

Edge-Sorting: A Chance for Courts to Sort Out the Law for Advantage Play

To the untrained eye, it would appear that Phil Ivey was on an incredible streak. The well-known professional poker player was dabbling in another game, as many pro gamblers do; his choice was a high-stakes game of Baccarat at the Borgata casino in Atlantic City, N.J.¹ And he was up by as much as \$3.5 million on this October 2012 visit, the fourth time in four trips to the Borgata that year that he was pulling in a seven-digit profit.²

To the trained eyes and ears in security, something was wrong. Players are going to win big from time to time, but Borgata security grew wary when they heard Mr. Ivey was embroiled in a lawsuit against the Crockfords casino in London over huge profits from the same game.³ Still, the Borgata's security detail couldn't determine what was wrong. Mr. Ivey and his companion never touched the cards.⁴ His companion, an Asian-American woman named Cheng Yin Sun, was speaking Mandarin to their Chinese dealer throughout the weekend, but security knew that many Asian guests feel more comfortable conversing in their native language.⁵ Mr. Ivey had requested several unusual rules, such as using the same cards throughout the session and asking the dealer to turn cards a certain way, but gamblers in general and Baccarat players specifically are a superstitious bunch.⁶ In their guts security agents were convinced Mr. Ivey had

¹ Chad Holloway, *Details Emerge in Borgata's Lawsuit Against Phil Ivey*, POKERNEWS (April 16, 2014); <http://www.pokernews.com/news/2014/04/details-emerge-in-borgata-s-lawsuit-against-phil-ivey-18040.htm>.

² *Id.*

³ *Id.* Mr. Ivey sued Crockfords after the casino withheld his winnings in a game called Punto Banco, which is essentially Baccarat by another name. *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

cheated, but in their heads the only explanation available was that it somehow happened by magic.

What really happened, as the casino would later learn, was that Mr. Ivey and Ms. Sun were engaged in edge sorting, an intricate form of advantage play.⁷ In a world where a statistical likelihood for the casino to win is built into every game, advantage play is any of the rare circumstances in which a player finds a way to turn the odds to his or her favor – in other words, when a player gains an advantage over the house. Some of these plays, such as a frequent-player bonus that pushes a slot machine over a 100 percent payout, are completely innocent, and when they are discovered casinos simply tweak their rules to prevent the situation from recurring, with no penalty against the player.⁸ On the other hand, some players effect an advantage through means that even a lay observer would recognize as cheating, such as marking cards or changing their bets after play has begun. While courts and the law properly punish the true cheaters, advantage play exists on a continuum, and edge sorting – due to its position squarely in the middle of that spectrum – creates challenging legal questions.

Courts have yet to sort out these questions; outside of card-counting and outright cheating, most forms of advantage play have not been challenged in court. The Borgata is changing that, as it has brought a lawsuit against Mr. Ivey (and against the manufacturer of the cards used in his sessions, for reasons unrelated to advantage play) to recover the money he won

⁷ Some examples of advantage play are counting cards, trying to see the dealer's cards, taking advantage of a casino's mistake, and outright cheating.

⁸ Sometimes casinos will intentionally offer these plays as a "shill," the intent being to draw business, according to Las Vegas attorney Bob Nersesian, who specializes in representing players in disputes with casinos. At a September 2014 symposium on gaming law at the University of Las Vegas' Boyd School of Law, Nersesian stated that casinos in need of business occasionally implement promotions intended to benefit the player, and when one hits it big and others take notice and start playing that casino's machines, they quietly withdraw the bonuses before most of the new players ever knew it was available.

in those 2012 sessions.⁹ That suit could begin to fill in the gaps of gaming law as it pertains to edge sorting specifically and advantage play generally. This paper will examine how courts in New Jersey and Nevada might rule on edge sorting, making inferences based on the small body of existing advantage play law, due-process rights in the gaming context, and even contract law. Part I of this article will define advantage play, giving examples throughout the spectrum. Part II will examine existing laws along that same spectrum, illustrating how New Jersey is slightly more lenient to players, especially toward the innocent of the spectrum. Part III will discuss other bodies of law that impact advantage play. Part IV will analyze how courts in each state are likely to rule on an edge-sorting case, and then opine on how the law should treat players accused of edge sorting. In summary, while courts *should* protect Mr. Ivey and other edge-sorting players because the casinos already have the power to easily prevent any losses, courts in both states are unlikely to *do* so, and Nevada courts are even less likely to favor players than are their counterparts in New Jersey.

I. Advantage Play Is Any Set Of Conditions That Gives A Player A Statistical Advantage Over The Casino.

Every visitor to Las Vegas is frequently reminded that the city’s sprawling, opulent paean to gambling was not built by casinos that lose money. Indeed, Nevada casinos took in \$11 billion in gross revenue – i.e., winnings – in fiscal year 2014.¹⁰ Not surprisingly, a key element of the

⁹ *Borgata Hotel Casino & Spa v. Philip D. Ivey*, complaint, available at

<http://www.scribd.com/doc/218570101/Borgata-Lawsuit-Against-Poker-Pro-Phil-Ivey>; see also *infra* Part IV.A.

¹⁰ DAVID G. SCHWARTZ. NEVADA GAMING REVENUES 1984-2014: CALENDAR YEAR RESULTS FOR SELECTED REPORTING AREAS 2 (2015), available at http://gaming.unlv.edu/reports/NV_1984_present.pdf. In Nevada and other states, gross gaming revenue is essentially the difference between all money collected for wagers and all money paid out to winning players. NEV. REV. STAT. § 463.370-72 (2014). In this sense, it is closer to what other industries define as “net proceeds” rather than “gross revenue,” but due to the fluid nature of gambling, the difference between wagers

unspoken gambling contract formed between player and house on every bet placed is that over the course of an infinite number of bets, the house will win money and the player will lose.¹¹ The exact amount of the advantage the house has over players can be as low as under 2 percent, for blackjack,¹² a pass bet in craps,¹³ or a banker bet in Baccarat¹⁴ (notably, Mr. Ivey's game at the Borgata), or as high as 35 percent in keno,¹⁵ a game similar to most state lotteries. Players might find even more extreme examples depending on house rules for various games.¹⁶ One way or another, though, the rules of the game always build in a statistical advantage for the house. Getting around this advantage, then, requires either high degrees of intelligence, discipline, and skill, or a willingness to play outside the rules.

Anthony Cabot, a prominent Las Vegas gaming lawyer and a leading writer on gaming law, has broken down the advantage play spectrum into five distinct categories:

1. Using superior play within the rules of the game
2. Using superior play in analyzing factors outside the rules of the game
3. Taking advantage of the casino's mistakes
4. Acquiring knowledge not available to other players, and
5. Altering the randomness of the game.¹⁷

collected and moneys paid provides a more accurate basis for true "gross" revenue, from which overhead and taxes are paid.

¹¹ ANTHONY CABOT & ROBERT C. HANNUM, PRACTICAL CASINO MATH 256 (2001) [hereinafter *Casino Math*].

¹² Michael Shackleford, *Blackjack*, WIZARD OF ODDS (last updated March 18, 2013); <http://wizardofodds.com/games/blackjack/>.

¹³ Michael Shackleford, *Craps*, WIZARD OF ODDS (last updated Nov. 11, 2013); <http://wizardofodds.com/games/craps/>.

¹⁴ Michael Shackleford, *Baccarat*, WIZARD OF ODDS (last updated July 2, 2014); <http://wizardofodds.com/games/baccarat/basics/#toc-Odds>.

¹⁵ Michael Shackleford, *Keno*, WIZARD OF ODDS (last updated Sept. 3, 2013); <http://wizardofodds.com/games/keno/>.

¹⁶ In craps, for example, players who buy full odds on pass line bets under the predominant 3-4-5 model can drive the house advantage on those bets all the way down to 0.374 percent. (*Casino math*, *supra* note 11 at 91-92.) But many proposition bets on a craps table give casinos a double-digit advantage. Shackleford, *supra* note 13.

¹⁷ Anthony Cabot, Robert Hannum, and Darren Heyman, *Crimes and Advantage Play* (hereinafter *Crimes and Advantage Play*), in *Regulating Land-Based Casinos*, 365-74 (Anthony Cabot and Ngai Pindell, eds., 2014).

Taken in this order, the categories range from completely legal and ethical to completely illegal and unethical.

A. Gaining an Advantage Within a Casino's Rules Is an Innocent and Legal Form of Advantage Play.

Although extremely rare, it is possible to outwit the gambling industry's math wizards without any illicit help. Counting cards in blackjack, which is probably the most well-known form of advantage play, is one such example is beating the house purely through superior intellect and skill. In this technique, players track which cards have come out of the deck, and increase their bets when the bulk of the remaining cards are advantageous to the player.¹⁸ There are several methods of counting, although to keep things manageable, "counting" typically involves keeping a running total of how many advantageous cards are left, rather than trying to track how many cards of each rank have been played.¹⁹ Although there is still a great deal of financial risk in card counting, skilled counters can obtain an advantage of 0.5 to 1.5 percent over the house, and can therefore overcome short-term losses to consistently make money in the long run.²⁰ Not surprisingly, casinos frown on card counting. While there is no legal penalty for this practice and courts have upheld players' right to count cards,²¹ courts in some jurisdictions also allow casinos to remove suspected card counters from their premises.²²

¹⁸ See generally EDWARD O. THORPE, BEAT THE DEALER (1966). Thorpe, a mathematics professor at the Massachusetts Institute of Technology when he developed the strategy, was the first to recognize the power that card-counting systems gave players over the house. The original publication of Beat the Dealer in 1962 – researched in life game-play in Nevada and elsewhere – prompted several rule changes in blackjack, such as restrictions on splitting aces and prohibitions on doubling down on certain hands. Thorpe is also known for developing investment techniques using hedge funds.

¹⁹ *Id.*; see also *Bartolo v. Boardwalk Regency Hotel Casino, Inc.*, 449 A.2d 1339, 1341-42 (N.J. Super. Ct. Law Div. 1982).

²⁰ Michael Shackelford, *Card Counting*, WIZARD OF ODDS (last updated Oct. 27, 2009); <http://wizardofodds.com/games/blackjack/card-counting/introduction/>.

²¹ See, e.g., *Uston v. Hilton Hotels*, 448 F.Supp. 116 (D. Nev. 1978); see also *infra* Part II.A.

²² *Id.*

Also on the innocent end are situations where the house intentionally puts players at an advantage for various reasons, which typically happens with slot machines.²³ Sometimes progressive jackpots on these machines reach the point where the value of the pot grows greater than the odds against winning it, and players are at a statistical advantage until someone hits the jackpot, or sometimes the value of free play and other comps for regulars push payouts over 100 percent.²⁴ In addition, some video poker machines boast a payout of greater than 100 percent even without comps or other bonuses – if a player employs optimum strategy.²⁵ Casinos can make this offer because the rules for optimum strategy are so complex that most players either can't or don't bother to take full advantage of them, so the actual payout will remain below 100 percent of money taken in – and in fact, if casinos lowered the maximum payout below 100 percent, they would risk making the actual payout too stingy to attract players.²⁶ These situations do not raise legal issues for players; if casinos find themselves losing money they simply discontinue the game or change certain rules within it rather than dispute the players' winnings or their legal rights.²⁷

B. Manipulating the Natural Outcome of Events, Otherwise Known as Cheating, Is a Disreputable and Illegal Form of Advantage Play.

On the other end of the spectrum are actions that most people would recognize as cheating – as does the law. Adding to a bet after cards are dealt, slipping a high card under a

²³ Michael Shackelford, *Video Poker*, WIZARD OF ODDS (last updated March 3, 2015), <http://wizardofodds.com/games/video-poker/basics/#toc-PlayingStrategy>.

²⁴ *Id.*

²⁵ See, e.g., Michael Shackelford, *Dueces Wild*, WIZARD OF ODDS (last updated Sept. 17, 2013), <http://wizardofodds.com/games/video-poker/tables/deuces-wild/>, detailing payout for variations of the Dueces Wild video poker game.

²⁶ See, e.g., Ron Sylvester, *Station Casinos Eliminates Many Of Its Highest-Paying Video Poker Machines*, VEGASINC (March 1, 2013, 2 a.m.), <http://vegasinc.com/business/gaming/2013/mar/01/station-casinos-eliminates-many-of-its-highest-paying/>.

²⁷ See, e.g., *Id.*

sleeve to re-insert later, introducing loaded dice into a craps table, and marking cards are all clear-cut examples of cheating, under the standards of statutes, case law, and common sense.²⁸ Generally, any attempt to sabotage the equipment of a game in a way that interrupts the natural outcome or gives a player information not generally known (such as in the case of marked cards) will qualify as cheating under the law.

“Equipment” traditionally meant physical objects that determined the outcome of the bet or the payoffs: dice, cards, chips, etc.²⁹ As technology advanced, cheaters have turned to high-tech methods. One of the best-known modern cheats is Ron Harris, a Nevada Gaming Control Board computer technician who went rogue in the 1990s.³⁰ Mr. Harris’ scam involved reprogramming chips in the slot machines, which he easily accessed through his job, so that they would pay out jackpots when coins were inserted in a specific order.³¹ He used accomplices to claim the prizes, and he was caught when an accomplice in a different scam – in which he accessed proprietary software and used it to predict winning numbers in keno – acted suspiciously after winning a jackpot.³² Mr. Harris pled guilty in New Jersey in July 1998 to attempted theft by deception³³ and was also charged in Nevada for rigging slot machines.³⁴ He is currently on the Nevada Gaming Control Board’s Excluded Person List (the 21st Century successor to the Black Book), serving a lifetime ban on entering any Nevada casino.³⁵ A more recent case involved two players who discovered and exploited a bug in video poker that allowed

²⁸ See *infra* Part II.B.

²⁹ See *generally*, N.R.S. 465.015 (2014).

³⁰ Steve Bourie, *The World’s Greatest Slot Cheat?*, AMERICAN CASINO GUIDE, (last visited Nov. 18, 2014); <http://www.americancasinoguide.com/slot-machines/the-worlds-greatest-slot-cheat.html>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Nevada Gaming Control Board, *GCB Excluded Persons List: Ronald Dale Harris*, NEVADA STATE GAMING CONTROL BOARD (last visited Nov. 18, 2014); <http://gaming.nv.gov/index.aspx?page=190>

³⁵ Nevada Gaming Control Board, *Authority and Implementation*, NEVADA STATE GAMING CONTROL BOARD (last visited March 23, 2015); <http://gaming.nv.gov/index.aspx?page=75>

them to retroactively increase their bets after hitting a high-value hand,³⁶ although they escaped punishment, in part because they were charged by federal authorities who had no cheating statutes at their disposal.

C. Forms of Advantage Play In Between These Ends Present a Vast Gray Area.

The law is far more muddled, however, when a gambler's methods of gaining an advantage are neither wholly outside nor wholly inside the defined rules. Mr. Ivey's experience, wherein he confounded the Borgata casino through four highly profitable sessions of Baccarat in 2012, was a well-reported example of advantage play that falls somewhere in the middle of this spectrum. It is not a direct analogy to card counting, as counters only use information intended for all players to see. It's also difficult to define legally as cheating, because Mr. Ivey did not alter the randomness of the game or physically manipulate the equipment. His system as a whole seemed included elements of taking advantage of the casino's mistakes (the mistake being to allow his rules) and acquiring knowledge not known to other players, landing edge sorting solidly in the middle of Mr. Cabot's advantage play categories.

The edge-sorting tactic Mr. Ivey employed relies on a quirk – or what could be described with the legally charged term “defect” – in the playing cards. The back side of playing cards are designed to be entirely symmetrical, so that each face-down card is indistinguishable from any other, preserving the integrity of the random element of the game.³⁷ However, on decks where the design extends all the way to the edge of the card, the pattern loses its symmetry on the edges.³⁸ A deck of cards with a diamond pattern, for example, might not be cut exactly in the

³⁶ Kevin Poulsen, *Finding a Video Poker Bug Made These Guys Rich – Then Vegas Made Them Pay*, WIRED (Oct. 7, 2014 6:30 a.m.); <http://www.wired.com/2014/10/cheating-video-poker/>

³⁷ See generally, David Hill, *The Curious Case of Poker Pro Phil Ivey's Punto Banco Rake*, GRANTLAND, <http://grantland.com/the-triangle/the-curious-case-of-poker-pro-phil-iveys-punto-banco-rake/>

³⁸ *Id.*

center of the diamond, so some cards will have a little more or a little less than half the standard pattern at the edge. (Printing cards with a white border at the edge eliminates the design aberration, but for aesthetic and other reasons, casinos sometimes reject this simple design element.³⁹) If cards are lined up a certain way, a highly astute player might take notice of which cards have which elements of the design at the edge, and use this information to determine which is the next card to be dealt.⁴⁰ Mr. Ivey's companion, speaking Mandarin Chinese to their dealer so that her requests were incomprehensible to other casino personnel, asked for certain cards to be flipped one way and others to be flipped the opposite way.⁴¹ The purported reason for this request was superstition, but the real reason, by Mr. Ivey's admission, was to sort the cards so that edges were aligned in a manner that allowed him to read what was coming next.⁴²

Other examples of advantage play that fall between innocent and cheating abound. A player might catch a glimpse of a blackjack dealer's hole card, which would give him or her knowledge not generally available to the player and therefore fall outside the rules of the game.⁴³ This can happen with little effort on the player's part; dealers sometimes lift cards too high while dealing.⁴⁴ If a player uses any type of device to try to read the hole card, such as reflective glasses or a metal cigarette lighter conveniently placed on the playing table, the practice is generally banned by statute as cheating⁴⁵ – but a player also might simply position himself to maximize his chances to get a glimpse and remain vigilant for it, a practice known as hole

³⁹ Maurice "Mac" VerStandig, *Sorting Out the Law Behind Phil Ivey's Edge Sorting Debacle at Borgata*, POKERNEWS (last updated April 18, 2014); <http://www.pokernews.com/news/2014/04/sorting-out-the-law-behind-phil-ivey-s-edge-sorting-debacle-18054.htm>

⁴⁰ Hill, *supra* note 37.

⁴¹ Holloway, *supra* note 1.

⁴² See generally, Rich Ryan, *Ivey Claims He Used "Edge Sorting" in £7.8 Million Lawsuit With Crockfords*, POKERNEWS (Sept 16, 2013), <http://www.pokernews.com/news/2013/09/ivey-claims-he-used-edge-sorting-in-7-8-million-lawsuit-with-16301.htm>

⁴³ *Casino math*, *supra* note 11, p. 258

⁴⁴ *Id.*

⁴⁵ See, e.g., NRS 465.075.

carding. In another questionable practice, shuffle tracking, players try to monitor the location of advantageous cards by making mental notes of certain card sequences, then watching for the beginning of that sequence after the next shuffle, on the theory that cards will remain grouped together through lax shuffling by the dealers.⁴⁶ Courts are virtually silent on the legality of these practices,⁴⁷ although the Borgata's lawsuit has the potential to impact such scenarios.

II. Gaming Law Defines Only the Ends of the Advantage Play Spectrum.

A. Courts Are Most Lenient Toward Players Who Are Not Trying To Gain an Advantage Outside the Rules of Play.

To the extent that the law addresses advantage play, the players have virtually no protection for their activities and the resultant profits. However, what little shelter they might find comes at the innocent end of the advantage play spectrum, generally in card-counting cases. No court has ever held the practice to be illegal, and a New Jersey court stated as much in so many words:

Card counting does not involve dishonesty or cheating. On the contrary, a card counter is simply a highly skilled player who analyzes the statistical probabilities associated with blackjack and, based upon those probabilities, develops playing strategies which may afford him an advantage over the casino. It was solely this loss of the normal "house advantage" which caused the casinos to exclude card counters from the blackjack tables.⁴⁸

In that case, four players who were detained for questioning as suspected card counters sued for false imprisonment.⁴⁹ The New Jersey Superior Court, Law Division, ruled that casinos do not have immunity under the New Jersey Casino Control Act because the relevant statutes

⁴⁶ *Casino math*, supra note 11 at 258.

⁴⁷ *Crimes and Advantage Play*, supra note 17 at 384.

⁴⁸ *Bartolo v. Boardwalk Regency Hotel Casino, Inc.*, supra note 19 at 1342.

⁴⁹ *Id.* at 1340.

require probable cause to believe a gaming crime has been committed, and card counting is not a crime.⁵⁰

New Jersey also does not allow casinos to ban card counters, as determined in a case involving high-profile card counter Ken Uston, who sued after Resorts International Hotel, Inc. barred him from its casino.⁵¹ Resorts International had the implicit consent of the Casino Control Commission, which advised the hotel that nothing in its rules prevented a casino from banning whomever it chooses (outside of a federal civil rights violation, naturally).⁵² The New Jersey Supreme Court, however, took the view that nothing in CCC rules allowed a casino to ban whomever it chooses, and held that Resorts International had no common-law or statutory right to ban a suspected card-counter because that power belonged to the Casino Control Commission alone.⁵³ “Because the Commission has not exercised its exclusive authority to determine whether card counters should be excluded, we do not decide whether such an exclusion would be lawful,” the Court wrote.⁵⁴ The decision limits casinos’ direct control over players, a potential factor in *Borgata v. Ivey*.

Nevada, conversely, does allow casinos to exercise their authority to ban card counters, even though that state also recognizes the act itself as legal and imposes no criminal penalty. Nevada’s law also stems from a case involving Uston, decided four years before New Jersey’s. In the landmark case *Uston v. Hilton Hotels Corp.*, security at the Flamingo casino in Las Vegas requested that Uston leave and never return after officials determined he was counting cards, and Uston sought an injunction, arguing that the state of Nevada infringed his civil rights when the

⁵⁰ *Id.* at 1343.

⁵¹ *Uston v. Resorts Intern. Hotel, Inc.*, 445 A.2d 370 (N.J. 1982).

⁵² *Id.* at 372.

⁵³ *Id.* at 371.

⁵⁴ *Id.*

Flamingo asked him to leave because state regulation of casinos is so heavy that the request amounted to state action.⁵⁵ The court for the federal district of Nevada conceded, in a footnote, that card counting “is not cheating and is not illegal,” but still granted summary judgment for the defendants. The result is that card counting is legal, but casinos, as private enterprises, can try to stop the counters and even go so far as to ban them from the premises – just as a private homeowner could ask invited guests to leave his or her home for playing video games too loud, drinking alcohol against the homeowner’s wishes, or engaging in any number of other legal activities the host finds objectionable.

The twin Uston cases are sometimes interpreted as a sign that New Jersey is a more player-friendly jurisdiction than Nevada, because card counters cannot be banned in New Jersey. However, the New Jersey decision can also be read as an unwillingness on the court’s part to assume an activist role in favor of either side. After all, the court did not firmly establish a right for card counters to enter a casino; to the contrary, it left the door wide open for the CCC to ban them if it so chooses. In this light, the decision is in line with the larger slate of pro-casino rulings, where decisions that benefited the house also upheld the status quo and balked at expanding either sides’ rights.

And virtually all jurisdictions allow casinos to take some level of countermeasures to inhibit the practice.⁵⁶ Card counting becomes more effective as more information about the deck (or decks) in play becomes known, so casinos can thwart counters with more frequent reshuffling, the use of automatic shuffling machines, and rules that prevent players from entering a game in the middle of a “shoe” (a set of multiple decks), which forces players to bet throughout

⁵⁵ *Uston v. Hilton Hotels*, *supra* note 17 at 116. In this case, Uston claimed he was asked to leave because he is a “better than average blackjack player.”

⁵⁶ *See, e.g., Id.*

the game and not just when they identify a statistical advantage.⁵⁷ While casinos must balance these measures with business concerns – more frequent shuffles equate to fewer hands played and therefore fewer opportunities for the house to win money, for example – casinos typically use these and other countermeasures before resorting to an outright ban.

Other forms of advantage play that courts deem “innocent” are rare. In Nevada, for example, just about the only break courts give to players is protection for practices that a player of any skill level could trip across without trying.⁵⁸ In *Lyons v. Nevada*, the Nevada Supreme Court overturned the conviction of a habitual cheater because he was practicing a method of manipulating slot machines that any novice player might innocently discover.⁵⁹ In that case, Harold Travis Lyons was charged with cheating for “handle popping,”⁶⁰ a practice wherein players hit the handle hard enough that they can then manipulate it to stop the reels at a given point, thereby producing jackpots.⁶¹ Mr. Lyons entered an Alford plea to a charge of attempting to obtain money by false pretenses in a plea bargain, and appealed his conviction.⁶² The court ruled that Nevada’s cheating statutes were unconstitutionally vague as they applied to handle-popping, because a novice player who discovered the method entirely by accident would not have proper notice that he or she was doing something illegal:

Because handle popping neither damages nor mechanically alters a slot machine, the innocent novice may “stumble across” the technique and use it as effectively as the professional who adroitly identifies and depletes the mechanically deficient machines. Players engaging in handle manipulation do nothing more than take advantage of what the slot machines will give them In a sense, slot machine handle manipulators are analogous to all

⁵⁷ *Crimes and Advantage Play*, *supra* note 17 at 375-76.

⁵⁸ *Lyons v. Nevada*, 775 P.2d 219 (Nev. 1989).

⁵⁹ *Id.*

⁶⁰ *Id.* at 220.

⁶¹ *Crimes and Advantage Play*, *supra* note 17 at 348.

⁶² *Lyons*, *supra* note 58 at 220.

slot machine patrons who shuffle from machine to machine and casino to casino in the hope of favorably changing their luck.⁶³

The court's ruling is now moot as it applies to handle popping *per se*, both because Nevada later enacted a statute specifically banning the practice⁶⁴ and because machines are now button-operated (those relatively few machines that still have handles use them for decorative purposes only). The underlying reasoning, though, still gives truly innocent players who happen to find a legal advantage some thin veil of cover. However, this cover is more like to protect, for example, a player who inadvertently sees a dealer's hole card without trying, than it is to protect a player with a concerted strategy such as Mr. Ivey.

B. The Law Clearly Defines Cheating as Intentionally Altering the Outcome of Otherwise Random Events.

Prohibitions on cheating are defined by state law and supported by case law. Nevada, for example, defines cheating in a gaming context by statute:

As used in this chapter:

1. "Cheat" means to alter the elements of chance, method of selection or criteria which determine:
 - (a) The result of a game;
 - (b) The amount or frequency of payment in a game;
 - (c) The value of a wagering instrument; or
 - (d) The value of a wagering credit.
2. The words and terms defined in chapter 463 of NRS have the meanings ascribed to them in that chapter.⁶⁵

⁶³ *Id.* at 222. The court also strongly admonished the dissent for suggesting that the conviction should stand because the defendant agreed to it, in a plea bargain: "[A] five-year prison sentence arising out of conduct that is lawful is hardly a bargain. Because there was no constitutional basis for prosecuting Lyons as a result of his handle popping activities, Lyons received no consideration whatsoever in exchange for his Alford plea to a crime he did not commit. It would be an affront to justice and due process to hold Lyons to his plea when the conduct upon which the plea was entered did not occur and when the underlying conduct upon which the original charges were based was not criminal." *Id.* at 223.

⁶⁴ NRS 465.070(7); see also *Crimes and Advantage Play*, *supra* note 17 at 348.

⁶⁵ Nev. Rev. Stat. 465.015 (2014).

Furthermore, NRS 465.083 makes it illegal “for any person, whether the person is an owner or employee of or a player in an establishment, to cheat at any gambling game.”⁶⁶

Courts in Nevada and other states have consistently sided with casinos when presented with questions of what is and isn’t cheating. The case of *Sheriff of Washoe County v. Martin* sets the tone: The Nevada Supreme Court held that the state’s cheating statute is not unconstitutionally vague.⁶⁷ In that case, Jesse Martin was charged with cheating for working in conjunction with a “card crimper,” who surreptitiously bent certain cards as a way of marking them.⁶⁸ He challenged the charges on 14th Amendment due-process grounds, and the district court, dismissing the charges against him, found the words “to alter the selection of criteria which determine [the outcome of the game]” were unconstitutionally vague.⁶⁹ The Supreme Court reversed, however, holding that “the words bear an easily ascertainable meaning” and therefore Martin was given proper notice to satisfy due process, and ordering Mr. Martin to stand trial.⁷⁰

The Nevada Supreme Court has also held that dice sliding – the art of thrusting a pair of dice down a craps table in such a way that they don’t tumble or roll – is illegal cheating.⁷¹ In that case, Hubert Preston Skipper, Jr., was accused of dice sliding while an accomplice obscured the dealer’s view, and the Court upheld his conviction.⁷² Even in *Lyons*, the rare instance of Nevada courts siding with a player, the case includes significant dicta that favors the house. While allowing handle-popping because a novice could discover the practice with no intent, the *Lyons* court also declared that “those who, by resorting to mirrors, confederates, electronic equipment,

⁶⁶ Nev. Rev. Stat. 465.083 (2014).

⁶⁷ *Sheriff of Washoe County v. Martin*, 662 P.2d 634, 636 (1983).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 637.

⁷¹ *Skipper v. State of Nevada*, 879 P.2d 732 (Nev. 1994)

⁷² *Id.*

magnets, tools or other devices, alter the play of a game or machine to increase their prospects of winning, would have no difficulty understanding that they are cheating within the definition of the statute,”⁷³ thereby pre-emptively deciding what does qualify as cheating. Furthermore, the *Skipper* court noted that *Lyons* was an “expressly narrow application” that applied only to handle-popping and that accused cheaters should not assume it would protect them.⁷⁴ The court ruled that even though a novice could inadvertently slide the dice, *Skipper* was distinguished from *Lyons* because of the intent to shield the practice from the dealer:

The evidence adduced at trial indicated that craps dealers are trained to call a “no roll” [when dice are thrown incorrectly]. Thus players who may accidentally slide the dice simply have their play nullified by the dealer’s call. *Skipper*, however, sought to prevent the dealer from detecting and invalidating his method of play by utilizing a confederate to obscure the dealer’s vision. In effect, *Skipper* was blindfolding the dealer while placing the dice on the table in a winning combination. This method of altering the elements of chance clearly constitutes cheating. Innocent players would not engage in this type of deceptive, manipulated play.⁷⁵

This full slate of cases weighs heavily against Mr. Ivey and may well have doomed him had he been challenged in court in Nevada. *Martin*, a landmark case, is perhaps also the most analogous to Mr. Ivey’s actions: It too involved a player working with a teammate who read information not intended for him off the back of a card, who was ruled a cheater despite not touching any game equipment himself. *Skipper*’s limitation of *Lyons* also serves as a bad omen for Mr. Ivey in that it found a player can alter randomness even without touching the equipment by interfering with the dealer’s process. New Jersey courts also offer no refuge to players they

⁷³ *Lyons*, *supra* note 67 at 221.

⁷⁴ *Skipper* at 734.

⁷⁵ *Id.*

find to be cheaters; for example, courts there have held players accountable for attempting to increase a blackjack bet after the first card was dealt.⁷⁶

“Cheaters,” as most people understand the term, also might be charged with fraud under state statutes. In New Jersey, NJS § 5:12-133, provides that:

“[A] person is guilty of swindling and cheating if the person purposely or knowingly by any trick or sleight of hand performance or by a fraud or fraudulent scheme, cards, dice or device, for himself or herself or for another, wins or attempts to win money or property or a representative of either or reduces a losing wager or attempts to reduce a losing wager in connection to casino gaming.”⁷⁷

In Nevada, NRS 465.070 defines prohibited acts of fraud in detail.⁷⁸ The lengthy, broad-based statute prohibits, inter alia, accepting winnings that were not earned, raising or lowering a bet after acquiring knowledge about the outcome of the game, and manipulating the outcome of a game.⁷⁹ As such, it overlaps laws against cheating to a great degree.

Courts have recognized the connection between cheating and fraudulent intent as well. Notably, in *Sheriff of Washoe County*, the defendant-respondent who was ordered to stand trial was accused of working with the card crimper.⁸⁰ The Court, even while ruling against him, stated that “the statutes and the legislative history do not suggest that the Legislature intended to remove from the crime of cheating the requirement of fraudulent intent.”⁸¹ This would seem to suggest that advantage players who are not actively trying to bend the rules have some small level of protection, although the larger ramification is that courts see a lot of overlap between cheaters and fraudsters.⁸²

⁷⁶ See *State of New Jersey v. Perlman*, 404 A.2nd 643 (N.J. Super. Ct. Law Div., 1979)

⁷⁷ N.J. Stat. Ann. § 5:12-113 (West 2002)

⁷⁸ Nev. Rev. Stat. 465.070 (2014).

⁷⁹ *Id.*

⁸⁰ *Sheriff of Washoe County*, *supra* note 67 at 636.

⁸¹ *Id.* at 638.

⁸² See generally, *Isbell v. State*, 97 Nev. 222 (Nev. 1981), *Laney v. State*, 86 Nev. 173 (Nev. 1970).

III. Other Bodies of Law Might Impact Middle-Spectrum Advantage Play.

While innocent advantage play on one end and cheating on the other are well-defined, virtually no case law exists for the gray areas in the middle. Legal experts and other observers sometimes try to fill this void with other areas of the law.

A. Contract Law Generally Seeks a Balance Between the Parties.

Contract law provides some guidance, as the transaction at a gaming table can be viewed as a contract wherein the casino offers an opportunity to win money and the player accepts, with his or her wager serving as consideration.⁸³ Even here, though, questions abound, and in a gaming context the normally well-settled rules contract law quickly become as perplexing and circuitous as the floor layout in a typical casino.⁸⁴

Part of the reason for the confusion is that contract law typically assumes the parties to a contract have roughly equal bargaining power, a premise that does not hold true in the casino environment. The pillars of contract law – the Uniform Commercial Code and the Second Restatement of Contracts – do not directly address the gambling contract, but they do generally give deference to a party that is bargaining at a distinct disadvantage, and courts support this position. Contracts wherein one party is a minor or mentally incapacitated are, with some limitations, generally voidable by that party, for example.⁸⁵ The UCC also carves out special protections for non-merchants when forming contracts with merchants⁸⁶ because of the

⁸³ *Crimes and Advantage Play*, *supra* note 15 at 385.

⁸⁴ *Id.*

⁸⁵ See, e.g., *Dodson v. Shrader*, 824 S.W.2d 545, (Tenn. 1992) (a plaintiff who was 16 at the time of purchase was allowed to disaffirm his purchase of a truck after nine months and receive a partial refund, though it was offset by wear and tear stemming from his use); *Hauer v. Union State Bank*, 532 N.W.2d 456, (Wis. Ct. App. 1995) (bank ordered to void a loan to a customer the bank knew had suffered brain damage in a motorcycle accident).

⁸⁶ UCC Art. II §207 (Whereas merchants can incorporate contract terms by silent assent, a contract between a merchant and a non-merchant can only incorporate specific terms with the affirmative consent of the non-merchant.)

imbalance of power between the two parties; this position is backed up by some case law as well, albeit with some level of disagreement.⁸⁷ In *Klocek v. Gateway*, the federal district court in Kansas overturned Gateway's motion to dismiss a case on the grounds that purchasing disputes must be settled in arbitration.⁸⁸ William Klocek brought a class-action suit alleging that Gateway induced him and others into buying a computer with false promises of customer support.⁸⁹ Gateway pointed to a contract term, printed and shipped with Mr. Klocek's computer but never highlighted nor discussed with him, requiring arbitration for all disputes.⁹⁰ The Court interpreted the UCC Art. II §207 strictly, ruling that the terms Gateway sought were not part of the purchasing contract unless Mr. Klocek gave his OK.⁹¹ "Because plaintiff is not a merchant, additional or different terms contained in the Standard Terms did not become part of the parties' agreement unless plaintiff expressly agreed to them," the court ruled.⁹² The court was trying to level the playing field on behalf of consumers given a take-it-or-leave-it set of contract terms that a vendor draws up in its own favor. This example is virtually identical to what a player experiences at a gaming table: The house sets the rules and the player has no room to negotiate for, say, a lower minimum bet or permission to take multiple hits after splitting aces in blackjack.

The law also struggles to determine who bears the risk of mistake in a casino.⁹³ *Lyons*, the handle-popping case, provides a bit of guidance, again siding with the player by stating in a passage of dicta that card players can take advantage of a dealer's unintentional revelation of his

⁸⁷ *Klocek v. Gateway*, 104 F.Supp.2d 1332 (D. Kansas 2000); see *contra. Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (manufacturer's terms shipped in box govern agreement unless product is returned within 30 days).

⁸⁸ *Klocek v. Gateway*, *supra* note 85 at 1341-42.

⁸⁹ *Id.* at 1334.

⁹⁰ *Id.* at 1340-41.

⁹¹ *Id.* at 1341.

⁹² *Id.*

⁹³ *Crimes and Advantage Play*, *supra* note 17 at 384.

or her hole card because they are simply taking what the house gives them.⁹⁴ Here and elsewhere, though, courts would be obligated to consider intent when delineating which party bears the risk of a mistake,⁹⁵ as the Nevada Supreme Court noted in *Sheriff of Washoe County*.⁹⁶ In New Jersey, an ongoing dispute over playing with unshuffled cards was recently decided for a casino.⁹⁷ In that as-yet unreported case, the New Jersey Superior Court ruled that 14 players must give back \$1.5 million to the Golden Nugget casino, because a Baccarat game played with cards that were supposed to be pre-shuffled by the manufacturer was invalid.⁹⁸ The case has some similarities to Mr. Ivey's case, in that it involved Baccarat players who knew which cards were coming out of the shoe.⁹⁹ While the precise legal questions posed might be different than in *Borgata v. Ivey* (media reports are unclear on the precise questions), it still bodes poorly for him. And a bigger body of law suggests that advantage players are vulnerable to forfeiting any financial gain, no matter how innocently they came by it, because there is no property interest in gambling proceeds.

B. All Advantage Players Are Susceptible to Losses Because Courts Do Not Recognize a Property Interest in Gambling Proceeds.

One major aspect of gaming law always works against advantage players, wherever they are on the spectrum: Players have no property interest in gambling proceeds. While this aspect of law does not directly bear on *Borgata v. Ivey*, as Mr. Ivey is a defendant and has no need to raise

⁹⁴ *Id.*, quoting *Lyons*, *supra* note 67.

⁹⁵ *Crimes and Advantage Play*, *supra* note 15 at 385.

⁹⁶ *Sheriff of Washoe County*, *supra* note 67 at 638.

⁹⁷ The Associated Press, *Gamblers Must Return \$1.5M in Casino Winnings Since Cards Weren't Shuffled*, *Judge Rules*, NJ.COM (Feb. 13, 2015, 11:30 a.m.), http://www.nj.com/business/index.ssf/2015/02/unshuffled_cards_void_game_winnings_must_be_return.html. The \$1.5 million represents the total sum the players took away from the session; the court ordered them to give it all back and the casino to refund their buy-in, making the entire incident a push. *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

a due-process claim, the underlying logic is illustrative of how courts generally view player's rights. Several high-profile cases on this issue follow a similar pattern: A casino, acting within the rules set for it by state regulators, takes countermeasures against card counters. The card counters sue, claiming their due process rights were violated because casinos subjected them to different rules than other players while acting under the color of state law, because the casinos are authorized and heavily regulated by states. The courts hold that regulation of a private industry in and of itself does not rise to the level of acting under the color of state law, usually noting that such a theory would result in the untenable legal position that virtually every business is operating under the color of state law, and therefore further hold that due-process rights could not have been violated. While it's true that finding private industries act under color of state law would create havoc in federal Constitutional law, it's also troubling when a court effectively declines to reach that question by finding that players don't have a property interest to violate in the first place.

In one such case, a team of card counters in Atlantic City claimed they formed a class that was subject to different treatment than other players, because casinos took countermeasures only against the card counters.¹⁰⁰ The court in *Doug Grant, Inc. v. Greate Bay Casino Corp.* ruled there was no due process violation because casinos do not act under color of state law; ruled that the countermeasures would have been Constitutional even if the casinos had been a state agency, because they are rationally related to the legitimate state interest of protecting its gaming industry's financial viability; and then tersely added "plaintiffs have no property interest in the

¹⁰⁰ *Doug Grant, Inc. v. Greate Bay Casino Corp.* 3 F.Supp.2d 518, 522-23 (D. N.J. 1998).

opportunity to gamble and thus have not had their substantive due process rights violated,” with no explanation.¹⁰¹

Even in cases of completely legal card counting, court rulings typically don’t help players in due-process claims. In *Uston v. Hilton Hotels Corp.*, for example, the court held that mere regulation of an industry does not rise to the level of that industry acting on the state’s behalf, and therefore Uston’s 14th Amendment rights to due process were not violated when the Flamingo asked him to leave.¹⁰² “Something more, more in the nature of a substantial and direct state involvement in promoting the challenged activity, must be demonstrated in order to establish state action,” the court ruled.¹⁰³ Thus, courts in both Nevada and New Jersey refuse to recognize a Constitutional right for gamblers to keep their winnings.

IV. Analysis: Courts Unlikely to Provide Mr. Ivey the Shelter He Deserves.

A. Predicting What Will Happen: New Jersey Only Slightly Less Likely than Nevada to Rule Against Mr. Ivey.

Fairly or not, Nevada has a reputation as a tougher jurisdiction than New Jersey for players who wind up in court. And it’s easy to imagine that Mr. Ivey hand-picked Atlantic City for his edge-sorting adventure for a better chance of winning any litigation arising from it – or at least out of a fear of banishment in Las Vegas that would hinder his poker career. The Borgata’s lawsuit against Mr. Ivey could shed more light on how friendly New Jersey courts are to players, and in a broader sense it offers courts an opportunity to begin to more clearly define the law as it applies to advantage play in the middle of the spectrum.

¹⁰¹ *Id.* at 536.

¹⁰² *Id.*

¹⁰³ *Id.*

The Borgata suit contains 18 counts, 12 against Mr. Ivey and Ms. Sun and the other six against the card manufacturer, Gemaco.¹⁰⁴ Many of them are noteworthy only for their creativity; perhaps the most outlandish claim is that Mr. Ivey used his human companion as a “cheating device.”¹⁰⁵ However, at least a couple of them have legal merit, including a count that Mr. Ivey and Ms. Sun defrauded the Borgata by disguising their true intent in asking for special rules. The counts against Gemaco include allegations of breach of warranty and negligence for selling the Borgata defective cards.

The underlying logic of the New Jersey Supreme Court’s decision in *Uston v. Resorts International* is a key factor in trying to predict the outcome of the Borgata’s suit. On the surface, it was a decision that casinos cannot make their own rules and must rely on the CCC to define fair play and determine the penalties for pushing the boundaries. This reading would be unfavorable to the Borgata, as it would seem to suggest that the casino must wait for the CCC to codify a rule that casinos can recover losses from edge sorting. However, this case is highly distinguishable from *Uston* because Mr. Ivey, unlike Mr. Uston, was not merely using information available to anyone playing the game. Whereas a card counter only knows when it’s *more likely* that an advantageous card will come out of the shoe based on cards revealed for all to see, Mr. Ivey rigged a system in which he *knew* whether an advantageous card was coming, based on information obtained while the card value was intended to be hidden. If the district court were to hold this is an act of dishonesty or outright cheating, the court would not be bound by *Uston*.

¹⁰⁴ *Borgata v. Ivey*, complaint, supra note 9.

¹⁰⁵ *Id.*

In addition to its position as a middle-spectrum case, the Borgata lawsuit is also rare in that it presents an advantage player as the defendant in a civil case. Advantage play questions are typically resolved when a player sues a casino (as in Mr. Uston's Nevada and New Jersey lawsuits or Mr. Ivey's unsuccessful suit against Crockfords), or when a player is charged as a defendant with criminal violations for cheating or fraud. Again, *Uston v. Resorts International* could be read to either side's benefit. If the *Uston* court was simply reticent to give casinos too much power, as many observers believe, Mr. Ivey could have a good chance of keeping his winnings. If, however, the court intended to refrain from expanding gaming law, Mr. Ivey's innovative practice could put him in jeopardy. While Nevada may prove to be a desert for advantage players seeking relief from the courts, New Jersey is hardly a garden state.

And Nevada would likely prove to be a desert, as its casino-friendly reputation is well-earned. Rulings that favor players are extremely rare, and the one clear-cut victory, in *Lyons*, was later distinguished to limit it to the lone, and now obsolete, practice of handle-popping. Courts allow casinos to take counter-measures up to and including banning players for an act (card counting) that the courts recognize as completely legal. Allowing casinos to recapture winnings from a player, while arguably a more extreme remedy than banishment, is conceivable even for a legal act, and more so for an act of questionable legality such as edge-sorting. The avenues whereby Nevada might find a way to rule against a player in Mr. Ivey's position are too plentiful to believe he would have any serious chance of prevailing in that state.

The bulk of legal opinion on the counts against Mr. Ivey and Ms. Sun is that the onus should be on the Borgata to protect itself by not straying too far from its standard procedures.¹⁰⁶

¹⁰⁶ See, e.g., VerStandig, *supra* note 52. For what it's worth, these experts generally believe that the Borgata has a much stronger case against Gemaco. See *Id.*

But given the overall backdrop of advantage play opinions, his odds seem slim in any jurisdiction. He must first pass the test wherein a court finds his actions to be something other than cheating or fraud, which is in no way a guarantee. Once he's past this obstacle, the court system's refusal to recognize a property interest in gambling still looms large. While the property interest *per se* is not at issue, the underlying focus on protecting casinos' financial viability raises some level of expectation that a court would order Mr. Ivey to return his winnings to the Borgata. The difference between New Jersey and Nevada is that New Jersey has enough ambiguity to give him some slim chance of winning, whereas he has virtually none in Nevada.

B. What Should Happen: Courts Should Hold the Powerful Casinos Accountable By Obliging Them to Employ Countermeasures at Their Disposal.

There's a sentimental reason people, even legal experts, might want Mr. Ivey to win this lawsuit. It's the underdog aspect of his story, wherein he turned the tables on the casinos. The typical dynamic is that the casinos, flush with money, attract people who want it badly enough to take a risk and accept rules of play that will always ultimately favor the casino. Mr. Ivey walked into the Borgata with just enough money to make the casino want some of it, badly enough to accept his rules that would ultimately lead to him winning the Borgata's money. Anyone who's ever lost money to a casino – which is anyone who's ever gambled in a casino – might feel a little vindicated seeing the house on the other side of the equation.

As in card counting, countermeasures are available to the casino to prevent advantage play of the type engaged in by Mr. Ivey. Since his incident arose, many casinos have implemented a new shuffling technique across all of their card games, in which the dealer, after splitting the deck into two halves, rotates one half 180 degrees before shuffling the two halves

together.¹⁰⁷ This technique is aimed specifically at edge sorting.¹⁰⁸ Another obvious and effective countermeasure is to use only decks of cards with a white border, so that all edges will be uniform.

These countermeasures confer weight to the sentimental predilection toward Mr. Ivey's position, and that of any other advantage players in the middle of the spectrum. What Mr. Ivey did is not like what Mr. Harris did, physically manipulating casino equipment into paying out for him (and abusing power granted to him by the state in the process). He simply exploited a known characteristic of the equipment that casinos choose not to rectify, just as a shuffle tracker exploits defects in the shuffling technique. His actions do bear some similarity to those of Mr. Martin, insofar as he worked with a teammate and took advantage of information not generally known to other players. However, Mr. Ivey's case is highly distinguishable from Mr. Martin's because Mr. Ivey obtained that information with the aid of the casino. Because his actions could not have been profitable without the assistance of Borgata employees, however unwitting they might have been, he did not subvert the casino's ability to protect itself from losses in the ways that Mr. Harris and Mr. Martin did.

Because countermeasures were available to the casino, just as they are against shuffle-trackers and hole-carders, Mr. Ivey's edge-play adventure and other middle-spectrum forms of advantage play should not be held to the same standards as cheating. Instead, these actions should be governed by the same principles of contract law that apply to each and every wager placed in every casino – with courts giving deference to players because of their lack of bargaining power against the casino. As long as countermeasures are available to the house,

¹⁰⁷ Eliot Jacobson, *Edge Sorting in Baccarat*, A.P. HEAT!, (Aug. 18, 2012), <http://apheat.net/2012/08/18/edge-sorting-in-baccarat/>.

¹⁰⁸ *Id.*

casinos should be obliged to take them, without asking courts to cover their losses. The Borgata's lawsuit should fail¹⁰⁹ and Mr. Ivey should keep his money.

V. Conclusion

Courts have yet to wade into the murky waters of most advantage play law. The Borgata's lawsuit against Mr. Ivey presents an excellent opportunity to begin to define this new area of law and set precedents for how to apply long-standing principles of law to the special circumstances of the gaming environment. Allowing players to keep their winnings, even under questionable circumstances, when casinos had countermeasures at their disposal but failed to use them would be a good first step toward achieving the level playing field envisioned in contract law and thereby bringing basic fairness in this arena.

¹⁰⁹ To clarify, it is the author's opinion that the Borgata's lawsuit should fail at least in its counts against Mr. Ivey. The fate of the six counts against card manufacturer Gemaco, primarily for breach of warranty of merchantability, is outside the scope of this article.