

# Unboxing the Issue: The Future of Video Game Loot Boxes in the U.S.

Maddie Level\*

*“It’s only a game, why do you have to be mad?”*

—Aleksandra Zaryanova<sup>1</sup>

## I. INTRODUCTION

Video games are a source of joy for many—regardless of whether we played *Tetris* or the newest *Battlefront* iteration, whether we played on a joystick or a custom-built computer. The challenges and surrealist beauty in the games we play are what keep us coming back. New and potentially illegal mechanics in modern video games, however, could keep us coming back for different reasons.

Modern technology is quickly outpacing the American legal system, with each new technological innovation spawning new legal issues. The video game industry is no exception. Numerous game developers offer in-game microtransactions commonly known as “loot boxes.”<sup>2</sup>

According to current projections, loot boxes and similar mechanisms are set to produce \$50 billion in revenue worldwide by 2022.<sup>3</sup> Overall, the gaming market is expected to skyrocket to a net worth of \$160 billion in

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1. This is a voice line available for the character Aleksandra Zaryanova (better known as “Zarya”) in the popular video game, *Overwatch* (2016). See *Zarya*, OVERWATCH, <https://playoverwatch.com/en-us/heroes/zarya/> (last visited Oct. 23, 2019). To listen to this voice line, see NoStrife Games, *It’s Only a Game. Why Do You Have to Be Mad? - OVERWATCH ZARYA SUMMER GAMES 2017 VOICE LINE*, YOUTUBE (Aug. 14, 2017), <https://www.youtube.com/watch?v=YO69xNpuUDc>. This voice line is one example of the thousands of items available in loot boxes.

2. See Finlay Grieg, *Here’s What Parents Need to Know About Mystery Loot Boxes in Video Games*, INEWS (Sep. 12, 2018, 2:34 PM), <https://inews.co.uk/culture/gaming/mystery-loot-box-video-games-parents-guide-gambling-fortnite-fifa/> [<https://perma.cc/GL9C-LQ88>].

3. Press Release, Juniper Research, *Loot Boxes & Skins Gambling to Generate a \$50 Billion Industry by 2022* (April 17, 2019), <https://www.juniperresearch.com/press/press-releases/loot-boxes-and-skins-gambling> [<https://perma.cc/P5Q3-EK2Q>].

the same timeframe.<sup>4</sup> As such, loot boxes—and the video game market more generally—are on track to quickly outpace legal commercial gambling operations in the next few years.

Microtransactions, including loot boxes, provide millions of dollars in revenue for game developers,<sup>5</sup> but also create a litany of potential legal questions. One such question this Comment endeavors to answer is whether the loot box system itself should be subject to regulation under anti-gambling laws in the United States. Loot boxes appear to fulfill the elements of gambling in most U.S. jurisdictions, as they require consideration, chance, and provide the opportunity to win a prize of value.<sup>6</sup> Courts, however, may never substantially join this discussion.

Even if loot boxes fulfill the requirements of gambling, bringing a claim at the state or federal level on this particular issue would be an uphill battle. Such difficulty stems from issues proving injury in fact. The current federal anti-gambling statutes cannot be stretched to encompass loot boxes as a form of illegal gambling. Coupled with the fact that each state has its own regulations and statutes on the legality of gambling, finding a legal basis for such a claim could prove difficult. But the potential ramifications of leaving loot boxes unregulated demand attention. Legal precedent as well as policy concerns will eventually force judicial and legislative advocates to address the issue of whether loot boxes, as they are currently implemented, are a form of illegal gambling.

Game developers could easily avoid potential criminal and civil liability by augmenting the mechanics of loot box systems. Yet, they are unlikely to do so because there is little legislative, judicial, or societal pressure to incentivize change. Additionally, loot boxes generate large amounts of revenue for game developers, who are unlikely to change their profitable current models.

This Comment argues that while loot boxes appear to fulfill the elements of gambling, issues with proving injury in fact will prevent an individual from bringing a suit imposing liability on game developers that implement loot box mechanisms in their video games. Section II of this

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4. Press Release, Juniper Research, *Loot Boxes & In-Game Spend Drive Digital Games Market: Surpassing \$160 Billion by 2020* (May 1, 2018), <https://www.juniperresearch.com/press/press-releases/loot-boxes-in-game-spend-drive-digital-games/> [https://perma.cc/YF26-AB6Z].

5. Rob Thubron, *Over Half of Activision Blizzard's \$7.16 Billion Yearly Revenue Came from Microtransactions*, TECHSPOT (Feb. 12, 2018, 6:12 AM), <https://www.techspot.com/news/73230-over-half-activision-blizzard-716-billion-yearly-revenue.html> [https://perma.cc/7SDQ-BHF6] (stating that game developer Activision Blizzard earned \$7.3 billion in net bookings over the previous year and noting microtransactions provide “high-margin” revenues).

6. See *infra* Section III.B.

Comment begins with an exploration of the design and history of loot boxes, traditional views on gambling in the United States, and applicable federal statutes regulating illegal gambling. Next, Section II discusses the potential negative implications of allowing loot boxes to remain unregulated in the United States. Section III of this Comment shows how loot boxes fulfill the elements necessary to constitute gambling. Section III then details potential issues individuals would face bringing a loot box related lawsuit under federal law. Finally, Section III details how game developers could avoid liability in the future.

## II. BACKGROUND

### A. *Design and History of Loot Boxes*

Loot boxes are consumable virtual items which can be redeemed for a randomized selection of other virtual items.<sup>7</sup> When loot boxes are opened, they are often accompanied by colorful animations and sweeping music.<sup>8</sup> Some loot box systems even present themselves as gambling icons like roulette wheels or slot machines.<sup>9</sup> An opened loot box provides the player with a set number of randomized assortment of in-game cosmetics like skins, sprays, weapons, character introductions, player icons, and emote animations.<sup>10</sup> These in-game cosmetics are categorized by rarity, with rarer items being found less frequently in loot boxes.<sup>11</sup> In some games, a player can receive duplicates of items already received or purchased.<sup>12</sup> Players can receive loot boxes in several ways. Depending on the game, players may receive loot boxes by leveling up in-game, through limited seasonal events, or by purchasing them with real-world currency.<sup>13</sup> For

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7. See Alex Wiltshire, *Behind the Addictive Psychology and Seductive Art of Loot Boxes*, PC GAMER (Sept. 28, 2017), <https://www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes/> [https://perma.cc/X58V-R6B3].

8. *Id.*

9. *Id.*

10. *Id.*

11. See, e.g., Elizabeth Harper, *Overwatch, Hearthstone, and Heroes Loot Box Drop Rates Revealed in China*, BLIZZARD WATCH (May 5, 2017, 3:01 PM), <https://blizzardwatch.com/2017/05/05/overwatch-hearthstone-heroes-loot-box-drop-rates-revealed-china/> [https://perma.cc/4YAM-WCP7].

12. See generally Michael McWhertor, *Blizzard to 'Drastically Reduce' Overwatch Loot Box Duplicates*, POLYGON (June 22, 2017, 2:45 PM), <https://www.polygon.com/2017/6/22/15855604/overwatch-loot-box-duplicates-change-blizzard-jeff-kaplan> [https://perma.cc/33Q4-KLR4].

13. Heather Alexandra, *Loot Boxes Are Designed to Exploit Us*, KOTAKU (Oct. 13, 2017, 6:00 PM), <https://kotaku.com/loot-boxes-are-designed-to-exploit-us-1819457592> [https://perma.cc/2MBF-GNF3].

example, in the popular game *Overwatch*, players can purchase loot boxes in packages ranging from approximately \$2.00 to \$40.00.<sup>14</sup>

The first instance of a system resembling the modern-day loot box system occurred in Asian gaming markets in the late 1990s.<sup>15</sup> Loot boxes gained popularity among Western game developers nearly a decade later, after the success of Asian free-to-play games offering loot boxes.<sup>16</sup> Over the past few years, “the prevalence of loot boxes [has] swell[ed] as developers continue to try to find alternative ways to entice players into spending past the initial buy.”<sup>17</sup> Although recognized as “fundamentally ethical,” loot boxes may also encourage overconsumption by artificially creating a never-ending quest to obtain “more meaningful loot.”<sup>18</sup>

Many video games utilize a version of the modern loot box system. The most notable games to offer loot boxes are the *FIFA*, *Call of Duty*, and *Halo* franchises. Most infamously, in 2017, game developer Electronic Arts (“EA”) released *Star Wars: Battlefront II* with a proposed loot box system.<sup>19</sup> *Star Wars: Battlefront II* was met with heavy criticism from the gaming community and the press for creating a “pay to win” system, wherein a player could pay for loot boxes, giving them items that would instantly accelerate their in-game progress.<sup>20</sup> In a phone call with investors, EA CEO Andrew Wilson unequivocally took the stance that the loot boxes EA intended to implement were not gambling.<sup>21</sup> Faced with an overwhelming negative reception, EA pulled the loot box system from *Star Wars: Battlefront II*, instead offering rewards for “organically playing the game.”<sup>22</sup> Nevertheless, due to their profitability, loot boxes will

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14. Daniel Friedman, *Are Overwatch's Loot Boxes Worth Your Money?*, POLYGON (May 26, 2016, 12:30 PM), <https://www.polygon.com/2016/5/26/11785084/overwatch-loot-system-guide> [<https://perma.cc/W29G-FJL8>] (providing that *Overwatch* players can purchase the following “bundles of randomized loot boxes: two boxes for \$1.99, five boxes for \$4.99, [eleven] boxes for \$9.99, [twenty-four] boxes for \$19.99 or [fifty] boxes for \$39.99”).

15. Steven T. Wright, *The Evolution of Loot Boxes*, PC GAMER (Dec. 8, 2017), <https://www.pcgamer.com/the-evolution-of-loot-boxes/> [<https://perma.cc/E8PY-3VE2>].

16. *Id.*

17. *Id.*

18. *Id.*

19. Ben Gilbert, *'We Got it Wrong': EA Exec Apologizes for 'Star Wars' Loot Box Fiasco, Promises to 'Be Better.'*, BUS. INSIDER (Apr. 17, 2018, 9:11 AM), <https://www.businessinsider.com/star-wars-battlefront-2-ea-apologizes-for-loot-box-fiasco-2018-4> [<https://perma.cc/22AA-MWS6>].

20. *Id.*

21. See Tom McShea, *EA Adamant Loot Boxes Aren't Gambling*, GAMESINDUSTRY.BIZ (May 9, 2018), <https://www.gamesindustry.biz/articles/2018-05-09-ea-adamant-loot-boxes-arent-gambling> [<https://perma.cc/RA4S-6U5V>].

22. *Star Wars Battlefront 2's Loot Box Controversy Explained*, GAME SPOT (Nov. 22, 2017, 12:37

continue to be a significant factor in determining the overall strength of the gaming market.<sup>23</sup>

*B. A Brief History of Gambling in the United States*

Due to the development of new gambling mechanisms and technology, gaming regulation in the United States has been far from consistent. Gambling legislation is largely shaped by factors including “historical legal baggage, feelings of morality and tradition, demographics, sociological and psychological factors, and pure irrationality.”<sup>24</sup> Gaming regulations in the U.S. arguably serve to construct a “moral framework,” creating “an imagined ideal society.”<sup>25</sup>

Gambling is a central part of American history. The first colonial settlements were funded, in part, by lottery systems.<sup>26</sup> In the early nineteenth century, fueled by numerous lottery scandals, state and federal legislative reform led to the near prohibition of lotteries.<sup>27</sup> However, as settlers made their way West, the frontier became plagued with gambling.<sup>28</sup> After the Civil War, Victorian morality gained popularity, bringing anti-gambling sentiments to the Wild West.<sup>29</sup> The territories of New Mexico and Arizona were forced to close casinos to gain statehood.<sup>30</sup> However, regulations outlawing gambling tended to drive such activities underground.<sup>31</sup> But crime syndicates appeared undeterred, leading to more even more stringent regulation on illegal gambling.<sup>32</sup> The remnants of post-depression era regulations, and subsequent attempts to combat

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PM), <https://www.gamespot.com/articles/star-wars-battlefront-2s-loot-box-controversy-expl/1100-6455155/> [<https://perma.cc/J7FR-SMD4>].

23. See *supra* note 3 and accompanying text.

24. I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 364 (2010).

25. *Id.* at 365.

26. See John Samuel Ezell, FORTUNE’S MERRY WHEEL: THE LOTTERY IN AMERICA 30–32, 177, 204–05 (1960) (exploring history of American gambling and describing a lottery system that “prevailed in all colonies”).

27. Rose, *supra* note 24, at 369.

28. *Id.* at 370.

29. *Id.* at 373.

30. See Barton Wood Currie, *The Transformation of the Southwest: Through the Legal Abolition of Gambling*, 75 THE CENTURY ILLUSTRATED MONTHLY MAG. 905, 905–06 (1908) (describing the attitudes toward gambling and the transformations that territories went through in order to become states).

31. Rose, *supra* note 24, at 366.

32. See *id.*

organized crime are the framework for modern-day gambling legislation.<sup>33</sup>

*C. An Overview of Federal Gambling Regulations in the United States*

In July 2019 alone, commercial casinos across the nation generated over \$3.8 billion in revenue.<sup>34</sup> The American Gaming Association estimated the gambling industry contributed to more than \$8 billion in state and local tax revenue in 2015.<sup>35</sup> However, commercial casinos are not the only source of gambling revenue. The global online gambling market is predicted to reach a value of \$128.2 billion within the next decade and is expected to grow at a rate of 11.8% between 2018 and 2026.<sup>36</sup>

Due to the nature and size of the industry, gambling is a legally restricted activity in the United States. Gambling is conditionally legal under federal law, although each state is permitted to regulate gambling within its territory. Gambling is broadly regulated by federal law through several statutes.<sup>37</sup> The most applicable and broad sweeping federal statutes include the Federal Wire Act,<sup>38</sup> the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>39</sup> the Illegal Gambling Business Act (IGBA),<sup>40</sup> and more recently, the Unlawful Internet Gambling Enforcement Act (UIGEA).<sup>41</sup>

The Federal Wire Act prohibits interstate commerce centered on bets or wagers as well as the transfer of funds received as a result of those bets

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33. *Id.* at 367.

34. UNIV. OF NEV., LAS VEGAS CTR. FOR GAMING RESEARCH, NATIONAL STATES COMMERCIAL CASINO GAMBLING: MONTHLY REVENUES (2019), [https://gaming.unlv.edu/reports/national\\_monthly.pdf](https://gaming.unlv.edu/reports/national_monthly.pdf) [<https://perma.cc/G62F-RJUT>].

35. AM. GAMING ASS'N, THE STATE OF THE STATES: THE AGA SURVEY OF THE CASINO INDUSTRY 5 (2016), [https://www.americangaming.org/sites/default/files/2016%20State%20of%20the%20States\\_FINALE.pdf](https://www.americangaming.org/sites/default/files/2016%20State%20of%20the%20States_FINALE.pdf) [<https://perma.cc/X557-GLNA>].

36. Press Release, SBWire, Global Online Gambling Betting Market Projected to Reach a Value of US \$128.2 Bn by 2026 (Oct. 1, 2018), <http://www.sbwire.com/press-releases/global-online-gambling-betting-market-projected-to-reach-a-value-of-us-1282-bn-by-2026-1056081.htm> [<https://perma.cc/KG7H-T8MM>] (citing MKT. RES. REP. SEARCH ENGINE, ONLINE GAMBLING & BETTING MARKET – GLOBAL INDUSTRY ANALYSIS, SIZE, SHARE, GROWTH, TRENDS, AND FORECAST 2018–2026 (2018)).

37. While there are numerous statutes that regulate gambling, this Comment focuses on what appear to be the most applicable federal statutes to this particular issue. Other statutes, including state statutes, are outside the scope of this Comment.

38. 18 U.S.C. § 1084 (2012).

39. *Id.* §§ 1961–1968 (2012 & Supp. 2017).

40. *Id.* § 1955.

41. 31 U.S.C. §§ 5361–5367 (2012).

or wagers.<sup>42</sup> In 2011, the Department of Justice provided an opinion clarifying the intended scope of the Federal Wire Act, concluding that “[i]nterstate transmissions of wire communications that do not relate to a ‘sporting event or contest’ fall outside the reach of the Wire Act.”<sup>43</sup> The Fifth Circuit Court of Appeals echoed this sentiment, interpreting the scope of the Federal Wire Act to encompass all forms of sports betting, but not any other form of online gambling.<sup>44</sup>

In addition, RICO imposes criminal penalties and provides for civil causes of action against those engaging in “racketeering activity.”<sup>45</sup> RICO lists thirty-five crimes as racketeering activity, including illegal gambling.<sup>46</sup> A person who has committed two or more acts of racketeering may be charged under RICO, if such acts are related to the furtherance of an enterprise.<sup>47</sup> Additionally, RICO makes it a federal crime to violate any state statute regulating gambling.<sup>48</sup> RICO also allows private individuals who encounter damage to “business or property” to file a civil suit against an alleged racketeer.<sup>49</sup> Criminals convicted under RICO face up to \$25,000 in fines and twenty years in prison per count.<sup>50</sup> Although RICO’s primary intent was to combat organized crime syndicates,<sup>51</sup> the expansive list of what constitutes “racketeering activity” under RICO allows for broad application in both the civil and criminal context.

Another federal statute governing illegal gambling activities is the IGBA. On its face, the IGBA appears to reach all illegal gambling business conducted online. Under the IGBA, any business comprised of five or more individuals that conducts, manages, or finances illegal gambling activities may be held criminally liable.<sup>52</sup> However, the IGBA only bars gambling activities that are illegal under applicable state

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42. 18 U.S.C. § 1084(a) (2012).

43. Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. \_\_, 1 (2011), [https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion_0.pdf) [<https://perma.cc/G8HK-4SUR>] [hereinafter 2011 State Lotteries Opinion].

44. *In re Mastercard Int’l Internet Gambling Litig.*, 313 F.3d 257, 262–63 (5th Cir. 2002).

45. 18 U.S.C. § 1963–64 (2012).

46. *Id.* § 1961 (2012 & Supp. 2017).

47. *Id.* § 1962(a) (2012).

48. *Id.* § 1961(6) (2012 & Supp. 2017).

49. *Id.* § 1964(c) (2012).

50. *Id.* § 1963(a) (2012).

51. Dana P. Babb, *Recent Development: Asked but Not Answered—Accrual of Private Civil RICO Claims Following Klehr v. A.O. Smith Corp.*, 76 WASH. U. L.Q. 1149, 1150 (1998).

52. 18 U.S.C. § 1955(b)(1) (2012 & Supp. 2017).

statute.<sup>53</sup> A violation of the IGBA may result in a fine up to \$500,000 and five years in jail.<sup>54</sup> Although it was enacted before the prevalence of video games or Internet gambling, “its minimal requirements may make it a likely candidate” for the prosecution of illegal Internet gambling operations.<sup>55</sup> Despite this, prosecutors of illegal gambling traditionally favor the Federal Wire Act or RICO, relying on their broader application to a variety of crimes, as well as established case precedent.<sup>56</sup>

The UIGEA prohibits businesses from knowingly accepting payment in connection with or in furtherance of illegal Internet gambling activity.<sup>57</sup> Included in its definitions provision, the UIGEA describes a bet as risking something of value on a “game subject to chance.”<sup>58</sup> Charges brought under the UIGEA may be initiated by the United States or state attorneys general in federal court.<sup>59</sup>

Congress enacted the UIGEA because “traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”<sup>60</sup> Congress also found that “Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.”<sup>61</sup> Critics of the UIGEA, however, claim it does not do enough to effectively address online gambling.<sup>62</sup> This criticism draws mainly from the UIGEA’s legislative history, as many believe it was hastily drafted.<sup>63</sup> The UIGEA passed a day before Congress adjourned for the 2006 elections as a portion of the non-controversial Securities and Accountability For Every Port Act (“SAFE Port”).<sup>64</sup>

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53. *Id.*

54. *See id.*

55. Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, 53 (2004).

56. *See, e.g.,* United States v. Racing Servs., Inc., 580 F.3d 710, 713–14 (8th Cir. 2009); *see also* Gottfried, *supra* note 55, at 54.

57. 31 U.S.C. § 5363 (2012).

58. *Id.* § 5362(1)(A).

59. *Id.* § 5365(b).

60. *Id.* § 5361(a)(4).

61. *Id.* § 5361(a)(1).

62. *See* Gerd Alexander, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is A Bad Bet*, 2008 DUKE L. & TECH. REV. 6, 44 (2008).

63. *See* Kristina L. Perry, *The Current State of the Unlawful Internet Gambling Enforcement Act and Recently Adopted Prohibition on Funding of Unlawful Internet Gambling*, 8 RICH. J. GLOBAL L. & BUS. 29, 29 (2008).

64. *Id.*

According to one senator, no one on the Senate Conference Committee was able to read the final version of the UIGEA before it was passed as part of the unrelated SAFE Port Act.<sup>65</sup>

As a result, the UIGEA has been challenged for its vague language.<sup>66</sup> In exploring UIGEA's effectiveness, the Third Circuit, for example, focused in on the fact the UIGEA "does not itself outlaw any gambling activity, but rather incorporates other Federal or State law related to gambling."<sup>67</sup> As the Third Circuit Court of Appeals concluded, this does not in and of itself make the UIGEA unconstitutionally vague.<sup>68</sup> However, the UIGEA's lack of active concreteness does make it somewhat unhelpful and arguably moot as few successful claims have been brought under it; most cases resulting in convictions or guilty pleas under the UIGEA are those brought against Internet poker rooms or similar syndicates.<sup>69</sup>

#### D. *The Trading Card Analogy*

Because loot boxes are a fairly recent invention, no U.S. court—at the state or federal level—has decided a case on whether loot boxes constitute gambling. When asked if it would categorize loot boxes as gambling, a U.S. Entertainment Software Rating Board (ESRB) spokesperson stated in an email to gaming news outlet, *Kotaku*:

While there's an element of chance in these mechanics, the player is *always* guaranteed to receive in-game content (even if the player unfortunately receives something they don't want). We think of it as a similar principle to collectible card games: Sometimes you'll open a pack and get a brand new holographic card you've had your eye on for a while. But other times you'll end up with a pack of cards you already have.<sup>70</sup>

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65. I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 537 (2006), <https://www.liebertpub.com/doi/pdf/10.1089/igr.2006.10.537> [<https://perma.cc/R2KB-9FXH>].

66. *Interactive Media Entm't & Gaming Ass'n v. Att'y Gen. of the U.S.*, 580 F.3d 113, 115 (3d Cir. 2009).

67. *Id.* at 116.

68. *Id.*

69. *See, e.g., United States v. Elie*, No. S3 10 CRIM. 0336, 2012 WL 383403 (S.D.N.Y. Feb. 7, 2012).

70. Jason Schrier, *ESRB Says It Doesn't See 'Loot Boxes' as Gambling*, KOTAKU (Oct. 11, 2017), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091> [<https://perma.cc/VTX6-U7W8>].

The analogy between loot boxes and baseball cards is prevalent within the gaming community and has evolved into a highly contentious debate.<sup>71</sup>

Yet, in the late 1990s and early 2000s, baseball cards were the subject of several court cases brought under RICO.<sup>72</sup> The first of these cases, *Price v. Pinnacle Brands*, originated in the United States District Court for the Northern District of Texas in 1996.<sup>73</sup> In *Pinnacle Brands*, the plaintiffs alleged a trading card manufacturer engaged in illegal gambling by manufacturing rare cards (known as “chase” cards) and randomly packaging the highly sought-after cards among other common cards.<sup>74</sup> Plaintiffs argued they were not disappointed by obtaining less valuable cards, but rather in their pursuit of the chase cards, suffered significant gambling losses recoverable under RICO.<sup>75</sup> The court dismissed the plaintiffs’ claim, citing pleading and standing insufficiencies, without addressing the issue of whether Pinnacle’s chase cards fulfilled the elements of gambling under state or federal law.<sup>76</sup> The Fifth Circuit Court of Appeals affirmed this decision.<sup>77</sup> However, the Fifth Circuit similarly neglected to discuss the merits of the claim brought against Pinnacle.<sup>78</sup> All subsequent RICO claims against trading card companies met the same ill-fated dismissal as the one set forth in *Pinnacle Brands*.<sup>79</sup> Therefore, no U.S. court has fully addressed whether trading cards actually fulfill the elements of gambling.

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71. See, e.g., Jef Rouner, *The Most Ridiculous Defense for Loot Boxes*, HOUS. PRESS (Dec. 6, 2018, 4:30 AM), <https://www.houstonpress.com/arts/loot-boxes-are-not-like-baseball-cards-11066839> [<https://perma.cc/E6CU-2BCG>]; Jeff Grubb, *Australian Study: Loot Boxes Are More Like Gambling Than Baseball Cards*, VENTURE BEAT (Sep. 17, 2018, 2:36 PM), <https://venturebeat.com/2018/09/17/loot-boxes-australian-study/>; Hadyn Taylor, *Loot Boxes: An Industry At War With Itself Over A Technicality*, GAMESINDUSTRY.BIZ (Dec. 12, 2018), <https://www.gamesindustry.biz/articles/2018-12-12-loot-boxes-a-year-in-review> [<https://perma.cc/UGB6-AKU6>].

72. See, e.g., *Price v. Pinnacle Brands*, 138 F.3d 602 (5th Cir. 1998); *Major League Baseball Props., Inc. v. Price*, 105 F. Supp. 2d 46 (E.D.N.Y. 2000); *Dumas v. Major League Baseball Props., Inc.*, 104 F. Supp. 2d 1220 (S.D. Cal. 2000); *Chaset v. Fleer/Skybox Int’l*, 300 F.3d 1083 (9th Cir. 2002).

73. *Pinnacle Brands*, 138 F.3d at 605.

74. *Id.* at 604.

75. Opening Brief of Plaintiffs-Appellants at 17, *Price v. Pinnacle Brands*, 138 F.3d 602 (5th Cir. 1998).

76. *Pinnacle Brands*, 138 F.3d at 605.

77. *Id.* at 608.

78. *Id.* at 606–08.

79. See, e.g., *Major League Baseball Props., Inc. v. Price*, 105 F. Supp. 2d 46 (E.D.N.Y. 2000); *Chaset v. Fleer/Skybox Int’l*, 300 F.3d 1083 (9th Cir. 2002); *Dumas v. Major League Baseball Props., Inc.*, 104 F. Supp. 2d 1220 (S.D. Cal. 2000).

### III. ANALYSIS

Unregulated loot boxes will continue to drive game developers to seek profits by pushing the envelope of illegal gambling. Utilizing existing federal laws to try and control a technology only just recently contemplated by law makers will prove futile. Additionally, individual civil enforcement mechanisms are equally inept and procedurally difficult. Unless game developers are forced to curtail what otherwise looks like illegal gaming through effective regulation, the industry will continue to gamble on profits.

#### A. *Level One: Loot Boxes Should be Regulated*

As a matter of precedent, it is dangerous to allow loot boxes to remain unregulated. Loot boxes resemble gambling in many key aspects. Allowing them to remain unregulated incentivizes technologically savvy developers to implement new and creative gambling mechanisms without the fear of criminal or civil prosecution. Video game start-ups will rationalize the implementation of these systems. Prominent game developers with widespread multi-million-dollar loot box systems have not been told “no.” Until these game developers are held accountable for their arguably illegal gambling activity, nothing will change. Loot boxes will continue to be an enormous revenue stream for game developers unless legislation or the judiciary decides their legality.

Loot boxes should also be regulated as a matter of public policy. Despite the ESRB’s statement that loot boxes are not gambling, several international jurisdictions have recognized the similarities between loot box systems and real-world gambling. International gaming commissions, including China, Belgium, and the Netherlands, have produced statements concluding loot boxes violate their country’s gambling regulations or public policy.<sup>80</sup> Many of these jurisdictions cite concerns regarding the health and safety of minors in their decisions.<sup>81</sup>

According to a recent study, ten out of twenty-two of the best-selling games available to those under the age of seventeen induced gambling or

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80. T.J. Hafer, *The Legal Status of Loot Boxes Around the World and What’s Next in the Debate*, PC GAMER (Oct. 26, 2018), <https://www.pcgamer.com/the-legal-status-of-loot-boxes-around-the-world-and-whats-next/> [https://perma.cc/C5SL-GV3V].

81. See Wesley Yin-Poole, *Now Belgium Declares Loot Boxes Gambling and Therefore Illegal*, EUROGAMER (April 27, 2018), <https://www.eurogamer.net/articles/2018-04-25-now-belgium-declares-loot-boxes-gambling-and-therefore-illegal> [https://perma.cc/LX37-CYZU].

risk-taking behaviors through their loot box systems.<sup>82</sup> The design and marketing of video games, as well as their loot box systems, are targeted toward children.<sup>83</sup> Empirical data suggests children who engage in gambling behaviors at a young age are more likely to suffer from distorted cognition.<sup>84</sup> Loot boxes have a unique potential to adversely impact their target audience. Regulation is necessary to prevent the long lasting and potentially harmful effects associated with loot boxes.

### *B. Loot Boxes Fulfill the Elements of Gambling*

An activity constitutes gambling if the activity includes: (1) consideration; (2) chance; and (3) a prize.<sup>85</sup> As such, it must first be determined if loot boxes fulfill these basic elements. This Section discusses each element individually and attempts to demonstrate how loot boxes could be categorized as a form of gambling.

#### 1. Consideration

First, loot boxes require consideration. In contract law, consideration is defined as “[s]omething (such as an act, forbearance, or a return promise) bargained for and received by a promisor from a promisee.”<sup>86</sup> Although courts determined gambling implicates contract law to a degree, the analysis of what constitutes consideration within the context of gambling does not always exactly mirror a contract law analysis because gambling can be analyzed as a tort or a contract issue. The definition of the consideration element of gambling has been coined as “special” and proven somewhat problematic to distill due to this overlap in analysis.<sup>87</sup>

Despite a difficult first analysis, courts have settled on a general

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82. Mike McRae, *The Psychology Behind Why Loot Boxes Are Like Gambling Is Getting Clearer*, SCI. ALERT (June 21, 2018), <https://www.sciencealert.com/psychology-loot-boxes-reflect-gambling> [<https://perma.cc/T9CX-BQ3N>].

83. See Mattha Busby, ‘Easy Trap to Fall Into’: Why Video-Game Loot Boxes Need Regulation, GUARDIAN (May 29, 2018, 1:50 PM), <https://www.theguardian.com/games/2018/may/29/gamers-politicians-regulation-video-game-loot-boxes>.

84. See Jeffrey L. Derevensky, Rina Gupta & Hayley R. Baboushkin, *Underlying Cognition in Children’s Gambling Behavior: Can They Be Modified?*, 7 J. INT’L GAMBLING STUD. 281, 295 (Oct. 24, 2007), <https://www.tandfonline.com/doi/pdf/10.1080/14459790701601448?needAccess=true> [<https://perma.cc/VSB2-GBHW>].

85. See, e.g., KAN. STAT. ANN. § 21-6403 (2018); IND. CODE ANN. § 35-45-5-1 (LexisNexis 2007).

86. *Consideration*, BLACK’S LAW DICTIONARY (8th ed. 2004).

87. See, e.g., *Albertson’s, Inc. v. Hansen*, 600 P.2d 982, 989 (Utah 1979).

definition of consideration within the context of gambling. Consideration is a fee, in the form of money or anything of value, that an individual pays the operator for the chance to win a prize.<sup>88</sup> Even more simply, consideration has been described as “something of value” offered upon a chance to win.<sup>89</sup> Individual loot boxes are available for purchase via credit card for approximately \$1 per box.<sup>90</sup> The fee exchanged for a loot box has real-world value that the individual offers for a chance to acquire the contents of the loot box. Accordingly, the fees used to purchase loot boxes fulfill the requirement for consideration.

Whether loot boxes purchased with in-game currency satisfy the requirements of consideration remains unclear. Players accrue in-game currency by acquiring experience points (also known as “leveling up”), completing certain quests or challenges, or even from loot boxes themselves.<sup>91</sup> Therefore, it must be determined whether in-game currency is something of value. Many might be quick to dismiss in-game currency gained through hours of time spent in front of a screen as valueless. Even the word choice society uses to describe time spent on video games undermines the idea of value: people “play” video games. At first glance, the idea of categorizing a non-tangible currency, specific to a particular video game that many individuals play in their free time as “something of value” appears laughable. But individuals pour countless hours into these video games, sometimes with the goal of acquiring in-game currency. Many video games that offer loot box systems require immense amounts of skill to progress within the game and accrue in-game currency necessary to purchase loot boxes. To say the time players spend playing these games amounts to a valueless currency defeats the purpose of having in-game currency at all. In-game currency must inherently have value to players and game developers to be a viable and profitable mechanism. As such, even loot boxes purchased with in-game currency appear to fulfill the requirement of consideration.

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88. *Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 981 P.2d 990, 996 (Cal. 1999).

89. *People v. Hecht*, 3 P.2d 399, 401 (Cal. App. Dep’t Super. Ct. 1931).

90. *Overwatch Loot Boxes*, BLIZZARD ENT., <https://us.shop.battle.net/en-us/product/overwatch-loot-box> [<https://perma.cc/3RKQ-B5VU>] (last visited Oct. 23, 2019).

91. See generally John Ryan, *What Is the Best Way to Make Credits in Overwatch*, MMOGAH, <https://www.mmogah.com/news/overwatch/what-is-the-best-way-to-make-credits-in-overwatch> [<https://perma.cc/R4JY-BTL7>] (last visited Oct. 23, 2019); see also Chris Tapsell, *FIFA 18 Coins – How to Earn FIFA Coins Quickly and get FIFA Coins Free in Ultimate Team*, EUROGAMER (Sept. 17, 2018), <https://www.eurogamer.net/articles/2018-03-02-fifa-18-coins-how-to-earn-fifa-coins-quickly-get-coins-free-ultimate-team> [<https://perma.cc/8P2Y-3K38>].

## 2. Chance

Second, loot boxes fulfill the “chance” requirement of gambling. Courts define “chance” to encompass the concept that luck, rather than judgment or skill, decides the win or loss of the prize.<sup>92</sup> In other words, games of chance are determined by forces completely outside the player’s control.<sup>93</sup> Loot boxes are governed by algorithmic probabilities that generate the items within the loot box, just like a slot machine.<sup>94</sup> With the exception of one high-profile instance where game developer Blizzard briefly released its loot box probabilities and statistics for the game *Overwatch* when faced with threat of regulation in China,<sup>95</sup> loot box probabilities are not typically public knowledge.<sup>96</sup>

In the video game *Overwatch*, items are categorized by four levels of rarity.<sup>97</sup> The rarest of these items—so-called “legendary” items—were found approximately once in every 13.5 loot boxes, with each loot box containing four items.<sup>98</sup> Thus, the odds of receiving a legendary *Overwatch* item at any given time in any given loot box is less than 1.09%. If a player wanted to collect every item available in *Overwatch*, the player would need to open between 1,300 and 1,600 loot boxes.<sup>99</sup> Even though the loot boxes can be unlocked for free by obtaining experience points, a person would need to play *Overwatch* for 1,250 hours (over fifty-two days) to collect all in-game items available.<sup>100</sup>

If a slot machine in Las Vegas—although not an identical mechanism

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92. See, e.g., *People v. Grewal*, 168 Cal. Rptr. 3d 749, 761 (Cal. Ct. App. 2014), *rev'd on other grounds*, 326 P.3d 977 (Cal. 2014), *aff'd sub nom. People ex rel. Green v. Grewal*, 352 P.3d 275 (Cal. 2015).

93. See *United States v. 18 Gambling Devices*, 347 F. Supp. 653, 660 (S.D. Miss. 1972) (holding that certain pinball machines are games of chance because they utilize elements outside of the player’s control).

94. See Allegra Frank, *Overwatch Loot Box Probabilities Revealed—at Least for China*, POLYGON (May 5, 2017, 2:00 PM), <https://www.polygon.com/2017/5/5/15558448/overwatch-loot-box-chances-china/> [<https://perma.cc/7ATH-3TNB>]; *What Algorithm Do Slot Machines Use?*, BLACK MESA CASINO, <https://blackmesacasino.com/slot-machine-algorithm/> (last visited Oct. 23, 2019).

95. *Id.*

96. See Frank, *supra* note 94.

97. Daniel Friedman, *Want Overwatch to Get Rid of Loot Boxes? It Might Get More Expensive*, POLYGON (Sept. 5, 2018, 2:00 PM), <https://www.polygon.com/2018/9/5/17822966/overwatch-loot-boxes-skins-events> [<https://perma.cc/7RTM-SAKJ>].

98. *Id.*

99. BELG. GAMING COMM’N, RESEARCH REPORT ON LOOT BOXES 13 (2018), [https://www.gamingcommission.be/opencms/export/sites/default/jhksweb\\_nl/documents/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf](https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf) [<https://perma.cc/93FM-RS2Z>].

100. *Id.*

to a loot box—was set to these payout statistics, it would be illegal. Minimum Internal Control Standards set by the Nevada Gaming Control Board govern the statistics and dollar amount corresponding to a win.<sup>101</sup> Standards regarding slots are set such that the money paid out in the event of a win is balanced against the amount of money put in the machine for the chance to win.<sup>102</sup> Penny slots located on portions of the Vegas Strip are required to pay out approximately 90% of the money put into the machine.<sup>103</sup> If receiving a legendary *Overwatch* item in a loot box was considered a “payout,” receiving a payout from a Vegas slot machine is exponentially more likely.

The type and rarity of a cosmetic contained in any given loot box is generated by an algorithm that the player cannot influence.<sup>104</sup> A player’s game-based skill cannot and does not play any role in what actual content is generated by the loot box. Because the items within loot boxes are not won by skill, but generated at random, loot boxes are governed by chance.

### 3. Prize

Finally, loot boxes offer the player a prize. The prize element of gambling includes anything the operator offers to distribute to winning participants.<sup>105</sup> Some interpretations of “prize” describe it as an item of value.<sup>106</sup> Similar to the issue of whether in-game currency has value is the issue of whether loot boxes present players with the opportunity to win items of value. Items in loot boxes primarily alter the appearance of characters, weapons, or other aspects of the game. Such items are known as in-game cosmetics.<sup>107</sup>

One potential argument in favor of classifying in-game cosmetics as valueless centers on the video game platforms themselves. Items in video games are not tangible and cannot be removed from the game; they lack

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101. See generally NEV. GAMING CONTROL BD., VERSION 8, MINIMUM INTERNAL CONTROL STANDARDS: SLOTS (2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=12635> [<https://perma.cc/C7BW-44FB>].

102. *Id.* at 23.

103. *Nevada Slot Machine Payback Statistics*, AM. CASINO GUIDE, <https://www.americancasinoguide.com/slot-machine-payback-statistics.html#Nevada> (last visited Oct. 23, 2019).

104. See Frank, *supra* note 94.

105. See *W. Telcon, Inc. v. Cal. State Lottery*, 917 P.2d 651, 655 (Cal. 1996) (differentiating between “prize” and “wager”).

106. See, e.g., *State v. Mills*, 980 N.E.2d 1051, 1054 (Ohio Ct. App. 2012).

107. See Wiltshire, *supra* note 7.

liquidity. In-game items, like the games themselves, exist only in the form of code and are accessible only when the game is running on a computer or console. Thus, the items cannot exist in the real-world and cannot have “real-world value” ascribed to them.

This argument fails due to the concepts surrounding the Steam Wallet,<sup>108</sup> skin gambling,<sup>109</sup> and platforms like playerup.com.<sup>110</sup> In such instances, players will pay real money for the transfer of singular virtual items or entire accounts, including the collection of cosmetics associated with the account.<sup>111</sup> Thus, the items themselves have real-world value for players. Likewise, in games where the items contained in loot boxes are categorized by frequency and rarity, value is inherently assigned to the items. Moreover, the collection of items may be seen as a sign of status within the gaming community, thus ascribing a form of value to the items. Traditional legal interpretations of “prize” do not require the item to have a real-world monetary value that can be attached to the item.<sup>112</sup> There is no concrete way to measure the real-world value of in-game cosmetics received from loot boxes because many of these items are not available for purchase with real-world money. But there would be no incentive to acquire or offer cosmetics if they did not have some sort of value to the player.

#### 4. Nerfing the Analysis: A Counter Argument

However, one could argue that loot boxes do not fulfill *any* of the elements required to constitute gambling. Similar to opening a pack of baseball cards, when a player opens a loot box, the player will always receive a set number of items. The only thing left to chance is the rarity of the items received. For example, a pack of fifty-four Topps baseball

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108. The Steam gaming platform allows players to add funds to a “Steam Wallet” that are in turn used to purchase games. *Steam Wallet*, STEAM, [https://support.steampowered.com/kb\\_article.php?ref=1122-RTS-C-0478](https://support.steampowered.com/kb_article.php?ref=1122-RTS-C-0478) [<https://perma.cc/2J7S-J5NB>] (last visited Oct. 23, 2019).

109. The concept of skin gambling is beyond the scope of this Comment, but the concept is relevant to the current issue because skin gambling mimics real world gambling. See Evan Lahti, *CS:GO's Controversial Skin Gambling, Explained*, PC GAMER (July 6, 2016), <https://www.pcgamer.com/csgo-skin-gambling/> [<https://perma.cc/2F7B-WDR3>].

110. *Getting Started: About Us*, PLAYERUP, <https://www.playerup.com/support-tickets/knowledge-base/getting-started-about-us.33/> (last visited Oct. 23, 2019) (“PlayerUp is a free online platform for players of massive multiplayer online (MMO) games to buy, sell, and trade digital accounts.”).

111. *Id.*

112. See *State v. Pinball Mach.*, 404 P.2d 923, 927 (Alaska 1965) (“It is not of the essence of gambling that the element of prize have a monetary market value.”).

cards will cost a collector \$10.00.<sup>113</sup> This averages out to a value of .18 cents per card. The fact that the value of the consideration—.18 cents—is proportionate to the perceived value of the card itself does not seem to implicate any element of chance. Even if the baseball cards are packaged randomly, the individual buying the cards will always, at a minimum, receive cards of a value proportionate to that which the individual spent. There is a chance a card collector will get lucky and find a card of significant value disproportionate to that which she invested. However, there is never a chance the card collector will receive anything less in value than what was spent. Similarly, a player will always receive items when she opens a loot box. But the chances of receiving an item of disproportionately higher value than which the player put forth in consideration for the loot box are very slim.

While logically appealing, this argument is not incontrovertible. Counter to the baseball card analogy is a string of case-law involving Internet cafés.<sup>114</sup> For instance, in *Moore v. Mississippi Gaming Commission*, customers at so-called “sweepstakes cafés” could purchase internet access for an hourly rate and telephone cards for long-distance calls.<sup>115</sup> Telephone cards cost customers a minimum of \$1 and could be used to make long-distance calls.<sup>116</sup> The telephone cards, however, could also be used as entrance into a lottery or sweepstakes.<sup>117</sup> Although customers could enter the sweepstakes for free, customers who bought telephone cards received more entries.<sup>118</sup> The Mississippi Court of Appeals implied that while the telephone cards were ascribed a monetary value that could be used to make phone calls, the cards were essentially valueless.<sup>119</sup> The court stated the cards were essentially valueless because when these cases were being tried in the late 2000s, no one was actually using the telephone cards purchased at the sweepstakes cafés to make phone calls.<sup>120</sup>

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113. *2018 Topps Big League Baseball Value Box*, TOPPS, <https://www.topps.com/2019-big-league-baseball-value-box.html> [<https://perma.cc/KJ28-KAWA>] (last visited Oct. 23, 2019).

114. See *Moore v. Miss. Gaming Comm’n*, 64 So. 3d 537 (Miss. Ct. App. 2011); *State v. Fellows*, 471 S.W.3d 555 (Tex. App. 2015); *State v. Vento*, 286 P.3d 627 (N.M. Ct. App. 2012); *Lucky Bob’s Internet Cafe, LLC v. Cal. Dep’t of Justice*, No. 11-CV-148 BEN, 2013 WL 1849270 (S.D. Cal. May 1, 2013).

115. *Moore*, 64 So.3d at 539, 541–42.

116. *Id.* at 539.

117. *Id.*

118. *Id.*

119. *Id.* at 541.

120. *Id.*

This is not to say loot boxes are more similar to telephone cards than baseball cards. Rather, this analysis highlights the idea that simply because an item—like a telephone card, baseball card, or loot box—has an alleged value equal to that which the individual spent to obtain it, this does not somehow make the gambling activity inherently legal. Therefore, arguments used to compare loot boxes to baseball cards are not irrefutable. Simply relying on the contention that loot boxes do not constitute gambling because the value of the items within a loot box is equal to the amount of money spent to buy the loot box could prove precarious. In jurisdictions with precedent similar to that set forth in the “sweepstakes cafés” cases, the law may favor categorizing loot boxes as a form of illegal gambling. In jurisdictions without such precedent, the decision is not as clear cut; fact finders must determine whether an individual is wagering something of value for the chance to receive something of substantial value in return.

Judges and juries will answer questions like: “Does a video game weapon have value?” “Is a player wagering something of value?” and “Does a player’s wager and what she is likely to receive in return constitute chance?” However, determinations such as these are questions of fact. How these essential questions of fact are answered will likely turn on the finder of fact’s technological literacy. Technological literacy among individuals can vary wildly. Some judges have described video games as nothing more than retooled versions of chess, baseball, or pinball,<sup>121</sup> while children as young as six years old have competed in professional gaming tournaments.<sup>122</sup> As such, (and although a generalization) older fact finders will likely come to different conclusions than younger fact finders on issues regarding newer technologies, including loot boxes. Data appears to suggest juror age does, in fact, play a role in trial outcomes.<sup>123</sup> For example, older juries tend to enter judgments against defendants more often than younger juries.<sup>124</sup> Thus, it is probable a jury of young gamers would reach a different answer to these questions than a jury consisting largely of older persons with little gaming and technological experience.

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121. See, e.g., *Am.’s Best Family Showplace Corp. v. N.Y., Dep’t of Bldgs.*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

122. *Youngest Professional Videogamer*, GUINNESS WORLD RECS., <http://www.guinnessworldrecords.com/world-records/youngest-person-to-be-a-professional-video-gamer> [https://perma.cc/VWT9-ACSA] (last visited Oct. 23, 2019).

123. See generally Shamena Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001 (2014) (examining a study that followed jury selection and trial outcomes in felony cases based on the average ages of the juries).

124. See *id.* at 1014.

While the precedent of a particular jurisdiction may guide a jury or judge, the final determination of these questions lies solely with the finder of fact. As gaming and technology become more prevalent and the public becomes more informed, these determinations will likely become more predictable. Nevertheless, a fact finder, depending on their jurisdiction and level of technological literacy, could come down on either side of this analysis, making regulation a real and credible possibility.

In conclusion, loot boxes could be considered gambling. Loot boxes require consideration because a player wagers something of value—usually money—for a chance to receive a prize. The items contained within a loot box are governed by statistics, and not by a player's skill. Therefore, loot boxes also fulfill the “chance” element of gambling. Additionally, loot boxes contain a prize of value. This value is derived from the in-game categorization and commodification of items received in loot boxes. The categorization (typically based on rarity) inherently ascribes value to items, even if that value is not monetary. As such, loot box systems fulfill all three elements to be considered gambling. However, depending on a jurisdiction's precedent and the technological literacy of a jury or judge, classifying loot boxes as illegal gambling could prove an arduous issue of first impression for many courts.

### *C. Injury in Fact—The Unlikely Boss Battle*

Even if we can categorize loot boxes as a form of gambling under state or federal statutory schemes, individual citizens face several other potential issues in pursuing a claim against game developers.

First, claimants must decide which statute to bring the claim under. As previously discussed, the major federal statutes regulating online gambling in the United States include the Federal Wire Act, the IGBA, the UIGEA, and RICO. The Federal Wire Act governs bets or wagers on sporting events, making it largely inapplicable to the issue of loot boxes.<sup>125</sup> It is unlikely any court would recognize the act of pressing a button to open a virtual box as a sporting event. Although the IGBA's minimal requirements make it an enticing option for filing charges on this topic, it may not gain traction with federal prosecutors because it is rarely invoked.<sup>126</sup> The UIGEA, despite claiming to broadly prohibit online

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125. See 2011 State Lotteries Opinion, *supra* note 43, at 3.

126. The IGBA has not been discussed at length since 2013, when the Second Circuit Court of Appeals decided *United States v. DiCristina*, 726 F.3d 92 (2d Cir. 2013).

gambling, only prohibits the acceptance or transfer of online funds connected to online gambling.<sup>127</sup> RICO claims can be initiated by any private individual that has suffered injury due to an entity's racketeering activity.<sup>128</sup> As such, RICO is arguably the most accessible and inclusive statute allowing an individual to bring a claim alleging loot boxes as a form of illegal gambling.

However, an individual wishing to pursue a civil claim against a game developer for offering loot boxes will face several procedural hurdles. The most difficult issue facing a potential claim alleging loot boxes are a form of illegal gambling is the threshold issue of standing. Before a court can analyze whether loot boxes constitute illegal gambling in violation of a federal statute, the claimant must have standing.<sup>129</sup> To have standing, the claimant must establish injury in fact.<sup>130</sup> The Supreme Court derived the injury in fact requirement from Article III of the U.S. Constitution and articulated the requirements in *Lujan v. Defenders of Wildlife*:

(1) the plaintiff must have suffered an injury in fact—that is, an invasion of a legally protected interest which is

(a) concrete and particularized, meaning that the injury must affect the plaintiff in a personal and individual way, and

(b) actual or imminent, not conjectural or hypothetical,

(2) there must be a causal connection between the injury and the conduct complained of—that is, the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court, and

(3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>131</sup>

It is well established that “disappointment” in failing to receive the item desired does not amount to an injury.<sup>132</sup> Potential claimants would need to show they have suffered a more cognizable injury from the loot

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127. See 31 U.S.C. § 5363 (2012).

128. See 18 U.S.C. § 1964 (2012).

129. See generally *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (holding that a plaintiff must have standing to bring an action).

130. *Id.* at 560.

131. *Id.*

132. *Chaset*, 300 F.3d 1083, 1087 (9th Cir. 2002).

box system.<sup>133</sup> This seems unlikely, given the myriad cases holding claimants alleging trading card companies had violated federal anti-gambling statutes could not prove injury in fact.<sup>134</sup> This precedent suggests that if an individual receives anything of value from a gambling activity, then there is no injury—even if that gambling activity is categorically illegal under federal statute. Because claimants arguably suffer no injury in fact, courts may never reach the merits of the claim before dismissing the suit for lack of standing.

Private individuals face unnecessary and potentially disastrous challenges in proving they have been injured by an entity's illegal gambling scheme. This is especially true where the scheme seems innocent and low stakes, as is the case with loot boxes. However, the belief that loot boxes are always innocent and low stakes is exactly what prevents them from being regulated. Until Congress enacts legislation that explicitly carves out remedies and regulations for gambling activities like loot boxes, the judiciary will be unable and unlikely to stretch existing legislation to cover them.

Depending on the state, an individual or prosecutor could also initiate a claim alleging loot boxes violate established anti-gambling state laws. However, because the states are allowed to regulate gambling within their borders, there are fifty different sets of gambling laws in the United States, on top of federal prohibitions. Recently, state representatives have fashioned legislation specifically targeted at the regulation of loot boxes. Chris Lee, a Hawaii state representative and gamer, is at the forefront of this discussion.<sup>135</sup> In early 2018, Lee helped introduce several bills in Hawaii that would prohibit loot boxes accompanying games marketed for

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133. *See generally id.*

134. *See, e.g.,* Major League Baseball Props., Inc. v. Price, 105 F. Supp. 2d 46 (E.D.N.Y. 2000) (finding no injury in fact for allegations that inserting potentially more desirable cards into a pack violated RICO because not receiving the more desirable cards did not amount to an injury under RICO); Chaset v. Fleer/Skybox Int'l, 300 F.3d 1083 (9th Cir. 2002) (finding no injury in fact for allegations of a RICO violation by marketing and distribution of trading cards because "disappointment" does not amount to a recoverable injury under RICO); Dumas v. Major League Baseball Props., Inc., 104 F. Supp. 2d 1220 (S.D. Cal. 2000) (finding no injury in fact for allegations that purchasing trading cards in hopes receiving cash prizes was a RICO violation because Plaintiffs did not allege injury to person or business); Price v. Pinnacle Brands, 138 F.3d 602 (5th Cir. 1998) (finding no injury in fact allegations of RICO violation due to manufacturer's practice of inserting a rare and collectible card into trading card packs because Plaintiffs failed to allege value of the cards was less than what was paid for them).

135. Paul Tassi, *EA Activision And Others Should Be Afraid of Hawaii's New Loot Box Bills*, FORBES (Feb. 13, 2018, 12:24 PM), <https://www.forbes.com/sites/insertcoin/2018/02/13/ea-activision-and-others-should-be-afraid-of-hawaiis-new-loot-box-bills/#12f24d9a6b5f> [<https://perma.cc/JU2V-3S2F>].

children.<sup>136</sup> These bills failed to pass.<sup>137</sup> There have been attempts to pass similar bills in Washington, California, and Minnesota.<sup>138</sup> However, loot box legislation in these particular states is still “ongoing.”<sup>139</sup>

In early May 2019, Senator Josh Hawley announced he intended to introduce a federal bill banning loot boxes in particular video games.<sup>140</sup> The bill seeks to prohibit loot boxes and other micro-transactions in games marketed toward children.<sup>141</sup> The bill lists several factors that would be used to determine whether a game is “minor-oriented” and thus subject to the bill.<sup>142</sup> Referred to as the “Protecting Children Against Abusive Games Act,” the bill—as it currently reads—is overly broad. The definition of “minor-oriented game” is highly subjective.

For example, one of the fifteen factors used in the determination of whether a game is “minor-oriented” is “the age of the characters or models in the product.”<sup>143</sup> The *South Park* franchise released a video game in 2017 that, despite following the story of elementary aged children, received a “mature” rating from the ESRB.<sup>144</sup> Because the game contains minor children as playable characters, it arguably meets one criterion to be considered a minor-oriented game under Senator Hawley’s proposed bill. While this is not to suggest this video game would constitute a “minor-oriented” game under the bill, this example demonstrates that the highly subjective language Senator Hawley’s proposed legislation could encapsulate many games with an ESRB rating of E, E 10+, and T.<sup>145</sup> This

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136. H.B. 2686, 2018 Leg., 29th Sess. (Haw. 2018); S.B. 3024, 2018 Leg., 29th Sess. (Haw. 2018) 3024; H.B. 2727, 2018 Leg., 29th Sess. (Haw. 2018).

137. Michael Brestovansky, ‘Loot Box’ Bills Fail to Advance, HAW. TRIB.-HERALD (Mar. 24, 2018, 12:05 AM), <https://www.hawaiitribune-herald.com/2018/03/24/hawaii-news/loot-box-bills-fail-to-advance/> [https://perma.cc/K2F4-76C3].

138. S.B. 6266, 2018 Leg., 65th Reg. Sess. (Wash. 2018); Assemb. B. 2194, 2017–2018 Leg., 2018 Reg. Sess. (Cal. 2018); H.B. 4460, 2018 Leg., 90th Reg. Sess. (Minn. 2018).

139. See Sebastian Schwidessen, *USA: New Loot Box Bill Introduced . . . Again*, LINKEDIN (Apr. 27, 2018), <https://www.linkedin.com/pulse/usa-new-loot-box-bill-introduced-again-sebastian-schwidessen-llm-/> [https://perma.cc/7KHL-RGY Y].

140. See Harmeet Kaur, *A Senator Wants to Ban Video Games Like Candy Crush from Offering ‘Loot Boxes,’* CNN BUS. (May 9, 2019, 1:38 PM), <https://www.cnn.com/2019/05/09/tech/video-games-loot-boxes-ban-trnd/index.html> [https://perma.cc/6U3W-UKWR].

141. S. 1629, 116th Cong. (2019).

142. *Id.*

143. *Id.* § 2(5)(E).

144. *South Park: The Fractured but Whole: Rating Summary*, ESRB, <https://www.esrb.org/ratings/35104/South+Park%3A+The+Fractured+but+Whole+/> [https://perma.cc/DE4T-MJ9M] (last visited Oct. 23, 2019).

145. *ESRB Ratings Guide*, ESRB, <https://www.esrb.org/ratings-guide/> [https://perma.cc/FV5W-T7D9] (last visited Oct. 23, 2019).

would account for nearly 91% of video games put on the market in 2018.<sup>146</sup> In response to Senator Hawley's proposal, the Chief Executive Officer of the Entertainment Software Association, Stanley Pierre-Louis, called the bill "flawed and riddled with inaccuracies."<sup>147</sup> Both state and federal regulation is necessary to ensure loot boxes do not fall through the cracks of existing legislation. Arguably, Senator Hawley's proposal highlights the fact legislation must be tailored in such a way as not to demonize or cripple the gaming industry as a whole.

#### *D. Game Developers Can Avoid This Issue Altogether*

Game developers can easily avoid a possible loot box lawsuit. The simplest solution to this potential problem is to remove loot box systems from video games. However, this would result in an economic disaster for game developers. Game developer Activision Blizzard made a record \$7.16 billion in revenue during the 2017 fiscal year.<sup>148</sup> \$4 billion of that revenue was generated by in-game transactions like loot boxes.<sup>149</sup> If developers, such as Activision Blizzard, removed loot boxes systems from their games, they could potentially lose out on half of their overall revenue. However, game developers could face the same outcome, essentially overnight, if legislation or judicial opinions come down in favor of regulating loot boxes as a form of gambling.

As an alternative, game developers could mitigate this economic loss by selling the items contained in loot boxes individually. In many games, cosmetics can only be received by opening loot boxes. Game developers could list the cosmetics on an in-game store, available for a price similar to those a player would pay for a loot box. In such a scheme, there can be no element of chance. The player receives exactly what they paid for.

However, there is a clear reason why game developers have not already implemented this mechanic. Nearly 70% of gamers in a recent poll said they are "ok" with "cosmetic only micropayments," so long as

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146. Max Jay, *Ratings Category Breakdown*, ESRB (Jan. 10, 2019), <https://www.esrb.org/blog/esrb-s-2018-rating-category-breakdown/> [https://perma.cc/EY88-YPME].

147. See Eric Van Allen, *The Loot Box Bill is Public, and the ESA Says It's "Flawed and Riddled with Inaccuracies,"* USGAMER (May 23, 2019), <https://www.usgamer.net/articles/the-loot-box-bill-is-public-and-the-esa-says-its-flawed-and-riddled-with-inaccuracies> [https://perma.cc/2P54-XENP].

148. Rob Thubron, *Over Half of Activision Blizzard's \$7.16 Billion Yearly Revenue Came from Microtransactions*, TECHSPOT (Feb. 12, 2018, 6:12 AM), <https://www.techspot.com/news/73230-over-half-activision-blizzard-716-billion-yearly-revenue.html> [https://perma.cc/KH3P-TU8E].

149. *Id.*

they do not “alter the core parameters of the game.”<sup>150</sup> Conversely, only 2.4% of gamers said they would prefer to pay upfront for the items they want.<sup>151</sup> Loot box systems are appealing to game developers and players alike. It could prove difficult to persuade both consumers and developers to implement systems wherein items are only available for purchase individually. There is simply little incentive to remodel loot box systems without judicial, legislative, or cultural pressure.

The next possible solution is to make loot boxes—or potentially, the items contained therein—available to players by means other than payment. Some video games furnish loot boxes upon leveling-up or during seasonal events.<sup>152</sup> These loot boxes resemble gifts and not gambling. The player does not wager anything in consideration for a chance to receive the contents of the loot box. Because the consideration element cannot be met, loot boxes received in this manner cannot be considered gambling.

Regardless of whether or not there is external, statutory regulation on loot boxes, the gaming community is notoriously self-regulating.<sup>153</sup> In the past, developers removed mechanics that inflamed and infuriated their player bases—including removing loot boxes from their games.<sup>154</sup> If players become upset enough, game developers would likely be forced to modify or even remove the systems themselves. However, as previously discussed, both players and developers appear to enjoy the current loot box system.

#### IV. CONCLUSION

Loot boxes, as they are currently utilized, look and feel like real-world gambling. Some loot box systems even present themselves as slot machines and other gambling devices. However, it seems unlikely the judicial system will treat loot boxes as it does real-world gambling without unequivocal legislation to categorize them as such. A perceptive court or

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150. QUTEE, GAMING TODAY: A REPORT BY QUTEE INTO HOW PLAYERS REALLY FEEL ABOUT GAMING IN 2018, at 7 (2018), <https://s3.amazonaws.com/qutee-reports/Qutee-Gaming-Today-Report.pdf> [<https://perma.cc/5BXV-MCHR>].

151. *Id.*

152. See *Shop*, BLIZZARD ENT., <https://us.shop.battle.net/en-us/product/overwatch-loot-box> [<https://perma.cc/YGN9-6ZP6>] (last visited Oct. 23, 2019).

153. See Tae Kim, *EA's Day of Reckoning is Here After 'Star Wars' Game Uproar, \$3 Billion in Stock Value Wiped Out*, CNBC (Nov. 28, 2017, 4:49 PM), <https://www.cnbc.com/2017/11/28/eas-day-of-reckoning-is-here-after-star-wars-game-uproar.html> [<https://perma.cc/M6ZN-AJ9D>].

154. See Harper, *supra* note 11 and accompanying text.

jury may be able to find loot boxes fulfill the essential elements of gambling. Valid arguments exist to suggest loot boxes require consideration, are governed by chance, and present players with an opportunity to win a prize. Conversely, a technologically illiterate finder of fact who does not recognize the value associated with gaming or the items contained in loot boxes is unlikely to come to the same conclusion.

Yet it is improbable a court would be able to address this substantive issue at all. As precedent suggests, claims alleging injury on the basis of schemes similar to loot box systems are likely to be dismissed for a lack of standing. Individuals will face an uphill battle being able to effectively allege—and then prove—injury in fact given the structure of most loot box systems. Without a cognizable injury in fact, these cases will more than likely go the way of cases involving trading and baseball cards.

Nevertheless, there are many hazards associated with leaving the lucrative loot box market unregulated and unchecked. The gaming industry is aware of the challenges faced by potential plaintiffs and takes full advantage of the ambiguities in the law and the lack of regulation. Even though this issue could be avoided completely with the removal or simple modification of loot box mechanics, game developers and players alike seem unwilling to deviate from the current systems. As such, game developers will continue to push video gaming headfirst into something that more closely resembles real-world gambling, as profits continue to soar.

Unfortunately, the judicial and legal systems designed to protect society have failed to keep up with modern technological advances of the video gaming industry. Developers know there are simply too many obstacles inherent in federal and state statutory schemes that supposedly prohibit gambling. These obstacles are preventing litigants from effectively initiating substantive discussions through litigation. Until these barriers are broken down through effective regulation, the video gaming loot box market will continue to see unprecedented growth at the expense of millions of gamers.