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Articles

The Legality of Online Daily Fantasy Sports Versus the Illegality of Online Poker

John J. Chung*

INTRODUCTION

DraftKings is an online daily fantasy sports (DFS) website.¹

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1. According to its website:

DraftKings, Inc. is a leading skill-based DFS gaming destination for fans in North America and the UK to compete in single-day online games for cash and prizes across the largest variety of professional sports. DraftKings is the exclusive DFS partner of Major League Baseball, the National Hockey League, Major League Soccer, NASCAR and Ultimate Fighting Championship.

Frequently Asked Questions: What is DraftKings?, DRAFTKINGS, <https://www.draftkings.com/help/faq> [<https://perma.cc/69KL-HNKX>] (last visited Aug. 20, 2021). Many fantasy sports formats are based on season long results. For example, many NFL fantasy leagues are comprised of teams picked by players with the winner determined at the end of the season based on the results over the entire season (much like actual league play). Daily fantasy sports, by contrast, revolves around a single day's sporting events. See *DraftKings Form S-1 Registration Statement* 56, SEC. & EXCH. COMM'N (May 6, 2020), <https://draftkings.gcs-web.com/static-files/40ca9f7a-af74-4669-a55e-0712f41a4266> [<https://perma.cc/2EH6-2NRJ>].

It is a publicly traded corporation on the NASDAQ stock exchange.² In DFS, each participant constructs a team of professional athletes and competes to see who can build the best-performing team.³ In many DFS games, there will be tens of thousands of participants, where the top-performing participants win cash prizes.⁴ The top prize of one of its popular NFL games is \$1 million.⁵ According to its website, DraftKings is legal to play in all fifty states, but it is illegal for players in seven states to win cash prizes.⁶ DraftKings is big business; as of early December 2020, the market capitalization of DraftKings exceeded \$19.2 billion.⁷

2. *DraftKings Closes Business Combination and Will Begin Trading on the Nasdaq Stock Exchange*, DRAFTKINGS (Apr. 23, 2020), <https://www.draftkings.com/about/news/2020/04/draftkings-closes-business-combination-and-will-begin-trading-on-the-nasdaq-stock-exchange> [https://perma.cc/U4SW-4FES].

3. In daily fantasy sports, participants are given a set budget to select their players. See generally Andrew J. Griffin, *A Fantastic Gamble: An Analysis of Daily Fantasy Sports Under the UIGEA and the Predominance Test*, 23 B.U. J. SCI. & TECH. L. 456, 467 (2017). In daily fantasy football, for example, a participant can select seven athletes and a team defense. *Id.* Each athlete and defense are assigned a particular dollar value, so participants must decide how to spend their budget to fill their roster with the best combination. *Id.* Daily fantasy sports differ from traditional season-long fantasy sports in that participants are given a chance to win every week, rather than at the end of a season. Nathaniel J. Ehrman, *Out of Bounds: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 SPORTS L.J. 79, 81 (2015).

4. Sam Shefrin, *Don't Play Before Reading This 2021 DraftKings Review!*, DAILY FANTASY CAFE (Jul. 22, 2021), <https://www.dailyfantasycafe.com/draftkings-review> [https://perma.cc/8YHB-7E52].

5. *Id.*

6. *Frequently Asked Questions: Where (location) can I play Daily Fantasy?*, DRAFTKINGS, <https://www.draftkings.com/help/faq> [https://perma.cc/N6F2-PYUT] (last visited Aug. 25, 2021).

7. *DraftKings, Inc.*, GOOGLE FINANCE (Jul. 9, 2020), <https://www.google.com/finance/quote/DKNG:NASDAQ?sa=X&ved=2ahUKEwj4tu7Wo7ftAhXvt1kKHdgTDHcQ3ecFMAB6BAgCEBE> [https://perma.cc/NZ9E-F8NF]. DraftKings and its major competitor FanDuel attempted to merge in 2017 but were blocked by federal authorities on antitrust grounds. See Diane Bartz, *FanDuel, DraftKings Scrap Troubled Merger*, REUTERS (July 13, 2017, 3:11 PM), <https://www.reuters.com/article/us-fanduel-m-a-draftkings/fanduel-draftkings-scrap-troubled-merger-idUSKBN19Y2KL> [https://perma.cc/9KUD-NLQR].

By contrast, online poker is of questionable legality.⁸ In broad terms, online poker is not legally permitted within the United States, and there are no multi-state online poker companies based in the United States.⁹ There are online poker sites rivaling DraftKings in terms of size and popularity, but they are based outside of the United States and its legal jurisdiction.¹⁰ For the most part, and in general, online poker is unavailable by law in the United States. Federal law severely restricts the legality of online poker, which is why the large online poker sites are based elsewhere.¹¹ Both online fantasy sports and online poker are subject to federal law under the Unlawful Internet Gambling Enforcement Act of 2006.¹² Additionally, state law governs both, and some states outlaw both.¹³ However, online daily fantasy sports are available in most states, while online poker is illegal in most states.¹⁴

For those unfamiliar with DFS and online poker, it would be reasonable to conclude there must be a principled distinction to explain the different treatment of the games. However, as this Article will explain, it is difficult to justify the disparity. The fundamental issue is based on a straightforward principle: games of chance or gambling are generally illegal, and games of skill are legal. Judging from this, it would be reasonable to assume that daily fantasy sports are games of skill and therefore legal, while poker is gambling and is illegal.¹⁵ This would seemingly make perfect sense as the basis for the different treatment of the two.

8. See generally Maurice VerStadig, *Legal Perspective: You're (Probably) Breaking the Law Playing Online Poker in the USA*, POKER NEWS (May 29, 2020), <https://www.pokernews.com/news/2020/05/online-poker-usa-legal-update-37347.htm> [<https://perma.cc/M4PV-JDPN>].

9. See generally Mo Nuwwarah, *10 Years After Black Friday: Where Poker's Been and Where it's Going*, POKER NEWS (Apr. 16, 2021), <https://www.pokernews.com/news/2021/04/10-years-after-poker-black-friday-38989.htm> [<https://perma.cc/7FTU-5LQF>].

10. See *id.*

11. See *id.* Hereinafter, references to “poker” refer to No-Limit Texas Holdem. For an explanation of this variant, see *United States v. DiCristina*, 886 F. Supp. 2d 164, 172–173 (E.D.N.Y. 2012).

12. 31 U.S.C. §§ 5361-5367.

13. See VerStadig, *supra* note 8.

14. Compare *id.*, with DRAFTKINGS, *supra* note 6.

15. DraftKings website emphasizes that it offers games of skill. DRAFTKINGS, *supra* note 1.

This Article intends to show that there is no legally material distinction between daily fantasy sports and online poker, since they both require luck and skill to win. Although it is unknowable whether skill or luck is the predominant factor, success in either game depends on a combination of the two. This Article will show that measuring luck and skill in DFS and online poker is next to impossible, and thus the legal distinction between DFS and poker should not be based on the assertion that one game involves more skill or luck than the other. So, if both games require luck and skill, why does the law treat two similar situations in such opposite ways?

Part I will address the law's disparate treatment of lawful and unlawful gambling. In general, games of chance are deemed to be unlawful gambling, while games of skill are lawful.¹⁶ However, the way the law attempts to determine the differences between the two, and the treatment of DFS and online poker highlights an inconsistency. Part II will discuss the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), which plays a key role in the legal availability or unavailability of DFS and online poker. This part will explain how the UIGEA applies to DFS and online poker. The UIGEA is, in large part, the law that makes DFS generally legal and online poker generally illegal. Part III will explore the legal and factual distinctions between daily fantasy sports and online poker. This part will also illustrate how both games are played and discuss the role of skill versus luck in each game. For purposes of clarity, the individual playing the fantasy game will be called the "player." The professional athletes who play on the professional sports teams will be referred to as "athletes." Part IV will discuss whether the two games should be treated differently under the law, based on the comparisons between the two, as discussed in Part III. This part argues that the treatment of the two games should be the same due to their immaterial legal differences. Finally, Part V will bring this Article to conclusion.

16. See *DiCristina*, 886 F. Supp. 2d at 229–30; see also 18 U.S.C. § 1955(b)(4).

I. WHAT IS UNLAWFUL GAMBLING? GAMES OF CHANCE VERSUS GAMES OF SKILL

In general, playing for prizes in games of skill is legal, while playing for prizes in games of chance is illegal gambling.¹⁷ In many situations, the distinction between the two is difficult to draw. For example, a roulette wheel is a game of pure chance.¹⁸ The player has absolutely no control over the spin of the wheel or the landing of the roulette ball.¹⁹ In contrast, DFS requires a combination of luck and skill to win.²⁰ The amount of luck or skill required marks the important legal distinction between legality and illegality. Even if a game involves some skill, if the outcome depends to a material degree on chance, it is deemed to be a game of chance.²¹ In

17. See *People v. Hunt*, 616 N.Y.S.2d 168, 169 (1994).

18. John Grochowski, *How to Play Roulette*, HOW STUFF WORKS (Feb. 18, 2021), <https://entertainment.howstuffworks.com/how-to-play-roulette.htm> [https://perma.cc/JCC3-WKQJ].

19. *Id.*

20. *Infra*, Part III.A.

21. *Hunt*, 616 N.Y.S.2d at 169. One commenter noted, “No issue is more hotly contested than whether DFS contests are games of skill or games of chance.” Jonathan Bass, *Flushed from the Pocket: Daily Fantasy Sports Businesses Scramble Amidst Growing Legal Concerns*, 69 SMU L. REV. 501, 510 (2016). However, nearly all human endeavors involve some element of chance. See *id.* The line between mostly skill or mostly chance is difficult to draw, and brings into question certain activities that are unquestionably legal. For example, some observers have noted the many similarities between sports betting and speculating in the stock market. See Patrick Feeney, *Turning Fantasy into Regulatory Reality: A New Approach to Daily Fantasy Sports Laws*, 40 COLUM. J.L. & THE ARTS 105, 108–09, 111 (2016). A case from 1926 attempted to draw the distinction between lawful games and gambling:

The phrase “game of chance,” it has been said, is not one long known in the law and having therein a settled signification. It is a game determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance; a game in which hazard entirely predominates [F]or example, games with dice which are determined by throwing only, and those in which the throw of the dice regulates the play, or in which the hand at cards depends on a dealing with the face down, are games of chance. On the other hand, games of chess, checkers, billiards, and bowling are determined to be games of skill. This distinction has obtained in all jurisdictions where the definition of the term “game of chance” has been material under their statutory law. Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance

the United States, the definition of gambling has mostly been left to state law.²² It is widely accepted that gambling consists of three elements: (1) a prize; (2) some degree of chance; and (3) consideration.²³ The states employ a variety of tests to assess whether a game constitutes gambling; the most common test is known as the dominant (or predominant) factor test.²⁴ Under this test, a game is not gambling if a player's skill is at least 51% responsible for the game's outcome.²⁵ A second test is known as the material element test.²⁶ Under this test, a game is deemed as gambling if there is more than a small amount of chance involved in the game.²⁷ Chance is a material element even if the outcome of the game depends on less than 50% chance.²⁸ A third test disallows any chance whatsoever in the game's outcome.²⁹ A fourth test is known as the gambling instinct test, and prohibits activities that appeal to a player's desire to engage in gambling without regard to skill or chance.³⁰

It is a difficult task for courts to determine the amount of luck versus skill in many games.³¹ Even though courts have arrived at conclusions regarding poker, it is too simplistic to conclude how much the game is the result of skill or luck. Even games indisputably considered to be games of skill involve an element of luck.³²

because they call for the exercise of skill by the player, nor do games of billiards cease to be games of skill because at times . . . their result is determined by some unforeseen accident, usually called "luck." The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game.

Utah State Fair Ass'n v. Green, 249 P. 1016, 1019–1020 (Utah 1926).

22. See John T. Holden et al., *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 130 (2020).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 131.

31. *Cf.* United States v. DiCristina, 886 F. Supp. 2d 164, 231 (E.D.N.Y. 2012).

32. *Infra*, Part III.B.

For example, chess is acknowledged as an example of a pure game of skill. Each player is in complete control of how he or she plays the game. However, in a match between two equally skilled players, what if one player is suffering the effects of food poisoning the night before, and is unable to play at his or her best? Would it be accurate to say that the player was unlucky to have suffered the ailment right before the match, or that the other player was lucky to be scheduled in a match that occurred right after the opponent's food poisoning?

In a more attenuated example, a law student's ability to get a job after graduating is a matter of skill. Jobs are not assigned by lottery or the spin of a wheel. In the past year, however, many students who obtained job offers through skill had the offers rescinded due to the COVID-19 pandemic.³³ Does that mean a legal career is dependent on luck, and this generation was dealt a bad hand? Prevailing thought views career success as a matter determined by individual skill, but how does this view reconcile the harm caused by an unpredicted event like Covid? Are students less skillful because they lost a job offer due to Covid? The point here is that most, perhaps all, human endeavors involve an amount of luck in addition to skill. Yet, we believe that life is neither one big gamble nor that all successes and failures are entirely within our control. As it happens, teasing out and quantifying the relative proportions of luck and skill that success or failure in any endeavor depends on is an extremely difficult analytical task, which is inherent in classifying DFS and online poker as legal versus illegal games.

II. THE UIGEA AND ITS APPLICATION TO ONLINE DFS AND ONLINE POKER

A. *The History and Purpose of the UIGEA*

The UIGEA was signed into law on October 13, 2006, and subjected payment processors conducting business with customers in the United States to criminal liability for the funding of unlawful

33. See Francis Boustany & Sara Lord, *ANALYSIS: Lawyer Jobs Dropped Again in Q1, But There Is Hope*, BLOOMBERG LAW (Apr. 14, 2021, 5:00 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-lawyer-jobs-dropped-again-in-q1-but-there-is-hope> [<https://perma.cc/9QL2-LQE6>].

internet gambling.³⁴ The general purpose of the UIGEA was to ban “unlawful internet gambling,”³⁵ but its stated purpose was “to prevent the use of certain payment instruments, credit cards, and fund transfers for unlawful internet gambling, and for other purposes.”³⁶ The UIGEA accomplished its goal by targeting financial institutions and preventing them from processing transactions involving unlawful internet gambling.³⁷ However, the UIGEA did not target individual gamblers³⁸ and did not even criminalize or define gambling. The legality or illegality of any activity as gambling is left to state law;³⁹ the UIGEA did not define what constitutes gambling or criminalize it.⁴⁰ Whether an activity counts as “unlawful internet gambling” depends on whether an unlawful “bet” or “wager” is involved, as those terms are defined.⁴¹

B. *The UIGEA and Daily Fantasy Sports*

DraftKings claims that its operations are legal based on an exemption under the UIGEA.⁴² Specifically, § 5362(1)(E)(ix) excludes

34. See 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, 122-23 (2016); see also Joshua Shancer, *Daily Fantasy Sports and the Clash of Internet Gambling Regulation*, 27 DEPAUL J. ART, TECH. & INTELL. PROP. L. 295, 301 (2017).

35. 31 U.S.C. § 5361(a)(4).

36. H.R. 4411, 109th Cong. (2006).

37. See Brandon P. Rainey, *The Unlawful Internet Gambling Enforcement Act of 2006: Legislative Problems and Solutions*, 35 J. LEGIS. 147, 149 (2009).

38. *Id.*

39. *Id.*; see James Romoser, *Unstacking the Deck: The Legalization of Online Poker*, 50 AM. CRIM. L. REV. 519, 521 (2013).

40. See Elizabeth Steyngrob, *Real Liabilities for Fantasy Sports: The Modern Inadequacies of Our Archaic Legal Framework*, 18 U. PA. J. BUS. L. 1207, 1225 (2016).

41. 31 U.S.C. § 5362(1)(A)-(D).

42. *Where Can You Play DraftKings Daily Fantasy Sports?*, DRAFTKINGS, <https://www.draftkings.com/where-is-draftkings-legal#:~:text=Federal%20law%20specifically%20exempts%20fantasy,Gambling%20Enforcement%20Act%2C%20or%20UIGEA.&text=DraftKings%20monitors%20new%20developments%20and,any%20jurisdiction%20where%20it%20operates> [https://perma.cc/FH68-62NQ] (last visited Aug. 25, 2021). Other relevant federal laws to daily fantasy sports include the Interstate Wire Act of 1964 and the Illegal Gambling Business Act of 1970. See John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 950–953 (2020); Brendan Conley, *How*

“fantasy or simulation sports game[s]” from the definition of a “bet” or “wager.”⁴³ However, this language does not explicitly legalize online daily fantasy sports because the UIGEA merely prohibits the financial processing of payments involving unlawful internet gambling.⁴⁴ In other words, the UIGEA does not explicitly state that

the Rise of the Daily Fantasy Sports Industry Can Catalyze the Liberalization of Sports Betting Policies in the United States, 66 BUFF. L. REV. 715, 734 (2018). The Professional and Amateur Sports Protection Act of 1992 (PASPA) was, at one time, relevant. It prohibited:

[A] person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702(2). However, PASPA was ruled unconstitutional by the Supreme Court in 2018. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018); John T. Holden et al., *supra* note 22, at 114; Lars A. Peterson, *The Winning Lineup: Framework for Federal Regulation of Daily Fantasy Sports*, 80 U. PITT. L. REV. 729 (2019); *see also* John A. Fortunato, *Legal Consistency in Sports Gambling: Can Antitrust Law and Understanding Sponsorship Provide a Legal Path for States to Permit Wagering on Sports Games*, 5 ARIZ. SPORTS & ENT. L.J. 219, 254 (2016).

In *Murphy*, Justice Alito wrote:

The PASPA provision at issue here – prohibiting state authorization of sports gambling – violates the anti-commandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Murphy, 138 S. Ct. at 1478. *See generally* John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329 (2019). This ruling by the Supreme Court removed a major hurdle for the legal operation of daily fantasy sports businesses such as DraftKings and cleared the way for the expansion of the business to what it is today. Holden & Edelman, *supra*, at 924.

43. 31 U.S.C. § 5362(1)(E)(ix).

44. Kate Lowenhar-Fisher & Greg Gemignani, Introduction, *W. Bruce Lunsford Academy Symposium on the New Era of Gaming Law*, 42 N. KY. L. REV. 419, 420 (2015); Jeffrey Standen, *The Special Exemption for Fantasy Sports*, 42 N. KY. L. REV. 427, 430 (2015); *see* 31 U.S.C. § 5363.

daily fantasy sports is legal.⁴⁵ It states that it is illegal to process financial transactions involving unlawful internet gambling, and it exempts fantasy sports from the definition of unlawful internet gambling.⁴⁶ At most, the UIGEA provides implicit support for DFS legality.⁴⁷ This gives rise to the question as to how and why the exemption for fantasy sports was included in the UIGEA. The UIGEA exempts other activities from its application, but the exemption for fantasy sports is unlike the other exemptions, which are designed to exclude certain financial transactions.⁴⁸ The other exemptions address matters relating to the capital investment, banking, insurance markets, and to tribal gaming and pari-mutuel horseracing.⁴⁹ The inclusion of fantasy sports is “anomalous” compared to these other exemptions.⁵⁰

The answer is shrouded in uncertainty because there is no apparent record from which an answer can be found. Congress approved the UIGEA on September 14, 2006,⁵¹ but debate over its provisions commenced approximately ten years earlier.⁵² In 1998, Congress, for the first time, included the language exempting fantasy sports to the proposed UIGEA.⁵³ The first testimony regarding fantasy sports also occurred in 1998 when a representative of the Major League Baseball Players’ Association (MLBPA) testified in favor of fantasy sports before the House Judiciary Committee.⁵⁴ MLBPA’s representative testified again in 1999 before a Senate Judiciary Subcommittee.⁵⁵ Between 2001 and 2006, there were few references to fantasy sports in Congressional hearings.⁵⁶ However, it is unclear whether the MLBPA was the principal lobbying force behind the inclusion of fantasy sports. Scholarly research discusses

45. Standen, *supra* note 44, at 430.

46. *See* § 5363.

47. Standen, *supra* note 44, at 430.

48. *Compare* § 5362(1)(E)(i)-(viii), *with* § 5362(1)(E)(ix).

49. Standen, *supra* note 44, at 435–46.

50. *Id.* at 435.

51. *See* John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS SPORT 97, 101 (2018).

52. *Id.* at 103.

53. *Id.* at 110.

54. *Id.* at 104.

55. *Id.* at 105.

56. *Id.* at 107.

the possibility of other proponents.⁵⁷ The record is unclear as to who was the primary force in the push for inclusion of fantasy sports, and it is also unclear as to why it was included. In addition to its uncertain origins, the intended effect of the fantasy sports exemption is confusing. The reason is because in 2006, when Congress passed the UIGEA, DFS did not exist.⁵⁸ The phrase “daily fantasy sports” may have not been invented until a year later.⁵⁹ The record suggests that the drafters of the legislation were not considering DFS when drafting the language.⁶⁰

DFS platforms are required to comply with federal and state laws.⁶¹ With respect to state law, DFS’s legality depends on whether the state legislature deems DFS to be a game of skill or chance.⁶² A key rationale for the legality of DFS is the argument that winning outcomes reflect the relative knowledge and skill of the players, and are determined predominantly by the statistical results of individual athletes’ performance over relevant time periods.⁶³ In other words, the winners will tend to be players who have a better mastery of the statistical records of individual athletes. However, this may not be the only skill involved.⁶⁴ Success may also depend on devising algorithms to compile hundreds of line-ups and entering all of them with the confidence that one or more of the hundreds of entries will win big prize money.⁶⁵

57. *E.g., id.* at 112.

58. See Mark Dourmashkin, *Examining the Legalization of Daily Fantasy Sports*, 25 CATH. U. J.L. & TECH. 414, 426 (2017); see also Alicia Jessup, *21st Century Stock Market: A Regulatory Model for Daily Fantasy Sports*, 28 J. LEGAL ASPECTS SPORT 39, 45 (2018).

59. See 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, 143 (2016).

60. Ashly Menard, “Follow the Money and the Laws Will Follow”: *State Legislative Solutions to Daily Fantasy Sports*, 33 SYRACUSE J. SCI. & TECH. L. 101, 109 (2017); see also Robert Shawhan, *Legalizing Federal Sports Gambling Laws: You Got to Know When to Hold’em*, 40 HASTINGS COMM. & ENT. L.J. 41, 52 (2018).

61. See Edelman, *supra* note 59, at 129.

62. *Id.* at 130.

63. See Fortunato, *supra* note 42, at 258k.

64. *Infra*, Part III.A.

65. See Elizabeth Steyngrob, *Real Liabilities for Fantasy Sports: The Modern Inadequacies of Our Archaic Legal Framework*, 18 U. PA. J. BUS. L. 1207, 1220 (2016).

C. *The UIGEA and Online Poker*

In contrast to the treatment of DFS, the effect of the UIGEA was to effectively make online poker illegal.⁶⁶ On April 15, 2011, federal prosecutors invoked the UIGEA (and other federal statutes) to shut down online poker sites in the United States, a day known to poker players as “Black Friday.”⁶⁷ Before then, online poker was widely played and the market was dominated by sites like PokerStars, PartyGaming, and Full Tilt Poker.⁶⁸ Even after the UIGEA was enacted, online poker continued to grow, since the UIGEA did not actually make online gambling illegal, but rather regulated payment methods with respect to illegal gambling.⁶⁹ Post-UIGEA, PokerStars became the biggest online poker company in the world.⁷⁰ Its only serious competition was Full Tilt Poker, which decided to keep offering online poker in the United States as well.⁷¹ By 2010, PokerStars was generating about \$500 million in annual profits and \$1.4 billion in revenue.⁷² On Black Friday, federal prosecutors shut down online poker sites and indicted their owners for violations of the UIGEA and other criminal statutes.⁷³ All the defendants pled guilty, paid fines, or served prison sentences.⁷⁴ The next day, the widespread availability of legal online poker in America came to a screeching halt.⁷⁵ Today, poker is largely unavailable in the United States, except in a small number of states that have legalized it.⁷⁶ Americans can also access some offshore poker sites, assuming the sites will accept them, and

66. See Shawhan, *supra* note 60, at 52.

67. *A Throwback to Black Friday and Its Consequences*, CARD PLAYER (June 15, 2020), <https://www.cardplayer.com/poker-news/25026-a-throwback-to-black-friday-and-its-consequences> [<https://perma.cc/8SY7-MCNW>].

68. See Nathan Vardi, *The Incredible Rise Of PokerStars Cofounder Isai Scheinberg—And His Surrender To Federal Agents*, FORBES (Jan. 24, 2020, 2:08 PM), <https://www.forbes.com/sites/nathanvardi/2020/01/24/the-incredible-rise-of-pokerstars-cofounder-isai-scheinbergand-his-surrender-to-federal-agents/?sh=257fa3544fb0> [<https://perma.cc/83JV-WSMU>].

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. CARD PLAYER, *supra* note 67.

assuming American players are willing to take the risk of placing their money on foreign sites.⁷⁷

III. WHAT IS THE LEGAL DIFFERENCE BETWEEN DFS AND POKER?

The lay understanding as to why DFS and poker are treated differently is that that DFS are predominantly a game of skill, while poker is predominantly a game of chance.⁷⁸ However, there appear to be no conclusive rulings establishing this distinction, and there appear to be no legislative findings either. Moreover, it may not even be possible to arrive at findings of fact or conclusions of law on the issue. How much of success in DFS is due to luck versus skill? How much in poker? Subparts A and B intend to show that the answer may be incalculable or unknowable.

A. *Are DFS Games of Skill or Chance?*

For illustrative purposes, this subpart will explore the question of whether DFS are games of skill or luck with respect to American football or National Football League (NFL)-related DFS games. DraftKings offers several types of NFL fantasy games, which demand different required buy-in amounts.⁷⁹ For example, for a buy-in of twenty dollars, a player can enter a competition with total prize money of \$3.5 million, and the top finisher winning \$1 million.⁸⁰ In the “Classic” format, players must select athletes of different positions from teams that are playing that day.⁸¹ Multiple

77. See *Online Poker Sites by Country/Region*, POKER SITES, <https://www.pokersites.com/country/> [https://perma.cc/LHN4-B2BR] (last visited Aug. 20, 2021).

78. See *United States v. DiCristina*, 886 F. Supp. 2d 164, 195, 196 (E.D.N.Y. 2012).

79. Chet Gresham, *Beginner NFL DFS: Game Types*, DRAFTKINGS NATION (June 20, 2020), <https://dknation.draftkings.com/2020/6/10/21285500/daily-fantasy-sports-nfl-dfs-beginner-definitions-glossary-game-types-classic-show-down-tiers> [https://perma.cc/8SGM-S6X4]; *Types of DraftKings Daily Fantasy Football Contests*, BEST BET USA (Sept. 24, 2015), <https://bestbetusa.com/sports/nfl/types-of-draftkings-daily-fantasy-football-contests/> [https://perma.cc/ANY4-WMEQ].

80. Bryan Mears, *What Makes a Winning Millionaire Maker Lineup on DraftKings?*, FANTASY FOOTBALL LABS (Sept. 5, 2018), <https://www.fantasylabs.com/articles/draftkings-fantasy-football-millionaire-maker-dfs-lineup-trends-2018/> [https://perma.cc/MLK4-6R5C].

81. *Rules & Scoring*, DRAFTKINGS, <https://www.draftkings.com/help/>

players may draft the same athlete.⁸² Each athlete is assigned a value, and the total value of all the athletes selected cannot exceed the player's "salary cap."⁸³ The athletes that the player selects earn points based on their in-game performance that contribute to the player's total score for the competition.⁸⁴ The players with the highest combined score win cash prizes at the end of the competition.⁸⁵

The skill involved requires knowing the athletes and picking the best combination within the "salary cap" constraint.⁸⁶ The salary cap makes it impossible to pick the best athlete at each position, so the player must make informed decisions on which athletes are under or overvalued.⁸⁷ Thus, a player must determine the potential points an athlete may earn in relation to his cost.⁸⁸ A player may pick the most expensive quarterback based on past performance of high scores, but this leaves less money under the "salary cap" to acquire high-performing athletes in other positions.⁸⁹ Thus, picking a prize-winning team requires nuance and a sense of who will provide the most value.⁹⁰ Selecting athletes for value can also be influenced by the athlete's opponent; a player may select an athlete on a team facing a weak defense with the knowledge that the athlete will likely have a good performance, or select a team defense when the opposing team's offense is ineffective.⁹¹ In addition to

rules/nfl [<https://perma.cc/7ZDA-M456>] (last visited Aug. 20, 2021). Players pick one quarterback, two running backs, three wide receivers, one tight end, one flex player (a selection that is not limited to a particular player position), and one team defense. *Id.*

82. Matthew A. Melone, *Fantasy Sports Contests: Does the Fun Justify the Fantasy That These Contests Are Not Gambling*, 15 VA. SPORTS & ENT. L.J. 201, 206 (2016).

83. *Id.*

84. DRAFTKINGS, *supra* note 81.

85. Melone, *supra* note 82, at 207.

86. *Id.* at 206; *Study says skill, strategies exist in daily fantasy sports games*, CLEMSON NEWS (Dec. 6, 2018), <https://news.clemson.edu/study-says-skill-strategies-exist-in-daily-fantasy-sports-games/> [<https://perma.cc/P7E6-NBN2>].

87. Melone, *supra* note 82, at 238.

88. *Id.* at 206.

89. *See id.* at 238.

90. *See id.*

91. *See, e.g.,* Neil Greenberg, *Use this defensive strategy to get a huge edge in your fantasy football league*, WASH. POST (Aug.23, 2019),

researching athletes and matchups, a successful player will often research the likely weather for the games, as the weather may affect the outcome of the game.⁹² A clear day with no wind may lead to more passing, while a rainy or snowy day may cause a team to run the ball more.⁹³ So far, it seems as though DFS are games of skill that require extensive familiarity with the sport.

However, there is a large element of luck involved. The most obvious element of luck involves athletes' injuries.⁹⁴ The most knowledgeable player with the most highly advanced computer program simply cannot predict injuries. In short, injuries on a fantasy team are devastating to a DFS participant's outcome and chances to win.⁹⁵ There is also the possibility of bad officiating or freak plays.⁹⁶ Thus, to assert that DFS are games of pure skill is an overstatement. Each player is subject to the whims of bad luck and misfortune outside of his or her control, which is precisely what luck is about.

Some DFS bettors also utilize computer programs to submit hundreds of entries for a single competition, which undercuts the notion that DFS is a game of pure skill.⁹⁷ Rather than picking what they think will be "the" winning lineup, these players use computers to generate hundreds of lineups to maximize the chance of

<https://www.washingtonpost.com/sports/2019/08/23/use-this-defensive-strategy-get-huge-edge-your-fantasy-football-league/> [https://perma.cc/EK8G-TAK3].

92. Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 216 n.191 (2014) (citing *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1367 (Wash. 1972)).

93. See Mark Taylor, *NFL points totals and the effect of weather*, PINNACLE (Aug. 23, 2016), <https://www.pinnacle.com/en/betting-articles/Football/impact-of-the-weather-on-nfl-betting/5ZN2AV8E4W2G9SF9> [https://perma.cc/3XZ2-PZG8].

94. See Tex. Atty. Gen. Op. KP-0057, 2016 WL 281742, at *3 (Jan. 19, 2016).

95. Trippiedi, *supra* note 92, at 209.

96. Tex. Atty. Gen. Op. No. KP-0057, *supra* note 94, at *3.

97. See David Purdum, *Are computer scripts bad for daily fantasy sports?*, ESPN (July 15, 2015), https://www.espn.com/fantasy/baseball/story/_id/13261582/are-computer-scripts-bad-daily-fantasy-sports [https://perma.cc/Y2MU-79EL].

winning.⁹⁸ This strategy can be very profitable.⁹⁹ For the lone player who plays for amusement, there is little chance to win against computer-generated lineups. Thus, there is a colorable argument that that DFS is a game of chance, not a game of skill, since the use of technology maximizes the chances of winning and exploits luck.¹⁰⁰ If DFS were solely about skill, a player should feel confident in submitting one, and only one, entry per competition.¹⁰¹

B. *DraftKings NBA, January 20, 2021*

To further illustrate the point that DFS is a combination of both luck and skill, consider DraftKings' basketball, or National Basketball Association (NBA)-related DFS game on January 20, 2021. The NBA DFS games work similarly to its NFL contemporaries; a player will submit a lineup of eight basketball athletes of varying positions, and those athletes will generate fantasy points based on their in-game performance.¹⁰² The players with the highest total of all their selected athletes' points are in contention for prizes.¹⁰³ Like in the NFL games, basketball athletes are assigned a dollar value, and players have a set "salary cap" with which to purchase their desired athletes.¹⁰⁴ Skilled players know—or can ascertain—which athletes are worth selecting, and which are overvalued.¹⁰⁵

98. See Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans Into Suckers*, N.Y. TIMES (Jan. 6, 2016), <https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html> [<https://perma.cc/25R8-3HEJ>]; see also Joshua Brustein & Ira Boudway, *You Aren't Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG (Sept. 10, 2015), <https://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football> [<https://perma.cc/NWY8-UNMJ>].

99. Purdum, *supra* note 97. A player known as "Maxdalury" entered four hundred times into the same DFS competition. *Id.* Close to three hundred of his entries finished in prize-winning positions. *Id.* Maxdalury stated via Twitter that he took home multiple six-figures in winnings. *Id.*

100. See Brustein, *supra* note 98.

101. *But see* King, *supra* note 98.

102. *Rules & Scoring*, DRAFTKINGS, <https://www.draftkings.com/help/rules/nba> [<https://perma.cc/U9BH-XC59>] (last visited Aug. 20, 2021).

103. See Melone, *supra* note 82, at 207, 231.

104. DRAFTKINGS, *supra* note 102.

105. *Cf.* Melone, *supra* note 82, at 238.

To win the top prize, the player must have the skill to identify and select athletes who will overachieve.¹⁰⁶ However, is this a matter of skill or is it luck? It is extremely difficult to predict when an NBA athlete will have one of his best games of the season. It is infinitely more difficult to predict that outcome for all eight. If a player only submits one entry, the odds of winning are astronomically prohibitive. Thus, is winning based more on skill or luck? Perhaps the skill lies in designing a better algorithm to generate as many combinations as possible.

On January 20, 2021, two entrants tied for first place with each scoring 384.5 fantasy points.¹⁰⁷ That is an average of just over forty-seven points per athlete, a remarkable feat considering an elite NBA athlete generates around fifty fantasy points in a single night.¹⁰⁸ Even more remarkable, each had the exact same lineup.¹⁰⁹ Interestingly, neither player retained elite athletes for their roster.¹¹⁰ Rather, both players were able to identify athletes who happened to overperform. For example, both players had Clint Capela, Trae Young, Deandre Ayton, and Kendrick Nunn on their rosters¹¹¹—if you don't recognize those names as NBA athletes, that is the point. All four had incredible performances and were priced well below superstars.¹¹²

How was this unlikely, winning combination found; was it randomly generated? The selections seem too deliberate to be simply random or lucky. Kendrick Nunn received more in-game minutes because the Miami Heat were short on playable athletes due to

106. Cf. Trippiedi, *supra* note 92, at 220 n.232 (a “sleeper” is a fantasy term referring to an athlete who is a candidate for a breakout year, but very few players select).

107. *ResultsDB – NBA \$60K And-One*, ROTOGRINDERS (Jan. 20, 2021), <https://rotogrinders.com/resultsdb/site/draftkings/date/2021-01-20/sport/nba/slate/600984551d7ca92994abach2/contest/600984a144f08943035aba82> [<https://perma.cc/VYD8-GP4R>].

108. See e.g., Chapulana, *NBA DFS: Kevin Durant and best/worst DraftKings daily fantasy basketball plays for Saturday, June 5th*, SB NATION: FAKE TEAMS (June 5, 2021, 4:48 AM), <https://www.faketeams.com/2021/6/5/22520061/nba-dfs-kevin-durant-and-best-worst-draftkings-daily-fantasy-basketball-plays-for-saturday-june-5th> [<https://perma.cc/LARH-93KU>].

109. ROTOGRINDERS, *supra* note 107.

110. *Id.*

111. *Id.*

112. *Id.*

Covid.¹¹³ Clint Capela had a slow start to his season, but his form was improving leading up to January 20, 2021.¹¹⁴ Only an astute follower and student of basketball would know these underlying details, but that might only explain selecting one or two of the athletes, surely not all eight. It is possible to explain winners' success by skill, but it is equally possible that they were just lucky.¹¹⁵

There is a persuasive argument that DFS is a game of skill. However, it is also undeniable that luck plays a material role in the outcome. Injuries, bad referee calls, poor weather, freak plays, and athletes' "cold nights" make the chances of winning much harder to predict and adds to the element of chance. The most skillful DFS player may require the least amount of luck but could easily be overshadowed by an extremely lucky player on any given night.¹¹⁶ Ultimately, the amount of skill or luck required to win is entirely dependent on the player.

In furtherance of the argument that DFS are more luck-based, once a player selects his or her lineup, their selections are locked for the rest of the night, and he or she may not change them. In other words, there is nothing more the player can do once the games begin. This means that once a player makes their selections, their chances of winning lay at the mercy of the sports gods. Does this

113. Emily Bicks, *Miami Heat Ravaged by COVID-19: Butler, Adebayo & 6 More Ruled Out*, HEAVY (Jan. 12, 2021, 4:16 PM), <https://heavy.com/sports/miami-heat/miami-heat-ravaged-by-covid-butler-adebayo-6-more-ruled-out/> [<https://perma.cc/S8KX-7T95>].

114. See *Clint Capela 2020-21 Game Log*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/players/c/capelca01/gamelog/2021> [<https://perma.cc/HE7P-JSJF>] (last visited Aug. 26, 2021).

115. The argument that the team selection was pure luck is undercut by the fact that two players picked the same lineup. See ROTOGROUNDERS, *supra* note 107. The coincidence seems to be too pronounced to be a matter of luck (assuming that it was two different players, instead of one player using two different usernames). Also, the existence of websites such as Swish Analytics, which is devoted to compiling statistics for fantasy use suggests that information and knowledge (in other words, skill) is material to the outcome. See *Swish Analytics | Sports Predictions, Daily Fantasy, and Sports Betting Tools for NFL, MLB, NBA & NHL on FanDuel, DraftKings & Yahoo*, SWISH ANALYTICS, <https://swishanalytics.com/> [<https://perma.cc/G6K4-BUQA>] (last visited Aug. 26, 2021) (the title page describes Swish Analytics as “[a] machine learning system for US sports betting & fantasy.”). As a counterexample, it would be foolish for anyone to consult a website on how to pick the right numbers for Powerball.

116. See *supra*, Part III A (1).

mean DFS is more luck-based than poker? As discussed below, poker gives players many chances to change their betting stance, unlike DFS, and thus may even require just as much—if not more—skill to play and win.

C. *Is Poker a Game of Skill or Chance?*

Live poker, in most states, is illegal whether online or in-person because it is deemed to be a game of chance.¹¹⁷ However, many observers have recognized the significant factor of skill in the game.¹¹⁸ One successful professional player who is also known for his cerebral books on poker explains it this way: a player can deliberately lose a hand playing poker.¹¹⁹ However, it is impossible to deliberately lose at a game like roulette.¹²⁰ This sheds light on one difference between a game of skill and a game of pure luck. There is no skill involved in roulette because the player has no control over the outcome.¹²¹ However, a player's skill is materially responsible for the outcome of a poker hand.¹²²

From the world of mathematicians, John von Neumann, Oskar Morgenstern, Harold William Kuhn, and Ariel Rubinstein devoted a chapter in a book about game theory to the optimization of

117. One notable exception is California. For a general discussion of the complicated history behind the legality of live poker in California, see Michael Pierce Singen, *Where Will the Buck Stop on California Penal Code Section 330?: Solving the Stud-Horse Poker Conundrum*, 11 HASTINGS COMMUNICATIONS & ENT. L.J. 95 (1988).

118. *See infra*.

119. J.F., *Skill kills Lady Luck*, THE ECONOMIST (Aug. 23, 2012), <https://www.economist.com/game-theory/2012/08/23/skill-kills-lady-luck>; *see also* J.F., *Know when to fold'em*, THE ECONOMIST (Oct. 10, 2011), <https://www.economist.com/game-theory/2011/10/10/know-when-to-fold-em> [<https://perma.cc/QZ5W-SSXV>]. Others have performed empirical analyses on the role of skill versus luck in poker and have found that “even tiny differences in skill manifest themselves in near certain victory if the time horizon is long enough.” Bass, *supra* note 21, at 514.

120. J.F., *Know when to fold'em*, *supra*.

121. Grochowski, *supra* note 18.

122. *See* Rainey, *supra* note 37, at 155; Romoser, *supra* note 39, at 522–523; Rotem Nicole Moran, *Winner, Winner, No Chicken Dinner: An Analysis of Interactive Media Ent'mt & Gaming Ass'n v. Att'y Gen. of the U.S. and the Unjustified Consequences of the UIGEA*, 31 LOY. L.A. ENT. L. REV. 55, 71 (2011).

“bluffing” by a poker player.¹²³ The chapter explains that optimal play requires occasional bluffing, which is a deviation from “good” strategy.¹²⁴ A player with a strong poker hand may make a large opening bet to exploit the strength of his or her hand.¹²⁵ Betting serves as a signal to the other players that the bettor has a strong hand.¹²⁶ However, if the bettor bets only when he or she has a strong hand, the other players will notice this style of play and fold.¹²⁷ If all other players fold, the bettor with the strong hand will not win as much money as he or she could have, and the strong hand will be a wasted opportunity.¹²⁸ Therefore, it is optimal for a poker player to bluff (represent a strong hand when actually holding a weak hand) occasionally to introduce unpredictability and create uncertainty in the other players.¹²⁹ Whether to bluff or not is a decision that is entirely within the control of a player and has nothing to do with the cards that were dealt.¹³⁰ Thus, bluffing is an exercise of a player’s skill, not a matter of luck.

Those who are not familiar with poker may believe that bluffing is a predominant form of play for any individual player. That is incorrect. Bluffing has value only if it is used sparingly and at the right moment.¹³¹ Bluffing too often will cause other players to

123. See generally JOHN VON NEUMANN & OSKAR MORGENSTER, *THEORY OF GAMES AND ECONOMIC BEHAVIOR: 60TH ANNIVERSARY COMMEMORATIVE EDITION* 186–219 (2004). John von Neumann was regarded as one of the world’s leading mathematicians. William Poundstone, *John von Neumann* <https://www.britannica.com/biography/John-von-Neumann> [https://perma.cc/M5BZ-9FC6] (last visited July 3, 2021).

124. VON NEUMANN & MORGENSTER, *supra* note 123, at 206.

125. See Ashley Adams, *Poker and the Art of Bluffing*, POKEROLOGY, <https://www.pokerology.com/lessons/bluffing-in-poker/> [https://perma.cc/T5J6-7RBM] (last visited Aug. 24, 2021).

126. *Id.*

127. *Bluffing in Poker Explained (by Doug Polk)*, UPSWING POKER, <https://upswingpoker.com/bluffing-in-poker-explained/> [https://perma.cc/L9QP-TA9L] (last visited Aug. 23, 2021) (“Consequently, bluffing is a necessary part of the game. If you never bluff, poker won’t just be boring, it will be unbeatable—assuming your opponents are paying attention. They will be quick to exploit a playing style that depends too heavily on making strong hands, i.e., one that is not well-rounded with bluffing when appropriate.”) (emphasis in original).

128. *Id.*

129. See VON NEUMANN & MORGENSTERN, *supra* note 123, at 206.

130. Adams, *supra* note 125.

131. See *id.*

doubt the bluffer's sincerity, which can lead to catastrophic losses.¹³² Deciding whether to bluff is based on a variety of factors that are different with each hand, such as the opponent and their prior tactics.¹³³ The following is an illustration of a bluff and the factors involved in tournament poker.

D. *An Illustration of Tournament Poker Bluffing*

In a poker tournament—where there may be hundreds or even thousands of players—once a player loses all his or her chips, the player is out of the tournament.¹³⁴ Suppose the tournament is at the stage where the blinds are 500—1,000.¹³⁵ There are ten players at the table. Suppose the first player (Player 1 or “raiser”) to bet has 9♥ and 9♣, which is a moderately strong hand.¹³⁶ This player bets 4,000. The next few players fold because they do not believe they have strong enough hands. At this point, there are 5,500 in chips in the pot for this hand—1,500 from the small and big blinds, and 4,000 from the player's bet. Suppose over the course of the tournament, Player 1 has raised frequently, and the other players at the table are aware and believe that he or she often raises with hands that are not particularly strong, and certainly not the top three hands (Ace-Ace, King-King, Ace-King).¹³⁷ Now, suppose that the decision falls on a player (Player 2 or “bluffer”) with a weak hand (say, 7♥, 2♠).

132. See Donovan Panone, *Typical Beginner Mistakes*, POKEROLOGY, <https://www.pokerology.com/lessons/beginner-mistakes/> [<https://perma.cc/GN2T-EVJF>] (last visited Aug. 24, 2021).

133. Adams, *supra* note 125.

134. *Texas Hold'em Tournament Rules & How to Play Tournament Poker*, POKERLISTINGS, <https://www.pokerlistings.com/poker-rules-tournaments> (last visited [<https://perma.cc/946Q-EGWT>] Aug. 22, 2021).

135. The blinds refer to the small blind and the big blind. See *United States v. DiCristina*, 886 F. Supp. 2d 164, 172 (E.D.N.Y. 2012). The small blind is the position immediately after the dealer. *Id.* At 500–1000, the small blind must post 500 in chips before the cards are dealt. See *id.* The big blind, which is the position immediately after the small blind, must post 1,000 in chips before the cards are dealt. See *id.*

136. See *Poker Hands Ranking Chart*, POKER.ORG, <https://www.poker.org/poker-hands-ranking-chart/> [<https://perma.cc/U34H-WJ22>] (last visited Aug. 28, 2021).

137. See *id.*

This hand is so weak that most knowledgeable players with this hand would typically fold.¹³⁸ But suppose that unlike Player 1, Player 2 is known for raising with extremely strong hands. Player 2 decides to bluff and raises by betting 9,000. Everyone else folds, leaving only Players 1 and 2 in the hand. Now, the decision goes back to Player 1. Judging from the cards in hand, it is highly probable that a 9-9 hand will beat a 4-8. However, Player 2 is known for raising only when he or she has high quality hands, so in Player 1's mind, there is a high chance the bluffer holds much stronger cards. Nonetheless, the original player decides to call the raise and bets 5,000 more in chips to match the bluffer. There are now 19,500 in chips in the pot.

The first three cards are dealt: Ace♦, 10♦, 2♠ (the dealing of the first three cards for the entire table is called the "flop").¹³⁹ Player 1 is the first to act. His or her hand will lose if Player 2 holds an Ace or a 10, and there is no chance his or her hand can hit a flush¹⁴⁰ or a straight.¹⁴¹ The original raiser checks.¹⁴² The bluffer then bets 25,000 more chips. The bluffer is representing that he or she has an Ace. Given the presence of the Ace, the odds against improving the hand to a flush or a straight, and given the amount of chips at risk, the original raiser folds. The bluffer wins the hand and a significant amount of chips on a stone-cold bluff. This example is designed to showcase the number of skill factors involved in a successful bluff.¹⁴³

138. See *Poker Hand Nicknames – The Complete Guide*, 888POKER, <https://www.888poker.com/magazine/strategy/poker-hand-nicknames> [<https://perma.cc/F4MY-AW7L>] (last visited Aug. 28, 2021). This hand has the lowest odds of winning and is also called the "worst hand in poker." *Id.*

139. *Flop*, POKER DICTIONARY, <https://www.pokerdictionary.net/glossary/flop/> [perma.cc/J6Y2-3SK3] (last visited Aug. 29, 2021).

140. *Flush*, POKER DICTIONARY, <https://www.pokerdictionary.net/glossary/flush/> [<https://perma.cc/D939-295H>] (last visited Aug. 29, 2021).

141. *Straight*, POKER DICTIONARY, <https://www.pokerdictionary.net/glossary/straight/> [<https://perma.cc/8VCQ-WEGS>] (last visited Aug. 29, 2021).

142. *Check*, POKER DICTIONARY, <https://www.pokerdictionary.net/glossary/check/> [<https://perma.cc/632P-FYQ8>] (last visited Aug. 29, 2021).

143. See generally *How to Bluff in Poker*, 888POKER, <https://www.888poker.com/magazine/strategy/poker-bluff> [<https://perma.cc/EXT9-PWEY>] (last visited Aug. 20, 2021). A bluff like this may be easy to describe, but it requires a boldness to pull off successfully. *Id.* Moreover, it can only succeed if played at the right moment and against the right player. *Id.* These elements, in turn,

Poker is deemed a game of chance because the outcome depends on which cards are dealt. However, in the example just described, note all the winner's actions that had nothing to do with the cards. Every hand requires numerous decisions by a player. The first decision is whether to play the hand or fold.¹⁴⁴ Unskilled players will play bad starting hands because they do not know it is a bad hand.¹⁴⁵ The next decision is, if the player decides to play, should the player bet the amount of the big blind (the minimum bet) or raise. If the decision is to raise, by how much? This decision to call or raise is repeated as long as the player remains in the hand.¹⁴⁶ So long as a player does not fold, the betting strategy is a series of complicated decisions. To optimize betting decisions, numerous factors must be considered, including:

(1) What is the player's position? In other words, is the player one of the first to act or is the player one of the last to act? Generally, the player who is last to act has an advantage because that player has all the information regarding how the other players will bet because they have already acted. A player who is first to act is at a disadvantage because he or she does not know how the following players will act, so the first to act is operating with much less information.

(2) What are the chip stacks of each player? The player with the largest chip stack can afford to play marginal hands because the loss of the hand will not significantly reduce the amount of chips he or she has.¹⁴⁷ On the other hand, a player who is "short-stacked" (a small number of chips) faces a greater risk with any hand because a loss may mean losing all the chips and being knocked out of the tournament.¹⁴⁸

depend on the stage of the tournament and relative chip stacks of the players involved in the hand (among other factors). *Id.*

144. *Basics of Poker*, BICYCLE CARDS, <https://bicyclecards.com/how-to-play/basics-of-poker/> [<https://perma.cc/QS92-WHH5>] (last visited Aug. 29, 2021).

145. *See* Adams, *supra* note 125.

146. BICYCLE CARDS, *supra* note 144.

147. *See* Gareth Chantler, *The Temptation to Play it Safe in Poker Tournaments*, POKER NEWS (Jan. 27, 2020), <https://www.pokernews.com/strategy/playing-safe-taking-risks-poker-tournaments-36483.htm> [<https://perma.cc/SC7W-QVXG>].

148. *Id.*

(3) What has been the betting pattern of the other players? Which players play more hands than others? Which players are “tight,” meaning they fold most hands and only play a few?¹⁴⁹ If a tight player plays a hand, it is more likely than not that the player has a strong hand.¹⁵⁰ Players who play many hands demonstrate they are willing to play hands that are relatively weak.¹⁵¹

(4) At what stage is the tournament? In the early rounds of a tournament, players are usually reluctant to make “all-in” bets because losing the hand will usually lead to an early exit from a tournament.¹⁵² However, in later rounds, “all-in” bets are common, especially by short-stacked players because their chip stacks are too small to make any other kind of bet.¹⁵³ Experienced players know this, which is why players with large stacks will often call an “all-in” bet by a short-stacked player even if the player with more chips has a relatively weak hand.¹⁵⁴ If the player with the larger stack loses, he or she has plenty more chips to continue in the tournament, and he or she may get lucky and win with a weaker hand and take all the chips by the “all in” bettor.¹⁵⁵ These are just some of the decisions that must be made by each player if he or she is playing a hand. All these decisions require skill and experience to make the optimal decision.

Both poker and any financial competition require the rational calculation of risk and reward, and the outcome depends not only on a player’s decision but also on the independent decisions of the other players.¹⁵⁶ This introduces another element of skill, besides risk-reward calculations. This other skill is the ability to read the psychology of other players.¹⁵⁷ Pure games of chance do not involve

149. *Poker Terms*, POKER LISTINGS, <https://www.pokerlistings.com/poker-glossary> [<https://perma.cc/9RR3-UV7V>] (last visited Aug. 29, 2021).

150. *See id.*

151. Panone, *supra* note 132.

152. *See How to Build Stacks and Avoid Spewing Early in a Tournament*, UPSWING POKER, <https://upswingpoker.com/early-stage-poker-tournament-strategy-pre-ante/> [<https://perma.cc/U95G-MVE6>] (last visited Aug. 28, 2021).

153. Chantler, *supra* note 147.

154. *Cf. id.*

155. *Id.*

156. *See* Michael A. Tselnik, *Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 HOFSTRA L. REV. 1617, 1634 (2007).

157. *Id.* at 1656.

such factors.¹⁵⁸ Moreover, poker players do not play the “house” (the casino), unlike a game like roulette or blackjack; they play each other, which further distances poker from games of pure chance.¹⁵⁹

In 2012, Judge Weinstein of the Eastern District of New York issued a lengthy opinion in which the court concluded that poker is predominantly a game of skill and not unlawful gambling.¹⁶⁰ In reaching this conclusion, the court relied on expert testimony supported by statistical evidence.¹⁶¹ The court noted that the outcome in a poker hand is influenced by both the cards dealt (determined by chance) and the decisions made by players (determined by skill).¹⁶² While the game is influenced by the chance element of the dealt cards, a player’s decision is based on skill.¹⁶³ These decisions affect gameplay and perhaps the outcome of a hand.¹⁶⁴ Bluffing, as discussed above, can overcome the power of chance, and a player can win a hand despite holding inferior cards.¹⁶⁵ Moreover, most poker hands end when one player induces his opponents to fold.¹⁶⁶ The final card or cards are never dealt. Because the final cards are never dealt and because the winning player does not reveal his or her hand, the players’ decisions alone determine the outcome.¹⁶⁷

To be sure, chance does play a role in poker. However, the *DiCristina* Court opined that the presence of chance does not imply that poker is predominately a game of chance rather than predominately a game of skill.¹⁶⁸ To illustrate the point, the court pointed out that in golf, which is considered a game of skill, it is impossible to guarantee that the player’s ability will be the sole determinant of the outcome.¹⁶⁹ For example, changes in the weather can affect the game.¹⁷⁰ The wind speed or direction can change in the few

158. *Id.* at 1634.

159. *Id.* at 1646.

160. *United States v. DiCristina*, 886 F. Supp. 2d 164, 234 (E.D.N.Y. 2012).

161. *See id.* at 231–32.

162. *Id.* at 231.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* (quoting *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 687 (2001)).

170. *Id.*

minutes between the competitors' shots.¹⁷¹ Players have no control over this; it is purely a matter of chance.¹⁷² Thus, chance may have an impact on the outcome of golf tournaments, but no one would dispute that golf is a game of skill.¹⁷³ The opinion continued by stating that it is not whether some chance or skill is involved in poker, but what element predominates.¹⁷⁴ To predominate, skill must account for a greater percentage of the outcome than chance—i.e., more than fifty percent.¹⁷⁵ Expert testimony showed that: (1) poker involves a large number of complex decisions, which allow players of varying skill to differentiate themselves; (2) many people play poker for a living and consistently win money over time; and (3) players are able to win with starting hands that are weaker than their opponents (for example, by bluffing or bet sizing), indicating that the players' abilities, not the cards, are responsible for the results.¹⁷⁶

The District Court's opinion was certainly a victory for poker players, but it was short-lived: on appeal, the Second Circuit Court of Appeals reversed.¹⁷⁷ It ruled the argument that poker is a game of skill had no merit because the law of New York was well-settled that poker constituted illegal gambling.¹⁷⁸ In other words, there was no issue to be addressed because New York law governed and outlawed poker as unlawful gambling. The Second Circuit noted New York law was clear that poker contained a sufficient element of chance to constitute gambling.¹⁷⁹ Controlling New York law acknowledged the element of skill involved in playing poker, but the outcome depends in a material degree upon an element of chance, the draw of the cards.¹⁸⁰ The Second Circuit concluded that

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 231-32.

177. *United States v. DiCristina*, 726 F.3d 92, 106 (2d Cir. 2013).

178. *Id.* at 98 n.5.

179. *Id.* at 98.

180. *Id.* at 98 n.5 (quoting *People v. Turner*, 629 N.Y.S. 2d 661, 662 (N.Y. Crim. Ct. 1995)).

an activity constitutes gambling under the relevant federal statute whenever state law makes it so.¹⁸¹

It is important to note that the Second Circuit did not rule on the issue of whether poker is a game of skill or not.¹⁸² The District Court's opinion may be viewed as a ruling that poker is a game of skill, however a more precise description of the ruling is that the government, "failed to show that it is more likely than not that chance predominates over skill in poker."¹⁸³ The government failed to meet its burden, and the failure to meet a burden is not the same as a conclusive finding (in the same way that not guilty does not mean innocent).¹⁸⁴ Thus, it would be overreach to state that the District Court found, as a matter of fact, that poker is a game whose outcome is more than fifty percent dependent on skill.¹⁸⁵

It is important to note the precise ruling because it may not be possible to quantify how much of poker is skill versus luck. Just as there are arguments that poker is mostly a game of skill, there are equally valid arguments that poker is a game of luck. Even if precise quantification were possible, what percentage of poker can properly be assigned to skill or luck? Every experienced poker player knows that any two cards can win a hand.¹⁸⁶ At times, skill is the reason for the truth of this observation. At other times, it is pure, dumb luck.¹⁸⁷ Two players with equally strong hands may

181. See generally Jonathan Hilton, *Refusing to Fold: How Lawrence DiCristina Went Bust Fighting for a Novel Interpretation of the Illegal Gambling Business Act*, 83 CIN. L. REV. 1467, 1467 (2015) (summarizing *DiCristina* and criticizing the Second Circuit's interpretation of the Illegal Gambling Business Act).

182. See *DiCristina*, 726 F.3d at 98.

183. *United States v. DiCristina*, 886 F. Supp. 2d 164, 234 (E.D.N.Y. 2012).

184. See *id.*

185. See *id.*

186. Cf. *Is Poker Skill or Luck? Let's Get it Right*, POKER LISTINGS, <https://www.pokerlistings.com/skill-vs-luck-get-it-right> [<https://perma.cc/V67N-893B>] (last visited Aug. 30, 2021). A study conducted by the Cigital Group revealed that only twelve percent of hands were won by the player with the best cards in-hand. *Id.* This indicates that a player with a worse initial hand can use skills like bluffing to win. See *id.*

187. Cf. Pete Etchells, *Is poker a game of skill, or a game of luck?*, THE GUARDIAN (Jan. 14, 2015, 2:00 AM), <https://www.theguardian.com/science/head-quarters/2015/jan/14/poker-game-skill-luck-cepheus-bot-program> [<https://perma.cc/WCL4-386E>] (a study in the Journal of Gambling Studies

have an equal chance to win based solely on the cards in their hands.¹⁸⁸ Thus, the result is determined by the dealer's cards.¹⁸⁹ Even if a player's hand is weak, he or she can still win based on the cards revealed by the dealer.¹⁹⁰ However, the odds of being saved in this fashion are extraordinarily low; the odds of flopping a three of a kind with a random hand are 74 to 1.¹⁹¹ The odds of a straight are 77.5 to 1.¹⁹² The odds of flopping a flush are 118 to 1.¹⁹³ Thousands of hands are played in poker tournaments, and the sheer number of hands will inevitably generate such unlikely outcomes. Two players can make rational decisions as an exercise of skill and experience, but the result is determined by luck.¹⁹⁴

Another argument that suggests poker is more a game of luck than a game of skill is demonstrated by looking at past winners of the largest annual poker tournament, the Main Event at the World Series of Poker in Las Vegas.¹⁹⁵ Before 1990, there were players who won more than once.¹⁹⁶ This suggests skill because of the ability to repeat a result. However, since 1990, no one has won it more than once.¹⁹⁷ It should be noted that poker's popularity exploded in the early 2000's from a game frequented by a relatively small universe of professional players to widespread participation and TV

found that there was no material difference in chips between expert and non-expert poker players after sixty hands).

188. *See id.*

189. *See id.*

190. *See id.*

191. *The Odds of Making Three of a Kind in Poker*, 888POKER, <https://www.888poker.com/how-to-play-poker/hands/three-of-a-kind-poker-hand-odds/> [perma.cc/MQM3-BU6H] (last visited June 30, 2021).

192. *The Odds of Making a Straight in Poker*, 888POKER, <https://www.888poker.com/how-to-play-poker/hands/straight-poker-hand-odds/> [https://perma.cc/5AEG-KWC4] (last visited June 30, 2021).

193. *Poker Odds*, HOME POKER GAMES, <https://www.homepokergames.com/odds.php> [https://perma.cc/3GHT-67RJ] (last visited June 30, 2021).

194. *Cf. Etchells, supra* note 187.

195. *See generally* Steve Beauregard, *WSOP (World Series of Poker) Main Event Winners List*, GAMBOOL, <https://gamboool.com/wsop-world-series-of-poker-main-event-winners-list> [https://perma.cc/33CW-SCM3] (last visited June 30, 2021).

196. *Id.*

197. *Id.*

coverage.¹⁹⁸ So looking at the list of players from 1990 to the present, why have there been no repeat winners? If poker is truly a game of skill, where are the Roger Federers or Michael Phelps with repeat championships? It seems reasonable to conclude that one or more players would repeat their victories, as in tennis, swimming, or other individual sports, if skill were the primary determinant of success. Perhaps no one has repeated a win because each of the Main Event winners since 1990 had one lucky year.

IV. SHOULD THERE BE CONSISTENCY IN THE LEGAL TREATMENT OF DFS AND ONLINE POKER?

Several commentators have observed that DFS resembles sports gambling more closely than season-long fantasy sports.¹⁹⁹ DraftKings has explicitly compared the similarity of the action in DFS to the action in poker.²⁰⁰ Given the admitted similarity between DFS and poker, why does the law view online DFS as legal, while online poker is largely viewed as illegal. Attempting to justify this different treatment on the basis that one is a game of skill while the other is a game of chance falls flat; this Article has shown that both games are a combination of the two. Moreover, it is impossible

198. There was an explosive surge in the number of people playing poker in 2003. See Jake, *Poker's Popularity Waning in Vegas*, LAS VEGAS THEN & NOW (Sept. 6, 2018), <https://lasvegasthenandnow.com/is-poker-popularity-waning-in-vegas/> [https://perma.cc/7H89-AVM5]. This occurred after an amateur player called Chris MoneyMaker (his real name) won the Main Event. It inspired everyday players to believe they too could win millions of dollars. See *id.*

199. See Holden et al., *supra* note 22, at 122.

200. *Id.* at 140. For example, the CEO of DraftKings stated, "The concept is different from traditional fantasy leagues. Our concept is a mashup between poker and fantasy sports." *Id.* He also stated:

So[,] if you go and play DraftKings, it actually in many ways has a similar feel to poker. The game have [sic] payout structures that are similar and there's a lot of different variety; we can play head to head, we have [] larger tournaments. So[,] if you basically take anybody who is into poker, who is a poker fan; they also happen to like sports. It's a very natural fit. There's lot[s] of people who like sports. So being able to go to the poker market and attract customers [in] there has led to a lot of great customers [sic] acquisition. I think for a poker player, it is just much easier to immediately get and understand the product. It is just a great place for us to advertise.

Id.

to provide a conclusive answer as to whether luck or skill predominates in either game. A common saying among poker players goes, “I’d rather be lucky than good.” If one accepts the conclusion that it is not possible to quantify whether luck or skill predominates, then there is no principled reason for treating them differently.

Moreover, the law’s treatment of the two rests on shaky foundations. DFS rely on the UIGEA’s carve-out for fantasy sports. However, there is no evidence to suggest that the law was intended to protect DFS. The carve-out language certainly helps, and perhaps DFS fall squarely within the protection of the carve-out. But, if UIGEA’s proponents wanted certainty, they should have probably drafted different language if given the opportunity. There are ways to draft unambiguous language to protect DFS, but the UIGEA does not provide that absolute protection. The treatment of online poker is similarly flawed under existing law. First, states do not agree on poker’s legality (putting aside, for the moment, whether it is online or not).²⁰¹ Poker is legal in California but is illegal in almost every other state.²⁰² If live poker is legal in California, why is online poker unlawful there? In Rhode Island, for example, live poker is legal and offered at one of its casinos, but online poker is legally unavailable.²⁰³ This is the situation for poker, but online DFS games are legally available in both states.

CONCLUSION

The purpose of this Article is not to argue that DFS should be illegal or that online poker should be legal. The assertion of this paper is that both ought to be treated similarly. If one is legal, both should be, and vice-versa. There appears to be no principled distinction to treat the two differently. Moreover, there is no principled justification to argue bald conclusions that one is a game of

201. See generally *US Poker Legislation: Where Can You Play Online Poker?*, POKER NEWS, <https://www.pokernews.com/us-poker-map/> [https://perma.cc/9QCD-DUEW] (last visited Aug. 30, 2021).

202. Exceptions to this general rule are Nevada, New Jersey, Michigan, Pennsylvania, West Virginia, and Delaware. See *id.*

203. *Table Games—Twin River Casino Hotel*, TWINRIVER.COM, <https://www.twinriver.com/table-games/> [https://perma.cc/NV3S-H6SG] (last visited Aug. 29, 2021); *Where You Can Play Online Poker in Rhode Island*, POKER NEWS, <https://www.pokernews.com/us-poker-map/rhode-island.htm> [https://perma.cc/2C2Q-RZJD] (last visited Aug. 29, 2021).

skill, while the other is a game of chance. There is a combination of luck and skill in both games. Legal tests based on which factor “predominates” are equally unhelpful because it is unknowable and unquantifiable to determine an exact or even rough ratio of skill versus luck. The only guidance the law has been able to provide are rulings based on a party’s ability to meet a burden that skill or luck is more than fifty percent predominant. However, the ability or failure to meet a burden does not establish whether skill or luck is at the heart of the game.

DFS players understand that success depends on avoiding the bad luck of a key athlete suffering an injury during the game. Does this make DFS a game of chance? No, because other factors requiring skill are involved. But which is more important: skill or chance? The answer is “it depends,” and the answer also depends on whether the timeframe is one gameday or an entire season or seasons. In poker, a player does not win a big tournament solely due to skill. Successful poker players will acknowledge that winning a big tournament turned on a few hands where luck was the sole determinant of the outcome of those hands.

It may not be possible to conclusively demonstrate that DFS or poker are predominantly games of skill or games of chance. However, there seem to be more similarity than differences between them. Considering those similarities, this Article stands for the assertion that they should be treated the same. The general legality of one versus the general illegality of the other seems arbitrary, almost as if determined by chance.