of a bookmaker's permit'.¹⁰⁷ A certificate of consent had to first be obtained in order to apply for a gaming licence from the local licensing authority. This was secured from an authority called the Gaming Board.

3.2 *The Gaming Board*

The Gaming Board was an authority established under the Gaming Act 1968, an Act whose object was to 'purge [commercial gambling] of its criminal elements, to cut out excessive profits, and to ensure that gaming is honestly conducted in decent surroundings'.¹⁰⁸ The Gaming Board comprised a chairman, four independent members appointed by the Home Secretary, permanent staff and the 'Inspectorate':¹⁰⁹ a team of inspectors largely comprised of ex-policemen¹¹⁰ and armed forces¹¹¹ who were responsible for ensuring compliance with the law. This professional background was reflected in the 'command and control'¹¹² style approach employed by the regulator in its duties.

Under the Gaming Board and the legislative regime of the 1960s, commercial gaming was closely governed through regular inspections, strict enforcement of rules and the cultivation of a 'close, if deferential relationship' whereby managers would go to inspectors to obtain 'trustworthy advice'.¹¹³ Inspectors were given the same unrestricted rights of entry to gaming premises as the police,¹¹⁴ and had far reaching powers to inspect records, equipment and other relevant documentation.¹¹⁵ Tasked with monitoring compliance with the Act and the regulatory guidance, the Board would conduct inspections on at least a monthly basis, though in practice would often make 'three or four visits a month, without pre-arrangement

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid* para 16.11 citing the Home Office's *Introduction to the Gaming Act* (1968).

¹⁰⁹ *ibid* para 16.14.

¹¹⁰ Kate Bedford, *Bingo Capitalism: The Law and Political Economy of Everyday Gambling* (Oxford University Press 2019) 157.

¹¹¹ David Miers, *Regulating Commercial Gambling: Past, Present, and Future* (Oxford University Press 2004) 388.

¹¹² Bedford (n 110) 157.

¹¹³ *ibid* 167–8.

¹¹⁴ Gaming Act 1968, s 43

¹¹⁵ Royal Commission on Gambling (1976-8) (n 3) para 16.13.

with the licence holder'.¹¹⁶ The style of enforcement has been described as 'classically compliance oriented'¹¹⁷ in that it emphasised the use of measures falling short of formal sanctions, instead adopting assertive strategies such as warnings, advice, education and pressure to achieve a change in the practices of the licensee.¹¹⁸ While good working relationships were maintained between gambling managers and inspectors, 'interactions were always conducted in a spirit of deference [...] managers never referred to their inspectors by their first names, and they tended to ensure there were nice biscuits on offer when they visited'.¹¹⁹ The relationship was such that managers felt able to call up their inspector to seek guidance, though once advice was given, 'there was no room for interpretation: "in them days when the Gaming Board said "no", you just didn't do it"'.¹²⁰ More formal sanctions, chiefly the withdrawal of a gaming licence, were reserved for the most serious of infractions to exclude the operator from the market and, in the process, deter others from non-compliance.¹²¹

3.3 Earning the 'privilege' of providing commercial gaming

In light of the Act's objective, the regulator was granted 'wide and arbitrary powers'¹²² to supervise and broadly keep under review the extent, character and location of gaming facilities. This specifically included investigating the trustworthiness of all applicants for certificates of consent, a type of licence which was required on the part of the applicant before they could apply to the local justice for a gaming premises licence.¹²³ The Gaming Board enjoyed 'unfettered discretion' in granting or refusing applications for a certificate, having 'regard only to the question whether, in their opinion, the applicant is likely to be

¹¹⁶ Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 111) 388.

¹¹⁷ *ibid* 389.

¹¹⁸ *ibid*.

¹¹⁹ Bedford (n 110) 161.

¹²⁰ *ibid*.

¹²¹ Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 111) 389–91.

¹²² Royal Commission on Gambling (1976-8) (n 3) para 16.46.

¹²³ *ibid* 16.14.

capable of, and diligent in, securing that the provisions of this Act and of any regulations made under it will be complied with, that gaming on those premises will be fairly and properly conducted, and that the premises will be conducted without disorder or disturbance'.¹²⁴ For the purposes of this decision, the Board were required to, in particular, take into account the character, reputation and financial standing of the applicant or any person by whom the establishment would be managed or for whose benefit it would be carried on¹²⁵ (in other words, where the applicant is acting as a 'front man for some undesirable person').¹²⁶ In practice, this process of detailed 'individualised screening'¹²⁷ could take into account almost anything known or suspected to be adverse about the character of the applicant. In addition, the 1968 Act required that certain employees connected with game delivery or supervision within a gaming establishment obtain a certificate of approval to signify that they are a 'fit and proper person' to act in the capacity specified.¹²⁸

Kate Bedford illustrates the lengthy and gruelling process involved in the process of personnel licensing in order to obtain a certificate of approval to be employed in a key role within a bingo establishment.¹²⁹ This involved extensive background checks (pursuant to which police reports could be sought by the Board¹³⁰) and an interview with Board staff to ensure that the applicant was a fit and proper person and had sufficient knowledge of the legislation.¹³¹ The interview itself could last several hours and has been described in the following terms: 'intimidating, stressful, an interrogation, a trauma, awful, "difficult and nerve wracking", tough, daunting, intense, horrendous, "like your A-levels or driving test",

¹²⁴ Gaming Act 1968, sch 2 4(5)

¹²⁵ Gaming Act 1968, sch 2 4(6)

¹²⁶ Royal Commission on Gambling (1976-8) (n 3) para 19.7.

¹²⁷ Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 111) 359–60.

¹²⁸ Gaming Act 1968, s 19; Royal Commission on Gambling (1976-8) (n 3) para 19.17.

¹²⁹ Bedford (n 110).

¹³⁰ *Rogers v Secretary of State for the Home Department* [1973] A.C. 388; *R v Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417.

¹³¹ Bedford (n 110) 158.

“a little bit like a Gestapo meeting”¹³². The procedure symbolised, and helped to reinforce, the strict approach applied under the legislative framework during this period and served to strengthen the respect for - and also fear of - the Gaming Board, while inspectors sustained the day-to-day power.¹³³

In general, the Board had the power to regulate its own application procedures:¹³⁴ only if the ‘applicant meets the Board’s standards, which are very exacting, will it issue a certificate [...] If not, it will refuse the application and that will be that’.¹³⁵ Nor was there any legal requirement for the Gaming Board to provide reasons for refusing to grant a certificate or to reveal its sources of information.¹³⁶ Indeed, it was regarded as essential that the Board could utilise a wide range of information in its enquiries and that this could remain confidential, as long as the applicant was given the opportunity to demonstrate the relevant statutory requirements and answer any general impressions. Confirming this position in *R v Gaming Board ex party Benaim*, Lord Denning MR clearly illustrated the underlying ethos of the 1968 Act and the regulatory regime as a whole:

It is an error to regard Crockford's as having any right of which they are being deprived. They have not had in the past, and they have not now, any right to play these games of chance - roulette, chemin-de-fer, baccarat and the like - for their own profit. What they are really seeking is a privilege [...] to carry on gaming for profit, a thing never hitherto allowed in this country. It is for them to show that they are fit to be trusted with it. [...] Seeing the evils that have led to this legislation, the board can and should investigate the credentials of those who make application to them. They can and should receive information from the police in this country or abroad who know something of them. They can, and should, receive information from any other reliable source. Much of it will be confidential. But that does not mean that the applicants are not to be given a chance of answering it. They must be given the chance, subject to this qualification: I do not think they need tell the applicant the source of their information, if that would put their informant in peril or otherwise be contrary to the public interest.[...] Accepting that the board ought to do all this when they come to give their decision, the question arises, are they bound to give their reasons? I think not. [...] After all, the only thing that they have to give is their opinion as to the capability and diligence of the applicant. If they were asked by the applicant to give their reasons, they could answer quite sufficiently: "In our opinion,

¹³² *ibid* 159.

¹³³ *ibid* 161.

¹³⁴ Gaming Act 1968, Sch 1 para 7

¹³⁵ Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 111) 360.

¹³⁶ Royal Commission on Gambling (1976-8) (n 3) para 19.21.

you are not likely to be capable of or diligent in the respects required of you." Their opinion would be an end of the matter.¹³⁷

This position clearly illustrated the underlying principle to the 1968 Act, as set out in the Home Office's introduction to the Act, that 'no one can claim a right to provide commercial gaming; it is a privilege to be conceded subject to the most searching scrutiny, and only in response to public demand'.¹³⁸ Following the initial issues with the 1960 Act's mechanisms for controlling commercial gaming (explored in section 5 below) it had been recognised by this time that commercial gaming could not be suppressed and must be brought under strict control.¹³⁹ This was to be achieved in part by the Gaming Board's rigorous approach to licensing and compliance and in addition by the employing the principle of 'unstimulated demand'. This key principle will now be considered.

3.4 Restricting the supply: unstimulated demand

As outlined, the 1960s legislation was framed around the apparently liberal philosophy advocated by the previous two Royal Commissions:¹⁴⁰ that the role of the state was 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 socially damaging excesses and to prevent the incursion of crime into gambling'.¹⁴¹ Those restrictions were, in practice, stringent in form and regulated the supply of gambling opportunities closely through the concept of 'unstimulated demand'. This resulted in the legislative control retaining a strong paternalistic tone despite its liberal underpinnings.¹⁴²

The Acts were designed around the principle that the liberal function of government was to allow the provision of opportunities for individuals to gamble, though only to the limited

¹³⁷ *R v Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417, [430-1]

¹³⁸ Royal Commission on Gambling (1976-8) (n 3) para 16.11 citing the Home Office's Introduction to the Gaming Act (1968).

¹³⁹ *ibid* citing the Home Office's Introduction to the Gaming Act (1968).

¹⁴⁰ Lotteries and Betting (n 10); Royal Commission on Betting Lotteries and Gaming (n 10).

¹⁴¹ Royal Commission on Gambling (1976-8) (n 3) para 16.19.

¹⁴² Gerda Reith, *The Age of Chance: Gambling in Western Culture* (Routledge 1999) 89.

extent that the opportunities would meet existing demand (which would otherwise be satisfied by an unregulated market) and they should not go beyond that to stimulate the market.¹⁴³ This principle, and its ambiguities, were considered by the Royal Commission in 1978:

This is a principle about which it is not easy to be specific [...] It implies, for instance, the maintenance of curbs on certain forms of advertising, and it has up to now been taken to imply the limitation of amenities in betting shops [...] It is obvious that too wide and too literal adherence to it could result in nonsensical recommendations, such as, to give an extreme example, that there should be no football because it stimulates betting on the pools. But the principle has some sense. People should not be pestered; they should not be distracted from their real work, even if betting at appropriate times boosts morale of those engaged in repetitive or otherwise uncongenial tasks.¹⁴⁴

This extract illustrates that even though by this point in time gambling was becoming increasingly accepted as a legitimate leisure activity, it was not considered to be socially (or indeed economically) useful. Demonstrating the evolving status of gambling as an activity the Royal Commission, in its inquiry, responded to the objection that gambling does not create wealth by framing it as a leisure activity which is not structurally different to other forms of recreation:¹⁴⁵

There are many activities which do not themselves create wealth even if their promoters derive profit from them. Canoes and skates have to be bought but in general, canoeing and skating are leisure activities which do not create wealth and there is no reason why they should. The same applies to many forms of gambling which constitute pleasurable leisure activities to which there may be no objection.¹⁴⁶

However, this view of gambling as a ‘pleasurable leisure activity’ notwithstanding, it was still regarded as an activity which should not be encouraged from those who do not seek it out. There remained a paternalistic concern around protecting the population from harm and, moreover, it was important that people would ‘not be distracted from their real work’.¹⁴⁷ The regulatory regime was therefore concerned with how to permit, but maintain close control over, the activity of gambling.

¹⁴³ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 37).

¹⁴⁴ Royal Commission on Gambling (1976-8) (n 3) para 1.8.

¹⁴⁵ Dixon (n 4) 341.

¹⁴⁶ Royal Commission on Gambling (1976-8) (n 3) para 1.11.

¹⁴⁷ *ibid* para 1.8.

The principle of unstimulated demand was woven through the regulatory regime, underpinning the licence application process and the rules around how gambling facilities may be supplied by operators. In order to gain entry to the market, suppliers were required to obtain a licence or permit to supply gambling at the premises (in addition to their personal licence) which could be refused based on a number of statutory grounds, one of which was insufficiency of demand.¹⁴⁸ As part of this application positive evidence was required from the applicant to show that the market does not currently cater for this particular demand.¹⁴⁹ This was in order to prevent the proliferation of, for example, betting shops which ‘might result in difficulties of control and encouragement to bet’.¹⁵⁰ It also had the result of ‘dampening competition’ which facilitated an ‘orderly division of the market’.¹⁵¹ Relatedly, there were also geographical restrictions for certain types of gaming, in particular casinos, which were only allowed in one of 53 ‘permitted areas’ across the country,¹⁵² severely limiting the scope for competition between operators.¹⁵³

Once the relevant certificates were granted and the facilities in operation, suppliers had to abide by a number of detailed operating stipulations with regard to the supply of the gambling facilities. Naturally, advertising was generally prohibited¹⁵⁴ given its primary objective to ‘entice people into betting offices’¹⁵⁵, casinos or bingo clubs: ‘the prohibition of advertising prevents the artificial stimulation of demand’.¹⁵⁶ The restrictions went further, however, than overt attempts by suppliers to gain new business. In fact casinos were severely limited in advertising for staff on the basis that this type of notice could be perceived as

¹⁴⁸ Betting, Gaming and Lotteries Act 1963, Sch 1.

¹⁴⁹ Miers, *Regulating Commercial Gambling : Past, Present, and Future* (n 111) 347.

¹⁵⁰ Royal Commission on Gambling (1976-8) (n 3) para 7.10.

¹⁵¹ *ibid* para 7.21.

¹⁵² Department for Culture Media and Sport and Gambling Review Body, *Gambling Review Body Report (The Budd Report)*. (Cm 5206, 2001) paras 4.14, 7.4.

¹⁵³ Miers, *Regulating Commercial Gambling : Past, Present, and Future* (n 111) 375.

¹⁵⁴ Gaming Act 1968, s 42

¹⁵⁵ Royal Commission on Gambling (1976-8) (n 3) paras 7.53, 11.52.

¹⁵⁶ *ibid* para 18.19.

promotion.¹⁵⁷ More broadly, the restrictions on stimulating demand extended to the intricate details of how the gambling establishment was operated.

The Royal Commission (1978) observed that bookmakers were subjected to a ‘spartan betting office regime’.¹⁵⁸ The hours of business were restricted to between 7.00am and 6.30pm Monday to Saturday, with closure required on Sundays.¹⁵⁹ Most signs and notices were prohibited from being displayed both internally and externally - save for a few limited examples under the Act, including the display of licensed status¹⁶⁰ - in order to prevent any encouragement to bet. Indeed, severe restrictions were imposed on the appearance of betting offices to ensure that they did not entice new customers, with the result that they ended up looking more like ‘undertakers’ premises’ than betting shops.¹⁶¹ Television, radio, music or other entertainment were prohibited in the betting office, together with the offering of any kind of refreshment, so as not to induce people to enter other than to place a bet.¹⁶² The conditions meant that:

very little is permitted which might make this an agreeable way of passing the time. No television or refreshments are allowed and the rules about advertising and notices mean that the internal appearance of a betting office is usually bleak, functional and depressing.¹⁶³

Gaming establishments were subject to even greater access controls. As with betting offices, hours of business were restricted.¹⁶⁴ In addition, however, to take part in gaming at a licensed establishment, membership was required. Furthermore, rules on membership prescribed that new members must wait a certain period of time (24 hours for bingo¹⁶⁵ and 48 hours for casinos)¹⁶⁶ after their application was accepted before they could participate in gaming. This was to exclude ‘people who have no strong desire to gamble in casinos but might be tempted

¹⁵⁷ *ibid* para 18.54; Reith (n 142) 89.

¹⁵⁸ Royal Commission on Gambling (1976-8) (n 3) para 7.42.

¹⁵⁹ *ibid* para 7.6.

¹⁶⁰ *ibid* para 7.51.; Betting, Gaming and Lotteries Act 1963, sch 4

¹⁶¹ Dixon (n 4) 339.

¹⁶² Royal Commission on Gambling (1976-8) (n 3) paras 7.42-7.43.

¹⁶³ *ibid* para 7.26.

¹⁶⁴ Gaming Clubs (Hours and Charges) Regulations 1970

¹⁶⁵ Gaming Act 1968, s 20 (5)

¹⁶⁶ Gaming Act 1968, s 12

to enter one simply because it was there [...] the demand should be strong enough to survive a 48-hour delay'.¹⁶⁷

As well as access, there were a number of environmental controls applying in particular to casinos. As with betting, shows and other forms of entertainment were forbidden in casinos (though not in bingo clubs)¹⁶⁸ to 'stop proprietors from baiting the hook with free cabaret or dancing'.¹⁶⁹ Certain price and quality controls were stipulated for the gaming products. The gaming area itself was subject to 'space standards' as directed under the licence, for example:

The tables must be located so that the players can easily approach and leave them, and are able to game without disruption. Their location must allow casino supervisors to command a clear view of the tables and all players, including the dealers.¹⁷⁰

As mentioned, this regulatory framework applied predominantly disciplinary mechanisms, aimed towards the gambling operators, which strictly controlled how gambling facilities could be supplied. Thus, even though commercial gambling activity was 'liberalised' from the prohibitive constraints of the previous regime, it instead 'circulated' positively through a strictly ordered framework under which operators were required to submit to rigorous and expansive rules of conduct under a regime of close surveillance and examination. In this way, the legislative framework was not simply regarded as a 'liberalising measure, but also as one which provided the state with more effective control'.¹⁷¹ In fact, the withdrawal of prohibition enabled a much closer, and more effective, control over betting and gaming than the blunt tool of criminal sanctions: permits and licensing were used as a 'means of social discipline' allowing a 'closer surveillance of conduct'.¹⁷² This means that the state authorities were able, if necessary, to 'exact standards of behaviour going far beyond those required of ordinary citizens'¹⁷³ from those who are involved in the regulated activity.

¹⁶⁷ Royal Commission on Gambling (1976-8) (n 3) paras 18.19, 18.27.

¹⁶⁸ Gaming Act 1968, s 20

¹⁶⁹ Royal Commission on Gambling (1976-8) (n 3) para 18.19.

¹⁷⁰ Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 111) 379.

¹⁷¹ Dixon (n 4) 339.

¹⁷² *ibid* 342 citing Williams (1967) 'Control by licensing' 20 *Current Legal problems* 81, 81 - 83.

¹⁷³ *ibid* citing Williams (1967) 'Control by licensing' 20 *Current Legal problems* 81, 81 - 83.

4. The rationality of ‘police’

4.1 *Installing the rationality of ‘police’ onto *raison d’état**

In his genealogy of the ‘governmentalization of the state’, Foucault refers to the rationality of ‘police state’ as ‘an apparatus that was installed in order to make *raison d’état* function’.¹⁷⁴ ‘Police’, in this sense of the term, refers to the internal management of the state, in order to maximise its internal forces in accordance with the objectives of *raison d’état*.¹⁷⁵ In this regard, its meaning has ‘very little, no more than one or two elements’¹⁷⁶ in common with today’s understanding of the term ‘police’; its use in this context can be perhaps better conveyed by the contemporary definition of the term ‘policy’.¹⁷⁷ The rationality of police is therefore broadly concerned with regulating all elements of internal state policy and, as will be explored below, this is undertaken to a meticulous degree.

The governmental rationality of police, as an ‘assemblage of political knowledge’¹⁷⁸ and a technology, is what enables *raison d’état* to ‘outgrow its Machiavellian limitations’¹⁷⁹ and provide the means for the growth of the state’s forces internally. The underlying rationality of the police state governmentality is described as:

to affirm and increase the power of the state, to make good use of its forces, to procure the happiness of its subjects and chiefly the maintenance of order and discipline, the regulations that tend to make their life convenient and provide them with the things they need to live.¹⁸⁰

As this passage suggests, with the ‘installation’ of the apparatus of police onto what Foucault refers to as a ‘general absolutist theory of *raison d’état*’,¹⁸¹ the ‘population’ is re-conceptualised. The population is no longer constituted in purely passive terms as a

¹⁷⁴ 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) 278.

¹⁷⁵ See Chapter One for further discussion of *raison d’état* as a governmental rationality.

¹⁷⁶ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 174) 312.

¹⁷⁷ Colin Gordon, ‘Governmental Rationality: An Introduction’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 10.

¹⁷⁸ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 174) 365.

¹⁷⁹ Gordon (n 177) 10.

¹⁸⁰ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 174) 366.

¹⁸¹ *ibid* 278.

collection of class-defined, ‘juridical subjects’¹⁸² upon whom certain values are imposed.¹⁸³ The governmentality of police comprises a set of ‘controls, decisions and constraints brought to bear on men themselves not insofar as they have a status or are something in the order, hierarchy and social structure, but insofar as they do something, are able to do it and undertake to do it throughout their lives’.¹⁸⁴ Police is therefore concerned less with a person’s status, virtues or intrinsic qualities - ‘the distinction between the nobility and the common people’¹⁸⁵ - and more with their ‘occupation’, in ‘what men do’, as it relates to the strengthening of the state:¹⁸⁶

What interested the sovereign, prince or republic in the traditional conception, was what men were, either in terms of their status, their virtues, or their intrinsic qualities. It was important for them to be virtuous, [...] obedient, and [...] to be workers and not idlers. The good quality of the state depended upon the good quality of its elements. It was a relationship of being, of the quality of being. In this new conception, what interests the state is not what men are [...] what is characteristic of a police state is its interest in what men do; it is interested in their activity, their ‘occupation’.¹⁸⁷

The concern of police is therefore the activity of individual members of the population where this activity bears upon, and represents a constitutive element of, the strength of the state. The concept of the population as a good in itself, at this stage of the genealogy has not yet fully developed into the autonomous entity which is central to the subsequent liberal governmentality,¹⁸⁸ although there are certainly elements of a more ‘caring’ concern towards the general wellbeing of the population, in particular during the Parliamentary inquiries which led to the legal reform. Ensuring the wellbeing of the population as a concern in and of itself – and not connected purely to the strength of the state – will come to play a central role in the government of gambling under the modern regimes explored in Part II of this thesis.

For the police governmentality, the population of the state is important insofar as it is comprised of a number of individual, docile members who can work, with the aim being to

¹⁸² *ibid* 74.

¹⁸³ *ibid* 277–8.

¹⁸⁴ *ibid* 321.

¹⁸⁵ *ibid*.

¹⁸⁶ *ibid* 322.

¹⁸⁷ *ibid*.

¹⁸⁸ *ibid* 74–5.

maximise this number and in doing so maximise the strength of the state.¹⁸⁹ Thus, the rationality of police involves the orientation of the activity of all individual members of the population so that it becomes useful to the state: ‘the creation of state utility on the basis of and through men’s activity’.¹⁹⁰ According to this rationality, the real basis of the state’s power and wealth lies in the strength and prosperity of ‘all and each’:¹⁹¹ ‘to develop those elements of individual lives in such a way that their development also fosters the strength of the state’.¹⁹²

This shift in concern from ruling a population comprised of juridical subjects in order to assert particular moral values and virtues, to managing the activities of people in their daily lives, can be recognised in the transition to gambling regulation which was explored in section 2. The three official bodies tasked in the first half of the twentieth century with reviewing the current position with regard to gambling regulation took the view that, although there existed differing views about the morality of gambling across society (albeit the predominant views were relaxing), the role of the state was not to impose certain moral values upon the population.¹⁹³ Moreover, the groups were clear that an approach which applies in a way which results in class distinctions is not acceptable and, more importantly, not effective in regulating the activity of gambling, particularly given the persistent demand. The ‘negative’,¹⁹⁴ prohibitive approach, it was found, actually had a harmful effect upon the strength of the state through the lack of respect which resulted as regards the rule of law:

The police witnesses [...] were unanimous in stating that in street betting cases alone among crimes the sympathy and active assistance of the general public is with the bettor, whether bookmaker or backer, and against the police. No assistance is given to the police; on the contrary, obstacles are put in their way [...] Many of the witnesses account for this attitude of the public by the widespread feeling against the inequality of the laws, under

¹⁸⁹ *ibid* 337.

¹⁹⁰ *ibid* 323.

¹⁹¹ Gordon (n 177) 10.

¹⁹² *ibid*.

¹⁹³ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) para 159.

¹⁹⁴ *ibid* paras 187, 449.

which the rich man can bet legally while the poor man cannot without committing an offence.¹⁹⁵

Instead of the ‘impossible’¹⁹⁶ approach of prohibiting commercial gambling outright, the recommendation was that the activity should be permitted but closely regulated in a ‘positive’¹⁹⁷ manner, through a system of close regulation over the provision of gambling facilities. In this way the demand for commercial gambling would be satisfied and the respect for the criminal law, and the state, could be preserved. The ‘circulation’ of gambling activity would, however, be controlled more effectively in order to ensure that it remained within ‘reasonable bounds’ and did not descend into socially damaging excess.¹⁹⁸

It is worth noting that at this point in time, commercial gambling activity was in general not yet presented as a potential contributor to the state’s wealth fiscally, in the same way as set out in Part II (although certain types of gambling were subject to a tax). The primary concern here was regulating the gambling activity of members of the population so that their activity would remain within ‘reasonable bounds’ and would not become ‘excessive’, and their character ‘as a member of society’¹⁹⁹ would not be negatively affected.

4.2 The machinery of police

To achieve its objectives according to *raison d'état*, the technology of ‘police’ employs an insatiable appetite for obtaining an exhaustively detailed knowledge of the reality of the state itself. This knowledge is then used to calculate the numerous and wide-ranging forms of managing the internal elements of the state. Knowledge of the state is obtained through the collection of statistics, with ‘statistics’ in this sense comprising detailed knowledge of the resources and forces which characterise the reality of the state at a particular moment in terms

¹⁹⁵ Select Committee on Betting Duty (1923) (n 10) para 14.

¹⁹⁶ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) para 218.

¹⁹⁷ *ibid* paras 187, 449.

¹⁹⁸ *ibid* 159.

¹⁹⁹ *ibid*.

of, for example, the quantity, mortality and wealth of the population, the potential wealth available in the circulation of trade, etc.²⁰⁰

This preference for statistical knowledge regarding the gambling activity within Britain was frequently articulated during the three gambling reviews between 1923 and 1951 discussed in section 2. Later, in 1978, the Royal Commission was able to make use of ‘hitherto inaccessible information [...] to do with the gambling habits of the British public and the finances of bookmaking, football, casinos and bingo’ though still concluded that there was ‘serious shortage of reliable and accessible information’ concerning ‘the various forms of gambling, how the gambling industry works, how much is staked and spent, and how much excessive gambling there is’.²⁰¹

The mechanisms of police, predominantly disciplinary in nature, involve applying detailed prescriptive rules and regulations to all aspects touching the lives of individual members of the population. Police is concerned with an immense domain which ‘goes from living to more than just living’, so that this excess can be converted into the forces of the state.²⁰² This concept of ‘more than just living’ is referred to by Foucault as individual ‘felicity’, ‘happiness’ and ‘wellbeing’ and, as highlighted above, it is the ‘linking together of the state’s strength and individual felicity’²⁰³ that must be the objective of police: ‘splendour of the republic and the felicity of each’.²⁰⁴ This concern is the foundation for the central requirement in later modes of government to care for, and ensure the wellbeing of, the population as a good in itself, as will be explored further in Chapter Three.

On this point, Foucault cites eighteenth-century political economist JHG Von Justi to illustrate the specificities of police as a governmentality:

²⁰⁰ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 174) 274.

²⁰¹ Royal Commission on Gambling (1976-8) (n 3) para 4.5.

²⁰² Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 174) 326–7.

²⁰³ *ibid* 327.

²⁰⁴ *ibid*.

Police is a set of laws and regulations that concern the interior of the state, which endeavour to increase its power, to make good use of its forces [...] and finally to procure the happiness of its subjects'.²⁰⁵ [...] The objective of police is everything from being to wellbeing, everything that may produce this wellbeing beyond being, and in such a way that the wellbeing of individuals is the state's strength.²⁰⁶

The governmental approach of the state is concerned with taking into account 'the fine materiality of human existence and coexistence, of exchange and circulation', of 'being and wellbeing', with commerce being understood as the main instrument of the state's power and 'thus a privileged object of the police whose objective is the growth of the state's forces'.²⁰⁷ The exercise of 'police' state power at this point is therefore separate from the concept of justice. Through police, *raison d'état* and power begins to intervene within different domains. Foucault illustrates the police approach by quoting from the Instructions of Catherine II concerning her code of police:

Police regulations are of a completely different kind than other civil laws. The things of police are things of each moment, whereas the laws are concerned with important things. Police is perpetually concerned with details, and finally it can only act promptly and immediately. So there is a specificity of police compared with the general functioning of justice.²⁰⁸

Police, as an institutional practice intervenes in a regulatory manner, creating a 'world of regulation, a world of discipline'.²⁰⁹ This is achieved through 'indefinite [...], permanent continually renewed, and increasingly detailed regulation' in a form which 'if not judicial, is nevertheless juridical: the form of the law, or at least of law as it functions in a mobile, permanent, and detailed way in the regulation'.²¹⁰ Described as 'regulation-mania', the detailed rules concern all aspects of internal state policy.²¹¹

Under this regime, the disciplinary measures are imposed upon an empty, artificial space.²¹² Foucault describes the disciplinary approach as 'centripetal': isolating a particular space upon which its power is concentrated and functions. Everything in this discrete space is regulated

²⁰⁵ *ibid* citing ; JHG Von Justi, *Grundsätze Der Polizei-Wissenschaft* (Van der Hecks 1756).

²⁰⁶ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 174) 328.

²⁰⁷ *ibid* 339.

²⁰⁸ *ibid* 340.

²⁰⁹ *ibid*.

²¹⁰ *ibid*.

²¹¹ Gordon (n 177) 10–11.

²¹² Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 174) 19.

strictly; nothing is permitted to escape this tight form of regulation, which stipulates how individuals are obliged to act (as well as actions which are forbidden).²¹³ Foucault applies the analogy of the market town to illustrate the strict, artificial ordering of the state, and its sources of wealth, through the circulation of the activities of the people.²¹⁴

As discussed in section 3, the statutory framework introduced in 1960 as later amended, in particular in 1968, sought to create a brand new, strictly ordered, commercial gambling market which provided lawful, acceptable forms of gambling to cater for existing demand. This approach departed from the previous ‘negative’ attempts to prohibit gambling under the criminal law. Instead it aimed to secure a greater level of control over the existing gambling activity by allowing it to circulate but governing it ‘positively’ through rules and regulations, so that it would stay within ‘reasonable bounds’.

The extensive body of strict rules and regulations was exercised directly over the suppliers of the gambling activity, closely prescribing all aspects of how commercial gambling may be offered. This was to ensure that, although existing demand would be catered for in a moderate way, there would be no stimulation of additional demand which could lead to ‘excessive’ gambling and impact upon the ‘character’ of the gambler as a useful member of society. Gambling operators, especially those providing gaming facilities, were subject to strict disciplinary, ‘command and control’ style measures, including surveillance, examination and correction,²¹⁵ to ensure compliance and ultimately normalise the desired standard of commercial gambling.

²¹³ *ibid* 44–5.

²¹⁴ *ibid* 335–6.

²¹⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Allen Lane 1977). See Introduction for further discussion.

4.3 The gambling subject: the 'tolerated' gambler

Under this extensive set of controls, the gambling activity of players themselves was not disciplined directly. Instead, to a certain extent under this regime the activity was subject to indirect mechanisms of government - in the Foucauldian sense - which attempted to influence (and restrict) gamblers' behaviour through the structural and situational elements of the gambling environment. Under this regime, gambling activity was certainly not encouraged but, where the demand already existed, it was to be shaped through the environment by way of the direct, disciplinary restrictions placed on operators, so that it would remain moderate and would not become 'excessive'. Government, as a mechanism of power, is defined in the Introduction to this thesis and will be explored in greater detail in Part II as it comes to play a central role in the forthcoming governmental rationalities.

Though viewed as an increasingly legitimate leisure activity, participation in commercial gambling was still, at least in 1978, regarded with some distaste:

The objection that punters are wasting their time is a moral or possibly an aesthetic judgement. As it happens, none of us is attracted by the idea of spending an afternoon in a betting office. But the people who frequent betting offices have chosen to enjoy themselves in their own way and we think that in a free society it would be wrong to prevent them from doing so merely because others think that they would be better employed in digging the garden, reading to their children or playing healthy outdoor sports.²¹⁶

Thus, the regulatory regime allowed the existing demand for commercial gambling to be satisfied, provided that the gambling remained within 'reasonable bounds' and did not interfere with the gamblers' 'real work'.²¹⁷ This was regarded as one of the more legitimate bases upon which gambling activity may be restricted (though the Commission was satisfied that there was not sufficient evidence, especially of a quantitative nature, to suggest this was a significant issue):

Absenteeism is something on which it has not been possible to obtain any firm evidence. Common sense suggests that not all the people one sees in a betting office in the middle of the afternoon are on holiday, unemployed or waiting for the next load of bricks to be

²¹⁶ Royal Commission on Gambling (1976-8) (n 3) para 7.30.

²¹⁷ *ibid* para 1.8.

delivered. But we have no idea of the numbers who may be dodging work or whether they would be back at their jobs rather than taking tea in the park if the betting offices were shut. We have received no evidence from employers' associations complaining that absenteeism caused by betting offices is a serious problem.²¹⁸

Accordingly, whilst gambling activity should not be encouraged - or even vaguely stimulated in a more indirect way - it would be permitted as long as the gambler wasn't distracted from their socially useful activities, most particularly, their 'real work'. The regime was later described by the Gambling Review Body in 2001 as 'one of grudging toleration'.²¹⁹ This, I propose, neatly illustrates the identity of the ideal subject under this regime: the tolerated gambler. The subject is somebody who preferably doesn't gamble, but if they must, then they do so in a moderate way using the approved, lawful channels provided to ensure that it remains within reasonable bounds. In this way, the subject remains a 'useful and valuable member of society' by not engaging in disapproved or disorderly forms of gambling (such as street betting) and continuing to work, contributing to the strength of the state, without distraction.

4.4 Birth of the pathological gambler²²⁰

Whilst the general gambling activities of individuals within the population were primarily governed indirectly via the closely regulated gambling environment, there was a mode of individual discipline beginning to emerge during this period, which would increase substantially in prominence during the following regime of government analysed in Part II. This involved the pathologisation of deviant forms of gambling - conceived as individual excess - which would come to be viewed through a medical lens, warranting correction of the individual gambler by way of an appropriate form of treatment.

²¹⁸ *ibid* para 7.31.

²¹⁹ Department for Culture Media and Sport and Gambling Review Body (n 152) para 14.1; Department for Culture Media and Sport, *A Safe Bet for Success - Modernising Britain's Gambling Laws the Government's Response to the Gambling Review Report* (Cm 5397, 2002) para 1.3.

²²⁰ Michel Foucault, *The Birth of the Clinic : An Archaeology of Medical Perception* (Routledge 2003).

As discussed in section 2, the Royal Commission in 1951 no longer regarded the activity of gambling as inherently immoral or otherwise problematic in itself; the dangers were seen instead to lie in immoderate or excessive gambling.²²¹ By the 1960s, this position had continued to advance and the problem of gambling had been re-conceived as an issue of excess in line with the tendency at that point in time to view ‘deviance’ in medicalised, pathological terms, as seen in American addiction literature.²²²

A form of ‘compulsive gambling’ was initially ‘discovered’ by the Churches Council on Gambling (‘CCG’), an influential pressure group which became prevalent following the collapse of the NAGL.²²³ The CCG, under the direction of Rev. Gordon Moody, was not strictly an ‘anti-gambling group’; indeed it had adapted to the contemporary social environment by accepting legalised gambling as part of social life and disregarded traditional moral objections to gambling as ‘stale, flat and unprofitable’.²²⁴ Instead it established itself as a centre for information on gambling. In many ways, the CCG’s approach foreshadowed the present mode of government examined in Chapter Four. It was involved in conducting surveys, publishing pamphlets and reviewing legislation, and was considered to be a reputable source.²²⁵ The deliberate shift of emphasis towards ‘compulsive gambling’ by the CCG saw the establishment of Gamblers Anonymous self-help groups²²⁶ and the dissemination of knowledge about compulsive gambling through conferences and consultations attracting social and healthcare workers, and prison and probation officers.²²⁷

Rev. Moody, whilst working with Gamblers Anonymous, set up a therapeutic residential programme in 1971 called Gordon House, to ‘provide a safe place for gamblers to focus on

²²¹ Royal Commission on Betting Lotteries and Gaming (1949-51) (n 10) para 159.

²²² Dixon (n 4) 318.

²²³ *ibid* 317–8.

²²⁴ *ibid* 317.

²²⁵ Royal Commission on Gambling (1976-8) (n 3) paras 7.34-7.46; Dixon (n 4) 317.

²²⁶ Beginning in London in 1964. Dixon (n 4) 318 citing Gordon Moody (1982) ‘The Origins of the Society for the Study of Gambling’ (1982) 1 Society for the Study of Gambling Newsletter 1.

²²⁷ *ibid* citing Gordon Moody (1982) ‘The Origins of the Society for the Study of Gambling’ (1982) 1 Society for the Study of Gambling Newsletter 1, 2.

their recovery'.²²⁸ It became the first charity in the UK dedicated to helping problem gamblers, ultimately becoming incorporated as the Gordon Moody Association. Today it is one of the leading support organisations in the UK for problem gambling and related issues offering 'a unique and intensive residential treatment programme in the UK for those gamblers most severely addicted, as well as online support and advice'.²²⁹

Notwithstanding the therapeutic work which was being conducted at the time, pathological explanations for excessive gambling were not influential in the Royal Commission's inquiry of 1978. Instead, the Commission was influenced by Home Office evidence,²³⁰ 'tentatively' concluding that:

- (i) The initial decision to gamble probably reflects a variety of more or less ephemeral personal, social and situational factors rather than a single (or simple) urge to gamble.
- (ii) Habitual gambling is not so much determined by some deep-seated motivation as by a process of learning influenced by the environment in which gambling takes place and by the structural characteristics of the chosen type of gambling.²³¹

Concerns which framed 'excessive gambling' as a medicalised, compulsive disorder did not therefore feature greatly in the Commission's report. Its focus was instead centred on situational features of gambling, including how the gambling product was offered and the conduct of the operator: a position which we have also, in part, circled back to under the present regime.²³² It was, however, concluded at the time that 'there is a serious shortage of reliable and accessible information about gambling in the United Kingdom'²³³ and accordingly included a specific recommendation that the government establish a gambling research unit to 'monitor and study the incidence, sociology and psychology of gambling'²³⁴ (although no such body was ultimately set up). In the meantime, it was considered by the

²²⁸ Gordon Moody Association, 'Our History' <<https://www.gordonmoody.org.uk/our-history>> accessed 10 February 2021.

²²⁹ Charity Commission for England and Wales, 'Gordon Moody Association' <<https://register-of-charities.charitycommission.gov.uk/charity-details/?regid=1124751&subid=0>> accessed 10 February 2021.

²³⁰ DB Cornish, 'Gambling: A Review of the Literature and Its Implications for Policy and Research' [1978] *Home Office Research Study no 42*.

²³¹ Royal Commission on Gambling (1976-8) (n 3) para 4.4.

²³² See Chapter Four.

²³³ Royal Commission on Gambling (1976-8) (n 3) para 4.5.

²³⁴ *ibid* 425 Recommendation 1.

Royal Commission that the tight legislative restrictions were functioning effectively in controlling the gambling market and indeed warranted some degree of relaxation in a number of seemingly minor, but ultimately consequential ways, as explored in the next section.

A crucial event took place shortly after the publication of the Royal Commission's inquiry, however, for 'establishing the disease-like nature of problem gambling'.²³⁵ In 1980, the American Psychiatric Association included the condition of 'pathological gambling' in its influential Diagnostic and Statistical Manual (DSM) of mental disorders²³⁶ and the World Health Organisation subsequently followed suit.²³⁷ This change from 'compulsive' to 'pathological' can be regarded as an important shift in attention away from the activities about which an individual is compulsive, towards the physiological presence of an illness.²³⁸

The moralistic tones of the previous centuries had hence been replaced by medical opinions framing problematic gambling as a clinical defect located within the individual to be cured, rather than a moral issue or criminal behaviour which should be outlawed or punished.²³⁹ This is illustrative of the broader trend towards the medicalisation of deviance during the twentieth century, where behaviour which deviates from the present normative standard is subject to corrective treatment so that it can be normalised.²⁴⁰ This situation developed in parallel with the gradual deregulation of commercial gambling during the final two decades of the twentieth century.²⁴¹ Its agenda was complemented by the increasing influence of the pathological model of problem gambling which effected a transfer in the location of risk from the gambling environment to the individual. As Reith puts it:

As governments liberalize regulations and markets expand on a global scale, discourses of pathology and irresponsibly are invoked to articulate the negative impacts of 'excess'

²³⁵ Orford (n 94) 51.

²³⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders III* (at that time).

²³⁷ Orford (n 94) 51.

²³⁸ Reith (n 142) 7.

²³⁹ *ibid* 6.

²⁴⁰ Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (n 220).

²⁴¹ As explored further in section 5 below and Chapter Three.

consumption. The ideology of the responsible sovereign consumer is the corollary of the deregulation of markets and the expansion of commercial industry.²⁴²

The figure of the ‘pathological’ or ‘problem’ gambler - originating in 1980 - eventually became one of the key mechanisms used to regulate commercial gambling in the subsequent liberal regime under the Gambling Act 2005. This development and its operation will be considered in further detail in Part II. In the final section of this chapter, I will analyse the key events leading to the gradual deregulation and expansion of the commercial gambling industry, in relation to which the pathological gambler came to play an important role. This direction would perhaps have been especially surprising, and by no means assumed, in the first decade following the legalisation of commercial gambling when it appeared that gaming in particular was ‘out of control’ and in need of stronger measures to rein it in.

5. Effectiveness of the regime

5.1 Lessons learned: the difficulty of calculating a detailed action for regulating everything

In relation to betting, the Betting and Gaming Act 1960 was regarded as ‘revolutionary’ in addressing the problem of illegal bookmaking, which ‘almost completely disappeared’.²⁴³ The legislation was flawed, however, in relation to commercial gaming which proliferated as a result, demonstrating the perils and difficulties in strict prescription for every possible situation.²⁴⁴ This was later regarded by the Royal Commission (1978) as a ‘lesson painfully learned and applied in the Gaming Act 1968’, most specifically ‘the difficulty in controlling activities from which there were large amounts of money to be made by those astute enough to find ways round the legal obstacles, by relying solely on statutory provisions which were not backed by regulation-making powers’.²⁴⁵

²⁴² Gerda Reith, ‘Techno Economic Systems and Excessive Consumption: A Political Economy of “pathological” Gambling’ (2013) 64 *British Journal of Sociology* 717, 733.

²⁴³ Royal Commission on Gambling (1976-8) (n 3) para 6.3.

²⁴⁴ Gordon (n 177) 10.

²⁴⁵ Royal Commission on Gambling (1976-8) (n 3) para 1.19.

The 1960 Act had followed most of the Royal Commission's recommendations and made it lawful to provide commercial gaming facilities only in proprietary and members clubs, though subject to a number of restrictions around certain types and features of gaming which were viewed as possessing greater potential for exploitation. Thus, it incorporated mechanisms which proscribed certain bankers' games of unequal chance, such as roulette, blackjack and baccarat,²⁴⁶ as well as the charging or deducting a levy to gamblers for participation.²⁴⁷ Operators were nonetheless able to exploit a minor concession provided in the legislation which allowed the imposition of a charge for providing gaming facilities. Moreover, there was no restriction on this charge save that it must be fixed before gaming had begun.²⁴⁸ Gaming club proprietors were consequently able to circumvent the spirit of the Act in a number of 'ingenious'²⁴⁹ ways, for example by dividing gaming into sessions and charging a fee for providing gaming facilities per session,²⁵⁰ and by developing ways of playing bankers' games so that they held the appearance, at least in theory, of games of equal chance.²⁵¹ Courts ultimately ruled each of the strategies as unlawful; however, proprietors would soon develop a new strategy to take its place.²⁵² The result was an unsatisfactory situation whereby outlets for commercial gaming, particularly casinos, proliferated. Similarly, the provisions under the Act relating to gaming machines contained loopholes, for example regarding the amount that could be awarded in prizes. This resulted in the development of machines offering vast jackpots, which became increasingly popular and were offered widely in non-gambling spaces such as pubs, cafes and hotels.²⁵³

²⁴⁶ Betting and Gaming Act 1960, s 16(1)(a); Stephen Monkcom, Gerald Gouriet and Jeremy Phillips (eds), *Smith and Monkcom: The Law of Gambling* (4th edn, Bloomsbury Professional 2017) 20.

²⁴⁷ Betting and Gaming Act 1960, s 16(1)(b)-(c).

²⁴⁸ Betting and Gaming Act 1960, s 16(7).

²⁴⁹ Monkcom, Gouriet and Phillips (n 246) 21.

²⁵⁰ See, for example: *Quinn v Mackinnon* [1963] 1 QB 874, [1963] 2 WLR 391; *Kelland v Raymond* [1964] 2 QB 108, [1964] 2 WLR 662.

²⁵¹ See, for example: *Victoria Sporting Club v Hannam* [1970] AC 55, [1969] 2 WLR 454; *Kursaal Casino Ltd. v Crickitt (No 1)* [1966] 1 WLR 960; *Crickitt v Kursaal Casino Ltd (No 2)* [1968] 1 W.L.R. 53.

²⁵² Monkcom, Gouriet and Phillips (n 246) 23.

²⁵³ *ibid* 24–5.

An attempt was made to address these issues under the Betting, Gaming and Lotteries Act 1963, though this action was ultimately ineffective and the situation continued to escalate, with significant concerns being raised, in particular regarding the connection between casino gambling and organised, often violent, crime:

The Betting and Gaming Act, 1960, has led to abuses, particularly in the field of gaming clubs, which were not foreseen by its promoters. This country has become a gambler's paradise, more wide open in this respect than any comparable country. This has led to a close and growing connection between gaming clubs and organised crime, often violent crime, in London and other big cities. The fat profits made by proprietors (often out of the play itself and quite contrary to the intention of the 1960 Gaming Act) made them sitting targets for protection rackets. In addition, gaming on credit, with gaming debts unenforceable at law, means that strong-arm methods are sometimes used to extort payment from those who have gambled beyond their means.²⁵⁴

Illustrating one of the central concerns of the *raison d'état* rationality - the strength of the state in competition with other nation states - Parliament, by the mid-1960s also perceived the situation regarding commercial gaming as presenting a 'serious social problem', causing moral panic at the prospect of Britain becoming a 'nation of gamblers':²⁵⁵

A friendly bet is part and parcel of normal life, and to refuse to take part may seem unsociable. [...] Today, however, we are considering not the occasional friendly bet, but something very much more serious. We are considering large-scale commercial exploitation of the desire to get something for nothing. I think this is a matter for concern for the community as a whole, and the question is whether it should be encouraged or discouraged [...] I think we have here a major social problem. There are, in fact, some unfortunate people who are compulsive gamblers. They just cannot stop, and often they bring very real tragedy to their families. It is no use lecturing them on the folly of it all; that is absolutely useless. The compulsive gambler is similar to the compulsive alcoholic. Therefore I should like to pay a word of praise and of gratitude to a body known as Gamblers Anonymous, who are trying to tackle the problem sympathetically and to help those who are suffering from what can only be regarded as a disease. But the fact that this exists seems to me to provide evidence that we are considering this afternoon not just a harmless pastime, but a serious social problem which the community cannot afford to ignore.²⁵⁶

Here, in 1966, a clear distinction is drawn between acceptable gambling - 'the occasional friendly bet' - and excessive, 'compulsive' gambling which, as explored above, was beginning to be pathologised, considered a disease to be treated rather than a moral failing, a sin, or a crime on the part of the gambler. This contrast once again illustrates the norm at the

²⁵⁴ *R v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 QB 118, [133] per Lord Denning, citing Roy Jenkins, *The Times* (13 September 1966).

²⁵⁵ Dixon (n 4) 339; Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 111) 87.

²⁵⁶ HL Deb 19 May 1966, vol. 274, cols.1104-1108.

opposite end of the spectrum - the ideal gambling subject: someone who engages in gambling only occasionally on a moderate, and preferably social, basis and not as a means to get 'something for nothing'.

In order to address the unsatisfactory situation that had arisen, there was a clear consensus amongst the government that further legal reform was required, specifically in relation to gaming, in the form of 'a system of control which, whilst avoiding unnecessary interference with individual liberty, at the same time discourages excess and prevents the commercial exploitation of gaming'.²⁵⁷ It was also considered important that new legal controls 'ensure that people are not lured into gambling'.²⁵⁸ The result was the reformed regulatory framework provided for under the Gaming Act 1968, which introduced the strict licensing regime for the provision of gaming (in casinos, bingo halls and using machines) underscored by the principle of 'unstimulated demand', as set out above at section 3.4.

When later examined by the Royal Commission (1978), the updated regulatory framework, which conferred 'draconian powers' upon the Gaming Board to 'kill [the] invasion' of the gambling scene by criminals, was regarded as a 'conspicuous success',²⁵⁹ as apparently demonstrated by the reduction in casino numbers from 1200 to 120.²⁶⁰ It was also concluded in relation to betting that overall 'the licensing system and the demand criterion have been generally accepted as a useful stabilising influence operating for the public good'.²⁶¹ The Royal Commission's evaluation, and significant recommendations for the introduction of a National Lottery will now be examined.

²⁵⁷ HL Deb 19 May 1966, vol. 274, cols. 1155-1156.

²⁵⁸ HL Deb 19 May 1966, vol. 274, col.1129.

²⁵⁹ Royal Commission on Gambling (n 3) para 1.15.

²⁶⁰ Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 111) 371-2.

²⁶¹ Royal Commission on Gambling (1976-8) (n 3) para 7.14.

5.2 National Lottery as a catalyst for change

The Royal Commission was appointed in 1976 to inquire into the existing gambling laws, more specifically:²⁶² (a) the adequacy of the restrictions imposed on the provision of facilities for gambling; (b) the practices and financial structure of the gambling industry; (c) the publication of information about gambling activities; and (d) ‘the contribution made from the proceeds of gambling towards the support of other activities (including sport), the means by which this might be enhanced, and the conditions to be imposed.’²⁶³

It was concluded overall that the legislative attempts to control commercial gambling had been successful; the number of casinos in particular had reduced dramatically from 1200 to 120.²⁶⁴ Accordingly, it found that some minor relaxation of the rules would be possible without compromising the integrity of the market.²⁶⁵ For example, while maintaining the view that betting offices should not offer facilities which may induce people to bet, the Commission considered that the restrictions governing signs and notices *inside* a betting office should be revoked, provided a ‘code of consumer protection is instituted’²⁶⁶ and it should be permissible for betting offices to provide vending machines for light refreshments and non-alcoholic drinks.²⁶⁷ It was also recommended that casinos be permitted to obtain ‘special hours certificates and extended hours orders for the supply of alcoholic liquor’²⁶⁸ and while advertising should remain prohibited, it was felt that operators should be permitted a ‘reasonable degree of latitude’ in framing staff advertisements and listing in classified directories.²⁶⁹ The allowance of a ‘greater latitude for advertising’ for licensed bingo clubs was also endorsed and in particular it was considered that ‘a club should be permitted to

²⁶² Royal Commission on Gambling (1976-8) (n 3).

²⁶³ *ibid* iii.

²⁶⁴ Miers, *Regulating Commercial Gambling: Past, Present, and Future* (n 111) 371.

²⁶⁵ David Miers, ‘The Gambling Review Report: Redefining the Social and Economic Regulation of Commercial Gambling’ (2003) 66 *Modern Law Review* 604, 608.

²⁶⁶ Royal Commission on Gambling (1976-8) (n 3) 426 Recommendation 11.

²⁶⁷ *ibid* 425 Recommendation 9.

²⁶⁸ *ibid* 438 Recommendation 186.

²⁶⁹ *ibid* 437 Recommendations 171-2.

publicise its social and other activities and to invite applications for membership in the local press and radio, as well as on its own premises. It should also be allowed to advertise its facilities within the premises of another licensed establishment, but not by public display on the outside of them'.²⁷⁰

However, perhaps most significantly (though it attracted little public or media attention at the time²⁷¹) the Royal Commission proposed that 'a national lottery for good causes' be established.²⁷² The 1970s had witnessed a significant shift in government policy as regards lotteries, which had started to be seen as a potential contributor to the economy. A number of legislative changes²⁷³ permitted the promotion of large lotteries by local authorities and societies (such as charitable, cultural, local amenity and sport associations), marking a key turning point in policy as to the suitability of lotteries as a legitimate means of raising funds for public goods.²⁷⁴ Accordingly, the Royal Commission had come to accept that lotteries were now generally regarded as a 'socially harmless' form of 'entertainment',²⁷⁵ and whilst it held severe concerns regarding the 'scandalous' and 'wholesale disregard of the law' in relation to the external management of some local authority and society lotteries which, as a result, were criticised for their susceptibility to fraudulent exploitation,²⁷⁶ it presented empirical evidence to suggest that there was 'potentially, a substantial new market for a national lottery for good causes among all sections of the public'.²⁷⁷

A national lottery, the Commission found, would serve as a method of raising money and at the same time provide 'national entertainment and much harmless amusement. This could not

²⁷⁰ *ibid* 440 Recommendations 212-4.

²⁷¹ Orford (n 94) 17-8.

²⁷² Royal Commission on Gambling (1976-8) (n 3) 434 Recommendation 127.

²⁷³ In particular the Lotteries Act 1975 and the Lotteries and Amusements Act 1976.

²⁷⁴ Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (n 37) 97.

²⁷⁵ Royal Commission on Gambling (1976-8) (n 3) paras 13.59, 13.63.

²⁷⁶ In relation to which it recommended significant legal reform. *ibid* para 12.134.

²⁷⁷ *ibid* para 13.54.

be said of any known system of taxation, however cheap to run'.²⁷⁸ Correspondingly, it pointed out the opportunities presented for improving the lives of the British population, concluding that:

there is a positive case for such a [national] lottery. At relatively little cost, in money or resources, an extremely popular but harmless entertainment could be set up. At the same time the lottery could provide in our society a source of money to be allocated to deserving causes unfettered by short term political and public pressures, meeting, as the Government can scarcely do, the need for large scale benefaction of particular types. [...] A national lottery for good causes is, therefore, a rare opportunity to improve, indirectly if not directly, the quality of British life.²⁷⁹

The recommendations of the Royal Commission were ultimately accepted and the National Lottery was subsequently introduced in 1994, proving instantly popular.²⁸⁰ With its mass public appeal, the National Lottery further contributed to the ongoing normalisation of gambling and marked a radical transformation in gambling policy: it was now in the public interest to promote mass participation in gambling for 'good causes'.²⁸¹ Indeed, pursuant to the National Lottery etc. Act 1993, the Secretary of State and the Director General were required to each 'do his best to secure that the net proceeds of the National Lottery are as great as possible'.²⁸² In direct contrast with the core principle of existing gambling legislation, that gambling opportunities should only be provided to the extent that they meet existing, unstimulated demand, the operating principle underlying the National Lottery was precisely to create a demand for this single gambling product.²⁸³

This proved to be one of the main catalysts in stimulating the rest of the gambling industry's deregulation agenda, increasing the pressure for regulatory change in line with the privileges enjoyed by the National Lottery.²⁸⁴ It does, however, also have to be viewed within the wider 'shift in governmental ideology' arising in the 1980s, 'from social-democratic liberalism and state regulation towards Neo-conservative individualism, with the market as a social and

²⁷⁸ *ibid* para 13.61.

²⁷⁹ *ibid* para 13.63.

²⁸⁰ Orford (n 94) 18.

²⁸¹ Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (n 37) 98.

²⁸² The National Lottery etc Act 1993, s 4(2).

²⁸³ Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (n 37) 98.

²⁸⁴ Orford (n 94) 19; Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (n 37) 98.

economic regulator'.²⁸⁵ Rather ironically given Prime Minister Margaret Thatcher's famous anti-gambling stance (gambling being contrary to her Methodist principles of thrift and hard work, as well as neoliberal values concerning 'aspiration, entrepreneurship and talent as 'proper' routes to wealth and success'²⁸⁶), this political shift laid the groundwork for a stream of gradual relaxation of gambling legislation. This relaxation began in the 1980s, following the Royal Commission's recommendations to partially ease the burden of regulation for the industry;²⁸⁷ a shift which should be viewed as part of the general policy pursued by the government during that era (both Conservative and Labour) to reduce restrictions on businesses generally²⁸⁸ in order to 'remove any unnecessary burdens and to reduce bureaucracy'.²⁸⁹ As a result, the gambling landscape looked very different going into the final decade of the twentieth century than it had at its beginning:

Gambling is big business in contemporary Britain. Betting shops are seen in every high street, bingo games occupy redundant cinemas, every national newspaper provides a racing service and news of football pools; many operate their own form of lottery. There have even been proposals that a lottery competition provide marginal finance for the National Health Service.²⁹⁰

During the second half of the 1990s, gambling regulations were relaxed (on a mostly piecemeal basis through statutory instruments made possible under the Deregulation and Contracting Out Act 1994) in relation to almost all sectors, for instance: permitted opening hours were extended across all gambling facilities; limited advertising in newspapers and magazines was permitted for casinos and betting, whilst bingo was allowed to be advertised with no restrictions; and the hours that gamblers had to wait to game after becoming a member of a casino was halved.²⁹¹ There was a clear shift in the government's attitude towards the gambling sector, which was viewed 'no longer [as] a pariah industry, run by the

²⁸⁵ Dixon (n 4) 1.

²⁸⁶ Emma Casey, 'Gambling, Status Anxiety and Inter-Generational Social Mobility: Findings from the Mass Observation Archive' (2020) 54 *Sociology* 380, 381.

²⁸⁷ Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (n 37) 97.

²⁸⁸ Orford (n 94) 18.

²⁸⁹ Department for Culture Media and Sport and Gambling Review Body (n 152) para 19.26.

²⁹⁰ Roger Munting, 'Betting and Business; the Commercialisation of Gambling in Britain' (1989) 31 *Business History* 67, 67.

²⁹¹ Orford (n 94) 19.

least attractive of capitalism's wealth creators [...] but [as] part of the "mainstream leisure industry".²⁹² The reallocation of responsibility for gambling policy from the Home Office to the Department for Culture, Media and Sport following the 2001 general election subsequently provided clear recognition of this shift.²⁹³ Dixon identified this change in approach as the

decline of a strategy which allowed people to gamble, but attempted to restrict commercial exploitation of their activities. It was an expression of a paternalism which was part of the social/liberal democratic philosophy which dominated British politics from the Second World War to the 1970s: its method was close administrative regulation... This strategy came to challenge and replace its predecessor, a more authoritarian paternalism whose tool was prohibitory legislation. In turn, it is now being undermined by the new philosophy of neo-conservatism, relying on the operation of the market as the prime social and economic regulator.²⁹⁴

It was in this climate of government inclination towards deregulation, competitive stimulation²⁹⁵ and free market principles that the Gambling Review Body, chaired by former treasury advisor Sir Alan Budd, was commissioned by the Home Office to review the 'current state of the gambling industry' and 'make recommendations for the kind and extent of regulation appropriate for gambling activities in Great Britain'.²⁹⁶ The review ultimately endorsed a much more *laissez faire* approach to gambling regulation facilitated by increased competition between gambling operators; an approach entirely incompatible with the 'police' style of regulation. Crucially, the gambling economy would, for the first time, come to be seen as a good in itself which should be maximised. Likewise, the wellbeing of the population would also be regarded as an end in itself, no longer connected solely with the strength of the state, introducing a new balancing act which strives to find an equilibrium whereby these two objectives sustain one another. This transformation, and the present legislative framework - the Gambling Act 2005 - which, I propose comprises two distinct regimes (so far) will now be examined in Part II of this thesis.

²⁹² Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (n 37) Citing Chairman of the Gaming Board, Peter Dean, GamCare Conference (17 October 2001).

²⁹³ *ibid* 100.

²⁹⁴ Dixon (n 4) 354-5.

²⁹⁵ Orford (n 94) 20.

²⁹⁶ Department for Culture Media and Sport and Gambling Review Body (n 152) para 2.1.

Part II

Gambling *Now*

From 2005 to Present

Chapter Three

The Liberal Regime

1. Introduction

In Chapter Three, I recommence the genealogical analysis of gambling regulation at the end of the twentieth century when the Gambling Review Body was formed to ‘review the current state of the gambling industry’¹ and make recommendations for its reform. I begin once more by examining the ways in which commercial gambling was described during this period within the prominent discourse, as accepted by the Gambling Review Body, its character having been wholly reformed to the status of an ordinary leisure activity which adults should be free to enjoy. Importantly, the economic benefits of a successful gambling industry, which had also begun to migrate online, had come to be appreciated by the state. It was considered, therefore, that the restrictive and ‘intolerably paternalistic’ approach to regulation was no longer appropriate and needed to be replaced.

I then go on to examine the replacement regime, which arrived in the form of the Gambling Act 2005, together with its underlying rationalities. The Act represented a significantly more *laissez faire* approach to the regulation of gambling, which regarded the market and competition as the most effective regulatory instruments, expressly removing the previous restriction on stimulating new demand. In addition to maximising economic benefits, the regime also sought to ensure the wellbeing of the gambling population, identifying that a balance was required between permitting competition and protecting consumers, requiring certain steps to be taken for the purposes of ‘social responsibility’. This approach as a whole,

¹ Department for Culture Media and Sport and Gambling Review Body, *Gambling Review Body Report (The Budd Report)*. (Cm 5206, 2001) para 2.1.

I argue, aligns broadly with Foucault's liberal governmentalities, which seek to influence conduct indirectly by allowing the 'natural' course of events and intervening only where necessary to manage the risks presented to the population. This management of risk was to be achieved in part by gaining a greater understanding of those most vulnerable to gambling-related harm: the statistical minority of 'problem gamblers' whose deviance should be treated through clinical intervention. By contrast, the activity of the majority of gamblers was facilitated through the gambling environment by way of information about how to participate in the market in an informed, rational and therefore responsible manner, aligning with the 'neoliberal' ideal standards of *homo oeconomicus*. Thus, the 'responsible gambler' emerges as the 'useful and valuable' subject under this regime, as a person who is at liberty to participate in a liberalised gambling market but assumes full responsibility for ensuring that they gamble responsibly. Lastly, I consider the effects of this liberal regime, most particularly the rapid expansion of the British gambling industry which emerged in parallel with - and was, I argue, accelerated by - developments in internet, data-driven technology. This section also serves to contextualise the more restrictive, paternalistic direction that gambling regulation appears to have since taken under the regime examined in Chapter Four, which has been enabled to a large extent by the repurposing of this data-driven technology for alternative, apparently more protective ends.

2. Changing attitudes and the Gambling Review Report

By the end of the twentieth century, there had been a clear shift in the government's attitude towards the gambling sector, which was viewed 'no longer [as] a pariah industry, run by the least attractive of capitalism's wealth creators [...] but part of the "mainstream leisure industry"'.² The reallocation of responsibility for gambling policy from the Home Office to

² David Miers, 'From Constraint to Competition: 50 Years of Change in British Gambling Policy' (2011) 15 *Gaming Law Review and Economics* 93, 98 Citing Chairman of the Gaming Board, Peter Dean, GamCare Conference (17 October 2001).

the Department for Culture, Media and Sport following the 2001 general election subsequently provided clear recognition of this shift.³ It was in a climate of government inclination towards deregulation and competitive stimulation⁴ that the Gambling Review Body, chaired by former treasury advisor Sir Alan Budd, was commissioned by the Home Office to review the ‘current state of the gambling industry’ and ‘make recommendations for the kind and extent of regulation appropriate for gambling activities in Great Britain’.⁵

The pre-existing legal framework under the legislative regime of the 1960s was described by the Gambling Review Body as ‘one of grudging toleration’⁶ and perceived to be no longer relevant in a social climate where gambling was ‘part of the main stream of leisure activity’.⁷ In forming its conclusions, the Review Body addressed a familiar and ‘central dilemma’ between the desire to permit free choice and the ‘fear that such choice may lead to harm either to the individual or to society more widely’,⁸ referring to three recognisable arguments in favour of gambling regulation:

Gambling can cause serious financial and psychological harm to some of those who do it [...] (the “danger” argument).

Gambling is intrinsically undesirable because of the attitudes it sustains or encourages (the “moral” argument).

The activity of gambling can adversely affect the lives of those who do not themselves gamble [...] Dealing with such gamblers may impose costs (e.g. of law enforcement or health treatment) on the rest of society (the “externalities” argument).⁹

The Review Body agreed with the liberal starting point of its predecessors¹⁰ that ‘in determining the aims and proper limits of legal control over gambling in our society’, the imposition of such restrictions should be limited to those which ‘are desirable and practicable

³ *ibid* 100.

⁴ Jim Orford, *An Unsafe Bet? : The Dangerous Rise of Gambling and the Debate We Should Be Having* (Wiley-Blackwell 2011) 20.

⁵ Department for Culture Media and Sport and Gambling Review Body (n 1) paras 2.1-2.2.

⁶ *ibid* 14.1.

⁷ Department for Culture Media and Sport, *A Safe Bet for Success - Modernising Britain's Gambling Laws the Government's Response to the Gambling Review Report* (Cm 5397, 2002) para 1.3.

⁸ Department for Culture Media and Sport and Gambling Review Body (n 1) para 3.1.

⁹ *ibid* 3.7-3.9.

¹⁰ Royal Commission on Gambling (1976-8), *Royal Commission on Gambling. Final Report. (the Rothschild Report). Volumes 1-2* (Cmnd 7200, 1978).

to discourage socially damaging excess'.¹¹ In considering this central issue, however, the Review Body proceeded to take a 'rather narrower view of what is meant by "socially damaging excesses"'.¹² It sought to achieve a level of 'compromise within a range of views about the role of the state in controlling or influencing individual activity',¹³ though this 'compromise' represented a move which was significantly liberal in its direction: 'allowing greater freedom for the individual to gamble in ways, at times and in places than is permitted under current legislation'.¹⁴ The direction taken by the Gambling Review Body can be explained, at least in part, by a concern which was somewhat novel in the area of the reviews undertaken by the state historically as regards the regulation of gambling: the potential economic benefits presented by commercial gambling.

2.1 A 'world-leading' British gambling economy

Unlike other jurisdictions, it had not historically been government policy in Great Britain to commercially exploit gambling revenues other than narrowly through standard forms of duty and taxation (with exceptions in the horse race betting levy and the Tote, used to assist the racing industry).¹⁵ A key exception of course arrived in the form of the National Lottery in 1994, which represented a commercial gambling monopoly whose surplus would purchase public goods: 'the good causes'.¹⁶ However, with regard to commercial gambling broadly, debates had tended to centre on the social or moral value of gambling, generally in negative terms, without considering the potential economic value presented for the state.

The Royal Commission in 1977 was, as part of its inquiry, directed to consider 'the contribution made from the proceeds of gambling towards the support of other activities

¹¹ Department for Culture Media and Sport and Gambling Review Body (n 1) para 3.12.

¹² *ibid* 3.13.

¹³ *ibid*.

¹⁴ *ibid* 3.6.

¹⁵ David Miers, 'The Gambling Review Report: Redefining the Social and Economic Regulation of Commercial Gambling' (2003) 66 *Modern Law Review* 604, 610.

¹⁶ *ibid* 611.

(including sport), the means by which this might be enhanced, and the conditions to be imposed',¹⁷ finding its answer, as we have seen, in the creation of a National Lottery for 'good causes'. This subsequently proved to be a catalyst for the wider liberalisation of the commercial gambling market. In terms of other broader potential economic benefits, however, in the form of jobs, leisure and tourism for example, their view of 'grudging toleration' towards the activity of gambling was reflected with clarity:

The objection that punters are wasting their time is a moral or possibly an aesthetic judgement. As it happens, none of us is attracted by the idea of spending an afternoon in a betting office. But the people who frequent betting offices have chosen to enjoy themselves in their own way and we think that in a free society it would be wrong to prevent them from doing so merely because others think that they would be better employed in digging the garden, reading to their children or playing healthy outdoor sports. [...] Absenteeism is something on which it has not been possible to obtain any firm evidence. Common sense suggests that not all the people one sees in a betting office in the middle of the afternoon are on holiday, unemployed or waiting for the next load of bricks to be delivered. But we have no idea of the numbers who may be dodging work or whether they would be back at their jobs rather than taking tea in the park if the betting offices were shut.¹⁸

Thus, while the Royal Commission was clearly at pains to demonstrate its liberal stance on how individual gamblers chose to spend their leisure time, considerations regarding the potential impact of gambling on employment, for example, were limited to negative concerns ensuring that people were not 'pestered' or 'distracted from their real work, even if betting at appropriate times boosts morale of those engaged in repetitive or otherwise uncongenial tasks (as the late Ernest Bevin is said to have believed)'.¹⁹ This naturally led to the support of the 'demand' principle, a device that effectively prevented competition by artificially constructing a gambling market which solely catered for pre-existing demand, but prevented the stimulation of any new demand. The Gambling Review Body in 2001, however, applied a very different approach. Not only did it refer to the wording employed by the Royal Commission as being 'intolerably paternalistic with the implication that gambling is acceptable (though not to be encouraged) for workers, whose lives are so limited, but not

¹⁷ Royal Commission on Gambling (1976-8) (n 10) iii.

¹⁸ *ibid* 7.30-7.31.

¹⁹ *ibid* 1.8.

something that could appeal to the educated’,²⁰ it also identified a number of additional economic benefits presented by commercial gambling in the form of employment and recreational opportunities, as well as increased tax revenue.²¹ Undertaking an analysis of the costs and benefits of gambling, the Body identified that ‘the benefit of gambling is the recreational enjoyment that punters derive from it. They are willing to pay the price - in terms of losses - which supports the labour and capital allocated to the industry’.²² On balance, these benefits outweighed the potential costs of the increased availability of gambling in terms of the possibility of an increase in problem gambling.

2.2 The internet and offshore gambling

Clearly, whilst the economic strength of the gambling market had not been a matter of great importance to previous governments, the climate was very different at the time of the Gambling Review Body’s appointment in 2000. As well as the creation of the National Lottery (a revenue raising device in the form of state-sponsored gambling) a further development was regarded as central to this change in stance: the threat posed by the growth of e-commerce in the late 1990s to government revenues, taking ‘betting not just off-track but off-shore’.²³ Further context to the gambling review report was provided by the Department of Customs and Excise’s announcement that there would be a review of general betting duty with a view to replacing it with a fiscal system to enable British companies to exploit e-commerce and withstand ‘global competition for the gambling pound’, while ensuring a return on revenue.²⁴

The bookmaking and racing industries in the UK need a tax system that allows them to take advantage of the increasing globalisation of the gambling market and the possibilities

²⁰ Department for Culture Media and Sport and Gambling Review Body (n 1) para 3.25.

²¹ *ibid* 17.83.

²² *ibid* 17.8.

²³ David Miers, ‘OFGAM? OFBET? The Regulation of Commercial Gambling as a Leisure Industry’ (2002) 1 Entertainment Law 20, 22.

²⁴ *ibid*.

that e-commerce offers. The tax system also needs to ensure that these industries continue to contribute fairly to government revenues.²⁵

Seemingly paying tribute to the *raison d'état* foundations, concerned with maximising the external strength of the state in relation to other states, this translated in the 2001 budget to the replacement of the general duty with a gross profits tax: 'a radical reform of betting duty which will create the right competitive environment for British-based bookmakers to develop their business domestically and internationally, and give punters a better deal'.²⁶ It was in this milieu, then, that the Gambling Review Body was explicitly instructed within its terms of reference to consider the potential values that may be presented by commercial gambling to the economy. Specifically, the Gambling Review Body was asked to investigate 'whether it was not now time to amend the regulatory policy, to permit competition, within a regulated market, to serve the interests of the gambling consumer and, more broadly, the economy'.²⁷

Its explicit terms of reference thus required that it:

Consider the current state of the gambling industry and the ways in which it might change over the next ten years in the light of economic pressures, the growth of e-commerce, technological development and wider leisure industry and international trend.²⁸

In addition, it was required to 'consider, and make recommendations for, the kind and extent of regulation appropriate for gambling activities in Great Britain, having regard to':

the desirability of creating an environment in which the commercial opportunities for gambling, including its international competitiveness, maximise the UK's economic welfare; and the implications for the current system of taxation, and the scope for its further development.²⁹

By the time the Gambling Review Body was established, at the turn of the new millennium, to conduct a review of the current state and regulation of the gambling industry,³⁰ there had already developed a significant market for the provision of online gambling services to

²⁵ HM Treasury, *Budget 2000 - Prudent for a Purpose: Working for a Stronger and Fairer Britain* (HC 2000, 346) para 5.108.

²⁶ Department for Culture Media and Sport and Gambling Review Body (n 1) para 36.11.

²⁷ Miers, 'The Gambling Review Report: Redefining the Social and Economic Regulation of Commercial Gambling' (n 15) 609.

²⁸ Department for Culture Media and Sport and Gambling Review Body (n 1) para 2.1.

²⁹ *ibid.*

³⁰ *ibid.*

gamblers in the UK.³¹ The existing legislative framework established in the 1960s, however, had ‘failed to keep pace with technology, and [did] not make proper provision for gambling on the internet’.³² Indeed, one of the key issues with the current ‘patchwork’³³ of legislation, owing to the piecemeal deregulation which had taken place in the last decade, was that it was overly complicated and rigid, which prevented it from staying relevant to present circumstances.³⁴ Accordingly, it had failed to keep pace with technological advances; in particular the internet, and the impact of remote ‘off-shore’ gambling both on gamblers’ themselves and on the national economy, was a key concern which the Review Body sought to address.³⁵ Highlighting the importance of online gambling to its considerations, the Review Body dedicated two chapters specifically to the subject.³⁶ Among its overarching proposals for the ‘managed relaxation of outdated restrictions and extension of choice for adult gamblers’³⁷ in relation to the general provision of gambling facilities, its recommendations with regard to online gambling were clear:

It would not be right to try to ban on-line gambling in the UK, and it would not, in any case, be feasible to do that. Where relevant, our recommendations try to replicate for on-line services the regulation that will apply to UK casinos.³⁸

2.3 Freeing the UK gambling market

Overall, the Gambling Review Body recommended a simplification of gambling regulation and an extension of choice for adult gamblers³⁹ through the abolition and replacement of the ‘demand’ test with a ‘free-market, commercially moulded model’⁴⁰ which facilitated

³¹ Stephen Monkcom, Gerald Gouriet and Jeremy Phillips (eds), *Smith and Monkcom: The Law of Gambling* (4th edn, Bloomsbury Professional 2017) 929.

³² Department for Culture Media and Sport (n 7) para 1.2.

³³ Miers, ‘The Gambling Review Report: Redefining the Social and Economic Regulation of Commercial Gambling’ (n 15) 609.

³⁴ Department for Culture Media and Sport (n 7) paras 1.1-1.2.

³⁵ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 2) 99.

³⁶ Department for Culture Media and Sport and Gambling Review Body (n 1) chs 12, 30.

³⁷ Department for Culture Media and Sport (n 7) para 1.7.

³⁸ Department for Culture Media and Sport and Gambling Review Body (n 1) para 30.2.

³⁹ *ibid* 1.1.

⁴⁰ Roy Light, ‘The Gambling Act 2005: Regulatory Containment and Market Control’ (2007) 70 *Modern Law Review* 626, 629.

competition.⁴¹ In removing the principle of unstimulated demand, and the barriers to market entry associated with it, the Gambling Review Body sought to allow the gambling market to freely compete, which would in turn benefit the player in a more natural and therefore effective way:

We believe that competition between suppliers of gambling activities offers the most effective way of providing a fair deal for the punter. Our proposals for the abolition of the demand test and the permitted areas rule will help to increase competition.⁴²

The majority of the Gambling Review Body's 176 recommendations were therefore overwhelmingly in favour of relaxing the regulations.⁴³ It proposed that gambling regulations should be confined to what is necessary to meet three essential criteria (which subsequently became preserved as the three central licensing objectives under the Gambling Act 2005):

Permitted forms of gambling should be crime-free.

Players should know what to expect and be confident that they will get it and not be exploited.

There should be some protection for children and vulnerable persons.⁴⁴

As mentioned above, by this time there had been a radical shift in the state's perception of commercial gambling in general: 'no longer the dupes of a pariah industry', gamblers were perceived as valued consumers within 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'.⁴⁵ The deregulatory and free-market stance of the Gambling Review Body was thus accepted by the Government, which incorporated into its 'plans for modernising the laws governing gambling in Great Britain'⁴⁶ a 'move towards legalising the provision of the full range of online gambling services by operators located in the UK':⁴⁷

There is a potentially vast international market for which gambling operators based in this country will be encouraged to compete (some estimates suggest that annual global on-line gambling revenues could double to around £10 billion by 2005). Consumers, both here and

⁴¹ Department for Culture Media and Sport and Gambling Review Body (n 1) para 1.17.

⁴² *ibid.*

⁴³ *ibid* 193–201.

⁴⁴ *ibid* 3.28.

⁴⁵ David Miers, 'Regulation and the Management of Risk in Commercial Gambling in Great Britain' (2015) 15 *International Gambling Studies* 422, 423.

⁴⁶ Department for Culture Media and Sport (n 7).

⁴⁷ *ibid* para 4.47.

abroad, will be able to access a full range of gambling sites licensed and located here, safe in the knowledge that the probity and integrity of the gambling operators and the products they offer are assured by the Gambling Commission. [...] Against this background of deregulation and proportionate consumer protections, there is every reason to believe that Britain can establish a reputation for itself as a world leader in the field of on-line gambling, just as it has with other types of gambling.⁴⁸

Thus, as well as dealing with concerns that the current legislative position was overly complicated and out-dated in a social climate where gambling was now ‘part of the main stream of leisure activity’,⁴⁹ one of the central aims of the Government in reforming the laws of gambling under the Gambling Act 2005 was to directly provide a ‘world-leading’ system for the regulation of online gambling in Great Britain, again seemingly building upon its *raison d’état* foundations. This was ‘partly to protect UK customers from unregulated, possibly unscrupulous, operators and partly to make Britain a base for the expanding online industry’.⁵⁰ The Government was, however, keen to point out that the potential fiscal advantages were categorically ‘not a motivator for this legislation’⁵¹ despite making multiple references to the increasing financial value of the sector, stating: ‘It is my job as Secretary of State for Culture, Media and Sport to establish the regulatory framework; it is the Treasury’s responsibility to establish the taxation regime’.⁵² Notwithstanding these assertions, the remarkable dynamic between the seemingly dual purpose of the new regime is particularly well-illustrated in this extract from the Gambling Bill debates:

An area where regulation is most urgently needed is that of remote gaming. Gambling on the internet has become a huge business in the space of a few years, and it is predicted that the industry will be worth £10 billion globally within the next five years. At present, such gambling can take place only on websites hosted outside the UK [...] Many offshore sites offer no player protection and few safeguards against under-age access or criminal activity. It therefore makes sense to have a licensed and regulated UK-based industry, where players can be certain that their bets will be honoured and that operators will be above board.⁵³

⁴⁸ *ibid* para 4.48-4.52.

⁴⁹ *ibid* para 1.3.. See Chapter One for further in-depth discussion.

⁵⁰ Culture Media and Sport Committee, *The Gambling Act 2005: A Bet Worth Taking? First Report of Session 2012-13. Volume I: Report, Together with Formal Minutes, Oral and Written Evidence. Volume II: Additional Written Evidence.* (HC 2012-13, 421-I, II) para 126.

⁵¹ HC Deb, 1 November 2004, vol. 426, col 30.

⁵² HC Deb, 1 November 2004, vol. 426, col 30.

⁵³ HC Deb, 1 November 2004, vol. 426, cols. 42-43.

It was confirmed that regulation of commercial gambling would be ‘confined to what is necessary to keep crime out, protect the vulnerable, and ensure that gambling products are fair to the consumer’.⁵⁴ This ‘lighter-touch’ regulatory approach would allow the removal of ‘unnecessary barriers to customer access and new entrants to the industry’ and safeguard the potential economic benefits to society which a successful gambling industry was seen to offer.⁵⁵

We will remove the present confusing array of legal restrictions on the advertising and promotion of gambling products, enabling them to become more visible and accessible and creating a fairer and more competitive operating environment.⁵⁶ [...] In the Government’s view the law should no longer incorporate or reflect an assumption that gambling is an activity which is objectionable and which people should have no encouragement to pursue. It is an important industry in its own right, meeting the legitimate desires of many millions of people and providing many thousands of jobs.⁵⁷

The final Gambling Bill was introduced into the House of Commons in October 2004 where it received considerable opposition, though this centred mainly on the planned expansion of the casino industry: members strongly opposed ‘the proposal to make it easier for multinational casinos to rip off hard-working British families’.⁵⁸ It was, however, generally accepted by the House that there was a need to modernise the laws on gambling (especially to address online gambling) it being accepted that it was the proper role of the state to regulate the way in which gambling is offered and to avoid harm. Thus, it was made clear that in allowing for the economic benefits and ensuring the necessary consumer protections, the new regulatory framework would *direct* gambling conduct in a way which is for the benefit and wellbeing of society as a whole, as illustrated particularly well in this lengthy quote from former Culture Secretary Tessa Jowell introducing the Bill for parliamentary debate:

The House should recognise, however, that gambling is at the boundary between personal freedom and state intervention. On one side of the boundary is the reasonable expectation of adults who, within the law, exercise their right to live their lives as they choose. On the other is the role of the state: to recognise human frailty, and in particular to respect its duty to protect children and the vulnerable. As a Government and a society, we have three

⁵⁴ Department for Culture Media and Sport (n 7) paras 10.9-10.10.

⁵⁵ *ibid.*

⁵⁶ *ibid* para 4.4.

⁵⁷ *ibid* para 7.1.

⁵⁸ HC Deb 1 November 2004, vol. 426, col. 53.

options in that respect: prohibition, a free-for-all or regulation. We have no doubt about choosing the regulatory route. The question for the House is how best to apply the regulatory framework for the benefit of society as a whole.⁵⁹ [...] To reduce the risk of harm, the Bill provides new powers to regulate the way in which gambling is offered. Our controls are currently limited to specifying what can be offered and where that can happen. The Bill will give us powers to change the way in which gambling is offered to avoid harm. [...] As with other forms of addiction to legal activities, we have to balance carefully the citizen's right to act freely with the state's duty to minimise harm and warn of the risks. There is a parallel between alcohol and gambling. Both are legal pursuits, both carry an associated risk of addiction and the state has chosen not to proscribe but to shape supply. [...] Some, I accept, would react to that evidence by suggesting that we prohibit such choices; but if we have learnt anything at all about the history of regulating gambling, it is that if the law does not allow people to gamble safely, they will find ways of gambling at higher risk. We do not want to drive gambling underground or offshore. Expenditure on gambling is rising by about 3.5 per cent. each year, and it is predicted that that rate of increase will continue, with or without the Bill. People will go on choosing casino games whether we like it or not; the question for us is, how do we direct that demand? [...] We consider it reasonable for British consumers to be allowed access to casino games on properly regulated casino premises. We would rather people gambled on machines in the carefully controlled environment of a casino than on dodgy internet sites at home.⁶⁰

For the 'benefit of society as a whole' these two intertwining concerns - the economy and the wellbeing of the gambling population - would be addressed under the new Gambling Bill by first, allowing the market to freely compete; the innate free market principles simultaneously naturally ensuring a fair deal for the gambling consumer, whose freedom to gamble would equally be respected. Any regulatory barriers to innovation, competition and other economic activity would be strictly limited to the three licensing objectives: (1) the prevention of crime; (2) ensuring that gambling is conducted in a fair and open way; and (3) the protection of children and other vulnerable persons from harm.⁶¹ Pursuant to these objectives, flexible regulatory measures could be introduced to broadly direct or shape the supply and demand of gambling, for example by including certain social responsibility measures, in order to ensure the wellbeing of society as a whole, as well as protect the most 'vulnerable' sections of the population - including children and 'problem gamblers'.

Despite substantial amendment (most particularly in relation to the provisions on casinos) the Bill retained its liberalising agenda and received royal assent on 7 April 2005. Significantly, the Gambling Act 2005 represented a fundamental shift from a restrictive system of

⁵⁹ HC Deb 1 November 2004, vol. 426, col. 28.

⁶⁰ HC Deb 1 November 2004, vol. 426, cols. 30-33.

⁶¹ Incorporated at Gambling Act 2005, s.1

legislative constraint to a facilitative model⁶² whereby the gambling industry is ‘left to free-market economic forces’.⁶³ The provisions of the 2005 Act and this method of government will now be examined.

3. The liberal regime: from constraint to competition⁶⁴

3.1 ‘Modern regulation for a modern industry’⁶⁵: striking a balance

The Gambling Act was brought in under the Blair government in 2005 and was a radical departure for UK betting, gaming and lotteries legislation. The Act was deliberately intended to be light touch and favourable towards gambling but with safeguards and sanctions in place should they be required.⁶⁶

The Gambling Act 2005 received Royal Assent on 7 April 2005 and subsequently came into force on 1 September 2007. It completely reformed the laws on gambling by replacing the existing legislation⁶⁷ with a single regulatory system which governs all forms of gambling activity in Great Britain, other than the National Lottery and spread betting.⁶⁸ As discussed, the perceived role of the state in the regulation of gambling has undergone dramatic change over the last three hundred years or more and by 2007, gambling was seen as a ‘legitimate industry to be regulated rather than a vice to be suppressed’.⁶⁹ Accordingly, it was considered ‘the role of Government to treat the gambling industry in the same way as any other legitimate leisure industry whilst putting in place *measures* to prevent criminality and excess’.⁷⁰ The overarching ‘facilitative’ framework under the new Act, together with the specific ‘measures’ for preventing excess, will be examined in this section.

⁶² Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 2) 101.

⁶³ Light (n 40) 629–30.

⁶⁴ Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 2).

⁶⁵ Department for Culture Media and Sport (n 7) para 3.

⁶⁶ ‘UK Gambling Review’ (2021) Spring *IMGL Magazine* 16, 17. (quoting lawyer Jeremy Phillips QC)

⁶⁷ In particular the Betting, Gaming and Lotteries Act 1963, the Gaming Act 1968 and the Lotteries and Amusements Act 1976.

⁶⁸ Gambling Act 2005, ss 10 and 15.

⁶⁹ Light (n 40) 628.

⁷⁰ Culture Media and Sport Committee (n 50) para 4 (emphasis added).

More broadly, however, the 2005 legislation seeks to ‘re-balance’ the limits of the regulation in order to maximise the benefits for two inter-related objectives - the population and the economy - for the overall benefit to society as a whole:

We want gambling to be safe, not only for those who take part in it, but also in the way that it impacts on wider society. Gambling must continue to be conducted fairly, remain free of criminal influence and infiltration, and operate within a regulatory framework that offers protection for children and vulnerable adults. We also, however, want to see a successful British gambling industry; one that is able to respond rapidly and effectively to technological and customer-led developments in both the domestic and global marketplace, building on its existing reputation for quality and integrity, and in the process increasing its already important contribution to the UK economy.⁷¹

The government accepted that ‘the balance between these two sets of objectives is a fine one’,⁷² demonstrating the fundamental tension between the competing interests of the various stakeholders in commercial gambling: the state, the industry, the consumer and public health bodies.⁷³ The ‘new balance of regulation’,⁷⁴ under the Gambling Act 2005, it appears, was to take a distinctly more liberal approach.⁷⁵ (The concept of liberalism as an art of government, and its application to the present regime of gambling regulation is considered in greater detail in section 4 of this chapter.⁷⁶) This is most particularly evident in the new statutory duty of the industry regulator under the Act to *permit* gambling insofar as it is consistent with three specific licensing objectives.⁷⁷ Any interference with the public’s freedom to gamble under the current legislative framework must be strictly limited to that which is necessary to prevent ‘excess’:⁷⁸

The keynote of the Government’s approach to the regulation of the gambling industry is that it should be confined to what is necessary to keep crime out, protect the vulnerable, and ensure that gambling products are fair to the consumer. As the Review Body has clearly shown, many of our current controls are irrelevant to these aims. Remodelling them will offer significant benefits for consumers, businesses and all those who work in the gambling industry, without jeopardising the three key objectives.⁷⁹

⁷¹ Department for Culture Media and Sport (n 7) 1 (Foreword).

⁷² *ibid.*

⁷³ Miers, ‘Regulation and the Management of Risk in Commercial Gambling in Great Britain’ (n 45) 424.

⁷⁴ Department for Culture Media and Sport (n 7) para 1.4.

⁷⁵ Miers, ‘Regulation and the Management of Risk in Commercial Gambling in Great Britain’ (n 45) 424.

⁷⁶ One particular ‘programme’ or mode of liberal governmentality which is particularly relevant to this regime of gambling regulation is neoliberalism, which will also be discussed at length in section 4.

⁷⁷ Gambling Act 2005, s 22

⁷⁸ Department for Culture Media and Sport and Gambling Review Body (n 1) para 3.13.

⁷⁹ Department for Culture Media and Sport (n 7) para 4.1.

These key concerns have been translated into the ‘licensing objectives’; three principle concepts which are central to the regulatory regime created by the Act:⁸⁰

- (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime;
- (b) ensuring that gambling is conducted in a fair and open way, and
- (c) protecting children and other vulnerable persons from being harmed or exploited by gambling.⁸¹

The licensing objectives are continually reflected throughout the provisions of the Act and the associated measures for regulation, in particular the Licensing Conditions and Codes of Practice (‘LCCP’),⁸² as discussed below. The Gambling Commission, as the industry regulator, also has a primary statutory duty under the Gambling Act 2005 to pursue the licensing objectives in the exercise of its regulatory functions. Moreover, the Commission’s duty to permit gambling only extends insofar as the regulator considers it reasonably consistent with pursuit of the licensing objectives.⁸³ Thus, the Gambling Commission’s regulatory functions specifically revolve around the three licensing objectives which permeate throughout this mode of regulation and, in effect limit, the permissive element of the regulator’s duty.

In this Part of the thesis, I will mainly focus on the second and third licensing objectives and their translation into specific regulatory requirements under the LCCP. It is pursuant to these two objectives that I propose in Chapter Four that mechanisms of security have been set up to shape gambling behaviour and encourage gamblers to exercise a ‘responsible’ or ‘safe’ standard of gambling.

3.2 Liberalising measures and a risk-based model of regulation

The reform package we are bringing forward signals a new and exciting future for the gambling industry in this country [...] well-informed adults will have greater freedom and choice to spend their leisure money on gambling if they want to. The law will, for the first

⁸⁰ Gambling Act 2005, explanatory notes para 13.

⁸¹ Gambling Act 2005, s 1.

⁸² Gambling Act 2005, explanatory notes para 14.

⁸³ Gambling Act 2005, s 22(b).

time, treat them like grown ups. Outdated restrictions [...] will be removed and the industry will be able to develop innovative new products. Gambling will be increasingly combined with other leisure products in attractive surroundings – providing high quality entertainment for adults.⁸⁴

In accordance with its liberalising agenda, the Gambling Act 2005 removed a number of obstacles to market entry, most significantly the ‘demand test’ which is expressly excluded from the scope of consideration of a licence application,⁸⁵ in effect enabling competition between regulated operators. The relaxation of restrictions on the supply and advertising of gambling also now provides gambling operators with freedom to increase the attractiveness of their offerings, allowing the market to ‘facilitate’ individuals to gamble.⁸⁶

The Act also overturned the provisions which had been in place for over 150 years⁸⁷ as regards the enforceability of gambling contracts,⁸⁸ providing that contracts made for gambling purposes are now to be treated in the same way as other standard contracts.⁸⁹ ‘In particular, any debts that arise from gambling will be capable of enforcement in the same way as any other personal or business debts.’⁹⁰ Thus, the gambling relationship is now formally seen as a contractual one; a further clear indication perhaps that gambling at this point is no longer viewed as an inherently harmful activity, or a private concern with which the courts should not interfere,⁹¹ but an ordinary commodity in relation to which consumers and suppliers should be able to rely on the law for enforcement.⁹² This element of the reform of gambling regulation - and the application of contract law - is arguably the most illustrative of the clear transition in the status of gambling from a social ill to be prohibited or restricted to an ordinary, commercial activity: a legitimate commercial transaction which can be economically exploited by the state.

⁸⁴ Light (n 40) 634 Citing Secretary of State’s speech to the Business in Sport and Leisure annual conference, 19 November 2003.

⁸⁵ Gambling Act 2005, ss 72 and 153.

⁸⁶ Light (n 40) 652.

⁸⁷ Under the Gaming Act 1845, s 18.

⁸⁸ Gambling Act 2005, s 334.

⁸⁹ Gambling Act 2005, s 335.

⁹⁰ Gambling Act 2005, explanatory notes para 827.

⁹¹ Select Committee on Gaming (1844), *Report from the Select Committee on Gaming; Together with the Minutes of Evidence, Appendix and Index* (HC 1844, 297-VI) iv.

⁹² Orford (n 4) 37–8.

Broadly speaking, in permitting (or according to some, promoting⁹³) commercial gambling in an open, competitive market, the state inherently invokes the concept of risk: in both a positive and negative sense. All parties involved with the gambling industry are engaging in risk-taking, including operators, individual gamblers and the state itself. The very activity of gambling requires citizens to engage in private expenditure which entails some form of risk: the activities may be financially rewarding or alternatively the gambler may lose an amount of money. Moreover, the risks can extend beyond financial concerns to the individual's health, more widely to their family and ultimately to society,⁹⁴ as a 2016 IPPR report attempted to quantify.⁹⁵ The state thus has a public interest⁹⁶ in ensuring that gambling is a 'safe risk' for consumers. This it acknowledged before the Act was passed, identifying 'the state's duty to minimise harm and warn of the risks', which had to be carefully balanced with the 'citizen's right to act freely'.⁹⁷ The regulations are therefore designed to 'reduce the risk of harm' through the 'new powers'⁹⁸ granted to the new regulatory body created under the Act: the Gambling Commission.

3.3 New powers and a new regulator

Under the 2005 Act, it has remained an offence to offer facilities for commercial gambling without the appropriate permissions being granted, by way of an operating licence, permit, registration or similar.⁹⁹ This also now applies to gambling operators based off-shore who provide services to British gamblers online, following an amendment to the Act in 2014,¹⁰⁰ a provision which was implemented to address an unsatisfactory situation whereby online

⁹³ See, for example Jim Orford, *The Gambling Establishment: Challenging the Power of the Modern Gambling Industry and Its Allies* (Routledge 2020).

⁹⁴ Miers, 'Regulation and the Management of Risk in Commercial Gambling in Great Britain' (n 45) 423.

⁹⁵ Craig Thorley, Alfie Stirling and Edison Huynh, 'Cards on the Table: The Costs to Government Associated with People Who Are Problem Gamblers' (*Institute for Public Policy Research*, 2016) 3 <https://www.ippr.org/files/publications/pdf/Cards-on-the-table_Dec16.pdf> accessed 26 March 2020.

⁹⁶ Miers, 'Regulation and the Management of Risk in Commercial Gambling in Great Britain' (n 45) 423.

⁹⁷ HC Deb 1 November 2004, vol. 426, cols. 30-33.

⁹⁸ HC Deb 1 November 2004, vol. 426, cols. 30-33.

⁹⁹ Gambling Act 2005, s 33.

¹⁰⁰ Gambling (Licensing and Advertising) Act 2014

gambling operators based in Great Britain required a licence, while those whose systems were based outside of the country did not. This issue is considered in greater detail in section 5 below. The role of granting operating licences is assigned primarily to a ‘body corporate known as the Gambling Commission’, a unified regulator of commercial gambling introduced under the Act, whose function, as will be shown, is essentially permissive in nature.¹⁰¹

The Gambling Commission is an independent, non-departmental, publicly funded body sponsored by the Department for Digital, Culture, Media and Sport (DCMS),¹⁰² and governed by a board of Commissioners who are appointed by the Secretary of State. The main form of the Commission’s funding is derived from the industry itself through the collection of licence fees that are payable by the industry on application and annually thereafter, rather than coming from the Exchequer.¹⁰³ The Gambling Commission’s role of regulating commercial gambling¹⁰⁴ is principally exercised through: determining licence applications; setting standards (which are contained within the Licence Conditions and Codes of Practice (‘LCCP’)); providing advice and publishing guidance; assessing compliance with the Act and the LCCP provisions; taking regulatory action for breaches, which range from formal warnings, amendment or revocation of a licence, and financial penalties; and investigating and prosecuting offences under the 2005 Act.¹⁰⁵

¹⁰¹ Gambling Act 2005, s 20. The Gambling Commission replaced the Gaming Board introduced under the Gaming Act 1968.

¹⁰² Gambling Commission, ‘Annual Report and Accounts 2018-19’ (2019) 6 <<https://www.gamblingcommission.gov.uk/PDF/Annual-Report1819.pdf>> accessed 20 March 2020.

¹⁰³ Gambling Commission, ‘Part 3: The Gambling Commission’ <<https://www.gamblingcommission.gov.uk/for-licensing-authorities/GLA/Part-3-The-Gambling-Commission.aspx>> accessed 1 April 2020.

¹⁰⁴ It also regulates the National Lottery under a separate regulatory regime, pursuant to the National Lottery etc. Act 1993 (as amended). This chapter focuses on the regulatory regime of the Gambling Commission as regards commercial gambling.

¹⁰⁵ Gambling Commission, ‘Licensing, Compliance and Enforcement under the Gambling Act 2005: Policy Statement’ (2017) para 1.1 <<http://www.gamblingcommission.gov.uk/PDF/Licensing-compliance-and-enforcement-policy-statement.pdf>> accessed 24 August 2020; Gambling Commission, ‘Statement of Principles for Licensing and Regulation: June 2017’ (2017) paras 1.9-1.10 <http://www.gamblingcommission.gov.uk/UploadDocs/Contents/Documents/Statement_of_principles.pdf> accessed 31 March 2020.

It governs pursuant to a range of hard and soft law instruments established under the Act,¹⁰⁶ though licensed operators are regulated primarily in accordance with the standards set by the LCCP, a set of requirements which must be met in order to hold an operating licence in Great Britain.¹⁰⁷ This consists of a suite of ‘general conditions’ which attach to operating licences,¹⁰⁸ and the Commission’s principal code of practice.¹⁰⁹ The code is further divided into two types of code provisions: social responsibility (‘SR’) code provisions and ordinary code provisions. While both types of code provisions possess the force of law,¹¹⁰ the SR code must be complied with as a licence condition, and breach of this code would expose the operator to a risk of prosecution and to the regulatory sanctions of the Commission. By contrast, ordinary code provisions represent good practice but do not have the status of a licence condition (although they are admissible in evidence in criminal or civil proceedings and in the exercise of the Commission’s regulatory functions). Accordingly, any departure from ordinary code provisions may be taken into account by the Commission during a licence review, but cannot in itself lead to imposition of a financial penalty.¹¹¹

Fundamentally, in exercising the above regulatory functions, the Commission must adhere to two statutory duties, as introduced above. These statutory duties clearly illustrate the underlying ethos of the Act, which is essentially ‘facilitative’ rather than ‘restrictive’:¹¹²

In exercising its functions under this Act the Commission shall aim—

- (a) To pursue, and wherever appropriate, have regard to the licensing objectives, and
- (b) To *permit gambling*, in so far as the Commission thinks it reasonably consistent with pursuit of the licensing objectives.¹¹³

¹⁰⁶ Gambling Act 2005, explanatory notes para 14.

¹⁰⁷ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (2020) <<https://www.gamblingcommission.gov.uk/PDF/LCCP/Licence-conditions-and-codes-of-practice.pdf>> accessed 1 March 2021.

¹⁰⁸ *ibid* I.

¹⁰⁹ *ibid* II This is issued pursuant to Gambling Act 2005, s 24.

¹¹⁰ Pursuant to Gambling Act 2005, s 24.

¹¹¹ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 107) 31.

¹¹² Miers, ‘From Constraint to Competition: 50 Years of Change in British Gambling Policy’ (n 2) 99.

¹¹³ Gambling Act, s 22 (Emphasis added).

Notably, therefore, in direct contrast with the preceding legislative system of constraint, the present regulatory regime established by the 2005 Act is essentially permissive.¹¹⁴ Limited only by the pursuit of the three licence objectives, the regulator has a statutory duty to permit gambling. It therefore aims to impose the minimum necessary regulatory burden in upholding the licence objectives, so as to ‘not unduly hinder the economic progress of licensees’.¹¹⁵ Moreover,

The Commission will seek to provide a fair regulatory framework within which existing operators and new entrants can compete and grow with as limited a regulatory burden as is compatible with the protection of consumers, the protection of the wider public, and the upholding of the licensing objectives.¹¹⁶

Far from a ‘command and control’ style of regulation where the regulatory body is feared and respected in equal measure (as was the case with the predecessor organisation, the Gaming Board), the Gambling Commission applies (or it certainly did apply in this first regime under the 2005 Act) a more hands-off, ‘risk-based’ approach to regulation, as aligned directly with the ‘better regulation’ agenda pursued in Great Britain since the 1980s as an element of a liberal market economy.¹¹⁷ The personnel licensing process again provides a useful illustration of the contrasting approaches. Far from the ‘intimidating’, interrogation-like process of the Gaming Board,¹¹⁸ the Gambling Commission’s procedures for granting the equivalent personal management licence have, in practice,¹¹⁹ become significantly more relaxed, with greater reliance being placed on company self-regulation. Instead of an interview, the process - described as ‘very easy’ and ‘nothing really...I just had to fill in a form’¹²⁰ - involves the completion of relevant application forms and verification of official identification for a disclosure and barring check, with a focus on criminal and financial

¹¹⁴ Monkcom, Gouriet and Phillips (n 31) 285.

¹¹⁵ Gambling Commission, ‘Licensing, Compliance and Enforcement under the Gambling Act 2005: Policy Statement’ (n 105) para 2.7.

¹¹⁶ *ibid* para 2.12.

¹¹⁷ David Miers, ‘Social Responsibility and Harm Minimization in Commercial Gambling in Great Britain’ (2016) 20 *Gaming Law Review and Economics* 164, 164.

¹¹⁸ Kate Bedford, *Bingo Capitalism: The Law and Political Economy of Everyday Gambling* (Oxford University Press 2019) 159.

¹¹⁹ Though the legislative framework does enable in theory a somewhat stricter vetting of licence applicants: - Gambling Act 2005, ss 70-80.

¹²⁰ Bedford (n 118) 164.

background. The regulator is no longer involved in assessing the knowledge or skill of personnel, which is now the responsibility of the licence holder.¹²¹

Fundamentally, the Gambling Commission is obliged to regulate in line with the Regulators' Code, which aims to reduce regulatory burdens and support 'compliant business growth through the development of an open and constructive relationship between regulators and those they regulate'.¹²² Pursuant to the Code, 'regulators should take an evidence-based approach to determining the priority risks in their area of responsibility, and should allocate resources where they would be most effective in addressing those priority risks'.¹²³ Accordingly, the Gambling Commission seeks to 'ensure that its regulatory approach does not impose unnecessary regulatory burdens [...] and does not unduly hinder the economic progress of licensees'¹²⁴ by adopting a proportionate, risk-based approach whereby resources are 'concentrated where they are needed most and can be most effective'.¹²⁵ This concentration is placed 'on those issues and operators that potentially present the greatest risk to the licensing objectives',¹²⁶ with a primary focus on an operator's size and market scope 'in order to focus resources on higher priorities'.¹²⁷ 'High Impact Operators', distinguished by 'factors such as customer base, number of premises, turnover or gross gaming yield ('GGY') and the extent of licensed activity (including overseas activity) plus the organisation's own risk management approach'¹²⁸ receive greater regulatory attention.

¹²¹ *ibid* 165.

¹²² Department for Business Innovation & Skills, 'Regulators' Code' (*Better Regulation Delivery Office*, 2014) 2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf> accessed 1 April 2020. The Regulators' Code is issued by the Secretary of State under sections 22 and 23 of the Legislative and Regulatory Reform Act 2006 and was presented to Parliament on 22 January 2014 for approval. Regulators must have regard to the Code when developing policies and operational procedures that guide their regulatory activities.

¹²³ *ibid* 4.

¹²⁴ Gambling Commission, 'Statement of Principles for Licensing and Regulation: June 2017' (n 105) para 2.7.

¹²⁵ *ibid* para 2.9.

¹²⁶ Miers, 'Regulation and the Management of Risk in Commercial Gambling in Great Britain' (n 45) citing Gambling Commission, 'Annual Report 2012/13' (2013).

¹²⁷ Gambling Commission, 'Gambling Commission Annual Report and Accounts 2014/15' (2015) 14 <gamblingcommission.gov.uk/PDF/Annual-report-and-accounts-2014-15.pdf> accessed 10 April 2020.

¹²⁸ *ibid*.

Moreover, any regulatory action taken, according to the regulator, must be ‘proportionate to the importance of the matters to which it relates, having regard to its risk assessment’.¹²⁹

Bearing in mind its essentially permissive role in the delivery of its core regulatory functions, the current strategy has ‘been shaped against the background of [the Commission’s] assessment of current risks to consumer confidence and market integrity,’ as well as to the licensing objectives more broadly.¹³⁰ The Commission thus seeks to apply a ‘targeted and innovative approach to regulating’ licence holders, intervening and ‘taking precautionary action where this is necessary’.¹³¹ Any regulatory action which is taken is differentiated and tailored according to the ‘inherent risk and impact’ of the operators’ activities,¹³² as well ‘the engagement by businesses themselves to tackle risk to consumers’.¹³³

Accordingly, under this more permissive, free market approach to gambling regulation, the economic benefits are preserved through increased innovation and competition. In turn it is considered that the ‘punter’ will benefit by way of the ‘natural’, free market principles which will ensure they receive a fair deal.¹³⁴ There are, however, a number of additional supportive measures implemented to essentially ensure that the consumer is able to properly participate in the gambling market, as well as to ‘protect the vulnerable’, being those individuals who ‘become obsessed by gambling to the point at which they cease to function as normal members of society’: ‘it is a legitimate role of regulation to limit the risk of problem gambling’.¹³⁵ Certain ‘mechanisms of security’ have accordingly been set up, pursuant to the second and third licence objectives, in order to facilitate ‘responsible gambling’ without inhibiting the overall freedom to gamble.

¹²⁹ Gambling Commission, ‘Statement of Principles for Licensing and Regulation: June 2017’ (n 105) para 2.10.

¹³⁰ Gambling Commission, ‘Strategy 2018-2021: Making Gambling Fairer and Safer’ (2018) 5 <<https://www.gamblingcommission.gov.uk/PDF/Strategy-2018-2021.pdf>> accessed 20 March 2020.

¹³¹ *ibid* 7.

¹³² *ibid* 24.

¹³³ *ibid*.

¹³⁴ Department for Culture Media and Sport and Gambling Review Body (n 1) para 1.17.

¹³⁵ *ibid* para 1.18.

3.3 Facilitating the ‘responsible gambling’ behaviour of the population: the Reno Model

The British Government, in its proposals for reform, acknowledged that in permitting commercial gambling there are a number of risks which are presented:

Gambling has characteristics which make it unusually open to the risk of exploitation and abuse, and attractive to those who have insufficient knowledge of or respect for the laws of probability. For many gambling is a source of pleasure; for a minority it is a source of the deepest distress for themselves and their families.¹³⁶

As such, it was concluded that the price for a ‘managed relaxation of outdated restrictions and extension of choice for adult gamblers’ would be ‘a greater emphasis on social responsibility and protection for the vulnerable’,¹³⁷ in order to ensure a safe level of risk for society.¹³⁸ Accordingly, the Gambling Commission is required under the Act to impose standards on ‘the manner in which facilities for gambling are provided’,¹³⁹ which are incorporated into the LCCP in the form of operating licence conditions (Part I of the LCCP) and social responsibility standards (Part II of the LCCP). There are also a number of technical and game standards - including the Remote Technical Standards for online gambling¹⁴⁰ - which must be complied with to ensure that the gambling facilities abide by the licence objectives.

In order to ‘strike the right balance between consumer protection and allowing players to benefit from innovation in terms of improved or more competitive products’, the Commission incorporated requirements into the standards to ensure gamblers would be put ‘in a position to make informed decisions about what risks to take when gambling’,¹⁴¹ and thus ‘promot[e] consumer awareness of the risks they are running in their choice of operator or product’.¹⁴²

¹³⁶ Department for Culture Media and Sport (n 7) para 1.4.

¹³⁷ *ibid* para 1.7.

¹³⁸ Miers, ‘Regulation and the Management of Risk in Commercial Gambling in Great Britain’ (n 45) 423.

¹³⁹ Gambling Act 2005, s 24

¹⁴⁰ Gambling Commission, ‘Remote Gambling and Software Technical Standards’ (2021) <https://assets.ctfassets.net/j16ev64qyf6l/1KdHqgC205yZOnZbKKhjoz/a18598c19de61ef1f515c4dc98fe7d06/Remote_gambling_and_software_technical_standards__Feb21_.pdf> accessed 3 May 2021. Pursuant to under section 89 and section 97 of the Gambling Act 2005.

¹⁴¹ Miers, ‘Social Responsibility and Harm Minimization in Commercial Gambling in Great Britain’ (n 117) 166; Gambling Commission, ‘Gambling Commission Annual Report and Accounts 2014/15’ (n 127) 6.

¹⁴² Gambling Commission, ‘Gambling Commission Annual Report and Accounts 2014/15’ (n 127) 6.

Pursuant to the licence objective that gambling is fair and open, operators are required ‘to provide good information to consumers about their products and the possible risks’¹⁴³ including, for instance, the ‘Return to Player’ measurement for a particular product, to indicate the average pay out percentage.¹⁴⁴ Provisions were also later strengthened in 2015 to ensure that the terms of the contract with players are fair and clearly displayed,¹⁴⁵ and similarly that conditions for bonuses and rewards are clearly set out and readily accessible.¹⁴⁶ Overlapping with the third objective of protecting vulnerable people from harm, the LCCP has also, from the outset, included a requirement for operators to make information readily available to gamblers on how to ‘gamble responsibly’, as well as how to access help for problem gambling.¹⁴⁷ Operators are thus obligated to provide ‘responsible gambling management information’ to all customers (not only problem gamblers) covering the ‘measures’ which are provided to help individuals to monitor and manage their own gambling activities.¹⁴⁸ The gambling management ‘measures’, which include facilities to restrict the amount of time (time-out)¹⁴⁹ or money (deposit, spend or loss limits)¹⁵⁰ which can be spent gambling, or to fully prevent themselves from participating in gambling altogether (self-exclusion)¹⁵¹ must also be made available by operators for customers to utilise as they choose.

This approach is conceptualised by the ‘Reno Model’, a ‘science-based framework for responsible gambling’¹⁵² which was welcomed by the industry, government and regulators, and proved to be particularly influential as a ‘strategic framework’ for responsible gambling

¹⁴³ Miers, ‘Social Responsibility and Harm Minimization in Commercial Gambling in Great Britain’ (n 117) 166; Gambling Commission, ‘Gambling Commission Annual Report and Accounts 2014/15’ (n 127) 6.

¹⁴⁴ Gambling Commission, ‘Remote Gambling and Software Technical Standards’ (n 140) Requirement 3.

¹⁴⁵ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 107) SR Code 4.

¹⁴⁶ *ibid* SR Code 5.

¹⁴⁷ *ibid* SR Code 3.

¹⁴⁸ *ibid* SR Code 3.

¹⁴⁹ *ibid* SR Code 3.3.4.

¹⁵⁰ Gambling Commission, ‘Remote Gambling and Software Technical Standards’ (n 140) Requirement 12.

¹⁵¹ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 107) SR Code 3.5.

¹⁵² Alex Blaszczynski, Robert Ladouceur and Howard J Shaffer, ‘A Science-Based Framework for Responsible Gambling: The Reno Model’ (2004) 20 *Journal of Gambling Studies* 301.

policy.¹⁵³ This model - so-called because it emerged from a meeting held in Reno¹⁵⁴ prior to the enactment of the Gambling Act 2005 - purported to provide a strategic framework for ‘effective socially responsible public policies designed to protect consumers, minimise social harm, and maintain a sustainable gaming industry’, remaining mindful of the potential negative impacts of regulation on the industry:¹⁵⁵

socially responsible regulatory efforts that oversee gambling activities must demonstrate a likelihood of effectiveness for targeted groups and an awareness of the potential for regulations to cause unintended negative effects among those targeted and for the broader population of harm-free responsible recreational gamblers.¹⁵⁶

Under the Reno Model, gambling is conceptualised as a leisure activity which should be engaged in as an informed, individual choice. Two central principles of the model are thus ‘personal responsibility and choice in gambling-related decision-making’.¹⁵⁷ The ‘primary responsibility’ of the industry according to this model is to provide ‘relevant, pertinent and available information in a timely manner’¹⁵⁸ to the whole of the population of ‘responsible recreational gamblers’, in order to meet the conditions required to make an informed choice, and to not exploit gamblers by providing misleading or misrepresentative information.¹⁵⁹ At the same time, the model views individuals as being responsible for ‘ensuring that they are fully informed and select[ing] choices that are appropriate to and within their preferences, circumstances, and financial and social limits’ in respect of the ‘individual’s personal freedom and ‘right to make decisions’.¹⁶⁰

Unjustified intrusion is likely not the way to promote responsible gambling. [...] Responsible gambling is best achieved at the direction of the player by using all of the information available. The guiding principle of responsible gambling practices is that people have freedom of choice regarding their decision to gamble. To guarantee informed choice, the gambling industry should adopt a policy of accurate disclosure.¹⁶¹

¹⁵³ Orford (n 93) 45.

¹⁵⁴ Blaszczynski, Ladouceur and Shaffer (n 152) 302.

¹⁵⁵ Alex Blaszczynski and others, ‘Informed Choice and Gambling: Principles for Consumer Protection’ (2008) 2 *The Journal of Gambling Business and Economics* 103, 104.

¹⁵⁶ Blaszczynski, Ladouceur and Shaffer (n 152) 302–3.

¹⁵⁷ Blaszczynski and others (n 155) 105.

¹⁵⁸ *ibid.*

¹⁵⁹ Blaszczynski, Ladouceur and Shaffer (n 152) 312.

¹⁶⁰ *ibid* 311; Blaszczynski and others (n 155) 105.

¹⁶¹ Blaszczynski, Ladouceur and Shaffer (n 152) 312.

The objective of informed choice in the context of responsible gambling is therefore to make key, relevant information available in a timely manner ‘with the aim of empowering them to understand the concept of gambling and what it represents, and to assist them in making appropriate decisions that are not based on faulty information or mistaken beliefs or attitudes’.¹⁶² In this way, the broader population of gamblers are governed indirectly through a fully functioning gambling market which is free to compete and innovate, with the support of measures that promote the gambler’s ‘responsible’ participation in the market through being properly informed of the risks involved and provided with the tools to regulate their own gambling.

3.4 Protecting the vulnerable minority

3.4.1 Disciplining problem gamblers

Returning to the ‘risk-based’ approach to gambling regulation, problem gamblers represent the minority section of the population wherein the risk of harm is effectively located. As repeatedly stated in the dominant discourse during this period, the majority of gamblers participate in this legitimate leisure pursuit without issue. It is a small number of problem gamblers who are perceived, during this regime, as being at risk of harm, and this is predominantly framed in particular as being due to the inability of these gamblers to gamble in the normal or ‘responsible way’. This position is supported in statistical, prevalence research which has been conducted since 1999 to ‘understand the way people gamble in Britain’ by providing data on participation of all forms of gambling in Great Britain, as well as the prevalence of problem gambling.¹⁶³ The 2010 British Gambling Prevalence Survey, which was both the first to be conducted following the Gambling Act 2005 coming into

¹⁶² Blaszczyński and others (n 155) 106.

¹⁶³ Heather Wardle and others, ‘British Gambling Prevalence Survey 2010 Prepared for: The Gambling Commission’ (*NatCen*, 2010) 7, 9

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243515/9780108509636.pdf> accessed 11 March 2020.

force, and also the last of its kind (the Gambling Commission continued to fund its own survey research utilising Health Survey England), for instance, found that ‘the vast majority of people experience no problems from gambling (92%).¹⁶⁴ Overall, 5.5% of the population were identified as low risk gamblers, 1.8% as moderate risk gamblers and 0.7-0.9%¹⁶⁵ as problem gamblers.

The prevalence research in fact now classifies problem gambling according to a continuum of risk ‘ranging from those who experience no problems with gambling, to those who experience some problems, to those who experience more problems and are classified as problem gamblers’.¹⁶⁶ In order to classify those who are at a low level of risk and a moderate level risk of problem gambling, as well as those who have reached the stage of problem gambler, the prevalence research applies the medicalised diagnostic criteria found in the Problem Gambling Severity Index (PGSI)¹⁶⁷ and the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-IV)¹⁶⁸ screening instruments. I will return to this medicalised view of problem and at-risk gambling, which has dominated research and gambling discourse until more recently, in Chapter Four where I critically examine this perspective as a device for the transfer of risk to a minority section of the population. At this point, however, it is useful to highlight the diagnostic criteria used by the screening tools to indicate problematic (vs ‘normal’ or ‘responsible’ gambling):

Table 1 - Diagnostic criteria used by problem gambling screens

<u>PGSI</u>	<u>DSM-IV</u>
Gambling more than you can afford to lose	Preoccupation with gambling

¹⁶⁴ *ibid* 12.

¹⁶⁵ Depending upon the screening tool used, as set out below. *ibid* 11–12.

¹⁶⁶ *ibid* 12.

¹⁶⁷ Jackie Ferris and Harold Wynne, ‘The Canadian Problem Gambling Index : Final Report’ [2001] Canadian Consortium for Gambling Research.

¹⁶⁸ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders IV*.

Need to gamble with increasing amounts of money to achieve the desired excitement	Need to gamble with increasing amounts of money to achieve the desired excitement
Chasing losses	Repeated unsuccessful efforts to control, cut back or stop gambling
Borrowing money or selling belongings to gamble	Restlessness or irritability when attempting to cut down or stop gambling
Feeling like you might have a problem with gambling	Gambling to escape problems or relieve a dysphoric mood
Receiving criticism from others about your gambling	Chasing losses
Feelings of guilt about your gambling	Concealing extent of involvement with gambling
Health problems caused by gambling, including stress and anxiety	Committing illegal acts to finance gambling
Financial problems for you or your household caused by gambling	Jeopardisation of relationship or career opportunities because of gambling
	Reliance on others to provide money to relieve a desperate financial situation caused by gambling

These screening tools require individuals to make subjective judgments about their own moods, motivations and attitudes towards their gambling, and utilise diagnostic criteria which are ‘replete with normative judgements about productivity, rationality and self-control’,

wherein the exemplary standard is demonstrated by the majority of the population who gamble responsibly. From within the screening tools, ‘the disordered gambler emerges as a subject who undermines these ideals.’¹⁶⁹

As for regulating the industry to protect this risky minority, the authors of the Reno Model do accept that simply providing information to increase knowledge and awareness of gambling risks may not be sufficient in itself, particularly where the individuals’ values, attitudes or beliefs remain unchanged and continue to influence their behaviour.¹⁷⁰ In these circumstances, since the industry does not have the ‘expertise or responsibility’ to diagnose or treat those experiencing gambling-related harms, it was recommended that established links to clinical support services be maintained,¹⁷¹ and principles of responsible gambling be separated ‘from those approaches to harm minimisation and rehabilitation that are directed toward assisting gamblers that already have problems’.¹⁷² The responsibility of operators was therefore limited (under this regime) to providing the information and facilities for gamblers to restrict their own gambling (through deposit limits for example) or to self-exclude entirely and to signpost to clinical support services, where the problem gambler can seek medical treatment in order to correct their defective beliefs and behaviour. Once a gambler has self-excluded, however, operators cannot re-open their account for a minimum period of six months and only at the request of the gambler themselves, with a 24 hour ‘cooling off period’ in-between the request and the account being re-opened,¹⁷³ this 24-hour period seemingly demonstrating that the gambler has addressed their gambling problems and is capable of exercising the required level of self-control to gamble responsibly.

¹⁶⁹ Gerda Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (Routledge 2018) 141–3.

¹⁷⁰ Blaszczyński and others (n 155) 104.

¹⁷¹ Blaszczyński, Ladouceur and Shaffer (n 152) 312–3.

¹⁷² *ibid* 308.

¹⁷³ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 107) SR Code 3.5.

In support of these social responsibility requirements, operators may also owe gamblers a duty of care at common law; however, the position in this regard is far from clear. In the leading case on this matter, *Calvert v William Hill Credit Limited*,¹⁷⁴ the Court found that whilst there was no general duty of care owed, a narrow duty of care existed on the facts of the case: the Claimant had been assured by the operator's employee that he had been self-excluded, but this had not been implemented and the Claimant had continued to gamble. The limited duty of care in this case was found to have arisen from the employee's assurance; however, the claim failed as it could not be proved that the breach of this limited duty caused the relevant losses. Courts have subsequently been slow to enforce any limited duty of care that may exist: more recently in *Ritz Hotel Casino Limited v Al Geabury*¹⁷⁵ it was held that a self-exclusion agreement, once revoked, did not give rise to an additional duty to protect a gambler who claimed to have an addiction.¹⁷⁶

3.4.2 Prohibiting underage gambling

Finally, there is one section of the population which represent so great a risk that their involvement in most forms of commercial gambling is prohibited by law: children and young persons (aged under 18). For the Gambling Review Body, children represented 'a vulnerable part of the community for whom it is right to prescribe special rules'.¹⁷⁷ Accordingly, in contrast with the general trend of its recommendations towards liberalisation, its proposals as regards underage gambling (under the age of 18) actually involved some tightening of regulation (particularly with regard to gambling machines).¹⁷⁸ Under the Gambling Act 2005,

¹⁷⁴ *Graham Calvert v William Hill Credit Limited* (2008) EWHC 454 (Ch); and on appeal *Graham Calvert v William Hill Credit Limited* (2008) EWCA Civ 1427

¹⁷⁵ *Ritz Hotel Casino Ltd v Al Geabury* [2015] EWHC 2294

¹⁷⁶ The Select Committee on the Social and Economic Impact of the Gambling Industry, in their 2020 report, made a formal recommendation that the law be amended to make an operator who contravenes provisions of the licence conditions and social responsibility codes liable to an action for breach of statutory duty at the suit of a customer who has suffered loss as a result of that contravention. As discussed in Chapter Four, the Gambling Act 2005 is currently under Government review to determine what, if any, reform is required. Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20), *Gambling Harm — Time for Action* (HL 2019-21, 70) para 389.

¹⁷⁷ Department for Culture Media and Sport and Gambling Review Body (n 1) para 1.24.

¹⁷⁸ *ibid* para 1.19.

then, the juridico-legal mechanism of prohibition has been applied by incorporating the offence of inviting, causing or permitting a child or young person to gamble.¹⁷⁹

Clearly, this complex, multi-layered approach to gambling regulation is very different from the previous regime under the legislation enacted in the 1960s, in both its form and its underlying rationality. I will now examine this development by drawing parallels with Foucault's genealogy of the state at the point that *raison d'état* and police is transformed into a 'liberal governmentality'.

4. Liberal governmentality

I argue in this section that the regime of gambling regulation outlined within this chapter aligns with the next transformation in Foucault's genealogy of the governmentalisation of the state, which he locates as emerging around the middle of the eighteenth century: liberal governmentality. As discussed below, Foucault uses the term 'liberalism' in a unique manner. His understanding of liberalism, which I apply throughout this thesis, represents a new 'art of government' which critiques the excessive application of biopower, rather than a political doctrine (such as classical liberalism, for example).¹⁸⁰ As I will show, however, liberalism in this context exists in a complex relation with biopower, whereby biopower effectively becomes a product of liberal disciplines of political economy.¹⁸¹

Applying this understanding of liberalism as a way of governing, it follows that there exists multiple 'programmes' or specific types of liberal governmentality.¹⁸² One of the most relevant programmes in relation to gambling regulation in liberal democracies, certainly

¹⁷⁹ Gambling Act 2005 s 46 - a number of exceptions are set out in 46(2) including private gambling, lotteries, football pools and category D gaming machines (traditionally associated with seaside town resorts).

¹⁸⁰ For the purposes of this thesis, I understand classical liberalism as the respect for individual liberty to the degree that it does not harm anybody else, or their right to liberty, as per for example John Stuart Mill, *On Liberty* (Project Gutenberg 2011). Though, famously, Mill acknowledged that questions of liberty with regard to commercial gambling are not straightforward: 'Fornication, for example, must be tolerated, and so must gambling; but should a person be free to be a pimp, or to keep a gambling-house? The case is one of those which lie on the exact boundary line between two principles, and it is not at once apparent to which of the two it properly belongs. There are arguments on both sides' at 187–190.

¹⁸¹ Fiona Nicoll, *Gambling in Everyday Life. Spaces Moments and Products of Enjoyment* (Taylor & Francis Group 2019) 20.

¹⁸² Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, SAGE Publications 2010).

during the period of time covered in this chapter, is characterised as ‘neoliberalism’.¹⁸³ In his understanding of liberalism, Foucault identified a connection between freedom of the market and ‘the problem of public law, namely that of limiting the power of public authorities’,¹⁸⁴ with neoliberalism representing a further formalisation of the relation between the market, society and the self.¹⁸⁵ This specific neoliberal formalisation of liberal governmentality problematises bureaucracy, rigidity and welfare dependence, recommending reform of individual and institutional conduct in line with market principles, so that it becomes more efficient and competitive. Thus, market rationality is extended to additional spheres within society, such as gambling regulation, through a focus on individual choice, responsible autonomy and a culture of enterprise.¹⁸⁶

As I analyse in section 4.4 below, the neoliberal rationality of government as reflected in gambling regulation is concerned with transforming ‘a closely regulated and socially problematic aspect of leisure into an instrument of state purpose and profitable component of ... entertainment industries.’¹⁸⁷ This is achieved through gambling governance approaches which assume the value of frugal government together with a ‘model of the virtuous individual figured as an autonomous, entrepreneurial and responsible subject’¹⁸⁸ (or *homo oeconomicus*¹⁸⁹). In the context of gambling regulation, this is refracted for example in policies of ‘responsible gambling’ which seek to encourage ‘healthy behaviours’ in individual gamblers, failing which the option to ‘self-exclude’ from a gambling website is made available for individuals to enforce upon themselves.¹⁹⁰

¹⁸³ Nicoll (n 181) 15.

¹⁸⁴ Nicoll (n 181) 20 citing Michel Foucault, ‘The Birth of Biopolitics’ in *Ethics, Subjectivity and Truth* (Picador 2004).

¹⁸⁵ *ibid.*

¹⁸⁶ Dean (n 182) 268.

¹⁸⁷ Nicoll (n 181) 16.

¹⁸⁸ *ibid.* 195-6.

¹⁸⁹ 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) 259.

¹⁹⁰ Nicoll (n 181) 200.

Observing the rise of neoliberalism, Foucault argues that ‘only when we know what this governmental regime called liberalism was, will we be able to grasp what biopolitics is’.¹⁹¹ I therefore begin this section by charting the transformation from the rationality of *raison d'état* to liberal governmentality, in order to understand the fundamental importance of liberalism as an art of government, and its applicability under the regime of gambling regulation represented in this chapter.

4.1 Liberalism as a new art of government

Foucault views liberal governmentality, or more generally ‘liberalism’, not primarily in terms of the political ideology or doctrine, but as a practice and a style of thinking;¹⁹² a form of challenge and a new art of government.¹⁹³ Liberalism presents itself as a critique of the excessive operation of bio-political power in the name of the rights and liberty of the individual, though as will be explored below there is a complex relation between liberalism and bio-politics.¹⁹⁴

Liberalism is characterised by Foucault as a new method and principle of rationalising the exercise of government, which obeys ‘the internal rule of maximum economy’.¹⁹⁵ Specifically, this is not just focused on a reduction of costs (politically or economically). Liberal governmentality in this way fundamentally modifies *raison d'état* by breaking away from the associated technology of police in that it begins with the premise that government (as the conduct of conduct) cannot be an end in itself. Whereas traditionally, *raison d'état*, through the technology of police, seeks the expansion and maximisation of internal government in order to control every detail and in doing so maximise the strength of the state,

¹⁹¹ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 22; Nicoll (n 181) 20.

¹⁹² Colin Gordon, ‘Governmental Rationality: An Introduction’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 14.

¹⁹³ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 318.

¹⁹⁴ Dean (n 182) 133.

¹⁹⁵ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 318.

liberal governmentality ‘is imbued with the principle: “one always governs too much”’.¹⁹⁶ The *raison d’état* rationality is transformed into something like ‘reason of the least state’, or ‘frugal government’,¹⁹⁷ where the underlying rationality (according to liberal governmentality) involves a critique to ensure not only that it is employing the best (or least costly) means of achieving its outcomes, but also to consider whether and why it is necessary to govern at all.¹⁹⁸

As will now be considered, liberal governmentality emerges through the discovery of the government of processes found in the population, economy and society, introducing the ‘liberal problematic of security as the security of these “non-political processes” on which government will depend’.¹⁹⁹ The role of the law will then change from an instrument of sovereignty to a component of the liberal technology of government.²⁰⁰

4.2 From police to liberalism - the role of political economy

The development of political economy as theory and the market as a reality, or site of veridiction for this theory, both played an important role in the emergence of this governmentality.²⁰¹ The ‘intellectual instrument, the type of calculation and rationality’ that made possible the de facto, internal self-limitation of governmental reason is ‘political economy’, understood in a broad and practical sense as both the methods of government that procure a nation’s prosperity, and a reflection on organisation, distribution and limitation of powers in a society.²⁰² Political economy was formed within the framework of the objectives of government according to *raison d’état*, that of the state’s enrichment: ‘its objective was the simultaneous, correlative, and suitably adjusted growth of the population on the one hand,

¹⁹⁶ *ibid* 318–9.

¹⁹⁷ *ibid* 28.

¹⁹⁸ *ibid* 319.

¹⁹⁹ Dean (n 182) 133.

²⁰⁰ *ibid*.

²⁰¹ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 320.

²⁰² *ibid* 13.

and the means of subsistence on the other'.²⁰³ As explored in Part I, *raison d'état* employed two technologies: the military-diplomatic apparatus concerned with developing the state's external forces and ensuring an equilibrium with other states, and the police technology which was focused on the internal enrichment of the state through exhaustive regulation. Foucault identifies the point at which these two technologies meet, their common instrument, as being monetary circulation and commerce:²⁰⁴

it was expected that from enrichment through commerce one would have the possibility of increasing the population, manpower, production, and export, and of equipping oneself with strong and large armies. In the period of mercantilism and cameralism, the population-wealth couple was the privileged object of the new governmental reason.²⁰⁵

And it is this 'population-wealth problem' which is one of the conditions for the development of political economy (as a science of production, trade, and their relationship with the law and the government).²⁰⁶ Moreover it is this 'problem' of economy, as will be outlined in the elements below, that leads to the emergence of a new art of government which fundamentally modifies *raison d'état*,²⁰⁷ that of liberalism. In his lectures, Foucault uses the example of the marketing, circulation and scarcity of grain to illustrate how each art of government operates in order to highlight the distinctions and, in particular, show the problems posed by applying the technology of the police to the market, according especially to the economists during the eighteenth century. In doing so he seeks to provide 'a better understanding of [...] the theoretical breakthrough and practical mutation that was being prepared on the basis of this problem and of these specific techniques and objects of police'.²⁰⁸ This mutation is broken down into five central components which apply the theses of the eighteenth-century economic experts:

²⁰³ *ibid* 14.

²⁰⁴ 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) 365.

²⁰⁵ *ibid*.

²⁰⁶ *ibid* 365–6.

²⁰⁷ *ibid* 348.

²⁰⁸ *ibid* 341.

4.2.1 A broader object: moving the analysis ‘back a notch’²⁰⁹

The problem or phenomenon to be regulated, which is considered in the illustrative example of grain is that of scarcity. Under the juridical-disciplinary (police) model, this is addressed through mercantilist regulation which asserts that the price of grain must be strictly regulated to remain cheap and so ensure low wages. In contrast, the economists propose that to create abundance, grain must be well paid for.²¹⁰ This position is reached by taking into account elements which are wider than the transaction itself, and introduces the surrounding environment (of agriculture in this example) into the calculation as a fundamental element of the governmental rationality: the land itself becomes a privileged object of intervention. Moreover, this rationality steps back from the market and processes of buying and selling to consider production, as well as return to the producer.²¹¹ Foucault describes the disciplinary approach as ‘centripetal’: ‘it isolates a space [...] concentrates, focuses and encloses. [...] it focuses on the space of the market’.²¹² By contrast, apparatuses of security which are employed under a liberal governmentality consider and apply to a constantly expanding collection of surrounding elements: ‘they are centrifugal’²¹³:

new elements are constantly being integrated: production, psychology, behaviour, the ways of doing things of producers, buyers, consumers, importers, and exporters, and the world market. Security therefore involves organising, or anyway allowing the development of ever-wider circuits.²¹⁴

4.2.2 The natural course of events

Secondly, under the juridical-disciplinary system, the phenomenon which is to be avoided - scarcity, in the grain example - is considered essentially to be an evil. Instead, however, the economists propose that scarcity should instead be considered as a phenomenon which is

²⁰⁹ *ibid* 36.

²¹⁰ *ibid* 342.

²¹¹ *ibid* 342–3.

²¹² *ibid* 44–5.

²¹³ *ibid* 45.

²¹⁴ *ibid*.

neither good nor evil, but in the first place natural: ‘it is what it is’.²¹⁵ Thus an analysis of the wider environment and elements, as described above, must be carried out in order to understand the ‘reality’ of that phenomenon. In the example of grain, where it is well-paid for, according to the economic experts, its price will not continue to rise indefinitely but will settle and stabilise naturally at the level of the ‘just price’ (farmers will sow as much as possible, harvests will be better, leading to less accumulation in anticipation of scarcity, and foreign states will also seek to profit from a just price).²¹⁶ All of this will happen quite naturally and spontaneously, without the need to strictly regulate.

The economists thus propose that there is a set course of events which is in fact not only inflexible but may also result in the opposite of the desired effect of any discipline by police intervention or the sovereign’s will. If low prices were fixed by regulation, for example, farmers would naturally hoard their grain, increasing scarcity, which would lead to a price increase. So, police regulation must be replaced by a form of government which is based upon and works in accordance with the natural course of things.²¹⁷ This natural course of events can be understood by first, ‘standing back sufficiently so that one can grasp the point at which things are taking place, whether or not they are desirable [...] to grasp them at the level of nature, [...] at the level of their effective reality’.²¹⁸

In this way, the liberal critique serves as a ‘de facto’ limitation and form of regulation as opposed to a legal limitation, meaning that it does not involve questions of legitimacy: ‘a government that ignores this limitation will not be an illegitimate, usurping government, but simply a clumsy, inadequate government that does not do the proper thing’.²¹⁹ For instance, it asks ‘what will happen if, at a given moment, we raise a tax on a particular category of

²¹⁵ *ibid* 36.

²¹⁶ *ibid* 343.

²¹⁷ *ibid* 343–4.

²¹⁸ *ibid* 46–7.

²¹⁹ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 10.

persons or a particular category of goods? What matters is not whether or not this is legitimate in terms of law, but what its effects are and whether they are negative'.²²⁰ In response, the existence of phenomena, processes and regularities is revealed, which are affected by intelligible mechanisms and those mechanisms may be impeded by practices of government but they cannot be avoided.²²¹ Thus a reflection and reappraisal of governmental practice becomes necessary:

Political economy does not discover natural rights that exist prior to the exercise of governmentality; it discovers a certain naturalness specific to the practice of government itself. The objects of governmental action have a specific nature. There is a nature specific to governmental action itself and this is what political economy will study [...] thus, *the economists* explain, the movement of the population to where wages are highest, for example, is a law of nature; it is a law of nature that customs duty protecting the high price of the means of subsistence will inevitably entail something like dearth.²²²

The consequence is that governmental practice can only act in a way which respects this 'nature'; by disrupting or going against this 'naturalness', it would inevitably suffer negative consequences. Thus actions become defined in terms of success or failure, rather than legitimate or illegitimate.²²³ The objection to state intervention under the liberal governmentality is therefore transformed from the abuse of sovereignty to excessive government.²²⁴

These natural processes, according to the economists, can and must be knowable by a form of 'scientific' knowledge, and indeed government would be bound to fail if it did not take into account this analysis and scientific knowledge of the processes. This knowledge is not, however, internal to the art of government, as with *raison d'état*. Crucially, it is external and established, developed and proven separate to government. However, in order to govern, the results and evidence arising from this scientific knowledge of economy are essential, leading

²²⁰ *ibid* 15.

²²¹ *ibid*.

²²² *ibid* 15–6.

²²³ *ibid* 16.

²²⁴ *ibid* 13.

to a key relationship between ‘power and knowledge, [...] government and science’.²²⁵ This crucial relationship between power and knowledge is particularly central to this regime of government, as will be expanded upon in greater detail below.

4.2.3. A new conception of the population

Within the system of knowledge-power, the technology of economic management, Foucault also identifies a break in the way that the population is conceived.²²⁶ Population is no longer considered a good in itself, in terms of the number of individual workers which ought to be maximised, under *raison d'état* and the technology of police, in order to increase the state's wealth.²²⁷ The economists instead view population in terms of its relative value, rather than its absolute value or number. There will be an optimum number of people necessary to bolster the economy, but this will move, vary, and adjust itself naturally dependant on a number of factors, such as resource, work and consumption levels. Again, there is a natural course of things according to which the numbers of a population will spontaneously regulate, without the need for artificial regulation. It should not therefore be treated as an ‘indefinitely modifiable datum’.²²⁸

The appearance of population in this new form, as both a specific and relative reality is central to the transformation of the art of government. Whilst relative to other elements such as resources and wages, it is also specific for Foucault in two ways: it has its own specific, intrinsic natural laws of transformation, movement, growth and decline, in the same way as the natural processes concerning wealth and the economy. In addition, the population is conceptualised as a ‘composition of interests’ - spontaneous relations and interactions between individuals which are not willed by the state but are governed by the ‘law of the

²²⁵ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 204) 351.

²²⁶ *ibid* 42.

²²⁷ *ibid* 344–5.

²²⁸ *ibid*.

mechanics of interests'.²²⁹ With the naturalness of the population and the composition of interests, the population itself appears as a distinct, natural reality: it is an entity in itself which is different from a collection of subjects, who are subject to police intervention, with a 'natural density and thickness' and its own internal mechanisms of regulation. It is this population, as a reality, which the state becomes responsible for instead of individuals to be dominated or subject to strict rules.²³⁰ Here, the population appears as a political, collective subject or instrument which will be called upon to act in a certain way. At the same time it appears as an object towards which certain mechanisms will be directed in order to achieve a particular effect.²³¹

4.2.4. 'Civil society'

The importance that becomes attributed to social 'naturalness', as opposed to the artificiality of police, as in the naturalness of processes specific to relations between human beings, is central to the development of this art of government: 'what happens spontaneously when they cohabit, come together, exchange, work, and produce [...]. That is to say, it is a naturalness that basically did not exist until then and which, if not named as such, at least begins to be thought of and analysed as the naturalness of society'.²³² Foucault finds that the economists brought to light civil society as the naturalness which is peculiar to human life in common, as an object or domain of analysis, knowledge and intervention. The central importance of civil society for this new art of government is summarised by Foucault as follows:

Civil society is what governmental thought, the new form of governmentality born in the eighteenth century, reveals as the necessary correlate of the state. With what must the state concern itself? For what must the state be responsible? What must it know? What must the state, if not control, at least regulate, or what kind of thing is it whose natural regulations it must respect? It is not a primitive nature, as it were, any more than it is a set of subjects indefinitely subject to a sovereign will and submissive to its requirements. The state has responsibility for a society, a civil society, and the state must see to the management of

²²⁹ *ibid* 352.

²³⁰ *ibid* 351–3.

²³¹ *ibid* 42–3.

²³² *ibid* 350–1.

this civil society. This is of course a fundamental mutation with regard to a form of *raison d'état*, of police rationality that continued to deal only with a collection of subjects.²³³

The liberal critique is linked to the concept of 'society', in that it will be by reference to society that the necessity of governmental action will be judged. Whereas *raison d'état* starts from the existence of the state and uses the means of government to optimise and guarantee its existence, liberal governmentality starts from society, 'which exists in a complex relation of exteriority and interiority vis-a-vis the state':²³⁴

It is society - as both a condition and a final end - that makes it possible to no longer ask: how can one govern as much as possible at the least possible cost? Instead, the question becomes: why must one govern? That is to say: what makes government necessary, and what ends must it pursue with regard to society in order to justify its own existence? It is the idea of society which permits the development of a technology of government based on the principle that it is already in itself "too much", "excessive" - or at least that it is added as a supplement whose necessity and usefulness can and must always be questioned.²³⁵

This approach is different from the previous forms of biopower (or power over life) in that it will not be content to derive norms of the optimal conditions for the population to simply expand and prosper, as under *raison d'état*. It will balance these considerations against another set of norms, those derived from the delicate, unstable dis-equilibrium between the population and those resources necessary for its maintenance. The discovery of the 'ontological reality of scarcity' means that the administration of life must also take into account the means of production for the subsistence of that life through the economy.²³⁶

Governmental reason in its modern form, in the form established at the beginning of the eighteenth century with the fundamental characteristic of a search for the principle of its self-limitation, is a reason that functions in terms of interest. But this is no longer the interest of an entirely self-referring state which only seeks its own growth, wealth, population, and power, as was the state of *raison d'état*. In the principle to which governmental reason must conform, interest is now interests, a complex interplay between individual and collective interests, between social utility and economic profit, between the equilibrium of the market and the regime of public authorities, between basic rights and the independence of the governed.²³⁷

²³³ *ibid* 350.

²³⁴ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 319.

²³⁵ *ibid*.

²³⁶ Dean (n 182) 137.

²³⁷ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 44.

4.2.5. *Laissez-faire* and the role of freedom

In identifying that the workings of civil society - in terms of the population and economic processes - have their own natural laws of regulation, it means there is no justification, or indeed use, in trying to impose strict, artificial regulatory systems or prohibitions upon them. The economists argued that a *laissez-faire*, freedom of movement approach should be permitted to let things run their natural course, as set out above in the grain example.²³⁸ Specifically, free trade should be allowed so as to enable the operation of competition between private individuals:

it is precisely this game of the interest of competing private individuals who each seek maximum advantage for themselves that will allow the state, or the group, or the whole population to pocket the profits, as it were, from this conduct of private individuals, that is to say, to have grains at the just price and to have the most favourable economic situation. On what will the happiness of the whole, of all and everyone, depend? It does not depend, precisely, on that authoritarian intervention of the state in the form of police, which controls the space, the territory, and the population. The good of all will be assured by the behaviour of each when the state, the government, allows private interest to operate, which through the phenomena of accumulation and regulation will serve all.²³⁹

The state no longer serves as the transcendent and artificial source of good of each. Its role is no longer to ensure individual happiness or ‘better than just living’, so that the state can first benefit and then pass this benefit onto the people. The role of the state at this point changes so as to only intervene where necessary to allow the interests of each private individual to adjust itself so that it can serve all.²⁴⁰ State intervention is therefore limited, though not in an entirely negative sense. Instead, the state’s role under a liberal governmentality will be to take these natural processes into account and work *with* or *through* them via the wider environment. Rather than employ solely (or even primarily) laws to control the population, the state will use different types of intervention to ‘arouse, to facilitate, and to *laisser faire*, in other words to manage and no longer to control through rules and regulation’.²⁴¹ In this way, the purpose of this ‘management’ will not be to prevent things in advance, but to frame the

²³⁸ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 204) 41–2.

²³⁹ *ibid* 346.

²⁴⁰ *ibid*.

²⁴¹ *ibid* 353.

‘natural phenomena’ in such a way that they do not ‘veer off course’ and continue to work as required.²⁴² This will be achieved through the setting up of ‘mechanisms of security’, the forms of non-judicial intervention which enable the government (as the conduct of conduct) of the population indirectly towards a particular end.

The fundamental objective of governmentality will be mechanisms of security, or, let’s say, it will be state intervention with the essential function of ensuring the security of the natural phenomena of economic processes or processes intrinsic to population. [...] a whole series of mechanisms that fall within the province of the economy and the management of the population with the function of increasing the forces of the state.²⁴³

At this point ‘freedom’ becomes inserted into the art of government not only in the form of an individual right, but as an essential element for this form of governmentality to operate:

this fundamental principle that political technique must never get away from the interplay of reality with itself is profoundly linked to the general principle of what is called liberalism. The game of liberalism – not interfering, allowing free movement, letting things follow their course; *laissez faire, passer et aller* – basically and fundamentally means acting so that reality develops, goes its way, and follows its own course according to the laws, principles, and mechanisms of reality itself.²⁴⁴

Instead of being prevented or restricted in advance, components of the population and the economy must be ‘free’ to circulate according to the natural, or quasi-natural processes in order to achieve a particular end and so continue to be a productive form of ‘bio-power’. Freedom for Foucault is therefore not just an ideology but a technique of government, ‘the correlative of the deployment of apparatuses of security’.²⁴⁵ Indeed mechanisms of security require freedom, of movement, change, and circulation, in order to operate.²⁴⁶ ‘Failing to respect freedom is not only an abuse of rights with regard to the law, it is above all ignorance of how to govern properly. The integration of freedom, and the specific limits to this freedom within the field of governmental practice has now become an imperative.’²⁴⁷

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ *ibid.* 48.

²⁴⁵ *ibid.*

²⁴⁶ *ibid.* 48–9.

²⁴⁷ *ibid.* 353.

4.3 Application and mechanisms of security in gambling regulation

This approach to government, according to a liberal governmentality is, I find, reflected throughout this current regime of gambling regulation. Most explicitly, it can be seen in the fundamentally permissive, *laissez faire* approach to the regulation of operators, whereby competition between private operators is held to be the most effective method of ensuring that gamblers get a ‘fair deal’. Moreover, the economic benefits presented by gambling for the state are repeatedly emphasised in order to be exploited for the benefit of the state and society as a whole. Accordingly, as shown above, allowing and facilitating the gambling economy to operate effectively was one of the primary motivators for the reform of gambling under the Gambling Act 2005.

Simultaneously, however, there is a clear concern for the interests and wellbeing of the British population of adult gamblers, firstly in allowing greater freedom of choice for the majority segment who gamble without problems, and secondly in protecting the minority of individuals who experience problem gambling and ‘cease to function as normal members of society’.²⁴⁸ It is the ‘existence or risk of problem gambling’ which the Gambling Review Body saw as the ‘most important potential reason for restricting the individual’s freedom to gamble’.²⁴⁹

In order to manage this risk, the regulatory framework has shifted from the rigid set of strict regulations, described by the Home Office in 2004 as ‘limited to specifying what can be offered and where that can happen’,²⁵⁰ which applied to the gambling transaction, and were enforced through a predominately disciplinary, command and control style approach applied to the industry operators. In contrast, under this regime, in accordance with the ‘permissive’ ethos of the Act, the gambling transaction is left to be regulated by competitive forces and

²⁴⁸ Department for Culture Media and Sport and Gambling Review Body (n 1) para 1.18.

²⁴⁹ *ibid* 3.16.

²⁵⁰ HC Deb 1 November 2004, vol. 426, cols. 30-33.

there has been a clear shift in focus from the operators being disciplined to the gambling consumer, in order to understand the nature of the gambling population as a whole, as well as the ‘problematic’ minority. Indeed the Gambling Review Body in 2001 recommended that research be conducted into both ‘the effect on problem gambling of the changes in regulation’ and, more broadly ‘the nature of normal, responsible gambling behaviour’, to ‘understand the development of, and risk factors for, problem gambling’.²⁵¹

4.3.1 Normalisation and risk

As discussed, prevalence research has provided knowledge (in a statistical form) of the ‘normal’ gambling behaviour of the British population. This is an essential part in the process of normalisation under liberal governmentality. Whereas a juridical or disciplinary regime imposes a predetermined norm from above (for example that people should not gamble at all, as in Chapter One), governmentality utilises a norm which is deduced from within the population, through observation and statistical analysis of the ‘normality’ of the particular phenomenon.²⁵² The analysis first identifies the probability of the phenomenon occurring at the general population level, in order to establish a ‘normal’ rate. Further analysis can then, where required, break down the instances of the phenomenon categorically (for example: by age; location; occupation) to determine various different degrees of ‘normality’ as compared to each other and the general population rate.²⁵³ Those distributions which are considered to be most favourable in line with relevant governmental rationalities and objectives will then be prioritised as the ‘norm’, and techniques of intervention will be applied to the outlying distributions, which are accordingly considered to be unfavourable, or deviant, in an attempt

²⁵¹ Department for Culture Media and Sport and Gambling Review Body (n 1) Recommendations 153-155.

²⁵² Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 204) 60–1.

²⁵³ *ibid* 62.

to bring them in line with this norm. The clear interplay between the different distributions of normality is therefore the process of normalisation.²⁵⁴

The notion of risk is also invoked at this stage,²⁵⁵ through this quantitative categorical analysis, it becomes possible to identify, by reference to the statistical analysis of the phenomenon, the probability or level of ‘risk’ on aggregate and for each individual based on their own characteristics. This analysis also reveals ‘zones’ of higher and lower risk to assist in identifying the most dangerous or ‘at risk’ categories.²⁵⁶ The gambling prevalence research is a clear example of this approach, utilising a risk scale between non-problem gamblers (where the majority of the population is located) working through the ‘curve of normality’, towards the low, medium and high-risk gamblers within the population who need to be normalised. To support these findings, and gain additional understanding, much of the gambling research conducted, particularly between the last decade of the twentieth century and during the first decade of the twenty-first century, has been based in the discipline of psychology to understand the innate reasons for gambling problematically.²⁵⁷ This crucial relationship between power and knowledge will be expanded upon in greater detail in Chapter Four. In summary, however, it plays an important role in the development and confirmation (through the research, presented as ‘knowledge’) of a particular, necessary discourse for the liberalisation of commercial gambling: that the majority of consumers gamble in a way which is considered to be ‘responsible’ and only a minority of pathological individuals, who are inherently and psychologically predisposed to problematic gambling, experience gambling harm.

Any action to be taken as part of this process of normalisation will, as discussed above at 4.3, involve a calculation which takes into account the interplay of the various interests

²⁵⁴ *ibid* 62–3.

²⁵⁵ *ibid* 60.

²⁵⁶ *ibid*.

²⁵⁷ Heather Wardle and others, ‘Gambling and Public Health: We Need Policy Action to Prevent Harm’ (2019) 365 *BMJ* 1.

concerning civil society. Foucault uses the example of punishment in the criminal justice system to illustrate this process:

Punishment will be rooted only in the play of the interests of others, of the family circle, of society, and so on. Is it worthwhile punishing? What interest is there in punishing? What form must punishment take for it to be in society's interests to punish? Is there an interest in torturing, or is it more worthwhile to re-educate, and if so, how and up to point? How much will it cost? The insertion of this thin phenomenal film of interest as the only sphere, or rather, as the only possible surface of government intervention, is what explains these changes, all of which must be referred back to this reorganization of governmental reason.²⁵⁸

In order to normalise the favourable degrees of normality identified, apparatuses of security are to be applied to the natural elements of the phenomenon in an attempt to regulate the flow of circulation, so that the elements work in relation to each other, sifting the favourable elements from the unfavourable. The goal is that the elements which are inherently riskier act to cancel themselves out,²⁵⁹ while allowing the continued circulation of the elements which are required or desirable.²⁶⁰ As outlined, this is achieved by working within the natural course of things, rather than imposing interventions upon an empty, artificial space as with disciplinary methods; governmentality relies on the material 'givens' which already 'naturally' exist. It seeks to maximise the positive elements in existence and minimise those which are more risky or inconvenient, in the knowledge that they can never be fully suppressed.²⁶¹

In its review, the Gambling Review Body accepted the likelihood that the proposed deregulation and increased availability would lead to an increase in the prevalence of problem gambling, in response recommending an increase in 'social responsibility by those who provide it'.²⁶² The government subsequently asserted that the new Act would provide the power to change the way in which gambling was offered 'to avoid harm'.²⁶³ As will be considered in detail in Chapter Four, gambling regulation now appears to incorporate an

²⁵⁸ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 46.

²⁵⁹ *ibid* 65.

²⁶⁰ *ibid* 29.

²⁶¹ *ibid* 19.

²⁶² Department for Culture Media and Sport and Gambling Review Body (n 1) para 17.7.

²⁶³ HC Deb 1 November 2004, vol. 426, cols. 30-33.

increasingly diffuse approach to indirectly shaping the behaviour of online gamblers via the broader elements of the online gambling environment, in line particularly with recent advances in technology. This approach is, however, already evident to an extent during this first regime of government under the 2005 Act, in the requirement to put in place apparatuses of security in the form of information and tools made available to the whole gambling population to enable consumers to gamble ‘responsibly’.

What is clear, under this system, is that gambling itself is no longer conceived, whether explicitly or implicitly, in negative terms. Instead it is viewed as a ‘natural’ phenomenon to be, in the first instance permitted or facilitated and secondly, observed to gain a more in-depth understanding for the appropriate mode of governance to be applied. In introducing the Gambling Bill, the Government was explicit in its view that ‘the law should no longer incorporate or reflect an assumption that gambling is an activity which is objectionable and which people should have no encouragement to pursue’.²⁶⁴ Instead, it was very much conceived as a natural phenomenon which cannot be restricted or prohibited without negative consequences:

If we have learnt anything at all about the history of regulating gambling, it is that if the law does not allow people to gamble safely, they will find ways of gambling at higher risk. We do not want to drive gambling underground or offshore. [...] People will go on choosing casino games whether we like it or not; the question for us is, how do we direct that demand? [...] We consider it reasonable for British consumers to be allowed access to casino games on properly regulated casino premises. We would rather people gambled on machines in the carefully controlled environment of a casino than on dodgy internet sites at home.²⁶⁵

In summary, political economy provides the simultaneous entry into the art of government of firstly, the self-limitation of government by reference to the ‘natural’ effect of its actions, and secondly the question of truth, whereby governmental practice needs to know ‘the natural consequences of its actions in the objects it deals with and manipulates’.²⁶⁶ Accordingly, political economy inserted a ‘formidable wedge’ into the ‘unlimited presumption of the

²⁶⁴ Department for Culture Media and Sport (n 7) para 7.1.

²⁶⁵ HC Deb 1 November 2004, vol. 426, cols. 30-33.

²⁶⁶ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 17.

police state'.²⁶⁷ Here, in the interests of the economy and the population, and thus for the wellbeing of society as a whole, the Gambling Act 2005 employs a liberal governmentality so that the freedom to circulate is preserved, but this circulation of 'demand' for gambling is directed towards the British, 'properly regulated' industry.

4.4 Neoliberal governmentality and the responsible gambling subject

In his next series of lectures, entitled *The Birth of Biopolitics*,²⁶⁸ Foucault goes on to examine two contemporary forms (in 1978-79) of liberal governmentality: the German Ordoliberalism;²⁶⁹ and American neoliberalism. The neoliberal programme of governmentality is of particular relevance here in that it was reflected, as discussed above, in the political agenda in Britain from the 1980s, as commercial gambling slowly began to be liberalised. Criticism of government intervention under this contemporary version of a liberal governmentality is made in the name of economic liberalism and justified by the 'danger represented by the inevitable sequence: economic interventionism, inflation of governmental apparatuses, over-administration, bureaucracy, rigidification of all the power mechanisms, and, at the same time, the production of new economic distortions, which would lead to new interventions'.²⁷⁰ Centrally, this neoliberal governmentality extends economic analysis and the rationality of the market (and the criteria for decision-making which it suggests) to domains which are not economic, including social phenomena.²⁷¹

This leads to the birth of the *homo oeconomicus*, or economic man, as a subject of interest whereby a dimension of human behaviour can be interpreted in economic terms, through

²⁶⁷ *ibid.*

²⁶⁸ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189).

²⁶⁹ The organisation of a market economy within a supportive legal and institutional framework to ensure that freedom of economic processes did not produce any social distortion - *ibid* 323.

²⁷⁰ *ibid.*

²⁷¹ *ibid.*

application of market principles, ‘and controlled as such’.²⁷² The economic man is someone who ‘reacts to reality’ in a rational, ‘non-random’ way as Foucault describes:

Homo oeconomicus is someone who accepts reality. Rational conduct is any conduct which is sensitive to modifications in the variables of the environment and which responds to this in a non-random way, in a systematic way, and economics can therefore be defined as the science of the systematic nature of responses to environmental variables [...] if you define the object of economical analysis as the set of systematic responses to the variables of the environment, then you can see the possibility of integrating within economics a set of techniques, those called behavioural techniques.²⁷³

At the same time, *homo oeconomicus* is someone who pursues their own interest but whose interest is such that it will converge naturally with the interest of others:²⁷⁴ ‘each only thinks of his own gain and, in the end, the whole industry benefits’.²⁷⁵ From this point of view, then, *homo oeconomicus* should be intangible to government and therefore left alone. Under the neoliberal governmentality, however, Foucault identifies this paradoxical position whereby *homo oeconomicus* appears as someone who is manageable, and whose rational behaviour is systematically modifiable through the variables of the environment: ‘*homo oeconomicus* now becomes the correlate of a governmentality which will act on the environment and systematically modify its variables’.²⁷⁶

We can see neoliberal values reflected throughout this regime of government, not only in the ‘better regulation’, hands-off approach of the regulator towards operators as set out in 3.3 but also in the form of the social responsibility requirements introduced, particularly in accordance with the Reno Model approach to regulation. The Reno Model effectively applies an approach to regulating the whole gambling population by applying market principles to ensure that each consumer is fully informed and provided with the tools required to participate rationally and responsibly within the gambling market. This approach, in turn,

²⁷² *ibid* 259.

²⁷³ *ibid* 269.

²⁷⁴ In line with Adam Smith’s ‘invisible hand’ - Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (RH Campbell, Andrew S Skinner and William B Todd eds, Clarendon Press 1976).

²⁷⁵ Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-1979* (n 189) 279.

²⁷⁶ *ibid* 270–1.

assists in supporting the wider neoliberal discourse which advocates a reduction of external governance accompanied by an emphasis on individual responsibility and self-control.²⁷⁷

These values are also reflected throughout the medical screens used to diagnose problem gambling, as set out in 3.4. The diagnostic criteria, as highlighted, are dominated by standards around self-control and rational decision-making, for instance: ‘gambling more than you can afford to lose’, ‘needing to gamble within increasing amounts to achieve the same levels of excitement’, and ‘repeated unsuccessful attempts to control, cut back or stop gambling’.²⁷⁸ From this, the disordered problem gambler emerges²⁷⁹ as a subject to be normalised in line with the contrasting, normative ideal standard of the ‘responsible gambler’. Correspondingly, the ‘responsible gambler’ is the identity of the subject formed under this regime. The responsible gambler is characterised by a gambling consumer who participates in the gambling market in a controlled, rational, fully-informed and self-limiting manner in accordance with the underlying neoliberal rationality.²⁸⁰

I will return to this central concept of responsibility, in the numerous meanings of the word, in Chapter Four when I explore the apparent transition from the regime of government outlined in this chapter to a new art of government focused on safety. In the final section of this chapter, I explore the consequence of this new liberal regime: the rapid expansion of the British gambling industry which emerged in parallel with - and was arguably accelerated by - developments in internet, data-driven technology. In fact it was the internet, and the increased opportunities for remote gambling provided by offshore operators that caused initial difficulties under the newly liberalised approach requiring a more direct means of intervention, including taxation, to which I will now turn.

²⁷⁷ Reith (n 169) 141.

²⁷⁸ Gambling Commission, ‘Problem Gambling Screens’ <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Statistics-and-research/Problem-gambling-screens.aspx>> accessed 30 May 2021.

²⁷⁹ Reith (n 169) 141–3.

²⁸⁰ Gerda Reith, ‘Gambling and the Contradictions of Consumption. A Genealogy of the “Pathological” Subject’ (2007) 51 *American Behavioral Scientist* 33, 35.

5. The effects of the liberal regime: a ‘turbo-charged online gambling market’

5.1 Initial difficulties in the regulation of online gambling

Despite optimism that offshore operators would ‘naturally’ seek a licence under the new ‘world-leading’, liberalised British online gambling market²⁸¹ this did not ultimately materialise and Parliament was, by 2012, judged as having ‘failed to produce a future-proofed regulatory structure for the remote and offshore online gambling industry’.²⁸² The regulatory system for online gambling initially set up under the Act operated on a ‘point of supply’ basis, meaning that only companies which located at least one piece of remote gambling equipment (their technical infrastructure) in Great Britain were required to obtain a licence to provide online gambling services to customers in Britain, and accordingly be subject to regulation by the Gambling Commission.²⁸³ Likewise, the corresponding taxation system for online gambling introduced at this time was also levied on a ‘point of supply’ basis, thus only online gambling companies with (at least part of their) technical infrastructure based in the UK were taxed at the set rate of 15 percent of gross profits, a rate which was significantly higher than the taxes imposed off-shore.²⁸⁴ Given that the Act also permitted online gambling companies based in the EU, EEA and various other ‘white-listed’²⁸⁵ territories to advertise their online gambling services to consumers based in the UK, the result was that the vast majority of online gambling operators remained in, or migrated their full technical infrastructure to, off-shore locations, creating what was described by the Government as an ‘uneven playing field’:²⁸⁶

It was hoped that a freer approach to advertising would provide maximum reciprocal benefits for British businesses both within Europe and more widely. It was also expected

²⁸¹ Department for Culture Media and Sport (n 7) para 4.52.

²⁸² Culture Media and Sport Committee (n 50) para 10.

²⁸³ *ibid* para 128.

²⁸⁴ Lorien Pilling and Warwick Bartlett, ‘The Internet Gambling Industry’ in Robert J Williams, Robert T Wood and Jonathan Parke (eds), *Routledge International Handbook of Internet Gambling* (Routledge 2012) 52. Around only 15-20% of operators who supplied internet gambling to customers in the UK were regulated by the Gambling Commission.

²⁸⁵ Such as Alderney and the Isle of Man.

²⁸⁶ Culture Media and Sport Committee (n 50) paras 134–139.

that by demonstrating best practice in gambling regulation in relation to operators, Great Britain would be influential in improving standards of regulation across Europe and internationally. However, from the first, the UK-based gambling industry (both online and offline) considered itself disadvantaged in comparison to the offshore industry, primarily due to the issue of taxation.[...] The offshore industry avoids UK taxes. Since 2005 almost the entire online gambling industry based in the UK has moved overseas.²⁸⁷

As a consequence, it was considered that

the current regulatory framework for online gambling has failed to create a level playing field between operators based in the UK and those based overseas. This is because, whilst companies based in the UK are subject to strict regulation and high taxation, those based overseas can be lightly or unregulated paying little or no tax. This situation could allow unregulated – ‘grey’ – markets to emerge, able to attract UK customers because they can offer better odds as a result of their lower cost bases.²⁸⁸

In light of the significant tax advantages as compared with the UK, not only in relation to gambling, the majority of the leading operators serving the British online gambling market chose to be located in white-listed jurisdictions such as Gibraltar, Malta and the Channel Islands.²⁸⁹ Far from representing ‘lightly or unregulated’ gambling, however, these jurisdictions had ‘themselves developed first-class regulatory systems that gave UK customers confidence that operators licensed there would behave responsibly and treat them fairly’.²⁹⁰ Nonetheless, the government considered this regulatory position unsatisfactory, in particular for British consumers of remote gambling products:

Currently, consumers based in Great Britain face different consumer protection arrangements, and have to deal with a myriad of different regulators, depending on where the remote gambling they are taking part in is regulated. This problem is growing as more countries permit online gambling. At the same time, it is unfair to GB-licensed gambling operators that overseas competitors benefit from access to the market in Great Britain without necessarily bearing a fair share of the costs of regulation, or of research, education and treatment of problem gambling.²⁹¹

Economic concerns were thus clearly still central in the evaluation and re-formulation of the strategy for gambling regulation. However, while the anomalous tax situation was identified as one of the key reasons for the failure of the remote gambling regulatory regime initially introduced by the Gambling Act 2005, the now coalition Conservative/Liberal Democrat

²⁸⁷ Culture Media and Sport Committee, *Pre-Legislative Scrutiny of the Draft Gambling (Licensing and Advertising) Bill. Sixth Report of Session 2012-13. Volume I: Report, Together with Formal Minutes, Oral and Written Evidence. Volume II: Additional Written Evidence* (HC 2012-13, 905-I, II) para 4.

²⁸⁸ Culture Media and Sport Committee (n 50) para 151.

²⁸⁹ Monkcom, Gouriet and Phillips (n 31) 930.

²⁹⁰ *ibid* 931.

²⁹¹ Department for Culture Media and Sport, *Draft Gambling (Licensing & Advertising) Bill* (Cm 8497, 2012) 4.

Government was, as its predecessors were, keen to assert that ‘the ability to bring all operators serving UK consumers within the tax net is a consequence, but not the prime motivation, of the draft legislation’.²⁹² Unsurprisingly, commentators have nonetheless opined that it may be no coincidence that the scrutiny into regulation of overseas gambling operators was directed following the significant reduction in tax revenue from traditional sources as a result of decreased economic activity subsequent to the financial crisis affecting the UK between 2007 and 2008.²⁹³ Online gambling, on the other hand, had at that time proven to be relatively resilient to the recession and it seems that ‘the Treasury clearly wanted a piece of that action’.²⁹⁴

The Gambling (Licensing and Advertising) Act 2014 was introduced in response to extend the scope of the remote operators requiring a licence under the Gambling Act 2005. Since the ‘light-touch’, *laissez faire* approach was inadequate for attracting offshore (and indeed retaining domestic) remote gambling operators, the legislation was amended to incorporate a much more prescriptive, disciplinary tone towards the industry; an approach which, as will be explored in Chapter Four, appears to be becoming increasingly more prominent once again. The amendment unequivocally provided that an online gambling operator will require a licence from the Gambling Commission ‘if their gambling facilities are *used* in Great Britain (even if no equipment is located here) and the operator knows, or should know, that the facilities are being used or are likely to be used in Great Britain. If the operator does not obtain a remote gambling licence, they will be committing an offence under section 33 of the 2005 Act.’²⁹⁵ Thus, remote gambling is now regulated, and also taxed at a rate of 21 percent

²⁹² Culture Media and Sport Committee (n 287) 3 (Summary).

²⁹³ Monkcom, Gouriet and Phillips (n 31) 931.

²⁹⁴ *ibid.*

²⁹⁵ Gambling (Licensing and Advertising Act) 2014, s 1, and explanatory notes 3. (Emphasis added.)

of operator profits,²⁹⁶ on a ‘point of consumption’ basis, according to where the consumer is based.²⁹⁷

5.2 *The rise in online gambling*

In terms of economic growth, and from a liberal perspective, the liberal regime outlined in this chapter can be regarded as an overwhelming success, particularly in relation to online gambling. As commented in the 2001 Gambling Review Body’s report:

Let us suppose, for example, that a more relaxed approach to regulation greatly increased the number of gambling establishments and also raised both the number of active gamblers and the time (and money) they spent gambling. An adherent of the liberal approach would welcome this development as a sign that consumers were better able to spend their time and money as they wished.²⁹⁸

The popularity of online gambling has increased enormously since the 2005 Act came into force, very much in alignment with the societal shift online more generally. Initially in 2007, the proportion of the population having used the internet to gamble within the past twelve months had increased from one percent (in 1999)²⁹⁹ to six percent,³⁰⁰ though it seemed that the majority of people still preferred to conduct their regular gambling activities in a land-based setting, with less than two percent of the population reported having used the internet to gamble within the previous seven days.³⁰¹ As internet technology, and e-commerce more generally, continued to develop, however, an increasing number of gamblers were choosing to gamble online: a strong correlation is evident between the increase in download speed,

²⁹⁶ Remote Gaming Duty is currently charged at the rate of 21% of a gaming provider’s profits from remote gaming with UK persons. HM Revenue and Customs, ‘Excise Notice 455a: Remote Gaming Duty’ (2019) <<https://www.gov.uk/government/publications/excise-notice-455a-remote-gaming-duty/excise-notice-455a-remote-gaming-duty#rgd-calculations>> accessed 8 May 2021.

²⁹⁷ Culture Media and Sport Committee (n 287) 3 (Summary).

²⁹⁸ Department for Culture Media and Sport and Gambling Review Body (n 1) para 3.26.

²⁹⁹ Kerry Sproston, Bob Erens and Jim Orford, ‘Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey’ (*National Centre for Social Research*, 2000) i <<http://www.nationalcasinoforum.co.uk/wp-content/uploads/2013/11/British-Gambling-Prevalence-Survey-1999.pdf>> accessed 11 March 2020.

³⁰⁰ Heather Wardle and others, ‘British Gambling Prevalence Survey 2007’ (*National Centre for Social Research (‘NatCen’)*, 2007) 9 <<http://www.nationalcasinoforum.co.uk/wp-content/uploads/2013/11/British-Gambling-Prevalence-Survey-2007.pdf>> accessed 11 March 2020.

³⁰¹ *ibid* 32.

together with the availability of broadband internet in consumers' homes, and the growth of the online gambling sector.³⁰²

By the time the 2014 amendments came into force, 11 percent of the population reported having participated in online gambling within the past four weeks.³⁰³ Since then, online gambling participation has continued to rise at a steady rate, boosted by the increased 'pervasiveness' of opportunities to gamble brought³⁰⁴ about through advances in smartphone and mobile internet technology.³⁰⁵ In February 2020, reporting on gambling participation during the previous twelve months (before the full impact of the COVID-19 pandemic was felt) it was estimated by the Commission that 21 percent of the population had gambled using the internet in the past four weeks, with 55 percent of those online gamblers having used their mobile phone for this activity.³⁰⁶ 2020 was indeed a unique year with the arrival of the pandemic - as will be mentioned in the following chapters - and perhaps unsurprisingly saw an acceleration in the shift to online gambling following the closure of land-based gambling outlets in accordance with lockdown restrictions. The Commission's telephone survey research found that in the year to December 2020 the proportion of the adult population who had gambled online in the past four weeks had increased to 24 percent.³⁰⁷

The value of the British gambling industry has also sharply increased due to the inclusion of the gross gambling yield ('GGY')³⁰⁸ earned by the overseas remote gambling operators.

³⁰² Pilling and Bartlett (n 284) 46.

³⁰³ Excluding National Lottery participation. Gambling Commission, 'Gambling Participation: Activities and Mode of Access' (2014) s 2.3 <<https://www.gamblingcommission.gov.uk/PDF/survey-data/Survey-data-on-gambling-participation-year-to-September-2014.pdf>> accessed 16 March 2020.

³⁰⁴ Reith (n 169) 131.

³⁰⁵ Pilling and Bartlett (n 284) 46.

³⁰⁶ Though not entirely clear from the report, this figure does appear to include National Lottery participation online, whereas previous figures did not. The Gambling Commission did not provide an exclusive figure. Gambling Commission, 'Gambling Participation in 2019: Behaviour, Awareness and Attitudes. Annual Report (Updated Publication)' (2020) <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Statistics-and-research/Levels-of-participation-and-problem-gambling/Gambling-participation-and-problem-gambling.aspx>> accessed 1 May 2021.

³⁰⁷ Gambling Commission, 'Gambling Behaviour in 2020: Findings from the Quarterly Telephone Survey' <<https://beta.gamblingcommission.gov.uk/statistics-and-research/publication/year-to-december-2020>> accessed 1 May 2021.

³⁰⁸ This is essentially the amount that the operator retains as profit (before other costs are deducted). It is roughly calculated as the amount of stakes received less the amount of winnings paid out. Gambling Commission, 'How to Calculate Your

Online gambling now represents the majority sector of the British gambling market, with an almost 40 percent overall share, securing £5.7 billion in gross profits ('GGY') in the year April 2019 to March 2020.³⁰⁹ The sector is dominated by online casino games (in particular slot games) and remote betting (chiefly football and horse-race betting), which generated £3.2bn and £2.3bn in GGY respectively during the same period.³¹⁰ Further, of the 3,528 operators in total licensed by the Gambling Commission as at March 2020, 17 percent were licensed to operate in the remote betting, bingo and casino sector.³¹¹ The level of competition in the online gambling market is therefore extremely high given the degree of market saturation that exists, in combination with the relatively low level of differentiation as regards product offering.³¹²

This increased competition should, in theory, and in accordance with the Government's strategy under the Gambling Act 2005, place gambling customers at an advantage with regard to internet gambling. Indeed generous new customer bonus offers are ubiquitous in the industry and players tend not to be particularly loyal to one brand over another, being able to hold accounts with multiple operators without restriction and switch easily between gambling websites to find a broadly similar selection of games and bets available.³¹³ As a result, player acquisition and retention are particularly important, and the online gambling industry has been 'light years ahead of other consumer industries in terms of analytics-driven marketing' in using the 'immense data sets' to which operators have access:³¹⁴ 'the industry has

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 1 May 2021.

³⁰⁹ 39.9% - Gambling Commission, 'Industry Statistics - November 2020' (2020)

<<https://beta.gamblingcommission.gov.uk/statistics-and-research/publication/industry-statistics-november-2020>> accessed 7 May 2021.

³¹⁰ *ibid.*

³¹¹ *ibid.*

³¹² Alex Brennan, 'Online Gambling's Unique Personalisation Opportunity' (*Hudson Sandler*, 2017) <<https://www.hudsonsandler.com/insights/online-gamblings-unique-personalisation-opportunity>> accessed 9 July 2019.

³¹³ Pilling and Bartlett (n 284) 56.

³¹⁴ Brennan (n 312).

recognised that harnessing the power of customer data has a direct positive impact on revenues and profits'.³¹⁵

5.3 Using big data to 'nurture commercial viabilities'

Remote gambling operators have access to a wealth of big data by virtue of their online presence, which is tracked and utilised for the purposes of their commercial operations. This data extends far beyond the basic demographic information which is provided directly when a player registers for an account, and includes extensive transactional 'game-play' data collected through the customer's use of the website and services,³¹⁶ which can be 'analysed to not only understand the past behaviour of customers but to use it to cast inference to predict the future behaviour'.³¹⁷

Transactional data consists of financial indicators, such as value and frequency of deposits, stakes, withdrawals, amounts lost and amounts won, as well as indicators which provide a more behavioural insight. The data collected is vast and diverse, including, for example: cancelled withdrawals; variances in the size or frequency of deposits, stakes, and amounts lost and won; use of credit cards; games played; favourite game; length of session; number of days played; gaps in play; geo-location; IP address; device fingerprint; site logins; time of the day or the month; the pages a customer has visited; language used in customer interactions; frequency of customer interactions and use of responsible gambling tools.³¹⁸ Moreover, customers often provide additional non-essential information on becoming a member of a

³¹⁵ Toby Finnerman, 'The Role of Big Data and Predictive Analytics in Online Gaming and Gambling' (*LinkedIn*, 2016) <<https://www.linkedin.com/pulse/role-big-data-predictive-analytics-online-gaming-toby-finneran/>> accessed 25 January 2018.

³¹⁶ This information was obtained during interviews conducted with employees of an online gambling company in September 2018. See Appendix I for further details in relation to this methodology.

³¹⁷ Finnerman (n 315).

³¹⁸ This information was obtained during interviews conducted with employees of an online gambling company in September 2018. See Appendix I for further details in relation to this methodology.

gambling website's loyalty scheme in order to obtain rewards or bonuses,³¹⁹ further increasing the depth in which operators are able to get to 'know their customers'.³²⁰

In addition to the data which is collected directly from the customer's use of the website, open source data, which is publicly available, is gathered by operators from various sources such as social media platforms (in particular where the profile information is made public), government statistics (for example, census data), the Land Registry, Companies House, and even online dating platforms.³²¹ By combining this information with its own stored data, operators can draw inferences on, for example, their customers' interests, employment, salary, house value, economic classification and area social grading.³²² Third-party companies also offer services to operators providing access to data which is not necessarily publicly available from additional sources, such as private social media accounts³²³ and open banking.³²⁴ Accordingly, online gambling operators can utilise the vast amounts of data available to form in-depth profiles which detail - amongst many other things - the player's gambling behaviour, interests and hobbies, past and current locations, earnings, credit history³²⁵ and their estimated pay-day.³²⁶

³¹⁹ Mark D Griffiths and Jonathan Parke, 'The Social Impact of Internet Gambling' (2002) 20 *Social Science Computer Review* 312, 315.

³²⁰ As a regulatory requirement, operators are required to comply with detailed identity verification and due diligence requirements, referred to as 'know your customer' or 'KYC' obligations: Gambling Commission, 'Anti-Money Laundering – Compliance Advice' <<https://www.gamblingcommission.gov.uk/for-gambling-businesses/Compliance/General-compliance/AML/How-to-comply/Anti-money-laundering-compliance-advice.aspx>> accessed 1 April 2020. See also, Gambling Commission, 'Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1' <<https://www.gamblingcommission.gov.uk/PDF/Customer-Interaction-Formal-Guidance-Remote-July-2019.pdf>> accessed 3 March 2021.

³²¹ From interview E – Enhanced Customer Due Diligence

³²² From interview data (aggregated)

³²³ From interview B – Fraud & Risk. For example: Hello Soda <<https://hellosoda.com/>> accessed 14 February 2019

³²⁴ From interview B – Fraud & Risk. For example: TransUnion (formerly CallCredit) <<https://www.transunion.co.uk/>> accessed 14 February 2019

³²⁵ Mattha Busby, 'Revealed: How Bookies Use AI to Keep Gamblers Hooked' (*Guardian*, 2018) <<https://www.theguardian.com/technology/2018/apr/30/bookies-using-ai-to-keep-gamblers-hooked-insiders-say>> accessed 9 July 2019.

³²⁶ From Interview B – Fraud & Risk. See also: Charles Mott, 'Increase Your Odds of Success, with Big Data' (2018) <<http://hellosoda.com/increase-odds-success-big-data/>> accessed 13 April 2018.

Having access to such a granular view of each player allows operators to tailor their services to the individual in order to ‘enhance customer experience’.³²⁷ Practices of this nature have been prevalent for a number of years to track players in a land-based casino setting, chiefly through loyalty schemes, which provide access to data regarding the value of bets, wins, losses, breaks in play, meals, drinks etc.³²⁸ Through this electronic surveillance, the traits and habits of casino guests are systematically compared with those of other guests to more precisely identify certain niches and, comparably, create a ‘360 degree’ profile to predict when and how a customer can be expected to gamble, allowing customisation of marketing and bonus offerings.³²⁹ This may also involve the generation of ‘behaviour modification reports’ seeking to invoke solicitation where a customer is ‘overdue’ based on their observed pattern of frequency. Moreover, ‘personalised pain points’ are identified to determine how much money a customer can lose and still feel satisfied in order to continue playing; thus when approaching a ‘pain point’, rewards can be dispensed to replicate a ‘win’ (for example, free dinner vouchers) in an effort to keep the customer gambling.³³⁰

Similarly in online gambling, big data is used by operators to predict when a player may be likely to lapse in terms of their use of the site, as well as identify higher value players who have lapsed, in order to intervene with more attractive, personalised offers which are relevant to them based on their previous activity:

We do things like [predict] players who are going to lapse - so players who we predict are going to stop playing - and when they are going to stop playing, therefore we can intervene and get them to play more.

Interview with online gambling employee (C) – Business intelligence/data analytics

For example, yesterday I sent out a promotion that was to high value players who hadn’t deposited in the last forty-five days and to try and get that, sort of, level of personalisation I included their favourite game. [...] you’re not engaging people who are that far back with that kind of [generic] email or that kind of, erm, message so a lot of time you’ll just see unsubscribes and then once they’ve unsubscribed, you’ve, kind of, lost that contact. So a more personalised message that might have been “this is your favourite game, why don’t

³²⁷ Griffiths and Parke (n 319) 315.

³²⁸ Natasha Dow Schüll, *Addiction by Design : Machine Gambling in Las Vegas* (Princeton University Press 2012).

³²⁹ *ibid* 145.

³³⁰ *ibid* 154.

you play it with this [bonus]?” might have got them back in but the fact you’re sending them something generic, they might just think “ah, I can’t be bothered”, unsubscribe, and then you’ve, kind of, lost them.

Interview with online gambling employee (F) - Marketing

As well as targeting players who may be likely to leave the site, retention marketing strategies are used to engage and retain existing players through targeted online advertising,³³¹ relevant and timely marketing communications, personalised offers and customised website content.³³² An operator could, for example, ‘geolocate customers to identify when they arrive at stadiums so they can be prompted via texts to bet on the game they are about to watch’.³³³ Marketing messages are tailored to ‘let players know, for example, when a game is about to start, and update them on changing odds in real time’.³³⁴ ‘Clickstream data’, which analyses data from the customer’s ‘clicks’ and journey around the website can also be used to inform the design of the website and influence user experience and behaviour in this regard.³³⁵ Thus operators are able to utilise the insights gained from the data to target customers more effectively through optimised marketing initiatives based on, for example, preferred type of device, optimum time of day (or month) or favourite game,³³⁶ increasing their chances of success and, accordingly, the revenues generated as a result, in comparison with more generalised strategies.³³⁷

So, things like [...] time of month, so around pay day, we’ll send big promotions out [...] we always send a really generous, kind of, promotion out to all depositors and all non-depositors to try and capture players. We know they’ve been paid, we know it’s, kind of, the end of the month, people have got disposable income [...]

The personalisation comes from [...] favourite game, maybe type of offer that they like to do, or we have seen that just the personalisation in the subject line of an email works better than not, so if it was like “Dave, why don’t you play this weekend?” rather than just “Play this weekend”, that always seems to work better as well. We’ve done split tests on that. So just even personalising someone’s name does get better results.

Interview with online gambling employee (F) – Marketing and customer retention

³³¹ 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.

³³² Taken from interview data (aggregated)

³³³ Busby (n 325).

³³⁴ Reith (n 169) 131.

³³⁵ From interview A – Compliance; Busby (n 313).

³³⁶ Griffiths and Parke (n 319) 314.

³³⁷ *ibid* 315.

In addition to the general customer base, big data is also used as part of a controversial (and currently under regulatory scrutiny, as discussed in Chapter Four) but longstanding business strategy to identify potential higher value customers, commonly known as ‘VIP players’.³³⁸ Using an algorithmic model, operators can predict which of their customers are most likely to become VIPs based on past experience and historical data, ‘allow[ing] companies to focus on the most profitable customers’.³³⁹

What the VIP predictor tool does is it draws out what we then term our players of interest [...]

[This is] based on past experience. So players who have become VIPs, valuable VIPs, they’ve used the flags. So what age range were they in, maybe even post code factors into it, what games did they like to play, what initial stakes and deposits did they make, what were the trends of the game play? [...]

That tool is then given to the VIP team for players that they might want to look at further, to [determine] whether they’ll be a commercial viability to nurture.

Interviews with online gambling employees (A) and (B) - Compliance and Fraud & Risk

Once a player has met the criteria and becomes a VIP (or prospective VIP) they will receive preferential treatment as compared to the majority of players on the website to try and retain their custom through the allocation of a personal ‘VIP manager’ with whom the player can liaise (and thus avoid the general lines of communication or be subject to the standard wait times for a response, or for withdrawals of winnings, for example).³⁴⁰ In addition, VIP players will receive rewards in recognition of their status, such as ad hoc bonuses credited to their account (calculated on the basis of their net spend),³⁴¹ as well as gifts and corporate hospitality, which can again be aligned to the player’s interests based on their profile in order provide a more personable service to the customer in the interests of ‘establishing a rapport’.³⁴²

When it comes to, sort of, gifting and hospitality you can see what they’re – say [...] if they’ve ‘liked’ Manchester United or whatever [on social media], you can say that’s presumably their favourite football team and you can then, with regards to relationship

³³⁸ This term is referenced in the Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 308). Also taken from interview data (aggregated).

³³⁹ Finnerman (n 303).

³⁴⁰ From interview E – Enhanced customer due diligence.

³⁴¹ From interview E – Enhanced customer due diligence.

³⁴² From interview A – Compliance.

building you, from a VIP point of view - you know that they're into football because you can see on Facebook so you can [use] an open question "oh, do you like football?". You know the answer's going to be 'yes'. [...] It then leads into a conversation, whereby [...] you're not just a faceless entity, you've sort of built a rapport.

Interview with online gambling employee (E) - Enhanced Customer Due Diligence

In facilitating the earlier identification of potential VIP players, big data analytics have been found by operators to be more powerful than traditional methods, allowing the experience of more 'valued customers' to be 'managed'³⁴³ from the beginning of the relationship:

If you can say that someone is a valued customer then, if you can spot that early on then that's [...] a lot more powerful than just guessing [...] it gives the VIP team, kind of, an earlier chance to interact and hopefully have a positive interaction to, kind of, keep that player there.

Interview with online gambling employee (B) - Fraud & Risk

By enabling operators to get to 'know their customers' in ever more granular detail, big data and the corresponding algorithmic tools used allow the industry to optimise each step of the player's gambling experience from the beginning of the relationship, in the interests of customer retention and, naturally, increased revenue.

5.4 Enhancing experience or 'turbo-charged' exploitation?

The increasingly sophisticated use of technology to interpret data in order to make predictions and influence the gambler's choices has been met with criticism,³⁴⁴ particularly in the media where operators are accused of 'using artificial intelligence to predict consumer habits and personalise promotions to keep gamblers hooked'.³⁴⁵ Rather than benefitting customers and enhancing player experience, these competitive practices, which seek to direct or manipulate player behaviour towards a particular, more profitable, end have been described as 'dark nudges', designed to 'exploit gamblers' biases' in an activity which can be interpreted as 'socially-wasteful', since gamblers' losses are transferred straight to the

³⁴³ Terminology used by participants in Interview D – Customer service/responsible gambling; and Interview E – Enhanced customer due diligence

³⁴⁴ Alfredo Lazcano, Andrea Avedillo and Francisco Del Real, 'Artificial Intelligence, Privacy and Gaming: An Equation With Almost No Regulation' (2018) 22 Gaming Law Review 295, 300.

³⁴⁵ Busby (n 325).

industry while the social costs are suffered by individual gamblers, their families and society more widely.³⁴⁶

Moreover, the VIP schemes operated by the industry, which have significantly benefited from advances in predictive technology, have also been heavily criticised. The dependence of operators on a minority of high-spending VIP gamblers, who are eleven times more likely to be problem gamblers than the rest of the population, was revealed by the Guardian in January 2020, having obtained access to a report from the Gambling Commission pursuant to freedom of information rights.³⁴⁷ This Commission report, which contained information on VIP schemes from nine of the UK's largest gambling companies (the identities of which were anonymised), disclosed the extent to which operators rely on a small percentage of VIP customers for a disproportionate amount of deposits: one of the companies obtained 83 percent of deposits from its VIP customers, which accounted for two percent of its player base.³⁴⁸

In general, the adoption of mobile internet gambling via smartphones, together with the embrace of the geo-locational and data tracking technologies, further interlinked with personalised marketing 'have made gambling more ubiquitous, more pervasive and more intensive'.³⁴⁹ By delivering direct, personalised marketing, for example, to the device on which individuals also now bet, at the optimum time (for example when the customer is physically nearby a particular venue), the gap between the desire to gamble and the means to do so is shortened, increasing the potential for 'impulsive, and therefore profitable, action'.³⁵⁰ Remote gambling has, according to Gerda Reith, become an intensified vehicle for consumption and capital accumulation, and at the same time a form of surveillance,

³⁴⁶ Philip WS Newall, 'Dark Nudges in Gambling' (2019) 27 *Addiction Research and Theory* 65.

³⁴⁷ Rob Davies, 'Report Shows Betting Industry's Reliance on Problem Gamblers' (*Guardian*, 2020) <<https://www.theguardian.com/society/2020/jan/02/gambling-report-shows-industrys-reliance-on-loss-making-customers>>.

³⁴⁸ *ibid.*

³⁴⁹ Reith (n 169) 131.

³⁵⁰ *ibid* 132.

collecting vast amounts of big data to more effectively target gamblers and direct their behaviour, inducing them to gamble.³⁵¹ These advances in technology and marketing have had what Reith has termed a ‘turbo-charging’ effect on the provision of commercial gambling opportunities:

Such technologies generate what Deleuze (1995)³⁵² would call environments of ‘continuous control’ that stimulate desire, encourage play or, in industry terms, increase ‘time on device’. In this, they go far beyond the panopticon-style design of casinos, with their ubiquitous cameras and security, to create networks of surveillance across a range of ‘gambling spaces’, which, due to the extended mobility of mobile and social gambling, can, in reality, be potentially any space.³⁵³

In the past few years, however, it appears that the ‘environments of continuous control’ are being re-purposed as the dominant discourse of gambling once again shifts towards a focus on customer ‘safety’. In the following chapter, I argue that gambling regulation has moved on once more, from the liberal regime explored here to a multi-faceted approach to government which applies a greater level of both direct and indirect interventions on a precautionary basis in order to facilitate a safer, sustainable form of gambling. A central mechanism under this new regime is the use of ‘harm detection algorithms’³⁵⁴ to track gambling patterns over time and assess a gambler’s risk of harm, intervening where necessary to mitigate this risk. These data-driven mechanisms will be considered within the wider framework of government, which I propose now applies to more closely regulate gambling activity in order to produce a population of safe gamblers and, ultimately, a sustainable gambling economy.

³⁵¹ *ibid* 133.

³⁵² Citing Giles Deleuze, *Negotiations* (Columbia University Press 1995).

³⁵³ Reith (n 169) 133.

³⁵⁴ Department for Digital Culture Media and Sport, ‘Review of the Gambling Act 2005 Terms of Reference and Call for Evidence’ (2020) para 25 <<https://www.gov.uk/government/publications/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence>> accessed 7 May 2021.

Chapter Four

The Sustainable Regime

1. Introduction

Chapter Four brings this genealogy of gambling regulation up to date. In this chapter, I propose that we have now moved beyond the liberal regime of gambling regulation to a new regime which is notably more restrictive and paternalistic: the sustainable regime. I start by examining the evidence of this shift within the prevalent discourse, to show that gambling is now regarded as a public health issue requiring a precautionary, population-based approach to regulation, thus necessitating a ‘shift in the balance’ between allowing the freedom to gamble and protecting gamblers from harm. Similarly, the ideal standard of gambling has been rebranded from ‘responsible’ to ‘safe’, apparently reflecting a slightly more risk-averse attitude, where, for example, online gamblers elect to use self-management tools by default, in the same manner as wearing a seatbelt. This approach represents part of the state regulator’s response to criticism that the existing regulatory framework under the liberal regime placed too great an emphasis on individual responsibility. In parallel, the technological, big data-driven advances discussed in Chapter Three have been identified as both a central issue necessitating additional regulation and, at the same time, a regulatory opportunity to ‘enhance player protection, which all those with an interest in safer gambling must capitalise on’.¹

¹ Department for Digital Culture Media and Sport, ‘Review of the Gambling Act 2005 Terms of Reference and Call for Evidence’ (2020) para 7 <<https://www.gov.uk/government/publications/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence>> accessed 7 May 2021.

I then go on to examine the complex framework of regulatory mechanisms which form this sustainable regime. Each element of the regime, which I have sought to visually portray in the form of the Sustainable Gambling Model, is examined in detail to provide an understanding of the various ways in which the conduct of gamblers is being directed. In particular, I focus on the incorporation of novel player-tracking, data-driven technologies which have come to play a central role in the regulation of gamblers' conduct both directly and indirectly, later reflecting on the implications of this approach for individual autonomy. Under the sustainable regime, operators have been assigned a greater degree of responsibility for protecting their customers, in particular through the employment of this technology to monitor customers and identify those who are potentially 'at risk' of harm. The objective of this model of regulation, I argue, is to produce a population of safe gamblers who 'autonomously' continue to circulate around the sustainable gambling cycle, and an industry of responsible operators who identify and 'correct' those individual gamblers who do not conform.

Finally, I contemplate the multiple governmental rationalities underlying this regime, which I argue have moved beyond Foucault's genealogy of the governmentalisation of the modern state. Although the regime retains its liberal (and more specifically, neoliberal) character to an extent – though it seems within decreasing parameters of what is acceptable – it seems clear that understandings focused solely on market freedom and individual responsabilisation are not sufficient to provide the whole picture. In addition, there is evidence of a return to a form of governmentality which Foucault refers to as 'pastoral' power, particularly given the additional responsibilities placed on the industry for 'protecting' their customers. On closer examination, however, I argue that the present regime is rather more perverse, illustrating what Foucault referred to as the 'daemonic coupling of the city-game and shepherd-game: the invention of a form of secular political pastorate which couples individualisation and

totalisation'.² Whereas the shepherd within the pastoral model of government is concerned with ensuring the salvation of the flock, the outcome of the sustainable gambling model is also productive: producing a gambling economy which is sustainable and therefore ultimately ends up serving the interests of capital. Accordingly, the regime produces 'responsible' operators whose public image is reformed, securing a sustainable revenue source directly for the industry and indirectly for the state. At the same time, it produces its sustainable resource: the population of 'safe' gamblers who have internalised the normative standard of 'safety' as the truth against which they autonomously regulate their own gambling conduct.

2. A shift in the 'balance'

The UK leads the way in Europe in terms of regulation and enforcement. By and large that has had a positive effect on the industry which has undergone a complete culture change and is now 'safety first'.³

In the last few years, there seems to have been a noticeable shift in the aforementioned 'balance'⁴ between allowing the freedom to gamble and protecting people from harm related to gambling. This appears to be set within the 'groundswell of public opinion, supported by politicians from all parties, public health officials, academia and the press in favour of even tighter regulation and more enforcement'.⁵ In 2016, for example, the Government, led by Tracey Couch (Minister for Sport, Tourism and Heritage at that time), launched a consultation to address the widespread media criticism of category B2 gaming machines - commonly known as Fixed Odds Betting Terminals (FOBTs) or, more colourfully, 'the crack cocaine of gambling'⁶ - as well as the effectiveness of gambling regulation generally.⁷ The 2016 review sought to consider the concerns around the particularly addictive qualities of the

² Michel Foucault, 'Omnes et Singulatim: Towards a Criticism of "political Reason"' [1979] Tanner Lectures on Human Values 239; Colin Gordon, 'Governmental Rationality: An Introduction' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 8.

³ 'UK Gambling Review' (2021) Spring *IMGL Magazine* 16, 19.

⁴ Department for Culture Media and Sport, *A Safe Bet for Success - Modernising Britain's Gambling Laws the Government's Response to the Gambling Review Report* (Cm 5397, 2002) 1.

⁵ 'UK Gambling Review' (n 3) 20.

⁶ Nicki Dowling, David Smith and Trang Thomas, 'Electronic Gaming Machines: Are They the "crack-Cocaine" of Gambling?' (2005) 100 *Addiction* 33.

⁷ Jim Orford, *The Gambling Establishment: Challenging the Power of the Modern Gambling Industry and Its Allies* (Routledge 2020) 20.

FOBT machines owing to the fact that stakes of £100 could be placed every 20 seconds. In the review, the government expressly referred again to this familiar balancing act:

In launching this review I am seeking to ensure that we have the right balance between a sector that can grow and contribute to the economy, and one that is socially responsible and doing all it can to protect consumers and communities.⁸

The result of the consultation, however, was undeniably more protectionist in its approach than the previous Government reviews of the twenty-first century. In April 2019, after what was regarded an ‘unjustifiable delay’ culminating in Couch’s resignation,⁹ a £2 stake limit on FOBTs was introduced,¹⁰ notwithstanding the not insignificant economic benefits that the machines had previously generated for the industry (and indirectly, the state).¹¹ This re-balanced approach appears to have set the tone for gambling regulation going forward and in April 2020 a similarly severe, prescriptive measure was taken when gambling using a credit card became prohibited.¹²

2.1 ‘Analogue legislation in a digital age’? The role of technology

Most recently, in 2020, there have been four critical parliamentary reviews in the area of gambling regulation published. The National Audit Office, in February 2020, raised concerns regarding the Gambling Commission’s ‘ability to ensure consumers are protected’ from ‘new risks’ emerging from technological developments in online and mobile gambling.¹³ Similarly, the review by the Gambling Related Harm All Party Parliamentary Group,¹⁴ published in June 2020, focused on online gambling harms given the significant rise in online and mobile gambling operations (yield having increased from £1bn to £5.3bn between 2009 and 2019),

⁸ Department for Culture Media and Sport, ‘Review of Gaming Machines and Social Responsibility Measures. Call for Evidence’ (2016) 3
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/562122/Call_for_evidence_-_Review_of_Gaming_Machines_and_Social_Responsibility_Measures.pdf> accessed 10 May 2021.

⁹ Rob Davies, ‘Sports Minister Resigns Over Delay to Gambling Curb’ *The Guardian* (1 November 2018).

¹⁰ Gambling Commission, ‘Regulator Warns Gambling Industry Not to Circumvent FOBT Stake Cut’ (2019) <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/regulator-warns-gambling-industry-not-to-circumvent-fobt-stake-cut>> accessed 26 March 2021.

¹¹ In 2014/15 B2 machines generated £1.7bn in GGY - Department for Culture Media and Sport (n 8) 22.

¹² Davies (n 9).

¹³ National Audit Office, *Gambling Regulation: Problem Gambling and Protecting Vulnerable People* (HC 2020, 101) para 21 (Page 11).

¹⁴ Gambling Related Harm All Party Parliamentary Group, ‘Online Gambling Harm Inquiry - Final Report’ (2020).

recommending a series of more stringent measures, including a ban on all VIP schemes, inducements and gambling advertising.¹⁵ The scope of the additional two reviews by the House of Commons Public Accounts Committee¹⁶ ('PAC') (also published in June 2020) and the House of Lords Select Committee¹⁷ (published 2 July 2020) extended to the whole of the gambling industry, though both Committees also identified online gambling, and associated developments in technology, as being one of the key factors in the need for such a review. Indeed the PAC concluded that the 'Department for Digital, Culture, Media & Sport and the Gambling Commission have failed to adequately protect consumers at a time of considerable change in the sector, as gambling increasingly moves online and new games become popular'.¹⁸

The Select Committee was also unequivocal in its conclusion that advances in online and mobile gambling technologies, in combination with the industry's exploitation of them, mean that the regulatory framework is in need of reform:

How did we get to this state? Until the Gambling Act 2005, public policy decreed that while Parliament did not want to ban gambling, it would do nothing to stimulate it. All that changed with the radical Budd Report of 2001 which laid out a blueprint for the liberalisation of gambling, promoting consumer freedoms to choose in a wider competitive gambling market. [...] A second revolution, unforeseen by policy makers at the time, was the almost universal adoption of the smart phone and other devices which enabled gambling 24/7—whenever and wherever the gambler wanted, totally unsupervised. Gambling operators have made hay exploiting the laissez faire regime that has existed hitherto, while successive governments and regulators have failed to keep up with the revolution in the UK gambling sector. [...] The unscrupulous methods and ingenuity of some gambling operators makes for shocking reading.¹⁹

While the Gambling Review Body may not have foreseen the advances in smart phone technology and internet gambling when it published its recommendations in 2001, these developments were envisaged by academics as early as 2003, four years prior to the Gambling Act coming into force:

¹⁵ *ibid* 7.

¹⁶ Public Accounts Committee, *Gambling Regulation: Problem Gambling and Protecting Vulnerable People: Seventh Report of Session 2019–21. Report, Together with Formal Minutes Relating to the Report* (HC 2020, 134).

¹⁷ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20), *Gambling Harm — Time for Action* (HL 2019-21, 70).

¹⁸ Public Accounts Committee (n 16) 3.

¹⁹ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20) (n 17) 6.

Advances will allow users to watch sporting events live on their phones while wagering in real time. Consider the following scenario. A betting service that knows where you are and/or what you are doing has the capacity to suggest something context-related to the mobile user to bet on. For instance, if a mobile phone user bought a ticket for a soccer match using an electronic service, this service may share this information with a betting company. If in that match the referee gives a penalty for one team, a person's mobile could ring and give the user an opportunity (on screen) to bet whether or not the penalty will be scored. On this type of service, the mobile phone user will only have to decide if they want to bet, and if they do, the amount of money. Two clicks and the bet will be placed. Context, timeliness, simplicity and above all user involvement look like enough to also convince people that never entered a bet-shop.²⁰

What this extract demonstrates is the rapid rate of technological advancement over the past decade. This scenario, which may have seemed far-fetched in 2003 (four years prior to the introduction of the first-generation iPhone)²¹ when internet on mobile phones via WAP technology was of limited use,²² is now a commonplace practice in the industry.²³ The technological innovations, as described in Chapter Three, have apparently 'turbo-charged'²⁴ the rate of gambling, extending its reach across space and time, into the pockets of gamblers to access 24/7.²⁵

In response to the reviews, and as promised in its 2019 election manifesto,²⁶ the Government, in December 2020, launched a review of gambling laws to ensure they are 'fit for a digital age'.²⁷ In doing so, the apparent inability of the regulation to keep up with technological advances was again remarked upon:

Whilst millions gamble responsibly, the Gambling Act is an analogue law in a digital age. From an era of having a flutter in a high street bookmaker, casino, racecourse or seaside pier, the industry has evolved at breakneck speed. This comprehensive review will ensure

²⁰ Mark Griffiths, 'Internet Gambling: Issues, Concerns, and Recommendations' (2003) 6 *CyberPsychology & Behavior* 557, 564–5.

²¹ Dan Grabham and Robert Jones, 'History of the iPhone 2007-2017: The Journey to iPhone X | T3' <<https://www.t3.com/features/a-brief-history-of-the-iphone>> accessed 11 July 2018.

²² Griffiths (n 20) 564.

²³ Mattha Busby, 'Revealed: How Bookies Use AI to Keep Gamblers Hooked' (*Guardian*, 2018) <<https://www.theguardian.com/technology/2018/apr/30/bookies-using-ai-to-keep-gamblers-hooked-insiders-say>> accessed 9 July 2019.

²⁴ Gerda Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (Routledge 2018) 133.

²⁵ James Banks, 'Gambling in Britain: Analogue Legislation in a Digital Age' (*Sheffield Institute for Policy Studies (SIPS)*, 2020) <<https://sheffieldinstituteforpolicystudies.com/2020/06/24/gambling-in-britain-analogue-legislation-in-a-digital-age/>> accessed 25 May 2021.

²⁶ 'Get Brexit Done. Unleash Britain's Potential. The Conservative and Unionist Party Manifesto' (*The Conservative and Unionist Party*, 2019) 20 <[https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conervative 2019 Manifesto.pdf](https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conervative%202019%20Manifesto.pdf)>.

²⁷ Department for Digital Culture Media and Sport (n 1). The call closed on 31 March 2021 and is due to report later in 2021

we are tackling problem gambling in all its forms to protect children and vulnerable people. It will also help those who enjoy placing a bet to do so safely.²⁸

As I will discuss in the following section, the call for evidence incorporated two key elements of this new regime - safety and public health - into its terms of reference; indeed it now explicitly ‘recognises the essential public health elements to any discussion of gambling’.²⁹ Moreover, the call identifies new technology as being both a key issue and also a regulatory opportunity:

Technological change has undoubtedly presented new risks, particularly in the form of more intensive products, accessible at any time of day without direct human interaction, accompanied by much more advertising, and involving increasingly rapid innovation. Technology has also given new opportunities to enhance player protections, which all those with an interest in safer gambling must capitalise on.³⁰

2.2 A new regulatory strategy for ‘safer’ gambling

The regulatory strategy of the Gambling Commission has, it appears, aligned with this broader shift towards a more protective stance across roughly the same period of time. In this context, in 2018 the Gambling Commission published its regulatory strategy for 2018-2021 in which it ‘set out a vision for a gambling market that is fairer and safer for consumers’.³¹ The explicit intention of the Commission under this most recent strategy has been ‘to shift attitudes and mindsets – to disrupt old ways of thinking and behaving – in order to get better outcomes for consumers’.³² Uncontroversially, the strategy reiterates that ‘gambling legislation and public policy recognises gambling as a legitimate and mainstream leisure activity’, maintaining that it is ‘one which must be licensed and regulated’.³³ It also acknowledges that there is a balance that must be found between excessive interference and consumer protection: ‘we put consumers at the heart of our approach, which requires us to

²⁸ Department for Digital Culture Media and Sport, ‘Government Launches Review to Ensure Gambling Laws Are Fit for Digital Age (Press Release)’ (2020) <<https://www.gov.uk/government/news/government-launches-review-to-ensure-gambling-laws-are-fit-for-digital-age>> accessed 18 April 2021.

²⁹ Department for Digital Culture Media and Sport (n 1).

³⁰ *ibid* para 7.

³¹ Gambling Commission, ‘Chief Executive, Neil McArthur (Gambling Commission) Speech at ICE – International Regulators Lunch’ (2020) <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Media-resources/Speech-web-pages/ICE---International-Regulators-Lunch.aspx>> accessed 26 March 2020.

³² *ibid*.

³³ Gambling Commission, ‘Strategy 2018-2021: Making Gambling Fairer and Safer’ (2018) 5 <<https://www.gamblingcommission.gov.uk/PDF/Strategy-2018-2021.pdf>> accessed 20 March 2020.

strike a balance between the enjoyment people get from gambling and the risks that gambling can present.’³⁴ Notwithstanding these familiar statements, however, there has been a perceptible change in the discourse used to frame gambling, as well as the mechanisms used to regulate it.

2.2.1 From an ordinary leisure pursuit to a public health issue

Let’s be completely clear. Gambling related harm is a public health issue, one that policy makers are increasingly aware of.³⁵

The Gambling Commission, in its 2017 keynote speech, announced its ‘push for gambling-related harm to be recognised and resourced like other public health issues’.³⁶ Whilst still regarded as a ‘legitimate and popular leisure activity, enjoyed by many’,³⁷ the regulator appeared to be simultaneously declaring that gambling should not be treated as an ordinary leisure pursuit ‘like any other’.³⁸ Instead, gambling is now being framed in ‘public health’ terms illustrating, it seems, an increased perceived risk, not only to a minority of ‘vulnerable’ individuals, but to the whole of society. Indeed, the Commission’s public health approach broadens the remit of what is recognised as ‘gambling-related harm’ to include the effects of gambling on the families and close associates of gamblers and on the wider community:

In our view, where there is potential for risk to the whole population, not just to those who are directly involved, there is a duty upon Government and its agencies to be vigilant and minimise the effects through a public health approach.³⁹

The implications of this public-health approach for the operation of the regulatory mechanisms under this new regime will be examined in section 3 below. However, calls for the treatment of gambling as a public-health issue build upon long-standing scholarly

³⁴ Gambling Commission, ‘Business Plan 2019-2020’ (2019) 2 <<https://www.gamblingcommission.gov.uk/PDF/Business-plan-2019-2020.pdf>> accessed 26 March 2020.

³⁵ Gambling Commission, ‘Fairer and Safer Gambling - Keynote Speech’ (2017) <<https://beta.gamblingcommission.gov.uk/news/article/fairer-and-safer-gambling-keynote-speech>> accessed 12 April 2021.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20) (n 17) para 22.

³⁹ Gambling Commission, ‘Gambling-Related Harm as a Public Health Issue. Briefing Paper for Local Authorities and Local Public Health Providers’ (2018) <<http://www.gamblingcommission.gov.uk/PDF/Gambling-related-harm-as-a-public-health-issue.pdf>> accessed 12 April 2021.

criticism of understandings of ‘problem gambling’ as an individual pathology.⁴⁰ As discussed in Chapter Three, the negative effects of gambling have, since the end of the twentieth century, been largely framed using medical diagnostic screening tools. These clinical tools have been used to categorise problem or pathological gambling in terms of specific symptoms and behaviours, displayed by individual gamblers, indicating a loss of control or lack of rational thinking, as aligned with a neoliberal ideology, including: failed attempts to stop gambling; preoccupation with gambling; and gambling more than can be afforded.⁴¹

This perspective, however, only identifies a small minority of the population as having problems associated with gambling.⁴² The Gambling Commission’s prevalence studies reported that in 2019, 0.5% of adults within the general population were classified as problem gamblers,⁴³ defined as ‘gamblers who gamble with negative consequences and a possible loss of control’.⁴⁴ In addition to this, a further 0.8% of adults are classified were ‘moderate-risk’ gamblers (‘gamblers who experience a moderate level of problems leading to some negative consequences’) and 2.7% of adults were considered ‘low-risk’ gamblers (‘gamblers who experience a low level of problems with few or no identified negative consequences’).⁴⁵ These figures, taken by the Gambling Commission from Health Survey England data,⁴⁶ use both the full Problem Gambling Severity Index (PGSI) screen and the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) screening tools as measures of problem gambling.⁴⁷ Here, the use of extremely small percentages to illustrate the extent of problem gambling assists in advancing the narrative that gambling is an ordinary form of

⁴⁰ Heather Wardle and others, ‘Gambling and Public Health: We Need Policy Action to Prevent Harm’ (2019) 365 *BMJ* 1, 2.

⁴¹ Jackie Ferris and Harold Wynne, ‘The Canadian Problem Gambling Index : Final Report’ [2001] Canadian Consortium for Gambling Research; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders IV*.

⁴² Wardle and others (n 40) 2.

⁴³ Gambling Commission, ‘Gambling Participation in 2019: Behaviour, Awareness and Attitudes. Annual Report (Updated Publication)’ (2020) 5 <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Statistics-and-research/Levels-of-participation-and-problem-gambling/Gambling-participation-and-problem-gambling.aspx>> accessed 1 May 2021.

⁴⁴ *ibid* 14.

⁴⁵ *ibid*.

⁴⁶ In its report, the Gambling Commission presented both the NHS Digital Health Survey for England 2018 data (which uses the full PGSI and DSM IV screens) with its own telephone survey data (which uses a PGSI ‘mini screen’) - *ibid* 5.

⁴⁷ *ibid* 14.

entertainment for most people, harming only a small minority, a narrative which was central in legitimising the liberalisation of commercial gambling under the 2005 Act with the effect of locating any associated risk in this minority section of the population.⁴⁸

These diagnostic tools, and the prevalence studies which apply them to statistically measure the extent of the ‘problem’, have been criticised as being the ‘epistemological vehicle’⁴⁹ through which ‘pathological gambling’ is constructed and situated within a deviant minority section of the population. The ‘pathological gambler scapegoat’⁵⁰ emerges as an individual who is incapable of gambling in accordance with the normative standard of the ‘responsible gambler’, and is therefore responsible for addressing their own individual defects by seeking clinical treatment. From this “‘therapeutic gaze”, a biopolitics of the gambling population is created,⁵¹ and the problem population becomes increasingly knowable, visible and “real”.⁵² In this way, broader social problems associated with problematic gambling are transposed into individual problems to be treated through clinical intervention,⁵³ and the impact of wider structural aspects, for example harmful gambling products or environments, are obfuscated.⁵⁴

As set out above, however, there is evidence that the discourse is partially changing. Under this new public-health approach, the type of harm associated with gambling is now interpreted more broadly; adverse impacts are not limited to medical problems, but now include ‘loss of employment, debt, crime, breakdown of relationships [...] deterioration of

⁴⁸ Orford (n 7) 45–6.

⁴⁹ Martin Young, ‘Statistics, Scapegoats and Social Control: A Critique of Pathological Gambling Prevalence Research’ (2013) 21 *Addiction Research and Theory* 1, 4.

⁵⁰ *ibid* 9.

⁵¹ Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (Routledge 2003).

⁵² Gerda Reith, ‘Techno Economic Systems and Excessive Consumption: A Political Economy of “pathological” Gambling’ (2013) 64 *British Journal of Sociology* 717, 721.

⁵³ Colin S Campbell and Garry J Smith, ‘Gambling in Canada, from Vice to Disease to Responsibility: A Negotiated History’ (2003) 20 *Canadian bulletin of medical history = Bulletin canadien d’histoire de la medecine* 121; James Cosgrave, ‘Embedded Addiction: The Social Production of Gambling Knowledge and the Development of Gambling Markets’ (2010) 35 *The Canadian Journal of Sociology* 113; Gerda Reith, ‘Gambling and the Contradictions of Consumption. A Genealogy of the “Pathological” Subject’ (2007) 51 *American Behavioral Scientist* 33; Reith, ‘Techno Economic Systems and Excessive Consumption: A Political Economy of “pathological” Gambling’ (n 52).

⁵⁴ Reith, ‘Techno Economic Systems and Excessive Consumption: A Political Economy of “pathological” Gambling’ (n 52) 721.

physical and mental health [...] [and] loss of life through suicide'.⁵⁵ This approach also regards harm as extending beyond the individual, to their family, community, and wider society.⁵⁶ Pursuant to this approach, the Gambling Commission's current three-year National Strategy to Reduce Gambling Harms,⁵⁷ introduced in July 2019, cites its 'sole and critical aim' as being to 'make better and faster progress to reduce gambling harms',⁵⁸ which are expressly defined as 'the adverse impacts from gambling on the health and wellbeing of individuals, families, communities and society'.⁵⁹ It aspires to achieve this by 'taking a broader focus than simply encouraging individuals to gamble responsibly'⁶⁰ and applying a public health approach to prevent gambling harm:

this strategy sets out collectively how we can adopt a public health approach to reducing gambling harms. A public health approach to reducing gambling harms in this context is not solely – or even primarily – about health care provision. It is about adopting practices that bring benefit at the population level, as well as at the individual, in order to prevent gambling harms from occurring.⁶¹

As part of its strategic priority for 'prevention and education', the strategy sets out a range of measures to be applied at both a universal level – 'for the benefit of the whole population' – and an individual level – 'for the benefit of at-risk individuals'.⁶² I will return to these specific measures in detail, and their role under this regulatory regime, in section 3.

It also appears that the House of Lords Select Committee, in their 2020 review, sought to partially disrupt the narrative by reframing the number of problem gamblers in actual terms rather than as a percentage: 'one third of a million of us are problem gamblers',⁶³ and 'some 1.8 million gamblers [...] are at low or moderate risk. [...] What is beyond dispute is that there are a very large number of individuals afflicted by problem gambling, and a still much

⁵⁵ Gambling Commission, 'National Strategy to Reduce Gambling Harms' (2019) 6 <<https://www.begambleaware.org/media/1931/gc-national-strategy.pdf>> accessed 1 April 2021.

⁵⁶ *ibid* 4.

⁵⁷ *ibid* 10.

⁵⁸ *ibid* 4.

⁵⁹ *ibid* 6.

⁶⁰ *ibid*.

⁶¹ *ibid*.

⁶² *ibid* 10.

⁶³ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20) (n 17) 6.

larger number who are at risk of joining their ranks’.⁶⁴ These figures, taken from the same statistical evidence, serve to paint two very different pictures of the extent of problem gambling in Britain.

2.2.2 From responsible gambling to safe gambling

Linked to the critical scholarly discussion around the use of diagnostic screening tools and prevalence studies to locate risk within a minority of problem gamblers, there has also been extensive criticism of the regulatory approach to social responsibility introduced under the 2005 Act, and the associated concept of ‘responsible gambling’.

Under the social responsibility licence obligations set out in Chapter Three, operators are obliged to provide all gamblers with the information and responsible gambling tools to make rational decisions and stay in control of their gambling in accordance with the so-called ‘Reno Model’.⁶⁵ This approach has been heavily criticised for ‘downshifting responsibility’ to individuals while placing minimal emphasis on commercial operators’ practices or policies.⁶⁶

Scepticism of this approach has centred around the notion of the ‘informed gambler’; while fair and open gambling information is regarded as necessary, it is arguably not sufficient and places too great an onus on the individual gambler, who may only have a limited understanding of the product’s structural characteristics, for example.⁶⁷ Moreover, this free, informed choice is regarded as illusory, and in any event largely ineffective, as a strategy for harm prevention: gamblers ‘cannot bring an alternative product into existence through the

⁶⁴ *ibid* para 265.

⁶⁵ Alex Blaszczynski, Robert Ladouceur and Howard J Shaffer, ‘A Science-Based Framework for Responsible Gambling: The Reno Model’ (2004) 20 *Journal of Gambling Studies* 301.

⁶⁶ Linda Hancock and Garry Smith, ‘Critiquing the Reno Model I-IV International Influence on Regulators and Governments (2004–2015)— the Distorted Reality of “Responsible Gambling”’ (2017) 15 *International Journal of Mental Health and Addiction* 1151, 1155–6.

⁶⁷ David Miers, ‘Social Responsibility and Harm Minimization in Commercial Gambling in Great Britain’ (2016) 20 *Gaming Law Review and Economics* 164, 166.

power of choice, and the approach responsabilizes consumers more than it empowers them'.⁶⁸

In effect, the regulatory approach to social responsibility under the neoliberal governmentality set out in Chapter Three has the effect of assigning 'responsibility' to the individual gambler in every sense of the word:

the party who emerges as the main subject of notions of responsibility is the individual gambler. It is with the individual gambler that the tasks of seeking out information, setting limits on the amount of time and money he or she spends playing, making reasoned decisions, and controlling his or her own behaviour ultimately rest [...] those who cannot or will not act responsibly are subject to various prohibitions and restrictions, as well as a moralising agenda that persuades or cajoles individuals into "responsible" patterns of behaviour. In the case of problem gamblers, interventions range from voluntary therapy to compulsory counselling and rehabilitation [...] all of these approaches work on the individual player themselves, bypassing production side concerns such as availability or access.⁶⁹

According to this analysis, we are left with a situation where, notwithstanding the more recent 'turbo-charged'⁷⁰ competitive practices of gambling operators such as the 'dark nudges'⁷¹ discussed in Chapter Three, the regulatory framework of 'responsibility' situates the individual gambler as being *responsible* for gambling in a way which aligns with the norm of the *responsible* gambler. Where an individual shows signs of *irresponsible* or problem gambling, they are viewed as incapable of gambling in a way which is considered *responsible*, and yet they are held to be *responsible* for correcting their individual pathology by using the 'self-exclusion' tool to block their access to a gambling website and seeking clinical treatment.

Again, however, it appears that in recent years, these criticisms of 'responsible gambling' have been taken into account, at least on the surface, by the British regulator. Aligned with the movement towards a public health approach to gambling-related harm, the Gambling Commission has explicitly replaced the previously ubiquitous concept of 'responsible gambling' with that of 'safe gambling'. This deliberate change in the language used was

⁶⁸ Kate Bedford, *Bingo Capitalism: The Law and Political Economy of Everyday Gambling* (Oxford University Press 2019) 271; Christine Parker, 'Voting with Your Fork? Industrial Free-Range Eggs and the Regulatory Construction of Consumer Choice' (2013) 649 *The Annals of the American Academy of Political and Social Science* 52.

⁶⁹ Gerda Reith, 'Reflections on Responsibility' [2008] *Journal of Gambling Issues* 149, 150, 153.

⁷⁰ Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (n 24) 133.

⁷¹ Philip WS Newall, 'Dark Nudges in Gambling' (2019) 27 *Addiction Research and Theory* 65.

apparently in recognition of the concern that ‘responsible gambling’ strategies place too great an onus on the individual gambler:

Delivering a significant and sustained reduction in such harms will not be achieved by a narrow focus on ‘responsible gambling’. That is an approach that places too much of the burden on the individual to gamble responsibly and not enough responsibility on businesses, and those that oversee them, to ensure that gambling is provided in a way that maximises protections and minimises the risk of harm. That is why we have not simply rolled forward the existing National Responsible Gambling Strategy. Instead we are today launching a new National Strategy to Reduce Gambling Harms. A new strategy with a new approach - a public health approach - that focusses much more on the part that products and the environment play.⁷²

Accordingly, the Responsible Gambling Strategy Board - an advisory body to the Commission - was renamed the Advisory Body for Safer Gambling. The Responsible Gambling Week project was also rebranded ‘Safer Gambling Week’ from November 2020.⁷³

The extent to which this burden has shifted in reality is questionable and will be explored throughout the chapter; however, it is perhaps telling that the terms ‘safe’ and ‘responsible’ gambling appear to be used interchangeably on sections of the Commission’s website, for example in the ‘Safer Gambling’ area:

Safe and responsible gambling comes from an industry that takes care of its customers, customers who are empowered with the knowledge to manage their gambling and a regulator that ensures the consumer is at the heart of everything we do.⁷⁴

To illustrate this ideal standard of ‘safe gambling’ to be facilitated, the Gambling Commission sets out ‘9 ways to keep yourself safe when gambling’:

1. Feel like it’s getting too much? Talk to someone
2. Ask yourself why you are gambling
3. Monitor how often you’re gambling online
4. Keep track of how much time you’ve spent gambling
5. Limit how much you can spend
6. Give yourself a timeout
7. Need a longer break? Self-exclude from gambling firms for a minimum of 6 months

⁷² Gambling Commission, ‘Launch of the National Strategy to Reduce Gambling Harms Speech by William Moyes, Chair of Gambling Commission (Thursday 25 April 2019)’ <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Media-resources/Speech-web-pages/National-Strategy-to-Reduce-Gambling-Harms.aspx>> accessed 13 October 2020.

⁷³ ‘Responsible Gambling Week Rebranded as Safer Gambling Week’ (*iGB*, 2020) <<https://igamingbusiness.com/responsible-gambling-week-rebranded-as-safer-gambling-week/>> accessed 27 July 2020.

⁷⁴ Gambling Commission, ‘Safer Gambling’ <<https://www.gamblingcommission.gov.uk/for-the-public/Safer-gambling/Safer-gambling.aspx>> accessed 27 July 2020.

8. Read the terms and conditions
9. Make sure the website you're gambling with is licensed⁷⁵

Aside from the degree of responsibility that is still seemingly assigned to the individual to regulate their own behaviour in accordance with the standard of 'safe gambling', what this guidance demonstrates is that the 'safe' gambler is still perceived to be an informed, controlled, rational and self-reflective individual, aligning neatly with the ideal values exhibited by the neoliberal concept of *homo oeconomicus*, as set out in Chapter Three.

2.2.3 Responsible gambling operators

Under this new strategy, the regulator has sought to address the apparent imbalance in the level of responsibility assigned to industry operators, as compared with individual gamblers, by introducing additional, more interventionist regulatory obligations and a stricter approach to enforcement.

Again, as will be examined in greater detail in Section 3, online gambling operators have become increasingly responsabilised for facilitating 'safe gambling' pursuant to additional regulatory obligations. A large focus of these obligations has been on the re-purposing of the industry's technological, data-driven innovations for social responsibility: the Commission expects 'licensees to be just as focused on how they can exploit new technologies to manage risks and protect consumers, as they are on how to use them to achieve their commercial ambitions'.⁷⁶

Information currently available to help consumers understand the products and services they use, apply their rights and how to access help is difficult to find, and generic in nature. Technology has not been applied to tailor information, processes and systems to an individual's circumstances and needs. There is an imbalance between businesses and consumers as a result. Too often, the consumer bears a disproportionate share of the risk.⁷⁷

These obligations, as will be shown, go far beyond simply providing generic information to customers on how to gamble responsibly, as required under the previous regime. Now,

⁷⁵ Gambling Commission, '9 Ways to Keep Yourself Safe When Gambling' <<https://www.gamblingcommission.gov.uk/for-the-public/Safer-gambling/Consumer-guides/9-ways-to-keep-yourself-safe-when-gambling.aspx>>.

⁷⁶ Gambling Commission, 'Strategy 2018-2021: Making Gambling Fairer and Safer' (n 33) 7.

⁷⁷ *ibid* 10.

operators must use the extensive data that they have to identify customers who may be at risk of experiencing gambling-related harm, and take positive steps, using what they know, to interact with those customers and minimise that risk.⁷⁸ As part of this broadened scope of responsibility, the Commission has also strengthened its strategy on enforcement. Indeed, the Commission has been unequivocal in stating that operators failing to meet the more onerous regulatory requirements will be subject to strict enforcement action:

The first strand [of the strategy] is the implementation of a much tougher compliance and enforcement regime, intended to significantly change behaviour by operators and those who run them. A change in behaviour was much needed, frankly, standards were not good enough. That is why we have escalated the penalties over this time:

Penalty packages have got bigger

Licences have been revoked

Operators have left Great Britain [...]

Our increasing enforcement caseload demonstrates that more needs to be done and we will continue to deal firmly with people who do not meet our expectations.⁷⁹

This, it seems was not an empty threat; indeed, there has been a demonstrable increase in enforcement against licensed operators in Great Britain. The 2020 enforcement report published by the Gambling Commission disclosed that in the financial year 2019-20, over £30 million was incurred by the industry in financial penalties or regulatory settlements, together with five operating licences being suspended and 11 licences revoked.⁸⁰ The Commission has made clear that it is prepared to ‘be interventionist where necessary’,⁸¹ and has explicitly ‘implemented a much tougher compliance and enforcement regime, intended to significantly change behaviour by operators’, an approach which looks set to continue.⁸² In March 2021, online operator ‘Casumo’ was fined £6m for multiple social responsibility and anti-money laundering failings, including:

⁷⁸ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (2020) <<https://www.gamblingcommission.gov.uk/PDF/LCCP/Licence-conditions-and-codes-of-practice.pdf>> accessed 1 March 2021 SR Code 3.4.1.

⁷⁹ Gambling Commission, ‘Chief Executive, Neil McArthur (Gambling Commission) Speech at ICE – International Regulators Lunch’ (n 31).

⁸⁰ Gambling Commission, ‘Raising Standards for Consumers. Compliance and Enforcement Report 2019-20’ (2020) 4 <https://assets.ctfassets.net/j16ev64qyf6l/4iVB1r9VHD4ftt04nZ4QTX/96f99b13399eb37e654e3f3fc85a0bd3/Enforcement_report_2020.pdf> accessed 10 April 2021.

⁸¹ Gambling Commission, ‘Strategy 2018-2021: Making Gambling Fairer and Safer’ (n 33) 24.

⁸² Gambling Commission, ‘Raising Standards: Reducing the Risks from Online Gambling’ (2019) <<https://www.gamblingcommission.gov.uk/PDF/Raising-Standards-Online-gambling.pdf>> accessed 1 April 2020.

Not putting into effect policies and procedures for customer interaction where it has concerns that a customer's activity may indicate problem gambling, and this resulted in:

- One customer losing £1.1m over three years without being subject to a responsible gambling interaction [...]
- The operator not carrying out a responsible gambling interaction on a customer who lost £89,000 in a five hour period.
- The operator not carrying out a responsible gambling interaction on a customer who lost £59,000 in a 90 minute period.⁸³

The Commission, it seems, is keen to drive this message of stronger enforcement home to operators, in stating: 'This case was brought about through planned compliance activity and every operator out there should be aware that we will continue to take firm action against those who fail to raise standards.'⁸⁴ It would appear, therefore that the industry is being held increasingly accountable where it does not meet its increasing responsibilities for ensuring a safer standard of gambling.

Though the 'balance' appears to have perceptibly shifted in recent years towards protecting gamblers, it should also be noted that economic drivers continue to play a role in the regulation of gambling. Indeed the Commission indicates that a 'well-regulated market, one in which consumers can have confidence can also contribute to sustainable business and growth over the longer term'.⁸⁵ This theme of sustainability is now, it appears, central to any form of business growth and the Commission's current corporate strategy, published in April 2021, provides that a 'market in which consumers have confidence that they will be well treated and protected, is the only sustainable basis for allowing businesses to provide facilities for gambling'.⁸⁶

In the following section, I will examine the current, multi-layered framework of mechanisms now in place under this new regime to govern gambling behaviour towards a 'safe' standard. Together, these diverse mechanisms form an apparatus of security which I conceptualise as

⁸³ Gambling Commission, 'Regulatory Action against Casumo' (2021) <<https://beta.gamblingcommission.gov.uk/news/article/regulatory-action-against-casumo> > accessed 24 April 2021.

⁸⁴ *ibid.*

⁸⁵ Gambling Commission, 'Strategy 2018-2021: Making Gambling Fairer and Safer' (n 33) 4.

⁸⁶ Gambling Commission, 'Our Strategy for the next Three Years' <<https://beta.gamblingcommission.gov.uk/about-us/guide/our-strategy-for-the-next-three-years>> accessed 30 April 2021 (Foreword).

the Sustainable Gambling Model. Pursuant to this model, gamblers' behaviour is governed both directly and indirectly on aggregate and on an individual level in order to create responsible operators and a population of safe gambling subjects who 'autonomously' choose to gamble safely and at the same time contribute to the economy through a sustainable gambling industry.

3. Regulation online gambling according to the Sustainable Gambling Model

3.1 Introducing the Sustainable Gambling Model and its objectives

As alluded to throughout this part of the thesis, the underlying objective of the current mode of online gambling regulation under the Gambling Act 2005 is 'to maximise opportunity and minimise harm',⁸⁷ more recently translating to 'sustainability in gambling'.⁸⁸ I propose that the present regulatory structure in Great Britain is organised to realise this goal by producing a population of gamblers who protect themselves from harm by 'autonomously' gambling in a way which is considered 'safe', and an industry of responsible operators who intervene to correct any gamblers who are not meeting this standard of safe gambling. Accordingly, the objective is attained when the 'safe' gamblers continue to contribute sustainably to the economy by continuously circulating around the cycle within, what I term, the 'safe' zone, as illustrated in the Model below:

⁸⁷ Mark Griffiths and Richard Wood, 'Responsible Gaming and Best Practice: How Can Academics Help?' [2008] *Casino & Gaming International* 107, 107.

⁸⁸ David Aro, Laura Jakob and Sally Gainsbury, 'Use of Data Analytics for Responsible Gambling Regulatory Directives Final Report' (*Ontario Problem Gambling Research Centre (OPGRC)*, 2015) 2
<[https://www.greo.ca/Modules/EvidenceCentre/files/Aro et al\(2015\)Use_of_data_analytics_for_responsible_gambling_regulatory_directives.pdf](https://www.greo.ca/Modules/EvidenceCentre/files/Aro%20et%20al(2015)Use_of_data_analytics_for_responsible_gambling_regulatory_directives.pdf)> accessed 1 July 2020.

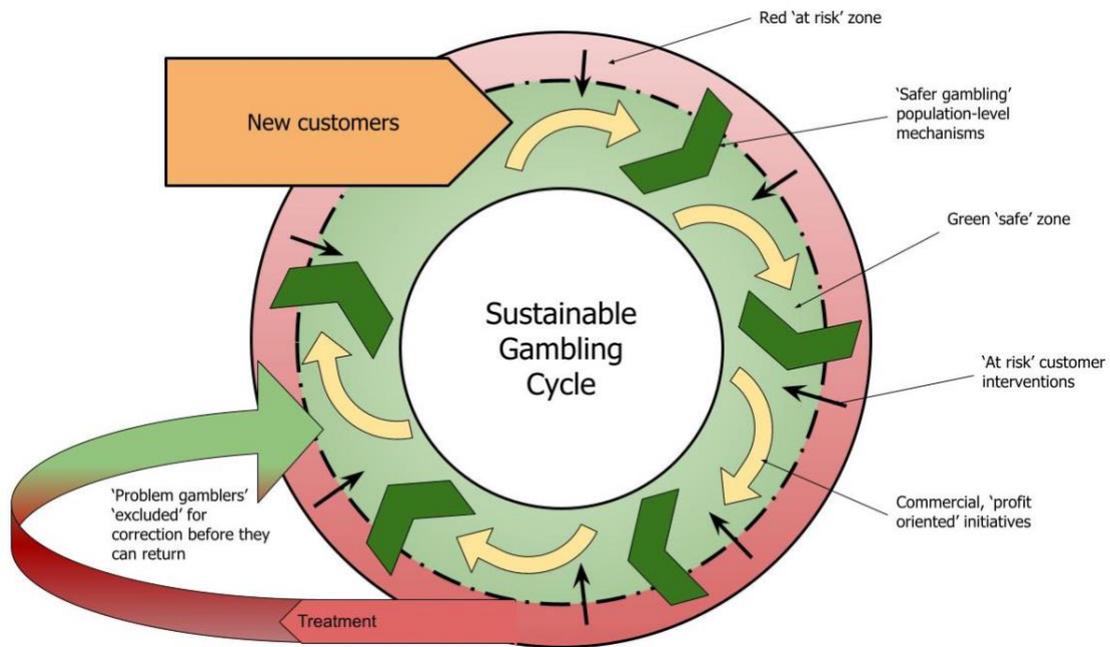


Figure 1 - Sustainable Gambling Model

The Sustainable Gambling Model, as a mode of regulation, is designed to represent the overall apparatus of security through which the conduct of gamblers is regulated in order to achieve the objective of a sustainable gambling industry populated by safe gamblers. Its mechanisms of government seek to direct the conduct of the population ensuring that gamblers continue to gamble in a ‘safe’ way, and thus remain within the ‘safe’ zone of the model. These mechanisms of government are supported by disciplinary techniques which are applied to gamblers who fall outside of the ‘safe’ zone in order to correct this deviant behaviour.

Each of the mechanisms within the model will be considered in this section. More broadly, however, the goal is achieved through ‘a collective and clear prevention plan applying the right mix of interventions [...] at both the population and individual level’, as set out in the Gambling Commission’s current National Strategy to Reduce Gambling Harms.⁸⁹ The three-year strategy, which was implemented in July 2019, cites its ‘sole and critical aim’ as being

⁸⁹ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 10.

to ‘make better and faster progress to reduce gambling harms’,⁹⁰ which are widely defined as ‘the adverse impacts from gambling on the health and wellbeing of individuals, families, communities and society’.⁹¹ It aspires to achieve this by ‘taking a broader focus than simply encouraging individuals to gamble responsibly’⁹² and applying a public health approach to prevent gambling harm:

this strategy sets out collectively how we can adopt a public health approach to reducing gambling harms. A public health approach to reducing gambling harms in this context is not solely – or even primarily – about health care provision. It is about adopting practices that bring benefit at the population level, as well as at the individual, in order to prevent gambling harms from occurring.⁹³

As part of its strategic priority for ‘prevention and education’, the Commission’s strategy sets out a range of measures to be applied at both a universal level - ‘for the benefit of the whole population’ - and an individual level - ‘for the benefit of at-risk individuals’.⁹⁴ In alignment with the regulatory strategy, GambleAware⁹⁵ (a leading charitable organisation which has an agreement with the regulator to deliver the National Strategy to Reduce Gambling Harms) also promotes a public-health approach to addressing gambling harm, and divides the response into the following three levels:

Primary prevention – universal promotion of a safer environment

Secondary prevention – selective intervention for those who may be ‘at risk’

Tertiary prevention – direct support for those with gambling disorder or for those who may be directly affected.⁹⁶

The universal measures in the strategy, which seek to govern the gambling population towards the ‘safe’ zone by promoting a safer environment, are represented in the model by the dark green arrows and will be considered below in section 3.2. The measures for the benefit of ‘at-risk individuals’, examined in section 3.3 are those represented by the black

⁹⁰ *ibid* 4.

⁹¹ *ibid* 6.

⁹² *ibid*.

⁹³ *ibid*.

⁹⁴ *ibid* 10.

⁹⁵ Regulated by the Charity Commission for England and Wales, and the Scottish Charity Regulator (OSCR), GambleAware is wholly independent and has a framework agreement with the Gambling Commission to deliver the National Strategy to Reduce Gambling Harms within the context of arrangements based on voluntary donations from the gambling industry.

⁹⁶ GambleAware, ‘Keeping People Safe from Gambling Harms. A Briefing Note’ (2020) <<https://about.gambleaware.org/media/2238/briefing-note-july-2020.pdf>> accessed 31 July 2020.

arrows which point inwards from the ‘at risk’ zone to the ‘safe’ zone. These arrows depict the interventions which aim to discipline those gamblers who are not exhibiting ‘safe gambling’ behaviour, aiming to change their behaviour so that they move from the ‘at risk’ zone to the ‘safe’ zone. Finally the tertiary prevention measures are represented at the foot of the model whereby those with a gambling disorder are subject to more medicalised disciplinary measures and are effectively removed from the model for treatment. These measures will be considered below at 3.4.

Notably, the aim of the National Strategy is to ‘reduce’ gambling harms, rather than eradicate them. As explored in Chapter Three, the ‘proportionate, risk-based approach’ of the Gambling Commission is to ‘reduce the residual risk value to an acceptable level’.⁹⁷ This infers a calculation which takes into account the economic benefits of gambling, as well as the costs of gambling related harm in order to determine the ‘acceptable level’.

Continuous circulation of gamblers around the cycle is imperative for economic reasons since, put simply, there would be no gambling economy (sustainable or otherwise) without the continued gambling activity of customers. The economic benefits of gambling which are often cited include the provision of employment (the industry employs over 106,000 people)⁹⁸ and the contribution to the UK economy as part of the leisure and entertainment industry.⁹⁹ Most significantly, the financial contribution made by the gambling industry through taxes cannot be understated: in the year 2018-19, the industry paid £3 billion to the Exchequer in gambling duties, £531 million of which came from online casino, slots and bingo sites.¹⁰⁰

⁹⁷ Gambling Commission, ‘Annual Report and Accounts 2018-19’ (2019) 49 <<https://www.gamblingcommission.gov.uk/PDF/Annual-Report1819.pdf>> accessed 20 March 2020.

⁹⁸ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20) (n 17) para 81.

⁹⁹ *ibid* paras 76–88.

¹⁰⁰ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20) (n 17) Table 4.

The gambling industry also presents social benefits, which include ‘opportunities for social engagement and increases in mental acuity’ most particularly evidenced in relation to bingo.¹⁰¹ While this benefit appears self-evident in relation to land-based bingo halls, online bingo operators are also keen to emphasise the importance of community in relation to online bingo. According to the Chief Executive of Tombola: “‘all of the games that are available on our sites involve chat communities, where people can meet up and make friends. We have even had people who have ended up getting married, having originally met on our Tombola website.’”¹⁰² Accordingly, gambling regulation is partially concerned with maximising these economic and social opportunities and operators are now permitted under the Gambling Act 2005 to ‘stimulate demand’, as explored in Chapter Three. As such, while the gambling population participates in gambling and progresses around the cycle, their conduct is also directed by commercial instruments which seek to increase participation in gambling and ensure continuous circulation for the benefit of the national economy. The commercial techniques, which were explored in Chapter Three, are represented in the model by yellow arrows.

As mentioned regularly by the Government and the regulator, a balance must be struck between increasing the benefits from gambling and minimising the harm caused, in both social and economic terms, to the population. Moreover, and as explored above, gambling-related harm is defined more widely than simply the clinical symptoms and behaviours of problem gamblers, extending beyond the individual¹⁰³ and their health issues to ‘include loss of employment, debt, crime, breakdown of relationships and deterioration of physical and mental health. At worst, gambling harm can contribute to loss of life through suicide.’¹⁰⁴ A study by the Institute for Public Policy Research, which was funded by GambleAware, sought

¹⁰¹ *ibid* para 76.

¹⁰² *ibid* para 79.

¹⁰³ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 6.

¹⁰⁴ *ibid*.

to quantify the direct cost of problem gamblers to the public purse. This was estimated, very broadly, to be between £260 million and £1.2 billion,¹⁰⁵ with such costs being associated with the following interactions between ‘problem gamblers’ and the state:

- a) Health – mental health primary care, secondary mental health services and hospital inpatient services;
- b) welfare and employment costs – jobseeker’s claims and lost labour tax receipts;
- c) Housing costs – statutory homelessness applications; and
- d) Criminal justice – incarcerations.¹⁰⁶

The regulatory framework for commercial gambling continues to seek the correct balance where these two central concerns – the economy and the well-being of the population – sustain one another in order to ultimately achieve a sustainable gambling industry. Together, the green and yellow arrows in the model represent the instruments of government which apply to the gambling population as a whole. These instruments operate by shaping gambling behaviour indirectly through the gambling environment into a form which is considered safe, ultimately seeking to ensure that gamblers continue to gamble but remain within the ‘safe’ zone. Importantly, although the arrows are deliberately shaped differently (as will be explained below), they both point in a clockwise, ‘forwards’ direction around the cycle to illustrate that the overall objective of the model is to facilitate gambling activity within the remit of what is considered safe, again emphasising the importance of continuous circulation. The objective thus is to produce a population of safe gamblers who will remain within the ‘safe zone’ and thereby contribute to the creation and maintenance of a sustainable gambling industry.

¹⁰⁵ Craig Thorley, Alfie Stirling and Edison Huynh, ‘Cards on the Table: The Costs to Government Associated with People Who Are Problem Gamblers’ (*Institute for Public Policy Research*, 2016) 3 <https://www.ippr.org/files/publications/pdf/Cards-on-the-table_Dec16.pdf> accessed 26 March 2020.

¹⁰⁶ *ibid.*

3.2 *The safe zone*

The green area of the model represents the ‘safe’ zone. This zone characterises the standard of gambling which is considered to be acceptable (and, arguably, is encouraged by virtue of the permissive regulatory scheme under the Gambling Act 2005 as explored in Chapter Three). It is larger in size than the red ‘at risk’ zone to reflect the dominant narrative which persists from the liberal regime, as explored later in this section, that gambling is not problematic for the majority of gamblers. The ‘safe’ zone is thus occupied by the majority of the gambling population, who engage in gambling behaviour which complies with the newly-branded standard of the ‘safe’ gambler: a standard which functions as the norm. The mechanisms of government, which are represented in the model by the dark green arrows, seek to guide the gambling population indirectly so that their behaviour comes to conform with this standard during the process of normalisation.

3.2.1 The norm

The norm itself is still derived from knowledge of the population and their gambling behaviour, which is obtained largely through statistical prevalence research as discussed in Chapter Three. The Commission publishes an annual gambling participation study which sets out statistics on gambling participation rates, online gambling behaviour, awareness of gambling management tools, perceptions and attitudes towards gambling and prevalence of ‘problem, moderate-risk and low-risk gambling’.¹⁰⁷ It aims to gain an in-depth understanding of British gambling participation in general, covering: how many people gamble and how often; how people gamble; what people gamble on; use of gambling management tools, and also seeks to obtain detailed information with regard specifically to online behaviour, including: devices used; location of online gambling; participation in in-play betting;

¹⁰⁷ Gambling Commission, ‘Gambling Participation in 2019: Behaviour, Awareness and Attitudes. Annual Report (Updated Publication)’ (n 43) 5.

participation in e-sports and number of accounts.¹⁰⁸ In future, it is the aim of the regulator to supplement this understanding with knowledge gained from ‘useful data on customers’ gambling activities’,¹⁰⁹ which will be stored in a central repository to enable access to anonymous datasets for research purposes.

From this research, the characteristics of the average gambler can thus be determined and, as examined in Chapter Three, the norm of the ‘responsible gambler’ emerges, as contrasted with the minority section of the population comprised of problem gamblers. In support, the dominant narrative that gambling is fun for the majority of people continues to permeate the discourse, including the Lord’s recommendations - notwithstanding their attempts to partially disrupt the narrative discussed in section 2.2.

We do not overlook that for *most people* who gamble this is a *source of enjoyment* that can foster social cohesion. We have been careful, in formulating our recommendations, to make sure that they impact on the undoubted benefits of gambling only to the extent necessary to make gambling safer for all.¹¹⁰

As discussed in section 2.2.2, however, there are signs that what is regarded as responsible gambling is changing, with the normative standard being rebranded as ‘safe gambling’. Arguably the characteristics of ‘safe gambling’ outlined on the Gambling Commission’s website remain closely aligned with the standard of *homo oeconomicus*: a rational, informed gambler who ‘read[s] the terms and conditions’, keeps track of ‘when, how much and what [they] have been gambling on over time’ to ‘make well-informed decisions about what to do next’.¹¹¹ However, the parameters of this responsible autonomy seem to be closing in, with a comparatively more risk-averse attitude to gambling being promoted. The Commission, for example, directly encourages the use of gambling management tools, recommending that customers ‘limit how much [they] can spend’ or ‘give [themselves] a timeout’,¹¹² and customers must now be offered the option of setting a financial limit when they create an

¹⁰⁸ *ibid* 2.

¹⁰⁹ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 24.

¹¹⁰ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20) (n 17) 7 (Emphasis added).

¹¹¹ Gambling Commission, ‘9 Ways to Keep Yourself Safe When Gambling’ (n 75).

¹¹² *ibid*.

account.¹¹³ This more risk-averse approach is illustrated by a research report entitled ‘An Integrated Approach to Safer Gambling’;¹¹⁴ based on a project commissioned by GambleAware.¹¹⁵ The report advocates a preventative approach where safer gambling is regarded as the ‘default way to play’,¹¹⁶ likened to the use of a seatbelt:

When we get in a car, we put on a seatbelt without a second thought. To drive without one would feel like a conscious decision to put ourselves at increased risk. Wearing a seatbelt is a normalised part of driving. Everyone does it, even if they think they are a good driver. When we gamble, we should do so safely, by default and without effort. Engaging with safer gambling messages, tools and interventions should be a seamless part of the gambling experience, as easy and natural as putting on a seatbelt. It should be easy to play safely, and uncomfortable to opt not to.¹¹⁷

Accordingly, as explored below in section 3.2.3, operators are now encouraged to create a gambling environment which facilitates a ‘safer’ standard of gambling as the norm to ‘reinforce expectations that the customer will engage with safe behaviours, tools [and] norms’.¹¹⁸ One operator participating in the project commented on their ‘safer gambling’ campaign as follows: ‘#Sharethejoy is our way of inviting our players to embrace the fun they have on site but to also make time for all the other things in their life that bring them joy’.¹¹⁹ At the same time, therefore, and somewhat paradoxically, gambling continues to be presented as a fun activity; indeed this element of the dominant discourse must be maintained and is imperative to the success of the regulatory model, as I will now explore.

3.2.2 Ensuring continuous circulation: commercial instruments

In order to ensure continuous circulation and benefit to the economy, the activity of gambling itself has to be ‘normalised, specifically through the deployment of the notion of recreation,

¹¹³ Gambling Commission, ‘Remote Gambling and Software Technical Standards’ (2021) <https://assets.ctfassets.net/j16ev64qyf6l/1KdHqgC205yZOnZbKKhjoz/a18598c19de61ef1f515c4dc98fe7d06/Remote_gambling_and_software_technical_standards__Feb21_.pdf> accessed 3 May 2021 Requirement 12.

¹¹⁴ Revealing Reality, ‘An Integrated Approach To Safer Gambling. A Roadmap for How the Industry Can Prevent Gambling Harm’ (*GambleAware*, 2021) <https://www.begambleaware.org/sites/default/files/2021-03/Revealing_Reality_Integrated_Safer_Gambling_Final.pdf> accessed 5 May 2021.

¹¹⁵ Based on a brief developed by the Responsible Gambling Strategy Board with input from the Gambling Commission

¹¹⁶ Revealing Reality (n 114) 16.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ *ibid.* 47.

where gambling is recast as a desirable leisure pursuit'.¹²⁰ As discussed in the preceding chapters, societal attitudes towards gambling today are markedly different from those which have prevailed in the past. Commercial gambling is no longer considered a deviant, immoral activity; it is participated in by almost half of the adults in this country at least once per month.¹²¹ Gambling is so often described as 'deeply engrained in British life' and a 'source of fun for most',¹²² as reinforced by the notorious 'When the Fun Stops, Stop'¹²³ responsible gambling campaign. This widely accepted discourse is essential for growth and innovation in the commercial provision of gambling, which the state submits must be subject to regulation - 'but not too much since it would be no job of governments to interfere with people's fun'.¹²⁴ Operators are thus permitted to employ increasingly sophisticated strategies to make their offering more competitive and encourage gamblers to spend greater amounts of time and money gambling with them. The commercial instruments employed by the industry, which encourage players to essentially engage in an increased level of gambling activity, are represented in the model by the yellow arrows. As discussed in the preceding chapter, gambling operators employ a variety of techniques to direct player behaviour in order to increase the amount of time and money which gamblers spend on their website and these 'dark nudges'¹²⁵ have become more sophisticated and pervasive as a result of advances in data-driven technologies. These commercial practices are supported by the broader gambling environment in the form of products designed to keep players in 'the zone',¹²⁶ and ubiquitous gambling advertising, particularly linked with sport, which forms part of the wider societal normalisation of gambling as a legitimate leisure pursuit. This narrative, which is present

¹²⁰ Young (n 49) 7.

¹²¹ 47% of adults gambled in the last 4 weeks - Gambling Commission, 'Gambling Participation in 2019: Behaviour, Awareness and Attitudes. Annual Report (Updated Publication)' (n 43) 3.

¹²² Gambling Commission, 'Chief Executive, Neith McArthur (Gambling Commission) Speech' (*GambleAware Conference*, 2018) <<https://www.gamblingcommission.gov.uk/PDF/Neil-GambleAware-speech-final.pdf>> accessed 31 July 2019.

¹²³ Considered in further detail below.

¹²⁴ Orford (n 7) 45.

¹²⁵ Newall (n 71).

¹²⁶ Natasha Dow Schüll, *Addiction by Design : Machine Gambling in Las Vegas* (Princeton University Press 2012).

throughout industry discourse (including the campaigns discussed below that seek to encourage ‘responsible’, or now ‘safe’ gambling) is necessary to satisfy the economic objective of continuous circulation and ensure a sustainable source of revenue.

The commercial measures are incorporated into the overall sustainable gambling apparatus to facilitate participation in gambling, thereby generating revenue and ensuring the continued circulation of the gambling economy. These yellow arrows are intentionally shaped in an upwards, as well as clockwise, direction in the model, with the arrowhead pointing towards the boundary between the ‘safe and ‘at risk’ zones, to illustrate that these techniques arguably increase the possibility of players engaging in gambling behaviour which is not considered to be in line with the ‘safe gambler’ norm, and thus passing into the red ‘at risk’ zone. Indeed it appears that this characteristic is now being recognised by the Commission, which has more recently announced ‘a package of strict measures to strengthen protections and controls for those who gamble through online slot games’,¹²⁷ including a permanent ban on: features that speed up play or give the illusion of control; and ‘losses disguised as wins’, as well as the introduction of limits on spin speeds. Moreover, in October 2020 the Commission introduced new rules ‘to stamp out irresponsible VIP customer practices’ requiring additional risk assessments to be carried out in order to ensure that ‘spending is affordable and sustainable’ before an operator makes a customer a VIP.¹²⁸ These new stricter measures, and their implications for the rationality of the present regime, are examined in section 4 of this chapter.

Finally, in the model, the commercial instrument arrows are only present within the green ‘safe’ zone since operators are expected by the regulator to cease any efforts to encourage

¹²⁷ Gambling Commission, ‘Gambling Commission Announces Package of Changes Which Make Online Games Safer by Design’ (2021) <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/gambling-commission-announces-package-of-changes-which-make-online-games-safer-by-design>> accessed 22 April 2021.

¹²⁸ Gambling Commission, ‘High Value Customers: Industry Guidance (September 2020)’ <https://assets.ctfassets.net/j16ev64qyf6l/4TVcLLR9ymZoEKr5fC4JCQ/3c22f256c91eb8452c35a37ca723d5f6/Guidance_to_operators_on_high_value_customers.pdf> accessed 13 October 2020.

gambling by players who have self-excluded,¹²⁹ as well as those who are displaying indicators that they may be ‘at risk’ of gambling-related harm (as I will come on to in section 3.3).¹³⁰ Of course, this is not possible in relation to the more widely applicable instruments which seek to normalise gambling at a societal level. Thus, mechanisms such as widely present advertising and the so-called ‘gamblification of sport’¹³¹ will continue to have an influence on behaviour and attitudes of all gamblers, including those most ‘at risk’ of problem gambling, serving to underline the widespread concerns raised as to the negative impact of pervasive, unavoidable advertising, particularly on ‘children and vulnerable people’.¹³²

By contrast, the dark green arrows, which represent ‘safe gambling’ (‘SG’) instruments of government, span both the ‘safe’ zone and the ‘at risk’ zone, to reflect that their purpose is to guide the conduct of the whole gambling population, including - if not especially - those who are ‘at risk’ of problem gambling.

3.2.3 ‘Safe Gambling’ (‘SG’) instruments of government

Whilst gamblers are being encouraged to participate in gambling and continue around the cycle by commercial strategies, their behaviour is also shaped indirectly by mechanisms of government which aim to facilitate ‘safer gambling’ (‘SG instruments’). These SG instruments, represented by the dark green arrows in the model, attempt to encourage gamblers to make ‘safe’ choices and thus conduct their gambling in line with the norm: the safe gambler. In this way, gamblers will remain within the ‘safe’ zone and continue to play a productive role in the gambling economy.

¹²⁹ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 78) SR Code 3.4.1.

¹³⁰ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ para 3.9 <<https://www.gamblingcommission.gov.uk/PDF/Customer-Interaction-Formal-Guidance-Remote-July-2019.pdf>> accessed 3 March 2021.

¹³¹ Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20) (n 17) para 497.

¹³² Gambling Related Harm All Party Parliamentary Group (n 14) 12.

This forms part of the process of normalisation which aims to direct the conduct of the gambling population towards the norm, reducing the prevalence of outliers (being the minority of problem gamblers). In this process, gamblers are governed from a distance through environmental factors to encourage the type of behaviour exhibited by the ‘safe gambler’: controlled gambling based on rational, informed decision-making and the uptake of gambling management tools by default, like wearing a seatbelt. There are a number of ways in which the gambling environment is set up to effect this method of government, as will now be explored.

The ‘prevention plan’, which is contained with the National Strategy to Reduce Gambling Harms highlights the ‘universal measures’ to be taken ‘for the benefit of the whole population’: ‘at the universal level, gambling businesses are required to offer safer gambling information to customers and a range of preventative tools to limit time or money spent or to take time-outs from gambling’.¹³³ As outlined in Chapter Three, operators have a number of obligations pursuant to the Licence Conditions and Codes of Practice (‘LCCP’)¹³⁴ and the associated Remote Gambling and Software Technical Standards (‘RTS’)¹³⁵ which relate to the way in which online gambling services must be offered. In general, operators are required to ‘promote socially responsible gambling’¹³⁶ through their policies and procedures. This requirement explicitly includes the provision of ‘readily available’ information on ‘how to gamble responsibly’ and how to seek help or advice in relation to problem gambling, which must be directed to all customers, not only those who ‘may be “problem gamblers”’.¹³⁷ Operators most commonly comply with this condition by providing a dedicated ‘responsible

¹³³ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 10.

¹³⁴ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 78).

¹³⁵ Gambling Commission, ‘Remote Gambling and Software Technical Standards’ (n 113).

¹³⁶ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 78) SR Code 3.1.1.

¹³⁷ *ibid* SR Code 3.3.1.

gambling’ page on their website for customers to navigate to.¹³⁸ The information must also give details of the ‘gambling management tools’¹³⁹ that licensees are under a regulatory obligation to provide to ‘help individuals monitor or control their gambling’.¹⁴⁰ Thus, gamblers are not only educated on how to gamble safely in line with the norm, they are also provided with the tools to achieve this artificially. All of these facilities must be easily accessible for customers to employ should they choose to do so, and are designed to give players the opportunity to ‘stay in control’ of their own gambling, for example by ‘sticking to their personal budgets’.¹⁴¹ These social responsibility requirements have been a familiar feature of the regulatory regime since its inception under the 2005 Act.

In recent years, aligned with the regulatory shift towards ‘safety’, operators have had to take more positive steps to facilitate the required standard of gambling. For example, the setting up of a financial limit must also be actively encouraged by operators as part of the website architecture: ‘customers must be given the opportunity to set a limit as part of the registration process (or at the point at which the customer makes the first deposit or payment)’, though this additional obligation does not as yet apply to any of the other mechanisms.¹⁴² In addition, the Gambling Commission is seeking to develop, through research, an ‘understanding of how consumers use these tools and how to increase take-up’, though this is ‘still at an early stage’.¹⁴³ One particular area of research in this regard is the use of insights from gambling data to increase the effectiveness of these SG techniques of government, to ‘move faster and go further to have a positive and significant impact on reducing the harms that gambling can cause’.¹⁴⁴ A priority under the strategy which is being pursued in this regard is the creation of

¹³⁸ . See, for example: Paddy Power, ‘Safer betting & gaming’ <https://responsiblegaming.paddypower.com/> accessed 15 July 2020; bet365, ‘Making sure everyone gambles responsibly’ <https://responsiblegambling.bet365.com/en> accessed 15 July 2020; SkyBet, ‘Responsible Gambling’ accessed 15 July 2020 <https://support.skybet.com/s/article/Keeping-Gambling-Fun>

¹³⁹ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 10.

¹⁴⁰ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 78) SR Code 3.3.1.

¹⁴¹ Gambling Commission, ‘Remote Gambling and Software Technical Standards’ (n 113) Requirement 12.

¹⁴² *ibid* Requirement 12.

¹⁴³ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 11.

¹⁴⁴ *ibid* 4.

a central data repository to provide researchers with access to anonymous datasets of gambling behavioural data.¹⁴⁵ Prior to the implementation of the National Strategy, and since at least 2017, the Commission has supported research projects, primarily commissioned by GambleAware, which utilise gambling transactional data from operators to 'understand how products, environments and characteristics vary – and importantly, identify those more associated with harmful play'.¹⁴⁶ This research has demonstrated that players who are at risk of developing a gambling problem can be identified through analysis of their transactional data; a finding which led to the incorporation of a licence condition requiring operators to utilise gambling data to identify and interact with customers who may be at risk of gambling related harm.¹⁴⁷ This significant requirement will be considered in detail below at 3.3.

More broadly, however, research has also focused on obtaining behavioural insights from online gambling data to understand the behavioural influences which are relevant throughout the online gambling 'player journey',¹⁴⁸ in order to reduce levels of 'risky play' in online environments. Approaches which are currently being researched include designing websites in a way which reduces 'friction' in accessing gambling management tools to increase uptake,¹⁴⁹ adding friction when depositing funds or placing bets,¹⁵⁰ responsible gambling messaging which incorporates 'social norm feedback',¹⁵¹ and creating opportunities for self-reflection through pop-ups encouraging self-appraisal.¹⁵² Moreover, it is suggested that 'the

¹⁴⁵ *ibid* 24.

¹⁴⁶ Gambling Commission, 'Gambling Commission Calls for Industry to Collaborate on New Research to Prevent Harm' (2018) <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/gambling-commission-calls-for-industry-to-collaborate-on-new-research-to-prevent-harm>> accessed 15 July 2020.

¹⁴⁷ Gambling Commission, 'Licence Conditions and Codes of Practice (October 2020)' (n 78) SR Code 3.4.1.

¹⁴⁸ The Behavioural Insights Team in partnership with GambleAware, 'Can Behavioural Insights Be Used to Reduce Risky Play in Online Environments?' (2018) 3–4 <begambleaware.org/media/1869/gambleaware-phase-iii-report_updated-v1.pdf>.

¹⁴⁹ *ibid* 5.

¹⁵⁰ *ibid* 57; Elisabeth Costa and David Halpern, 'The Behavioural Science of Online Harm and Manipulation, and What to Do about It' (*The Behavioural Insights Team*, 2019) 82–15 <<https://www.bi.team/publications/the-behavioural-science-of-online-harm-and-manipulation-and-what-to-do-about-it/>>.

¹⁵¹ Noah J Goldstein, Robert B Cialdini and Vlaslas Griskevicius, 'A Room with a Viewpoint: Using Social Norms to Motivate Environmental Conservation in Hotels' (2008) 35 *The Journal of Consumer Research* 472; Loredana Marchica and Jeffrey Derevensky, 'Examining Personalized Feedback Interventions for Gambling Disorders: A Systematic Review' (2016) 5 *Journal of Behavioral Addictions* 1; The Behavioural Insights Team in partnership with GambleAware (n 148) 59.

¹⁵² The Behavioural Insights Team in partnership with GambleAware (n 148) 59–60.

choice architecture of an operator’s website’ could be adjusted ‘at key touchpoints along the user journey’, such as when depositing money or placing a bet, to increase friction and incorporate ‘nudge’ techniques which encourage the player to gamble in a safe way.¹⁵³

The ‘EROGamb Project’, which is funded jointly by GambleAware and Bournemouth University, is an additional ongoing¹⁵⁴ research initiative concerned with the use of online gambling data to ‘empower people who gamble with a contextual and accurate understanding of their gambling, whilst increasing their control over their gambling patterns’.¹⁵⁵ The project is in the process of developing an app platform which accesses player data in order to facilitate more informed decision-making through real-time persuasive information systems, with a focus on the gambling population (as well as personalised staged interventions for those who players who are identified as at-risk),¹⁵⁶ and seeks to establish and utilise information relating to ‘normatively acceptable’ gambling behaviour, as well as individual gambling patterns, to ‘empower’ gamblers by increasing their level of control.¹⁵⁷ Aligned to this, Bournemouth University are also solely funding a project focused on the design of online gambling sites and apps in order to ‘facilitate responsible gambling’, and to make it easier to ‘host interventions and persuasive interactions seamlessly without adversely affecting the player experience’, again highlighting the dual purpose at the centre of the model.¹⁵⁸

¹⁵³ *ibid* 73.

¹⁵⁴ The project is due for completion in Summer 2022.

¹⁵⁵ ‘Safer Gambling App – EROGamb 2.0’ (*GambleAware*) <<https://www.begambleaware.org/professionals/project/safer-gambling-app-erogamb-20>> accessed 10 May 2021; Bournemouth University, ‘Responsible Gambling Projects’ <<https://www.bournemouth.ac.uk/research/projects/responsible-gambling-projects>> accessed 1 May 2021.

¹⁵⁶ George Drosatos and others, ‘Empowering Responsible Online Gambling by Real-Time Persuasive Information Systems’, *Proceedings - International Conference on Research Challenges in Information Science (RCIS)* (2018).

¹⁵⁷ ‘Safer Gambling App – EROGamb 2.0’ (n 155).

¹⁵⁸ Bournemouth University (n 155).

In the industry, bodies such as the Senet Group¹⁵⁹ have conducted ‘behaviour change research’ to advise operators on ‘how to support safer gambling’,¹⁶⁰ which recommended the following steps that should be taken to better enable the gamblers themselves to stay in control of their gambling:

Consistently endorse a clear and aspirational picture of controlled gambling as a desired behaviour

Motivate customers to maintain control while they gamble and make sure not to undermine these motivations

Provide tools that make it easier to maintain control while gambling and make sure not to undermine the strategies people develop for themselves.¹⁶¹

The objective of these steps is to ‘reinforce people’s motivation to remain in control’,¹⁶² which it states can be achieved through a variety of measures, including embedding messages which promote the benefits of controlled gambling and providing additional tools which allow gamblers to set and stay within their own boundaries.¹⁶³ In general, therefore, there does appear to be a noticeable shift towards a reduction in gambling-related harm at the level of the population, rather than solely targeting disordered individuals. Accordingly, there is a greater emphasis on creating a safer gambling environment ‘for all’, as demonstrated by the inclusion in regulatory guidance of the requirement to ‘actively promote and encourage the use of gambling management tools to all customers’,¹⁶⁴ as well as the explicit incorporation of ‘universal measures’ for gambling harm reduction within the National Strategy prevention plan.¹⁶⁵

¹⁵⁹ Taken over in 2020 by the Betting and Gaming Council, an industry standards body for betting and gaming - ‘BGC TAKES OVER SENET SAFER GAMBLING REMIT’ (*Betting and Gaming Council*, 2020) <<https://bettingandgamingcouncil.com/news/senet-group-bgc>> accessed 1 March 2021.

¹⁶⁰ Revealing Reality and The Senet Group, ‘In Control: How to Support Safer Gambling Using a Behaviour Change Approach’ (2019) 5 <<https://www.revealingreality.co.uk/wp-content/uploads/2019/02/RR-SENET-IN-CONTROL-report-DIGITAL.pdf>> accessed 10 November 2020.

¹⁶¹ *ibid* 57.

¹⁶² *ibid* 58.

¹⁶³ *ibid*.

¹⁶⁴ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) 4 (Emphasis added).

¹⁶⁵ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 10.

This shift towards ‘responsible gambling for all players’ was signalled within policy documentation published in 2017, prior to the current National Strategy.¹⁶⁶ In the report commissioned collaboratively by the Industry Group for Responsible Gambling, the Senet Group,¹⁶⁷ GambleAware, the Gambling Commission and the Responsible Gambling Strategy Board,¹⁶⁸ ‘a new vision for Responsible Gambling (RG) within the industry’ is outlined.¹⁶⁹ This new vision sees the focus transitioning from ‘only “problem gamblers” to responsible gambling for all players’.¹⁷⁰ Accordingly, in its recommendations for good practice, the report provides that operators should 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’.¹⁷¹

The universal measures also include ‘population-based safer gambling campaigns’¹⁷² in order to influence the attitudes of the population in support of the above instruments. These campaigns educate the general public on what it means to be a ‘responsible gambler’, embedding the values of self-control and rational, informed gambling within the population at large. The recent GambleAware ‘multi-layered, public-health based campaign’, Bet Regret, seeks to promote self-reflection through the 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’.¹⁷³ The campaign is designed

¹⁶⁶ The project was originally instigated by the Industry Group for Responsible Gambling (IGRG), GambleAware agreed to IGRG’s request to commission the projects, which was supported by the Gambling Commission and the Responsible Gambling Strategy Board (now the Advisory Board for Safer Gambling ‘AGSB’), providing both funding and independent governance under the charity’s Research Committee. The Senet Group part-funded the Social Messaging project.

¹⁶⁷ Now incorporated into the Betting and Gaming Council.

¹⁶⁸ Now the Advisory Board for Safer Gambling (AGSB).

¹⁶⁹ Becky Rowe and others, ‘Responsible Gambling: Collaborative Innovation Identifying Good Practice and Inspiring Change’ (*Revealing Reality*, 2017) 6.

¹⁷⁰ *ibid* 20.

¹⁷¹ *ibid* 12.

¹⁷² Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 10.regret

¹⁷³ GambleAware, ‘Press Release - Largest National Safer Gambling Campaign, “Bet Regret”, Launches During Man Utd Vs Liverpool Game’ (*GambleAware*, 2019) <<https://about.gambleaware.org/media/1907/2019-02-21-bet-regret.pdf>> accessed 31 July 2019.

to ‘encourage moderation’ by ‘driv[ing] self-reflection, as well as help[ing] friends and partners recognise the warning signs’.¹⁷⁴ Accordingly, certain ‘responsible’ behaviours are promoted, with the expectation that gamblers internalise these normative standards, monitoring and modifying their own behaviour to comply.¹⁷⁵

At the same time as promoting ‘safe’ gambling behaviour, the campaigns assist in the normalisation of commercial gambling by furthering the familiar narrative (as set out above) which depicts gambling as a fun leisure pursuit in which the majority of the population partake without issue. The now omnipresent, award-winning ‘When the FUN Stops, Stop’¹⁷⁶ campaign by the Senet Group¹⁷⁷ was introduced in 2015 to encourage greater self-awareness and prompt more responsible gambling behaviour, although empirical research conducted by Warwick University found that the labelling failed to achieve this aim.¹⁷⁸ The Senet Group disputed such findings, however, claiming that the campaign:

generated substantial awareness of the link between negative emotional states and problem gambling, giving young men an accessible phrase to challenge each other’s behaviour in a way that has now passed into popular culture. Discouraging all betting was never its purpose. Instead it aims to get gamblers to pause and reflect, in much the same way as the Bet Regret messaging.¹⁷⁹

Whether or not the ‘When the FUN Stops, Stop’ messaging promotes ‘responsible gambling’ behaviour, it is incontrovertible that the campaign describes the activity of gambling as ‘fun’. Indeed, the word ‘fun’ is capitalised and printed in a noticeably larger font than the rest of the wording.¹⁸⁰ That being the case, the campaign forms part of the overall discourse that presents gambling as a leisure activity which is a ‘source of fun for most’,¹⁸¹ as is essential to ensure the continuous circulation of the gambling economy. Moreover, this extract neatly

¹⁷⁴ *ibid.*

¹⁷⁵ 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, 173.

¹⁷⁶ The Senet Group, ‘Senet Group Wins Marketing Society Excellence Award for When the Fun Stops Stop’ (2018) <<https://web.archive.org/web/20191021204854/http://senetgroup.org.uk/senet-group-wins-marketing-society-excellence-award-for-when-the-fun-stops-stop-campaign/>> accessed 1 May 2021.

¹⁷⁷ Taken over in 2020 by the Betting and Gaming Council, an industry standards body for betting and gaming - ‘BGC TAKES OVER SENET SAFER GAMBLING REMIT’ (n 159).

¹⁷⁸ Philip WS Newall and others, ‘Testing a Gambling Warning Label’s Effect on Behavior’ (2019) August 3 *PsyArXiv*.

¹⁷⁹ Rob Davies, ‘Warning Message on Gambling Ads Does Little to Stop Betting – Study’ *The Guardian* (2019).

¹⁸⁰ Newall and others (n 178) 3.

¹⁸¹ Gambling Commission, ‘Chief Executive, Neith McArthur (Gambling Commission) Speech’ (n 122).

summarises the objective of a liberal governmentality: the internalisation of a particular normative standard and the government of one's own conduct, as well as the conduct of others, in accordance with this standard.

As discussed, the regulation of gambling is concerned with both the wellbeing of the population and the maximisation of economic benefits. The green SR instrument arrows in the model are designed to illustrate this dual purpose: they span both zones but point to the centre of the 'safe' zone, which is where gambling conduct is directed towards. At the same time, however, the arrows point clockwise around the cycle to indicate the importance of continuous but 'safe', sustainable circulation. The interconnectedness of the two values was highlighted by Revealing Reality as part of their collaborative research:

Throughout the project we were struck by the commitment of operators across all sectors to ensure that gambling remains an enjoyable leisure activity for all. [...] Many held the view that promoting 'healthy gambling' was not only good for players, but also – in the long term – would be good for business (retaining customers throughout long 'playing careers', and helping re-cast gambling establishments as positive work/leisure environments, accessible to a wider range of people).¹⁸²

Accordingly, it is essential that gamblers are 'free' to participate in a competitive, commercial gambling industry; indeed, it is promoted as an enjoyable leisure pursuit. At the same time, gambling behaviour is shaped indirectly through instruments of government within the gambling environment and wider discourse, which seek to influence the attitudes and choices of the gambling population to embed the normative values represented by the 'safe gambler'. If successful, gamblers will facilitate their own gambling in alignment with this norm, and thus 'autonomously' remain within the 'safe zone', creating a population of safe gamblers who play a productive role in a sustainable gambling industry. If a gambler fails to meet this standard, their behaviour will fall outside of the 'safe' zone into the 'at risk' zone and a more direct intervention will be required to correct this 'deviant' behaviour.

¹⁸² Rowe and others (n 169) 19.

3.3 The 'at risk' zone

The red, outer area of the model, which occupies a smaller space than the 'safe' zone, represents the 'at risk' zone. This zone is populated by the minority of the population who are classified as 'at risk' of, or exhibiting, gambling which is considered to be problematic; that is, those gamblers who are gambling in a way which does not comply with the 'safe gambler' norm. Because these players are no longer (potentially or actually) playing a productive role in the sustainable gambling cycle, and are at risk of harming themselves or others, their behaviour must be corrected directly, with the aim that they are returned to the 'safe' zone to continue gambling in a safe way 'autonomously'.

The National Strategy, and associated GambleAware response, provide that 'selective measures of intervention' should be applied for the benefit of 'at-risk individuals'.¹⁸³ These measures include identification of 'at-risk individuals' by gambling businesses, customer interaction, financial gambling blocks, and at the most extreme, self-exclusion.¹⁸⁴

As discussed in Chapter Three, online gambling involves the continuous and automated collection of player data, which presents an opportunity to gain an in-depth understanding of gambling behaviour; a task that the industry and regulator regularly regard as more challenging¹⁸⁵ in apparently anonymous, land-based environments.¹⁸⁶ As such, the regulator has, in the last few years, shown an increasing interest in utilising this data to increase the knowledge it holds as regards gambling participation and characteristics of problematic gambling. The 'Remote Gambling Research' project, a programme commissioned by GambleAware and supported by the Gambling Commission, was commenced in 2016 with the aim of:

¹⁸³ Gambling Commission, 'National Strategy to Reduce Gambling Harms' (n 55) 10; GambleAware (n 96) 3.

¹⁸⁴ Gambling Commission, 'National Strategy to Reduce Gambling Harms' (n 55) 10–11.

¹⁸⁵ Aro, Jakob and Gainsbury (n 88) 2.

¹⁸⁶ Although in some land-based settings, such as bingo, this can often be facilitated in arguably a more meaningful way - Bedford (n 68) 295–7.

explor[ing] the potential usefulness of industry-held data and behavioural analytics in the remote gambling sector, primarily to indicate markers and patterns of harmful or risky behaviour and then to recommend practical applications of harm minimisation. Importantly, there is an emphasis on how harmful and risky behaviour can be mitigated, not just if it can be identified and mitigated.¹⁸⁷

The project built upon existing research conducted over the past decade which established that it was possible for algorithms to reliably identify patterns of ‘problematic’ internet gambling behaviour.¹⁸⁸ One issue with the pre-existing research, however was its reliance on ‘self-exclusion’ as a proxy for problem gambling, since customers often self-exclude for reasons other than problem gambling, and many problem gamblers do not self-exclude at all.¹⁸⁹ Instead, the Remote Gambling Research project employed a PGSI screen survey, supplemented by demographic and behavioural criteria (such as the use of multiple online accounts), which was analysed in conjunction with industry held gambling data on the respondents’ account and gambling behaviour in order to determine markers of harm, providing ‘an analytical exploration of markers of problem gambling in a remote environment’.¹⁹⁰ Thus, the medicalised ‘problem gambling’ characteristics outlined in Chapter Three were translated, and as a consequence, embedded into the equivalent, practical predictive ‘markers’ of problem gambling in an online gambling environment, enabling the identification of gamblers who are not abiding by the neoliberal, normative standards with regard to productivity, rationality and self-control in relation to their gambling.

¹⁸⁷ GambleAware, PricewaterhouseCoopers LLP and Responsible Gambling Council, ‘Remote Gambling Research: Interim Report of Phase II’ (2017) 4 <https://about.gambleaware.org/media/1549/gamble-aware_remote-gambling-research_phase-2_pwc-report_august-2017-final.pdf> accessed 11 July 2018.

¹⁸⁸ 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; 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; Simo Dragicovic, 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; 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); 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; 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.

¹⁸⁹ Responsible Gambling Trust, PricewaterhouseCoopers LLP and Responsible Gambling Council, ‘Remote Gambling Research - Interim Report on Phase I’ (2016) 13 <https://www.begambleaware.org/sites/default/files/2020-12/rgt-remote-gambling-research_pwc-phase-i_final.pdf> accessed 25 January 2018; GambleAware, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 187) 2.

¹⁹⁰ GambleAware, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 187) 2,6,9,10.

The project identified 22 predictive markers, including behavioural indicators¹⁹¹ relating to bet volume, frequency, volatility and value, and demographic markers¹⁹² such as age, gender, employment status, occupation and marital status in order to more effectively enable the identification of players whose current behaviour places them within the ‘at risk’ zone. Furthermore, the National Strategy states that ‘the Commission is driving further progress [...] on how to develop further means of identifying these individuals and applying measures to prevent harm’¹⁹³ and is prioritising steps towards the creation of a central data repository to ‘accelerate the pace of research’¹⁹⁴ whilst adding to existing knowledge on ‘patterns of play’, which will be used to ‘inform action’.¹⁹⁵ It therefore appears that online gambling data will come to play an increasingly crucial role in contributing to the knowledge required to establish norms and facilitate normalisation.

In the model, the boundary between the ‘safe gambling’ and the ‘at risk’ zones is represented by a dashed line to reflect that gamblers can move between the two zones during the course of their gambling ‘lifecycle’. Although there is evidence to suggest that certain demographics render individuals at greater risk of developing a gambling problem (for example, ‘in particular, young unmarried men opening a new account, that are not employed but currently looking for work’)¹⁹⁶ it is possible for any gambler to begin gambling in a way which is considered to be ‘at risk’, causing them to migrate from the ‘safe gambling’ zone to the ‘at risk’ zone. Indeed, in order to identify the ‘largest population of problem gamblers as possible’, the GambleAware project designed and advocated ‘an approach which would create a model assigning a “risk score” for customers. This risk score rates *any* players’

¹⁹¹ *ibid* 48–51.

¹⁹² *ibid* 45–7.

¹⁹³ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 11.

¹⁹⁴ *ibid* 24.

¹⁹⁵ *ibid* 25.

¹⁹⁶ GambleAware, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 187) 47.

likelihood to be a problem gambler'.¹⁹⁷ As stated by the Gambling Commission in its guidance to operators:

Even if you think your sector is “lower risk”, all forms of gambling present risks and you should understand the prevalence of gambling harms for the type of gambling products you offer and implement appropriate processes. [...] Actively promote and encourage the use of gambling management tools to all customers, and in particular where you have carried out a customer interaction.¹⁹⁸

The incorporation of those who are classed as ‘at risk’ of problem gambling in prevalence studies and in the National Strategy for prevention of gambling harm ‘has the effect of drawing much larger numbers of people in the therapeutic “gaze” of the screens’ since ‘the status of risk is established through endorsement of only one or two diagnostic criteria’.¹⁹⁹ Therefore, even though the numbers of those defined as ‘at risk’ are statistically low, it is necessary and legitimate to surveil the whole of the gambling population for signs of risky behaviour.

As well as migrating from the ‘safe gambling’ zone to the ‘at risk’ zone, it is of course possible - and indeed the objective of the measures of ‘selective intervention for those who may be “at risk”’²⁰⁰ - for gamblers to move back into the ‘safe’ zone once their problematic behaviour has been corrected.

3.3.1 Disciplining individual ‘at risk’ gamblers

In reference to the ‘measures of intervention for the benefit of at-risk individuals’, the National Strategy refers to regulatory obligations which require gambling businesses to identify ‘at-risk individuals’.²⁰¹ The key requirement in this regard is Social Responsibility

¹⁹⁷ *ibid* 14 (Emphasis added).

¹⁹⁸ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) 4.

¹⁹⁹ Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (n 24) 138.

²⁰⁰ GambleAware (n 96) 3.

²⁰¹ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 6–7.

(‘SR’) code provision 3.4.1 of the Licence Conditions and Codes of Practice (‘LCCP’)²⁰²

which states that:

1. Licensees must interact with customers in a way which minimises the risk of customers experiencing harms associated with gambling. This must include:
 - a) identifying customers who may be at risk of or experiencing harms associated with gambling.
 - b) interacting with customers who may be at risk of or experiencing harms associated with gambling.
 - c) understanding the impact of the interaction on the customer, and the effectiveness of the Licensee’s actions and approach.
2. Licensees must take into account the Commission’s guidance on customer interaction.

Accordingly, gambling operators are obliged as a condition of their operating licence to identify players who are, or may be at risk of, experiencing gambling-related harm and then interact with that player ‘in a way which minimises the risk of customers experiencing harms associated with gambling’.²⁰³ Moreover, licensees must take the Commission’s guidance on customer interaction into account and ‘be able to demonstrate how they have done so’.²⁰⁴

While the licence condition itself does not specifically set out how this should be carried out, the Gambling Commission has made clear that it expects operators to utilise technological advances in relation to data processing for the purposes of player protection: ‘We want to see you harnessing the same innovation and tools that are used to determine customer profitability, to drive customer protection’.²⁰⁵ Moreover, the formal guidance provides that operators should ‘draw on all available sources of data to give a comprehensive picture of the customer’s gambling’, including ‘in-play real time monitoring to identify harmful behaviour as it occurs’, ‘daily reports on activity’ and open source information.²⁰⁶ In short, operators

²⁰² Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 78) SR Code 3.4.1.

²⁰³ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) para 1.1.

²⁰⁴ *ibid* para 1.4.

²⁰⁵ Gambling Commission, ‘Social Responsibility’ <<https://www.gamblingcommission.gov.uk/for-gambling-businesses/Compliance/General-compliance/Social-responsibility/Social-responsibility.aspx>> accessed 29 July 2020.

²⁰⁶ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) para 2.15.

must ‘demonstrate they know their customers and use what they know to protect them.’²⁰⁷

Thus, online gamblers are subject to continuous surveillance to ensure that their gambling behaviour does not fall outside of the norm of the ‘safe gambler’.

Whilst there is no evidence to suggest that the surveillance itself operates to coerce gamblers into a certain form of behaviour²⁰⁸ (as per the Foucauldian disciplinary model) - indeed it is likely that most gamblers are unaware that their behaviour is being monitored²⁰⁹ - it is nonetheless an essential element of the disciplinary process to identify gamblers whose behaviour is in need of correction. In addition, through the ongoing surveillance, operators are able to generate detailed knowledge of each gambler, which can then be used to enable ‘quicker and better-informed decisions’ regarding when and how to deliver a corrective intervention.²¹⁰ Once an individual has been identified as falling outside of the norm, the normalising judgement will be applied. The regulatory guidance emphasises the importance of interacting ‘early and quickly [to] help stop or prevent the harm worsening’.²¹¹ This interaction, represented in the model by the black arrows pointing from the ‘at risk’ zone to the ‘safe gambling’ zone, serves as a corrective intervention in order to discipline the ‘at risk’ gambler and coach them on how to practise safe gambling.

The interaction itself may take a number of forms depending on the level of risk presented by the customer: ‘for example above certain thresholds one might be confident enough to freeze and close an account straight away. Lower risk scores might merit a recommendation to use a protection tool such as time or spend limits’.²¹² The Gambling Commission, in its prevalence

²⁰⁷ 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.

²⁰⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Allen Lane 1977).

²⁰⁹ Relatedly on this point, only 20% of gamblers reported having read the terms and conditions (and so it could perhaps be assumed that a similar percentage will have read an operator’s privacy policy) - Gambling Commission, ‘Gambling Participation in 2019: Behaviour, Awareness and Attitudes. Annual Report (Updated Publication)’ (n 43) 26.

²¹⁰ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) para 2.2.

²¹¹ *ibid* para 3.1.

²¹² GambleAware, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 187) 14.

research, views problem gambling on a risk scale, which is measured using the PGSI and DSM-IV screens:

Non problem gambler (gamble with no negative consequences)

Low-risk gambler (experience a low level of problems with few or no identified negative consequences)

Moderate-risk gambler (experience a moderate level of problems leading to some negative consequences)

Problem gambler (gamble with negative consequences and possible loss of control).²¹³

Low and moderate risk gamblers are classified as ‘at risk’, implying that they may ‘progress up the scale to a “problem gambler”’,²¹⁴ and it is these gamblers who are the target of precautionary disciplinary interventions to prevent this from happening. The form of the interaction may vary depending on the knowledge held about that customer, as well as the relevant circumstances such as ‘what information you want to give to that customer’, ‘how urgent it is to make contact’ and ‘the outcome you want to achieve’.²¹⁵ Importantly, however, impact forms part of the regulatory requirement under SR Code 3.4.1 against which operators will be judged:

In this context, by impact we mean a change in the customer’s gambling activity which could be attributed to the interaction. An important part of this is whether the customer has understood the information or advice you gave.²¹⁶

In this regard, the guidance stresses that ‘interactions should have an outcome’ and operators are required to find out what impact, if any, their interaction has had.²¹⁷ It is therefore expected that the disciplinary coaching by the operator has some corrective effect, which must be subsequently evaluated:

Not every customer who receives an interaction will require active follow up, but many will. In these cases, follow up activity should be proportionate to the severity or extent of the harm being displayed. [...] Some ways to work out that impact include:

²¹³ Gambling Commission, ‘Gambling Participation in 2019: Behaviour, Awareness and Attitudes. Annual Report (Updated Publication)’ (n 43) 42.

²¹⁴ Gambling Commission, ‘Problem Gambling vs Gambling-Related Harms’ <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Statistics-and-research/Problem-gambling-vs-gambling-related-Harms.aspx>> accessed 31 July 2020.

²¹⁵ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) para 3.4.

²¹⁶ *ibid* para 4.2.

²¹⁷ *ibid* para 3.3.

- a) Did the customer start using gambling management tools; independently or following your advice?
- b) If you are tracking links from emails, did the customer click through to safer gambling information?
- c) Was there a positive change in behaviour? Did the customer's gambling seem to change after the interaction?
- d) You could also follow up and ask the customer whether they found the interaction helpful or not.
- e) Is there a need for further or follow up action?²¹⁸

While the guidance does not prescribe the form that a particular interaction itself should take, it does set out a number of suggestions for offering help and support, which are largely centred around increasing the gambler's awareness of their own behaviour, for example:

Encourage customers to think about their own gambling. Their responses will help you work out the right kind of help and support to offer. [...]

A self-assessment questionnaire can help customers think about their own gambling. Their shared responses, alongside their gambling behaviour, can help both you and the customer work out the right kind of help and support they may need. [...]

Feedback from consumers shows that they often respond better to being informed about their behaviour and why, rather than being "told" what to do. [...]

You will need to direct some customers to information about safer gambling, and/or suggest suitable gambling management tools. You might need to signpost them to sources of help and specialist support from organisations who deal with advice and treatment for problem gambling.²¹⁹

This guidance, therefore, illustrates again that the objective is for gamblers to internalise, and ultimately govern their own conduct in accordance with a certain standard, as discussed above. The role of the operator in this process is to identify gamblers who have not done so and apply a corrective intervention. To further increase the effectiveness of these interventions and therefore maximise impact, the regulatory guidance recommends using the knowledge that operators have of their customers from the gambling data to tailor customer interactions. A study by Auer and Griffiths, cited by the regulatory guidance, has, for example, shown that personalising feedback with enhanced 'normative' and 'self-appraisal' content can improve the impact it has on customers.²²⁰ This study found that 'enhanced' messaging, which included social norm feedback, 'information to correct erroneous beliefs

²¹⁸ *ibid* para 4.5.

²¹⁹ *ibid* 3.9-3.14.

²²⁰ *ibid* 3.7; 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.

about gambling’ and advice to take a break, was more effective at changing player behaviour than generic messaging.²²¹ Moreover, the guidance also promotes the use of ‘messages that get customers to think and make their own decisions based on the information they are given’, which ‘can be more effective than messages that seem to be “nagging”’.²²²

This approach is supported by industry policy documentation, which is also cited in the formal guidance,²²³ advocating 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.²²⁴ The first and second pillars encourage a user-centred approach by ‘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’.²²⁵ The report also 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)’.²²⁶

This emphasis on promoting self-awareness and informed decision-making aligns clearly with the normative values exhibited by the ‘safe’ or ‘responsible’ gambler, who is rational, informed and in control of their own gambling. The object of this process of normalisation is therefore to make the individual aware that their behaviour is not conforming with normative standards and coach them on how they can become a ‘safe gambler’, whilst providing the gambling management tools to artificially facilitate this standard and support the correction. Thus, players are encouraged to change not only their current behaviour, but ultimately their

²²¹ Auer and Griffiths (n 220); The Behavioural Insights Team in partnership with GambleAware (n 148) 111.

²²² Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) para 3.7.

²²³ *ibid* 14.

²²⁴ Rowe and others (n 169) 13.

²²⁵ *ibid*.

²²⁶ *ibid* 15.

attitudes and beliefs as regards the correct way to gamble, with the ultimate expectation that gamblers internalise these standards and autonomously modify their own future gambling behaviour accordingly.²²⁷ It is at this point that the gambler will return to - and be more likely to remain within - the 'safe' zone, resuming their role as a productive member of the gambling population.

3.4 'Self-excluding' and treating problem gamblers

Of course, there will be gamblers who are identified as displaying too high a risk, or continue to be identified as displaying deviant behaviour despite disciplinary attempts to correct it. For these more 'abnormal' gamblers, who appear to be incapable of conforming with the standard 'autonomously', the guidance prescribes more preventative measures: 'for some customers, and particularly if the behaviour continues to cause concern, you may need to take a more proactive approach. In some cases, you may need to take action for the customer, such as setting limits or refusing service by closing their account'.²²⁸

Towards the later stages of the sustainable gambling cycle, the 'at risk' zone gradually becomes a darker red. This reflects the increasing level of risk associated with gamblers who are still in the 'at risk' zone at this stage of the cycle. Where a gambler is identified as displaying too great a risk or continues to be identified as displaying deviant behaviour, notwithstanding an operator's disciplinary interventions to correct it, the guidance advocates 'a more proactive approach' including 'refusing service by closing their account'.²²⁹ These deviant gamblers, who are not capable of conforming with the 'safe gambler' norm will be

²²⁷ Miller and others (n 175) 173.

²²⁸ Gambling Commission, 'Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1' (n 130) para 3.14.

²²⁹ *ibid.*

classified as ‘problem gamblers’, defined as ‘gamblers who gamble with negative consequences and possible loss of control’.²³⁰

Since problem gamblers have demonstrated that they are not capable of exercising responsible autonomy in accordance with the normative standard of controlled, rational gambling based on informed decision-making, they will not play a productive role within a sustainable gambling economy. They are, in fact, viewed as the opposite of productive: a direct cost to the public purse estimated to be between £260 million and £1.2 billion.²³¹ Accordingly, more severe disciplinary techniques are applied to prevent them from gambling, for example, closing the account²³² or imposing ‘self-exclusion’,²³³ and the gambler will be directed to seek ‘treatment and support’ in order to correct their gambling problem through a clinical form of treatment.²³⁴

The specific support and treatment of problem gamblers falls outside the scope of this sustainable gambling model, which is instead focused on the first priority of the National Strategy to Reduce Gambling Harms: ‘prevention and education’.²³⁵ Nonetheless, the fact that problem gamblers are prevented from gambling and encouraged to seek ‘formal treatment or support’²³⁶ is a central component to the overall apparatus of government. Where a gambler has ‘entered a self-exclusion agreement’²³⁷ (or paradoxically had a ‘self-exclusion agreement’ imposed upon them), the operator must refuse service for the whole period of that self-exclusion (which can last anywhere between six months and at least five years)²³⁸ and

²³⁰ Gambling Commission, ‘Gambling Participation in 2019: Behaviour, Awareness and Attitudes. Annual Report (Updated Publication)’ (n 43) 42; Gambling Commission, ‘Problem Gambling vs Gambling-Related Harms’ (n 214).

²³¹ . Cards on the table: The Costs to Government Associated with People who are Problem Gamblers, IPPR, p 3

²³² Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) para 3.14.

²³³ From interview D – Customer service/responsible gambling.

²³⁴ Gambling Commission, ‘National Strategy to Reduce Gambling Harms’ (n 55) 6–7.

²³⁵ *ibid.*

²³⁶ *ibid* 14.

²³⁷ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 78) SR Code 3.5.3.

²³⁸ *ibid* Ordinary Code 3.5.4.

cease all individual marketing communications.²³⁹ Moreover, the self-exclusion agreement must automatically remain in place for a minimum of seven years after the initial chosen period expires, unless the ‘customer takes positive action to gamble again’.²⁴⁰ In other words, the operator can’t take direct steps to encourage the individual back to gamble after their self-exclusion has expired; it must be the customer’s choice and still they won’t be granted immediate access. After ‘taking positive action to gamble again’, a 24 hour ‘cooling off period’ is applied to ensure that they have fully thought through their decision to return to gambling:

the Commission does not require the licensee to carry out any particular assessment or make any judgement as to whether the previously self-excluded individual should again be permitted access to gambling. The requirement to take positive action in person or over the phone is purely to a) check that the customer has considered the decision to access gambling again and allow them to consider the implications; and b) implement the one day cooling-off period and explain why this has been put in place.²⁴¹

Thus, a gambler will effectively only be permitted to resume gambling within the sustainable gambling cycle where they demonstrate that their deviant behaviour has been corrected and they are in control of their gambling (rather than acting compulsively). In other words, only once they show that they are capable of acting in conformance with the ‘safe gambler’ standard, by waiting 24 hours, will they be permitted by the operator to return to the safe zone.

Under this regime, the form that the ‘useful and valuable member of society’ takes correlates with the attributes of the now so-called ‘safe gambler’. This person is characterised as a perhaps slightly more risk averse version of the ‘responsible gambler’ in that they continue to demonstrate all of the neoliberal features of rationality and self-control in their gambling, but are also more strongly encouraged to utilise the management tools and, for instance, set a deposit limit as part of the sign up process. Moreover, as will be examined in section 4.4, if their behaviour does stray outside of this norm it should be picked up by the operator, who

²³⁹ *ibid* SR Code 3.5.3.

²⁴⁰ *ibid* Ordinary code 3.4.4 (5).

²⁴¹ *ibid* Ordinary code 3.4.4 (7).

will take steps to help the gambler correct their behaviour and return to the ‘safe gambling zone’.

3.5 New customers and Covid-19

The sustainable gambling model, as discussed, seeks to shape the existing gambling population into ‘safe gamblers’ who assume responsibility for autonomously circulating around the cycle, identifying problematic individuals for corrective intervention. There will, of course, in addition, be new customers entering the cycle, whose impact will now be considered.

When a customer creates their first account with an online gambling provider they will enter the cycle at the top of the model. In general, all that will be known about this gambler is the information that they have provided in the registration form data (which may or may not be accurate). The operator has a regulatory obligation at this stage to verify the player’s age and identity before that customer is permitted to gamble²⁴² as part of what the Commission calls an ‘on-boarding’ process.²⁴³ As well as checking the customer’s identity and ensuring that they are old enough to gamble, this verification is also used to check whether the player has self-excluded from gambling, in which case they must be prevented from registering an account.²⁴⁴ This verification process is usually completed almost instantaneously using identity verification databases; however, it may need to be carried out manually (through the

²⁴² *ibid* Ordinary code 17.1.1.

²⁴³ Gambling Commission, ‘Covid-19 - A Message from Neil McArthur to Online Gambling Operators’ (2020) <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/covid-19-a-message-from-neil-mcarthur-to-online-gambling-operators>> accessed 1 July 2020.

²⁴⁴ . A multi-operator self-exclusion facility is being developed for online gambling companies, which is called GAMSTOP. The first phase of this facility includes a number of online gambling operators (but not all). Gamblers can sign up to GAMSTOP voluntarily should they wish to self-exclude on a national basis. Ultimately all online gambling websites will be included in this scheme. Gambling Commission, ‘Self-Exclusion’ <<https://www.gamblingcommission.gov.uk/for-the-public/Safer-gambling/Self-exclusion.aspx>> accessed 10 May 2021.

customer sending in identity documentation) in the event that the automated check is inconclusive.²⁴⁵

The ‘new customers’ arrow in the model is represented by the colour amber to indicate the gambler’s perceived risk status at this point. As a new customer, the gambler’s level of risk is unknown given the operator’s ‘lack of knowledge of that individual’s play and spend patterns’.²⁴⁶ To reflect this, the Commission now expects operators to set further ‘thresholds and triggers’ specifically for new customers.²⁴⁷ This is in addition to those which are required in general under SR Code 3.4.1 ‘to track vulnerability’ of all existing customers and identify ‘customers who may be at risk of or are experiencing harms associated with gambling’,²⁴⁸ which perhaps indicates that new customers are considered to represent a higher risk than the majority of existing customers²⁴⁹ in the ‘safe’ zone, as a consequence of this lack of data, and therefore knowledge, on their gambling behaviour.

Notably, this additional expectation did not form part of the formal guidance which was originally introduced to accompany the requirement under SR Code 3.4.1 in July 2019. The Commission published additional formal guidance in response to the COVID-19 pandemic and associated lockdown measures in 2020, which incorporated this expectation in relation to new customers. In general, the pandemic has increased the perceived level of risk associated with online gambling, arising from a number of prevalent factors during the lockdown, including: the temporary closure of land-based gambling facilities; the lack of live sports and

²⁴⁵ Gambling Commission, ‘Why ID Verification Is Important’ <<https://www.gamblingcommission.gov.uk/for-the-public/Safer-gambling/Why-ID-verification-is-important.aspx>> accessed 1 July 2020.

²⁴⁶ Gambling Commission, ‘Customer Interaction – Additional Formal Guidance for Remote Operators during COVID-19 Outbreak’ <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Statistics-and-research/Covid-19-research/Customer-interaction---Additional-formal-guidance-for-remote-operators-during-COVID-19-outbreak.aspx>> accessed 1 July 2020.

²⁴⁷ *ibid.*

²⁴⁸ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 78) SR Code 3.4.1.

²⁴⁹ Excluding, of course, those customers who have otherwise been identified as ‘vulnerable’.

associated betting opportunities; reduced income; increased levels of uncertainty around employment; and increased isolation from support networks.²⁵⁰

During this time, a number of observations were made by the Commission, which were perceived as increasing the levels of risk. Most particularly, the regulator saw ‘a market shift to online products such as slots’, which have faster gambling cycles and are therefore considered to be riskier due to the potential for high levels of spend in a short space of time.²⁵¹ It is, therefore, perhaps understandable that the Commission decided to incorporate a more precautionary approach with regard to customers who are new to online gambling during this period. It remains to be seen whether this more protective stance as regards new customers will remain in place after the COVID-19 pandemic has ceased. It seems unlikely, however, that the Commission will be relaxing measures any time soon, particularly given the general shift towards ‘safety’ and protection observed within the regulatory landscape more broadly, and the recommendations of the parliamentary reviews considered above.

4. A new governmental rationality?

It appears that under this new regime of government, we have moved beyond the point of Foucault’s governmentalisation of the state, as he left it in 1979, to an increasingly plural and complex form of government with multiple diverse, and often seemingly paradoxical rationalities. On the one hand, mechanisms of regulation are becoming more diffuse and facilitative of a particular type of gambling, yet in many ways we seem to be returning to a progressively disciplinary and stringent approach to government of gambling conduct.²⁵²

This present form of government has, I argue, been advanced significantly by developments in data-driven technologies and the general societal shift to living more of our lives online.

²⁵⁰ Gambling Commission, ‘Risks Arising from Covid-19 and Our Response’ <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Statistics-and-research/Covid-19-research/Risks-arising-from-Covid-19-and-our-response.aspx>> accessed 1 July 2020.

²⁵¹ *ibid.*

²⁵² Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, SAGE Publications 2010) 200.

Through the collection and analysis of big data, it becomes possible to ‘know’ individual gamblers in more intimate detail and observe patterns of gambling behaviour displayed at an aggregate population level through the ‘online footprint’ left behind in the form of transactional data. This is also supplemented by ‘open source’ data from sources such as social media and open banking. Moreover, this technology provides the ability to shape general gambling conduct indirectly through online architecture and forms of ‘nudging’ to encourage a safer form of gambling, as well as identify those deviant - or potentially deviant - individuals, to administer a more direct, corrective intervention. It is, indeed, often contended, particularly by the industry²⁵³ but also by the regulator,²⁵⁴ that online gambling presents enhanced opportunities for ensuring safer forms of gambling available in view of the ability to ‘know your customer’ and effectively influence or control their behaviour. Overall, these data-driven technological advances have enabled a closer form of regulation of gambling conduct through the medium of online gambling.²⁵⁵

As I will explore in this section, some elements of the governmental rationality underlying this regime appear to still be founded within liberal forms of governmentality, as introduced in Chapter Three; seeking to encourage and facilitate a particular type of responsible autonomy by online gamblers. At the same time, however, there has been an explicit widening of responsibility to encompass the gambling industry, which seems to be expected to assume a more ‘pastoral’ role and take proactive steps to keep their customers ‘safe’. This ‘social responsibility’ is quite direct, and there seems to be no doubt that operators will be subject to disciplinary action from the regulator if they are found not to meet these expectations. I will now consider each of these styles of government before examining how they fit together for the production of a sustainable gambling industry.

²⁵³ ‘UK Gambling Review’ (n 3) 19.

²⁵⁴ Gambling Commission, ‘Raising Standards : Reducing the Risks from Online Gambling’ (n 82).

²⁵⁵ Schüll (n 126) 144; Bedford (n 68) 275.

4.1 Liberal governmentalities

The governmental regime seems to have quite clearly moved on from the more '*laissez faire*'-style approach to regulating the industry discussed in Chapter Three. No longer are the 'natural' laws of the free market and competition²⁵⁶ perceived as being the most effective method of regulating gamblers' behaviour; indeed operators now have a number of more onerous responsibilities for ensuring customer safety. Nonetheless, there are still 'liberal' dimensions which permeate this mode of government and seek to facilitate a certain type of responsible autonomy by gamblers (even if the parameters of this autonomy are becoming increasingly narrow).

4.1.1 Advanced liberal government

One further type of liberal governmentality which builds upon Foucault's work is Mitchell Dean's 'advanced liberal government'.²⁵⁷ Advanced liberal practices are a multiplicity of 'practices of liberty' insofar as they continue to work *through* 'freedom' as conceptualised in Chapter Three, as a corollary of government, seeking to activate or empower forms of liberty, agency or choice in particular groups of individuals (including, for instance, consumers). At the same time, these practices set norms and standards to monitor and measure performance of this type of agency against. In this way, and as will be explored throughout this section, 'the position of "freedom" in advanced liberal regimes of government is exceedingly ambivalent: it can act as a principle of philosophical critique of government while at the same time being an artefact of multiple practices of government'.²⁵⁸ This explains how advanced liberal forms of rule can also include measures which are paternalistic or coercive for those

²⁵⁶ Department for Culture Media and Sport and Gambling Review Body, *Gambling Review Body Report (The Budd Report)*. (Cm 5206, 2001) para 1.17.

²⁵⁷ Dean (n 252) 192.

²⁵⁸ *ibid* 193.

not deemed to be displaying the capacity of what is considered a prudential or responsible form of autonomy.²⁵⁹

One feature of advanced liberalism, which seems to be present in the current mode of regulation applicable to gambling, is termed by Dean (borrowing from O'Malley)²⁶⁰ 'new prudentialism'. This involves the responsabilisation of individuals, households and communities for their own risk minimisation.²⁶¹ What is specific about this 'new prudentialism' is that what is calculated is not dangerousness of an activity in itself (i.e. gambling), it is the associated risks, which are seen to extend across the whole of the population, rather than being located within a specific group (for example, a minority of problem gamblers). Moreover, this understanding does not divide populations using a single division between a risky group and a non-risky group. Here, risk is conceived as a fluid continuum where the whole of the population is attributed a level of risk, whether that is 'high risk' or 'low risk'. Sub-populations will inevitably be targeted for intervention where they display characteristics which are deemed to be more 'high risk'; however, the primary locus of risk is the entire population,²⁶² in this case of gamblers.

Although the language of the National Strategy to Reduce Gambling Harms²⁶³ seems to delimitate discrete measures for the population which are separate from 'at risk' groups, when this is examined in operation - as illustrated in the Sustainable Gambling Model - the fluid threshold of risk can be observed. The model sets out the distinction between gamblers who are currently showing signs of being 'at risk' of gambling harm and those which are in the 'safe' zone and therefore not currently presenting as 'at risk'. Those gamblers who have moved across the threshold to the 'at risk' zone are identified for certain measures of

²⁵⁹ *ibid* 266.

²⁶⁰ Pat O' Malley, 'Risk, Power and Crime Prevention' (1992) 21 *Economy and society* 252.

²⁶¹ Dean (n 252) 194.

²⁶² *ibid* 195.

²⁶³ Gambling Commission, 'National Strategy to Reduce Gambling Harms' (n 55).

correction. This threshold, however, is a permeable one. In theory, therefore any gambler from within the population could at any time become classified as ‘at risk’. The Gambling Commission has in recent times referred to this potential for fluctuation using a concept it calls ‘hot state play’:

Gambling attitudes, as with most attitudes tend to shift slowly but actual behaviour varies highly over time. Gambling behaviour results from shifting from a cold state of consideration into a hot state of play ... [In a hot state] behaviour can fluctuate or stay constant depending on baseline attitudes. The graph below is an illustrative example of how a person’s attitude (cold state consideration) and behaviour (hot state play) can fluctuate over time. The blue line represents a person’s underlying attitude to gambling which moves relatively slowly, however when attitudes to gambling soften, behaviour changes can be more easily triggered. The pink line indicates the much greater variation that occurs in hot state play over time.²⁶⁴

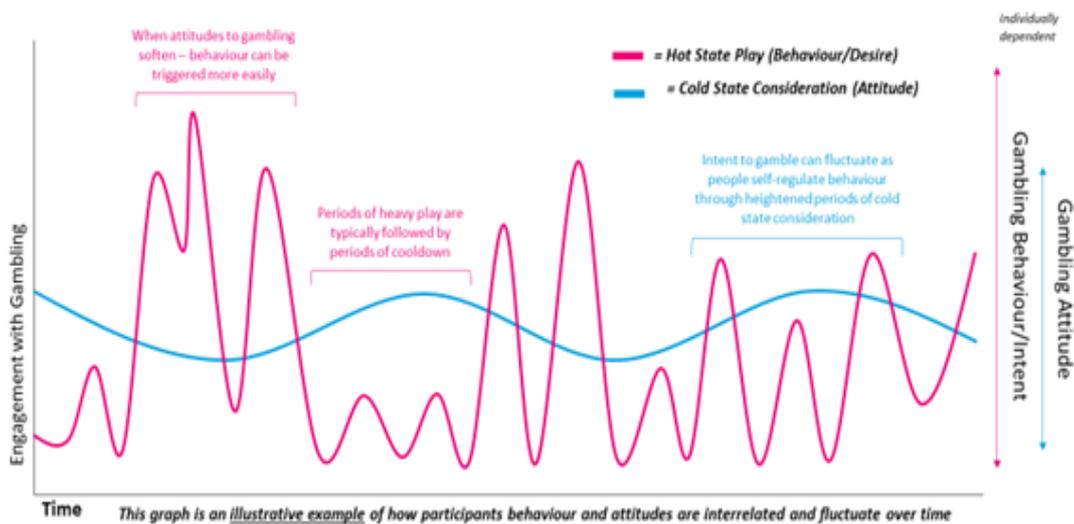


Figure 2 - Gambling Commission illustration of fluctuation in risk²⁶⁵

This extract seems to illustrate the fluctuating nature of the risk across all gamblers and in this way, the Sustainable Gambling Model can be seen to represent a continuum of risk where those in the safe zone could perhaps as easily be described as ‘not currently at risk’. This is also the case for new customers (about whom there is a lack of data and therefore knowledge) who are deemed by the regulator to present a higher level of risk because their actual risk level is at that point unknown. Accordingly, operators are expected to implement

²⁶⁴ Gambling Commission, ‘Blog: Gambling Attitudes Shift Slowly but Behaviour Varies over Time’ <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/Statistics-and-research/Research/Blog-Gambling-attitudes-shift-slowly-but-behaviour-varies.aspx>> accessed 10 April 2021.

²⁶⁵ *ibid.*

additional measures to monitor and manage the behaviour of these new customers. This fluid approach to risk necessitates and therefore legitimates the regulatory requirement for continuous surveillance (as enabled by advances in online, data-driven technologies) of all online gamblers for signs of harm, as per SR Code 3.4.1, bringing the whole of the gambling population under the ‘therapeutic gaze’²⁶⁶ in case an ordinarily safe gambler starts to display concerning behaviour requiring correction.

4.1.2 Neoliberal government

In addition to an ‘advanced liberal’ rationality, the neoliberal programme of liberal governmentality discussed in Chapter Three can still be seen to permeate this current mode of government, notwithstanding the explicit steps taken to widen the scope of responsibility. The normative standard of the ‘safe gambler’ demonstrates values which, as discussed, closely align with *homo oeconomicus*: a rational, informed individual who exercises self-control when they participate in the market. Safe gamblers ‘read the terms and conditions... to ensure [they] understand exactly what [they] are gambling on... [to] make an informed decision’.²⁶⁷ They ‘think carefully about [their] motivations to gamble’, monitor the time spent gambling, keeping track of ‘exactly when, how much and what [they] have been gambling on over time’ in order to ‘make well-informed decisions about what to do next’.²⁶⁸ If they are concerned about their gambling, the safe gambler will take positive steps to manage it by using the responsible gambling tools provided to: ‘limit how much you can spend’; ‘give yourself a timeout’ or ‘ask to be self-excluded’.²⁶⁹ The neoliberal values are still, therefore, very much present in the ideal standard of gambling which the governmental mechanisms work to facilitate.

²⁶⁶ Reith, ‘Gambling and the Contradictions of Consumption. A Genealogy of the “Pathological” Subject’ (n 53) 46.

²⁶⁷ Gambling Commission, ‘9 Ways to Keep Yourself Safe When Gambling’ (n 75).

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

Additionally the medical screening tools, which measure and identify problematic gambling in the form of symptoms and behaviours representing the inverse of the normative standard, still play an integral role within this regime of government. The screens continue to be used within prevalence research,²⁷⁰ measuring the extent to which problematic gambling exists within the population, as defined in those clinical terms. Perhaps more fundamentally in terms of the practical regulation of gambling, the screens are also now encoded within the design of the algorithms used to predict and identify ‘at risk’ gambling,²⁷¹ thereby identifying individual gamblers who are not conforming to the neoliberal standards of the ‘safe gambler’ and require correction, coaching and discipline so that the individual ultimately corrects their own behaviour and returns to the ‘safe zone’. As a result, these devices continually perpetuate the narrative of the ‘responsible gambler’ that the Gambling Commission appears to be trying to move away from.

Algorithms, in particular, can be viewed as more than apparently objective, neutral lines of mathematical code; indeed, such claims of objectivity and accuracy are often misleading.²⁷² Instead, algorithms should be understood as having been modelled and produced within a particular social context, with specific objectives framed around certain dominant values and assumptions²⁷³ such as the neoliberal values embodied by the ‘safe gambler’. In addition, they have arguably become an integral part of the social world, being ‘woven into practices and outcomes’, which are then fed back into the algorithmic design.²⁷⁴ As such, the algorithms used to predict ‘at risk’ gambling are also a form of ‘social process’ which takes on a ‘constitutive or performative role’ in the ‘ordering of the social world’,²⁷⁵ continually

²⁷⁰ Gambling Commission, ‘Problem Gambling vs Gambling-Related Harms’ (n 214).

²⁷¹ Responsible Gambling Trust, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 189); GambleAware, PricewaterhouseCoopers LLP and Responsible Gambling Council (n 187).

²⁷² 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, 666.

²⁷³ David Beer, ‘The Social Power of Algorithms’ (2017) 20 *Information Communication and Society* 1, 3–4.

²⁷⁴ *ibid* 4.

²⁷⁵ *ibid* 3.

perpetuating and embedding the narrative of individual responsibility for gambling in a way which is considered to be ‘responsible’ or ‘safe’.

Employing a classically liberal perspective, this is arguably a correct and preferable position: an individual should be free in their decision to gamble (provided they are not harming others) and bear the consequences for their gambling.²⁷⁶ As Shaffer, Blaszczynski and Ladouceur, the authors of the infamous Reno Model note, ‘it is not open to conjecture as to who makes the *final* decision to gamble: if not the individual, who then makes the decision?’.²⁷⁷ Moreover, they regard it important to highlight that ‘findings show that the majority of individuals and those reporting some gambling-related harm also believe they are personally responsible for this situation and are the principal agent for recovery’.²⁷⁸

Yet this agency is arguably fundamentally impaired when data-driven technology and algorithmic decision-making form such an integral part of the overall framework. Broadly speaking, this leads to another of the main challenges posed by big data and associated algorithmic technologies, according to critical law and data scholars:²⁷⁹ the impact on individual autonomy. The application of algorithmic processes as a mode of behavioural regulation, which effectively shapes individual decision-making in order to serve a particular

²⁷⁶ Though as also noted in Chapter Three, John Stuart Mill acknowledged that questions of liberty with regard to commercial gambling are not straightforward: ‘Fornication, for example, must be tolerated, and so must gambling; but should a person be free to be a pimp, or to keep a gambling-house? The case is one of those which lie on the exact boundary line between two principles, and it is not at once apparent to which of the two it properly belongs. There are arguments on both sides’. John Stuart Mill, *On Liberty* (Project Gutenberg 2011) 187–190.

²⁷⁷ Howard J Shaffer, Alex Blaszczynski and Robert Ladouceur, ‘Gambling Control and Public Health: Let’s Be Honest’ (2020) 18 *International Journal of Mental Health and Addiction* 819, 820 (Original emphasis).

²⁷⁸ *ibid* (Original emphasis).

²⁷⁹ See for example: boyd and Crawford (n 272); Karen Yeung, ‘“Hypernudge”: Big Data as a Mode of Regulation by Design’ (2017) 20 *Information Communication and Society* 118; Karen Yeung, ‘Algorithmic Regulation: A Critical Interrogation’ (2018) 12 *Regulation and Governance* 505; Martha Poon, ‘Corporate Capitalism and the Growing Power of Big Data: Review Essay’ (2016) 41 *Science, Technology, & Human Values* 1088; Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2015); Shoshana Zuboff, ‘Big Other: Surveillance Capitalism and the Prospects of an Information Civilization’ (2015) 30 *Journal of Information Technology* 75; Sara Degli Esposti, ‘When Big Data Meets Dataveillance: The Hidden Side of Analytics’ (2014) 12 *Surveillance and Society*; Neil M Richards and Jonathan H King, ‘Three Paradoxes of Big Data’ (2013) 66 *Stanford Law Review Online* 41; Lilian Edwards and Michael Veale, ‘Slave to the Algorithm? Why a ‘Right to an Explanation Is Probably Not the Remedy You Are Looking For’ (2017) 16 *Duke Law and Technology Review* 18; Mireille Hildebrandt, ‘Law as Information in the Era of Data-Driven Agency’ (2016) 79 *The Modern Law Review* 1; Julie E Cohen, ‘What Privacy Is For’ (2013) 126 *Harvard Law Review* 1904; Julie E Cohen, ‘The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy’ (2018) 31 *Philos. Technol* 213; Roger Brownsword, ‘Technological Management and the Rule of Law’ (2016) 8 *Law, Innovation and Technology* 100.

end, is arguably at odds with the ‘paradigmatic autonomous decision’ of a fully-informed, mentally competent individual arrived at through rational self-deliberation.²⁸⁰ Indeed, as Karen Yeung argues, this ‘hypernudging’ process is intended to work in a way which deliberately bypasses the rational decision-making process, exploiting ‘cognitive irrationalities and thus entailing illegitimate manipulation, expressing contempt and disrespect for individuals as autonomous, rational beings’.²⁸¹ This is exacerbated further by the lack of transparency of the algorithms in which these mechanisms of ‘hypernudge’ are embedded; described as a ‘black box’²⁸² due to their legal and technical opacity, there is a lack of algorithmic accountability, despite their potential to significantly influence or, perhaps more strongly, interfere with individual decisions and behaviour. Yeung describes ‘Big Data hypernudging’ as a “‘soft’ mechanism of surveillant control’ which operates in a subtle manner by continuous feedback loops which are based on the user’s data and interactions, operating to configure individuals online by ‘tailoring their conditions of possibility’.²⁸³ Such continuous, pervasive and highly granular surveillance and algorithmic regulation, which modulates our informational environments pursuant to logics which are outside of our control, may have an eroding effect on ‘capacity for authentic processes of self-creation and development’ and for ‘democratic self-government’.²⁸⁴ Accordingly, Julie Cohen stresses the importance of a broader understanding of privacy as separate from the concept of the liberal self and the capacity for autonomous choice and self-determination:

The self who is the real subject of privacy law and policy is socially constructed, emerging gradually from a pre-existing cultural and relational substrate. For the self, privacy performs a function that has nothing to do with stasis. Privacy shelters dynamic, emergent subjectivity from the efforts of commercial and government actors to render individuals and communities fixed, transparent, and predictable. It protects the situated practices of boundary management through which the capacity for self-determination develops.²⁸⁵

²⁸⁰ Yeung, “‘Hypernudge’”: Big Data as a Mode of Regulation by Design’ (n 279) 124.

²⁸¹ *ibid.*

²⁸² Pasquale (n 279).

²⁸³ Yeung, “‘Hypernudge’”: Big Data as a Mode of Regulation by Design’ (n 279) 129–30.

²⁸⁴ *ibid.* 131–2; Cohen, ‘What Privacy Is For’ (n 279).

²⁸⁵ Cohen, ‘What Privacy Is For’ (n 279) 1905.

It is not difficult to identify examples of situations where individual autonomy is impaired in an online gambling context. Most obviously, they can be observed in the data-driven commercial practices discussed in Chapter Three; the ‘dark nudges’²⁸⁶ which seek to increase user engagement with the product to keep customers gambling for longer and extract greater profits, effectively resulting in ‘addiction by design’.²⁸⁷ Thus these mechanisms encourage gamblers to exercise their ‘agency’ in a certain way and continue to circulate in a ‘forwards’ direction around the sustainable gambling cycle. Arguably, for many of these products and practices, the rational capacity of agents is no longer the object of these data-driven measures, which attempt to increase the profitability of gamblers by inciting and manipulating certain impulses and desires, rather than rational choices,²⁸⁸ further impacting on the capacity for true autonomy. Moreover, the central element of ‘informed choice’ within gambling regulation, and more broadly within the dominant, privacy self-management model,²⁸⁹ is, at least in part, illusory; only 20 percent of gamblers report having ever read the terms and conditions provided by an operator,²⁹⁰ and in any event, they ‘cannot bring an alternative product into existence through the power of choice’.²⁹¹

The parameters of possible autonomy are also now, it seems, being limited under this current regime from the opposite perspective, to protect gamblers from harm. Increased scrutiny has, in recent times, been applied by the regulator to commercial practices and products, including product design, targeted online advertising or ‘ad-tech’ and the ‘High Value Customers’ or VIP practices, with a range of new ‘industry commitments’ and additional operator obligations being implemented to make the gambling environment ‘safer’, indirectly

²⁸⁶ For example, Newall (n 71) As discussed in Chapter Three.

²⁸⁷ Schüll (n 126).

²⁸⁸ Laurence Barry, ‘The Rationality of the Digital Governmentality’ (2019) 23 *Journal for Cultural Research* 365, 374.

²⁸⁹ Daniel J Solove, ‘Introduction: Privacy Self-Management and the Consent Dilemma’ (2013) 126 *Harvard Law Review* 1880.

²⁹⁰ Gambling Commission, ‘Gambling Participation in 2019: Behaviour, Awareness and Attitudes. Annual Report (Updated Publication)’ (n 43) 26.

²⁹¹ Bedford (n 68) 271; Parker (n 68).

influencing gambling conduct in this way.²⁹² Moreover, operators have increased responsibilities for protecting their customers from harm, as will be explored in more detail in the following section. Where, for instance, gamblers display behaviour which the algorithm determines may present a risk of gambling-related harm - whether presently or in future - gambling regulation stipulates that the operator must intervene, including on a precautionary basis, to effectively discipline the gambler on how to gamble 'safely' so that they correct their own behaviour and return to the 'safe zone'. It seems therefore that the boundaries of individual agency in relation to gambling are becoming increasingly restricted. In a rather authoritarian-paternalistic sense, not unlike the regime examined in Chapter One, gamblers are only 'free' to gamble where they demonstrate that they are capable of exercising this agency in the 'correct' way. The central role of this particular type of freedom under this regime will be returned to below.

4.2 Responsible operators: a return to the pastorate?

As alluded to throughout this chapter, it appears that the rationalities underlying gambling regulation have moved beyond a solely liberal governmentality (encompassing, in particular, neoliberal rationalities) concerned with ensuring market freedom and the responsabilisation of individuals. Indeed, the regulator has explicitly sought to broaden the scope of responsibility for gambling-related harm beyond the individual and has placed additional, onerous obligations of a rather paternalistic nature on the industry, to use data to ensure that their customers are conforming with the normative standard of 'safe gambling'. The customer interaction requirements under SR Code 3.4.1²⁹³ are the primary requirements in this regard

²⁹² Gambling Commission, 'CEO Breakfast Briefing - Neil McArthur November 2020' <<https://beta.gamblingcommission.gov.uk/news/article/ceo-breakfast-briefing-neil-mcarthur-november-2020>> accessed 3 May 2021.

²⁹³ Gambling Commission, 'Licence Conditions and Codes of Practice (October 2020)' (n 78) SR Code 3.4.1.

and compel a precautionary,²⁹⁴ pre-emptive approach whereby operators must step in to protect their customers not only where they are experiencing gambling harm, but also where a customer is showing signs that they may be ‘at risk’.²⁹⁵ Operators are also expected to facilitate a safe gambling experience for all customers and encourage the use of responsible gambling tools as part of ‘normal’ gambling activity.²⁹⁶ In addition, the current guidance advises that operators take into account ‘affordability’ and ‘personal circumstances’ as part of their more general ‘know your customer’ obligations²⁹⁷ and in ‘developing customer interaction policies and procedures’, using open source data to build a fuller picture,²⁹⁸ as shared by this gambling professional:

If we can find out their employment, we can then try and work back over to work out what their salary may be, to give us an idea - so if they were part time working in a shop, perhaps you could tell that that’s not affordable but if they’re working in a certain industry [...] that pays well, you get an idea of what their salary might be [...] It’s good that we do these checks. Some people actually think it is, and see it as a good thing that we do these checks. They [say] ‘I’m really pleased you’re checking [...] just to make sure that I’m in control and I’m not doing anything naughty or, you know, that I can’t afford’.

Interview with online gambling employee (E) – enhanced customer due diligence

These practices appear at times to even take on quite a compassionate, benevolent tone:

It was a few months ago that we were doing a profile on a player and then noticed on Facebook that she had indicated that her husband had passed away quite recently [...] and then there, it was within a week, her game play went from just muddling away to absolutely [rocket launch noise] [...] so we contacted the player, we actually pointed out to them, ‘your game play’. We didn’t say specifically that we knew, we said ‘your game play seems to have increased a lot around this time [...] is there a reason for that?’. She actually then said what had happened, which we were aware of but we didn’t- we then went down the route of excluding, just saying, you know, ‘it’s not the best way to cope with grief, although we understand that people do’.

Interview with online gambling employee (E) – enhanced customer due diligence

Moreover it does seem that the current regulatory regime seems set to continue in this more protectionist direction. Indeed, there are signs that the regulatory obligations may be further strengthened in future in an increasingly paternalistic way. A Gambling Commission

²⁹⁴ Gambling Commission, ‘Customer Interaction – Additional Formal Guidance for Remote Operators during COVID-19 Outbreak’ (n 246).

²⁹⁵ And as discussed above, any gambler could be perceived as being at risk at a certain time.

²⁹⁶ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) para 2.3.

²⁹⁷ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (n 78) Ordinary code 17.1.1.

²⁹⁸ Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) paras 2.8-2.14.

consultation, which closed in February 2021, sought views on the introduction of obligatory, ‘defined affordability assessments at thresholds set by the Commission’,²⁹⁹ so that operators can ‘satisfy themselves that their customers are not gambling beyond their means’.³⁰⁰ The outcome of the consultation is, at the time of writing, outstanding though has been vehemently opposed by the industry in particular, partly on the grounds that such a restrictive approach will drive gamblers away from the UK regulated market:

The suggestion that operators should consider affordability and identify customers who are gambling more than they can afford has rung alarm bells across the sector. They are fearful that customers could be required to produce bank statements or even tax returns before placing bets. [...] There is a fear [...] that, if we go too far, unless it’s frictionless, customers won’t participate in regulated UK sites.³⁰¹

These measures are framed as protective: ‘protecting consumer interests and preventing harm to consumers’.³⁰² In some ways, then, it could be argued that gambling operators have been assigned the role of ‘shepherd’ under Foucault’s model of pastoral government, charged with caring for and protecting their ‘flock’ of gamblers. Foucault identifies ‘pastoral power’, originating in the pre-Christian East, as the ‘origin of the idea of a government of men’.³⁰³ This form of power is characterised by Foucault as being exercised by the ‘shepherd’ over the ‘flock in its movement from one place to another... over a multiplicity in movement’.³⁰⁴ The shepherd leads people in their multiplicity on a path to where the shepherd ‘knows fertile grasslands can be found, the best routes to take, and the most suitable place for resting’.³⁰⁵ At the same time, pastoral power is an ‘individualising power’: the shepherd directs the whole flock, but he can only really direct it insofar as not a single sheep escapes him [...] he does everything for the totality of the flock, but he does everything also for each sheep of the

²⁹⁹ Gambling Commission, ‘Remote Customer Interaction - Consultation and Call for Evidence’ (2020) <<https://consult.gamblingcommission.gov.uk/author/remote-customer-interaction-consultation-and-call/>> accessed 4 April 2021.

³⁰⁰ *ibid.*

³⁰¹ ‘UK Gambling Review’ (n 3) 18–9.

³⁰² Gambling Commission, ‘Customer Interaction - Formal Guidance for Remote Gambling Operators. Formal Guidance Note under SR Code 3.4.1’ (n 130) para 1.7.

³⁰³ 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) 123.

³⁰⁴ *ibid.* 125.

³⁰⁵ *ibid.* 126.

flock'.³⁰⁶ He must 'keep his eye on all and on each, *omnes et singulation*'.³⁰⁷ This is a type of power which is 'fundamentally beneficent',³⁰⁸ a 'power of care':³⁰⁹

The shepherd is someone who [...] feeds the flock first by leading it to good pastures, and then by making sure the animals eat and are properly fed. Pastoral power is a power of care. It looks after the flock, it looks after the individuals of the flock, it sees to it that the sheep do not suffer, it goes in search of those that have strayed off course and it treats those that are injured [...] The shepherd is someone who keeps watch [...] in the sense of vigilance to any possible misfortune. He will see to it that things are best for each of the animals of his flock.³¹⁰

In a similar way, gambling operators have been responsabilised (by the state, through the regulator) for protecting their flock of gambling customers. They must facilitate a 'safe' form of gambling for the entire population of gamblers and also step in where gamblers 'stray off course' into the 'at risk' zone. There is, however, one elemental difference between the present regime and Foucault's concept of pastoral power which fundamentally alters the nature of the regime from wholly caring to potentially quite perverse.

Pastoral power is entirely defined by its beneficence; 'its only *raison d'être* is doing good [...] the essential objective of pastoral power is the salvation of the flock'.³¹¹ This is not, however, the case under the present regime of gambling regulation. There are multiple, genuine competing interests between protecting the gambler and allowing the economic benefits to society to flow. The outcome of the current regime, with its multiple, diverse interests, is not, therefore, only the salvation of gamblers but the production of a sustainable gambling industry and it is in these terms that the additional measures are often justified by the regulator to operators: 'A well-regulated gambling market, in which consumers have confidence that they will be treated fairly and are well protected, is the only sustainable basis

³⁰⁶ *ibid* 128.

³⁰⁷ *ibid*.

³⁰⁸ *ibid* 126.

³⁰⁹ *ibid* 127.

³¹⁰ *ibid*.

³¹¹ *ibid* 126.

for allowing businesses to provide facilities for gambling'.³¹² This proposition, it seems, is one that makes the additional requirements more acceptable to the industry from an economic perspective:

Operators said that preventing harm was a core part of their long-term strategy, not only because of the moral argument but because they believe it will result in more sustainable relationships with their customers and better business outcomes over time.³¹³

The gambling professionals I spoke with in 2018 indicated that there had been a shift in commercial strategies towards ensuring a sustainable revenue source, rather than targeting high-value, short-term spend:

In terms of business sense, it makes more sense longer term to have a sustainable player base, so you're not having people spend money they can't afford and burn out [...] I think years ago in the gambling industry, there was a reticence to do anything that might impact on short-term spend. I think, these days, companies have now realised, and several surveys - I think Betsson did one - that shows that players who have a deposit limit in place generate more lifetime value than players who don't. So I think that data has given, say, chief execs and chief commercial officers, and the like, more comfort that some of the things that the responsible gambling teams or the compliance officers are doing isn't going to hurt [...] We're better off having, you know, sustainable revenue.

Interview with online gambling employee (A) – compliance

On the face of it, the use of this concept of 'sustainability' appears to make logical sense, especially from an economic perspective. Moreover, the term 'sustainable' has positive, wholesome connotations of green, environmentally-friendly, conservationist initiatives, and therefore appears to fit well within a regime focused on safety. However, when its application to a gambling context is examined more closely, and especially taking into account the shepherd/flock analogy of pastoral power, I would argue that a certain perversity emerges. Rather than a shepherd leading their flock of sheep to salvation, an alternative perspective could be presented, that online gambling operators are managing a herd of 'cash cows'; a resource in the form of gamblers to be farmed in a sustainable way (rather than in the more intensive way that came about when the 2005 Act was first enacted).

³¹² Gambling Commission, 'The Moment for Momentum - CMS Conference Speech by Executive Director Tim Miller 30 March 2021' <<https://beta.gamblingcommission.gov.uk/news/article/cms-conference-speech-the-moment-for-momentum>> accessed 5 May 2021.

³¹³ Revealing Reality (n 114) 13.

To be clear, this perspective does not seek to discount the multiple, diverse interests which are presently at play. As well as the commercial and fiscal interests of operators and the state in maintaining a profitable gambling industry, as discussed there appears to be a genuine interest in protecting gamblers and caring for their wellbeing. In putting forward this perspective, I do not mean to imply the existence of an overriding conspiracy or scheme on the part of the gambling industry, or indeed the state, with the pre-determined end goal of securing a reliable revenue scheme. Indeed, such an assertion would also discount the genuine benefits which prompt individuals to choose to gamble, including the enjoyment and sense of community which can be gained from the activity.³¹⁴ Instead, I mean to point out that through this confluence of diverse interests, we arrive at a situation in the case of online gambling which produces a circular, sustainable gambling economy (as illustrated by the Sustainable Gambling Model) that ultimately serves the interests of capital. The perversity inherent within this perspective is, it seems to me, compounded by the fact that the data-driven, player-tracking technologies being used in an online gambling context to maintain the ‘resource’ were originally designed for the extraction of increased profits from gamblers.³¹⁵

4.3 The role of ‘freedom’

What follows from this interpretation is the central role played by freedom, not in the classical sense, but as a resource or corollary of power, as referenced in Chapter Three. Unlike a classically liberal, *laissez faire* regime, which is concerned with too much government, it could be said that this present regime appears to instead be concerned with not governing enough.³¹⁶ Certainly there has been a ‘re-balancing’ of how much government is required. This is justified by a reconceptualization of gambling in the discourse as a public

³¹⁴ As highlighted for example by Select Committee on the Social and Economic Impact of the Gambling Industry (2019-20) (n 17) para 76-79.

³¹⁵ Bedford (n 68) 274–5; Schüll (n 126) 69, 276–288; Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (n 24) 140.

³¹⁶ Dean (n 252) 261.

health issue, with a broader risk status - a continuum of risk - potentially impacting upon the whole of the gambling population. Therefore in the interests of public safety, stricter and more restrictive regulation has been, and is continuing to be, imposed.

It could be asked, then, why a return to the prohibitive or prescriptive regimes explored in Part I has not appeared as a desirable or practicable option. One answer could be, certainly in relation to the prohibitive regime set out in Chapter One, that this approach was simply not effective and people continued to gamble, whether hidden in illegal gambling ‘hells’ or on the streets. This response is not satisfactory in relation to the second regime, however. An alternative proposition is that in reverting to one of these previous frameworks, the ‘productive’ element of the current regime would be lost. Instead, under this present sustainable regime, the interests of the industry and the state converge in a distinct and ‘productive’ way: policy-makers can ensure that gambling is ‘safe’ (guaranteeing a sustainable fiscal revenue without the economic costs associated with problem gambling) and operators secure a sustainable income while presenting as a responsible industry which cares about its customers.

The Gambling Act 2005 was introduced to liberalise the gambling market in Great Britain, so as to provide ‘well-informed adults [...] greater freedom and choice to spend their leisure money on gambling if they want to. The law will, for the first time, treat them like grown ups’.³¹⁷ Thus gambling was re-framed in the discourse as a fun, legitimate leisure pursuit rather than an activity subject to grudging toleration. In the almost fifteen years since the Act’s enactment in 2007, however, the regulatory framework has evolved into an increasingly paternalistic regime which involves an intimate form of continuous surveillance and regulation over gamblers’ behaviour on an aggregate and individualised basis, which has been enabled by advances in big data capabilities and online, data-driven technology.

³¹⁷ Roy Light, ‘The Gambling Act 2005: Regulatory Containment and Market Control’ (2007) 70 *Modern Law Review* 626, 634 Citing Secretary of State’s speech to the Business in Sport and Leisure annual conference, 19 November 2003.

Gamblers are indirectly encouraged to practice ‘safe gambling’ through mechanisms of government, internalising these standards so that they make acceptable choices and autonomously gamble in a ‘safe’ way. Operators are responsabilised to monitor their customers’ behaviour and make normative judgements to determine whether and when they might need to step in to get a gambler ‘back on track’, being punitively disciplined through fines and other measures where they fail to comply. Arguably, through the techniques enabled by big data and technology, gamblers are subject to far greater levels of power and control under this ‘liberal’ statutory framework than they were under past regimes which were overtly prohibitive or restrictive. The type of power being applied here is not, however, repressive: it is, for the most part, productive. ‘Freedom’ is thus central to this regime; not in the classical sense as a right to self-determination, but as a fundamental component in the exercise of power:

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.³¹⁸

The key point is not that gamblers are only free on the face of it, ‘while in fact secretly manipulated by the cunning of power’³¹⁹ to gamble safely. Instead, an alternative understanding of the relation between power and freedom is required. Power is not only concerned with repression, it can also 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’.³²⁰ In this way, regimes of government which incorporate a liberal dimension, such as this one, can be conceived as a way of working

³¹⁸ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 303) 48–9.

³¹⁹ Jacopo Martire, *A Foucauldian Interpretation of Modern Law* (Edinburgh University Press 2017) 2.

³²⁰ *ibid.*

through and attempting to construct autonomous individuals or ‘free subjects’, demonstrating the ‘full ambivalence of liberalism regarding the self-determining individual’:³²¹

This is a subject whose freedom is a condition of subjection. The exercise of authority presupposes the existence of a free subject of need, desire, rights, interests and choice. However, its subjection is also a condition of freedom: in order to act freely the subject must first be shaped, guided and moulded into one capable of responsibly exercising that freedom through systems of domination.³²²

The Gambling Act 2005 undoubtedly instated wide parameters of freedom to gamble in a highly-competitive market, and the economic benefits flowed. More recently, though, it seems that those parameters are becoming increasingly narrow, refining the type of ‘freedom’ to gamble which is permitted in line with the normative standard of safe gambling, as represented by the ‘safe zone’ in the model. Where a gambler moves into the ‘at risk zone’ and thus presents as incapable of ‘autonomously’ exercising this freedom within the ‘safe gambling’ parameters, the operator is required to protect the gambler by stepping in and correcting their deviant behaviour so that they may be return to the ‘safe zone’ and continue to circulate around the cycle. Indeed continuous circulation (in a ‘forwards’ or clockwise direction around the cycle) is essential in accordance with the economic interests under the regime. Thus, even though gambling is now deemed to be a ‘public-health’ issue, it is still, at the same time, framed by the Government in the following terms:

Gambling is a fun leisure activity for many people, with nearly half of adults gambling each month. We respect the freedom of adults to choose how they spend their money and the value of a responsible industry which protects players, provides jobs and pays taxes.³²³

Overall, then, the outcome of the regime, through the diverse interests and multiplicity of mechanisms in operation, is to produce a sustainable gambling economy, where gamblers continue to gamble in a safe way ‘autonomously’, having internalised the normative standard, so that the ‘resource’ is not depleted. This is achieved in part by creating an industry of ‘responsible’ operators who ‘protect’ their customers and help them to stay on track. Most

³²¹ Dean (n 252) 193.

³²² *ibid.*

³²³ Department for Digital Culture Media and Sport (n 1).

fundamentally, however, it involves the production of a population of safe gambling subjects who know that ‘when the fun stops’, they *should* stop.

Conclusion

Returning to the starting point of this thesis: ‘of the universality of gambling there is no doubt and it seems to be inherent in human nature’.¹ In this study, I have sought to chart the ways in which gambling regulation has evolved to try and tame this aspect of human nature, by shaping and directing gambling conduct in order to make it productive, and in doing so forming ‘useful and valuable members of society’.² This process of subjection, I have argued, illuminates the common thread running through an otherwise disparate range of approaches to the regulation of gambling over the last five centuries.

1. Original contribution

Throughout this thesis, I offered the perspective that gamblers under the present regime are subject to perhaps greater, and certainly more intimate, levels of regulation than they were when commercial gambling was prohibited under the criminal law, notwithstanding the apparently liberalising ethos of the current statutory framework: the Gambling Act 2005. This, I argued, is particularly true for online gamblers where technological advances in big data analytics, originally developed for the maximisation of profits, have been re-purposed to indirectly facilitate a ‘safe’ standard of gambling by the whole of the gambling population, and to pre-emptively identify those gamblers who are ‘at risk’ of harm so as to enable an appropriate corrective intervention. I depicted this regime of government in Chapter Four as the Sustainable Gambling Model, which is illustrated below:

¹ John Ashton, *The History of Gambling In England* (Duckworth 1898) 2.

² HC Deb 19 February 1818, vol 37, col 567 (Emphasis added).

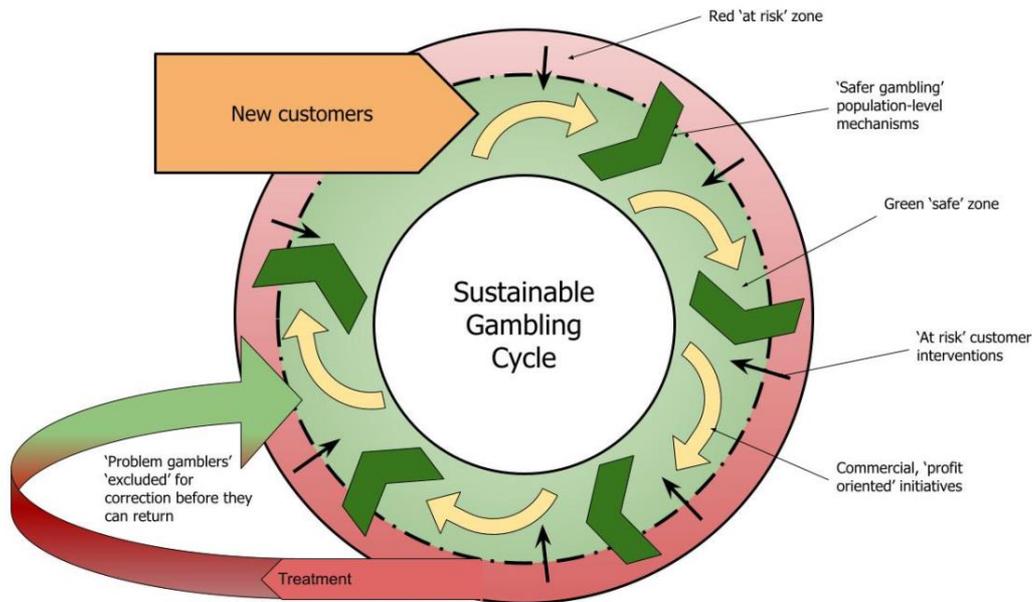


Figure 1 Sustainable Gambling Model

In this analysis, I problematised the ‘joint state/researcher faith’³ in algorithmic, data-driven solutions to gambling-related harm by illustrating that the role played by these technologies is more complex than simply protecting gamblers. These mechanisms are also, I argued, employed to more closely surveil, shape and (where necessary) correct gamblers so that they conform to a particular standard: the ‘useful and valuable member of society’ of today. Under the ‘sustainable gambling regime’, as depicted by the model and examined in Chapter Four, these data-driven mechanisms are used to form gambling subjects who ‘autonomously’ gamble in a way which is considered safe. At the same time, it produces responsible operators who ‘protect’ their customers by identifying those ‘at risk’, for example, of spending more than they can afford, so that their gambling remains at a level which is sustainable. Whilst this appears to represent a genuinely benevolent, caring approach to the regulation of gambling, I have argued that there is also something quite perverse about the repurposing of player-tracking technologies (originally designed for the extraction of profits) for the management of gamblers’ behaviour.

³ Kate Bedford, *Bingo Capitalism: The Law and Political Economy of Everyday Gambling* (Oxford University Press 2019) 275.

This approach, I have suggested, characterises gamblers as a resource to be utilised safely and sustainably by market actors who present as responsible and caring, and therefore cement their place within the overall framework. Fundamentally, however, the multiple interests of various state and industry actors align in a way which, in effect, serves the interests of capital; securing a sustainable source of revenue directly for the industry and indirectly for the state. It would appear, therefore that we have now moved beyond a solely liberal governmentality, such as the neoliberal regime concerned with ensuring market freedom and the responsabilisation of individuals. The current approach to regulation, I argue represents a regime which is much more paternalistic or ‘pastoral’ in nature, concerned with ‘safety’ and regulation. Under this ‘sustainable regime’ the interests of policy-makers and gambling operators have converged: policy-makers can ensure that gambling is ‘safe’ (protecting the population from harm whilst guaranteeing a sustainable fiscal revenue without the economic costs associated with problem gambling) and operators secure a sustainable income while looking after their customers and presenting as a responsible industry.

2. A genealogy of gambling regulation

To understand how we arrived at this point, and to demonstrate the contingency of the particular standards of ‘truth’ that are relied upon to justify the present approach to regulation, I employed a genealogical approach to the analysis of gambling regulation. Using the later work of Michel Foucault on governmentality,⁴ this genealogy examined four periods of time, each with its own distinct approach to regulating gambling, which I referred to as a ‘regime’. For each regime, I examined the prevalent discourse around gambling during that period to understand how this activity was framed as part of the overall regulatory framework. I also analysed the mechanisms and techniques applied to manage gambling

⁴ 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); 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).

activity, as well as the underlying rationale, in order to identify the normative, ideal standard during that particular period: the identity of the ‘useful and valuable member of society’.

The genealogy began by examining a period I have called ‘the prohibitive regime’. Spanning over 400 years, this regime is characterised predominantly by the application of juridico-legal methods which aimed to suppress commercial forms of gambling in order to protect and increase the strength of the state. During this period, gambling was regarded as wasteful, unproductive and sinful. It held the potential to upset the existing social order (through the transfer of property) and distracted the working class from socially useful activities which contribute to the strength of the state (whether that was practising archery or engaging in hard labour). The ‘useful and valuable’ gambling subject to be formed during this period was therefore someone who does not gamble. The activity could not be stymied, however. As soon as one form of gambling was prohibited, a new form would appear elsewhere. Moreover, working-class gamblers apparently began to resent the class-discriminatory nature of the legislation, participating in forms of ‘counter-conduct’,⁵ for instance, by assisting street bookmakers to evade the law, which was regarded as having a damaging effect on the strength of the state. Clearly, the current position could not continue. In order to gain greater control of gambling activity, however, it was decided that it would first have to be permitted.

In line with the development of statistics, and taking into account the damaging effects of the widespread disregard for the rule of law, unsubstantiated assumptions regarding the negative social consequences of gambling for working-class members of society began to be questioned by the state. This led to the implementation of a completely new approach whereby gambling activity was apparently ‘liberalised’ from the criminal law, though instead subject to a regime of close administrative, statutory regulation. This ‘administrative regime’

⁵ Foucault, *Security, Territory, Population. Lectures at the College de France 1977-1978* (n 4) 196.

consisted of a ‘police’,⁶ command-and-control approach to regulation which permitted commercial gambling activity within narrow parameters prescribed by strict rules on the provision of gambling facilities. Importantly, gambling facilities could only be provided to satisfy existing demand: the stimulation of new demand, for example through advertising, was not permitted. Thus, whilst gambling would be grudgingly tolerated, it was not be encouraged. The regulations therefore served to keep the activity within reasonable bounds so that it did not distract gamblers from their ‘real work’, which would contribute to the strength of the state. The ‘useful and valuable member of society’ under this regime was, therefore, the ‘tolerated’ gambler: a person who, ideally, did not gamble but if they were so inclined, this would be permitted provided their gambling stayed within reasonable bounds.

By the end of the twentieth century, however, the potential economic benefits which gambling presented to the state had, it seems, been recognised. The introduction of the National Lottery in 1994, in particular, with its mass public appeal, had illustrated the benefits presented by commercial gambling to the national economy. Online gambling, and e-commerce in particular, also presented new forms of revenue to be taken advantage of. The character of gambling within the prevalent discourse had, in parallel, been completely reformed and it was now regarded as harmless fun; an ordinary and legitimate leisure industry in which operators should be free to compete for the custom of gambling consumers, who would be treated like adults and allowed to ‘naturally’ reap the benefits of a more competitive industry. The strict, ‘police’-style style of regulation was therefore no longer considered appropriate and was replaced by a facilitative, significantly more *laissez faire* approach which regarded competition and the market as the most effective regulatory instruments. This ‘liberal regime’ was enacted under the Gambling Act 2005, which came into force in September 2007 and allowed gambling operators to implement increasingly

⁶ In the Foucauldian sense - *ibid* 322.

competitive business practices, making significant use in the subsequent decade of technological advances such as big data analytics, which ‘turbo-charged’ the ability of operators to essentially extract profits from their customers. As well as seeking to enhance the economic benefits presented by gambling, the regime also aimed to ensure the wellbeing of the population and therefore identified a balance which had to be struck between permitting competition and requiring operators to protect their customers, particularly those considered to be most vulnerable to the potentially harmful effects of gambling. These vulnerable individuals – a statistical minority of problem gamblers as diagnosed by clinical problem gambling screening instruments – were regarded as inherently incapable of gambling in a ‘normal’, responsible way like the majority of the gambling population, and thus excluded from participation for clinical treatment to correct this deviance. Otherwise, the majority of ordinary gamblers were simply provided with information on how to gamble responsibly – aligning with the neoliberal standard of an informed, rational individual who remains in control – together with responsible gambling self-management tools to make use of should they feel the need. The ‘responsible gambler’ thus emerged as the ‘useful and valuable’ subject under this regime; being someone who is at liberty to participate in the gambling market but assumes full responsibility for managing their own behaviour to ensure they remain informed and in control of their gambling, notwithstanding the increasingly effective methods of profit extraction implemented by the industry, and permitted by the state. It seems, however, that this *laissez faire*, ‘free market’ approach to gambling regulation has been relatively short-lived in the grand scheme of this genealogy.

In recent years, gambling regulation, I argued, appears to have again moved on in its approach to governing the conduct of gamblers in a direction which is significantly more paternalistic and restrictive. The state regulator responded to criticism that the regulatory framework under the liberal regime places too great a responsibility on individuals, by

increasing the extent of responsibility borne by the industry. Under the current ‘sustainable regime’, as outlined in section 1 above, gamblers are now governed by a complex framework of regulatory mechanisms, with their conduct being directed both directly and indirectly in several directions by numerous actors. Importantly, operators must now abide by more onerous regulatory obligations to ‘know their customers and use what they know to protect them’,⁷ in particular by using player-tracking, data-driven technology to monitor all gamblers and identify those who may be ‘at risk’ of harm, so that their behaviour can be corrected preemptively.⁸ The Gambling Commission has also made it very clear that those operators who do not comply with these enhanced obligations will be disciplined accordingly. In rationalising this approach, the character of gambling has again been modified within the discourse. Gambling is now framed in rather conflicting terms as both an enjoyable leisure pursuit for the majority of gamblers, and simultaneously a public health issue requiring greater levels of regulatory intervention and a precautionary approach, at both a population and individual level. The ideal standard of gambling has also been re-branded from ‘responsible gambling’ (due to its negative connotations) to a perhaps more risk-averse, precautionary ‘safe gambling’ whereby the uptake of gambling self-management tools is more strongly encouraged. This regime, I have proposed, shows that the rationalities underlying the current mode of gambling regulation can no longer be explained by solely referring to a ‘neoliberal’ ideology with an emphasis on the responsabilisation of the individual. While the current regime retains its liberal character to an extent (within, it seems, ever decreasing parameters of acceptable conduct) there is also evidence of a return to a pastoral form of governmentality. It could, however, be said that this regime of gambling regulation visibly illustrates what Foucault referred to as the ‘daemonic coupling of the city-

⁷ 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.

⁸ Gambling Commission, ‘Licence Conditions and Codes of Practice (October 2020)’ (2020) <<https://www.gamblingcommission.gov.uk/PDF/LCCP/Licence-conditions-and-codes-of-practice.pdf>> accessed 1 March 2021 SR Code 3.4.1.

game and shepherd-game: the invention of a form of secular political pastorate which couples individualisation and totalisation'.⁹ This is because where the shepherd in the pastoral model of government is concerned only with ensuring the salvation of the flock, the objectives of operators and the state are productive in nature. Through the alignment of the multiple, diverse interests in operation, including economic interests concerned with ensuring revenue as well as more paternalistic interests seeking to protect the wellbeing of gamblers, a sustainable gambling economy is produced, which ultimately, it seems in the case of online gambling, serves the interests of capital. Thus, it produces 'responsible' operators whose public image is restored, securing a sustainable revenue source directly for the industry and indirectly for the state. Moreover, it produces a population of 'safe' gambling subjects who take care of their own health by internalising and acting in accordance with the current 'truth'; that 'when the fun stops', they *should* stop.

3. Wider observations during pandemic times

Despite my best efforts, whilst writing up this thesis during a pandemic, it has been impossible to overlook parallels between the central themes within the proposed current regime of gambling regulation and the way in which the British Government has responded to the COVID-19 public health emergency. In this final section I reflect on these parallels and in doing so offer some thoughts on how the regulation of gambling could provide an indication of the broader trends in the government of society more widely.

To borrow again from Gerda Reith, the level of paternalistic state intervention into the lives of the population has been 'turbo-charged'¹⁰ during the pandemic. Our conduct has been

⁹ Michel Foucault, 'Omnes et Singulatim: Towards a Criticism of "political Reason"' [1979] Tanner Lectures on Human Values on Human Values 239; Colin Gordon, 'Governmental Rationality: An Introduction' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 8.

¹⁰ Gerda Reith, *Addictive Consumption: Capitalism, Modernity and Excess* (Routledge 2018) 133.

governed through a series of unprecedented direct¹¹ and indirect¹² efforts, which affected where we could go ('stay at home'¹³), with whom we should mix ('the rule of 6'¹⁴), and what steps we should take as we go about our daily lives ('hands, face, space'¹⁵). These unprecedented restrictions on individual liberty were implemented in the interests of safety: to curtail the spread of the virus, 'protect the NHS [and] save lives'.¹⁶

Much of the responsibility has been placed on individuals for making safe choices and taking steps to 'keep yourself and others safe',¹⁷ particularly as restrictions have begun to ease:

New guidance on meeting friends and family emphasises personal responsibility rather than government rules. Instead of instructing you to stay 2m apart from anyone you don't live with, you are encouraged to exercise caution and consider the guidance on risks associated with COVID-19 and actions you can take to help keep you and your loved ones safe.¹⁸

Thus, individuals are encouraged to exercise their autonomy in a way which will keep themselves and their loved ones safe from the virus (notwithstanding perhaps conflicting messaging about what this looks like in practice¹⁹). At the same time, commercial organisations have also been assigned a level of responsibility for keeping people safe: those that are permitted to open their doors must have 'COVID-secure' measures in place,²⁰ to facilitate a safe standard of conduct by its customers, for example by ensuring social distancing.

¹¹ Pursuant to the Coronavirus Act 2020 plus numerous coronavirus-related statutory instruments, for example the Self-Isolation Regulations 'impose certain requirements on individuals to self-isolate where they are notified by one of the bodies specified in those Regulations that they have tested positive for coronavirus or have been in close contact with such a person.' See: Explanatory Memorandum to The Health Protection (Coronavirus, Restrictions) (All Tiers and Self-Isolation) (England) (Amendment) Regulations 2021.

¹² For example campaigns and architecture within the retail and leisure industries to promote social distancing.

¹³ Department of Health and Social Care, 'New TV Advert Urges Public to Stay at Home to Protect the NHS and Save Lives (Press Release)' (2021) <<https://www.gov.uk/government/news/new-tv-advert-urges-public-to-stay-at-home-to-protect-the-nhs-and-save-lives>> accessed 30 May 2021.

¹⁴ Home Office and The Rt Hon Priti Patel MP, 'Rule of Six Comes into Effect to Tackle Coronavirus' (2020) <<https://www.gov.uk/government/news/rule-of-six-comes-into-effect-to-tackle-coronavirus>> accessed 30 May 2021.

¹⁵ 'Hands. Face. Space. Fresh Air.' (*Public Health England*) <<https://coronavirusresources.phe.gov.uk/hands-face-space-fresh-air/>> accessed 30 May 2021.

¹⁶ Department of Health and Social Care (n 13).

¹⁷ Cabinet Office, '(COVID-19) Coronavirus Restrictions: What You Can and Cannot Do' (2021) <<https://www.gov.uk/guidance/covid-19-coronavirus-restrictions-what-you-can-and-cannot-do#keeping-yourself-and-others-safe>> accessed 31 May 2021.

¹⁸ *ibid.*

¹⁹ HM Revenue and Customs, 'Get a Discount with the Eat Out to Help Out Scheme' (2020) <<https://www.gov.uk/guidance/get-a-discount-with-the-eat-out-to-help-out-scheme>> accessed 31 May 2021.

²⁰ Cabinet Office (n 17).

While non-remote elements of the economy have suffered significantly during the pandemic, with lockdowns forcing the closure of non-essential retail and hospitality, online businesses – just as in the gambling industry – have prospered.²¹ This has only served to accelerate the already increasing extent to which we live our lives online; a trend which the Government seems set to take advantage of. Indeed, data-driven approaches have been central to the Government’s response to the pandemic,²² from digital and manual contact tracing²³ to combining health and non-health data to identify individuals most clinically and socio-economically vulnerable to the pandemic in order to recommend isolation or ‘shielding’²⁴ (in the case of clinical vulnerability) and, more generally, direct support.²⁵ Mobility, geospatial data from mobile phones has also been utilised throughout the pandemic to monitor and analyse population behaviour.²⁶ Most recently (at the time of writing) it has come to light that mobility data from a telecoms company has been used to understand how people’s behaviour changed after being vaccinated²⁷ and the Government is unequivocal in its strategy for the increased use of data post-pandemic:

Data is the great opportunity of our time. It has the potential to transform almost every part of our society and economy — from boosting trade and productivity, to fuelling business and job creation, securing the next scientific breakthrough, revolutionising the public sector and creating a better and fairer society for all. [...] I made clear the importance of unlocking the power of data to build back better, safer and stronger from COVID-19 and shape a new golden age of tech for the UK. We will follow the high watermark set during our fight against COVID-19, when we used data quickly, efficiently and responsibly to model, predict and ultimately control the spread of the virus. [...] As we build back better,

²¹ Tom Braithwaite, ‘Prospering in the Pandemic: The Top 100 Companies’ *Financial Times* (19 June 2020).

²² Rachel Allsopp and others, ‘Snapshot Report 1: Data-Driven Public Policy’ (*The Observatory for Monitoring Data-Driven Approaches to Covid-19 (OMDDAC)*, 2021) <<https://www.omddac.org.uk/wp-content/uploads/2021/05/OMDDAC-Snapshot-Report-1-Public-Policy.pdf>>.

²³ NHS, ‘Protect Your Loved Ones. Download the App.’ <<https://www.covid19.nhs.uk/>> accessed 31 May 2021; Department of Health and Social Care, ‘NHS Test and Trace: What to Do If You Are Contacted’ (2020) <<https://www.gov.uk/guidance/nhs-test-and-trace-how-it-works>> accessed 31 May 2021.

²⁴ <https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19> and <https://digital.nhs.uk/coronavirus/shielded-patient-list>

²⁵ Allsopp and others (n 22); Centre for Data Ethics and Innovation, ‘Local Government Use of Data During the Pandemic’ (2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/968515/Local_government_use_of_data_during_the_pandemic.pdf> accessed 31 May 2021.

²⁶ See for example: Scientific Advisory Group for Emergencies, ‘SPI-B Consensus on Reintroduction of Measures and Their Impact on Rate of Infection’ (2020) <<https://www.gov.uk/government/publications/spi-b-consensus-on-reintroduction-of-measures-and-their-impact-on-rate-of-infection-22-june-2020>> accessed 31 May 2021.

²⁷ Christopher Hope, ‘Millions “unwittingly Tracked” by Phone after Vaccination to See If Movements Changed’ *The Telegraph* (22 May 2021).

we want to create an environment in which data-driven innovation can thrive. By combining our bold approach to data with investments in transformative technologies, we will unlock the power of data not only to help tackle COVID-19, but also to meet the challenges of tomorrow.²⁸

In ‘following the high watermark’ set during the pandemic, the broader trend towards safety remains a central element; to ‘build back better, *safer* and stronger’. This is also reflected in the Government’s Online Harms White Paper²⁹ and associated Online Safety Bill,³⁰ which make clear that the apparent trend towards an increasing responsabilisation of commercial operators to keep their customers safe is set to continue: ‘It’s time for tech companies to be held to account and to protect the British people from harm. If they fail to do so, they will face penalties’.³¹ The White Paper sets out its expectation for ‘technology itself to be part of the solution’, proposing ‘measures to boost the tech-safety sector in the UK, as well as measures to help users manage their safety online’.³²

It appears, therefore, that the normalisation of continuous, pervasive surveillance, and the increasingly paternalistic regulation of human conduct by market and state actors using data-driven technologies in the interests of increased ‘safety’ may not be limited to the realms of gambling. Though there is no way to know what life might look like post-pandemic - or indeed when that may be - some of the central trends identified by this research, it seems, may be broadly indicative of the direction in which society is now headed.³³

²⁸ Department for Digital Culture Media and Sport, ‘Government Response to the Consultation on the National Data Strategy. Consultation Outcome’ (2021) <<https://www.gov.uk/government/consultations/uk-national-data-strategy-nds-consultation/outcome/government-response-to-the-consultation-on-the-national-data-strategy>> accessed 31 May 2021.

²⁹ Department for Digital Culture Media and Sport and Home Office, *Online Harms White Paper* (White paper, CP 57, 2019).

³⁰ Online Safety HC Bill (2021-22)

³¹ Department for Digital Culture Media and Sport and Home Office, ‘Landmark Laws to Keep Children Safe, Stop Racial Hate and Protect Democracy Online Published’ (2021) <<https://www.gov.uk/government/news/landmark-laws-to-keep-children-safe-stop-racial-hate-and-protect-democracy-online-published>> accessed 31 May 2021.

³² Department for Culture Media and Sport and Home Office, ‘Online Harms White Paper, Consultation Outcome’ (2020) <<https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper#technology-as-part-of-the-solution-1>> accessed 31 May 2021

³³ And if not, this final section will serve as a useful reminder of the conditions in which I completed this thesis!

Appendix I

Methodology

In this project, I used qualitative research methods. As outlined in the Introduction, I primarily employed a genealogical approach to conducting this analysis of gambling regulation in Great Britain. This element of the research was desk-based, involving examination of legal and political discourse (from 1541 to 2021) including: legislation, case law, policy documents, Parliamentary inquiries, Hansard records, licence codes, regulatory guidance and official reports and statements produced by the Gambling Commission.

In addition, I conducted six semi-structured interviews with gambling industry professionals towards the beginning of the research project in September 2018. Although the interviews did not ultimately play as central a role in this thesis as originally envisaged, they were nevertheless influential in the direction that I chose to take the project, as I will explain in this Appendix.

1. Interview aims

The aim of undertaking this method of research was primarily exploratory in nature. Through conducting interviews with staff employed within the online gambling industry, I sought to gain a more practical, in-depth understanding of how big data was being used by operators, from the perspective of those who work in the industry, in their own words.¹ I had found the available literature which refers to the use of big data in an online gambling context to be relatively abstract, particularly in relation to the commercial uses. This was perhaps unsurprising given that more ‘profit-oriented’ uses of big data tend to be commercially sensitive.

¹ Alice Yeo and others, ‘In-Depth Interviews’ in Jane Ritche and others (eds), *Qualitative research practice: a guide for social science students and researchers* (SAGE 2014) 182.

It was therefore my intention to obtain practical information from the participants, including: the type of data collected; the various algorithmic models and reports into which this data is fed; the profiling techniques employed; and the types of decisions which are made on the basis of the data analysis. This, I anticipated, would enable me to gain a more concrete understanding of how big data is used by those who work with it as part of their role in the online gambling industry, which would be used to complement the information publicly available in the (predominantly grey) literature. Thus, the objective of this method was not to produce replicable, objective findings to be generalised across the gambling industry. Whilst these big data practices are commonplace, I appreciated that each operator would have its own processes in place which would likely differ from those which the participants outlined, though there would inevitably be common elements also (for example, in the types of player data that gambling operators have access to). Instead, by conducting interviews with members of the gambling industry, my aim was to obtain an ‘on-the-ground’ understanding of the different ways in which player data was being used. This was used in my research to complement other primary and secondary sources, including regulatory requirements, Gambling Commission reports and other official documents, as well as publicly available literature, in an illustrative capacity, in order to try and bring the discussion ‘to life’ and in doing so - hopefully - make it more meaningful.

2. Method

2.1 Recruitment and access

Recruitment of interview participants was a challenge. I attended a large industry conference (ICE London²) in February 2018 where I made a number of seemingly promising industry contacts. Unfortunately, the majority of these connections proved not to be fruitful; upon my

² <https://www.icelondon.uk.com/> accessed 1 April 2021.

return I reached out to these contacts but did not receive a response. I was, however, able to gain access to one online gambling company through an existing professional contact gained during my employment prior to commencing my PhD studies. This ultimately means that the participant sample is limited to six employees from the same company. Although this small sample size presents obvious difficulties within regard to representativeness and generalisability of any findings, this does not significantly impact on the validity of my research, given that the purpose of employing this method is primarily exploratory and illustrative. The participants were, however, all from different departments within the company which meant that I was able to gain a variety of perspectives across the spectrum, from compliance to marketing.

2.2 *Research design*

I conducted six interviews with six members of staff employed by an online gambling company licensed by the Gambling Commission. The interviews were all conducted in September 2018, and took place at the company's offices (located in England), in order to ensure that the participants were comfortable and to minimise any disruption for the company. The individual participants were organised by the company and each participant was employed within a different department in the company, as illustrated in Table 2 below, in order to obtain a variety of perspectives on the company's use of gamblers' data. The participants have each been assigned an ID and a generic description of the department in which they were employed has been provided, rather than a more specific job title, to preserve anonymity.

Table 2 - List of participants by department

ID	Department
A	Compliance
B	Fraud & Risk
C	Business intelligence/data analytics
D	Customer services and responsible gambling
E	Enhanced customer due diligence
F	Marketing and customer retention

The interviews lasted between thirty minutes and one hour and were semi-structured,³ taking the form of a conversation guided by a rough outline detailing a list of open questions and associated prompts which I had prepared in advance.⁴ This form of interview was chosen in line with the objective of obtaining primarily descriptive content from the participants concerning the data processing activities, from the perspective of an insider within the industry, in their own words. It also allowed me to fully explore and ensure sufficient coverage of the topic through supplementary questions and prompts, as tailored to the participant's responses. A number of the questions related to data protection matters, which formed part of my research design at the beginning of the project. As the research evolved, however, I decided to pursue a different course influenced by themes which emerged strongly from the interview data, as explained below.

³ Barbara DiCicco-Bloom and Benjamin F Crabtree, 'The Qualitative Research Interview' (2006) 40 *Medical education* 314, 315; Svend Brinkmann, 'The Interview' in Norman K Denzin and Yvonna S Lincoln (eds), *The Sage handbook of qualitative research* (5th edn, SAGE 2018) 578–9.

⁴ See Appendix II for this interview plan.

In preparation for the interviews, I completed a training session provided by the University researcher development programme and read textbooks on the practical aspects of research interviewing.⁵ An initial draft of the interview plan itself was prepared, and the questions subsequently trialled with a colleague. This allowed me to reduce the questions to their essential components, and ensure the wording was as natural as possible, avoiding complex phrasing. Thus, although I was unable to complete a formal pilot test, due to the small number of participants to whom I had access, the informal trialling process was extremely useful to ensure that my interview plan was well organised, with priorities pre-determined.

The interviews were recorded using a tape recorder, with a backup copy also being recorded on my laptop computer. At the end of each interview, the participant was given the opportunity to receive a copy of the transcript once available. All participants refused this offer but were reassured that it remained open should their position change. Transcription was subsequently undertaken personally over the course of the following month. Through the process of transcription, I was able to become very familiar with the data and at the same time anonymise it. The recordings were deleted following completion of the transcription.

3. Analysis

In completing the transcription myself, I was able to get close to the data and became very familiar with its contents. This essentially therefore formed the first stage of my data analysis. I subsequently reviewed the transcripts to check for errors and also begin to ‘get a feel’ for the content, in preparation for the following stage of analysis.⁶

I then reviewed the transcripts again and identified the statements that I considered to be significant, highlighting the same manually on paper. At the same time, I began to decide on

⁵ Bill Gillham, *Research Interviewing: The Range of Techniques* (Open University Press 2005); Jaber Gubrium and James Holstein, *Handbook of Interview Research: Context and Method* (SAGE Publications 2001).

⁶ Gillham (n 5) 125; Benjamin F Crabtree and William L Miller, *Doing Qualitative Research* (2nd edn, SAGE Publications, Inc 1999).

categories which I considered were present within the data. This manual coding was an iterative process as I moved back and forth through the six transcripts, reviewing and revising the categories as I proceeded.⁷ At this stage of my analysis the following descriptive categories were identified, as aligned with the objectives of conducting the interviews:

- Commercial data processing activities;
- Player protection data processing activities;
- Types of data collected

One of the, perhaps, unanticipated consequences of the interviews was the emergence of three themes which became central to my thesis: *knowledge*, *risk* and *sustainability*.⁸ These concepts emerged as significant during the subsequent analysis of the data, many months later, due to the prominence they played within the participant gambling company's processes, as well as in the official regulatory documentation in view of the direction that gambling regulation has taken in recent years (as discussed in Chapter Four). Admittedly, at the beginning of this project my assumption was that the focus of the research would be centred largely on the more 'controversial', commercial data practices. However, my experience in conducting the interviews was that participants were much more willing to share information about their data practices which concerned 'responsible gambling' and player protection. Indeed, I later learned that one of the participants I had been scheduled to interview, the Head of Marketing, had been swapped for a member of the Enhanced Customer Due Diligence team at the last moment. Being aware of my positionality as a researcher,⁹ I understand that this may have had to do with the fact that I am based in the field of legal studies. However, this tendency, coupled with the three themes which emerged and the direction that I was observing in the regulatory climate, strongly influenced the

⁷ Crabtree and Miller (n 6) 22.

⁸ The themes of knowledge and risk in particular were also instrumental in my choice to employ the work of Foucault on governmentality.

⁹ Adrianna Kezar, 'Reconstructing Static Images of Leadership: An Application of Positionality Theory' (2002) 8 The Journal of leadership studies 94.

direction of this research towards examining the use of gamblers' data for 'player protection'. Indeed, the fact that the use of data in this way was regarded as uncontroversial, and that it was somewhat 'taken for granted' (as discussed in the Introduction) by the regulator, and now, it appeared, the industry, that data *should* be used in this way, prompted me to investigate this area further.

4. Ethical considerations

Ethical approval was sought and granted by the Faculty of Business and Law Ethics Committee on 21st May 2018. Each participant was provided with a participant information sheet in advance of the interview. Before commencing the interview, each participant signed a consent form to indicate their consent to being interviewed in writing. Organisational consent was also obtained in writing from the online gambling company in advance.

Some of the information provided by the participants was commercially sensitive in nature to the extent that it relates to original marketing techniques involving the use of big data analytics which are designed to gain an advantage over competitors. As part of the process of obtaining informed consent, the participant company was informed of the purpose of the research and the possibility of publication. It was also informed of the right to withdraw from the research at any point and of the right to refuse to answer any of the questions posed. Appropriate measures, as detailed below, were also taken to preserve confidentiality, including anonymisation and the secure storage of data. The participant company was informed of the measures via the consent form and participant information sheet.

To preserve confidentiality, all interview data (voice recordings and transcripts) was stored using simple ID labels which are not personally identifiable. The key for the labels is known only to myself. All voice recordings were deleted following completion of the transcription. All personal information or data which could otherwise be used to identify the company was

removed during the transcription phase to ensure that the data was fully anonymised. The only place where personal data is detailed on all research documentation is the consent forms. These are stored separately from the rest of the research data. All research data is stored in Google Drive, a 256-bit encrypted cloud based file storage system which is password protected at account level as well as being protected by Google's privacy and information security policies.¹⁰ Google Drive services are ISO27001 accredited. The signed physical consent forms were scanned and stored electronically in a separate location within the Google Drive infrastructure and the hard copies were destroyed. On successful completion of the PhD, all electronic data files will be disposed of in line with Northumbria University Research Data Management Policy and the University data disposal process.

¹⁰ <https://www.google.com/intl/en/policies/privacy/#infosecurity> accessed 10 January 2021.

Appendix II

Interview Plan

Key questions:	Prompts/probes (only if necessary)
<p>Intro:</p> <p>As I mentioned, I am interested in how big data analytics is used in online gambling. For the purposes of the research, my understanding of big data analytics is the collection of huge volumes of various different types of data and the analysis of this data to draw correlations and inferences in order to obtain insights and make predictions.</p>	
<p>1) How does your company use big data analytics in its business practices?</p>	<p><i>Personalised bonuses, special offers?</i></p> <p><i>Loyalty schemes?</i></p> <p><i>Acquire new customers or just existing?</i></p> <p><i>Other marketing?</i></p> <p><i>Design of website? Recommend games? Bespoke user journey?</i></p> <p><i>Personalised pricing/odds/RTP %?</i></p> <p><i>Responsible gambling?</i></p> <p><i>Regulatory/UKGC obligations?</i></p>

	<p><i>Fraud/identify player?</i></p> <p><i>Any future plans?</i></p>
2) What kinds of data do you collect and use to feed into the algorithms for the analytics?	<p><i>Transactional/personal/click stream</i></p> <p><i>Only data from player use of sites or does 3rd party data feed in?</i></p>
3) What kinds of reports do you build/use with this data?	<p><i>Can you show me an example? Ask to talk through.</i></p> <p><i>Try to see/get an idea of how this flows through to the player - from business intelligence to marketing teams etc.</i></p> <p><i>Where do the instructions for these reports/processes come from?</i></p> <p><i>Do the models get updated? What kind of feedback loops are in place?</i></p>
4) How does your company measure player value?	<p><i>How is the VIP status calculated?</i></p> <p><i>What effect does this valuation have on the player's user experience?</i></p>
5) What kind of decisions are made on the basis of the insights and predictions obtained from the	<p><i>Examples of decisions</i></p> <p><i>Are any of the decisions solely</i></p>

<p>data/reports/analytics?</p>	<p><i>automated? What is the level of human involvement?</i></p> <p><i>Who makes the decisions?</i></p>
<p>6) How does your company ensure compliance with the legal requirements surrounding this use of player data?</p>	<p><i>Data protection obligations?</i></p> <p><i>Regulatory obligations?</i></p>
<p>7) How are players informed of the use of their data for these types of big data practices?</p>	<p><i>Privacy policies – which section specifically deals with big data?</i></p> <p><i>Drafted internally or by external law firm?</i></p>
<p>8) What new steps, if any, have been taken by your company as a result of the GDPR or other new legislation?</p>	<p><i>Any changes to privacy policies/T&Cs?</i></p> <p><i>Done anything to make more transparent/accessible?</i></p>
<p>9) How do you demonstrate that players have read/agree to the T&Cs/privacy policy?</p>	<p><i>Do you have any way of measuring whether player has visited the privacy policy page?</i></p>

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