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# The Fox in the Henhouse: The Failure of the Video Game Industry's Self-Regulation with Regard to Loot Boxes

*Carl C. Jones\**

## INTRODUCTION

You are shopping for a loved one. Perhaps the holidays are approaching, or a birthday draws near, or perhaps you simply wish to show your affection by making a gift out of the blue. Your loved one enjoys video games, so you stop by your local big-box store and the clerk directs you to a glass-paneled shelf, stacked to the ceiling with games in bright neon boxes. You peruse the offerings and ask for the clerk to withdraw a few samples. You note their titles and prices and consider your loved one's tastes. A clear favorite emerges. Almost as an afterthought, you check the game's rating, noting the stark black-and-white box in the lower left-hand corner of the cover: "E10+." An appended note makes the statement a little clearer: "Everyone 10+."

You've seen these eye-catching labels before; they're on virtually every video game you can think of. Out of curiosity you flip the game over, consulting the more detailed rating guide on the back side of the box, in the lower right-hand corner. In plain black text the rating guide cites "Cartoon Violence" and "Comic Mischief" to support the ten-and-up rating. That's all well and good, you think to yourself; comic mischief never seriously hurt anyone. Then something else catches your eye, in a narrower box beneath the rating guide: "In-Game Purchases."

What on earth does that mean?

You decide you will figure that out later. You purchase the game, along with some handsome gift-wrapping. Later, at home, you resume your inquiry. The ratings guide says "ESRB," so you run a quick internet search and stumble across the

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\* J.D. Candidate, Expected May 2021, Chapman University Dale E. Fowler School of Law. I wish to thank Professor Kurt Eggert, Director of the Alona Cortese Elder Law Center and Professor of Law at Chapman University. Without his insights into gambling law and the philosophical questions surrounding personal autonomy, this Article would have forever remained stuck on Level One. Unlike a loot box, his door was always freely open. I also wish to thank my family for a lifetime of love and support.

Entertainment Software Ratings Board's website.<sup>1</sup> The organization's "About" page lays out its mission statement against an attractive backdrop depicting a city skyline at dusk: "We are the non-profit, self-regulatory body for the video game industry. Established in 1994, our primary responsibility is to help consumers – especially parents – make informed choices about the games their families play."<sup>2</sup> Somewhat relieved, you consult the ESRB's webpage detailing the in-game purchases label. It explains that "microtransactions" are "[s]maller in-game purchases" that "typically augment or personalize the content of a game."<sup>3</sup> The webpage further lists "the key types of in-game microtransactions,"<sup>4</sup> including a term you may not have heard before: "loot boxes."<sup>5</sup>

The ESRB defines loot boxes as follows:

"Loot boxes" or "loot crates" are like locked treasure chests that contain an array of virtual items that can be used in the game once unlocked. In some games loot boxes can be earned through gameplay and/or can be purchased using either real money or in-game currency. In most cases, you can't see the items before you make the purchase.<sup>6</sup>

You may not remember loot boxes appearing in the games you used to play, and the fact that the contents of a loot box are generally unknown before they are purchased may trouble you. If so, you're not alone.<sup>7</sup>

Loot boxes and other microtransactions represent an opportunity for the video game industry (the "Industry") to monetize particular video game titles for a far longer

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<sup>1</sup> ESRB, <https://www.esrb.org/> (last visited Dec. 30, 2020) [<http://perma.cc/L55P-RYM5>].

<sup>2</sup> *About ESRB*, ESRB, <https://www.esrb.org/about/> (last visited Dec. 30, 2020) [<http://perma.cc/PAN2-UT2G>].

<sup>3</sup> Patricia E. Vance, *What Parents Need to Know About Loot Boxes (and Other In-Game Purchases)*, ESRB (July 24, 2019), <https://www.esrb.org/blog/what-parents-need-to-know-about-loot-boxes-and-other-in-game-purchases/> [<http://perma.cc/5DBB-BBA9>].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Ben Johnson, *Loot Boxes Are a Lucrative Game Of Chance, But Are They Gambling?*, NPR (Oct. 10, 2019, 5:08 PM), <https://www.npr.org/2019/10/10/769044790/loot-boxes-are-a-lucrative-game-of-chance-but-are-they-gambling> [<http://perma.cc/S8QS-4WEN>]; David Zentle & Paul Cairns, *Video Game Loot Boxes are Linked to Problem Gambling: Results of a Large-Scale Survey*, PLOS ONE (Nov. 21, 2018), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0206767> [<http://perma.cc/333Y-XN33>]; Mattha Busby, *Loot Boxes Increasingly Common in Video Games Despite Addiction Concerns*, GUARDIAN (Nov. 22, 2019, 5:51 PM), <https://www.theguardian.com/games/2019/nov/22/loot-boxes-increasingly-common-in-video-games-despite-addiction-concerns> [<http://perma.cc/LEQ2-9LPW>]; *How My Son Went from Gamer to Compulsive Gambler*, BBC (Oct. 8, 2019), <https://www.bbc.com/news/stories-49941610> [<http://perma.cc/F2D9-BU2H>].

post-initial-release period than previously possible.<sup>8</sup> Loot boxes are particularly lucrative: current estimates project that “total spending on loot boxes and skin gambling is forecast to go up to \$50 billion by 2022.”<sup>9</sup> Yet even as loot boxes promise the Industry tremendous profit,<sup>10</sup> players have pilloried them<sup>11</sup> and consumer advocates have raised concerns about their alleged predatory tactics.<sup>12</sup>

This Article seeks to distill the broad cultural and legal conversations about loot boxes in the United States into a coherent summary. Part I presents the history of loot boxes by examining Industry-wide changes in the monetization and development of video games over the past several decades. Part II addresses the alleged financial and psychological costs that loot boxes impose upon consumers by reviewing scientific studies and mainstream reporting on the topic. Part III evaluates the present controversy over whether loot boxes are a type of gambling, analyzing traditional gambling definitions and critiquing existing Industry arguments to the contrary. Part IV reviews existing self-regulatory measures imposed by the ESRB. Part V presents arguments for and against continued Industry self-regulation. Part VI explores possible regulatory solutions, and the identities of the entities, legislatures, or agencies best equipped to implement them.

This Article argues that loot boxes are legally equivalent to gambling. Although others have evaluated whether loot boxes run afoul of current gambling laws, and most have determined that courts are unlikely to find sufficient value in a loot box transaction,<sup>13</sup> this Article comes to the opposite conclusion: that existing case and statutory law is sufficient for a court to

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<sup>8</sup> FED. TRADE COMM’N, *INSIDE THE GAME: UNLOCKING THE CONSUMER ISSUES SURROUNDING LOOT BOXES*, 57–59 (2019) [hereinafter *INSIDE THE GAME*] (transcript downloadable at <https://www.ftc.gov/news-events/events-calendar/inside-game-unlocking-consumer-issues-surrounding-loot-boxes>) [<http://perma.cc/R5CM-3K26>].

<sup>9</sup> *Id.* at 58.

<sup>10</sup> *See Loot Boxes & Skins Gambling to Generate a \$50 Billion Industry by 2022*, JUNIPER RSCH. (Apr. 17, 2018), <https://www.juniperresearch.com/press/press-releases/loot-boxes-and-skins-gambling> [<http://perma.cc/XRT6-HGLZ>].

<sup>11</sup> *See, e.g.*, Matthew Gault, *Gamers Can’t Stop Buying the Loot Boxes They Hate*, VICE (Oct. 9, 2017, 10:42 AM), [https://www.vice.com/en\\_us/article/8x8jq4/gamers-cant-stop-buying-the-loot-boxes-they-hate](https://www.vice.com/en_us/article/8x8jq4/gamers-cant-stop-buying-the-loot-boxes-they-hate) [<http://perma.cc/JB5U-5JBV>].

<sup>12</sup> *See, e.g.*, *INSIDE THE GAME*, *supra* note 8, at 9 (remarks of Andrew Smith, Director of the FTC’s Bureau of Consumer Prot.).

<sup>13</sup> *See, e.g.*, Alexander Mann, *Pseudo-Gambling and Whaling: How Loot Boxes Prey on Vulnerable Populations and How to Curtail Future Predatory Behavior*, 15 WASH. J.L. TECH. & ARTS 200, 225 (2020) (observing that “[T]he prizes for loot boxes do not carry any market value.”). *But see* Edwin Hong, *Loot Boxes: Gambling for the Next Generation*, 46 W. ST. U. L. REV. 61, 68 (2019) (“These loot boxes constitute an illegal lottery because in each case, there is a prize, distribution by random change, and consideration. Therefore, they should be regulated as a form of gambling under California law.”).

conclude that loot boxes can have value. This Article engages with and critically analyzes the Industry's arguments against such a designation. Additionally, it argues that, even if loot boxes do not rise to the level of gambling as it is traditionally understood, their economic, social, and mental health costs warrant regulation nevertheless as a novel area of law.

Unlike the present literature, this Article takes a dim view of the Industry's arguments for self-regulation, concluding that external regulation is preferable to continued Industry self-regulation under the ESRB. It further argues that the Industry's failure to acknowledge the merits of gambling comparisons, coupled with its repeated reliance on tired and discredited arguments in the face of studies to the contrary, amounts to bad faith conduct. Throughout, this Article advances the legal discussion surrounding loot boxes by analyzing the transcript of a 2019 Federal Trade Commission workshop<sup>14</sup> where members of the Industry, academics, and consumer advocates made their latest arguments in light of the most recent research. Finally, this Article advocates for the use of individual limit-setting, in conjunction with transparent pricing and odds disclosures, as mechanisms to rein in uninformed and compulsive consumer spending on loot boxes.

## I. THE HISTORY OF LOOT BOXES

Loot boxes are a relatively new innovation in the Industry.<sup>15</sup> Historically, video games were produced in a “developer-centric” business model, where individual games were envisioned, developed, and ultimately released as standalone titles by their developers, who “put it out there and hope[d] [it was] a hit.”<sup>16</sup> From a business standpoint, a game's success was measured by the total number of units sold.<sup>17</sup> That emphasis has since shifted toward a focus on a game's “lifetime value.”<sup>18</sup> Where games were previously static products, unchanging after being shipped<sup>19</sup> (much like a movie), a new “player-centric” era has begun, in which the development of “games are being driven by feedback from gameplay itself, from attention paid by publishers and developers to the chatter around these games online. And then they . . . [use] that to iterate on the game after it's already been

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<sup>14</sup> INSIDE THE GAME, *supra* note 8.

<sup>15</sup> See Andrew E. Freedman, *What Are Loot Boxes? Gaming's Big Controversy Explained*, TOM'S GUIDE (Aug. 9, 2019), <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html> [http://perma.cc/E3C9-25MH].

<sup>16</sup> INSIDE THE GAME, *supra* note 8, at 57.

<sup>17</sup> *Id.* at 58.

<sup>18</sup> *Id.*

<sup>19</sup> See *id.*

shipped.”<sup>20</sup> In calculating a game’s lifetime value, stakeholders examine “not only how much [consumers] pay to acquire the game . . . but [also] how much value is delivered over the life of the game through things like microtransactions.”<sup>21</sup> Such profit windows “are measured in years, not months.”<sup>22</sup>

The first commercial home video game system, the Odyssey, was marketed by Magnavox and sold in 1972.<sup>23</sup> Over the ensuing decades, video games have grown into “a \$100 billion global industry, and nearly two-thirds of American homes have household members who play video games regularly.”<sup>24</sup> Video games are now available across multiple “platforms,” such as personal computers (“PCs”), modern video game consoles, and mobile phones.<sup>25</sup> Through the 1990s and into the dawn of the new century, the Industry derived most of its revenue from selling individual, self-contained products to consumers, their ultimate end-users.<sup>26</sup> While these products originally took the form of tangible goods, such as cartridges and discs, the advent of the Internet allowed for games to be distributed via digital downloads.<sup>27</sup> Even at that time, the business of buying a video game still resembled most consumer transactions for the purchase and sale of goods: consumers bought a copy of a video game outright (as one might a book or DVD), or in the case of some online games, purchased a license to play.<sup>28</sup> Video games were sold as complete, finished products.<sup>29</sup> As the Industry moved further into the new decade, “monetisation in video games underwent a significant shift,” with a growing emphasis on the sale of supplemental digital products to augment the gameplay experience: microtransactions.<sup>30</sup> While some microtransactions made mere cosmetic changes to a game, others granted players “in-game advantages.”<sup>31</sup> In both instances, these supplemental products were available for direct purchase for a set price.<sup>32</sup>

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<sup>20</sup> *Id.* at 57–58.

<sup>21</sup> *Id.* at 58.

<sup>22</sup> *Id.*

<sup>23</sup> *Video Game History*, HISTORY, <https://www.history.com/topics/inventions/history-of-video-games> [<http://perma.cc/73P5-PM6G>] (last updated June 10, 2019).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> David Zendle et al., *The Changing Face of Desktop Video Game Monetization: An Exploration of Trends in Loot Boxes, Pay to Win, and Cosmetic Microtransactions in the Most-Played Steam Games of 2010-2019*, PSYARXIV PREPRINTS 3 (Nov. 1, 2019), <https://psyarxiv.com/u35kt> [<http://perma.cc/TGA7-C4SD>].

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *See id.*

By 2006, however, the practice evolved, and some of the earliest loot boxes appeared in *ZT Online*, a Chinese massively-multiplayer online game (“MMO”).<sup>33</sup> Loot boxes, unlike their direct-purchase predecessors, added “an element of randomisation” to the process of making a video game microtransaction.<sup>34</sup> Now, if a player wished to receive a specific virtual item and that item happened to be distributed via a loot box system, she could not simply purchase that item directly as before; she would have to open one or more loot boxes, until she received the item she desired or she gave up her search.<sup>35</sup>

Today, loot boxes often appear in so-called free-to-play (F2P) games, which do not charge an up-front purchase price to begin playing.<sup>36</sup> Industry advocates have often justified the inclusion of loot boxes and other microtransactions in such games by noting the high cost of developing a video game,<sup>37</sup> as well as the freedom these delayed costs afford players to try out these free-to-play games before making a financial commitment.<sup>38</sup> However, over the past decade, and in particular since the release of Activision Blizzard’s *Overwatch* in 2016,<sup>39</sup> loot boxes have been increasingly adopted as an alternative revenue stream by video game developers and publishers, and have been featured in many modern-day video games across platforms and genres.<sup>40</sup> They have appeared in triple-A titles sold in retail and digital stores for a sticker price,<sup>41</sup> as well as free-to-play games available over the internet, whether accessible through personal computers or mobile devices.<sup>42</sup> At present, loot boxes represent a \$30 billion industry, an amount projected to rise to \$50 billion by 2022.<sup>43</sup>

Because loot boxes require players who seek a particular digital item to pay money, often without any guarantee of receiving the item they desire, critics have likened the process to gambling.<sup>44</sup> Some countries have since passed laws regulating loot boxes by mandating disclosure of the odds of receiving

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<sup>33</sup> Steven T. Wright, *The Evolution of Loot Boxes*, PC GAMER (Dec. 8, 2017), <https://www.pcgamer.com/the-evolution-of-loot-boxes/> [http://perma.cc/VQ89-ESDF].

<sup>34</sup> Zandle, *supra* note 26, at 3.

<sup>35</sup> *See id.*

<sup>36</sup> *See* Makena Kelly, *How Loot Boxes Hooked Gamers and Left Regulators Spinning*, VERGE (Feb. 19, 2019, 8:00 AM), <https://www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play> [http://perma.cc/9X3H-PDBG].

<sup>37</sup> *See id.*

<sup>38</sup> INSIDE THE GAME, *supra* note 8, at 26 (remarks of Sean Kane).

<sup>39</sup> Freedman, *supra* note 15.

<sup>40</sup> *See* Kelly, *supra* note 36.

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> JUNIPER RSCH., *supra* note 10.

<sup>44</sup> *See, e.g., What Are Loot Boxes?, PARENT ZONE*, <https://parentzone.org.uk/article/what-are-loot-boxes> [http://perma.cc/G48K-VSJG].

specific virtual items;<sup>45</sup> others have banned the practice outright.<sup>46</sup> The United States has yet to take significant regulatory action against loot boxes,<sup>47</sup> and the Entertainment Software Association (“ESA,” the parent entity of the ESRB<sup>48</sup>) has announced its opinion that loot boxes categorically do not constitute gambling.<sup>49</sup>

However, players,<sup>50</sup> consumer advocates,<sup>51</sup> and politicians<sup>52</sup> continue to voice their concerns about the practice. Academics have begun to examine the psychology driving loot box purchases; an empirical study has noted links between loot box purchases and problem gambling behavior.<sup>53</sup> The federal government has also begun to take note; in August of 2019, the Federal Trade Commission (“FTC”) hosted a conference to hear the opinions of players, industry associations, attorneys, consumer advocates, and academic researchers.<sup>54</sup> The future of regulatory action against loot boxes in the United States is far from certain, and the present status quo grants the ESRB broad self-regulatory oversight over its member entities’ activities.<sup>55</sup> Yet calls for enhanced regulation have not abated, and the precise mechanisms for direct government oversight remain uncharted.

<sup>45</sup> T.J. Hafer, *The Legal Status of Loot Boxes Around the World, and What’s Next in the Debate*, PC GAMER (Oct. 26, 2018), <https://www.pcgamer.com/the-legal-status-of-loot-boxes-around-the-world-and-whats-next/> [<http://perma.cc/ZW4J-WJ32>].

<sup>46</sup> *Gaming Loot Boxes: What Happened When Belgium Banned Them?*, BBC (Sept. 12, 2019), <https://www.bbc.com/news/newsbeat-49674333> [<http://perma.cc/5QZA-4UW4>].

<sup>47</sup> See Makena Kelly, *Game Studios Would Be Banned from Selling Loot Boxes to Minors Under New Bill*, VERGE (May 8, 2019, 12:00 PM), <https://www.theverge.com/2019/5/8/18536806/game-studios-banned-loot-boxes-minors-bill-hawley-josh-blizzard-ea> [<http://perma.cc/9965-3YSU>].

<sup>48</sup> *Our History*, ESRB, <https://www.esrb.org/history/> (last visited May 3, 2020) [<http://perma.cc/JW6Q-CS2W>].

<sup>49</sup> See Paul Tassi, *The ESRB Is Being Willfully Obtuse About Loot Boxes, And Will Never Be Any Help*, FORBES (Feb. 28, 2018, 9:25 AM), <https://www.forbes.com/sites/insertcoin/2018/02/28/the-esrb-is-being-willfully-obtuse-about-loot-boxes-and-will-never-be-any-help/#1959c0b76877> [<http://perma.cc/8P5A-G47R>].

<sup>50</sup> See, e.g., Will Fulton, *Do Players Really Like Loot Boxes, or are Game Publishers Forcing Them on Us?*, DIGITAL TRENDS (Nov. 16, 2017), <https://www.digitaltrends.com/gaming/do-players-like-loot-boxes/> [<http://perma.cc/2K26-U72V>].

<sup>51</sup> See, e.g., INSIDE THE GAME, *supra* note 8, at 33 (remarks of Jeff Haynes, Senior Editor of Video Games, Common Sense Media).

<sup>52</sup> See, e.g., Chris Lee, *Highlights of the Predatory Gaming Announcement*, YOUTUBE (Nov. 21, 2017), [https://www.youtube.com/watch?v=\\_akwfRuL4os](https://www.youtube.com/watch?v=_akwfRuL4os) [<http://perma.cc/83QR-477F>].

<sup>53</sup> Zendle & Cairns, *supra* note 7.

<sup>54</sup> INSIDE THE GAME, *supra* note 8, at 10–11 (remarks of Andrew Smith, Director, FTC Bureau of Consumer Protection).

<sup>55</sup> See *ESRB Introduces New Rating Process for Console Downloadable Video Games*, ESRB (Apr. 18, 2011), <https://www.esrb.org/blog/esrb-introduces-new-rating-process-for-console-downloadable-video-games/> [<http://perma.cc/2NPY-DETF>] (featuring ESRB President’s claim that “Our rating system is widely considered to be among the most effective in the world, and ESRB continues to be an exemplary model of self-regulation.”).



## II. THE FINANCIAL AND PSYCHOLOGICAL COSTS OF LOOT BOXES

Ordinary consumers are bearing real psychological and financial costs as a result of the increased implementation of loot boxes.<sup>56</sup> Mainstream reporting on the rise of loot boxes is replete with personal vignettes from parents discovering that their young children are being enticed to spend the equivalent of hundreds or thousands of dollars on loot boxes to chase desired items.<sup>57</sup> However, children are not the only players affected; spouses and parents have also suffered familial strain as a result of their own compulsive spending on loot boxes.<sup>58</sup> Writing about his loot box spending habits, one parent wrote, “I am currently \$15,800 in debt. My wife no longer trusts me. My kids, who ask me why I am playing *Final Fantasy* all the time, will never understand how I selfishly spent money I should have been using for their activities.”<sup>59</sup> Perhaps even more sobering are the stories of young adults who were introduced to the world of online gambling through loot boxes featured in sports games.<sup>60</sup> Studies have noted that, on average, where non-problem gamblers spend only \$2.50 on loot boxes every month, problem gamblers spend \$25.<sup>61</sup>

As one author noted, the video game “industry is certainly no stranger to moral panics and appeals to the judicial and legislative systems.”<sup>62</sup> It is clear that regulations should not be haphazardly foisted upon an industry based upon scattered and anecdotal reports, in particular an industry as susceptible to public outrage and demonization as the video game industry, a trend just as common today<sup>63</sup> as it was at the Industry’s inception.<sup>64</sup> The revenue derived from loot boxes serves a

<sup>56</sup> See, e.g., Mattha Busby, ‘Easy Trap to Fall Into’: Why Video-Game Loot Boxes Need Regulation, *GUARDIAN* (May 29, 2018, 1:50 PM), <https://www.theguardian.com/games/2018/may/29/gamers-politicians-regulation-video-game-loot-boxes> [http://perma.cc/NP62-Z45S].

<sup>57</sup> See, e.g., Kate Jackson, *The Great Game Robbery: How Kids are Racking Up Bills Worth Thousands Buying ‘Loot Boxes’ on Games Like Fifa and Minecraft*, *THE SUN* (Oct. 22, 2019, 10:30 PM), <https://www.thesun.co.uk/tech/10192098/games-bill-loot-boxes/> [http://perma.cc/F9LD-YLN5].

<sup>58</sup> See, e.g., Busby, *supra* note 56.

<sup>59</sup> *Id.* (emphasis of game title added).

<sup>60</sup> See *How My Son Went from Gamer to Compulsive Gambler*, *supra* note 7.

<sup>61</sup> Aaron Drummond et al., *Loot Box Limit-Setting: A Potential Policy to Protect Video Game Users with Gambling Problems?*, 114 *ADDICTION* 935, 935 (2019).

<sup>62</sup> David J. Castillo, *Unpacking the Loot Box: How Gaming’s Latest Monetization System Flirts with Traditional Gambling Methods*, 59 *SANTA CLARA L. REV.* 165, 175 (2019).

<sup>63</sup> See, e.g., Lisette Voytko, *Trump Suggests Video Games Connected to Violence: Research Doesn’t Support That*, *FORBES* (Aug. 5, 2019, 12:34 PM), <https://www.forbes.com/sites/lisettevoytko/2019/08/05/trump-blames-video-games-for-shootings-but-research-doesnt-support-that/#7c58d92611dc> [http://perma.cc/NZ8P-JSNL].

<sup>64</sup> See, e.g., Stacie Ponder, *25 Years Later, ‘Disgusting’ Night Trap is Incredibly*

meaningful purpose: Industry advocates have justified the inclusion of loot boxes in games by noting that they help to offset rising development costs<sup>65</sup> and stagnant, or even falling, video game prices.<sup>66</sup>

One of the strongest arguments in favor of loot box implementation is that it enables players to choose how much they wish to financially support a particular game.<sup>67</sup> At the 2019 FTC conference, Mike Warnecke of the ESA noted, “[W]hen people experience games, they want to be able to kick the tires on it and not . . . [buy] something until they have a chance to experience it. . . . [Y]ou have the chance to expand the content if you decide to like it.”<sup>68</sup> Loot boxes undoubtedly allow players to vary their level of financial support for a particular game, and are not mandatory to progress in most, if not all, games that feature them.<sup>69</sup> Indeed, Industry advocates frequently tout players’ choice and autonomy in deciding whether or not to buy loot boxes.<sup>70</sup>

It is undeniable that loot boxes make modern-day games profitable for publishers<sup>71</sup> and accessible to players who cannot—or will not—pay anything to play.<sup>72</sup> But one cannot ignore the impact the practice has on vulnerable individuals, who are suffering real-world financial and psychological costs associated with the increased implementation of loot boxes in modern video games. While legal and political decision-makers may ultimately decide to endorse the practice, the decision should not be made lightly or without confronting the human costs.

A *Vice* author sought out the opinions of individuals on the subject, writing:

I opened myself to a broad spectrum of stories and experiences. The individuals I spoke to ran a wide gamut of gaming contexts and age groups. They played across multiple platforms, from mobile to PC and console. Generally, these individuals had problems with one specific game rather than a problem spread across multiple titles. I did not observe a line between cosmetic economies, such as *Overwatch*, and economies that influence progression such as *Battlefront II* and

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*Tame*, KOTAKU (Aug. 15, 2017, 2:30 PM), <https://kotaku.com/25-years-later-disgusting-night-trap-is-incredibly-tam-1797864067> [<http://perma.cc/9JGW-JTH6>].

<sup>65</sup> INSIDE THE GAME, *supra* note 8, at 25–26 (remarks of Sean Kane).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 26.

<sup>68</sup> *Id.* at 45–46.

<sup>69</sup> *Id.* at 46.

<sup>70</sup> *E.g., id.* at 26, 46.

<sup>71</sup> *Id.* at 59 (remarks of John Breyault).

<sup>72</sup> *See id.* at 26 (remarks of Sean Kane).

*Shadow of Mordor*. The strongest common thread in all of these stories was a similar set of behaviors and impacts. The people I spoke to by-and-large described their spending on loot boxes as impulsive, shameful, and stress-inducing.<sup>73</sup>

This description of loot boxes cuts against the Industry's well-established narrative that players choose to purchase loot boxes as part of an informed process.<sup>74</sup> One Industry advocate claimed, "No one is forced to spend money in a video game that is free to play. They choose what they want to spend and when they want to spend it and how they want to spend it."<sup>75</sup> But those words are difficult to reconcile with those of an affected player, who has spent several hundreds of dollars on loot boxes, who wrote:

I felt compelled to spend on loot boxes every time a limited time event started so I wouldn't miss out. . . . It warped my whole perception of the game into short periods of anxiety and stress where I had to spend money or play constantly on the hope of not missing out.<sup>76</sup>

The harm inflicted by compulsive loot box spending goes beyond mere embarrassment. Affected individuals have reported intense feelings of shame and self-loathing.<sup>77</sup> In a particularly chilling example, one correspondent in the *Vice* article confessed, "I ended up calling a suicide hotline that night. I felt distraught, pathetic, that I had just blown so much money on nothing but virtual jewels. I felt like I deserved to die for letting it get so bad and for wasting this much money."<sup>78</sup>

These players' experiences are anything but unique,<sup>79</sup> and language of compulsion and anxiety dominates first-hand player discussion of their encounters with loot boxes.<sup>80</sup> It may be easy to

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<sup>73</sup> Ellen McGrody, *For Many Players, Lootboxes are a Crisis That's Already Here*, VICE (Jan. 30, 2018, 11:08 AM), [https://www.vice.com/en\\_us/article/kznmwa/for-many-players-lootboxes-are-a-crisis-thats-already-here](https://www.vice.com/en_us/article/kznmwa/for-many-players-lootboxes-are-a-crisis-thats-already-here) [http://perma.cc/UD6V-SGKA].

<sup>74</sup> See, e.g., INSIDE THE GAME, *supra* note 8, at 26.

<sup>75</sup> *Id.*

<sup>76</sup> McGrody, *supra* note 73.

<sup>77</sup> See *id.*

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., Ethan Gach, *Meet the 19-Year-Old Who Spent Over \$17,000 on Microtransactions*, KOTAKU (Nov. 30, 2017, 10:00 AM), <https://www.kotaku.com.au/2017/11/meet-the-19-year-old-who-spent-over-17000-on-microtransactions/> [http://perma.cc/SB94-FSPM]; Mike Wright, *Children Spending £250 on Fortnite 'Skins' to Avoid Being Labelled 'The Poor Kid' at School, Children's Commissioner Warns*, TELEGRAPH (Oct. 22, 2019, 12:01 AM), <https://www.telegraph.co.uk/news/2019/10/21/children-spending-250-fortnite-skins-avoid-labeled-poor-kid/> [http://perma.cc/VYA2-6LNJ]; Zoe Kleinman, *My Son Spent £3,160 in One Game*, BBC (July 15, 2019), <https://www.bbc.com/news/technology-48925623> [http://perma.cc/N8H3-VS9P].

<sup>80</sup> See, e.g., Alysia Judge, *Video Games and Mental Health: 'Nobody's Properly Talking'*, BBC (July 14, 2018), <https://www.bbc.com/news/newsbeat-44662669> [http://perma.cc/SQ2V-6UFM].

assume that such players are the exception, and that a few individuals with problematic gambling behaviors are simply making imprudent decisions, but that claim is far from reality.<sup>81</sup> It has become clear in academic circles that there is a statistically-significant correlation between loot box spending and problem gambling activity.<sup>82</sup> Doctors David Zendle and Paul Cairns conducted a large-scale survey of video game players in order to evaluate the connection between these two behaviors.<sup>83</sup> The results of their research were sobering:

This research provides empirical evidence of a relationship between loot box use and problem gambling. The relationship seen here was neither small, nor trivial. *It was stronger than previously observed relationships between problem gambling and factors like alcohol abuse, drug use, and depression.* Indeed, sub-group analyses revealed that an individual's classification as either a non problem gambler or a problem gambler accounted for 37.7% of the variance in how much they spent on loot boxes. These results may confirm the existence of the causal relationship between buying loot boxes and problem gambling . . . . Due to the formal features that loot boxes share with other forms of gambling, they may well be acting as a 'gateway' to problem gambling amongst gamers. Hence, the more gamers spend on loot boxes, the more severe their problem gambling becomes.<sup>84</sup>

They were quick to point out a significant caveat: "However, it is important to note that this is not the only causal relationship which fits the data. It may be the case that individuals who are already problem gamblers instead tend to spend more on loot boxes."<sup>85</sup> Uncertain of which way the causal arrow pointed, the authors posited:

It may, indeed be the case that both directions of causality are true: Problem gamblers spend more on loot boxes, whilst buying loot boxes simultaneously leads to increases in problem gambling amongst gamers. However, regardless of which of these outcomes is the case, this research bears an important message when it comes to the regulation of loot boxes within the gaming industry. . . . It may be the case that this spending is leading to problem gambling. It may be that this level of spending is driven by pre-existing problem gambling amongst gamers. . . . *However, in either case, this research provides industry bodies such as the ESRB with crucial evidence to use when determining whether there is still insufficient evidence of links between problem gambling and loot box use.*<sup>86</sup>

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<sup>81</sup> See Zendle & Cairns, *supra* note 7.

<sup>82</sup> *Id.* at 1, 3.

<sup>83</sup> *Id.* at 3.

<sup>84</sup> *Id.* at 9 (emphasis added).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (emphasis added).

This research illustrates a quantifiable connection between loot box spending and problem gambling behavior,<sup>87</sup> providing academic support for the notion that loot boxes exploit or impose real psychological harm on a very real population of consumers. Finally, the authors of the study looked beyond the legal roadblocks to implementing loot box regulations and couched the matter in human terms:

This study shows a relationship between loot box spending and problem gambling. . . . Furthermore, we believe that the strength of the relationship that was observed here between problem gambling and loot box spending suggests that important gambling-related harm is experienced by users of loot boxes. We strongly recommend that relevant national and federal regulatory authorities consider restricting access to loot boxes as if they were a form of gambling. . . . *It is our opinion that this relationship remains serious and potentially dangerous regardless of whether loot boxes are technically considered a form of gambling or not.*<sup>88</sup>

While it is unclear whether loot boxes' presence in video games first exposes individuals to further gambling-related harm, or merely exploits the existing problematic gambling tendencies of a subset of players, neither result can be considered trivial. Under both models, the Industry profits off of vulnerable individuals, whether it creates that vulnerability or merely exploits it. Further, the Industry is aware of, and indeed relies upon, the revenue derived from those individuals.<sup>89</sup>

In writing on the topic of habit-forming design in phone applications and video games, Associate Professor Kyle Langvardt discussed the incentives developers have to maximize user "time on device," both from an advertising and a microtransactional approach.<sup>90</sup> He found that, while the majority of players pay little into microtransaction-heavy free-to-play games,<sup>91</sup> "most revenue from micropayments is highly concentrated among a small group of apparent addicts who individually spend thousands of dollars on in-app purchases."<sup>92</sup> Professor Langvardt further illustrated the problematic behavior of heavy spenders, indicating that "0.15 percent of mobile gamers account for 50 percent of the industry's revenue from micropayments. About 1.9 percent make up 90 percent of

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<sup>87</sup> *Id.* at 3.

<sup>88</sup> *Id.* at 9–10 (emphasis added).

<sup>89</sup> See Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 *FORDHAM L. REV.* 129, 140 (2019).

<sup>90</sup> *Id.* at 134–46.

<sup>91</sup> *Id.* at 140.

<sup>92</sup> *Id.* (internal citations omitted).

revenue.”<sup>93</sup> He noted that the Industry refers to such players as “whales,” and recognize whales as one of their primary revenue streams in games of this kind.<sup>94</sup> Indeed, Professor Langvardt hypothesized that the “unbalanced” rate at which whale and non-whale players paid into certain games “may give game developers strong incentives to encourage addiction-driven, whale-like purchases.”<sup>95</sup>

Ultimately, Professor Langvardt concluded that habit-forming design poses “at least three types of harm: addiction, strain on social norms, and degradation of public discourse.”<sup>96</sup> He discussed the relatively small population of individuals suffering from the World Health Organization-recognized “problem gaming disorder,”<sup>97</sup> and likened the demographic trend to “the gambling industry, where only a small percentage of the population develops a serious habit.”<sup>98</sup> This demonstrates that, as in the gambling industry, loot boxes can pose serious harms to individuals, even if the majority of people engaging in the activity walk away relatively unscathed.

The Industry’s leadership in recognizing these harms has been sorely lacking.<sup>99</sup> Professor Langvardt noted that “Industry leaders in both the tech and gambling sectors emphasize the behavioral nature of the problem, and they suggest that they are not responsible for the small minority’s problems with impulse control.”<sup>100</sup> This moralizing disavowal of responsibility fails to account for the fact that, behind the scenes, the Industry relies heavily on such vulnerable individuals in monetizing its products.<sup>101</sup> Professor Langvardt remarked, “Developers have strong incentives to drive problem use, just as casinos do, and they make every effort to do so.”<sup>102</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 141.

<sup>96</sup> *Id.* at 146.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; see also Ferris Jabr, *Can You Really be Addicted to Video Games?*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/2019/10/22/magazine/can-you-really-be-addicted-to-video-games.html> [<http://perma.cc/JLL8-FM9U>].

<sup>99</sup> Langvardt, *supra* note 89, at 146.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 140–41; see also PocketGamerbiz, *Let’s Go Whaling: Tricks for Monetising Mobile Game Players with Free-to-Play*, YOUTUBE (Oct. 3, 2016), [https://www.youtube.com/watch?v=xNji03CGkb4&ab\\_channel=PocketGamerbiz](https://www.youtube.com/watch?v=xNji03CGkb4&ab_channel=PocketGamerbiz) [<http://perma.cc/LGZ5-UERR>] (depicting CEO of a developer speaking at a conference, describing his presentation, entitled “Let’s go Whaling!” as follows: “It is about a summary of a huge bunch of behavioral psychology, so the tricks on how to monetize a game well. Some of you will probably be slightly shocked by all the tricks I have listed here, but I’ll leave the morality of it out of the talk, we can discuss it if we have time later.”).

<sup>102</sup> Langvardt, *supra* note 89, at 147.

It is necessary to consider the words of the Industry's own representatives in defending these problematic practices. Speaking at the 2019 FTC workshop, Sean Kane, a representative of "more than 100 video game companies,"<sup>103</sup> attempted to normalize problem users' heavy spending as a purely volitional activity, claiming, "I don't think that we, as an industry, needs [sic] to step into that parental role, though, because some of these people are not children. . . . Some of these people are our age and they're spending \$1,000 on a game that they love and this is their way of relaxing after a hard day's work."<sup>104</sup> It is difficult to characterize these whales' spending patterns as knowing purchases, however.

Some game mechanisms cloud just how much a player is spending on loot boxes and other microtransactions by employing in-game currencies purchased with real-world money,<sup>105</sup> a level of abstraction that can impede players' ability to evaluate the financial consequences of their purchases.<sup>106</sup> The Industry defends the practice of using in-game currencies as one that helps "to maintain a player's sense of immersion in the game."<sup>107</sup> In its staff perspective write-up a year after the 2019 FTC conference, the FTC recognized as one of its "key takeaways" that in-game currencies "may confuse some players, as it essentially requires a player to remember the real currency to in-game currency 'exchange rate' and calculate it for every transaction."<sup>108</sup>

At the same 2019 FTC conference, a panelist from the National Consumers League, John Breyault, noted the following concerning in-game currency:

So I'd like to turn now to a specific issue that we're looking at, which is the use of in-game currency. As you've heard from the other panelists, in-game currency has proliferated throughout the top games. In *FIFA*, you've got *FIFA* coins. In *NBA 2K19*, you've got VC. In *Overwatch*, you've got credits. . . . So the currencies obtained via gameplay or purchase, our concern is that they may obscure the true cost of purchasing in-game content. So does it actually tell you how

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<sup>103</sup> INSIDE THE GAME, *supra* note 8, at 14.

<sup>104</sup> *Id.* at 100.

<sup>105</sup> *Id.* at 62–63.

<sup>106</sup> *Id.* at 66–67; see also Brendan Sinclair, *Is it Time to Retire Virtual Currency?*, GAMESINDUSTRY (Sept. 20, 2019), <https://www.gamesindustry.biz/articles/2019-09-20-is-it-time-to-retire-virtual-currency> [<http://perma.cc/LAU4-LRJJ>] (discussing the lubricating effect in-game currency has on players' decisions to purchase microtransactions, by reducing "friction points" and "opportunities for a consumer to consider whether they really want to spend this money").

<sup>107</sup> FED. TRADE COMM'N, FTC VIDEO GAME LOOT BOX WORKSHOP: STAFF PERSPECTIVE 4 (2020), [https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-loot-box-workshop/loot\\_box\\_workshop\\_staff\\_perspective.pdf](https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-loot-box-workshop/loot_box_workshop_staff_perspective.pdf) [<http://perma.cc/24CA-EUCZ>].

<sup>108</sup> *Id.*

much you're spending in real money down the line? . . . When something's priced at \$1.99, you may not think that this is \$2 and be more likely to spend money on it. . . . The problem here is that when you combine this with things like these bonuses that are offered here, it puts a lot of cognitive load on the user, creating a complex exchange rate between digital money and real dollars. And it can make it easy to lose track of an object's real world value.<sup>109</sup>

The piecemeal nature in which microtransactions, loot boxes included, extract money from players ultimately causes players to spend more on a free to play game in total than they would have likely consented to spend in advance.<sup>110</sup> In order to address the difficulties surrounding in-game currencies, Section VI below advocates for limit-setting practices as one of several new regulatory mechanisms to be implemented in video games.

Because of developer incentives to drive problematic use and because of the absence of a meaningful Industry response in the face of demonstrated links between loot boxes and problem gambling behavior, it is patently unwise to defer to the Industry as a self-regulatory authority. Concerned consumers must look elsewhere for protection, namely their governments. The function of a government's police power is to protect its citizens from physical harms and perceived social evils.<sup>111</sup> The manner and extent to which that power is exercised is a question of policy and preference, but its existence cannot be denied.<sup>112</sup> There is a longstanding history in the United States of government intervention to protect individuals from predatory and harmful corporate behavior, such as in the decades-long regulatory fight with the tobacco industry.<sup>113</sup> As explained in Section VI below, government loot box regulation is a viable method to address the harms discussed thus far, a remedy forestalled only by misconceptions about the number and type of individuals affected by loot boxes, as well as disinterest by existing regulatory authorities. It is clear that loot boxes harm certain individuals,

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<sup>109</sup> INSIDE THE GAME, *supra* note 8, at 62–63. (emphasis of game titles added).

<sup>110</sup> See Langvardt, *supra* note 89, at 135; see also INSIDE THE GAME, *supra* note 8, at 94 (“I don't think that simply saying on a box that you have any in-app purchases available adequately informs your typical parent or consumer just about the level of investment that goes into trying to get people to spend more on a game or in the app.”); *id.* at 180 (“It's very hard for consumers to know what they're getting, what it's going to cost.”).

<sup>111</sup> 38 AM. JUR. 2D *Gambling* § 8 (2020); see also Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 430 (2004).

<sup>112</sup> See Barnett, *supra* note 111, at 430.

<sup>113</sup> See, e.g., CHRISTOPHER BANTHIN, TOBACCO CONTROL LEGAL CONSORTIUM, REGULATING TOBACCO RETAILERS: OPTIONS FOR STATE AND LOCAL GOVERNMENTS 1 (2010); see also Ned Sharpless & Mitch Zeller, *Achievements in Tobacco Regulation Over the Past Decade and Beyond*, FDA, <https://www.fda.gov/news-events/fda-voices/achievements-tobacco-regulation-over-past-decade-and-beyond> (last updated Aug. 20, 2019) [<http://perma.cc/PJX2-TFFY>].



both financially<sup>114</sup> and psychologically.<sup>115</sup> As constituents become better-informed of the pervasiveness and effects of loot boxes, they can press elected and regulatory officials to take action. Whether that action can take the form of enforcement under existing gambling statutes would require a court to find that loot boxes amounted to a form of gambling, discussed further below.

### III. LOOT BOXES AS GAMBLING

The controversy over whether loot boxes are a form of gambling (“the gambling determination”) continues to rage.<sup>116</sup> The Industry’s advocates have been quick to rebut claims to that effect, seeking to distinguish traditional gambling activity from the experience of opening a loot box.<sup>117</sup> The ESRB, an entity purporting to serve as a self-regulator the video game industry, weighed in on the controversy by writing to gaming news source *Kotaku*:

ESRB does not consider loot boxes to be gambling. . . . While there’s an element of chance in these mechanics, the player is *always* guaranteed to receive in-game content (even if the player unfortunately receives something they don’t want). We think of it as a similar principle to collectible card games: Sometimes you’ll open a pack and get a brand new holographic card you’ve had your eye on for a while. But other times you’ll end up with a pack of cards you already have.<sup>118</sup>

In evaluating whether to take steps to regulate loot boxes, states and nations have grappled with this labelling issue.<sup>119</sup> Countries that have concluded that loot boxes are not a form of gambling have not meaningfully regulated them.<sup>120</sup> Countries

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<sup>114</sup> See, e.g., McGrody, *supra* note 73.

<sup>115</sup> See, e.g., Zendle & Cairns, *supra* note 7.

<sup>116</sup> See, e.g., Andrew V. Moshirnia, *Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 MINN. J.L. SCI & TECH. 77, 77–78 (2019) (noting that loot boxes are unlikely to be labeled gambling in the United States, and advocating instead for “transparency-based” solutions); see also *Loot Boxes Are a Lucrative Game of Chance, But Are They Gambling?*, NPR (Oct. 10, 2019, 5:08 PM), <https://www.npr.org/2019/10/10/769044790/loot-boxes-are-a-lucrative-game-of-chance-but-are-they-gambling> [<http://perma.cc/339C-L4LR>]; Hong, *supra* note 13 at 65–67 (arguing loot boxes constitute gambling under the California Penal Code, with a particular focus on protecting minors).

<sup>117</sup> Jason Schreier, *ESRB Says It Doesn’t See ‘Loot Boxes’ as Gambling*, KOTAKU (Oct. 11, 2017, 12:46 PM), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091> [<http://perma.cc/GJ65-YRFZ>].

<sup>118</sup> *Id.*

<sup>119</sup> See Alex Hern & Rob Davies, *Video Game Loot Boxes Should Be Classed as Gambling, Says Commons*, GUARDIAN (Sept. 12, 2019, 1:01 PM), <https://www.theguardian.com/games/2019/sep/12/video-game-loot-boxes-should-be-classed-as-gambling-says-commons> [<http://perma.cc/M5RY-Z9YK>].

<sup>120</sup> See Zoe Kleinman, *Fifa Packs and Loot Boxes ‘Not Gambling’ in UK*, BBC (July 22, 2019), <https://www.bbc.com/news/technology-49074003> [<http://perma.cc/DM5N-UK7S>].

that have come to the opposite conclusion have heavily regulated or outright banned the practice.<sup>121</sup> As a result, the resolution of this issue one way or the other can have serious financial ramifications for the Industry.<sup>122</sup> While some Industry spokespeople seek to characterize the gambling comparison as misinformed,<sup>123</sup> it seems imprudent to take their word for it without further engaging with the issue. Considering that the governments of multiple nations have found against the ESA's position that loot boxes are not a form of gambling,<sup>124</sup> the controversy is a far cry from being neatly resolved.

### A. Defining Gambling

*Black's Law Dictionary* defines gambling as “[t]he act of risking something of value, esp. money, for a chance to win a prize.”<sup>125</sup> While state statutes differ in the precise wording of their gambling definitions, they all focus on the elements of (1) a wager of something of value for (2) a valuable prize awarded through (3) random chance.<sup>126</sup> Some statutes directly acknowledge that not all activities featuring prizes are gambling, such as contests of skill.<sup>127</sup> Regardless of the precise wording of a particular statute, all traditional gambling activity, by nature, requires a participant to risk something of value (i.e. consideration).<sup>128</sup> It is only after a participant risks something of value that they are eligible to win a prize.<sup>129</sup> However, as anyone

<sup>121</sup> See Tom Gerken, *Video Game Loot Boxes Declared Illegal Under Belgium Gambling Laws*, BBC (Apr. 26, 2018), <https://www.bbc.com/news/technology-43906306> [http://perma.cc/YE7E-NBAW].

<sup>122</sup> See, e.g., Alex Hern, *Square Enix Pulls Three Games from Belgium After Loot Box Ban*, GUARDIAN (Nov. 21, 2018, 4:57 PM), <https://www.theguardian.com/games/2018/nov/21/square-enix-pulls-games-mobius-final-fantasy-belgium-loot-box-ban> [http://perma.cc/H5HA-SAY4]; see also Amrita Khalid, *Nintendo Pulls Two Mobile Games in Belgium Due to Loot Box Laws*, ENGADGET (May 21, 2019), <https://www.engadget.com/2019-05-21-nintendo-pulls-two-mobile-games-in-belgium-due-to-loot-box-laws.html> [http://perma.cc/2QFJ-78U5]; Paul Tassi, *EA Surrenders in Belgian FIFA Ultimate Team Loot Box Fight, Raising Potential Red Flags*, FORBES (Jan. 29, 2019, 10:23 AM), <https://www.forbes.com/sites/insertcoin/2019/01/29/ea-surrenders-in-belgian-fifa-ultimate-team-loot-box-fight-raising-potential-red-flags/#2a4b366d3675> [http://perma.cc/KHX8-74L4].

<sup>123</sup> See, e.g., Tae Kim, *State Legislators Call EA's Game a 'Star Wars-Themed Online Casino' Preying on Kids, Vow Action*, CNBC (Nov. 22, 2017, 8:57 AM), <https://www.cnbc.com/2017/11/22/state-legislators-call-eas-game-a-star-wars-themed-online-casino-preying-on-kids-vow-action.html> [http://perma.cc/VEU2-Y8UH].

<sup>124</sup> See Shabana Arif, *The Netherlands Starts Enforcing Its Loot Box Ban*, IGN (June 20, 2018, 3:07 AM), <https://www.ign.com/articles/2018/06/20/the-netherlands-starts-enforcing-its-loot-box-ban> [http://perma.cc/QU8E-Q2DV]; see also Gerken, *supra* note 121.

<sup>125</sup> *Gambling*, BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>126</sup> See, e.g., WASH. REV. CODE § 9.46.0237 (2005).

<sup>127</sup> See *id.*

<sup>128</sup> 38 AM. JUR. 2D *Gambling* § 2 (2020).

<sup>129</sup> See *id.*

passingly familiar with the concept of gambling can attest, simply being eligible to win does not guarantee that result. Uncertainty is inherent in all gambling activity.<sup>130</sup>

However, the definition of gambling in *Black's Law Dictionary* is not sufficient on its own. In order to meaningfully discuss whether loot boxes are a form of gambling, a baseline definition must be established.<sup>131</sup> While many of the generalized terms employed in the dictionary definition are reflected time and again in state gambling laws, their arrangement and emphasis varies.<sup>132</sup> Historically, the federal government has only stepped in to regulate gambling where it meaningfully encroaches upon the realm of interstate commerce.<sup>133</sup> As a result, the decision whether and how to regulate gambling has largely fallen to the respective states, each of which makes its own policy determination.<sup>134</sup> Indeed, the ability to regulate gambling is perhaps one of the most iconic and well-settled exercises of a state's police power.<sup>135</sup> As such, we must look to state laws to begin to define gambling. Some states, like California, regulate gambling activity broadly.<sup>136</sup> In listing the forms of gambling conduct it prohibits as a misdemeanor, California law provides:

Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment.<sup>137</sup>

Washington state defines gambling as “staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.”<sup>138</sup> Of particular interest is the statute's focus

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<sup>130</sup> See *id.*

<sup>131</sup> Castillo, *supra* note 62, at 183.

<sup>132</sup> See, e.g., Castillo, *supra* note 62, at 183–84.

<sup>133</sup> See *Lottery Case*, 188 U.S. 321, 344 (1903).

<sup>134</sup> 38 AM. JUR. 2D *Gambling* § 8 (2020).

<sup>135</sup> See 38 AM. JUR. 2D *Gambling* § 8 (2020).

<sup>136</sup> See CAL. PENAL CODE § 330 et seq. (1991).

<sup>137</sup> CAL. PENAL CODE § 330 (1991) (emphasis added).

<sup>138</sup> WASH. REV. CODE § 9.46.0237 (2005).

on whether the result of the activity is within a purported gambler's "control or influence," and the necessary implication that activities involving results within a player's control do not constitute gambling.<sup>139</sup>

Other states, perhaps most famously Nevada, embrace gambling activity by permitting it statewide and reap its economic benefits as a result.<sup>140</sup> Under Nevada law: "'Gaming' or 'gambling' means to deal, operate, carry on, conduct, maintain or expose for play any game as defined [by state law], or to operate an inter-casino linked system."<sup>141</sup> Nevada further defines "Game" as "any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value . . . ."<sup>142</sup>

While some states may elect to enact detailed gambling laws, state statutes need not define gambling to avoid being unconstitutionally vague.<sup>143</sup> Perhaps as an inevitable result, states can define the term loosely to suit their needs. It is therefore necessary to view the broad constellation of state gambling definitions to determine its common elements.<sup>144</sup>

Based upon a review of multiple state gambling statutes, one author advanced the following working gambling definition: "any activity in which consideration is given in a game of chance in return for a prize."<sup>145</sup> This Article adopts the same definition for purposes of discussion and critique. Where other scholarly articles have examined loot boxes under these elements and determined that a court would be unlikely to hold their use to be gambling activity,<sup>146</sup> this Article comes to the opposite conclusion. As argued in detail below, players and game developers treat loot

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<sup>139</sup> *See id.*

<sup>140</sup> *See* NEV. REV. STAT. ANN. § 463.010 et seq. (2019) (also known as the "Nevada Gaming Control Act," in which the Nevada Legislature expressly "[found], and declare[d] to be the public policy of this state, that... the gaming industry is vitally important to the economy of the State and general welfare of the inhabitants.")

<sup>141</sup> NEV. REV. STAT. ANN. § 463.0153 (2019).

<sup>142</sup> NEV. REV. STAT. ANN. § 463.0152 (2020) (emphasis added).

<sup>143</sup> 38 AM. JUR. 2D *Gambling* § 1 (2019).

<sup>144</sup> Castillo, *supra* note 62, at 183 ("[B]y examining various state statutes' definition of gambling and gambling instruments, a working definition begins to emerge.")

<sup>145</sup> *Id.* at 184.

<sup>146</sup> *See id.* at 192 (noting that the believed-to-be-absent element of "value" could be found by "more technically-literate court judges [who could] judge 'value' in more than just monetary terms," but concluding that as of yet, "[u]ntil such a shift in perception occurs the in-game items received from loot boxes cannot be considered value"); *see also* Mann, *supra* note 13, at 227 (concluding that "current case law and statutory definitions are inadequate to classify loot boxes as gambling outright"); Moshirnia, *supra* note 116, at 99 ("Nor would loot boxes qualify as gambling if one considers the virtual items to be worthless.").

box contents as things of value; in many games, those contents are often resold for value in player-to-player transactions with the direct sanction of the developer. This Article further argues that the money players pay in order to purchase loot boxes constitutes valuable consideration. The gambling determination, therefore, turns largely upon whether a loot box contains an item of independent value, received at random, for which the purchaser pays consideration.<sup>147</sup>

As authors have noted,<sup>148</sup> and as the ESRB conceded in its own statement on the subject,<sup>149</sup> the element of “chance” is clearly present in opening a loot box, and as such this Article will not further discuss it. Instead, it will engage with the stronger argument against the presence of the element of a valuable prize and, to a lesser extent, consideration.

## B. Valuable Prize

In order to evaluate whether a loot box’s contents have independent value, we must consider the reasons why players buy loot boxes in the first place. Are they seeking one or more specific advertised items, and all other results are disappointments? Or are they paying for a virtual lightshow, unconcerned with the specific contents of their loot box? Industry representatives frequently contend that loot boxes are not a form of gambling because a loot box always gives the player something.<sup>150</sup> From the perspective of such advocates, the “value” derived from a loot box transaction is the guaranteed receipt of any one or more items inside the loot box.<sup>151</sup> But this interpretation assumes and disregards much. Certainly, a player who receives a free loot box as part of an in-game promotion might open it out of idle curiosity, or a desire to receive something, anything. That player cannot be disappointed, because a loot box will always give him something, whether it be a “skin” (a recolor or texture swap for an existing in-game asset, with no practical gameplay effects), in-game currency, a consumable item, or any number of other possible in-game effects<sup>152</sup> (hereinafter referred to as “items”). But such a player has not purchased his loot box.

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<sup>147</sup> See Castillo, *supra* note 62, at 183.

<sup>148</sup> *Id.* at 187–88.

<sup>149</sup> Schreier, *supra* note 117.

<sup>150</sup> *Id.*

<sup>151</sup> See *id.*

<sup>152</sup> See Vance, *supra* note 3 (providing ESRB definition which states loot boxes “are like locked treasure chests that contain an array of virtual items that can be used in the game once unlocked.”).

Players who purchase loot boxes are making a decision, consciously or not, to enter into a monetary transaction.<sup>153</sup> It is clear that such paying players desire something from their purchased loot boxes. The issue then becomes whether a paying player is purchasing loot boxes for the experience of opening the loot box,<sup>154</sup> or to seek one or more specific items.<sup>155</sup> If one player—let’s call him Jace—is simply purchasing the experience, a talking point adopted by some Industry advocates,<sup>156</sup> then he has received a guaranteed thing of value for his purchase. Jace opened his loot box and got an item. He got what he paid for. Ergo, the Industry proclaims, not gambling.<sup>157</sup>

This interpretation is flawed. To illustrate: a one-dollar slot machine that always paid out at least one penny would still amount to gambling activity—the “guaranteed” receipt of a nominal prize would not invalidate the larger game being played. Further, while Jace might be finding value in the chase itself (rather than any particular prize), this makes the practice *more* akin to gambling, not less.<sup>158</sup>

But what of the other player—let’s call her Liliana—who has no interest in most of the possible items in the loot box, and sees them simply as chaff through which she must sift to unearth the solitary gem that she desires? Depending on the manner in which that particular video game is monetized, Liliana may not have the option<sup>159</sup> to purchase the item directly from the loot box. In

<sup>153</sup> See Imran Khan, *Loot Box Bill Officially Introduced to Senate*, GAMEINFORMER (May 23, 2019, 1:05 PM), <https://www.gameinformer.com/2019/05/23/loot-box-bill-officially-introduced-to-us-senate> [<http://perma.cc/VMK9-QD6Z>] (quoting text of unnumbered bill in U.S. Senate that defines “loot box” in pertinent part as “an add-on transaction to an interactive digital entertainment product”).

<sup>154</sup> See INSIDE THE GAME, *supra* note 8, at 127–28 (remarks of Dr. Andrey Simonov).

<sup>155</sup> See *id.* at 9 (“There have been anecdotal reports of consumers spending hundreds to thousands of dollars in pursuit of coveted items. . . . In addition, do consumers, especially children or adolescents, adequately understand what they’re purchasing and how much time or money they’re spending? Are the disclosures adequate? For example, disclosures about the odds of obtaining specific loot box items, especially if those odds may change depending on game behavior.”).

<sup>156</sup> See *id.* at 116–17, 121–30.

<sup>157</sup> See Moshirnia, *supra* note 116, at 98–99.

<sup>158</sup> See INSIDE THE GAME, *supra* note 8, at 127 (“[M]aybe consumers just play loot boxes because they get some utility from a risk. . . . And this is really problematic because this is the same as [in] casinos, and it can lead to problem gambling, to addiction, and to all stories like this.”).

<sup>159</sup> It is worth noting that a prominent video game featuring loot boxes, Activision-Blizzard’s *Overwatch*, adopts a hybrid model. Under this model, players receive free loot boxes periodically for playing games and logging in, while also having the opportunity to buy as many loot boxes as they wish through the in-game store. Any item in a loot box is also available for purchase using the in-game currency known as “credits.” Credits cannot be purchased directly and instead must be acquired by opening loot boxes, which pay them out in lots of 50, 150, 200, and 500 according to the rarity of the bundle of credits contained in a particular loot box. Duplicate items received from loot boxes award a

that case, she must roll up her sleeves and begin to open loot boxes, one by one, until she finds what she is looking for or abandons her search out of frustration or economic necessity. Liliانا would have paid out real money for the mere chance to receive what she desired. Even if she is ultimately successful, her success could have come after opening one loot box or one hundred. The solitary item she desired could have cost her wildly different amounts of money. Initial research suggests that most loot box purchasers adopt this approach, and “open loot boxes mainly for functional value . . . .”<sup>160</sup>

One might consider the above distinction to be largely philosophical. What do players personally value? Why should the Industry be regulated in dealing with Liliانا if they would be free to deal with Jace? Indeed, Industry advocates have often emphasized players’ decision to purchase loot boxes as an act of self-expression,<sup>161</sup> noting that often loot box contents are entirely cosmetic and confer no gameplay advantages.<sup>162</sup> These arguments tend to frame the discussion around loot boxes in terms of player agency and expression.<sup>163</sup> The ESA laid out its position as follows:

Loot boxes are a voluntary feature in certain video games that provide players with another way to obtain virtual items that can be used to enhance their in-game experiences. They are not gambling. . . . In some games, they have elements that help a player progress through the video game. In others, they are optional features and are not required to progress or succeed in the game. In both cases, the gamer makes the decision.<sup>164</sup>

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prorated amount of credits as well. A “Rare” skin (featuring a simple color palette swap of that character’s original model) for a particular character costs 250 credits to be directly unlocked, while a new “Legendary” skin for that character (incorporating new visual and audio effects and a more radically altered character model) will cost 3,000 credits. A player could either choose to open their free loot boxes (augmenting them with paid loot boxes as desired) until they got the skin they wanted, or they could use their credits to purchase the skin directly. The purpose of this footnote is to illustrate that, even though players can unlock skins “directly” in *Overwatch*, the currency to do so must be accrued by opening loot boxes. A player attempting to acquire a limited-time skin may not have enough time to purchase that skin directly with their available credits, and will instead need to purchase multiple loot boxes to either find the skin by chance or accrue enough credits to unlock it manually. See, e.g., Daniel Friedman, *Want Overwatch to Get Rid of Loot Boxes? It Might Get More Expensive*, POLYGON (Sep. 5, 2018, 2:00 PM), <http://www.polygon.com/2018/9/5/17822966/overwatch-loot-boxes-skins-events> [<http://perma.cc/EW2X-ZAH5>] (discussing *Overwatch*’s in-game economy).

<sup>160</sup> See INSIDE THE GAME, *supra* note 8, at 130.

<sup>161</sup> *Id.* at 22 (remarks of Sean Kane).

<sup>162</sup> *Id.* at 30–31.

<sup>163</sup> *Id.* at 22 (“[C]ustomization in games is exceedingly popular and it’s something that [players] do to really interact with their friends. They love to be able to show off some sort of new element that allows their game character to more reflect their own personality.”).

<sup>164</sup> Hannah Dwan, *Hawaii to Crack Down on ‘Predatory’ Loot Boxes in Video Games*

In evaluating the ESA's above defense of the practice, Professor Andrew V. Moshirnia noted the wrongheadedness of discussing free will and choice in arguing whether a practice amounts to gambling.<sup>165</sup> Professor Moshirnia wrote:

Unsurprisingly, the Entertainment Software Association (ESA), a trade association, has strongly opposed any suggestion that loot boxes are a form of gambling. ESA has wrongly made this argument based on the voluntary nature of the activity, rather than the relative value of resulting items. . . . The ESA's approach is odd as gambling definitions do not typically revolve around volition—it is assumed that bets do not place themselves and that a viewer can watch a race without placing a wager.<sup>166</sup>

Further, player-agency arguments disregard the economic value that players<sup>167</sup> and game developers<sup>168</sup> themselves assign to specific items in their loot boxes.

The Industry is nevertheless hesitant to characterize loot box contents as things of real-world value, and prefers to discuss them as fun add-ons.<sup>169</sup> This view is somewhat supported by the monetization structure of some video games, in which players cannot trade the items they receive from loot boxes—the items are permanently associated with individual accounts.<sup>170</sup> One might wonder how the contents of a loot box can be things of value if they cannot be shared, traded, or sold off. Under such a system, one might imagine players enter into a loot box transaction with the understanding that they are receiving nothing of value, because they cannot sell it off and will eventually stop playing that particular game.

This notion does not overcome loot boxes' similarity to traditional gambling activity for two reasons: (1) it fails to acknowledge that many things of value cannot be shared or later sold off, and (2) it also fails to take into account the many online games in which loot box contents can and are traded and resold

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*Following Star Wars Battlefront 2 Controversy*, TELEGRAPH (Nov. 27, 2017, 4:57 PM), <http://www.telegraph.co.uk/gaming/news/hawaii-crack-predatory-loot-boxes-video-games/> [<http://perma.cc/AA7W-GCEW>].

<sup>165</sup> Moshirnia, *supra* note 116, at 95–96.

<sup>166</sup> *Id.*

<sup>167</sup> *See, e.g.*, Joseph Knoop, *The Most Expensive CS:GO Skins of 2017*, PCGAMER (Nov. 30, 2017), <http://www.pcgamer.com/csgo-skins-most-expensive> [<http://perma.cc/5CDU-BHRR>].

<sup>168</sup> *See, e.g.*, Maddie Level, *Unboxing the Issue: The Future of Video Game Loot Boxes in the U.S.*, KAN. L. REV. 201, 216 (2019) (“Likewise, in games where the items contained in loot boxes are categorized [by developers] by frequency and rarity, value is inherently assigned to the items.”).

<sup>169</sup> *See, e.g.*, INSIDE THE GAME, *supra* note 8, at 22.

<sup>170</sup> *See id.* at 69–70.



for considerable sums of money with the direct support of the game developer.<sup>171</sup>

To the first point: individuals frequently pay money for services, such as haircuts and car washes, that cannot later be re-sold or cashed out, and the benefits of which diminish over time. That is not to say, however, that these services lack value.<sup>172</sup> The Industry's logic with regard to loot boxes assumes that the ability to trade something is integral to whether that thing is valuable. But the Industry's logic is faulty. It is irrelevant whether the contents of a loot box are freely tradable, as a court could find that the payment of cash for an uncertain, nontransferable prize amounts to gambling activity regardless. However, it is important to note that at least one nation, the Netherlands, has only found gambling activity to take place when the contents of those loot boxes are transferable as part of real-world transactions.<sup>173</sup>

To the second point: in games where players *are* allowed to trade amongst themselves, in-game items can command real-world prices. Some online marketplaces, such as Valve's Steam Community Market ("Steam"), allow players to buy and sell items from a host of affiliated games, many of which were originally exclusively obtained from a loot box mechanism.<sup>174</sup> Steam places an \$1800 limit on any single transaction, and charges a five percent transaction fee.<sup>175</sup> Individual game developers determine whether they wish to enable player-to-player trading through Steam's market.<sup>176</sup> This serves as further evidence that many developers acknowledge in-game items to be things of value, and directly profit from selling loot boxes to players, knowing and intending for those players to in turn resell the loot boxes' contents for cash.

<sup>171</sup> See Jeremy Laukkonen, *Steam Community Market: What It Is and How to Use It*, LIFEWIRE, <https://www.lifewire.com/steam-community-market-what-it-is-and-how-to-use-it-4586933> [<http://perma.cc/T2GW-9FD8>] (last updated Oct. 17, 2019).

<sup>172</sup> See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 297 (1988) (providing a helpful overview of John Locke's labor theory of property, noting in pertinent part that, human "labor adds value to the goods, if in no other way than by allowing them to be enjoyed by a human being.").

<sup>173</sup> *Loot Boxes & Netherlands Gaming Authority's Findings*, DUTCH GAMES ASS'N, <http://dutchgamesassociation.nl/news/loot-boxes-netherlands-gaming-authoritys-findings> [<http://perma.cc/U64K-TPXM>] (last visited Apr. 26, 2020).

<sup>174</sup> See, e.g., Laukkonen, *supra* note 171.

<sup>175</sup> *Community Market FAQ*, STEAM, [http://support.steampowered.com/kb\\_article.php?ref=6088-udxm-7214](http://support.steampowered.com/kb_article.php?ref=6088-udxm-7214) [<http://perma.cc/A5D4-3P8L>] (last visited Apr. 28, 2020).

<sup>176</sup> *Id.* ("It is up to the game developer to decide whether or not they want to participate in the Community Market.").

Evidence that players themselves assign value to these in-game items can be found in the steep prices they are often willing to pay for them. For example, players of *Counter-Strike: Global Offensive* (a first-person shooter game with military themes) trade skins for the guns they use in ordinary gameplay.<sup>177</sup> Some of the rarer skins, originally obtained through a loot box mechanism, have commanded staggering prices; in one extreme case, a skin called “Dragon Lore” sold for \$61,000.<sup>178</sup>

That is not to say that players are arbitrarily finding value in particular items despite game developers’ best intentions; developers themselves are well aware that certain items are more highly sought-after than others, and indeed engineer them to be as such. The manner in which they advertise these rarer items, such as releasing promotional videos highlighting particular items and emphasizing their time-limited nature,<sup>179</sup> suggests that developers intend players to urgently seek out these items in particular. Furthermore, developers entirely control the scarcity of a particular item by setting the percentage chance of a particular item appearing in any given loot box<sup>180</sup> (known colloquially as the “drop rate”<sup>181</sup>). These drop rates can be variable, and where variable, can lead to complicated payout structures.<sup>182</sup> By setting certain items to have a lower drop rate

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<sup>177</sup> Andy Chalk, *CS:GO ‘Dragon Lore’ AWP Skin Sells for More than \$61,000*, PCGAMER (Jan. 31, 2018), <http://www.pcgamer.com/csgo-dragon-lore-awp-skin-sells-for-more-than-61000> [http://perma.cc/RNR8-VNHF].

<sup>178</sup> *Id.*

<sup>179</sup> See, e.g., PlayOverwatch, *Overwatch Seasonal Event Lunar New Year 2020*, YOUTUBE (Jan. 16, 2020), <https://www.youtube.com/watch?v=eLnET-OCI4M> [http://perma.cc/PTN7-D6TQ].

<sup>180</sup> See INSIDE THE GAME, *supra* note 8, at 33, 49.

<sup>181</sup> See *id.* at 49.

<sup>182</sup> To illustrate the complexity that can be involved in the implementation of a particular variable-rate loot box mechanic, refer to the example below.

In Nintendo’s free-to-play mobile game, *Fire Emblem Heroes*, new collectible items (in this case fantasy characters to be added to a player’s “barracks”) are introduced into the game at regular intervals, often in sets of three or four. Those characters are advertised as being available in a particular loot box (referred to in this game as a “banner”). New characters often boast unique weapons or abilities, many of which a player can transfer to their existing characters. A player seeking to receive one or more advertised characters must spend in-game currency (purchased with real-world money) in order to receive a randomized character from the banner. The chance to receive a featured character (a “focus hero”) is 3% on most banners. Players also have a separate 3% chance to receive a different, randomized character of the same level of rarity from a prior banner (a “non-focus hero”). The other 94% of the time, the player will receive a randomized character of a lower rarity from throughout the game’s history. *Fire Emblem Heroes* tracks whether or not a player has received a high-rarity character, and gradually improves the rate at which the rarest characters are available (referred to colloquially as the “pity rate”) in increments of 0.25% for every five characters received without receiving a character of the highest rarity, resetting to 3% for both focus heroes and non-focus heroes once one or the other has been obtained. This creates an incentive for a player to continue to continue to spend as their pity rate increases and the opportunity to receive their desired prize

than other items (essentially making those items more “rare”), game developers are tacitly acknowledging that they expect some items to be more desirable or useful to their players. For these reasons, it is disingenuous to claim that monetary value is not often assigned to loot box items, or that particular items are not more highly valued than others.

One author concluded that the “prize” element would be found lacking in United States courts, based upon a two-pronged analysis.<sup>183</sup> In the first prong, the author relied in part on the fact that games made by Electronic Arts (“EA”) and Activision-Blizzard contained terms of service that expressly forbade account trading.<sup>184</sup> The author discussed the case of *Kater v. Churchill Downs Incorporated*,<sup>185</sup> noting that an item that merely extended gameplay did not constitute sufficient value to meet the definition of gambling,<sup>186</sup> and further that a game company could not be held responsible for real-world trading enabled by third parties in violation of the game’s terms of service.<sup>187</sup>

In *Kater*, a player attempted to bring a class action suit against the operators of a virtual casino, seeking recovery under a Washington state lost-gambling-funds statute, the Washington Consumer Protection Act, as well as an unjust enrichment claim against the casino.<sup>188</sup> Gameplay required users to purchase and spend virtual chips to extend their time in the virtual casino.<sup>189</sup> While the game included a feature allowing users to transfer their chips to other players, the game only allowed players to do so gratuitously.<sup>190</sup> Nevertheless, a secondary market existed,

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improves. Starting a “summoning session” (the term the game uses to describe the loot box mechanism through which players acquire characters) costs five “orbs,” the in-game currency. The player then may choose from one of five doors, which are color-coded among four possible colors (red, green, blue, and gray) in order to indicate, broadly, what type of weapon that character uses. Players seeking a particular character will know that character’s weapon color, which is advertised in advance, and can select the corresponding door. The door is then opened, and the player receives a character of the chosen weapon color. The player may then choose to continue opening the remaining four doors (for a cumulative cost of 20 orbs if all five doors are opened) or may abandon the summoning session. Three orbs can be purchased via the Google Store at any time for \$1.99. Orbs are available in other quantities, up to a bundle of 143 (including 33 “bonus” orbs) for \$74.99. See Jason Venter, *Understanding Fire Emblem Heroes: A Beginner’s Guide*, POLYGON (Feb. 8, 2017, 10:30 AM), <https://www.polygon.com/fire-emblem-heroes-guide/2017/2/8/14541874/rewards-base-maps-difficulty-battle-dying-summoning-ritual-teams-merge-arena-heroes-tower-quests>.

<sup>183</sup> See Castillo, *supra* note 62, at 189–92.

<sup>184</sup> *Id.* at 190.

<sup>185</sup> *Kater v. Churchill Downs Inc.*, 2015 U.S. Dist. LEXIS 175049 (W.D. Wash. 2015).

<sup>186</sup> Castillo, *supra* note 62, at 191.

<sup>187</sup> *Id.*

<sup>188</sup> *Kater*, 2015 U.S. Dist. LEXIS 175049, \*1.

<sup>189</sup> *Id.* at \*2.

<sup>190</sup> See *id.* at \*3.

whereby players would trade for gameplay-extension chips, using the in-game transfer feature to finalize the transaction after a deal had been struck.<sup>191</sup> Prior to playing any digital games, the plaintiff accepted the terms of use on the casino's website, which expressly "state[d] that virtual chips have no monetary value and cannot be exchanged 'for cash or any other tangible value.'"<sup>192</sup> The plaintiff had purchased and subsequently lost over \$1,000 worth of these gameplay chips prior to bringing suit.<sup>193</sup> The district court dismissed the complaint with prejudice, finding that because the terms of service expressly forbade transferring the gameplay-extension chips for value, the defendant "[did] not award something of value satisfying the requisite prize element, and therefore the game [was] not 'illegal gambling' under Washington law."<sup>194</sup> The author based his determination that loot box contents could not constitute things of value partly on this lower court ruling.<sup>195</sup> Ultimately, however, the appellate court reversed the lower court's decision, holding that the gameplay-extension chips were, in fact, a "thing of value," and concluding "that Big Fish Casino falls within Washington's definition of an illegal gambling game."<sup>196</sup> The author's argument as based upon *Kater* is therefore unconvincing.

With regard to real-world trading bans under a game's terms of service, the decision on the part of some game developers to forbid real-world trading of accounts (and therefore the items associated with them) does not necessarily eliminate the real-world monetary value of those items to the players holding them. A player with no intention of selling their account can still be enticed by an attractive advertised item into purchasing a loot box in the hopes of acquiring the item. Their inability to (lawfully) trade that item does not negate that item's value to the player, which could very well constitute a "prize" sufficient to meet most definitions of gambling. Furthermore, the author did not acknowledge the existence of authorized online marketplaces, such as Steam, where players are free to trade items with other players for real-world money and in full compliance with a game's terms of service. For these reasons, this prong of the author's analysis is not convincing.

In the second prong, the author cited the case of *Chaset v. Fleer/Skybox International*<sup>197</sup> to further support his

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<sup>191</sup> *Id.*

<sup>192</sup> *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 786 (9th Cir. 2018) (appellate court ruling reversing district court opinion).

<sup>193</sup> *Id.*

<sup>194</sup> *Kater v. Churchill Downs Inc.*, 2015 U.S. Dist. LEXIS 175049, \*12.

<sup>195</sup> *See* Castillo, *supra* note 62, at 192.

<sup>196</sup> *Kater*, 886 F.3d at 788.

<sup>197</sup> *Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083 (9th Cir. 2002).

view that U.S. courts would fail to find prize value in a loot box's contents.<sup>198</sup> *Chaset* concerned a Racketeer Influenced and Corrupt Organizations Act ("RICO") suit by "purchasers of [physical] trading cards" against the manufacturers of those cards, who distributed them at random in manufacturer-sealed booster packs.<sup>199</sup> At issue was the disappointment consumers felt in failing to obtain desirable "chase" cards, and whether that disappointment rose to the level of an injury to property.<sup>200</sup> The Ninth Circuit in *Chaset* dismissed the case for lack of standing, noting that the plaintiffs lacked an injury to property.<sup>201</sup> In pertinent part, the Ninth Circuit wrote:

At the time the plaintiffs purchased the package of cards, which is the time the value of the package should be determined, they received value—eight or ten cards, one of which might be an insert card—for what they paid as a purchase price. Their disappointment upon not finding an insert card in the package is not an injury to property.<sup>202</sup>

In coming to this conclusion, the Ninth Circuit appears to indicate not that the contents of a pack of cards themselves are worthless, but rather that they have a set value as a sealed pack, calculated at the time of purchase and not when its contents are discovered.<sup>203</sup>

Industry advocates have trotted out the comparison to physical trading cards often in defense of loot box practices.<sup>204</sup> The argument is clear: if trading card packs under *Chaset* have a value as a pack with a certain number of cards inside, and nothing more, then loot boxes, which have a value as a loot box with a certain number of items inside, likely have no further value. A consumer's expectations are not subverted when they open the loot box and fail to find the item they desired, or so the argument might go. But this argument fails to distinguish physical trading cards under *Chaset* from the contents of loot boxes, which differ in significant respects.

For one, the cause of action in *Chaset* was a RICO claim,<sup>205</sup> not an attempt to label trading cards as a form of gambling. The

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<sup>198</sup> Castillo, *supra* note 62, at 189.

<sup>199</sup> *Chaset*, 300 F.3d at 1085.

<sup>200</sup> *Id.* at 1087.

<sup>201</sup> *Id.* at 1087–88.

<sup>202</sup> *Id.* at 1087.

<sup>203</sup> *See id.*

<sup>204</sup> *See, e.g.*, INSIDE THE GAME, *supra* note 8, at 42 (ESA representative Mike Warnecke claiming, "For 75 years or more, Americans have been opening up millions of packages of baseball cards to put together their dream team, to get the players that they root for on their home teams, and to build their collections with their friends. It's a common mechanic that people are very familiar with.")

<sup>205</sup> *Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083, 1085 (9th Cir. 2002).

requirement of an injury to property is an element of a RICO claim,<sup>206</sup> not of a traditional gambling definition. Further, the trading card comparison is inapposite because it fails to take into account the velocity with which consumers can participate in loot box transactions.<sup>207</sup> At the 2019 FTC conference, Professor Adam Elmachtoub explained in response to a question about the trading card comparison:

[O]ne thing though it's important to recognize, is there's no friction costs for buying loot boxes. There's a huge friction cost for buying a physical item. . . . So when you buy something—even if you buy it from Amazon, you still have to wait to receive it. And by that point, your thrill may have disappeared a little bit.<sup>208</sup>

Noted researcher Dr. David Zendle, at that same conference, responded to Professor Elmachtoub by noting:

I remember when we were talking to the Australian Senate about this, they sort of said, what are the differences between loot boxes and trading card games in the real world. . . . [O]ne of the things that seems important is the velocity and the volume with which you can make loot box purchases. I mean, you can't go to a shop and just buy Kinder Egg, Kinder Egg, Kinder Egg, Kinder Egg, Kinder Egg, Kinder Egg, Kinder Egg, Kinder Egg, but that's what we see people do with loot boxes.<sup>209</sup>

The above discussion between Professor Elmachtoub and Dr. Zendle draws into sharp contrast the distinction between physical card purchases and digital loot box buys. Whereas physical purchases involve “friction costs,” such as taking an item to the cash register or waiting for it to be delivered (which represent opportunities for individuals to rethink their purchase or, more significantly, subsequent purchases), loot boxes can be purchased very quickly using pre-recorded credit card information,<sup>210</sup> large bundles,<sup>211</sup> and even in the case of the Google Play Store, biometrics in the form of one-touch fingerprint purchase authorization.<sup>212</sup> Academics have noted that, particularly in the realm of smart phone gaming, app designers

<sup>206</sup> 18 U.S.C.S. § 1964(c) (2000).

<sup>207</sup> INSIDE THE GAME, *supra* note, at 159–60.

<sup>208</sup> *Id.* at 159.

<sup>209</sup> *Id.* at 159–60.

<sup>210</sup> *Add, Remove, or Edit Your Payment Method*, GOOGLE PLAY HELP, <https://support.google.com/googleplay/answer/4646404?co=GENIE.Platform%3DDesktop&hl=en%20> [<http://perma.cc/8GVR-8B9U>] (last visited Apr. 29, 2020).

<sup>211</sup> INSIDE THE GAME, *supra* note 8, at 221.

<sup>212</sup> Nicole Cozma, *Use Your Fingerprint to Authorize Google Play Purchases on Android 6.0 Marshmallow*, CNET (Feb. 26, 2016, 9:20 AM), <https://www.cnet.com/how-to/authorize-google-play-purchases-with-your-fingerprint-on-android-marshmallow-use-your-fingerprint/> [<http://perma.cc/MR9J-EGXN>].

prioritize developing experiences that short-circuit individuals' ability to control their own impulses.<sup>213</sup>

This cuts against the possible moralistic argument that only gamblers are hurt by sharp practices in the realm of digital monetization; apps are increasingly being designed to exploit fundamental weaknesses of human psychology.<sup>214</sup> For these reasons, it is not appropriate to claim that the purchaser of a loot box is in as strong a position to evaluate the value of what they are purchasing as is the purchaser of a physical product; the transaction far better resembles a digital game of chance than the simple purchase of a product. A finder of fact could take the next logical step and hold that loot box contents (whether transferable or not) have value.

### C. Consideration

Another argument against the classification of loot boxes as a form of gambling is the purported absence of consideration in the transaction.<sup>215</sup> This argument is not as strong as the argument against the existence of a valuable prize, however, because loot boxes are by definition available for direct purchase using a real-life payment method.<sup>216</sup> *Black's Law Dictionary* defines "consideration" as "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act."<sup>217</sup> Consideration is an essential element in all contracts.<sup>218</sup>

As Industry advocates themselves are quick to point out, players are not required to buy loot boxes to play games.<sup>219</sup> As such, any money a player pays in exchange for a loot box is consideration for a single transaction, separate from the purchase price of the game, if any.<sup>220</sup> For this reason, it is clear that players are paying consideration in exchange for loot boxes, regardless of the determination of whether individual items have value or whether there is chance involved.

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<sup>213</sup> See Langvardt, *supra* note 89, at 141–42.

<sup>214</sup> *Id.*

<sup>215</sup> See, e.g., Castillo, *supra* note 62, at 185–87.

<sup>216</sup> See, e.g., *Purchasing Loot Boxes*, BLIZZARD, <https://us.battle.net/support/en/article/73354> (last visited Apr. 28, 2020).

<sup>217</sup> *Consideration*, BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>218</sup> See, e.g., CAL. CIV. CODE § 1550 (West 2020) ("It is essential to the existence of a contract that there should be . . . [a] sufficient cause or consideration.").

<sup>219</sup> INSIDE THE GAME, *supra* note 8, at 26 (statement of Sean Kane) ("No one is forced to spend money in a video game that is free to play. They choose what they want to spend and when they want to spend it and how they want to spend it.").

<sup>220</sup> See Castillo, *supra* note 62, at 186.

One author asserted that because certain titles, such as *Overwatch* and *Star Wars Battlefront II*, made all their in-game items available “after a certain amount of time playing,” a would-be plaintiff would be hard-pressed to argue that they had risked their money on a loot box.<sup>221</sup> This argument fails to account for games in which loot box items are only available through loot boxes, and cannot be received through commensurate in-game play. Furthermore, even if items are capable of being unlocked outside of a loot box, a player is still paying consideration when they purchase a loot box hoping to receive particular items immediately by random chance. The opportunity to earn an in-game item outside of a loot box based upon a large time investment does not diminish the cash value of the consideration a player pays in exchange for a loot box. Finally, as another author noted, “California courts have held that consideration need not be paid solely for the chance to win [in a gambling scheme]; rather, it is enough that consideration is paid for something in addition to the chance to win a prize.”<sup>222</sup> That author reasoned that consideration’s value is not diminished by the guaranteed receipt of a random item from a loot box.<sup>223</sup>

Another author raised an important note, reasoning that, although a tech-savvy fact-finder might accept that loot boxes meet the requisite elements of gambling, most cases would be dismissed nevertheless on the grounds that plaintiffs lack a particularized injury sufficient to constitute standing.<sup>224</sup> From that author’s perspective, loot boxes will only be treated as gambling activity by courts when there has been “unequivocal legislation to categorize them as such.”<sup>225</sup> However, the objective of this Article is not to claim that individual plaintiffs should be able to recover their lost consideration on a case-by-case basis (which would require those plaintiffs’ cases to survive motions to dismiss for lack of standing). Rather, this section has attempted to demonstrate that loot boxes are, in every meaningful sense, a form of gambling, such that game developers should be required to prospectively comply with existing gambling regulations.<sup>226</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> Hong, *supra* note 13, at 68 (citing *Holmes v. Saunders*, 114 Cal. App. 2d 389, 390 (1952)).

<sup>223</sup> *Id.*

<sup>224</sup> Level, *supra* note 168, at 225.

<sup>225</sup> *Id.* at 224.

<sup>226</sup> It is important to note, however, that policymakers may instead take the opposite approach and elect to offer loot boxes and other forms of “social gaming” special exemptions and protections. See, e.g., Erik Gibbs, *Washington State’s Big Fish Could be Off the Hook with New Gambling Bills*, CALVIN AYRE (Jan. 30, 2020), <https://calvinayre.com/2020/01/30/business/washington-states-big-fish-could-be-off-the->



Even if loot boxes are ultimately held to not constitute a form of gambling, they remain susceptible to novel forms of regulation. One possible regulatory avenue could be direct FTC oversight over loot boxes and other microtransactions, even if it is settled that they do not constitute gambling.<sup>227</sup> Alternatively, Congress or any given state could pass sweeping limitations or outright bans to curb the practice.<sup>228</sup> Neither of these possible regulatory solutions require a court to hold that loot boxes constitute a form of gambling under existing law. Despite the fierce public-relations battle that is still raging over the gambling determination, its disposition is not the end of the discussion.

#### IV. CURRENT REGULATORY MEASURES UNDER INDUSTRY SELF-REGULATION

At present, loot boxes are entirely unregulated by any federal or state statute in the United States.<sup>229</sup> In evaluating the current state (or lack thereof) of loot box regulation, two authors for the *National Law Review* commented, “Several states, including Hawaii, Washington, California, and Minnesota, also introduced bills last year to regulate the use of loot boxes in games, but all failed to pass.”<sup>230</sup> This failure was not for a lack of interest on the part of the legislators behind the respective bills; Rep. Chris Lee of the Hawaii House of Representatives publicly condemned the practice in introducing his state’s ultimately doomed legislation, calling loot boxes “a trap” that has “compelled many folks to spend thousands of dollars in gaming fees online.”<sup>231</sup> Vulnerable individuals are not the only ones falling prey to the practice; Rep. Lee himself shared his personal experience with the creeping cost of loot boxes while playing *Clash of Clans* during his downtime, stating, “At one point, I

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hook-with-new-gambling-bills/ [http://perma.cc/LSB7-TBUT] (noting that, as part of the political backlash against the appellate ruling in Washington’s *Kater* case, state senators have advanced bills to protect online casinos from gambling regulations where “players are not able to cash out for real money”).

<sup>227</sup> INSIDE THE GAME, *supra* note 8, at 107 (statement of John Breyault) (“And so to ensure that the industry doesn’t take advantage of gamers in its efforts to continue that profitability is an appropriate role for the FTC to take.”).

<sup>228</sup> See, e.g., *Senator Hawley to Introduce Legislation Banning Manipulative Video Game Features Aimed at Children*, JOSH HAWLEY (May 8, 2019), <https://www.hawley.senate.gov/senator-hawley-introduce-legislation-banning-manipulative-video-game-features-aimed-children> [http://perma.cc/P2CA-ZXZ5].

<sup>229</sup> Steven Blickensderfer & Nicholas A. Brown, *U.S. Regulation of Loot Boxes Heats Up with Announcement of New Legislation*, NAT’L L. REV. (May 9, 2019), <https://www.natlawreview.com/article/us-regulation-loot-boxes-heats-announcement-new-legislation> [http://perma.cc/FD6H-NGZQ] (noting, “[i]n the United States, there is no legislation currently in place to regulate this practice”).

<sup>230</sup> *Id.*

<sup>231</sup> Lee, *supra* note 52.

started buying crystals. I ended up spending a few hundred dollars over the course of a few months.”<sup>232</sup> He reflected that, upon realizing what had happened and deleting the app, “there was no value left. It’s just money that’s gone.”<sup>233</sup>

At the federal level, Senator Margaret Hassan of New Hampshire, in responding to her constituents’ concerns, corresponded directly with the president of the ESRB, Patricia Vance, asking the Industry to adopt improved loot box disclosures and to “develop best practices for developers.”<sup>234</sup> Senator Hassan further pressed the FTC to look into the practice, questioning nominees on their stance on the dangers posed by loot boxes.<sup>235</sup> The August 2019 FTC conference discussed above was likely the direct result of Senator Hassan’s outreach.<sup>236</sup>

On the legislative front, one bill introduced in 2019 would ban loot boxes in games directed primarily toward minors.<sup>237</sup> The practice would prohibit defined “pay-to-win microtransactions and sales of loot boxes in minor-oriented games,”<sup>238</sup> and would further prohibit the “publication or distribution of video games containing pay-to-win microtransactions or purchasing loot boxes where the publisher or distributor has constructive knowledge that any users are under age 18.”<sup>239</sup> However, the bill has yet to advance, and some commentators have expressed concerns about

<sup>232</sup> Cecilia D’Anastasio, *Hawaii State Rep Is Drafting Bill Barring Minors from Buying Games with Loot Boxes*, KOTAKU (Dec. 8, 2017, 4:40 PM), <https://kotaku.com/hawaii-state-rep-is-drafting-bill-barring-minors-from-b-1821136540> [<http://perma.cc/26EC-WJWD>].

<sup>233</sup> *Id.*

<sup>234</sup> Letter from Margaret Wood Hassan, Sen., to Patricia Vance, President of the ESRB, at 1 (Feb. 14, 2018), <https://www.hassan.senate.gov/imo/media/doc/180214.ESRB.Letter.Final.pdf> [<http://perma.cc/G6JS-6CA4>] (regarding loot boxes).

<sup>235</sup> Paul Tassi, *US Senator Confronts the ESRB Over Loot Box Classification and Addiction*, FORBES (Feb. 15, 2018, 9:59 AM), <https://www.forbes.com/sites/insertcoin/2018/02/15/us-senator-confronts-the-esrb-over-loot-box-classification-and-addiction/#73d8316e5a97> [<http://perma.cc/Y28B-PUYR>] (“This week, Hassan asked four FTC nominees the question: ‘That children being addicted to gaming – and activities like loot boxes that might make them more susceptible to addiction – is a problem that merits attention?’”).

<sup>236</sup> *Senator Hassan Statement on Announcement that Major Video Game Manufacturers Will Make Loot Box Odds More Transparent*, MAGGIE HASSAN (Aug. 7, 2019), <https://www.hassan.senate.gov/news/press-releases/senator-hassan-statement-on-announcement-that-major-video-game-manufacturers-will-make-loot-box-odds-more-transparent> [<http://perma.cc/JDC7-HMDL>] (“The announcement was made at a loot box workshop hosted by the Federal Trade Commission (FTC), which came in response to Senator Hassan’s advocacy.”).

<sup>237</sup> See Protecting Children from Abusive Games Act, S. 1629, 116th Cong. §§ 1–5 (2019).

<sup>238</sup> *Id.* § 1(a).

<sup>239</sup> *Id.* § 1(b).

its potential overbreadth,<sup>240</sup> while others have mocked its chances of passage altogether.<sup>241</sup>

The ESRB, and by extension its parent entity the ESA, are the only entities to have enacted anything resembling loot box regulations.<sup>242</sup> The Industry's advocates frequently argue that sufficient controls are already in place, and that parents need only be educated about the tools the Industry has placed within their control.<sup>243</sup> In response to Senator Hassan's communications with the FTC, and the subsequent announcement that the FTC would be hosting an exploratory panel in August 2019, ESA president Stanley Pierre-Louis noted, "We look forward to sharing with the senator the tools and information *the industry already provides* that keeps the control of in-game spending in parents' hands. . . . Parents *already have the ability* to limit or prohibit in-game purchases with easy to use parental controls."<sup>244</sup> Such arguments imply that no further regulation is necessary, only education.<sup>245</sup>

Despite purporting to engage in self-regulation, the Industry's advocates and representatives frequently disregard suggested regulatory changes by relying on their blanket assertion that loot boxes are not gambling.<sup>246</sup> At the 2019 FTC workshop, an audience question about whether the Industry would seek to connect affected players with resources similar to Gamblers' Anonymous was met with the following response from panelist Mike Warnecke of the ESA: "So, no, it does not include any sort of hotline for that. ESA's position is that loot boxes are not a form of gambling and that it wouldn't be an appropriate solution to that issue."<sup>247</sup>

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<sup>240</sup> Owen S. Good, *Anti-Loot Box Bill Poses a Real Threat to Sports Video Games*, POLYGON (June 1, 2019, 7:32 PM), <https://www.polygon.com/2019/6/1/18648907/anti-loot-box-law-congress-josh-hawley-senate-nba-2k-fifa-ultimate-team> [http://perma.cc/6Q7Z-38NL].

<sup>241</sup> Giancarlo Valdes, *'Zero' Chance It Passes: Game Analysts Break Down Senator's Anti-Loot Box Bill*, VENTUREBEAT (May 13, 2019, 11:35 AM), <https://venturebeat.com/2019/05/13/zero-chance-it-passes-game-analysts-break-down-senators-anti-loot-box-bill/> [http://perma.cc/N5TX-HQQS] (One securities analyst lambasted the bill, arguing, "Congress simply cannot legislate against pay-to-win, where a game is competitive and people purchase better weapons, gear, etc. . . . That's like legislating against faster cars, nicer handbags, whatever. Too dumb to comment on.").

<sup>242</sup> See, e.g., *Parental Controls*, ESRB, <https://www.esrb.org/tools-for-parents/parental-controls/> [http://perma.cc/JG27-9VS5] (last visited Apr. 30, 2020).

<sup>243</sup> See, e.g., Kelly, *supra* note 47.

<sup>244</sup> *Id.* (emphasis added).

<sup>245</sup> See INSIDE THE GAME, *supra* note 8, at 176–77 (reflecting ESRB President Patricia Vance's statement at the 2019 FTC workshop, "We want to make sure that parents know that when they see that in-game purchase notice . . . if they want to limit their child's ability to spend money, they know how to do it.").

<sup>246</sup> See, e.g., *id.* at 74–75 (statement by Renee Gittins).

<sup>247</sup> *Id.* at 101.

It was not until the FTC workshop was underway that the ESRB announced that it would seek to compel its member entities to disclose loot box drop rates to players.<sup>248</sup> Although the ESRB did not impose a detailed timetable for compliance,<sup>249</sup> multiple panelists in attendance touted the measure as a significant act of self-regulation.<sup>250</sup> However, commentators have noted that heralding the measure as an act of self-regulation is somewhat disingenuous,<sup>251</sup> as the measure was announced only after China had already enacted laws mandating such disclosure within their markets.<sup>252</sup> Furthermore, the exact method and specificity of odds disclosures under the mandate are unclear, with no set standard.<sup>253</sup> Absent a rigorous and well-defined odds disclosure scheme, players will not be meaningfully informed of the odds against them.<sup>254</sup> Further, even if the Industry committed to a measurable standard for disclosure, at present enforcement would be entirely managed by Industry insiders.<sup>255</sup> Keith S. White, executive director of the National Council on Problem Gambling, stated at the FTC workshop:

And one of the things that we do a lot in the gambling industry, is we recognize the role of parents, we recognize the role of industry self-verification, but we absolutely believe that there has to be third-party objective regulation. Sometimes that could take the role of the—sometimes that could be the role of the FTC. . . . It's an important consumer protection feature. And so if the industry is going to provide us information on odds and randomness, take a lesson from the gambling side, you got to get it done independently. It's not going to be effective if you're just telling us, oh, trust me, this game, these items

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<sup>248</sup> *Id.* at 100–01 (statement by Michael Warnecke).

<sup>249</sup> *Video Game Industry Commitments to Further Inform Consumer Purchases*, ENT. SOFTWARE ASS'N, <https://www.theesa.com/perspectives/video-game-industry-commitments-to-further-inform-consumer-purchases/> [http://perma.cc/F4B7-GL3E] (“The precise timing of this disclosure requirement is still being worked out, but the console makers are targeting 2020 for the implementation of the policy.”) (last visited Apr. 30, 2020).

<sup>250</sup> See *INSIDE THE GAME*, *supra* note 8, at 75, 106, 204.

<sup>251</sup> Tassi, *supra* note 122.

<sup>252</sup> See, e.g., Nathan Grayson, *China Will Force Games With Loot Boxes to Disclose Odds*, KOTAKU (Dec. 8, 2016, 11:35 AM), <https://kotaku.com/china-passes-law-forcing-games-with-loot-boxes-to-disclose-1789828850> [http://perma.cc/YE8Q-XYHF].

<sup>253</sup> See *Video Game Industry Commitments to Further Inform Consumer Purchases*, *supra* note 249.

<sup>254</sup> Rebekah Valentine, *Consumer Advocates to ESRB, FTC: Loot Box Odds Disclosure is Not Enough*, GAMESINDUSTRY.BIZ (Aug. 7, 2019), <https://www.gamesindustry.biz/articles/2019-08-07-consumer-advocates-to-esrb-ftc-loot-box-odds-disclosure-is-not-enough> [http://perma.cc/B588-CEM6] (summarizing the ESA's commitments after the 2019 FTC workshop and arguments stressing that while they are helpful first steps, they are not sufficient on their own).

<sup>255</sup> See *id.*

drop at this rate, especially without any means to independently verify it.<sup>256</sup>

Perhaps the only concrete regulation the ESRB has promulgated in this area has been the requirement of an “In-Game Purchases” label on games featuring loot boxes, among other microtransactions.<sup>257</sup> However, when initially released in 2018, the label did not distinguish between loot boxes and other, less-controversial microtransactions in games, such as one-time purchases of non-randomized content.<sup>258</sup> The words “loot box” do not appear on any ESRB ratings packaging<sup>259</sup>; it is necessary to review the ESRB’s website to find loot boxes listed and defined, amongst a wider list defining other types of microtransactions such as “In-Game Currency” and “Expansions.”<sup>260</sup> Prior to early April, 2020, the “In-Game Purchases” label said nothing more.<sup>261</sup> Perhaps in direct response to criticisms similar to those outlined above, on April 13, 2020 the ESRB updated the In-Game Purchases label to read on relevant titles, “In-Game Purchases (Includes Random Items).”<sup>262</sup> The ESRB noted that this new measure was intended “[t]o provide even greater transparency about the nature of in-game items available for purchase . . . .”<sup>263</sup> Outlining how the new label would be implemented, the ESRB explained:

This new Interactive Element, *In-Game Purchases (Includes Random Items)*, will be assigned to any game that contains in-game offers to purchase digital goods or premiums with real world currency (or with virtual coins or other forms of in-game currency that can be purchased with real world currency) for which the player doesn’t know prior to purchase the specific digital goods or premiums they will be receiving (e.g., loot boxes, item packs, mystery awards). *In-Game Purchases (Includes Random Items)* will be assigned to all games that include purchases with any randomized elements, including loot boxes, gacha games, item or card packs, prize wheels, treasure chests, and more.<sup>264</sup>

The article released by the ESRB announcing this new change justified the prior exclusion of the element of

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<sup>256</sup> INSIDE THE GAME, *supra* note 8, at 191–92.

<sup>257</sup> Vance, *supra* note 3.

<sup>258</sup> ESRB To Begin Assigning “In-Game Purchases” Label to Physical Video Games, ESRB (Feb. 27, 2018), <https://www.esrb.org/blog/esrb-to-begin-assigning-in-game-purchases-label-to-physical-video-games/> [<http://perma.cc/HJ3B-PDN3>].

<sup>259</sup> *See id.*

<sup>260</sup> Vance, *supra* note 3.

<sup>261</sup> *Introducing a New Interactive Element: In-Game Purchases (Includes Random Items)*, ESRB (Apr. 13, 2020), <https://www.esrb.org/blog/in-game-purchases-includes-random-items/> [<http://perma.cc/89E6-A4X5>].

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

randomization from the label by noting, “According to research, parents are far more concerned about their child’s ability to spend real money in games than the fact that those in-game purchases may be randomized.”<sup>265</sup> The ESRB claimed that the updated label, explicitly acknowledging randomization, resulted because of outreach from “many game consumers and enthusiasts (not necessarily parents) . . . asking the ESRB to include additional information to identify games that include randomized purchases.”<sup>266</sup> Perhaps anticipating further criticism, the ESRB directly acknowledged the lack of the term “loot box,” anywhere in the revised literature.<sup>267</sup> It justified the exclusion by observing that “‘Loot box’ is a term that doesn’t encompass all types of randomized in-game purchase mechanics. We want to ensure that the new label covers all transactions with randomized elements.”<sup>268</sup> It further noted:

Moreover, we want to avoid confusing consumers who may not be familiar with what a loot box is. Recent research shows that less than a third of parents have both heard of a loot box *and* know what it is. “Loot box” is a widely understood phrase in and around the video game industry and among dedicated gamers, but most people less familiar with games do not understand it. While this new label is primarily in response to feedback from game enthusiasts, it is still essential that all consumers, especially parents, have a clear understanding of the rating information we provide.<sup>269</sup>

Based on the foregoing, it appears the ESRB prioritizes cleanliness and brevity over meaningful information when crafting on-box video game ratings—further clarification risks raising uninformed consumers’ concerns. The fact that the ESRB has updated the label at all suggests that it sees the need to take some nominal action to respond to increased consumer concerns about loot box implementation, despite the ESRB’s refusal to directly acknowledge the practice’s similarities to traditional gambling activity.

Apart from the Industry’s commitment to a mercurial and future standard for loot box odds disclosure, and the (newly-updated) In-Game Purchases label, nothing further is required of game developers by the ESRB with regard to loot box implementation. If this is to be the regulatory standard of the Industry’s appointed self-regulator, it is helpful to analyze the arguments for and against such self-regulation.

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

## V. ARGUMENTS FOR AND AGAINST INDUSTRY SELF-REGULATION

The Industry's struggle for self-regulation was hard-won. Public outrage had been building against the Industry in the early 1990s,<sup>270</sup> as concerned parents turned their attention from explicit music to explicit video game content.<sup>271</sup> In particular, a street-fighting game called *Mortal Kombat* and a Sega game entitled *Night Trap* raised concerns about the effects of violent and sexual content in these games on video game-playing minors.<sup>272</sup> Senators Joseph Lieberman of Connecticut and Herbert Kohl of Wisconsin brought the issue to the attention of Congress, and held contentious hearings where the publishers of these titles were forced to justify the publication of these games.<sup>273</sup> Senator Lieberman introduced the Video Game Rating Act of 1994, which threatened to unilaterally establish an Interactive Entertainment Rating Commission.<sup>274</sup> Senator Lieberman's purpose in introducing the Act was to show the government's hand and encourage the Industry to take responsibility for its own regulation instead.<sup>275</sup> Senator Lieberman directly warned the Industry to that effect during one such hearing, advising, "The best thing you can do, not only for this country, but for yourselves, is to self-regulate. And believe me, it's not only going to be important to our kids, it's going to be important to the ultimate credibility and success of your business."<sup>276</sup>

As a direct result of sustained public and political pressure, and with the sword of the Video Game Rating Act dangling overhead,<sup>277</sup> the ESA (then called the Interactive Digital Software Association) founded the ESRB in 1994.<sup>278</sup> The ESRB developed a three-part rating system, with multiple content descriptors, "after consulting a wide range of child development and academic experts, analyzing other rating systems, and

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<sup>270</sup> Tiffany Hsu, *When Mortal Kombat Came Under Congressional Scrutiny*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/business/video-games-violence.html> [http://perma.cc/PX5Y-674Z].

<sup>271</sup> Charlie Hall, *A Brief History of the ESRB Rating System*, POLYGON (Mar. 3, 2018, 12:00 PM), <https://www.polygon.com/2018/3/3/17068788/esrb-ratings-changes-history-loot-boxes> [http://perma.cc/RC7P-UCCW].

<sup>272</sup> Hsu, *supra* note 270.

<sup>273</sup> *Id.*

<sup>274</sup> Video Game Rating Act of 1994, S. 1823, 103rd Cong. §§ 1–5 (1994).

<sup>275</sup> Gaming Historian, *The Creation of the ESRB – Gaming Historian*, YOUTUBE (Sept. 23, 2016), <https://www.youtube.com/watch?v=Wv3HDVd22P8> [http://perma.cc/8LB2-QFGU].

<sup>276</sup> *Id.*

<sup>277</sup> *See id.*

<sup>278</sup> *Our History*, *supra* note 48.

conducting nationwide research with parents.”<sup>279</sup> ESRB content rating is voluntary for game developers,<sup>280</sup> although all major console manufacturers<sup>281</sup> and multiple big-box stores<sup>282</sup> require affiliated games to go through the rating process.

The ESRB has developed standardized ratings and enforcement guidelines for all its member entities’ video games.<sup>283</sup> Senator Lieberman has since hailed the ratings entity, claiming, “I have long said that the ESRB ratings are the most comprehensive in the media industry. There are many age-appropriate games that are clever and entertaining. Parents should understand and use the ratings to help them decide which video games to buy for their families.”<sup>284</sup> Authors have applauded the success of the ESRB’s regulatory oversight in working to inform parents and consumers generally of the content of video games.<sup>285</sup>

Long having been the target of calls for “politically-opportune overregulation,”<sup>286</sup> the Industry is perhaps rightly fearful of the imposition of government oversight.<sup>287</sup> One of the strongest arguments for Industry self-regulation is that it wards off government censorship.<sup>288</sup> At the 2019 FTC workshop, Renee Gittins of the International Game Developers Association shared the perspectives of two of her fellow game developers, one supportive of regulation, the other opposed.<sup>289</sup> The opposing perspective provided, “I do not think it is the government’s role to regulate. It should be the industry and consumers that do. It could be a slippery slope that could lead to game censorship since the gaming industry has and will always be an easy scapegoat.”<sup>290</sup> Ms. Gittins emphasized the

<sup>279</sup> *Frequently Asked Questions*, ESRB, <https://www.esrb.org/faqs/#how-was-the-rating-system-created> [<http://perma.cc/3SES-Z4Z3>] (highlighting relevant text viewable under the “How was the rating system created?” drop-down menu) (last visited May 3, 2020).

<sup>280</sup> *Id.* (highlighting relevant text viewable under the “Are all games required to have a rating?” drop-down menu).

<sup>281</sup> *Id.*

<sup>282</sup> Gaming Historian, *supra* note 275.

<sup>283</sup> *Ratings Process*, ESRB, <https://www.esrb.org/ratings/ratings-process/> [<http://perma.cc/7F5T-DGTY>] (last visited May 3, 2020).

<sup>284</sup> *Senators Hillary Rodham Clinton and Joe Lieberman Join ESRB To Launch Nationwide Video Game Ratings TV PSA Campaign*, ESRB (Dec. 7, 2006), <https://www.esrb.org/blog/senators-hillary-rodham-clinton-and-joe-lieberman-join-esrb-to-launch-nationwide-video-game-ratings-tv-psa-campaign/> [<http://perma.cc/9369-8Q4B>].

<sup>285</sup> See, e.g., Kishan Mistry, *P()aying to Win: Loot Boxes, Microtransaction Monetization, and a Proposal for Self-Regulation in the Video Game Industry*, 71 RUTGERS L. REV. 537, 570 (2019).

<sup>286</sup> Moshirnia, *supra* note 116, at 113.

<sup>287</sup> INSIDE THE GAME, *supra* note 8, at 74 (statement of Renee Gittins).

<sup>288</sup> See *id.*

<sup>289</sup> *Id.* at 73–74.

<sup>290</sup> *Id.* at 74.



Industry's concerns about possible creative restrictions outside regulation could impose, adding that "game developers are worried about heavy-handed regulation hurting the game industry and their creativity."<sup>291</sup>

The video game industry's self-regulatory body has been favorably compared to the Motion Picture Association of America ("MPAA") with regard to its ability to preserve the First Amendment rights of the Industry.<sup>292</sup> The MPAA (originally the Motion Picture Producers and Distributors of America, or MPPDA) "was established in 1922 by the major Hollywood production studios in response to increasing government censorship of films, which arose in turn from a general public outcry against both indecency on the screen and various scandals involving motion-picture celebrities."<sup>293</sup> The Agency enabled Hollywood to censor itself and stave off mounting calls for government intervention to police morality in films.<sup>294</sup> The Agency's website notes, "Since that time, the MPA has served as the voice and advocate of the film and television industry around the world, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide."<sup>295</sup>

However, comparisons of the ESRB to the MPAA are fundamentally flawed. Loot box criticisms have everything to do with the monetization of video games; they have nothing to do with the content of video games.<sup>296</sup> Hypothetically, two nearly identical games could be released, with the same title, characters, plot, and gameplay. One version of the game would not feature loot boxes and would have all of its content freely available upon purchase of the full game. The other version of the game would include loot boxes, with certain in-game items and effects gated behind the mechanism. Only the second game would run afoul of the criticisms levelled against loot boxes. The creative and expressive content of a video game has nothing to do with loot box functionality; it is how that content is parceled-out and subdivided by loot boxes that raises consumer concerns. It is disingenuous to claim that the government would be regulating

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<sup>291</sup> *Id.* at 74–75.

<sup>292</sup> Mistry, *supra* note 285, at 569.

<sup>293</sup> The Editors of Encyclopædia Britannica, *Motion Picture Association of America*, ENCYCLOPÆDIA BRITANNICA (Sept. 14, 2020), <https://www.britannica.com/topic/Motion-Picture-Association-of-America> [<http://perma.cc/9LTZ-GN62>].

<sup>294</sup> *See id.*

<sup>295</sup> *Who We Are*, MOTION PICTURE ASS'N, <https://www.motionpictures.org/who-we-are/> [<http://perma.cc/U97Z-MHWP>] (last visited May 7, 2020).

<sup>296</sup> *See* Mistry, *supra* note 285, at 575.

the speech or content of a video game by regulating how loot boxes are implemented; the government would only be regulating how that game was monetized.

Furthermore, the external regulation of loot boxes would not render the ESRB moot. The ESRB continues to perform its function, and it performs it well: rating the content of video games to keep consumers informed.<sup>297</sup> As one author pointed out, “Senator Hassan is correct in noting that further research on monetization mechanics is necessary to guide regulatory efforts. But the ESRB is not best-equipped to handle such a task. The ESRB’s function is to review gaming content for such features as age-appropriateness, violence, graphic language, and nudity.”<sup>298</sup> Based on that logic, the ESRB is arguably overstepping its authority by inserting itself into the gambling determination. The manner in which a game is monetized is simply not a creative concern, and government oversight of monetization would pose no credible danger of censorship.

However, not all who agree that the ESRB should recuse itself from the regulation of loot boxes agree as to the appropriate next step. That same author went on to argue, “Instead of expanding the ESRB’s role, the industry should have a separate self-regulatory organization whose sole purpose is to investigate deceptive monetization techniques, publish guidelines, and enforce compliance.”<sup>299</sup> But such a step would only be a half-measure; the newly-formed Industry entity would be just as susceptible to Industry influence and suffer from the same fundamental conflict of interest to which the ESRB is vulnerable.<sup>300</sup> Industries’ self-regulation with regard to creativity, as is the case with the MPAA, helps to safeguard those industries’ First Amendment rights.<sup>301</sup> However, allowing the Industry to be the sole arbiter of whether its monetization methods are fair, ethical, or legal is the height of folly. It is critical to note that the ESRB exists to protect the Industry from outside regulation, not to protect the public from the Industry.<sup>302</sup> It is the equivalent of leaving the proverbial fox to run the henhouse.

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<sup>297</sup> *See id.*

<sup>298</sup> *Id.* (footnotes omitted).

<sup>299</sup> *Id.*

<sup>300</sup> *See* Brendan Sinclair, *Why is the Grand Theft Auto CEO Also Chairman of the ESRB?*, GAMESINDUSTRY.BIZ (Mar. 18, 2015), <https://www.gamesindustry.biz/articles/2015-03-18-why-is-the-grand-theft-auto-ceo-also-chairman-of-the-esrb> [<http://perma.cc/9YE9-DJ53>] (noting that the CEO of game company Take-Two Interactive is simultaneously the chairman of the ESRB).

<sup>301</sup> *See* Mistry, *supra* note 285, at 569.

<sup>302</sup> *See, e.g.,* Tassi, *supra* note 49.

The Industry has consistently failed to act in good faith with regard to consumer concerns about loot boxes.<sup>303</sup> Indeed, the Industry's refusal to recognize the negative effects of loot boxes, even in the face of mounting evidence, amounts to bad faith conduct. *Black's Law Dictionary* defines "bad faith" as "[d]ishonesty of belief or purpose."<sup>304</sup> The Industry has responded to public concerns about the negative psychological effects of loot boxes with persistent skepticism<sup>305</sup> and condescension<sup>306</sup> that betrays such a dishonesty of belief. At the FTC workshop, where an International Game Developers Association ("IGDA") representative read out both a pro- and anti-regulation statement prepared by two of her peers, the pro-regulation statement provided, "Unfortunately, it seems that the industry is having trouble being ethical when there's profit to be made. If someone cannot be trusted to not exploit someone else, then we must place down a regulation to protect others."<sup>307</sup> While the IGDA representative repeated the anti-regulation statement "[i]n summary," she did not acknowledge her pro-regulation peer's statement beyond simply reciting it.<sup>308</sup> While the IGDA spokesperson is only an individual and does not speak for the Industry as a whole, her selective deafness speaks to a pattern on the part of Industry advocates, a pattern of willfully disregarding valid criticisms of the practice of using loot boxes.<sup>309</sup>

The ESRB's decision to add the "(Includes Random Items)" label came only after two years of sustained criticism that the original label insufficiently notified purchasers of the presence of loot boxes—even then, the ESRB minimized consumers' concerns about loot boxes specifically.<sup>310</sup> Further, the Industry refuses to meaningfully respond to criticism in this area, a practice perhaps best illustrated by the frequency with which its advocates refuse to engage in a discussion over loot boxes. In one instance, EA's

<sup>303</sup> See, e.g., Patrick Kobek, *ESRB Adds New Label for Loot Boxes (It's About Time)*, THEGAMER (Apr. 14, 2020), <https://www.thegamer.com/esrb-adds-new-label-loot-boxes/> [http://perma.cc/2QRV-8KVE].

<sup>304</sup> *Bad Faith*, BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>305</sup> See, e.g., Zendle & Cairns, *supra* note 7.

<sup>306</sup> MBMMaverick, *Seriously? I Paid 80\$ to Have Vader Locked?*, REDDIT (Nov. 12, 2017, 5:36 PM), [https://www.reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously\\_i\\_paid\\_80\\_to\\_have\\_vader\\_locked/dppum98/](https://www.reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously_i_paid_80_to_have_vader_locked/dppum98/) [http://perma.cc/9856-NDQ6] (showing the EA's community management Reddit account's response to a player loot box complaint by claiming, "The intent is to provide players with a sense of pride and accomplishment for unlocking different heroes.").

<sup>307</sup> INSIDE THE GAME, *supra* note 8, at 73–74 (statement of Renee Gittins).

<sup>308</sup> *Id.* at 74.

<sup>309</sup> See, e.g., Tassi, *supra* note 49.

<sup>310</sup> See *Introducing a New Interactive Element: In-Game Purchases (Includes Random Items)*, *supra* note 261.

Vice President of legal and government affairs claimed at a hearing of the United Kingdom's Parliament that *Star Wars Battlefront II*'s randomized purchases were not loot boxes, "but rather 'surprise mechanics.'"<sup>311</sup> He further claimed, despite the increased economic costs loot boxes impose on players, that players actually enjoy the experience, stating, "We do think the way that we have implemented these kinds of mechanics . . . is actually quite ethical and quite fun, quite enjoyable to people."<sup>312</sup>

By failing to even acknowledge loot boxes as loot boxes, or recognize their wild unpopularity amongst players,<sup>313</sup> members of the Industry have effectively stalled meaningful conversation on the subject. When a Reddit user complained about paying a purchase price of \$80 for *Star Wars Battlefront II*, only to have Darth Vader locked behind a loot box, the EACommunityTeam account responded, "The intent is to provide players with a sense of pride and accomplishment for unlocking different heroes."<sup>314</sup> That comment has since gone on to be the most "downvoted" (disliked by unique users) post in Reddit's history,<sup>315</sup> with 667,826 downvotes at the time of writing, suggesting that players did not agree with its sentiment.<sup>316</sup> One struggles to see how asking players to pay additional funds to unlock portions of a game they have already purchased would instill "pride" in those players; rather, the argument leaves the impression that the speaker is not being forthright about its true purpose. These incidents illustrate that the Industry is all too willing to engage in bad faith argumentation when confronted about its monetization practices, disingenuously claiming that the feature is somehow beneficial to players.

The Industry's repeated insistence that loot boxes are not a form of gambling, even in the face of mounting evidence of its negative impact on individuals susceptible to gambling-related harm, further demonstrates the Industry's disinterest in communicating in good faith. Dr. Zendle and Dr. Cairns arguably

<sup>311</sup> Dustin Bailey, *EA: They're Not Loot Boxes, They're "Surprise Mechanics," and They're "Quite Ethical"*, PCGAMESN (June 20, 2019), <https://www.pcgamesn.com/ea-loot-boxes> [<http://perma.cc/9YGR-ZH4X>].

<sup>312</sup> *Id.*

<sup>313</sup> See, e.g., Joel Hruska, *Most Gamers Hate Buying Loot Boxes, So Why Are Games Using Them?*, EXTREME TECH (Oct. 13, 2017, 1:02 PM), <https://www.extremetech.com/gaming/257387-gamers-hate-buying-loot-boxes-games-using> [<http://perma.cc/A24G-7Z6R>].

<sup>314</sup> MBMMaverick, *supra* note 306.

<sup>315</sup> Paige Leskin, *EA's Comment on a Reddit Thread About 'Star Wars: Battlefront 2' Set a Guinness World Record for the Most Downvoted Comment of All Time*, BUS. INSIDER (Sept. 9, 2019, 10:39 AM), <https://www.businessinsider.com/reddit-world-record-downvotes-ea-star-wars-battlefront-2-2019-9> [<http://perma.cc/TZ2B-CUME>].

<sup>316</sup> MBMMaverick, *supra* note 306.

put the Industry on notice in 2018, when they wrote, in reporting on a large-scale study on the links between loot box purchases and problem gambling behavior, “[i]f loot boxes are attractive to those with problem gambling behaviours, they pose a serious moral question for the games companies who profit from them.”<sup>317</sup> They noted that the Industry did not seem to accept such a negative narrative, writing:

However, criticism of loot boxes has been roundly rebuffed by representatives of the games industry, with the ESRB recently claiming that there was insufficient evidence to state that loot boxes had negative consequences for gamers. They instead declared that “we do not consider loot boxes to be gambling for various reasons . . . loot boxes are more comparable to baseball cards, where there is an element of surprise and you always get something.”<sup>318</sup>

Further evidence of the Industry’s bad faith in failing to publicly acknowledge the harmful effects of loot boxes can be found in its knowing reliance on revenue derived from “whales.”<sup>319</sup> While claiming that it cannot control the behavior of a small addicted outgroup,<sup>320</sup> the Industry simultaneously accounts for the majority of its loot box-related profits from that same small group.<sup>321</sup> If the issue of loot box implementation is a “moral question” as Dr. Zendle and Dr. Cairns posited,<sup>322</sup> the Industry appears to have given its answer.

As discussed more fully in Section IV, the Industry has dragged its proverbial feet on each loot box regulation it has reluctantly advanced, each only in response to an outside stimulus and only after a significant delay. While entities such as the MPAA impose no additional financial burdens on consumers in performing their self-regulatory function, the same cannot be said of the ESRB, which has turned a blind eye to the negative impacts of loot boxes on players. External regulation of the Industry’s monetization practices is preferable to the present total abdication of authority to the ESRB.

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<sup>317</sup> Zendle & Cairns, *supra* note 7.

<sup>318</sup> *Id.* (alteration in original).

<sup>319</sup> See Langvardt, *supra* note 80, at 140.

<sup>320</sup> See *id.* at 146.

<sup>321</sup> See *id.* at 140; see also Aaron Drummond et al., *supra* note 61, at 935. (“Games containing loot boxes appear to receive a disproportionate amount of revenue via this mechanism from vulnerable problem gamblers, supporting ethical concerns about this monetization method. A deeper analysis of these data casts further disquiet about loot boxes, indicating that almost one-third of the highest spenders on loot boxes (\$300+ per month) are moderate-risk or problem gamblers.”) (internal citations omitted).

<sup>322</sup> Zendle & Cairns, *supra* note 7.

## VI. SOLUTIONS

Rather than continue to defer to the ESRB's authority or encourage the Industry to set up a separate self-regulatory entity solely tasked with regulating video game monetization practices,<sup>323</sup> the federal and state governments must step in to fill the void. In 1993, Senator Lieberman threw down the gauntlet and challenged the Industry to regulate itself or suffer government intervention.<sup>324</sup> In this critical area, the Industry has had every opportunity to meaningfully regulate itself, but has instead dragged its feet, advanced bad faith arguments, and abdicated its so-called authority. Apps are increasingly designed to circumvent individuals' psychological resistance to parting with their money,<sup>325</sup> and in-game currencies are obscuring the true cumulative costs of loot box purchases.<sup>326</sup> Action is required. Absent meaningful Industry action, it is unsurprising that consumers have turned to their governments. Whether the FTC takes regulatory action in response to the findings of its 2019 workshop, or state governments successfully pass bills of the sort advanced by Rep. Lee of Hawaii,<sup>327</sup> either result will likely cause a sea change in the Industry with regard to loot boxes.

## A. Regulation by the Federal Trade Commission

The Federal Trade Commission seeks to promote competition and protect consumers through its regulation and enforcement mechanisms.<sup>328</sup> The FTC's mission statement with regard to consumer protection provides in part that it seeks to prevent "unfair" and "deceptive" business practices.<sup>329</sup> As illustrated in Sections III and V above, loot boxes constitute unfair and deceptive practices and are thus ripe for FTC regulation. If the moral panics of the 1990s were sufficient to galvanize public support for government censorship of video game creative content, and stir the Industry to meaningful action, then the moral justification for government intervention here is even stronger. Before, public outrage concerned only scandalous and violent video game content, neither of which were proven to have lasting effects on players.<sup>330</sup> Here, however, individuals are

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<sup>323</sup> Mistry, *supra* note 285, at 575.

<sup>324</sup> See Gaming Historian, *supra* note 275.

<sup>325</sup> See Langvardt, *supra* note 89, at 141–42.

<sup>326</sup> See INSIDE THE GAME, *supra* note 8, at 62–63, 67 (statement of John Breyault); see also Sinclair, *supra* note 106.

<sup>327</sup> Lee, *supra* note 52.

<sup>328</sup> *What We Do*, FTC, <http://www.ftc.gov/about-ftc/what-we-do> [<http://perma.cc/UQ7P-ABZT>] (last visited May 7, 2020).

<sup>329</sup> *Id.*

<sup>330</sup> See Kevin Draper, *Video Games Aren't Why Shootings Happen. Politicians Still*

suffering lasting economic, social, and psychological costs as a result of loot box implementation.<sup>331</sup>

Initial investigatory steps have already been taken.<sup>332</sup> One year after the August 2019 FTC Workshop, the agency issued a “staff perspective” report.<sup>333</sup> The report reviewed the issues submitted to the FTC at the workshop and through public comment, distilling the key concerns of panelists and commenters to the following points: (1) mechanics that may confuse or manipulate consumers; (2) users feeling pressure to spend; (3) the impact of the practice on children; (4) the manner in which loot box odds are disclosed; (5) issues concerning in-game purchase disclosures (i.e. in-game currency confusion); and (6) concerns regarding whether developers could give popular content creators loot boxes with better odds for “promotional purposes than odds available to the general public.”<sup>334</sup> While the FTC staff perspective report provided an overview of possible future regulatory measures, it emphasized the role of existing ESRB initiatives such as the new “Includes Random Items” label, as well as “other proposed self-regulatory measures.”<sup>335</sup> To the extent the staff perspective discussed dissenting views critical of the ESRB, it merely included a section entitled “Mixed views on increased government regulation.”<sup>336</sup> The section briefly touched on the idea of implementing “third-party, independent verification of loot box odds” and hoping for “greater industry transparency.”<sup>337</sup> A significant portion of this section was devoted to reiterating the Industry’s scaremongering that “poorly crafted regulation could harm the industry and inadequately protect consumers.”<sup>338</sup> The document emphasized the importance of conducting further research in this “evolving” area, highlighting

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*Blame Them.*, N.Y. TIMES (Aug. 5, 2019), <http://www.nytimes.com/2019/08/05/sports/trump-violent-video-games-studies.html> [<http://perma.cc/2SWJ-AGLY>].

<sup>331</sup> See, e.g., Ethan Gach, *Meet the 19-Year-Old Who Spent Over \$17,000 on Microtransactions*, KOTAKU (Nov. 30, 2017, 10:00 AM), <http://www.kotaku.com.au/2017/11/meet-the-19-year-old-who-spent-over-17000-on-microtransactions/> [<http://perma.cc/BK7Z-RZ6S>]; Mike Wright, *Children Spending £250 on Fortnite ‘Skins’ to Avoid Being Labelled ‘The Poor Kid’ at School, Children’s Commissioner Warns*, TELEGRAPH (Oct. 22, 2019, 12:01 AM), <http://www.telegraph.co.uk/news/2019/10/21/children-spending-250-fortnite-skins-avoid-labeled-poor-kid/> [<http://perma.cc/QVJ6-GUCR>]; Zoe Kleinman, *‘My Son Spent £3,160 in One Game’*, BBC (July 15, 2019), <http://www.bbc.com/news/technology-48925623> [<http://perma.cc/D3J2-SMUF>].

<sup>332</sup> See FED. TRADE COMM’N, *supra* note 107, at 1.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 3–4.

<sup>335</sup> *Id.* at 6.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

the suggestions of “some panelists” who “encouraged the industry to share relevant video game data with researchers.”<sup>339</sup> The document’s conclusion, while noting the increased relevance of the loot box discussion in light of the COVID-19 pandemic and corresponding increased video game usage, made no recommendations as to how to proceed.<sup>340</sup> Rather, the FTC’s staff stated merely that it “encourages [the] industry to continue efforts to provide clear and meaningful information to consumers about in-game loot box and related microtransactions.”<sup>341</sup> The FTC did vanishingly little to suggest any direct action on its own part, only noting that it would “continue to monitor developments surrounding loot boxes and take appropriate steps to prevent unfair or deceptive practices.”<sup>342</sup>

In merely reciting the criticisms of the Industry’s behavior, some of which suggest the Industry harbors improper motives in pursuing this monetization method,<sup>343</sup> while simultaneously deferring to the Industry’s present self-regulatory measures, the FTC has signaled its disinterest in stepping into the arena at the present time. For reasons discussed throughout this article, this approach is insufficient to protect consumers. It is not sufficient to allow the Industry to continue to profit through these practices when the FTC has acknowledged the problematic nature of loot box odds disclosures and in-game currencies at present. A tepid commitment to mandate some form of permanent disclosure schedule, written by the Industry itself, at some point in the future does nothing to protect consumers today, and little to protect them tomorrow. Because of the FTC’s deference toward the Industry at this point in time, consumers should look elsewhere for protection.

## B. Regulation by State Governments

Individual state regulations may be best suited to rein in the Industry. While a single regulatory body is vulnerable to regulatory capture,<sup>344</sup> a robust and varied patchwork of state laws would require the Industry to meaningfully respond or else cease to operate in each jurisdiction entirely. While the Industry has

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<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 7.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> See, e.g., INSIDE THE GAME, *supra* note 8, at 102 (statement of Omeed Dariani) (“I’ve definitely been in a room where a publisher said we could do better odds on the packs that this person opens for promotional purposes.”).

<sup>344</sup> See Tejvan Pettinger, *Regulatory Capture*, ECONOMICS HELP (May 24, 2018), <http://www.economicshelp.org/blog/141040/economics/regulatory-capture/> [<http://perma.cc/8UUW-UQF5>].



previously pulled entire games out of countries such as Belgium in response to those countries' consumer protection laws,<sup>345</sup> such action would likely not be economically viable for the Industry if such a large global economy as California enacted meaningful loot box regulations. For a prime example of a state's power to compel better behavior on the part of its corporate citizens, look no further than the California Appellate Court's position that gig economy ride-share companies must treat their drivers as employees, rather than as independent contractors.<sup>346</sup> Even where companies threaten to pull out of a state entirely,<sup>347</sup> such a result nevertheless vindicates the right of the state to define what practices it will and will not accept within its borders.

Regulation of loot boxes should be no different. States can, in response to the popular will of their residents, begin to restrict the practice of operating a loot box scheme by passing meaningful regulations on a state-by-state basis. States may define which loot box practices they will accept, and which they will not.<sup>348</sup>

State regulation would also be more effective at striking the correct balance between the interests of consumers and the Industry, because each state can experiment with varying types and degrees of regulatory control over loot boxes. Rather than face a nationwide ban or potentially overbroad and burdensome federal regulation, the Industry would instead be subjected to individual states' efforts to formulate the "best" form of regulation. The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems."<sup>349</sup>

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<sup>345</sup> Hern, *supra* note 122.

<sup>346</sup> See *People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266, 312 (2020) ("The trial court found that rectifying the various forms of irreparable harm shown by the People more strongly serves the public interest than protecting Uber, Lyft, their shareholders, and all of those who have come to rely on the advantages of online ride-sharing delivered by a business model that does not provide employment benefits to drivers. . . . Accordingly, we conclude that the trial court correctly applied the law . . ."). Although the subsequent passage of Prop 22 in California's 2020 general election foiled the implementation of the rideshare driver employee classification, the California Supreme Court refused the rideshare industry's request to depublish this opinion. *People v. Uber Technologies, Inc.*, 2021 Cal. LEXIS 913 (2021).

<sup>347</sup> See Dara Kerr, *Uber CEO: We're Looking at All Our Options if Prop 22 Doesn't Pass*, CNET (Oct. 20, 2020, 10:03 AM), <http://www.cnet.com/news/uber-ceo-were-looking-at-all-our-options-if-prop-22-doesnt-pass/> [<http://perma.cc/9LKU-8U3W>].

<sup>348</sup> See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146–47 (1963) ("The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the 'historic police powers of the States,' is not to decree such a federal displacement 'unless that was the clear and manifest purpose of Congress.' In other words, we are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect." (citations omitted)).

<sup>349</sup> *Oregon v. Ice*, 555 U.S. 160, 171 (2009).

Leaving regulation of loot boxes to the states would serve that purpose well.

For example, as the 2019 FTC conference demonstrated, there is not yet a consensus as to how best to define and police loot box odds disclosures, or the precise risks they pose.<sup>350</sup> As a result, each state's legislature could decide how best to define the manner of disclosure it would require, and how those odds would be verified. Different standards could emerge, and the merits of each could be directly compared. Each state's efforts would better inform the others, and over time a reasonable and comprehensive regulatory system would emerge. When new and uncertain areas of the law emerge and the best solution is unclear, consumers are well-served by leaving regulation to the states.<sup>351</sup>

As a practical matter, interested consumers may have an easier time petitioning their respective states for some form of regulatory oversight, since they do not need to receive the consent of legislators from the other states, as would be required if a federal statute was to be passed. For the reasons asserted above, the best method of achieving meaningful regulation of the Industry would be through state-by-state regulation.

### C. Suggested Forms of Regulation

Whether the federal or state governments take the regulatory lead, regulators should consider government-set odds-disclosure requirements and limit-setting.

#### 1. Odds Disclosures

As discussed in Section IV, the Industry touted its commitment to mandate loot box odds disclosures by the end of 2020.<sup>352</sup> But the exact Industry standards for odds disclosure remain mercurial, and are unlikely to meaningfully advise consumers.<sup>353</sup> Additional problems arise when considering dynamic odds loot boxes, where the odds of receiving the item varies, because it greatly complicates the ability to determine

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<sup>350</sup> See, e.g., *INSIDE THE GAME*, *supra* note 8, at 66, 205, 209 (statements of John Breyault, Ariel Fox Johnson, and Keith Whyte).

<sup>351</sup> See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

<sup>352</sup> *Video Game Industry Commitments to Further Inform Consumer Purchases*, *supra* note 249.

<sup>353</sup> See Valentine, *supra* note 254.

whether the Industry is adhering to its published odds.<sup>354</sup> Even when the ESRB imposes mandatory odds-disclosure requirements on all its members, no two games are likely to use the same loot box system, which will make use of a centralized and easy-to-understand odds disclosure schedule difficult. Further, the Industry has a vested interest in only complying with these disclosure requirements at the bare minimum, in the most obtuse possible way.<sup>355</sup> In short, two problems are currently posed by the self-regulation initiative as it concerns odds disclosures: (1) it does not reasonably assure consumers that they will be meaningfully informed of the odds against them; and (2) it leaves the Industry to police its own adherence to its standards, with no mechanism for consumer or government oversight.

Government intervention would resolve both issues. A government-set odds disclosure schedule could provide uniformity across different games and mandate transparency, rather than leaving each developer to live up to the ESRB's odds disclosure commitment on a case-by-case basis. As demonstrated in gambling regulation, "self-regulation alone is never enough. It must have an enforceable consumer protection framework and be accompanied by external oversight, research, monitoring, and verification by independent groups."<sup>356</sup> So too would meaningful loot box regulation rely upon external verification of the Industry's compliance. Whereas a dissatisfied consumer currently has little power to review the fairness of the behind-the-scenes operations of her favorite mobile game, regulatory officials would be empowered to do so.

Further, a standardized method of odds disclosures would prevent the Industry from developing novel and confusing payout structures intended only to further obscure players' chances. If all games had to comply with a certain pre-set form of odds-disclosure, new loot boxes could not be developed that would employ inherently confusing probabilities for their own sake. Rather than try to cloud the odds, developers could cultivate player engagement with them by openly and ethically drawing their attention to them. As suggested by Mr. Whyte at the FTC workshop: "[L]et's find a way to make this information in disclosures entertaining and interactive and exciting.

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<sup>354</sup> See INSIDE THE GAME, *supra* note 8, at 163 (statement of Adam Elmachtoub) ("So I think that with regard to dynamic odds, I think that would be a nightmare to regulate. Because as the odds are changing, you can never, with like just a couple samples, see if you're truly adhering to such odds.").

<sup>355</sup> See *id.* at 190 (statement of Keith Whyte) ("I would hate to see [odds disclosure tables] look like what a pay table looks like for a slot machine, which is you know 2.5, zillions of numbers in there, and without a degree in higher math, you're utterly unable to understand this.").

<sup>356</sup> *Id.* at 196.

You know, build it into gameplay. Reward players for doing some pro-social behavior, like finding out what really the odds are in this game.”<sup>357</sup> The Industry has the ability to better inform its players, and from a financial perspective, has no incentive to do so currently. Government-set and monitored odds-disclosures would remove the tension between ethical and economic considerations in this area.

## 2. Limit-Setting

Another practice that could assist users in making informed purchase decisions is the requirement of pre-commitment limit-setting.<sup>358</sup> Dr. Aaron Drummond wrote to the journal *Addiction* on the topic of loot boxes in a letter to the editor, in which he provided a brief overview of the controversy and expressed his concerns about the practice’s similarities to gambling activity.<sup>359</sup> He cited Dr. Zendle and Dr. Cairns’s study, which indicated that problem gamblers spent approximately \$25 USD per month on loot boxes, compared to non-problem gamblers, who spent approximately \$2.50 USD in the same time period.<sup>360</sup> Noting the parallels between loot box spending and problem gambling behavior, Dr. Drummond advanced pre-commitment limit-setting as a possible solution, one he described as a “largely overlooked regulatory control.”<sup>361</sup> Dr. Drummond detailed the limit-setting process as follows:

In electronic gambling, pre-commitment limit-setting involves users specifying (voluntarily or compulsorily), before engaging in gambling, the maximum they would like to spend. Once reached, this limit triggers a reminder message and a cooling-off period in which the player is unable to gamble further. Limit setting is broadly effective at reducing over-expenditure, and generally viewed positively by gamblers. Our reanalysis suggests a clear need for limit-setting mechanisms on loot boxes, because a substantial proportion (30%) of the highest spenders are moderate-high-risk gamblers. Further increasing the probable utility of limit-setting in this context, unlike traditional gambling platforms gamers cannot bypass the limit-setting restriction simply by switching to a different game—rewards are game-specific.<sup>362</sup>

Dr. Drummond suggested a price point of \$50 USD per month as a recommended limit-setting threshold, noting that beyond that point “the proportion of risky gamblers rises substantially . . . , implying that this may be a functional spending cap to minimize over-

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<sup>357</sup> *Id.* at 190.

<sup>358</sup> See Aaron Drummond et al., *supra* note 61, at 935.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

spending by at-risk populations.”<sup>363</sup> He also discussed the option of absolute limits on loot box spending as an alternative explored by other researchers.<sup>364</sup> Directly calling upon regulators, Dr. Drummond concluded, “Policymakers would be wise to consider pre-commitment limit-setting and other harm minimization controls used in traditional gambling to regulate loot box spending.”<sup>365</sup>

Individuals with experience regulating gambling, such as Keith Whyte of the National Council on Problem Gambling, have spoken out in support of similar practices.<sup>366</sup> At the 2019 FTC workshop, Mr. Whyte noted:

[A]nother tip from the gambling side is self-exclusion. So one of the most effective ways to help someone who may have a problem with their gambling, or with their gaming use, is to allow them to self-exclude themselves. And in an environment where transactions are monitored, you can use self-exclusion through payment mechanisms, because while people may have many different accounts and play many different games across many different providers and platforms, they’re probably using that one credit card, or at least a common bank account. And so payment level blocking can be very effective, buttressing and adding to existing platform level controls and others.

Self-exclusion also places a priority, or that places the emphasis on the gambler, or the gamer, and not necessarily the operator.<sup>367</sup>

Not all experts agree that limit-setting would be an effective solution. In a subsequent letter to the editor of *Addiction*, Doctors Daniel L. King and Paul H. Delfabbro critiqued Dr. Drummond’s recommendation that limit-setting be incorporated into loot box regulations.<sup>368</sup> They noted:

Drummond et al. assert that limit-setting ‘is broadly effective at reducing over-expenditure, and generally viewed positively by gamblers’. While we agree that a range of harm minimization controls should be examined, we have some reservations about proposing any single regulatory control in isolation of other supporting measures. Introducing a \$50 limit on loot box spending, as Drummond et al. propose, may have unintended consequences that lead to other problems (e.g. some players may increase their playing time to compensate for spending less money). Additionally, game designers may find strategies to obtain revenue in other ways by introducing other micro-transaction features, such as features on external or

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<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> INSIDE THE GAME, *supra* note 8, at 185–86.

<sup>367</sup> *Id.* at 193–94.

<sup>368</sup> Daniel L. King & Paul H. Delfabbro, Letter to the Editor, *Loot Box Limit-Setting is Not Sufficient on Its Own to Prevent Players from Overspending: A Reply to Drummond*, Saurer & Hall, 114 ADDICTION 1324, 1324 (2019) (footnotes omitted).

third-party platforms, which would create further complexities for limit-setting and players keeping track of spending.<sup>369</sup>

The authors did not discard limit-setting as a regulatory measure; rather, they cautioned against over-reliance on a single regulatory mechanism and instead recommended “undertak[ing] a wide consultation and scoping process to develop a comprehensive list of potential countermeasures and related consumer advice and protections, particularly those designed specifically for gaming and in-game purchasing, for the purpose of further review and evaluation.”<sup>370</sup> While they raise a valid point, the existence of other possible consumer protection mechanisms should not foreclose the exploration of limit-setting in the here and now. Individuals are suffering real harm in the present; waiting to implement protections until the best protection has been discovered will needlessly prolong their harm. The authors’ concerns are further mitigated in light of this Article’s recommendation that the states implement their own regulations. By virtue of state-by-state experimentation, the best methodology will be discovered in time, and consumer interests will be advanced (even if only imperfectly) in the interim.

From a philosophical perspective, some might object to placing limits upon an individuals’ autonomy by preventing them from making a purchase they desire to make. In evaluating self-limitation as a method of protecting the elderly from predatory lenders, Professor Kurt Eggert engaged in an analysis of the meaning of autonomy.<sup>371</sup> Professor Eggert noted, “If we hold that autonomy has intrinsic value, then to improve the lives of the elderly, we should try to increase their autonomy.”<sup>372</sup> He further discussed the difficulties in maximizing elders’ autonomy, writing:

Increasing autonomy is not merely a matter of removing restraints, for even unrestrained, a person may have so few options that she has no real choice in what to do. Nor does merely providing more options provide more autonomy, since the individual given the options may effectively have no way to analyze them or determine which is preferable. To provide the greatest possibility of autonomy, we would need to provide a rich array of options as well as work to ensure that the chooser has the capacity to rate and compare those options.<sup>373</sup>

Professor Eggert confronted the difficulty in determining whether to honor an individual’s past wish to bind themselves in

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<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> See Kurt Eggert, *Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending*, 36 LOY. L.A. L. REV. 693, 695–96 (2003).

<sup>372</sup> *Id.* at 732.

<sup>373</sup> *Id.* at 733.

the present.<sup>374</sup> He reasoned, “[t]o determine which version of the self-limiter’s choice—the earlier decision to limit autonomy or the later decision to revoke that limitation—is closer to being more authentic and voluntary, the relative quality of the choice should be examined.”<sup>375</sup> He listed such factors as whether a “decision was made with greater competency, more information, and greater freedom from manipulation, coercion, or fraud, as well as which shows a more ‘resolute intention’ to make the decision.”<sup>376</sup> In considering the philosophical idea of “separat[ing] one’s identity into various strands, such as a present self and various future selves,”<sup>377</sup> Professor Eggert theorized that, “[i]f we . . . split the self this way, then the self-limitation of autonomy becomes, to a significant extent, a method for the present self to bind the future self, or for the long-term planning self to bind the self desiring immediate gratification.”<sup>378</sup>

Reviewing the efficacy of self-exclusion programs in the realm of problem gambling, Professor Eggert observed that self-exclusion is a “method of providing protection from excessive gambling, while respecting the autonomy of the problem gambler.”<sup>379</sup> He explained that self-exclusion programs involve self-identified problem gamblers voluntarily signing up to “request to be personally excluded from one or more, or perhaps all, of the casinos in the state.”<sup>380</sup> “The self-exclusion program,” Professor Eggert wrote, “is a classic example of the self-limitation of autonomy as a method of consumer protection. Like Ulysses, the compulsive gambler recognizes that he will be unable to resist the siren call of the casinos, and seeks a way to limit his own freedom.”<sup>381</sup> He noted that self-exclusion programs “also appeared useful as a ‘gateway’ to lead problem gamblers to obtain professional counseling for about half of those who self-excluded.”<sup>382</sup>

In evaluating the weaknesses of such programs, Professor Eggert conceded, “[t]he greatest potential flaw of these self-exclusion programs appears to be their unreliability, the ease with which gamblers can circumvent them, either by going to a different casino in a state which does not have a central registry, or by tricking the casinos to allow them to gamble.”<sup>383</sup> Nonetheless, Professor Eggert

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<sup>374</sup> *See id.* at 736.

<sup>375</sup> *Id.* at 738.

<sup>376</sup> *Id.* (footnote omitted).

<sup>377</sup> *Id.* at 739.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 748.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* (footnote omitted).

<sup>382</sup> *Id.* at 751–52.

<sup>383</sup> *Id.* at 752.

went on to conclude, in analyzing self-exclusion programs as a form of self-limitation:

A gambler's choice to self-exclude will, in general, likely increase rather than decrease his overall autonomy, at least if it aids the gambler to defeat his addiction. The amount of autonomy the gambler gives up will likely be small so long as he honors the self-exclusion, since he is still free in every other aspect of his life. The risk that he may have erred in his thinking also seems small, since existing evidence indicates that almost all those who self-exclude are problem gamblers. Perhaps most importantly, a gambler is likely to be acting more freely and more true to his essential self when he initially decides to limit his autonomy, rather than later, when his compulsion to gamble would push him to reenter a casino.<sup>384</sup>

As an example, Professor Eggert detailed the Illinois Gaming Board's step-by-step requirements for opting into the self-exclusion program, and noted that "[m]ost likely, people would put much more consideration and thought into going to a gaming board office and self-excluding than they would to dropping quarters into a slot machine."<sup>385</sup>

Just as limit-setting has encouraged individual autonomy in the gambling context, it could be similarly effective at combatting problematic loot box purchase activity. Individuals playing a certain game on their personal account would not be able to circumvent the lock without opening a brand new account, defeating the purpose of accruing rewards on their original account.<sup>386</sup> Professor Eggert's concerns about traditional self-exclusion workarounds are not entirely assuaged in video game circles, however, because those players could go on to simply play a different game or continue to obsessively play the game to make up the difference.<sup>387</sup> However, a player who encounters a message from their past selves, displayed in game and advising them that they have hit their pre-determined limit, will have more of an opportunity to reflect upon their actions than a player who does not see such a message.

While the casinos that opted out of the self-exclusion program (i.e. the casinos that did not have a central registry of participants) provided a venue for would-be self-excluders to cheat their past selves and exceed their personal limits, a government-mandated form of limit-setting would by definition not allow disinterested vendors to "opt out."<sup>388</sup> Unlike

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<sup>384</sup> *Id.* at 755–56.

<sup>385</sup> *Id.* at 756.

<sup>386</sup> Drummond et al., *supra* note 61, at 935.

<sup>387</sup> See King & Delfabbro, *supra* note 368, at 1324.

<sup>388</sup> See INSIDE THE GAME, *supra* note 8, at 196 (statement of Keith Whyte) ("But for



commentators at the FTC workshop, who struggled to envision a limit-setting scenario that could survive the perverse incentive individual developers would have to fail to adhere to the Industry standard,<sup>389</sup> a government-mandated limit-setting program would leave no room for lawful noncompliance. The Industry would be required to adhere to limit-setting practices in all of its loot box titles, deprived only of its opportunity to exploit vulnerable individuals.

Professor Eggert, writing about self-exclusion practices, considered the words of philosopher Joseph Raz: “[O]ne cannot force another person to be more autonomous. Instead, the most that can be done is ‘by and large confined to securing the background conditions which enable a person to be autonomous.’”<sup>390</sup> By requiring video game developers to implement limit-setting mechanisms in their loot box purchase systems, we as a society would be providing compulsive individuals with a better opportunity to exercise their autonomy than currently available under the ESRB’s direction.

## VII. CONCLUSION

Loot boxes are linked to problem gambling.<sup>391</sup> Whether they cause problem gambling or merely exploit players’ existing tendencies,<sup>392</sup> we as a society should not tolerate the Industry’s attempts to monetize the practice under its sole discretion. The ESRB has abdicated its authority by failing to advance meaningful regulations in a timely manner, and Industry advocates frequently engage in bad-faith argumentation to justify the practice and disregard or deny the harm to vulnerable individuals. The psychological and financial harm inflicted by loot boxes is real and pervasive, and individuals and their representatives are beginning to wake up to that fact. Both the federal and state governments have the ability to take action, and have merely neglected to do so thus far. Rather than wait for the ESRB to cede regulatory ground inch-by-inch, consumers should demand regulatory protection by an entity that primarily serves their own interests, not those of the Industry. The state governments are perhaps best equipped and empowered to act on behalf of consumers in this area. Limit-setting mechanisms and meaningful odds disclosures could serve as powerful tools to help

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these [self-exclusion] measures to be effective, it will take true commitment of leadership from ESA, ESRB, and every developer and publisher worldwide, because if you have even one company that chooses not to participate, that opts out, that doesn’t comply with standards, the whole system, the foundation of the entire system is undermined.”).

<sup>389</sup> *Id.*

<sup>390</sup> Eggert, *supra* note 371, at 732.

<sup>391</sup> Zendle & Cairns, *supra* note 7.

<sup>392</sup> *Id.*

consumers make informed purchase decisions, cutting through the veils raised by in-game currencies and piecemeal transactions.

Ultimately, video games are here to stay. They are a beloved pastime for millions of Americans.<sup>393</sup> Video game developers perform a useful role in creating these games for the enjoyment of the public, and loot boxes help to support some of them. This Article's goal is not to chastise developers, nor to advocate for the outright ban of loot boxes. Rather, this Article has attempted to peel back layers of Industry double-talk in order to reveal the very real costs of loot boxes and their similarities to traditional gambling practices, so that readers can decide for themselves how best to proceed. At the very least, perhaps a reader will think twice before hitting "Buy Now" when purchasing a loot box in their favorite game.

The true cost could be far more than \$1.99.

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<sup>393</sup> Myself included.