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## Daily Fantasy Sports as Game of Chance: Distinction Without a Meaningful Difference?

### I. INTRODUCTION

Fantasy sports have become an inseparable component of the modern fan experience. In 2015 alone, more than thirty million Americans spent an estimated eleven billion dollars on fantasy sports.<sup>1</sup> Fans, leagues, and policymakers alike have embraced fantasy sports as a new reality in American athletics. However, traditional fantasy sports require a fan to commit many hours to drafts, weekly analysis, and consumption of game broadcasts over the course of a simulated season.

These barriers helped spawn a new fantasy phenotype in 2009: daily fantasy sports. Requiring a commitment of only a day or week and incorporating cash prizes for winners, daily fantasy sports have shown enormous potential to disrupt the traditional fantasy ecosystem and threaten to change sports media altogether. DraftKings collected \$4 billion in entry fees in 2015 and estimates it will collect \$20 billion in 2017.<sup>2</sup> In two years, FanDuel grew from forty thousand users to more than one million.<sup>3</sup> DraftKings has enjoyed similar growth.<sup>4</sup> And for all of the growth of the industry, daily fantasy operators are “still just scratching the surface of where this could all go.”<sup>5</sup> While some

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1. John McDuling, *The bizarre, multibillion-dollar industry of American fantasy sports*, QUARTZ (Dec. 13, 2014), <http://qz.com/298042/the-bizarre-multi-billion-dollar-industry-of-american-fantasy-sports/>.

2. Michael Virtanen, *NY court documents show big business of daily fantasy sports*, ASSOCIATED PRESS (Nov. 20, 2015, 10:50 PM), <http://bigstory.ap.org/article/38325dafb4fa4d9eac30fcf5143460ee/ny-court-documents-show-big-business-daily-fantasy-sports>.

3. Eric Fisher, *Daily fantasy pushes to continue growth streak*, SPORTSBUSINESS DAILY (March 16, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/03/16/Marketing-and-Sponsorship/Daily-fantasy.aspx>.

4. *Id.*

5. *Id.*

have lamented daily fantasy's recent "implosion,"<sup>6</sup> allegedly the result of regulatory interference, this concern is largely unfounded and daily fantasy's disruptive potential remains—operators have continued to diversify product offerings, enjoy continued public support from professional sports leagues partners, raise funds,<sup>7</sup> and retain high-value users responsible for a majority of the sites' revenue.<sup>8</sup>

Despite rapid growth and enormous potential, the daily fantasy industry stands at a crossroads: state regulatory and legal action threatens to derail the future of daily fantasy sports.<sup>9</sup> As of the publication of this Comment, a majority of states have formally considered daily fantasy sports' legality.<sup>10</sup> Thirteen states consider daily fantasy sports to be gambling, either expressly or on a de facto basis: Alabama,<sup>11</sup> Arizona,<sup>12</sup> Delaware,<sup>13</sup> Georgia,<sup>14</sup> Hawaii,<sup>15</sup>

6. See Don Van Natta Jr., *Welcome to the Big Time*, ESPN (Aug. 24, 2016), [http://www.espn.com/espn/feature/story/\\_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel](http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel).

7. Curt Woodward, *DraftKings takes in \$150m*, BOS. GLOBE (Sept. 1, 2016), <https://www.bostonglobe.com/business/2016/09/01/draftkings-adds-kitty-with-million-investment-round/6l24Gth1ZtKPJznCFRFGCI/story.html>.

8. ADAM KREJCIK & CHRIS GROVE, DAILY FANTASY SPORTS INDUSTRY UPDATE – 2016 4 (Feb. 22, 2016), <https://courier.bluematrix.com/Courier/EmailDocViewer.action?info=2bm2m1YP%2FZUAK5UFmsa%2FnGIxg7M0iFxpVixG2tGWzFdIEN36g9VhozI9ulzzNOEdVE6M47tcE41%0AnMA4TSchXDsNTc2ofCWFw8hFrXNPfen48TWgBu8LnsCRfPQu%2Fv%2FWgQ4gEPaT1e5Z8pFiiXPjDD%2B%0Aqa1%2BYMP4EqVaISIFYXE%3D%0A>.

9. See Van Natta, *supra* note 6.

10. Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Aug. 27, 2016), [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states).

11. Press Release, *Attorney General Determines Paid Daily Fantasy Sports Contests are Illegal Gambling*, ALA. OFF. OF THE ATT'Y GEN. (April 5, 2016), <http://www.ago.state.al.us/News-810>.

12. See Van Natta, *supra* note 6.

13. *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, DELAWARE.GOV (July 8, 2016), <http://news.delaware.gov/2016/07/08/ofs/>.

14. James Gatto & Mark Patrick, *Daily Fantasy Sports Update – DraftKings Sues Texas AG; Activity in GA and IN*, SHEPPARD MULLIN (March 7, 2016), <http://www.lawofthelevel.com/2016/03/articles/fantasy-sports/daily-fantasy-sports-update-draftkings-sues-texas-ag-activity-in-ga-and-in/>.

15. Eric Beech & Eric Walsh, *Hawaii attorney general says daily fantasy sports contests are illegal*, REUTERS (Jan. 27, 2016), <http://www.reuters.com/article/us-fantasysports-hawaii-idUSKCN0V530Q>.

Idaho,<sup>16</sup> Illinois,<sup>17</sup> Montana,<sup>18</sup> Nevada,<sup>19</sup> South Dakota,<sup>20</sup> Texas,<sup>21</sup> Vermont,<sup>22</sup> and Washington.<sup>23</sup> On the other hand, daily fantasy is expressly permitted in Colorado,<sup>24</sup> Indiana,<sup>25</sup> Massachusetts,<sup>26</sup> Mississippi,<sup>27</sup> Missouri,<sup>28</sup> New York,<sup>29</sup> Tennessee,<sup>30</sup> and Virginia.<sup>31</sup> Though the legal status of daily fantasy sports is state-dependent, all

16. *Attorney General Reaches Agreement to Terminate Paid Daily Fantasy Sports Contests in Idaho*, IDAHO OFF. OF THE ATT'Y GEN. (May 2, 2016), [http://www.ag.idaho.gov/media/newsReleases/2016/nr\\_05022016.html](http://www.ag.idaho.gov/media/newsReleases/2016/nr_05022016.html).

17. Letter from Lisa Madigan, Ill. Attorney Gen., to Elgie R. Sims, Jr., Chairperson, Judiciary – Criminal Comm., and Scott R. Drury, Vice-Chairperson, Judiciary – Criminal Comm. (Dec. 23, 2015), <http://www.illinoisattorneygeneral.gov/opinions/2015/15-006.pdf>. Interestingly, some have argued that the language contained in Attorney General Madigan's letter suggests that any fantasy sports, traditional or daily, constitute gambling under Illinois law if they are played for a monetary entry fee or prize. Steve Silver, *Illinois' Attorney General Thinks All Forms of Fantasy Sports Are Illegal Gambling*, ABOVE THE L. (Dec. 23, 2015), <http://www.atredline.com/illinois-attorney-general-thinks-all-forms-of-fantasy-s-1749559685>.

18. Matt Hoffman, *DraftKings or FanDuel in Montana? Don't bet on it.*, BILLINGS GAZETTE (Oct. 20, 2015), [http://billingsgazette.com/news/local/draftkings-or-fanduel-in-montana-don-t-bet-on-it/article\\_f72b247d-5b9d-50bb-a11c-5dbcb0966abb.html](http://billingsgazette.com/news/local/draftkings-or-fanduel-in-montana-don-t-bet-on-it/article_f72b247d-5b9d-50bb-a11c-5dbcb0966abb.html).

19. Howard Stutz, *Nevada gaming regulators ban daily fantasy sports from the state*, LAS VEGAS REV.-J. (Oct. 15, 2015, 6:30 PM), <http://www.reviewjournal.com/business/casinos-gaming/nevada-gaming-regulators-ban-daily-fantasy-sports-the-state>.

20. Zachary Zagger, *So. Dakota AG Says No Plans to Indict Daily Fantasy Cos.*, LAW360 (Dec. 7, 2015), <http://www.law360.com/articles/735080/so-dakota-ag-says-no-plans-to-indict-daily-fantasy-cos>.

21. Letter from Ken Paxton, Tx. Att'y Gen., to Myra Crownover, Chairperson, Comm. on Pub. Health, Tex. House of Representatives (Jan. 19, 2016), <https://texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0057.pdf>.

22. Scott Malone, *Fantasy sports illegal in Vermont, attorney general's office says*, REUTERS (Jan. 15, 2016), <http://www.reuters.com/article/us-fantasysports-vermont-idUSKCN0UT2EN>.

23. Walker Orenstein, *Washington lawmakers aim to address illegal fantasy sports*, SEATTLE TIMES (Jan. 17, 2016, 9:07 AM), <http://www.seattletimes.com/seattle-news/politics/washington-lawmakers-aim-to-address-illegal-fantasy-sports/>.

24. H.B. 16-1404, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2016).

25. S.B. 339, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016).

26. 940 MASS. CODE REGS. 34.00 (2016).

27. S.B. 2541, 2016 Leg., Reg. Sess. (Miss. 2016).

28. H.B. 1941, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

29. 2016 N.Y. Sess. Laws Ch. 237 (McKinney).

30. 2016 Tenn. Pub. Acts 978 (codified at Tenn. Code Ann. §§ 47-18-5601–11, 39-17-501(1), 67-4-3201–05).

31. 2016 Va. Acts 318 (codified at VA. CODE ANN. §§ 59.1-556–61).

states permit traditional, season-long fantasy sports.<sup>32</sup> These divergent treatments may lead one to believe that the gulf between traditional and daily fantasy sports is wide. Indeed, those who advocate prohibition of daily fantasy sports while arguing that traditional fantasy sports should remain unregulated should be prepared to provide a compelling rationale for such varied treatment. Otherwise, such disparate regulation would smack of mere economic protectionism.<sup>33</sup>

The principal justification for distinguishing between the two fantasy regimes is that daily fantasy sports is a prohibited game of chance, while traditional fantasy sports is a permitted game of skill. In letters demanding that DraftKings and FanDuel cease and desist operations in the state, New York Attorney General Eric Schneiderman offered five factors to support the claim that daily fantasy sports are an impermissible game of chance, while traditional fantasy sports are permitted games of skill.<sup>34</sup> Though New York adopted legislation permitting daily fantasy sports with certain restrictions in August 2016,<sup>35</sup> the factors set forth in Attorney General Schneiderman's orders have provided a blueprint for other states in distinguishing between traditional and daily fantasy sports.<sup>36</sup>

This Comment contends that these factors are insufficient to justify treating daily fantasy sports as an impermissible game of chance

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32. Letter from Eric T. Schneiderman, N.Y. Attorney Gen., to Jason Robins, Chief Exec. Officer of DraftKings, Inc. (Nov. 10, 2015), [http://ag.ny.gov/pdfs/Final\\_NYAG\\_DraftKings\\_Letter\\_11\\_10\\_2015.pdf](http://ag.ny.gov/pdfs/Final_NYAG_DraftKings_Letter_11_10_2015.pdf); Letter from Eric T. Schneiderman, N.Y. Attorney Gen., to Nigel Eccles, Chief Exec. Officer of FanDuel, Inc. (Nov. 10, 2015), [http://ag.ny.gov/pdfs/Final\\_NYAG\\_FanDuel\\_Letter\\_11\\_10\\_2015\\_signed.pdf](http://ag.ny.gov/pdfs/Final_NYAG_FanDuel_Letter_11_10_2015_signed.pdf) [hereinafter Schneiderman Letters] (“[T]he legality of traditional fantasy sports has never been seriously questioned . . .”).

33. According to at least some circuit courts, such economic protectionism may be an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment. For a discussion of these decisions, see Robert M. Ahlander, Note, *Undressing Naked Economic Protectionism, Rational Basis Review, and Fourteenth Amendment Equal Protection*, 2017 BYU L. REV. (forthcoming 2017).

34. Schneiderman Letters, *supra* note 32.

35. 2016 N.Y. Sess. Laws Ch. 237 (McKinney).

36. See, e.g., Letter from J. Brin Gibson, Bureau Chief of Gaming & Gov't Affairs, and Ketan D. Bhirud, Head of Complex Litigation, to A.G. Burnett, Chairman of the Nev. Gaming Control Bd., Terry Johnson, Member of the Nev. Gaming Control Bd., and Shawn Reid, Member of the Nev. Gaming Control Bd. (Oct. 16, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/10/Nevada-AG-DFS.pdf>; Letter from Ken Paxton, Tex. Attorney Gen., to Myra Crownover, Chair, Comm. On Pub.

while leaving traditional fantasy sports unregulated as a game of skill. So long as traditional fantasy sports are permitted and even encouraged by policymakers, daily fantasy sports should not receive disparate treatment and should be permitted as a game of skill. This Comment does not contend that daily fantasy sports necessarily should or should not be treated as impermissible gambling, only that because daily fantasy sports are functionally equivalent to traditional fantasy sports in all respects material to such a determination, the two should enjoy identical legal treatment.<sup>37</sup> Part II presents a brief primer on the history of fantasy sports and describes the emergence of daily fantasy sports. Part III lays out the legal backdrop for evaluating fantasy sports and describes the laws applicable to fantasy sports generally and daily fantasy sports in particular. Part IV identifies and evaluates the factors used by policymakers to justify treating daily fantasy sports as a game of chance and traditional fantasy sports as a game of skill. Part V concludes.

## II. ORIGINS OF FANTASY SPORTS

Some dispute surrounds the origins of fantasy sports, but today's iteration is most closely related to "The Baseball Seminar," created by a Harvard psychology professor-qua-statistician who took baseball fandom to a new level with his statistical baseball simulation game in which entrants paid ten dollars to "draft" a "team" of Major League Baseball players.<sup>38</sup> The organizers pre-selected a basket of offensive and defensive statistics they believed best acted as a proxy for a player's value on a real-world team. The entrants then made draft decisions based on predictions of the players' expected performance in those

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Health (Jan. 19, 2016), <http://media.oag.state.tx.us/mediaroom/2016/pdf/kp0057.pdf> ("Under this statutory framework, odds are favorable that a court would conclude that participation in paid daily fantasy sports leagues constitutes illegal gambling, but that participation in traditional fantasy sports leagues . . . does not involve illegal gambling.").

37. This Comment does not, however, opine on whether either daily or traditional fantasy sports constitutes a game of skill or chance. It argues simply that either both are a game of skill or both are not, and the justifications used to date to distinguish between them are insufficient. The skill-chance debate is not a new one, but is still a crucial question on which this determination may turn. *See, e.g.*, Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371 (2006).

38. Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 120 (2016).

pre-selected categories during the upcoming season. The entrant whose team had the most total points at the end of the regular season was the victor. Baseball was the ideal proving ground for fantasy sports because among popular American sports it best lent itself to statistical analysis: performances are largely individual and easily measurable, the number of possible outcomes of any given play are limited and the sample size of 162 regular season games is uniquely large.<sup>39</sup>

Passed down by colleagues and mentors, The Baseball Seminar made its way to a group of journalists who met, discussed league rules, and developed a scoring format at New York restaurant La Rotisserie Française.<sup>40</sup> The group decided upon eight scoring metrics, four hitting and four pitching, that best simulated player performance and hypothetical impact on a real team.<sup>41</sup> At the end of the baseball regular season, the group determined the winner by calculating the number of points scored by each entrant's team.<sup>42</sup> The winner "receive[d] a cash prize, as well as a dousing in the chocolate drink Yoo-Hoo."<sup>43</sup> Thus, the "Rotisserie" scoring system that serves as the basis for modern fantasy sports was established.

Perhaps because the original La Rotisserie Française league participants were journalists, Rotisserie baseball received significant media coverage from the likes of the *New York Times* and *CBS Morning News*.<sup>44</sup> Baseball fans familiar with statistical analysis of the sport began to take notice and adopt the game by forming their own leagues. But rather than using only the four hitting and four pitching categories originally used in the Rotisserie League, many permutations of the game emerged. Leagues evolved to use their own alterations to the original Baseball Seminar rules—different statistical categories, more metrics, advanced measures of player productivity and value, utility player slots, larger rosters and budgets, weighting of statistical

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39. See BENJAMIN BAUMER & ANDREW ZIMBALIST, *THE SABERMETRIC REVOLUTION: ASSESSING THE GROWTH OF ANALYTICS IN BASEBALL* 85 (2014).

40. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 5–6 (2012).

41. *Id.* at 7.

42. *Id.* at 7–8.

43. *Id.* at 8.

44. *Id.*

categories, and a broad spectrum of other variations in the seemingly infinite set of baseball analytics.<sup>45</sup>

While media coverage of Rotisserie baseball led to modest adoption among statistically-oriented baseball fans, it was not until the popularization of the Internet that fantasy sports achieved a critical mass of users.<sup>46</sup> The mid-1990s saw the rise of analytics sites like RotoNews, which provided free and instant access to fantasy data, news, and analysis that was otherwise available only to statisticians in costly subscription-based forms.<sup>47</sup> The Internet democratized fantasy sports by obviating the need for manual scorekeeping, which was tedious and prone to error. Instead, box scores could be instantly uploaded to a spreadsheet or scraped from a database, and results were viewable in real time. A pastime that was originally reserved for the “overly bookish and socially challenged”<sup>48</sup> baseball fan was now accessible to the everyday casual viewer.<sup>49</sup>

“The Internet boom brought a ‘broad demographic shift in fantasy sports participation . . . .’”<sup>50</sup> ESPN launched the first fantasy baseball game played on the Internet in 1995, and quickly expanded from baseball to football, basketball, hockey, golf, and a number of other sports.<sup>51</sup> Today, fantasy sports are widely accepted as an important part of sports viewership and the fan experience; they are commonly played among friends, coworkers, and families, and a significant portion of sports media is targeted to fantasy owners.<sup>52</sup> Indeed, the market for paid fantasy sports research, generally provided

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45. *Id.* at 8–9.

46. See Edelman, *supra* note 38, at 121.

47. *Who We Are*, ROTO SPORTS, INC., <http://www.rotosportsinc.com/who-we-are.html> (last visited Sept. 16, 2016).

48. Bo J. Bernhard & Vincent H. Eade, *Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games*, 9 UNLV GAMING RES. & REV. J. 29, 32 (2005).

49. Dave Cunningham, *Still Cookin’? Rotisserie Baseball Celebrates its 20th Year*, ORLANDO SENTINEL, Mar. 26, 2000, at C10.

50. Edelman, *supra* note 40, at 10 (quoting Bernhard & Eade, *supra* note 47, at 32).

51. *Id.* at 10–11.

52. Omar Ali-Shamaa, *Daily Fantasy Sports: Are They Legal?*, FIU L. (Nov. 2, 2015), <https://law.fiu.edu/daily-fantasy-sports-legal/>; see also Jason M. Breslow, *Matt King: Daily Fantasy Sports Are “Entertainment,” Not Gambling*, FRONTLINE (Feb. 9, 2016), <http://www.pbs.org/wgbh/frontline/article/matt-king-daily-fantasy-sports-are-entertainment-not-gambling/>; Brent Schrottenboer, *Leagues see real benefits in daily fantasy sports*, USA TODAY (Jan. 1, 2015), <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

through subscription-based services in which fantasy owners pay a monthly or yearly fee for insider tips and analysis from purported experts, is expected to grow into a \$2 billion industry by 2020.<sup>53</sup>

### III. LEGAL BACKGROUND

#### *A. The Distinction Between Skill and Chance*

While the nuances of American gambling jurisprudence are outside the scope of this Comment, in order to adequately address the rationales used to classify traditional fantasy sports as a game of skill and daily fantasy sports as a game of chance, it is necessary to discuss the framework that states rely on when determining whether an activity is impermissible gambling. Because this Comment does not contend that daily fantasy sports necessarily should or should not be treated as impermissible gambling, but rather that because daily fantasy sports are functionally equivalent to traditional fantasy sports in all material respects, the two should enjoy identical legal treatment.

Whether an activity constitutes gambling generally hinges upon its status as either a game of skill or chance.<sup>54</sup> States regulate games of chance according to state gambling laws; this means total prohibition if gambling is not permitted in the state.<sup>55</sup> No federal standard exists to determine whether a game is one of skill or chance; each state makes that determination on the basis of its own law, which may lead to diverse treatment of a single activity among states.<sup>56</sup> The standards exist on a general continuum: states on the permissive end of gambling-like activities use the “predominant purpose” test, pursuant to which an activity is a game of chance if its outcomes require more chance than skill. States on the non-permissive end rely on an “any-chance” test, in which an activity is a game of chance if chance plays any part in determination of the outcome.<sup>57</sup> Many states fall somewhere in the middle of these tests, using various standards like

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53. Will McKitterick, *Fantasy Sports Services in the US*, in IBISWORLD 4 (2015), <http://www.ibisworld.com/industry/fantasy-sports-services.html>.

54. See Marc Edelman, *Keynote Address: A Sure Bet? The Legal Status of Daily Fantasy Sports*, 6 PACE INTELL. PROP. SPORTS & ENT. L. F. 1, 9 (2016), <http://digitalcommons.pace.edu/pipsself/vol6/iss1/1/>.

55. See *id.* at 10.

56. See *id.*

57. See *id.*

the “material factor” test, in which an activity is considered a game of chance if the outcome depends to a material degree on a matter of chance.<sup>58</sup> When an activity constitutes impermissible gambling under state law, it also likely violates various federal anti-gambling laws that depend on state gambling definitions, including “the Wire Act, the Illegal Gambling Business Act, and the Unlawful Internet Gambling Enforcement Act.”<sup>59</sup>

Determining the role of chance in an activity is not a straightforward endeavor, and “there is still no definite way to determine whether chance or skill predominates in a given game.”<sup>60</sup> Because no static criteria exist to be used in this determination, courts are free to engage in a subjective analysis that may permit them to work backward to justify a preferred result rather than engage in a predictable framework for analysis.<sup>61</sup> The wide latitude given courts, regulators and executive officers in classifying an activity as a game of skill or chance gives rise to questionable results like treating traditional and fantasy sports oppositely. This Comment calls into question such an anomalous outcome by demonstrating the material similarity between fantasy sports types.

#### *B. Federal Regulation of Games of Chance: The Fantasy Sports Exemption*

Federal regulation of fantasy sports is inextricably intertwined with the rise and fall of another controversial industry: online poker. Both fantasy sports and poker grew rapidly, driven by educated and Internet-savvy young people.<sup>62</sup> During the early- to mid-2000s, poker grew from “a fun thing for mostly middle-aged-and-above men to do with friends . . . [that was] of complete inconsequence to the mainstream population,” into “a multibillion-dollar industry. It came

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58. *Id.*

59. *Id.* at 11. *But see infra* Section III.B.

60. Jon Boswell, Note, *Fantasy Sports: A Game of Skill that is Implicitly Legal Under State Law, and now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1265 (2008).

61. *See id.* (“The modern approach to conducting the dominant factor test appears to be to subjectively determine whether a game’s outcome is controlled more by chance or by some other factor that is under the game participants’ control.”).

62. *See* Evan Grossman, *Will Daily Fantasy End Up Like Online Poker? You Bet*, ROLLING STONE (Oct. 29, 2015), <http://www.rollingstone.com/sports/features/will-daily-fantasy-end-up-like-online-poker-you-bet-20151029>.

out of the shadows and into the bright lights in a way nobody could have predicted.”<sup>63</sup> Like fantasy sports, the engine for online poker’s growth was the proliferation of accessible, real-money, online games. The victory of accountant and amateur poker player Chris Moneymaker<sup>64</sup> in the 2003 World Series of Poker Main Event for a \$2.5 million prize is widely cited as the watershed moment in online poker’s rise.<sup>65</sup> The possibility of a payday, inspired by Moneymaker’s story, generated massive interest from casual fans, which led to full coverage of the Main Event on ESPN.<sup>66</sup> Spurred by online growth and Moneymaker’s 2003 victory, the number of participants in the \$10,000 buy-in Main Event grew from 631 players in 2002 to 8,773 in 2006.<sup>67</sup> By 2005, online poker was a \$2.4 billion industry, and sites like PokerStars and FullTilt Poker cashed in on the game’s exploding popularity.<sup>68</sup> Players and operators alike believed online poker had received de facto acceptance by regulators.<sup>69</sup>

On October 13, 2006, the Unlawful Internet Gaming Enforcement Act (UIGEA)—passed as a rider to unrelated legislation to protect U.S. ports—changed the legal landscape of online gaming.<sup>70</sup> The UIGEA did not strike at poker sites themselves, but at payment processing companies, making it illegal for processors to facilitate unlawful Internet gaming by U.S. citizens.<sup>71</sup> While several of the most prominent online poker providers pulled out of the U.S. market completely, a number remained until April 15, 2011, dubbed “Black Friday” in the gaming community.<sup>72</sup> On Black Friday, the U.S.

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63. Eric Raskin, *The Poker Boom*, ALL IN (Feb. 2010) (alteration in original), <http://www.allinmag.com/poker/inside-poker/the-action/feb2010-the-poker-boom> (chronicling the rise of online poker from 2000–2010).

64. Not a stage name.

65. See, e.g., Raskin, *supra* note 63.

66. See Eric Raskin, *When We Held Kings*, GRANTLAND (May 22, 2013), <http://grantland.com/features/the-oral-history-2003-world-series-poker-which-chris-moneymaker-turned-39-25-million/>.

67. See *id.*

68. *Going All in for Online Poker*, NEWSWEEK (Aug. 14, 2005), <http://www.newsweek.com/id/56438>.

69. *Id.*

70. Raskin, *supra* note 63.

71. Edelman, *supra* note 38, at 122–23.

72. *Black Friday: The Day That Changed Online Poker*, CARD PLAYER (Apr. 13, 2012), <http://www.cardplayer.com/poker-news/13127-black-friday-the-day-that-changed-online-poker>; Michelle Minton, Opinion, *Online Poker Shutdown—What’s Really Behind the*

Department of Justice unsealed an indictment against poker websites for, *inter alia*, violating the terms of the UIGEA, and seized the sites' domain names.<sup>73</sup> Real-money online poker ended as quickly as it was popularized.

While the full breadth of the UIGEA's applicability was uncertain, an explicit carve-out made clear one thing to which it did *not* apply: fantasy sports.<sup>74</sup> Exempted from the UIGEA's regulatory purview are "fantasy or simulation sports game[s]"<sup>75</sup> that have an outcome "determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events."<sup>76</sup> In order to qualify for the fantasy sports exemption, a contest must comply with certain conditions: 1) prizes must be set before the contest begins, and may not be based on the number of entrants;<sup>77</sup> 2) "winning outcomes [must] reflect the relative knowledge and skill of the participants" and be based on accumulated statistical results;<sup>78</sup> and 3) winning outcomes may not be based on a point spread or the performance of any one team or any one athlete.<sup>79</sup> Fantasy sports have never been alleged to run afoul of the UIGEA.

The UIGEA carve-out in 31 U.S.C. § 5362(1)(E)(ix) evidences widespread tolerance of fantasy sports as a component of the American professional athletics experience and constitutes implicit acceptance of fantasy sports by the Federal Government.<sup>80</sup> As Congress increased its scrutiny of online gambling, it went "out of its way to explicitly ensure [that] operators of fantasy sports Websites . . . have nothing to fear."<sup>81</sup>

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*Department of Justice's Decision?*, FOX NEWS (April 22, 2011), <http://www.foxnews.com/opinion/2011/04/22/online-poker-shutdown-whats-really-department-justices-decision.html>.

73. See *Black Friday: The Day that Changed Online Poker*, *supra* note 71.

74. UNLAWFUL INTERNET GAMBLING ENF'T ACT, 31 U.S.C. § 5362 (1)(E)(ix) (2006).

75. *Id.*

76. *Id.* § 5362 (1)(E)(ix)(II).

77. *Id.* § 5362 (1)(E)(ix)(I).

78. *Id.* § 5362 (1)(E)(ix)(II).

79. *Id.* § 5362 (1)(E)(ix)(III)(aa).

80. Jeffrey Standen, *The Special Exemption for Fantasy Sports*, 42 N. KY. L. REV. 427, 430 (2016).

81. See Boswell, *supra* note 60, at 1263 n.42 (noting that the fantasy sports exemption in the UIGEA has caused several alleged internet gambling sites who otherwise are prohibited from operating to retain their customer lists as potential fantasy sports users).

*C. The Rise of Daily Fantasy Sports*

The de facto acceptance of paid fantasy sports by the federal government, as evidenced by the UIGEA carve-out, contributed to the rise of the daily fantasy sports phenomenon.<sup>82</sup> Recognizing the value of the UIGEA's narrow carve-out for sports simulation, poker blogger Kevin Bonnet created the first daily fantasy sports website, FantasySportsLive.com, where "entrants would pick individual players that they believed would perform well over a single day."<sup>83</sup> While traditional fantasy sports leagues operate over the course of an entire season, daily fantasy sports, as the name implies, take place over a shorter term—usually between one and four days. Such a model caters to traditional fantasy players who are unhappy with how their drafts or seasons have proceeded, as well as to fantasy players unable to commit to the demands of a season-long league, which may last up to five months.<sup>84</sup>

Though FantasySportsLive.com quickly fizzled, it laid the groundwork for a billion-dollar industry.<sup>85</sup> FanDuel and DraftKings, the two biggest daily fantasy operators, were soon formed based on a model similar to the one Bonnet first established. Like online poker sites, they advertised aggressively and grew rapidly. Leading up to the 2015 NFL season, DraftKings and FanDuel "blanketed the airwaves, ensuring that virtually any television viewer—football fan or not—[was] exposed to their commercials"<sup>86</sup> by airing more than 60,000 television commercials leading up to the 2015 NFL season.<sup>87</sup> For

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82. Dan McQuade, *The daily fantasy sports boom is the new, legal online poker*, BUS. INSIDER (May 19, 2015), <http://www.businessinsider.com/daily-fantasy-sports-legal-online-poker-2015-5>.

83. Marc Edelman, *Speech: The Legal Status of Daily Fantasy Sports in a Changing Business Environment*, 42 N. KY. L. REV. 443, 446 (2015) (citing KEVIN BONNET, ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS 219 (2014) (ebook)).

84. Drew Harwell, *The rise of daily fantasy sports, online betting's newest empire*, WASH. POST (July 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/>.

85. See Edelman, *supra* note 83, at 446–47.

86. Tom Kludt, *DraftKings and FanDuel ads seem to be everywhere on TV because they are*, CNN MONEY (Oct. 8, 2015), <http://money.cnn.com/2015/10/08/media/fanduel-draftkings-commercials/>.

87. Ilan Mochari, *Why DraftKings and FanDuel Spent \$206 Million on Ads This Year*, INC. (Oct. 9, 2015), <http://www.inc.com/ilan-mochari/fantasy-sports-betting-startups-206-million-tv-ads.html>.

several weeks in September, DraftKings ran a national television advertisement on average once every minute and a half.<sup>88</sup>

#### *D. Limited State Acceptance of Paid Fantasy Sports*

Paid fantasy sports have been expressly embraced by a small number of states.<sup>89</sup> Though each state's legislation was undoubtedly passed with daily fantasy sports in mind, most refer to "paid fantasy sports," rather than "paid daily fantasy sports."<sup>90</sup> This is equitable and proper, as argued *infra*, even if it is an inadvertent result of broad drafting. States that permit traditional fantasy sports while prohibiting daily fantasy sports or are considering measures that would do so should look to permitting states' equitable treatment of the two activities as a model.

Each permitting state has also implemented some regime for the licensure and/or regulation of daily fantasy sports. Common regulations include prohibitions banning daily fantasy operator employees from trading on inside knowledge of data in contests offered by other daily fantasy operators;<sup>91</sup> age restrictions;<sup>92</sup> exclusion of athletes, coaches or referees from entering contests in which they play, coach, or officiate;<sup>93</sup> limitation of the number of entries in a given contest;<sup>94</sup> segregation of operating and prize funds;<sup>95</sup> identification of highly experienced players;<sup>96</sup> prohibitions of automated scripts to

88. Dustin Gouker, *DraftKings' TV Blitz: One Commercial Every 1.5 Minutes; \$82 Million Spent in '15*, LEGAL SPORTS REP. (Sept. 2, 2015), <http://www.legalsportsreport.com/3483/draftkings-tv-commercial-blitz/>.

89. *See supra* notes 23–30.

90. *See, e.g.*, COLO. REV. STAT. § 12-15.5-102(4) (2016); MISS. CODE ANN. § 97-33-303(c) (2016) (effective until July 1, 2017); N.Y. PML LAW § 1401.8 (McKinney 2016); TENN. CODE ANN. § 47-18-1602(6) (2016); VA. CODE ANN. § 59.1-556 (2016); S.B. 339, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016); H.B. 1941, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016). *But see* 940 MASS. CODE REGS. 34.01 (2016) (regulating only "Daily Fantasy Sports contests").

91. MISS. CODE ANN. § 97-33-305(2)(a) (2016).

92. *See, e.g.*, Ind. S.B. 339, at 4.

93. 940 MASS. CODE REGS. 34.12(4) (2016).

94. *See, e.g.*, VA. CODE ANN. § 59.1-557(D)(6) (2016).

95. *See, e.g.*, Ind. S.B. 339, at 6–7. Indiana also requires daily fantasy operators to "maintain a reserve in the form of cash, cash equivalents, an irrevocable letter of credit, a bond, or a combination" thereof to secure prize funds. *Id.* at 7.

96. Massachusetts, for example, provides that a "Beginner" player for purposes of its regulation is one "who has entered fewer than 51 contests offered by a single [daily fantasy sports

enter lineups;<sup>97</sup> and restrictions on the permissible subject matter of daily fantasy contests.<sup>98</sup> In addition, state regulations generally include some implicit requirement that paid fantasy sports comport with the UIGEA restrictions discussed *supra* in Part III.B.<sup>99</sup> In addition, permitting states each provide some mechanism for enforcing the mandates of the adopted regulations. Indiana, for example, establishes a “paid fantasy sports division” and authorizes it to levy a fee for each violation of daily fantasy regulations.<sup>100</sup> Others delegate regulation of paid fantasy sports to the state’s gambling commission or similar regulatory body.<sup>101</sup>

#### IV. THE ILLUSORY DAILY AND TRADITIONAL FANTASY DISTINCTION

The legal status of daily fantasy sports remained largely unchallenged until New York Attorney General Eric Schneiderman issued cease-and-desist orders to both DraftKings and FanDuel on November 10, 2015. In the orders, he demanded that the daily fantasy sports operators immediately cease accepting funds from New York residents.<sup>102</sup> Ironically, it was the 2015 advertising blitz that catalyzed Attorney General Schneiderman’s scrutiny of daily fantasy sports.<sup>103</sup>

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operator] who does not meet the definition of Highly-Experienced Player by virtue of having won three [daily fantasy sports] contest Prizes of \$1,000 or more.” 940 MASS. CODE REGS. 34.03 (2016).

97. *See, e.g.*, 940 MASS. CODE REGS. 34.12(9) (2016).

98. Daily fantasy sports may not use “college or high school sports” as their subjects. *See* Ind. S.B. 339, at 3.

99. *See* MISS. CODE ANN. § 97-33-305(4) (2016).

100. Note, however, that a civil penalty alone, particularly one of such a *de minimis* amount, may be inadequate to motivate good faith compliance by large daily fantasy operators like DraftKings and FanDuel, who spend hundreds of millions of dollars per year on advertising. Curt Woodward, *Now a household name, DraftKings unlikely to repeat ad blitz*, BOS. GLOBE (Jan. 18, 2016), <https://www.bostonglobe.com/business/2016/01/18/draftkings-considers-lighter-spending-after-huge-buys/07d7NhKZkAQFlrHSQE5XhK/story.html>.

101. *See, e.g.*, VA. CODE ANN. § 59.1-556 (2016) (defining “Department” as the state “Department of Agriculture and Consumer Services”).

102. Press Release, N.Y. Attorney Gen., A.G. Schneiderman Issues Cease-and-Desist Letters to FanDuel and DraftKings, Demanding that Companies Stop Accepting Illegal Wagers in New York State (Nov. 11, 2015), <http://www.ag.ny.gov/press-release/ag-schneiderman-issues-cess-and-desist-letters-fanduel-and-draftkings-demanding>.

103. Asked how daily fantasy sports came on to his radar, Attorney General Schneiderman responded that for his “office, and for a lot of other state regulators, it really was the advertising blitz that took place this summer” that piqued interest and scrutiny. Jason M. Breslow, *Eric*

Schneiderman also sought an injunction to enforce the cease-and-desist order pending litigation.<sup>104</sup> After investigation, Attorney General Schneiderman concluded that “unlike traditional fantasy sports, daily fantasy sports companies are engaged in illegal gambling under New York law” because a contestant “stakes or risks something of value” upon an outcome that depends “to a material degree” on chance, rather than skill.<sup>105</sup> A significant portion of the cease-and-desist notices was dedicated to distinguishing daily from traditional fantasy sports.<sup>106</sup>

Though New York adopted legislation permitting daily fantasy sports so long as they comport with certain licensure and regulation requirements, the five arguments originally advanced by Attorney General Schneiderman in the cease-and-desist notices to FanDuel and DraftKings, “the two largest daily fantasy sports sites,”<sup>107</sup> have become archetypical for other state policymakers seeking to prohibit daily fantasy sports:<sup>108</sup> 1) presence of a competitive draft, 2) duration of competition, 3) repeated adjustment of teams, 4) owner motivation, and 5) control over game variables.<sup>109</sup> These factors allegedly draw a “critical distinction between [daily fantasy sports] and *traditional* fantasy sports” and explain why “the legality of traditional fantasy sports has never been seriously questioned.”<sup>110</sup> This Comment argues, in contrast, that each factor weighs in favor of treating traditional and daily fantasy sports similarly for purposes of the skill versus chance determination.

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*Schneiderman: Why Daily Fantasy Sports Is Gambling*, FRONTLINE (Feb. 9, 2016), <http://www.pbs.org/wgbh/frontline/article/eric-schneiderman-why-daily-fantasy-sports-is-gambling/> (interviewing New York Attorney General Eric Schneiderman regarding his views and subsequent actions taken *vis-à-vis* the daily fantasy industry).

104. *See id.*

105. Schneiderman Letters, *supra* note 32.

106. *See id.*

107. Marc Tracy, *FanDuel and DraftKings Suspend College Sports Contests*, N.Y. TIMES (Mar. 31, 2016), <http://www.nytimes.com/2016/04/01/sports/fanduel-and-draftkings-suspend-college-sports-contests.html>.

108. *See, e.g.*, Letter from J. Brin Gibson, Bureau Chief of Gaming and Gov’t Affairs, & Ketan Bhirud, Head of Complex Litig., to Nev. Gaming Control Bd. (Oct. 16, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/10/Nevada-AG-DFS.pdf>; Letter from Ken Paxton, Tex. Attorney Gen., to Myra Crownover, Tex. House Representative (Jan. 19, 2016), <http://media.oag.state.tx.us/mediaroom/2016/pdf/kp0057.pdf>.

109. *See* Schneiderman Letters, *supra* note 32.

110. *Id.*

### *A. Competitiveness of Draft*

The first of the Schneiderman factors considers different player allocation methods, arguing that a traditional fantasy draft, in which league members sequentially select players who are then “taken off the board,” requires skill while daily fantasy allocation, in which league members “bid” from a “salary budget,” is determined by chance.<sup>111</sup> In fact, traditional fantasy sports drafts may involve a greater degree of chance than the player-price allocation method used in daily fantasy sports. This factor weighs against applying a different standard to traditional and daily fantasy sports. This Section examines the player allocation methods most commonly used in traditional fantasy sports and daily fantasy sports, then compares the two.

#### *1. Traditional fantasy sports*

Traditional fantasy sports leagues use a variety of allocation mechanisms by which fantasy owners select real-world players. The two most common methods are a league auction and a draft.<sup>112</sup>

Leagues that use classic “Rotisserie” scoring generally rely on an auction to allocate players to fantasy owners.<sup>113</sup> An auction most closely resembles the free agency market in real world sports, in that the team willing to allocate to a player the most of its budget (as the player’s “salary”) values the player more than other teams, and that team receives the player.<sup>114</sup> An auction is an efficient method of distribution, particularly in fantasy sports like football where position specificity is key because the owner who most values a particular player that fits a specific need on the owner’s team and promises to excel in certain statistical categories is incentivized to pay the highest price for that player. In this method, all league owners are given a budget of some arbitrary amount—so long as the owners have identical budgets, the amount is irrelevant. Owners proceed to bid on players until all

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111. See, e.g., *id.*

112. See, e.g., *Fantasy Draft Types*, NFL, <http://www.nfl.com/fantasyfootball/help/drafttypes> (last visited Sept. 17, 2016).

113. Edelman, *supra* note 20, at 13.

114. See Tristan H. Cockcroft, *Fantasy football auction strategy*, ESPN (June 18, 2015), [http://www.espn.com/fantasy/football/story/\\_/id/13084199/fantasy-football-auction-strategy-fantasy-football](http://www.espn.com/fantasy/football/story/_/id/13084199/fantasy-football-auction-strategy-fantasy-football).

roster spots are filled for each team.<sup>115</sup> Once an auction for a player ends, that player is “off the board” and can no longer be selected by any other owner. In some variations, leftover currency from an owner’s budget may then be used toward auctions during the season for free-agent players who were not selected during the initial auction process.

In comparison to an auction, a draft more closely resembles real-world allocation of players who have not yet played in the league;<sup>116</sup> each team receives a pick in the draft, which can be assigned randomly, based on the results of a previous season, or by using some other method.<sup>117</sup> The draft proceeds in this fashion until all owners have reached the maximum number of players.<sup>118</sup> One variation on the traditional draft format is the “snake draft,” in which the draft order inverts in even-numbered rounds.<sup>119</sup> For example, in a snake draft, the player with the first overall pick will select first in the first round and last in the second round, and the player with the last overall pick will select last in the first round and first in the second round.<sup>120</sup> The theory underpinning snake drafting is that it mitigates the upside of receiving the first pick and downside of receiving the last; it is a mechanism for addressing fairness *ex post*.<sup>121</sup>

## 2. Daily fantasy sports

Daily fantasy sports, on the other hand, generally use a “player-price” allocation method.<sup>122</sup> Like the auction method described in

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115. *Id.*

116. *Id.* at 14.

117. Methods to pick a draft order are limited only by league members’ creativity. For example, in FX’s *The League*, a television show about a fictional fantasy football league, draft order is determined by the owners randomly picking numbers from a hat that correspond to children in a sack race. *The League: The Draft* (FX television broadcast Oct. 29, 2009). The owner who has the number of the children that win the sack race receives first pick in the draft, the owner with the number of the second-place finisher receives second pick, and so on. *Id.*

118. See Edelman, *supra* note 20, at 14.

119. *Id.*

120. In other words, the player will have back-to-back picks at the end of round one and the beginning of round two.

121. Jon Shidal & Todd Skinner, *Altering Draft Order in an Attempt to Create Fairness*, <http://www.cs.wustl.edu/~cytron/cake/Reports/PDFs/football.pdf> (last visited Sept. 17, 2016).

122. Edelman, *supra* note 40, at 13.

Section III.A.1, each owner is given an arbitrary budget, which teams “spend” on players.<sup>123</sup> Unlike an auction, however, the prices for each player are set by the site operator, and a player can be purchased by more than one owner.<sup>124</sup> As a result, all owners could theoretically have identical lineups. Daily fantasy sites change player salaries on a near-constant basis using algorithms that likely incorporate a number of factors, such as recent statistics, position, age, historical performance, opponent, weather, injury history, and a long list of other important considerations that impact player value.<sup>125</sup> The player-price method does not require all players to draft at the same time, which makes it ideal for contests with many entrants.

### 3. Comparison

Proponents of treating daily and traditional fantasy sports differently contend that a player-price allocation incorporates a greater degree of chance than an auction or league draft.<sup>126</sup> However, this view reflects a shallow understanding of the nuance required when picking a lineup in a player-price model. Player-price allocation is at least as competitive as the allocation methods commonly used in traditional fantasy sports for a number of reasons.

First, position in a traditional fantasy draft is typically determined randomly.<sup>127</sup> Traditional fantasy sports providers generally build in a random draft generator, and many services for draft randomization are readily available.<sup>128</sup> This process is as much an exercise in pure chance as the spin of a roulette wheel. Traditional fantasy owners have no input in draft order.<sup>129</sup> Unsurprisingly, draft position affects outcomes—fantasy owners with higher picks win their leagues more

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123. *Id.*

124. See Jon Bales, *Understanding Site Salaries*, ROTOGRINDERS, <https://rotogrinders.com/lessons/understanding-site-salaries-174298> (last visited Oct. 15, 2016).

125. See Keith Wagstaff, *Fantasy Moneyball: How Algorithms Are Minting Big Winners*, NBC NEWS (Sept. 3, 2014), <http://www.nbcnews.com/tech/innovation/fantasy-moneyball-how-algorithms-are-minting-big-winners-n193931>.

126. See Schneiderman Letters, *supra* note 32.

127. *But see supra* note 117 and accompanying text.

128. *E.g.*, FANTASY SPORTS RANDOM DRAFT ORDER GENERATOR, <http://www.draftordergenerator.com/> (last visited Sept. 17, 2016).

129. Provided, however, that certain legacy traditional fantasy leagues that carry over from previous years may incorporate a team’s finish in prior years to determine future draft position.

often than owners with lower picks.<sup>130</sup> A player who has the top pick in the draft is guaranteed to get the player she most values. Moreover, the top pick can “set the agenda” for a draft in the sense that taking an unexpected player with the top pick could appreciably skew opponents’ draft strategies.<sup>131</sup> While a snake draft spreads this advantage somewhat, top picks remain a valuable commodity.<sup>132</sup> As a result, pure chance has a significant impact on drafts and is thus a material part of the outcome, which suggests that traditional fantasy is a game of chance that should be prohibited under Attorney General Schneiderman’s analysis.

Second, not all daily fantasy sports contests are created equal. Different contest types require different draft strategies and considerations. Differences in structure require forethought and experience on the part of a fantasy owner; one strategy does not fit all when it comes to player-price allocation in daily fantasy sports. Daily fantasy pools can be structured to pay out smaller amounts to a larger number of owners over a certain threshold, or to pay out larger amounts to a smaller pool or even one winner.<sup>133</sup> Different contest rules call for vastly different allocation strategies. Daily fantasy requires the ability to leverage different methods of analysis and risk management to succeed.<sup>134</sup> Where a larger percentage of fantasy

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130. Eric Kay, *GRAPH STUFF: Draft position and its impact on fantasy football in 2013*, CBS SPORTS (July 10, 2014), <http://www.cbssports.com/nfl/eye-on-football/24614844/graph-stuff-does-where-you-pick-impact-how-your-fantasy-football-team-will-do>.

131. The Cleveland Cavaliers’ 2013 selection of Anthony Bennett provides a real world example of a team with the first pick in the draft skewing other teams’ strategies by making an unexpected pick. See Dan Devine, *Cleveland Cavaliers take Anthony Bennett with No. 1 overall pick in 2013 NBA Draft*, YAHOO! SPORTS (June 27, 2013, 6:00 PM), <http://sports.yahoo.com/blogs/nba-ball-dont-lie/cleveland-cavaliers-anthony-bennett-no-1-overall-pick-000748649.html>.

132. See Darren Hartwell, *Fantasy Football Preview 2015: Where’s The Ideal Position to Draft?*, NESN (Aug. 31, 2015, 9:00 AM), <http://nesn.com/2015/08/fantasy-football-2015-preview-whats-the-ideal-draft-day-position/> (“It’s only fitting that your fantasy football season officially begins with some luck.”).

133. See Brandon Marianne Lee, *Fantasy Football 2015: Explaining FanDuel Contest Types and Strategies*, FANDUEL INSIDER (June 5, 2015), <https://www.fanduel.com/insider/2015/06/05/fantasy-football-2015-explaining-fanduel-contest-types-and-strategies/>.

134. David Purdum, *How daily fantasy players are winning*, ESPN (Feb. 25, 2015), [http://espn.go.com/chalk/story/\\_/id/12380815/the-skills-required-succeed-daily-fantasy-sports-espn-chalk](http://espn.go.com/chalk/story/_/id/12380815/the-skills-required-succeed-daily-fantasy-sports-espn-chalk).

owners win a contest, participants are incentivized to minimize risk and anticipate what most other players are doing and set a lineup that has a similar risk profile to the bulk of other players. No style points are awarded, and the range of payouts is generally small in such tournaments.<sup>135</sup> Because fantasy owners are incentivized to score just enough points by assuming minimal risk to “make the money,” they will generally set lineups that include proven fantasy commodities, and will not swing for the fences with unknown players like rookies or backups. Variance is the enemy when the first player above the median receives the same prize as the top scorer.

Conversely, where only a small portion of fantasy owners win in a given contest, skilled owners will seek to maximize variance because the payout difference between a player in the twentieth percentile and the last-place finisher is generally zero. “[T]he goal is to *create a lineup that will produce extreme outcomes* (good and bad) more often than the average lineup.”<sup>136</sup> Variance can be increased in a number of ways. Some athletes tend to be “boom or bust,” in the sense that they will either have a very statistically productive game or produce little. For example, some baseball players tend to strike out frequently, but hit for extra bases when they connect.<sup>137</sup> In comparison, some athletes

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135. See DraftKings, Presentation at MIT’s Sloan Sports Conference (Feb. 25, 2014), <http://www.sloansportsconference.com/wp-content/uploads/2014/06/DraftKings.pdf>; Derek Farnsworth, *Basic 50/50 and Double-Up Strategy*, ROTOGRINDERS (2015), <https://rotogrinders.com/lessons/basic-50-50-and-double-up-strategy-174233> (discussing strategy for 50/50 game types, in which half of the field wins and half loses, and there is no variance in the payout between winners).

136. Ed Miller & Daniel Singer, *For daily-fantasy sports operators, the curse of too much skill*, MCKINSEY & COMPANY (Sept. 2015), <http://www.mckinsey.com/industries/media-and-entertainment/our-insights/for-daily-fantasy-sports-operators-the-curse-of-too-much-skill>. For example:

[A] casual player might pick Los Angeles Angels center fielder Mike Trout, Boston Red Sox left fielder Hanley Ramirez, and Arizona Diamondbacks first baseman Paul Goldschmidt in an MLB contest because they are star sluggers. A sharp player might instead choose Curtis Granderson, Wilmer Flores, and Lucas Duda, all of whom play for the New York Mets, because choosing players from the same team creates covariance, the Mets are at Wrigley Field in Chicago, the Chicago Cubs have a right-handed fly-ball pitcher on the mound, the wind will be gusting out to right field, and the Mets are a road favorite.

*Id.*

137. See, e.g., Michael Salfino, *Carlos Beltran Has Been Boom or Bust in the Bronx*, WALL ST. J. (May 12, 2016), <http://www.wsj.com/articles/carlos-beltran-has-been-boom-or-bust-in-the-bronx-1463011896>.

provide a consistent and reliable number of fantasy points, but have limited variance and upside<sup>138</sup>—some baseball players reach base frequently but fail to bring in scoring runs at a high rate.<sup>139</sup> Some players offer high variance because of their position on the depth chart.

A fantasy owner seeking variance may select a second- or third-receiver in an NFL contest if he or she anticipates that the receiver's team will be down by a wide margin early in the game, which generally dictates that the team will throw the ball more and provide the receiver with more targets and opportunities to score points.<sup>140</sup> In terms of expected value, a third-option receiver is generally not worth a great deal in a traditional fantasy sports league.<sup>141</sup> Indeed, if the fantasy owner is wrong and the team keeps the point margin close throughout the game, she will probably see little production from that receiver.<sup>142</sup> But if the owner is correct in her prediction, a third-receiver has the potential to score big for a low salary cost.<sup>143</sup> Likewise, a bench player in the NBA is much more likely to get minutes in a blowout game than a close one.<sup>144</sup> Such opportunities are also available based on predictions about the weather; football teams are more likely to run the ball than throw it if the conditions are wet or windy.<sup>145</sup> So, if an owner predicts that the weather is going to be worse than what is

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138. See, e.g., David John, *MLB Beyond Basics: Weighing Upside vs. Ownership in GPPs*, STACK & FADE (July 21, 2016), <https://www.stackfade.com/strategy/daily-fantasy-baseball-weighing-upside-vs-ownership>.

139. See, e.g., Bob Nightengale, *Votto, Phillips: Same team, different approaches*, USA TODAY (March 24, 2015), <http://www.usatoday.com/story/sports/mlb/2015/03/23/cincinnati-reds-joey-votto-brandon-phillips-on-base-percentage-rbi/70337854/>.

140. See Mike Horn, *Wide Receiver Targets From Year to Year*, FANTASYGURU (April 8, 2016) (describing how wide receiver targets can fluctuate according to “game script,” or whether the receiver’s team is playing from ahead or behind), <http://www.fantasyguru.com/football/subscribers/articles/4-8-16horn.php>.

141. See Mike Clay, *Which No. 3 NFL wide receivers should you target in fantasy drafts?*, ESPN (Aug. 3, 2016), [http://www.espn.com/fantasy/football/story/\\_/id/17200798/mike-clay-examines-fantasy-value-nfl-no-3-wide-receivers-ranking-fantasy-football](http://www.espn.com/fantasy/football/story/_/id/17200798/mike-clay-examines-fantasy-value-nfl-no-3-wide-receivers-ranking-fantasy-football).

142. See Horn, *supra* note 140.

143. See *id.*

144. See Steve Aschburner, *When the game is already decided, these players shine*, NBA.COM (Jan. 1, 2010), [http://www.nba.com/2010/news/features/steve\\_aschburner/01/01/garbage.allstars/](http://www.nba.com/2010/news/features/steve_aschburner/01/01/garbage.allstars/).

145. See Brian Burke, *Weather Effects on Passing*, ADV. FOOTBALL ANALYTICS (Jan. 13, 2012), <http://archive.advancedfootballanalytics.com/2012/01/weather-effects-on-passing.html>.

priced into a running back's salary, she may select a running back on a team with an offense built around the pass.

A fantasy owner may supercharge the risk profile of her team by seeking out “‘covariance,’ or the tendency for certain players’ performance to coincide with, for example, multiple hitters on the same baseball lineup (if the first gets a hit, the next is more likely to get an R.B.I.).”<sup>146</sup> In a traditional fantasy league, rational players seek to diversify the teams represented on their roster in order to limit downside risk and covariance; the goal is to advance to the next week while minimizing the chance of losing.<sup>147</sup> For example, if an owner starts Teddy Bridgewater, Adrian Peterson, and Stefon Diggs, each an offensive player for the Minnesota Vikings, and the Vikings offense performs poorly or plays against an exceptional defense, the owner’s team will be worse off than if he only had one poorly performing Vikings’ player and two players from other teams.

Diversification across teams, positions, and position sub-types mitigates non-player-specific risks like weather, opponent, coaching, etc.<sup>148</sup> However, covariance is of unique value in daily fantasy, where the payout goes to a limited number of owners: if the Vikings have an exceptional day due to one or a combination of systemic factors, the upside of owning all three players is very high. If they perform poorly and the fantasy team loses as a result, the fantasy owner is in no worse position than if she had started a lower-risk or risk-neutral lineup that got her an above average but not exceptional result that was not good enough to cash in the contest. A daily fantasy owner must consider each of these variables at length in assembling her team.

In either contest scenario, a fantasy owner must predict her opponents’ lineups. Setting a lineup that is similar to the field in a contest paying out to a small pool of players is a losing proposition. In

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146. Neil Irwin, *Daily Fantasy Sports and the Hidden Cost of America’s Weird Gambling Laws*, N.Y. TIMES (Sept. 24, 2015), [http://www.nytimes.com/2015/09/27/upshot/daily-fantasy-sports-and-the-hidden-cost-of-americas-weird-gambling-laws.html?\\_r=0](http://www.nytimes.com/2015/09/27/upshot/daily-fantasy-sports-and-the-hidden-cost-of-americas-weird-gambling-laws.html?_r=0).

147. Isaac Petersen, *How Fantasy Football is Like Stock Picking*, FANTASY FOOTBALL ANALYTICS (March 17, 2015), <http://fantasyfootballanalytics.net/2015/03/fantasy-football-is-like-stock-picking.html>.

148. A diversified fantasy football team may, for example, have a mix of possession receivers (players known for reliably catching the ball on underneath routes, but who are rarely open deep) and deep threats who are less reliable on short routes, but are more likely to catch the “home run” pass. A team seeking variance will tend to select more deep threats than a diversified team.

a contest paying out to a larger pool, any risk beyond that necessary to be the marginal winner is economically irrational. In this sense, daily fantasy provides a unique opportunity for success to owners who adopt game theory in making decisions.<sup>149</sup> Daily fantasy owners must be aware and take advantage of these concepts and apply them in a winning way in order to be successful in the long run. A winning owner must not just set a good lineup with high variance, but must set a good lineup that is different from the balance of the presumably well-informed field. A winning owner must have some grasp of game theory, statistics, and probability theory, in addition to being familiar with the players themselves. The limited number of successful daily fantasy sports owners<sup>150</sup> suggests that this process is at least as competitive as a traditional fantasy player allocation method.

Indeed, if the player-price allocation method was determined by chance, one would expect daily fantasy outcomes to be randomly distributed. This is not the case, however: a small cadre of daily fantasy sports players win a vastly disproportionate share of contests.<sup>151</sup> The top 1.3% of daily fantasy players won 91% of contests and generated a 27% return on their entry-fee investments in 2014, while the average member of the field failed to generate a positive return, losing \$25 on entry fees of \$49.<sup>152</sup> Because certain players consistently succeed at a rate greater than they would if outcomes were distributed randomly, some material non-chance element must be implicated.

Though it appears outcomes are random for 97.7% of daily fantasy players, the fact that a small subset of players win the vast majority of contests defies the proposition that winning outcomes are exclusively or even primarily the result of chance.<sup>153</sup> Rather, the existence of consistent sharks, who generally have analytical backgrounds and rely on sophisticated mathematical models, indicates that an owner's daily fantasy prospects depend on her level of skill.<sup>154</sup> In addition, the failure

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149. See Purdum, *supra* note 134.

150. See Drew Harwell, *All the reasons you (probably) won't win money playing daily fantasy sports*, WASH. POST (Oct. 12, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/>.

151. Miller & Singer, *supra* note 136.

152. *Id.*

153. *Id.*

154. See *id.*

of non-professional players to consistently win does not indicate that daily fantasy is a game of chance—daily fantasy sites are unique in that the top-level players compete against novices in nearly every competition.<sup>155</sup> One would not call basketball a game of chance because ninety-seven percent of games in a recreational league were won by a team made up of LeBron James, Stephen Curry, Blake Griffin, Russell Westbrook, and James Harden. Some daily fantasy players are simply more skilled than the vast majority of others.

Though a player-price allocation method is admittedly different from the draft method typically used in traditional fantasy sports leagues, it remains a competitive way to allocate players. Because chance determines draft order in traditional fantasy leagues and because player-price allocation found in daily fantasy requires a complex weighing of factors, consideration of game type, and anticipation of opponents' choices, no significant difference in competitiveness exists.

#### 4. *Duration of competition*

Because traditional fantasy sports “compete over the course of a long season,” it is allegedly distinguishable from daily fantasy sports competitions, the duration of which may be as short as one day’s slate of games.<sup>156</sup> The primary difference between traditional and daily fantasy sports is the duration of the competition. Traditional fantasy sports typically last for a season. Daily fantasy sports, on the other hand, last for the smallest amount of time in which all teams in a given league compete. For example, a season-long fantasy football league lasts for the entire duration of the NFL regular season. A contest on DraftKings or FanDuel, however, may last for only one week of the NFL regular season, with entries due before kickoff of the Thursday game (typically the first game in a given NFL week), and a winner determined at the conclusion of the Monday game (the final game of an NFL week). However, distinguishing between fantasy sports products based on the timeline of the contest is an inaccurate method of determining whether a game is one of skill or chance, and fails to appreciate that short contests may be less risky than season-long competitions.

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155. *Id.*

156. *See* Schneiderman Letters, *supra* note 32.

First, the “duration of competition” factor does not, in fact, differentiate traditional from daily fantasy sports with regard to the skill and chance distinction. Because variation in the number of regular season games of various professional sports leagues for which fantasy simulations exist is large, a “traditional” fantasy contest for a sport with a brief season may have the same duration as a daily fantasy contest for a sport with a longer season. For example, sites that are considered to offer exclusively traditional fantasy sports, offer fantasy golf for a single tournament, which consists of only four rounds played over the course of four days.<sup>157</sup> Fantasy football lasts for the duration of the sixteen-game NFL season, but three or more of these weeks are consumed by fantasy league playoffs.<sup>158</sup> At the other end of the spectrum, a traditional fantasy baseball league consists of the 162-game, approximately six-month, regular season.<sup>159</sup> The NBA<sup>160</sup> and NHL<sup>161</sup> regular seasons have 82 games and span five months. Despite this wide range in the duration of the competition and commitment necessary from players, all are considered traditional fantasy sports. If daily fantasy sports operators were to nominally increase contest periods to several days in the case of NBA basketball or MLB baseball contests, and to multiple weeks in the case of NFL football, would they still be classified as impermissible given that fantasy sports considered “traditional” offer contests of a similar duration? That the answer to this question is unclear demonstrates the unreliability of

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157. See, e.g., *Yahoo! Fantasy Golf Homepage*, YAHOO!, <https://golf.fantasysports.yahoo.com/> (last visited Sept. 17, 2016).

158. Fantasy football playoffs must occur during the regular season, while all teams continue to have games. Otherwise fantasy owners with players on real-world teams that do not make the playoffs would be at a significant disadvantage.

159. See James Montgomery, *Why Won't Anybody Join Your Fantasy Baseball League?*, ROLLING STONE (March 25, 2015) (lamenting fantasy baseball's decline compared to football and other sports due to, among other things, the length of the baseball season), <http://www.rollingstone.com/culture/features/why-wont-anybody-join-your-fantasy-baseball-league-20150325>; See *Fantasy Baseball Commissioner Plumbs Deepest Depths Of Friend Circle To Find 12th Participant*, ONION (March 12, 2015), <http://www.theonion.com/article/fantasy-baseball-commissioner-plumbs-deepest-depth-38206>.

160. See Kevin Arnovitz, *Why is there an 82-game schedule?*, ESPN (April 11, 2013), [http://www.espn.com/blog/truehoop/post/\\_/id/32294/why-is-there-an-82-game-schedule](http://www.espn.com/blog/truehoop/post/_/id/32294/why-is-there-an-82-game-schedule).

161. See *2015-2016 NHL regular season team schedules*, NHL.COM (June 25, 2015), <https://www.nhl.com/news/2015-2016-nhl-regular-season-team-schedules/c-771764>.

using competition duration as a distinguishing factor between traditional and daily fantasy sports.

Second, it is unclear why “duration of competition” is material to the skill versus chance determination. Some argue that the shorter time frame of daily fantasy sports permits and even encourages a higher volume of entries by a single player over the course of a season.<sup>162</sup> While this is undoubtedly true, and in practice daily fantasy owners clearly engage in more contests over the course of a season,<sup>163</sup> it ignores the reality that nothing stops a traditional fantasy owner from entering an infinite number of high-stakes money leagues. Such a player is no less likely to fall prey to the purported ills associated with sports gambling, and no regulatory measure to prevent or mitigate the damage caused by entry into many high-stakes traditional fantasy sports leagues exists. Longer duration fantasy sports contests do not avoid the issues associated with volume entry—if policymakers are concerned with the volume of a fantasy owner’s entries, the duration of a fantasy season is a poor proxy for its regulation.

Finally, entry into multiple daily fantasy contests over the course of a season may in fact subject fantasy players to *less* chance than traditional fantasy. Assembling a new team multiple times over the course of a season mitigates outcome variance because owners avoid the risk that injury or another unforeseeable variable will derail an entire season. Analogously, a poker player that holds two aces and plays them optimally is subject to an upset to lesser hole cards in the short-run, but over the long-term the law of large numbers dictates that her win rate will approximate eighty percent, the rate at which pocket aces beat the field.<sup>164</sup> Traditional fantasy sports is akin to playing multiple hands of poker with the same hole cards, while daily fantasy allows owners to discard cracked aces and draw new hole cards on the next hand. A fantasy owner who pays to play in a season-long league is subject to greater loss due to injury, coaching, or other uncontrollable variables, even if she plays optimally. Because the buy-in for traditional season-long leagues is generally larger than that of a single daily fantasy period, her loss will be greater than that of the daily fantasy player who can simply abandon that player tomorrow.

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162. See Harwell, *supra* note 150.

163. See Krejcek, *supra* note 8.

164. Purdum, *supra* note 134.

### 5. Repeated adjustment of teams

While daily fantasy owners lock their lineups once in a given competition period, traditional fantasy owners “repeatedly adjust their teams” over the course of a season; this difference is used to justify the game-of-skill and game-of-chance distinction with respect to fantasy sports.<sup>165</sup> In a traditional fantasy sports league, a fantasy owner simulates some of the actions of a real owner: deciding who to draft, who to start or sit, and who to trade or retain. A vast number of resources are available for a fantasy owner to use in making those decisions. Many popular fantasy outlets provide expert advice on the optimal strategy in each situation.<sup>166</sup> Complex models predict, based on matchups and other factors, which players a fantasy owner should start.<sup>167</sup> On the other hand, a fantasy owner in a daily fantasy league determines only to which players she will allocate salary budget funds for the shorter contest. Advocates of prohibiting daily fantasy sports argue that this requires less skill and constitutes a material element of chance.<sup>168</sup> The absence of single-contest lineup changes in daily fantasy sports is not, however, sufficient to cause differential treatment of fantasy sports because daily fantasy owners generally participate in multiple contests over consecutive periods, and because the underlying research and deliberation skills that make lineup changes valuable in traditional fantasy sports are also required of daily fantasy owners.

First, Attorney General Schneiderman’s contention that daily fantasy owners do not adjust their teams over the course of a single contest mischaracterizes the daily fantasy sports experience. A comparison of a single daily fantasy sports contest with a traditional season-long contest ignores the reality that the vast majority of daily owners compete in multiple contests per week, and many per season.<sup>169</sup> Daily fantasy owners adjust their lineups in the sense that they may set a different lineup the next day or week, or even for the

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165. See Schneiderman Letters, *supra* note 32.

166. See, e.g., Michael Fabiano, *Start ‘Em, Sit ‘Em Week 17: Defenses*, NFL.COM (Dec. 30, 2015), <http://www.nfl.com/news/author?id=09000d5d800219d7>.

167. See, e.g., NFL—*Who Should I Start or Sit?*, FANTASYSP, <https://www.fantasysp.com/start-sit-tool/nfl> (last visited Sept. 19, 2016).

168. See Schneiderman Letters, *supra* note 32.

169. See Krejcik, *supra* note 163, at 5.

same day in one or more different contests.<sup>170</sup> At most, traditional fantasy owners may change their lineups once per contest period. For example, an owner in a traditional fantasy baseball league may only start one lineup of players per day; once a game involving a player on a team's lineup begins, the fantasy lineup is locked for the day.<sup>171</sup> Similarly, a daily fantasy owner sets a lineup once per contest period—daily, in the case of baseball.<sup>172</sup>

Further, though a daily fantasy owner may prefer one or more players who she feels are systemically undervalued, her lineup will almost certainly change as the player performs differently, faces different opponents, and deals with adjustments to salaries from the daily fantasy provider. In this sense, the changing player salaries makes lineup adjustment necessary. A daily fantasy owner may not simply identify a preferred set of players and profitably select them for every contest entered over the course of a season, because daily fantasy operators' pricing will adjust accordingly. In traditional fantasy sports, however, the use of the same lineup over the course of an entire season is entirely possible. Absentee ownership, in which an owner does not draft her own team or does not set lineups, make trades, or take any other action during the season, is a *bona fide* problem in traditional fantasy sports that many have sought to address.<sup>173</sup> In practice, daily fantasy sports require lineup adjustment over a series of contests, whereas an owner in a traditional fantasy sports league might never adjust a lineup.

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170. See *id.* (illustrating that many daily fantasy owners participate in a number of contests during a single period of play).

171. See *General Rules for Standard Leagues (Free)*, ESPN <http://games.espn.go.com/flb/resources/help/content?name=general-rules-standard> (last visited Sept. 19, 2016) (“Once the roster is locked in Standard leagues, you are unable to make any roster changes.”).

172. See, e.g., *Daily Fantasy Baseball League Rules*, DRAFTKINGS, <https://www.draftkings.com/help/mlb> (last visited Sept. 19, 2016) (“DraftKings’ MLB daily fantasy sports contest are held each day of the MLB regular season . . .”).

173. See, e.g., Steve Gardner, *Fantasy owners plot their September strategies*, USA TODAY (Aug. 31, 2016, 3:20 PM), <http://www.usatoday.com/story/sports/fantasy/2016/08/30/gardner-september-baseball-strategies/89577008/> (“It’s human nature to stop paying close attention and making roster moves once it’s clear a team doesn’t have a chance to win—especially with fantasy football season on the horizon.”); AJ Mass, *The Commish’s Court: Absentee owners, rosters*, ESPN (Oct. 14, 2008), [http://espn.go.com/fantasy/football/ffl/story?page=commish\\_081014](http://espn.go.com/fantasy/football/ffl/story?page=commish_081014) (discussing the problem of absentee ownership in traditional fantasy sports and ways to encourage owners to actively participate in their leagues).

Second, lack of single-contest lineup adjustment does not obviate the need for the research, analysis, and forethought that make lineup adjustment a matter of skill rather than chance. Dedication and the ability to conduct statistical and other research about players is perhaps the most important skill of top daily fantasy owners.<sup>174</sup> For even the average daily fantasy owner, research, analysis, modeling and making predictions about player performance are an important part of daily fantasy sports: most spend between ten and twenty hours a week on research.<sup>175</sup> One quarter of daily fantasy football owners cite the research and analysis required to successfully compete as the factor they most enjoy about their participation.<sup>176</sup>

Simply making a historical determination about the most valuable player in a given period is only part of the equation, however, because daily fantasy owners must make predictions about future performance. At the highest level, daily fantasy owners generally create and maintain advanced mathematical models and algorithms to take advantage of arbitrage opportunities.<sup>177</sup> This is the same deliberative decision-making skill that characterizes lineup adjustment in traditional fantasy sports. Daily fantasy sports require at least as much commitment, analytical ability, and decision making. As a result, the absence of single-contest lineup changes does not suggest that daily fantasy depends to a material degree on chance.

#### 6. *Owner motivation*

Attorney General Schneiderman contends that traditional fantasy owners are not motivated by money, while daily fantasy owners are induced to play by daily fantasy operators touting the opportunity to “get rich quick.”<sup>178</sup> They supposedly play for the thrill of competition, as a way to keep up with friends, or to incentivize themselves to view

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174. See Jonathan Bales, *Here's What It Takes To Make A Living Playing Fantasy Sports*, BUS. INSIDER (Nov. 6, 2013), <http://www.businessinsider.com/how-pros-play-fantasy-sports-2013-11>.

175. Krejcik, *supra* note 8.

176. *Id.* at 29.

177. Brad Reagan, *A Fantasy Sports Wizard's Winning Formula*, WALL ST. J. (June 4, 2014), <http://www.wsj.com/articles/a-fantasy-sports-wizards-winning-formula-wsj-money-june-2014-1401893587>.

178. Schneiderman Letters, *supra* note 32; see Breslow, *supra* note 103.

games in which they would otherwise not be interested.<sup>179</sup> Daily fantasy sports, however, are allegedly nothing more than a substitute for illegal wagering, in which sports bettors and former online poker players take advantage of the next form of quasi-legal gambling in search of profits and the thrill of gambling.<sup>180</sup>

This purported difference in motivation, Schneiderman alleges, justifies characterizing traditional fantasy as a harmless game of skill used to stay in touch with friends and boost office morale,<sup>181</sup> while daily fantasy is a public health concern, the outcomes of which are dependent on chance.<sup>182</sup> This distinction is inaccurate: research indicates that daily fantasy owners are not primarily motivated by the potential of winning money. Owners play at low stakes, and traditional fantasy sports do nothing to weed out or discourage participation of players motivated primarily by money.

First, empirical research suggests that the pursuit of financial gain is simply not the primary or even secondary motivating factor for daily fantasy sports owners.<sup>183</sup> Even though more than 70% of participants fail to achieve a positive return on their contest buy-ins, most owners “love [daily fantasy sports] and would never quit,” even if they continue to lose money.<sup>184</sup> Nor is daily fantasy sports simply a proxy for sports gambling or online poker: ninety-four percent of daily fantasy participants surveyed said that even if sports betting was legal, they would not significantly reduce the amount of time they spend playing daily fantasy sports, and ninety-eight percent said they would not decrease their daily fantasy sports participation even if legal online poker was available.<sup>185</sup>

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179. See Mark St. Amant, *The Fantasy-Sports Non-Scandal*, N.Y. TIMES, Oct. 17, 2015, at A23.

180. See Evan Grossman, *Will Daily Fantasy End Up Like Online Poker? You Bet*, ROLLING STONE (Oct. 29, 2015), <http://www.rollingstone.com/sports/features/will-daily-fantasy-end-up-like-online-poker-you-bet-20151029>.

181. See McLean Mills, *How Fantasy Football Can Work For You in the Office*, MONSTER, <http://www.monster.com/career-start/a/how-fantasy-football-works-for-you-in-the-office> (last visited Sept. 20, 2016) (explaining how an office fantasy sports draft “is the opportunity to gather with the other members of your league and revel in the sprouting of the competitive roses”).

182. Schneiderman Letters, *supra* note 32.

183. Krejcek, *supra* note 8, at 29.

184. *Id.* at 28.

185. *Id.* at 33.

These figures do not comport with the narrative that daily fantasy sports players are simply refugees from forms of wagering recently made illegal. Instead, most daily fantasy participants cite increased enjoyment of watching games in which they otherwise would have little or no interest, and disappointment in the lack of research and statistical analysis required in the traditional fantasy context as motivations for enrolling in daily contests.<sup>186</sup> If survey data about daily fantasy owners' motivation is not good enough to provide even a presumption about participants' objectives for playing daily fantasy sports, perhaps policymakers' analysis on the subject should be reevaluated.

Second, daily fantasy participants tend to play at low stakes: most spend on average less than \$100 per week and prefer contests that cost less than \$5 to enter.<sup>187</sup> The *Diagnostic and Statistical Manual of Mental Disorders*<sup>188</sup> presents several factors that determine whether an individual has a gambling disorder.<sup>189</sup> These include whether the individual feels a need to increase the amount of her wagers over time to achieve a desired level of excitement and whether she chases losses and makes decisions in accordance with the Gambler's Fallacy.<sup>190</sup> The available data suggests that almost no daily fantasy participants exhibit these characteristics.<sup>191</sup> Daily fantasy players spend, on average, only

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186. *Id.* at 29.

187. *Id.* at 22.

188. AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 90 (5th ed. 2013), <http://dsm.psychiatryonline.org.erl.lib.byu.edu/doi/full/10.1176/appi.books.978089http://dsm.psychiatryonline.org.erl.lib.byu.edu/doi/full/10.1176/appi.books.9780890425596.dsm16#CHDHBDEE0425596.dsm16#CHDHBDEE>.

189. Christine Reilly & Nathan Smith, *The Evolving Definition of Pathological Gambling in the DSM-5*, NAT'L CTR. FOR RESPONSIBLE GAMING, [http://www.ncrg.org/sites/default/files/uploads/docs/white\\_papers/ncrg\\_wpdsm5\\_may2013.pdf](http://www.ncrg.org/sites/default/files/uploads/docs/white_papers/ncrg_wpdsm5_may2013.pdf) (last visited Sept. 20, 2016).

190. The Gambler's Fallacy, or Monte Carlo Fallacy, is the mistaken belief that if a number of outcomes have occurred, a different one in accordance with the mean of possible outcomes is more likely to occur shortly. For example, if three roulette spins in a row fall on black, a player subject to the Gambler's Fallacy may predict that the next spin is more likely to result in red winning. However, the odds for a single spin remain unchanged. See generally Matthew Rabin & Dimitri Vayanos, *The Gambler's and Hot-Hand Fallacies: Theory and Applications*, 77 REV. OF ECON. STUD. 730 (2010), [http://scholar.harvard.edu/files/rabin/files/ghfta\\_resf.pdf](http://scholar.harvard.edu/files/rabin/files/ghfta_resf.pdf).

191. Krejčík, *supra* note 8, at 32–35.

\$556 per year on all fantasy sports (not just daily fantasy), despite the majority of players having an annual income greater than \$75,000.<sup>192</sup>

Third, Schneiderman's articulation of the "owner motivation" factor flatly ignores the fact that even if most traditional fantasy sports players play for camaraderie or bragging rights, the same potential for addictive behavior exists as in daily fantasy competitions. Season-long fantasy leagues that require an entry fee are common, and high-stakes leagues are easily found.<sup>193</sup> Traditional fantasy sports are not regulated, and some states have gone to some length to encourage participation in traditional fantasy sports. If policymakers are willing to regulate based on the alleged marginal daily fantasy sports player, they must also consider the marginal traditional fantasy sports player who is equally susceptible to gambling addiction.

In short, distinguishing between traditional and daily fantasy sports on the basis that daily participants are motivated by the pursuit of money is inappropriate. As discussed above, research suggests that daily participants are motivated not by the prospect of winning big, but because it increases the enjoyment of viewing sporting events, and participants value the research and analysis required to participate. Further, if daily players were motivated by money, one would expect that they would play at progressively increasing stakes. This is not the case. Finally, traditional fantasy sports do nothing to prohibit or discourage players whose primary motivation is money. Because there is no concrete evidence available that demonstrates that daily fantasy sports players are more motivated by money than are traditional fantasy players, the "player motivation" factor does not indicate that daily contests are a game of chance rather than skill.

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192. *Industry Demographics*, FANTASY SPORTS TRADE ASSN., <http://fsta.org/research/industry-demographics/> (last visited Sept. 19, 2016).

193. See Mike Florio, *NFL Paying Attention to Influence of High-Stakes Fantasy Football Leagues*, NBC SPORTS (July 28, 2014), <http://profootballtalk.nbcsports.com/2014/07/28/nfl-paying-attention-to-influence-of-high-stakes-fantasy-football-leagues/>; Mike MacGregor, *Comparing High-Stakes Fantasy Football Contest Options*, FFTODAY: FFT'S BLOG O' FANTASY FOOTBALL (Aug. 31, 2010), <http://www.fftoday.com/blog/2010/08/31/comparing-high-stakes-fantasy-football-contest-options/> (comparing providers of high-stakes season-long fantasy football options).

*7. Control over game variables*

The fifth and final factor relied on by Attorney General Schneiderman to characterize daily fantasy sports as a game of chance is control over relevant game variables.<sup>194</sup> One prerequisite for use of the player-price allocation method used by daily fantasy sites is the setting of player salaries by site operators. Because a player may be owned by more than one daily fantasy team, prices must be standardized. Critics allege that this difference from traditional fantasy sports, in which player-prices are set by the league market by draft or auction, makes daily fantasy comparatively vulnerable to manipulation by operators.<sup>195</sup> However, control over salary pricing is an inappropriate factor on which to base the determination that daily fantasy constitutes a game of chance rather than skill because professional sports leagues, which constitute equity investors in, or marketing partners with, large daily fantasy operators, are unlikely to permit malfeasance, and because even malicious mispricing affects all daily fantasy players equally.

First, stakeholder involvement with the operation of daily fantasy sites makes abuse of control over game variables unlikely. Equity investors in daily fantasy sports include the NBA,<sup>196</sup> MLB,<sup>197</sup> NHL,<sup>198</sup> MLS,<sup>199</sup> and numerous owners of professional sports teams.<sup>200</sup> Professional sports leagues and team owners have historically been the stakeholders most concerned about adverse impacts from gambling,<sup>201</sup>

194. Schneiderman Letters, *supra* note 32.

195. See, e.g., Lauren Paine, *Are Daily Fantasy Sports Companies Playing the Odds against Future Regulations?*, 3 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 213, 222 (2016), [http://law.emory.edu/ecgar/\\_documents/volumes/3/3/essays/paine.pdf](http://law.emory.edu/ecgar/_documents/volumes/3/3/essays/paine.pdf).

196. Matt Hevia, *FanDuel Announces Official Partnership with NBA*, FANDUEL (Nov. 12, 2014), <https://www.fanduel.com/insider/2014/11/12/fanduel-announces-official-partnership-with-nba/>.

197. Michael Colangelo, *NFL, MLB, et. al., must ensure integrity of daily fantasy games to protect investment*, FIELDS OF GREEN (Oct. 7, 2015), <http://thefieldsofgreen.com/2015/10/07/daily-fantasy-sites-integrity-ownership-nba-nfl-mlb-nhl-mls/>.

198. Travis Hoiium, *DraftKings Scandal: You'll Be Shocked At Who Owns Fantasy Sports Giants*, MOTLEY FOOL (Oct. 11, 2015), <http://www.fool.com/investing/general/2015/10/11/draftkings-scandal-youll-be-shocked-at-who-owns-fa.aspx>.

199. *Id.*

200. *Id.*

201. See Steve Fainaru, Paula Lavigne, & David Purdum, *Betting on the Come: Leagues Strike Deals with Gambling-Related Firms*, ESPN (Jan. 28, 2016), [http://espn.go.com/espn/otl/story/\\_/id/14660326/nba-nfl-mlb-nhl-striking-various](http://espn.go.com/espn/otl/story/_/id/14660326/nba-nfl-mlb-nhl-striking-various).

and have frequently led the charge on anti-gambling legislation.<sup>202</sup> In 1991, then-NFL Commissioner Paul Tagliabue refused to permit “games to be used as bait to sell gambling,” and unequivocally noted, “We have to make it clear to the athletes, the fans and the public, gambling is not a part of sport, period.”<sup>203</sup>

As a result, the leagues’ functional endorsement of daily fantasy through equity investment in operators constitutes the best insurance against impropriety. No one suffers more than the leagues themselves when even the perception of anti-competitive collusion or behavior by players, officials, or the leagues exists among consumers. In addition to the leagues, a number of other institutional investors own large equity stakes in daily fantasy sports operators. For example, FanDuel’s investors include private equity firm KKR,<sup>204</sup> Comcast Ventures,<sup>205</sup> NBC Sports Ventures,<sup>206</sup> and Google Capital.<sup>207</sup> Similarly, DraftKings investors include Fox Sports and the Kraft Group (which also owns the New England Patriots).<sup>208</sup> DraftKings and FanDuel have established advertising partnerships with the NFL Players Association and almost every NFL team.<sup>209</sup> These stakeholders bring to the table significant experience in internal audit, governance, compliance, and other key operational matters, which significantly decreases the probability of bad action by daily fantasy sports companies and their employees.

Further, equity investors in daily fantasy sports are incentivized to make sure no impropriety occurs, because all rely to a significant extent on reputational capital in the operation of their businesses. Any

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business-deals-gambling-related-firms (discussing “nearly a century of zero-tolerance policies [in which major sports leagues] treated gambling as a mortal threat.”).

202. See Will Hobson, *Sports Gambling in U.S.: Too Prevalent to Remain Illegal?*, WASH. POST (Feb. 27, 2015), [https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c\\_story.html](https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html).

203. *Id.*

204. Miller & Singer, *supra* note 136.

205. *Id.*

206. *Id.*

207. Mason Levinson, *FanDuel Closes \$275 Million Financing from KKR, Google Capital*, BLOOMBERG (July 14, 2015, 9:47 AM), <http://www.bloomberg.com/news/articles/2015-07-14/fanduel-closes-275-million-financing-from-kkr-google-capital>.

208. Hoium, *supra* note 198.

209. *DFS Partnership/Sponsorship Tracker*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-sponsorship-tracker/> (last visited Sept. 19, 2016).

perceived association with an investment considered unethical or contrary to public interests could not only spark regulatory punishment, but also damage the reputational power of the investors. This could, in turn, depress enterprise value and diminish future investment opportunities. Short run abuses could also damage return on their daily fantasy investment as the industry draws scrutiny from policymakers.<sup>210</sup> Because the stakeholders mentioned above likely cannot afford to assume such reputational damage, they are incentivized to use their control as investors to force self-regulation.

Second, even if daily fantasy operators possess some degree of control over player salaries, they do not control outcomes. While player salaries in daily fantasy contests do not respond in the short term to bidding by owners, owners must engage in an arbitrage analysis—whether a player is under- or overvalued because of a broken or maliciously manipulated pricing algorithm, daily fantasy owners will be permitted to assume such valuation in their models. Nor would control over the pricing variable yield an unfair advantage even to a player with inside knowledge. If a fantasy owner knew based on an inside tip that the DraftKings pricing algorithm systematically undervalues Gordon Hayward, she still does not have uniquely valuable or even private information—the price is public, and owners must determine whether it is accurate relative to the player’s expected performance.

In addition, pricing models are of little value to daily fantasy owners *ex ante*, because price is an imperfect proxy for future performance. If price accurately modeled future performance, every daily fantasy contest would result in stalemate among informed entrants. Even if daily fantasy operators do, in fact, possess control over a relevant variable, such control does not determine contest outcomes and is thus of little value.

Finally, control over a relevant game variable justifies regulation, not prohibition. All states that permit the operation of daily fantasy sports, including New York, have also adopted promising regulatory

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210. See, e.g., *Insider Trading? DraftKings Employee Wins \$350k on Rival Site Fanduel*, FOX NEWS INSIDER (Oct. 6, 2015, 11:45 AM), <http://insider.foxnews.com/2015/10/06/insider-trading-draftkings-under-scrutiny-after-employee-wins-350k> (“It’s likely that this scandal will trigger more calls for the industry to be regulated by the federal government.”).

regimes with the goal of consumer protection.<sup>211</sup> Daily fantasy operators themselves have been at the forefront of calls for regulation of the industry.<sup>212</sup> Proposals for regulation of the daily fantasy industry began in earnest in September 2015, when a DraftKings employee won more than \$350,000 during one week playing on rival site FanDuel.<sup>213</sup> It was suspected that the employee used nonpublic data generated from his position at DraftKings to create his winning FanDuel lineups.<sup>214</sup> Nonpublic information such as lineup trends among historical winners could drastically improve an owner's odds of success in a daily fantasy contest, particularly when there is some chance of competing against the owners whose data was used.<sup>215</sup> While an investigation "[l]ed by former U.S. Attorney for the District of Massachusetts, John Pappalardo of Greenberg Traurig" concluded that the employee did not have access to nonpublic DraftKings data during the FanDuel contest,<sup>216</sup> calls for regulation had already begun.<sup>217</sup> Revelation of the employee's winnings led to significant discussion of what duties daily fantasy sports operators owe owners, and comparisons to insider trading in the securities law context were made.<sup>218</sup>

211. See *supra* Section III.D.

212. See J.D. Morris, *Turmoil in Daily Fantasy Sports Spreads Beyond DraftKings, FanDuel*, VEGAS INC. (Mar. 4, 2016, 2:00 AM), <http://vegasinc.com/business/2016/mar/04/turmoil-in-daily-fantasy-sports-spreads-beyond-dra/> (“[The daily fantasy sports] industry needs regulation . . . . If we [site operators] are to be holding customer money, then we need to be worthy of that customer trust.”).

213. Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html>.

214. *Id.*

215. Bourree Lam, *The New York Attorney General's Investigation of DraftKings and FanDuel*, ATLANTIC (Oct. 7, 2015), <http://www.theatlantic.com/business/archive/2015/10/draftkings-fanduel-fantasy-sports-insider-trading-advantage/409435/> (“[T]he reason that information is valuable is because one could see who was *not* picked. Those who finish at the very top of a fantasy contest often owe their success to picking wildly successful players who few other users picked, so knowing who was not picked can open the door to huge gains that others miss out on.”).

216. *DraftKings Summary of Findings*, DRAFTKINGS (Oct. 19, 2015), <http://pb-cdn.draftkings.com.s3.amazonaws.com/wp-content/uploads/2015/10/DraftKings-Independant-Summary-of-Findings-GT-FINAL.pdf>.

217. See, e.g., Haley Hintze, *DFS Data Leak Means Increased Demands for Regulation*, FLUSHDRAW (Oct. 5, 2015), <http://www.flushdraw.net/news/misc/dfs-data-leak-means-increased-demands-for-regulation/>.

218. Drape & Williams, *supra* note 213.

Following the DraftKings employee scandal, FanDuel CEO Nigel Eccles publicly advocated for the application of regulations that highlight the “industry’s principles for protecting the integrity of the game and the fantasy experience—from segregating player [and operating] funds to ensuring compliance with existing state and federal law.”<sup>219</sup> Eccles argued that in order for the daily fantasy industry to grow in a sustainable and responsible way, an entity with broad enforcement and law-making authority should adopt regulations that consider “strong, common sense, enforceable consumer protection requirements” such as “age and location verification, segregation of user funds, protection of user information, safeguards against use of proprietary contest information and . . . third-party audits.”<sup>220</sup> The conciliatory approach of the daily fantasy industry justifies at least an attempt to formulate and pass regulation, rather than an immediate prohibition without more developed and nuanced consideration.

## V. CONCLUSION

Because traditional fantasy sports have become ubiquitous and uniquely intertwined with professional sports, policymakers have deemed that they are a permissible game of skill. On the other hand, daily fantasy is viewed as a game of chance and immediate threat to public welfare. In order to equitably justify disparate treatment, some set of distinguishing characteristics must be offered. Attorney General Schneiderman and other proponents of the game-of-chance designation for daily fantasy sports argue that this characterization is justified by five factors: 1) presence of a competitive draft, 2) duration of competition, 3) repeated adjustment of teams, 4) owner motivation, and 5) control over game variables. However, these factors do not support disparate treatment of traditional and daily

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219. Nigel Eccles, *A Letter to Users from FanDuel CEO, Nigel Eccles*, FANDUEL (Oct. 29, 2015), <https://newsroom.fanduel.com/2015/10/29/a-letter-to-users-from-fanduel-ceo-nigel-eccles/>.

220. *Id.*

fantasy sports. So long as policymakers embrace traditional fantasy sports, daily fantasy should receive the same treatment.

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