

The Nanny and the Night Watchman

The Conservative case for regulating freedom in a failed market

Dr James Noyes

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Social Market
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Foreword

By Dominic Lawson

It is one of the paradoxes of British politics of the 21st Century that it was Labour, supposedly the enthusiast for the nanny state, which removed regulatory restraints on gambling to a degree not seen even in the US, while opposition to the iniquitous consequences has been led, in the main, by Conservative politicians.

James Noyes provides an invaluable philosophical guide as to why this should be so, and why, for example, Margaret Thatcher, who regarded Friedrich Hayek as an ideological mentor, would never have countenanced what has taken place. It was not just her Methodist upbringing, but an understanding that the market economy takes its moral justification from being socially productive, rather than turning life into some form of giant casino.

The highly consolidated modern gambling industry, however, does not just prey upon, and indeed, create an insidious addiction: it uses its control over online algorithms in a way which turns the apparently free-choosing consumer into a kind of zombie, or what the US writer Shoshana Zuboff describes as 'digital serfdom'. I had not realised, until reading Noyes' essay, that Hayek himself did not believe that gambling contracts should be enforceable, putting them in the same category as "contracts for perpetual servitude."

This was certainly not appreciated, or even understood, by Liz Truss, who while proclaiming Hayek to be an inspiration for her own politics, was absolutely disinclined to carry out the reforms of the gambling industry promised in the 2019 Conservative election manifesto. There is not much time left for that – and as the Betting and Gaming Council's party at the last Labour conference was attended by Keir Starmer along with much of the shadow cabinet, we may really depend on what remains of the Sunak administration to fashion legislation around the principles set out with such clarity here.

“None are more enslaved than those who believe themselves free when they are not”

Goethe, Elective Affinities

The Nanny and the Night Watchman

This is an essay about freedom: the bond between the freedom *to* and the freedom *from*; the struggle over individual freedom between state actors and market forces; and the wider political debate over freedom in the economy and society – particularly in the case of the United Kingdom, where the ruling Conservative Party recently promoted, appointed, regretted and then rejected a libertarian prime minister in Liz Truss.

While the Truss premiership was short, its ideological lineage was long, stretching back to contestations of the post-war Keynesian economic order and the founding of the Mont Pelerin Society by the Austrian philosopher Friedrich Hayek in 1947. Mont Pelerin's Statement of Aims was designed "to contribute to the preservation and improvement of the free society" – an aim based on the belief, as Hayek later wrote in *The Constitution of Liberty*, that "liberty is not merely one particular value but the source and condition of most moral values."¹ Hayek drew on a classical liberal tradition which, he argued, found its modern origins in seventeenth-century England and the changing nature of Parliament, the rise of the Whig movement and the growing influence of philosophers including Cicero and Locke on new expressions of individual sovereignty and government.² This tradition has been upheld by the political heirs to Mont Pelerin: Ronald Reagan said that liberty is "the bond that holds us together,"³ while Margaret Thatcher – who was called an 'icon' by Truss' Chancellor of the Exchequer, Kwasi Kwarteng – spoke of "the sanctity of the individual" in Hayekian terms by describing economic freedom as inseparable from wisdom, honour and the rule of law.⁴

Since Mont Pelerin, the defence of freedom has been associated in economic terms with tax-cutting, deregulation and growth, and in social terms with policies of limiting state intrusion in the lives of individuals and their free choice. In practice this means that politicians have positioned 'the freedom from' as the source and condition (to use Hayek's words) of 'the freedom to': by being free from state intrusion in the form of undue taxation, regulation or legislation, the individual is free to choose and business is free to grow.⁵ In Britain over the past decade, the Conservative government's interpretation of this 'freedom from' has been expressed in three main ways: first, a desire to promote so-called Thatcherite policies of deregulation, lower taxation and supply-side reform; second, a desire to remove EU legislation from the British statute book following Brexit to explore new laws and opportunities for trade and growth; and third, a desire to limit the cultural and social influence of the state in the lives of individuals through a 'War on Woke'. Liz Truss' brief premiership represented the coming-together of these three strands of contemporary Conservative thinking, with calamitous consequences.

This coming-together was not an accident. Rather, it was the inevitable conclusion to a struggle over ideology that has dominated and distracted the Conservative Party for over a decade. At the heart of this struggle, two bogeymen loom large: the Nanny and the Night Watchman. The Night Watchman is the idea (following a term disparagingly coined by the nineteenth-century Prussian jurist Ferdinand Lassalle)⁶ that the state should serve a minimal function of watching over society only in order to ensure two essential functions: the preservation of peace and the protection of property. On the other hand, the Nanny is accused of meddling in the everyday lives of ordinary people by using a range of regulatory and legislative tools that are seen as intrusive and over-protective.

In today's context of the British Conservative Party, government policies accused of nanny statism would include the proposed Online Safety Bill, the Government's anti-obesity strategy, the ambition to make England 'smokefree' by 2030, and the review of the 2005 Gambling Act. Most of these reforms are the legacy of Boris Johnson's premiership, with libertarian writers such as Christopher Snowdon accusing Johnson of being Britain's 'Nanny-in-Chief,'⁷ while Liz Truss' attempt to rescind these reforms was the act of a Night Watchman Prime Minister. The result is an increasingly entrenched debate that is dependent on exaggerated opposites – there is either freedom or coercion! – to the detriment of a more nuanced understanding of the regulatory complexities at stake and the role that the state can play.

This essay will take one of these policy examples – the ongoing and contested review of the 2005 Gambling Act – as a prism through which to examine the wider question of freedom. Far from the exaggerated, unhelpful and ultimately artificial binary of Nanny versus Night Watchman, this essay will draw on an alternative tradition of Hayekian and Conservative thinking to consider the case of gambling in the context of economic agency under the rule of law, the ways in which that agency is undermined by the market and how it can be protected by good regulatory practice.

In this way, we make a case for the regulation of a market which, in the eyes of many observers, is out of control and failing. Unlike the transactional worldview of libertarianism, the alternative tradition upholds a notion of freedom that is deeply connected to the relational, the social and the moral. It is a tradition that Conservatives today, including the Thatcherite Prime Minister Rishi Sunak, can draw on as their natural inheritance when they face the difficult challenge of weighing the balance between market, state and society.

The Freedom to Gamble

The battle between the bogeymen of Nanny and Night Watchman is the political context for today's debate over the reform of gambling laws in the United Kingdom. In this context, gambling industry lobbyists have pushed a shallow version of libertarian ideology in order to make an appeal to Government for light-touch regulation, arguing that increased reform of the market would lead to a decrease in individual freedom and choice. Numerous reiterations of this argument have been made over the past two years. In January 2022, Michael Dugher, the CEO of the UK's gambling trade association (the Betting and Gaming Council), wrote an opinion piece for the *Telegraph* in which he argued that the industry was in danger of becoming a "victim" of "an overmighty state" and the Prime Minister risked "picking another fight with Tory MPs concerned about state interference in personal freedoms" – MPs who "are trying to hold onto working class voters who regard restrictions on betting as a culture war waged by high-handed politicians who don't approve of how they spend their time and money."⁸

This position makes use of both established libertarian and populist tropes, creating a sort of hybrid – let us call it libertarian populism – ideological framework that conflates the enhanced regulation of a sector with "curbing the personal freedom" of working class voters, by politicians who are "waging a culture war" through an "overmighty state." The libertarian-populist position is not new. It has long been used by other industries and advocacy groups including the tobacco industry's historic legal challenges against curbs on advertising, which draw on constitutional freedoms in their defence.⁹ In 2021 the Betting and Gaming Council argued that "the issue of gambling won't decide the next election, but Red Wall voters will – and politicians should listen to what they have to say," highlighting polling of these voters which "pointed to the danger of over-regulation, with a factory worker in Scunthorpe saying: 'You can't regulate everything. You've got to take some personal responsibility.'"¹⁰ And in 2022 when Liz Truss emerged as the front-runner in the Conservative leadership contest, Dugher argued that she shared his libertarian-populist outlook, claiming that "we've seen in recent weeks Liz Truss present herself very strongly as a low tax, pro-business, anti-woke, anti-Nanny State libertarian."¹¹

In this way, gambling industry lobbyists have presented the commercial interests of their members as a cause for freedom that is ideologically akin to the wing of the Conservative Party that recently gave rise to Liz Truss. It has been a strategic decision calculated to curry political favour. But how much does the comparison hold up? In terms of being "low tax, pro-business," Truss said in her 2018 'Liberation Nation' speech given at the London School of Economics that "free enterprise has huge economic benefits, driving down prices and creating growth and jobs. It breaks down monopolies, hierarchies and outdated practices"¹² – a vision of the economy which, as she argued at a roundtable of business leaders during the UN General Assembly in New York ahead of her September 2022 mini-budget, depends on "lower, simpler taxes in the UK to incentivise investment."¹³ When applied to the gambling industry, the question of tax and growth is made complex by the fact that much of the sector is, in terms of fiscal location, based offshore. According to campaigners for reform in an open letter to the Chancellor of the Exchequer recently published in the *Financial*

Times, it is estimated that over £50 billion has been extracted from the British economy by remote gambling operators which have long avoided certain taxes by basing elements of their activity in offshore territories like Gibraltar, even though many of these operators are household names in the UK.

Changes to legislation in 2014 were meant to resolve this problem with the introduction of a so-called 'point of consumption' principle to Remote Gaming Duty, designed to ensure that "remote gambling operators will pay tax on the gross gambling profits generated from UK customers, no matter where in the world the operator itself is located." Yet Remote Gaming Duty (now set at 21%) for operators based in offshore locations like Gibraltar remains lower than equivalent taxes for land-based operators based in the UK and, by being based offshore, these operators continue to avoid certain other duties and associated costs that their land-based counterparts are obliged to pay.

The idea of a fiscal policy that lowers tax for a remote gambling sector which already enjoys an advantage over both its land-based competitors and other sectors in the economy makes no sense. Nor would a policy which seeks to incentivise further investment and growth of that sector. Gambling industry lobbyists seek to normalise the activity of their members through slogans about 'building back better' and 'going for growth,' but many economists, including free marketeers, consider gambling to be fundamentally different from other elements of the economy. As the open letter in the *Financial Times* argues, it is an industry with short supply lines, low employment rates and a limited multiplier effect – claims which are supported by at least two recent economic reports.¹⁴

Furthermore, it is an activity which depends on a fundamentally adversarial relationship of win or lose: money is not spent as it would be in other parts of the economy on a service or a commodity; it is staked, it is wagered, and ultimately it must be lost (with nothing to show in return) in order for the gambling operator to make a profit. In the case of addiction, this process has been described as 'socially-wasteful,' because losses are transferred from the gambler to the gambling firm, while society pays the social cost.¹⁵ What would it mean to introduce a fiscal policy which incentivises the growth of that loss? How does loss grow? And what would it mean to incentivise investment in that sector when, like those operators based offshore for tax purposes, many major shareholders in the industry are investment funds based in overseas locations such as the USA?

In terms of being "anti-woke, anti-Nanny State," Truss said in her 'Liberation Nation' speech that "I want our economic model to be one where it's not about the state deciding what you do, it's about you deciding what you do."¹⁶ She reiterated this in her speech as Prime Minister to the Conservative Party Conference in October 2022, when she said that "I'm not going to tell you what to do, or what to think or how to live your lives. I'm not interested in how many two-for-one offers you buy at the supermarket, how you spend your spare time, or in virtue signalling ... My friends, that is what Conservatism is about. It is a belief in freedom." This echoes another speech that she gave at the Institute of Economic Affairs in 2019, when she argued that "I believe this is going to be a major battle ground in British politics between those people who believe the role of Government is to tell other people what to do, to micro-manage their lives and those people (many of whom

are in this room) who believe in a bottom-up world, a world where we make our own decisions, we make our own mistakes and our own successes and we all benefit from that.”

Truss’ emphasis on the freedom of the individual living in a “bottom-up world” – what Hayek called “spontaneous order” – echoes the language used by the gambling lobbyists to describe a system of “top down” intrusion by politicians who “look down their long noses” at people and who seek to control them through the state. Within this libertarian-populist framework, the bottom-up world is not chaos; rather, it is the spontaneous order that comes through an accumulated expression of each individual’s informed choice, balanced by the rule of law. It is a concept of freedom that hinges on the ability of individuals to make educated decisions. In terms of state intervention, Truss accepts that “of course there are people who need to be protected ... Children who are growing up do need protection, they aren’t fully able to make decisions that adults are. But, if you are a grown up, if you have a good education, if you have the ability, if you have the capability as every citizen does in modern Britain then you should be able to make those decisions for yourself. You shouldn’t be told what to eat and what to drink – you need to be able to drive your own future.” She has written that “never has Britain been a more capable, educated society where people are better able to make their own decisions and control their own lives.”¹⁷

In other words, to be educated is to be able to choose, and to choose is to be free. This is the link made between the ‘freedom from’ and the ‘freedom to’, encapsulated in the rational agency of a utility-maximising individual for whom all choices are informed and all options are available: the sovereign, self-interested, superhuman myth of *homo economicus*.

For Truss and her wing of the Conservative Party, the freedom to choose (to use Milton Friedman’s famous words) is most clearly expressed in the market: in a speech given at the Freer Launch Party in 2018, Truss said that “it wasn’t until I got into university and I studied Economics and I began to understand that control of your own money is one of the most important freedoms of all. Because without that, you don’t have independence, you don’t have the wherewithal to forge your own future.” In the free market, the freedom to choose is a moral imperative because choice is, in Margaret Thatcher’s words, the “ethical basis” for individuals to uphold their “natural rights” of life, liberty and property. For Thatcher, “if there were no choice, there would be no ethics, no good, no evil; good and evil have meaning only insofar as man is free to choose” – a moral philosophy which “starts with the individual, with his uniqueness, his responsibility, and his capacity to choose” and leads to better economic results because “the moral philosophy is superior.”¹⁸

In gambling terms, this concept of educated freedom is the 'moral philosophy' which underpins the current legislation. When the proposed 2005 Gambling Act was being debated in Parliament, the then-minister Tessa Jowell said that "in the future, well-informed adults will have greater freedom and choice to spend their leisure money on gambling if they want to. The law will, for the first time, treat them like grown-ups."¹⁹ It also underpins the so-called 'Reno Model' of responsible gambling which states that the decision to gamble is a person's individual choice and to make the decision to gamble responsibly, people must be informed. The Reno Model advocates "prevention efforts that differentially target vulnerable community members" while "allowing the gambling industry to deliver its recreational product in commercial markets that permit such activity"²⁰ - essentially a mirror image of the British regulatory model which is split between licensing objectives designed to protect the vulnerable, keeping gambling fair and open and free of crime, and a statutory duty "to aim to permit gambling, in so far as it is considered to be reasonably consistent with the pursuit of the licensing objectives."

The Freedom to Choose the Good

For Thatcher, the 'ethical basis' of the market is defined by the freedom to choose. However, she did not believe that all attributes of the market were equal and argued that some choices were 'better' than others. In an interview for the *Daily Express* when she was the Tory spokesperson on economic affairs, she discussed stockpiling groceries as a hedge that a household might take against inflation. Criticised for this, she said that "I resent being called a hoarder. I keep a good stock of food at home for several reasons. The main one is that with prices shooting up, it seems to me to be an eminently prudent piece of housekeeping" – adding that spending money in this way was "much better than on bingo or smoking" and that her profit from long-term shopping was about 3p or 4p a tin.²¹ For Thatcher, then, the freedom to choose is not an end in itself; the end must be the good (in this case, the prudent) choice.

Thatcher's concept of the prudent being the good extended beyond the household to government and the wider economy. For example, it was at the heart of her rejection of the nationalisation of private firms because, in her words, "no prudent banker" could justify taxpayers' money being used to support companies that use up wealth created by others rather than create wealth themselves. Waste, for Thatcher, is the opposite of the good because it is not prudent – hence her rejection of the "material and moral failures" of Socialism, based on the belief that nationalisation and excessive taxation leads to waste.²² In contrast, the primary function of what Thatcher called "sound government" is to ensure "sound finances": in deeply Hayekian terms she argued that "the only true thing is to say that in a highly sophisticated economy which we run now, it is our task to uphold freedom under a rule of law, to run the finances soundly, to run the defences soundly, to give as much opportunity to people as we can," adding that "you simply cannot run a sound government if inflation is any part of your policy."²³

This is why Thatcher's concept of freedom for both individuals and governments, like that of Hayek, lends itself more to good housekeeping than to unbridled *laissez-faire*, and why she believed that making a profit from prudent shopping is an ethical choice while spending money on cigarettes and gambling is not. It is also why she argued against the introduction of a national lottery. The journalist Michael Crick offers some interesting insight into this, writing that "when Margaret Thatcher was in power, she always rejected the idea of a lottery. Having been raised as a Methodist, she feared it would encourage gambling. On this, I agreed with Thatcher. I thought the lottery was morally wrong and would do huge social damage, especially to many families who hoped a jackpot win would be their route out of poverty. I argued it would also instil a damaging attitude that one didn't need to work hard to become wealthy."²⁴ The son of her former Chancellor of the Exchequer, Dominic Lawson, has echoed this, writing that Thatcher's opinions "were also based on a firm moral bedrock. When, as her chief secretary to the Treasury, Norman Lamont tried to persuade her to license a national lottery, Thatcher peremptorily ended the discussion with these words (as Lamont retold them to me last week, laughing at the memory): 'So long as I am prime minister, there will be no state encouragement of gambling!'"²⁵

It should come as no surprise that Thatcher considered gambling to be out of place in a free market. After all, when she reportedly pulled a book out of her handbag and placed it on the table saying “this is what we believe!” she had in her hand a copy of Hayek’s *The Constitution of Liberty* rather than Milton Friedman’s *Capitalism and Freedom*. The difference is an important one. For Friedman, every individual is continually making decisions based on calculations of certainty and uncertainty, arguing that the two most basic expressions of this are insurance (where the individual is willing to pay a premium to avoid risk) and gambling (where the individual is willing to bear risk).²⁶ For Friedman, risk-taking defines our lives. In a clip from his ‘Free to Choose’ television series, he stands in a Las Vegas casino behind a table of people playing baccarat and asks “what does Las Vegas have to do with the real world? A great deal more than you might think. It’s one very important part of our lives in highly concentrated form. Every day all of us are making decisions which involve gambles... Each time, the question is: who shall make the decision? We, or somebody else?”

For Friedman, no one else is responsible for *homo economicus* but himself. In *Free to Choose*, he argues that the consequences of risk lie with the individual and not government, drawing on a Millian concept of individual sovereignty (“over himself, over his own body and mind, the individual is sovereign”) to state that “there is no place for government to prohibit consumers from buying products the effect of which will be to harm themselves”²⁷ – a position which, when applied to the question of gambling products, denies the legitimacy of their regulation.

Hayek did not take such a doctrinaire stance. While freedom is “the state in which a man is not subject to coercion by the arbitrary will of another,” he argued that this requires the rule of law and that government has a function to ensure the rule of law is upheld in a neutral and universal way – in this way “the conception of freedom under the law rests on the contention that when we obey laws, in the sense of general abstract rules irrespective of their application to us, we are not subject to another man’s will and are therefore free.” This conception of freedom based on the equal application of laws to all, which Hayek argued was drawn from the ancient principle of *Isonomia* (and introduced to England at the end of the sixteenth century by translators of Cicero and Livy),²⁸ is predicated on what he described as the limits of human knowledge: in the words of Bruce Caldwell, one of Hayek’s central arguments is that “the institutions of liberty allow fallible humans to make the best use of their (always dispersed) knowledge, an insight that he claimed was overlooked by those in the rationalist tradition” who promoted the idea of *homo economicus* as a utility-maximising individual.²⁹

For Hayek, then, like Cicero, there is no conflict between freedom and the law, because it is the law that makes us free.³⁰ This fundamentally changes the nature of sovereignty. Each individual is made free in their relation to the whole. The omniscient and omnipotent *homo economicus* is a myth, left to stalk alone in the barren landscape of the libertarian mind.

In *Law, Legislation and Liberty*, Hayek explores the role of the law in ensuring abstract and universal rules to 'guide' individual ends, arguing that "the law or the rules of just conduct serve not (concrete or particular) ends but (abstract and generic) values, namely the preservation of a kind of order." To quote Hayek at length:

*"What makes men members of the same civilization and enables them to live and work together in peace is that in the pursuit of their individual ends the particular monetary impulses which impel their efforts towards concrete results are guided and restrained by the same abstract rules. If emotion or impulse tells them what they want, the conventional rules tell them how they will be able and be allowed to achieve it. The action, or the act of will, is always a particular, concrete, and individual event, while the common rules which guide it are social, general, and abstract... What reconciles the individuals and knits them into a common and enduring pattern of a society is that to these different particular situations they respond in accordance with the same abstract rules."*³¹

In other words, rules – as long as they are neutral, predictable and universally applicable – enable freedom to flourish because they restrict the arbitrary will of one individual coercing the will of another. The law is the necessary means to enable peace and spontaneous order. From a political perspective, this is important: abstract rules are not mere technocratic instruments of control but are the way in which society is made possible.

This goes beyond the Friedman-Truss *laissez-faire* concept of the binary relationship between 'the freedom from' and 'the freedom to'. In the Hayekian tradition, the 'freedom to' is not just contingent on being free from coercion, but also on being 'restrained' in the pursuit of individual ends which might undermine the common order. It is a concept of restraint which has both economic and political consequences. Economically, it means that regulation – literally, to adjust by rule and restriction – and legislation have a legitimate role in the market. Politically, it allows for the state to have a function. For Todd Zywicki of the Cato Institute, Hayek's main focus "is executive discretion and legislative arbitrariness rather than interventionist laws themselves. So long as the executive and legislature are confined by neutral, abstract, generally-applicable laws, Hayek considered them to be a reasonable use of the coercive powers of the state" – a view shared by the philosopher John Gray who writes that, "for Hayek's view, much turns on the claim that it is subjection to *arbitrary will* that constitutes unfreedom and that such subjection is avoided if and only if a man lives under a regime of general and abstract rules which are equally applicable to all." Gray calls this an essentially Rousseauesque or Kantian position that "'true law' cannot limit freedom": a social contract that he describes as a type of utilitarianism.³²

An example of this Hayekian approach can be seen in a speech that Nick Gibb MP gave at the Social Market Foundation in April 2019 on ‘reclaiming capitalism’, in which he argued that “there is nothing un-Conservative about this. Capitalism does work best when least fettered by rules and regulations that can crush innovation and stifle enterprise. But the free market has always relied on rules and the rule of law for it to function. It relies on the state to provide security, infrastructure, enforcement of contracts, title to land and the protection of intellectual property.” Gibb continued that reclaiming capitalism meant “having the courage to regulate where we need to regulate. And it means ensuring that these companies are paying their fair share of tax,” adding that “a Conservative Party that stands up for the powerless shouldn’t stand by and let people be exploited by these multinational corporations.”³³

A dividing line has emerged in this essay between two traditions of Conservative thinking. One tradition is that of the Friedman–Truss axis which prioritises individual sovereignty and sees the freedom *to* choose as an end in itself. The other tradition is that of the Hayek–Thatcher axis which prioritises freedom *from* coercion under the rule of law as a means to achieve the good. The first tradition prioritises the economic in its worldview; the second prioritises the ethical.

This difference has often been overlooked in the recent debate over the role of the state in the market, not least by Liz Truss herself. In her 2018 ‘Liberation Nation’ speech at the LSE, Truss said that “as an economics geek, and a committed free marketer, I’ve always admired the London School of Economics. Despite its left-wing reputation, it was the academic home of Hayek”³⁴ – a point that she repeated in a meeting she had with local Tory voters in Oxfordshire when she credited the ideas of Hayek with being instrumental in her “youthful conversion” from the Liberal Democrats to the Conservative Party.³⁵ Yet nothing during Truss’ premiership indicated that she was prepared to allow a framework of functions for the state to establish common rules that would ensure freedom from arbitrary coercion and ‘knit’ (to use Hayek’s words) the will of individuals into a common and enduring pattern of a society. Truss as Prime Minister was no Hayekian. Nor was she a Thatcherite. Nothing in her September 2022 Growth Plan could be described as prudent. Rather, it has been widely called ‘casino economics,’ placing her firmly on the same ideological axis as Milton Friedman standing at a card table in Las Vegas talking about risk and personal responsibility.

It is not an accident that the Truss Growth Plan was called ‘casino economics,’ or that the gambling industry lobbyists believed that they saw in her a natural ally as “a low tax, pro-business, anti-woke, anti-Nanny State libertarian” in their desire for self-regulation. Nor is it an accident that her deeply Thatcherite opponent for the Conservative leadership contest, Rishi Sunak, sought to distance himself from the Friedman–Truss axis and position himself instead as a guardian of economic responsibility. During the leadership contest, Thatcher’s former Chancellor Nigel Lawson wrote about “Thatcher’s determination that Britain should never again underestimate the central importance of sound money,” adding that “there is an additional risk in an insouciant attitude to the public finances, quite apart from undermining the Tories’ principal electoral asset – being seen as the more

economically responsible of the two main parties” and arguing that “Rishi Sunak is the only candidate who understands Thatcherite economics.”³⁶ Sunak himself has echoed this, saying that “I am a Thatcherite... I will govern as a Thatcherite,” a claim that defined his government’s Autumn Statement of November 2022. And in an interview given to the BBC Radio 4 Today programme on the morning after the Autumn Statement, Sunak’s Chancellor of the Exchequer, Jeremy Hunt, said that “as a Conservative, all tax rises are difficult for me because I think we should be moving to a low tax economy, but I’ve made the choice that in the end sound money matters more than low taxes – bringing down inflation, that’s what Margaret Thatcher and Geoffrey Howe decided in 1981, that actually sound money is more important if you want stability and economic growth and investment by businesses.”

It is clear that if we follow the logic of the Hayekian–Thatcherite tradition when it comes to questions of freedom and sound money, gambling – both as a market and as an industry – should be seen as an exception to the economic rule. In fact, the activities of the gambling industry limit freedom in the market. This can be illustrated with three concrete examples. First, the gambling industry treats its own customers in a way that can be described as coercive. Second, the transactional relationship between gambling operators and their customers is undermined by contracts which are frequently not fit for purpose. Third, the gambling industry behaves in a way that is considered by many to be anti-competitive. In terms of coercion, contracts and competition, then, the gambling industry acts in a way that undermines some of the fundamental principles of the free market.

Coercion

Hayek defined coercion in individual terms as happening “when one man’s actions are made to serve another man’s will, not for his own but for the other’s purpose,” so that “my mind is made someone else’s tool.” In the debate over gambling, much of the libertarian-populist narrative has focused on the question of coercion of individuals by the state through market regulation. What is missing from this narrative is the question of coercion by market actors – that is, coercion by corporations which make use of techniques to control individual spend and behaviour and thereby maintain control of their market share.

In today’s digital economy, a key tool of control is the data that corporations hold on customers: large-scale, real-time, algorithmically-driven systems of information that are able to assess, simulate and predict patterns and profiles. As both a tool and a commodity, data has become the lynchpin of digital markets from retail to social media platforms, creating a new economic (and behavioural) reality that has been described by Shoshana Zuboff as ‘the age of surveillance capitalism.’ Data enables corporations to gain insight into the minds of individuals to the extent that the decision-making processes and behaviour of those individuals can be directed and defined. For Zuboff, “just as industrial capitalism was driven to the continuous intensification of the means of production, so surveillance capitalists and their market players are now locked into the continuous intensification of the means of behavioural modification” through what she calls “instrumentarian power” – a power which “works its will through the automated medium of an increasingly ubiquitous computational architecture” and “shapes human behaviour towards others’ ends.”³⁷

In Hayekian terms, this is coercion, and it is not surprising that the title of Hayek’s most famous book has been adapted to describe Zuboff’s vision as ‘the Road to Digital Serfdom.’ The result of this ubiquitous architecture, according to Zuboff, is that “the competitive struggle among surveillance capitalists produces the compulsion toward totality. Total information tends toward certainty and the promise of guaranteed outcomes.” To illustrate this totality, she gives the example of “Mark Zuckerberg’s boast that Facebook would know every book, film, and song a person had ever consumed and that its predictive models would tell you what bar to go to when you arrive in a strange city, where the bartender would have your favourite drink waiting.”³⁸

This is the way in which surveillance capitalists usurp the rules-based order: for Hayek, a function of the state is to ensure predictability through the universal application of the law; for Zuboff, that predictability is taken over and replaced by the certainty of the data-driven economy. The “computational architecture” of corporations becomes the ubiquitous presence in our lives.

The tools used by behavioural data-driven corporations to coerce and control their customers have been developed over the course of several decades. According to Zuboff, the gambling industry was key to the creation of ‘prediction products’ through machine intelligence to “intervene in the state of play in order to nudge, coax, tune, and herd behaviour toward profitable outcomes.” She draws a trajectory from the research carried out in the 1950s by psychologists such as B.F. Skinner on new instruments of operant conditioning that could engineer behaviour to ‘improve’ it to achieve rational ends, to “today’s digitally engineered casino environments, whose sophistication in the precise shaping of gamblers’ behaviour has made them a testing ground for state security agencies and surveillance capitalists alike.” Like Skinner’s instruments of operant conditioning, she argues, “gambling devices could be ‘improved’ – from the point of view of the proprietor – by introducing devices which would pay off on a variable-interval basis, but only when the rate of play is exceptionally high,” replicating the “‘choice architects’ of behavioural economics designed to ‘nudge’ behaviour along a preferred path” and keeping the users of these instruments in the “closed loops of obsession and compulsion”³⁹ – a manipulation of rational choice which makes a mockery of *homo economicus*.

An example of operant conditioning in the remote gambling sector would be losses disguised as wins, a feature of casino gaming identified by a group of Canadian academics in 2010. In their study, losses disguised as wins occur when a player wins less money than they bet, resulting in an overall loss, but this net loss is punctuated at intervals by winning lines that are experienced in the same way as a net win because of the same psychological responses to the accompanying sights and sounds. Reinforcement, to use a Skinnerian term, is key: when players of slot games “spin and fail to gain any credits, the machine goes into a state of relative quiet. By contrast, when they spin and win, these spins are accompanied by reinforcing sights and sounds. Such reinforcement also occurs when the amount won is less than the spin wager.” The researchers say that they “sought to show that these ‘losses disguised as wins’ would be as arousing as wins, and more arousing than regular losses.”⁴⁰ Such tricks of play have been given the famous label of ‘addiction by design’ by Natasha Dow Schüll, creating what she calls a ‘machine zone’ of complete immersion where, in the words of one casino executive quoted by Schüll, the key is “figuring out how to leverage technology to act on customers’ preferences [while making] it as invisible as possible”⁴¹ – an act of manipulation that the psychologist Philip Newall has described as ‘dark nudges’ designed to exploit gamblers’ biases of economic rationality.⁴²

Data is the driver of the remote gambling industry. Gambling operators control significant amounts of information on their customers, including geolocation, search history, patterns of spending behaviour and even Social Security numbers and bank statements. This data is primarily used to assess each customer’s net worth and generate targeted marketing, but it can also be used to intervene when an operator detects problems with a customer’s spend.⁴³ Much of this information is made commercially available through ‘cookie syncing’ with third parties, often without a customer’s knowledge or consent. According to a report written by the Austrian digital rights expert Wolfie Christl, gambling industry data is integrated in an ‘invisible processing’ of modelling and analytics in order to build

individual and socio-demographic profiles which can map the financial opportunities and vulnerabilities of a customer journey. Christl's report shows that gambling platforms track this behavioural data in real time, including information on how often individuals gambled, how much they were spending, and their value to the company if they returned to gambling after lapsing: a tool which enables, he argues, the creation of "profiles which include indicators of personal vulnerability and addictive behaviours, which can then be used to target the most vulnerable."⁴⁴

For digital rights lawyers, this practice is unethical at best and illegal at worst. In an interview with the *New York Times*, Ravi Naik, a lawyer who was instrumental in uncovering data misuse by the political consulting firm Cambridge Analytica, examined how "vulnerabilities are laid out to the platforms," arguing that in the case of one operator's dealings with the data of an addicted customer, "they had taken his addiction and turned it into code."⁴⁵ Yet politicians who are currently debating the review of the 2005 Gambling Act frequently fail to take this on board. Much of the controversy over the review has involved privacy concerns about so-called affordability checks (checks which are designed to oversee a customer's spend if unaffordable thresholds are crossed). In a recent parliamentary debate, for example, Baroness Fox said that "we should recognise that there is a moral dilemma here. A *de facto* demand that individuals open up their financial details to betting companies... would not, in other contexts, be something we would encourage... There is a question of privacy, and that matters, yet here we are advocating that we allow big business to use our data to control our behaviour and manage the choices of adult citizens. This sets a dangerous precedent that should at least give us pause about the expansion of corporate control over our data and our choices – or, indeed, the encouragement of state intervention in our spending habits and our individual liberty."⁴⁶ Fox's words echo those of MPs such as Scott Benton, who has written (in language identical to that of the Betting and Gaming Council) that proposals for affordability checks constitute a "culture war" waged on working class voters by "London politicians" and the state, and that the Conservative Party must "be the defenders of their culture and liberty."⁴⁷ They also echo the words of gambling industry leaders who have argued that affordability checks equate to nanny statism because they amount to a "fundamental ethical issue" of "intrusion into personal affairs."⁴⁸ Yet this makes no sense, when we consider that such data on consumers already exists, is already held by gambling operators and is already made commercially available to third parties, often without the consumer's knowledge. As the Chairperson of the Betting and Gaming Council herself said in an oral evidence session to the Lords Select Committee in 2020, "we work with TransUnion and Experian to make sure that we have data about people. Ultimately, we will ask them to produce payslips or whatever to be absolutely clear that they have the ability to gamble in that way."⁴⁹

Under different circumstances, concerns about state interference in the private lives of individuals through digital surveillance would be legitimate. But in the case of gambling industry data, it is clear that talk about interference is little more than a false flag raised by the industry to reject regulation and protect its own commercial interests. The intrusion – the coercion – is already happening, and the corporations already have control.

Contracts

For libertarians, the contract is the free market's sole guarantor. It is the glue that holds together the fragility of the libertarian worldview. Because economic transactions mean more in this worldview than social relationships, the market is seen as the main testing ground for human exchange. When the integrity of a contract is undermined, the basis of that exchange becomes broken. The market – and therefore the worldview – fails.

The contract is held as an example of arbitration which reflects both neutrality and choice, because it is entered into freely by different parties who make themselves subject to what Hayek called common rules. When crafted well, contracts remove arbitrary uncertainty between parties by giving their relationship neutrality and predictability; in this way, the contract limits coercion in the market. The primacy of the contract for even the most individualist fringes of the libertarian tradition therefore cannot be underestimated. For John Hospers, a former associate of Ayn Rand, the breach of a contract is described in terms of harm: “harm,” he says, “is usually construed by libertarians, in accordance with their own political philosophy, to include (a) bodily injury, such as assault and battery, (b) damage to or theft of property, and (c) violation of contract; and accordingly it is only these that libertarians usually seek to prohibit by law.”⁵⁰

Is a bet a contract? Historically, this was not clear cut. The economist John Kay has written that as gambling became more popular in coffee houses in the seventeenth century, it was necessary to draw a distinction between a wager, insurance and trading (initially these three things were often combined). The law determined that insurance contracts were legally binding because they were based on economic interest, while wagering for amusement was not. The consequence was that a gambling debt was a debt in honour only, enforceable only by social convention.⁵¹ It is also interesting to note that Hayek touched on the question of whether gambling contracts, like contracts for immoral purposes and contracts for perpetual servitude, are unenforceable.⁵²

The 2005 Gambling Act changed this, by making new provision for contracts relating to gambling and repealing a number of statutes, dating from the eighteenth and nineteenth centuries, which had prevented gambling contracts from being enforceable in law (the Act also made provision for contracts relating to bets to be made void in circumstances where the Gambling Commission believes the bet was unfair, in particular as a result of misuse of information or cheating). In the United Kingdom today, therefore, a bet is a legal contract. For the Gambling Commission, both gambler and operator enter the contract freely, and “just as you can decide whether or not you wish to place a bet, a gambling business is also free to decide who they accept bets from, and on what terms, so that they can manage their business as they see fit.” However, the Commission also stipulates that gambling businesses must make the terms and conditions of a bet available and must provide the means for a consumer to complain. This, in the words of the Commission, “helps us to keep betting fair.”⁵³

In other words, the integrity of a gambling contract depends on three things: that it is entered into freely (as a commercial arrangement, not a statutory right); that the terms and conditions which define a bet are made available; and that a means of complaint is provided to the consumer. Yet frequently this integrity is undermined by the practices of the industry. Even if the terms and conditions of a bet are made available, they are often not clear, with pages of small print containing a multitude of clauses which benefit the operator over the interests of the customer. This lack of clarity means a lack of equality in the contractual relationship, with the 'commercial arrangement' typically skewed in favour of one side. Numerous examples exist which illustrate contractual inequality in the gambling market. An examination of various operator terms and conditions finds clauses which show the differences of liability expected of a consumer ("once you have placed your bet and you have received confirmation that your bet has been accepted, it is too late to cancel the bet") and an operator (if "we make an error (whether human or otherwise), we will be entitled to declare the transaction void and withhold any payments.")⁵⁴ In terms of complaints, contracts will often state that if a dispute arises in relation to a bet or a wager placed, then the operator's own transactions database is deemed the "ultimate authority" in such a dispute.⁵⁵

A well-publicised (and legally significant) example of unclear terms and conditions in a gambling contract was the 2021 case of *Green v. Betfred*, in which the operator refused to pay out £1.7m of winnings to a player because it claimed that there had been a glitch in the game and that the terms of the contract excluded the operator's liability to pay out in circumstances where there was a software defect. The judge ruled against Betfred, stating that the presentation of the terms and conditions was neither transparent nor fair, and that the contract therefore did not "as a matter of the natural meaning of the language in context" preclude the operator's liability to pay out.

Of course, unclear terms and conditions are a common feature in many markets. So too is the commercial surveillance of consumers. The Federal Trade Commission has recently embarked on an ambitious investigation of what it calls 'dark patterns' and the ways in which corporations across digital markets disguise terms and conditions, bury junk fees, make it difficult for consumers to cancel subscriptions or charges, use sophisticated design practices to trick consumers into sharing their data, and manipulate consumers into buying products or services.⁵⁶ All of these dark patterns are now common features of our online economic lives. But as this essay has argued, gambling is not the same as the rest of the economy. The particular combination of commercial surveillance, design tricks, unclear contracts and the nature of the transactional relationship between operator and consumer – based on the uncertain outcome and adversarial nature of a wager – means that a gambling contract is more open to the potential for interpretation, confusion and abuse than it would be for the purchase of most other goods or commodities.

Dark patterns undermine rational decision-making. When embedded in a contract, they diminish the freedom to choose. The shallow vision of informed economic agency promoted by libertarians like Liz Truss is made impossible. In the UK, the Competition and Markets Authority went some way to responding to this question in its 2018 guidelines for action in the remote gambling sector, where it made a link between the inadequate communication of conditions and restrictions (including on wagering requirements, which effectively compel consumers to gamble more than they otherwise would have in order to withdraw winnings) and the “information necessary for consumers to make an informed decision and understand the economic consequences of the terms.” Mindful of the relationship between dark patterns (or what Philip Newall and others have called ‘dark nudge’) and bad choices, and the way that this relationship is fostered in the unclear terms and conditions of remote gambling contracts, the CMA has stipulated that conditions should be presented in a “clear, timely, intelligible, unambiguous, transparent, non-misleading and prominent manner.”⁵⁷

It has been noted by some lawyers that the ruling of *Green v. Betfred* puts the gambling industry on a difficult footing when it comes to the question of excluding liability. Should each specific circumstance of each separate game be laid out in terms and conditions, leading to contracts the length of an encyclopaedia? How clear should these terms be when it comes to explaining the conditions for voiding a bet? How do they conform with the regulator’s rules on fairness, and how do they conform with the 2015 Consumer Rights Act? How are they enforceable and who does the enforcing? Additionally, in the words of one team of lawyers, the outcome of *Green v. Betfred* means that “the practical difficulty inherent in specifically excluding liability for every possible eventuality that might arise is made more burdensome by the need, particularly in consumer contracts, to use clear, plain, ‘unlawyerly’ language.”⁵⁸

The scale of this challenge is a monster of the gambling industry’s own making. Fifteen years of unclear, unfair and, at times, illegal contractual practice have created a legal labyrinth in which consumers, regulators and even operators find themselves lost. How to get out? Simplicity or even more intricacy? Perhaps one day it will be concluded that no amount of contractual meddling or manhandling will ever be able to overcome the structural problems inherent to the adversarial relationship between the bookmaker and the customer. In the meantime, the Gambling Commission’s investigations and sanctions and consultations will carry on – until the industry works out how (if at all) it can sustain its business model while also upholding the fairness and clarity of contracts necessary to enable genuine consumer choice and consent.

Competition

For the Competition and Markets Authority, fairness and competition go hand-in-hand in a productive and sustainable economy.⁵⁹ In 2016, the CMA investigated whether remote gambling firms were treating their customers fairly, following concerns raised by the Gambling Commission about potential breaches of consumer law. These breaches included misleading promotions and unfair terms used by gambling operators. Finding that the terms and conditions of many sites were too difficult for consumers to understand, the CMA announced in 2017 that it was taking enforcement action against several online gambling firms in connection with promotions for new players; in 2018, it concluded that online gambling firms must stop using unfair practices including misleading promotions, with the Gambling Commission's chief executive saying that the industry "must get its house in order on this" and pointing to the second licensing objective that gambling should be fair and open.⁶⁰

Despite this announcement, gambling operators have continued to breach the rule (known as Licence Condition 7.1.1) that requires compliance with fair and transparent terms and practices. A look at the Gambling Commission's list of sanctions since 2018 provides examples that include a financial penalty of £3.4m to In Touch Games, the revoking of the license of BetIndex Ltd (which traded as Football Index), and a £1.7m payment in lieu of a financial penalty to BV Gaming (trading as BetVictor). These sanctions were for breaches of the rules preventing money laundering and terrorist financing (Licence Condition 12.1.1) in addition to the rules on fair terms and practice. Each one of these operators – BetVictor, In Touch Games and Football Index – are or were members of the Betting and Gaming Council when they were sanctioned.⁶¹

The case of the BetVictor sanction illustrates another structural problem with the remote gambling market: the fact that many operators, including members of the Betting and Gaming Council with trading names commonly associated with household brands in the UK, are based in overseas locations. Incredibly, many of them are even based at the same address on the same street in Gibraltar. This cluster includes the holding companies of some of the commercial activities of British brands such as Bet365, William Hill and Betfred. In addition to these offshore clusters, the remote gambling sector has also seen over recent years an increased consolidation of the market through mergers and acquisitions, including partnerships with overseas partners to enter new markets. In many respects, the remote gambling sector is defined by being an offshore and consolidated market.

Advocates of reform, including the author of this essay, have argued that this presents a challenge to the Government, because an industry that is both based offshore and increasingly consolidated means an industry of large international players which are well equipped to extend their activities beyond the reach of national regulators and revenue agencies. When this same industry also controls vast amounts of data, as is the case with much of global tech today, there is a risk that the market becomes uncontrollable. This challenge was famously described by former Google Chairman Eric Schmidt, speaking to

the *Washington Post* about the ‘disconnect’ between ‘the Hill’ and ‘the Valley’ following his testimony to the US Senate Judiciary Antitrust Committee in 2011, as the ‘nine times gap’. Schmidt said “I’ll give you a formula. This is an Andy Grove formula. So I’m sitting at this dinner in 1995 – Andy Grove was the CEO of Intel – and he gives this speech, and he says, ‘This is easy to understand. High tech runs three-times faster than normal businesses. And the government runs three-times slower than normal businesses. So we have a nine-times gap.’ And I said, ‘Works for me.’”⁶²

Increasingly, concerns over anti-competitive behaviour in the remote gambling sector are being raised. In Colombia, for example, the Ministry of Trade’s Superintendence of Industry and Commerce has identified risk within the online gambling sector in terms of unfair competition and consumer protection, pointing to market concentration as a factor. In America, concerns have also been raised over anti-competitive practice through state-generated barriers to entry in the online sports gambling and fantasy sports market, including failures to licence new market competitors in some states (helping, in the words of *Forbes*, “to ensure that the industry’s oligopoly of yesterday remains its oligopoly of tomorrow”) and the imposition of high registration fees. Highlighting a disconnect between the federal position (guided by President Biden’s drive to scrutinise mergers and reduce market consolidation) and the position of some state governments (which are passing new legislation that enables market consolidation in fantasy sports and sports gambling), *Forbes* concludes: “it is hard to square some states’ efforts to limit competition in emerging sports gaming markets with an emerging federal policy aimed at fostering free and fair competition in broader high-tech markets. Moreover, in some ways, market consolidation in online gaming should be seen as even more bothersome than market consolidation in other high-tech industries. This is because, whereas there is little doubt that companies such as Google and Amazon gained substantial market share through product innovation, companies such as DraftKings and FanDuel gained their initial market share by entering through ‘regulatory arbitrage.’”⁶³

These concerns are part of wider efforts by regulators to understand oligopoly in digital markets. In the US, the chairperson of the FTC, Lina Khan, is on record as saying that the current ‘wave’ of mergers and acquisitions in the tech sector risks diminishing opportunity and innovation.⁶⁴ And Alvaro Bedoya, one of the FTC’s new commissioners, has raised concerns over mergers in which large amounts of data changes hands, saying “where you are dealing with sensitive data, I’m going to ask about it as a component of price and as a potential barrier to entry. I am going to be making sure that we don’t exclude data considerations from these mergers”⁶⁵ – a statement which combines elements of the FTC’s ongoing investigation of dark patterns and data with its work on antitrust rules. In the UK, the CMA called on the Government in 2020 to introduce a new pro-competition regulatory regime “to take on the tech giants,” stating that “the dynamic nature of digital advertising markets and the types of concerns identified by the Competition and Markets Authority in its market study are such that existing laws are not suitable for effective regulation.” This recommendation was subsequently adopted by the Government and led to the creation of the Digital Markets Unit,⁶⁶ an agency which is now beginning to take an interest in the activities of the remote gambling industry, as well as the ways in which digital

design can harm competition and consumers.⁶⁷ Like the FTC, then, the CMA connects the issue of competition with the issue of data, design and fairness.

A final word on competition and consolidation. It should be noted that for Hayek, the theory of ‘perfect competition’ has little bearing on the conditions for competition in real life and is of little use as a guide to policy. Competition may be weak, he argues, because of special obstacles to entry into a trade or even ‘the character of natural monopolies,’ but weak competition is better than no competition at all.⁶⁸ He writes that in cases of weak competition where “large aggregations of material resources make it possible to achieve better results in terms of improved or cheaper products or more desirable services than smaller organizations provide, every extension of this kind of power must be regarded as in itself beneficial.”⁶⁹ For Hayek, then, oligopoly is not a problem. Nor even is the drift of an oligopoly towards monopoly, as long as it occurs through market forces rather than state interference. As Ellen Frankel Paul points out, “bigness itself is not a problem, unless government itself creates special, artificial advantages to bigness through tax policy, the law of corporations, tariffs, industrial patents, or bureaucratic hurdles that large firms can surmount with greater facility than small firms. Such artificial advantages to bigness should be dismantled.”⁷⁰

Hayek does endorse the state’s function to regulate monopolies if the restraint of trade involves controlling the supply of an essential commodity on which people are completely dependent (for example, the ownership of scarce and exhaustible resources such as the deposits of certain ores). Clearly, the provision of gambling products cannot be described as an essential commodity and, under those terms, “so long as the services of a particular person are not crucial to my existence or the preservation of what I most value, the conditions he exacts for rendering these services cannot properly be called ‘coercion.’”⁷¹ However, Hayek also states that where a large corporation uses the power of its market dominance to discriminate, together with the influence it may exercise on government possessing similar powers, it is clearly harmful and “ought to be curbed.” This is because of the different type of power at play. To quote Hayek at length:

“The argument that the great size of an individual corporation confers great power on its management, and that such power of a few men is politically dangerous and morally objectionable, certainly deserves serious consideration. Its persuasiveness derives, however, in a great measure from a confusion of the different meanings of the word ‘power,’ and from a constant shifting from one of the senses in which the possession of great power is desirable to another in which it is objectionable: power over material things and power over the conduct of other men. These two kinds of power are not necessarily connected and can to a large extent be separated. It is one of the ironies of history that Socialism, which gained influence by promising the substitution of the administration of things for the power over men, inevitably leads to an unbounded increase of the power exercised by men over other men...”

From the replacement of the cottage weaver by the factory to the growth of the continuous process in steel production and to the supermarket, advances in technological knowledge have again and again made larger units more efficient. But if such increase in size leads to more effective use of resources, it does not necessarily increase the power over the conduct of the people.”⁷²

In this essay, we have examined the remote gambling industry through the lens of what Shoshana Zuboff has called the totality of the digital market, where “total information tends toward certainty and the promise of guaranteed outcomes,” and we have described this totality in Hayekian terms as a type of coercion – that is, “when one man’s actions are made to serve another man’s will, not for his own but for the other’s purpose”, so that “my mind is made someone else’s tool.” It is a logical step to understand this totality and coercion as an example of what Hayek called power over the conduct of people. And in the debate over oligopoly, it also a logical step to conclude that as gambling operators merge and grow into a smaller market of bigger operators, this power also grows. Their bigness *per se* is not the problem, but the extent and the power of their reach. This is how competition and coercion go hand-in-hand. Both lead to the same conclusion: dominance and control.

This essay has used the examples of data and behavioural conditioning to illustrate the totality of the remote gambling market. Everything is monitored, everything is predicted, everything is nudged according to the closed map of the operator’s machine mind. This represents not the restriction of an essential commodity or resource, or the restraint of trade, but rather the constraint of something even more precious to the individual: their freedom, in the fullest sense of the word, through the manipulation of their decision-making capacities, the diminishing of their agency, the erosion of trust in the market, and the undermining of the value of money.

Totality and coercion are not just a feature of the industry’s use of data or the consolidation and growth of the market. They are also a feature of the products offered by that market and the new partnerships struck by the industry to reach into other areas of our recreational lives. We see this in the continued conflation of online gambling with traditional sports, with incessant television advertising, with the ‘gamblification’ of social media platforms and video games – all of which include children in the audience – and we see it in new forms of transactions and trading with cryptocurrency and decentralised finance.

Conflation defines the new market of brand partnerships and hybrid products. Since the loosening of restrictions on remote gambling in dozens of US states since 2018, the biggest UK-licensed operators have pursued partnerships and mergers with established American sports betting brands, casinos and sports clubs. The partnership between Flutter and FanDuel is one example. William Hill and Caesars is another. So too is the new DraftKings sportsbook at Wrigley Field, the home of the Chicago Cubs described as being to baseball what Rome is to religion – a “holy ground” with “famed ivy-covered walls,” in the words of the Bloomberg journalist Peter Robison, where games were always “a deliciously low-fi affair.” Echoing the increasingly symbiotic relationship between gambling brands and

football in the English Premier League, around half of Major League Baseball teams now have marketing relationships with sports betting partners. The Washington Nationals' ballpark recently opened a sportsbook operated by BetMGM LLC (which, in turn, is partly owned by Entain PLC, the holding company of the British brands Ladbrokes and Coral). There are even speculative arrangements, according to Robison, for a sportsbook at the NBA's Houston Rockets "should Texas legalize sports betting."

Furthermore, the nature of sports betting itself is changing, increasingly fused into casino-type gaming through 'in-play' offers with the effect, in the words of Natasha Dow Schüll, to turn live sports into a video game. In those states where it is legal, just as in the UK, customers who do bet online on sports events are faced with continual 'cross-selling' that encourages them to migrate to online casino games like slots because, in the words of Fanduel's former vice president for content, "that's where the juice comes from."⁷³

Each step of this conflation redefines the established boundaries of products, sectors and regulators. If Eric Schmidt described a nine-times gap between the Valley and the Hill back in 2011, it is fair to say that today this gap has widened immeasurably, with numerous different sectors, brands and products converging and diverging in complex ways with a speed and fluidity that the current regulatory framework struggles to comprehend, let alone keep up with. This is the challenge facing the Federal Trade Commission and the Securities and Exchange Commission in the United States, and the Gambling Commission, the Information Commissioner's Office, the Competition and Markets Authority and the Financial Conduct Authority in the United Kingdom, as well as the European Commission: how should different regulators also converge or diverge, both nationally and across borders, in order to keep up with new markets which at the moment seem increasingly impossible to regulate? Ideas abound on new rules for competition, privacy, and the changing nature of money – but how to turn these ideas into something that can be implemented?

Conclusion: The Future of Regulation is Relational

Since the British government launched its review of the 2005 Gambling Act in December 2020, the gambling industry has sought to depict the preservation of its commercial interests as a fight for economic and social freedom against the intrusion of a nanny state. In other words, the industry has chosen to respond to a technical exercise of legislative review with an ideological claim about liberty. This essay has met that claim on its own terms, examining the terms in detail and locating them in the conceptual traditions on which they draw.

In our account of these conceptual traditions, as well as in our three illustrative examples of coercion, contracts and competition, we have argued that the industry's claims about freedom are flawed. While many other types of digital sector also engage in coercive data use, unclear contracts and unfair, anti-competitive behaviour, we have argued that the remote gambling sector pushes these malpractices in the market to another level.

We have explored the reasons for this. Gambling is an activity which depends on a fundamentally *adversarial relationship* of win or lose. Money is not spent as it would be in other parts of the economy on a service or a commodity; it is *staked*, it is *wagered*, and ultimately it must be *lost* in order for the gambling operator to make a profit. In the case of addiction, gambling has been described as *socially wasteful*, because while losses are transferred from the gambler to the operator, society pays the cost of harm. As an industry, gambling tends to have short supply lines, low employment rates and a limited multiplier effect. It represents *the transfer of wealth* from productive parts of the economy (in terms of individuals, activities and communities) to *unproductive* parts (the accumulation of wealth by operators, many of which are based offshore). This transfer of wealth is achieved in part through *coercion*, particularly in the control of data and the application of machine intelligence to monitor, predict and nudge human behaviour, and distort the freedom to choose. It is also achieved through *dark patterns* such as unclear *contracts* and unfair terms and conditions. Increasingly, gambling operators are creating a *consolidated market* through mergers, acquisitions and new partnerships; often, they engage in *anti-competitive behaviour*. Taken together, these factors lead to what Shoshana Zuboff has described as the '*totality*' of the market and what Friedrich Hayek described as power over the conduct of people. This power, this totality, means that the gambling industry repeatedly *breaks the rules* that are set in place by regulators. Frequently the industry *harms*. None of this is akin to freedom. If anything, it is freedom's enemy.

In 2022, the British Conservative government embarked on a brief and calamitous libertarian experiment under the premiership of Liz Truss. This experiment was lauded at the time by gambling lobbyists who anticipated that it would mean a new era of deregulation for their industry, with the Chief Executive of the Betting and Gaming Council saying that "we've seen in recent weeks Liz Truss present herself very strongly as a low tax, pro-business, anti-woke, anti-Nanny State libertarian."

Erroneously, Truss cited Friedrich Hayek as an inspiration for her political vision and low tax, pro-business, anti-woke, anti-Nanny State programme. But Hayek was no advocate of libertarian populism or *laissez faire*. Rather, he advocated an extensive framework of functions for government intervention, especially when coercion was taking place within a market. To quote Ellen Frankel Paul at length:

“Hayek faulted classical liberals for stressing the limits of government, rather than the positive role that government needs to play in the functioning of a competitive system. His list of ‘positive requirements’ for government interventions is not trivial: the provision of institutions for money, markets, and information where these ‘can never be adequately provided by private enterprise’; the formulation and implementation of a legal system designed to make competition work as beneficially as possible, a legal system that defines property rights over specific kinds of things and delimits freedom of contract; state control of weights and measures to prevent fraud; state assistance to individuals in providing against the hazards of life (including sickness, accident, and ‘acts of God’ such as earthquakes and floods); and monetary policy and public works to combat the business cycle and waves of large-scale unemployment. The inventory of government functions does not end there, but extends to what we now call provision of ‘public goods’ and prevention of ‘public harms,’ that is, instances of supposed ‘market failure.’”⁷⁴

For Hayek, freedom depends on the application of abstract rules that are neutral, predictable and universally applicable, because these rules restrict the arbitrary will of one individual from coercing the will of another. In this way the rule of law is the necessary means to enable what Hayek called ‘spontaneous order.’ We have argued that from a Conservative perspective, this is important for two reasons. First, freedom is not an end in itself. It depends on the rule of law and it is the means (as Thatcher argued) to achieving the good. Second, rather than being a technocratic instrument of state control, abstract rules are the way in which the social is made possible – the fact that different individuals respond to different situations in accordance with the same abstract rules is, for Hayek, “what reconciles the individuals and knits them into a common and enduring pattern of a society.”

In other words, freedom for Hayek is deeply intertwined with both the rule of law and the social. This relational, rules-based understanding of liberty is a far cry from the shallow libertarian-populist caricature of a low tax, pro-business, anti-woke, anti-Nanny State Night Watchman.

In market terms, abstract rules are expressed through regulation. It therefore follows that it is through regulation that the freedom of free markets is made possible. The political scientist Ian Bremmer says as much in his defence of free market capitalism against the rise of what he calls state capitalism following the 2008 financial crisis, when he acknowledges that the “massive state-managed injections of capital were necessary to refloat a global economy unhinged by a massive failure to regulate international financial flows.”⁷⁵ The 2008 crisis demonstrated this: when regulation fails, markets fail and the state takes control; when regulation is done well, markets function and the state is kept at bay.

The case of gambling is an interesting example of the symbiotic relationship between regulation and freedom. Following the 2005 Act, the Gambling Commission has followed two guiding principles enshrined in law: first, a statutory duty to aim to permit gambling; and second, the three licensing objectives to keep gambling free of crime and disorder, to ensure that it is conducted in a fair and open way, and to protect children and vulnerable people from being exploited or harmed. This is the principle of regulatory balance through which the aim to permit – that is, the freedom of the market – depends on the licensing objectives being upheld through regulation.

The relationship between freedom and regulation can be seen in our three examples of industry coercion, contracts and competition. It is through regulation that the encroaching computational architecture of digital markets can be kept in check, that the integrity of contracts can be upheld and that competition can be protected. To reduce this to a clumsy conflict between state and market – the Nanny versus the Night Watchman – is to ignore the balance of the relationship between freedom, the social and the rule of law. Regulation, when done well, is a way of expressing this relationship. Regulation which loses sight of that purpose is destined to retreat into the empty role of technocratic management and state control.

Ultimately, then, the question of regulation is a way of understanding the wider relationship between the economy, the state and society. It is also a window into understanding the future of capitalism. With the rise of artificial intelligence and decentralised finance, the bewildering array of new types of economic activity and hybrid commodities, and the power and reach of digital markets – their ‘totality’, in the words of Zuboff – the question that we must ask is whether any government will ever be able to bridge what Eric Schmidt called the nine-times gap.

This is a challenge of existential significance for future governments, conservative and progressive alike. If, as the saying goes, it is easier to imagine the end of the world than the end of capitalism, then the same can surely be said for regulation: it is easier to imagine the end of regulatory governance than the end of an increasingly untethered economy. The challenge facing our governments is therefore not just one of political leadership but also of imagination – the imagination needed to comprehend, create and sustain the order of a world in which the economic is in balance with the social. Only then can we hope to maintain the productive in the face of the speculative, preserve the collective in the face of the connected, and uphold the human in the face of the machine. Our future and our freedom depend on it.

ENDNOTES

- ¹ Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978), 6.
- ² Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978), 162–170.
- ³ Ronald Reagan, ‘Remarks on the lighting of the torch of the Statue of Liberty in New York’, July 1986, <https://www.reaganlibrary.gov/archives/speech/remarks-lighting-torch-statue-liberty-new-york-new-york>
- ⁴ Margaret Thatcher, ‘Freedom, Economic Liberty and the Rule of Law’, speech to the European Foundation, October 1996, <https://www.margaretthatcher.org/document/108365>
- ⁵ See, for example, Hayek’s description in *The Constitution of Liberty* of the relationship between employers and employees, the relationship between private property and competitive enterprise, and the relationship between coercion and the state.
- ⁶ Lassalle used this term in a speech he gave on the ‘worker program’ to a Berlin craftsman’s association in 1862, in which he said that “the bourgeoisie understands the moral purpose of the state as consisting exclusively and solely in protecting the personal freedom of the individual and his property. This is a night watchman’s idea [Nachtwächteridee], gentlemen, a night watchman’s idea because it can conceive of the state only in the image of a night watchman whose whole function is to prevent robbery and burglary... If the bourgeoisie wanted to consistently say its last word, it would have to admit that according to this idea, if there were no robbers and thieves, the state would be entirely superfluous”. See Eduard Bernstein, *Ferdinand Lassalle: Gesammelte Reden und Schriften Vol. 2* (Berlin: Cassirer, 1919), 195–196.
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- ¹¹ Michael Dugher, ‘Our new Prime Minister must get gambling reform right’, *Politics Home*, September 1, 2022, <https://www.politicshome.com/members/article/bgc-83698>
- ¹² Liz Truss, ‘Liberation Nation: how to free the economy and liberate the state’, speech to the London School of Economics, June 2018, <https://www.gov.uk/government/speeches/chief-secretary-to-the-treasury-liz-truss-speech-to-the-london-school-of-economics>

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²⁶ Milton Friedman and L. J. Savage, 'The Utility Analysis of Choices involving Risk', *Journal of Political Economy* 56 (4), August 1948, 279–304.

²⁷ Milton and Rose Friedman, *Free to Choose: a Personal Statement* (San Diego: Harcourt, 1980).

²⁸ Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978), 164–166.

²⁹ Bruce Caldwell, 'Hayek on Mill', *History of Political Economy* 40 (4), 2008: 689–704.

³⁰ Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978), 166. Hayek says that to Cicero "is due the conception of general rules or *leges legum*, which govern legislation, the conception that we obey the law in order to be free".

³¹ Friedrich A. Hayek, *Law, Legislation and Liberty: a New Statement of the Liberal Principles of Justice and Political Economy*, Volume 2, 'The Mirage of Social Justice' (London: Routledge, 1998), 12, 14.

³² John Gray, 'Hayek on Liberty, Rights and Justice', *Ethics* 92 (1), October 1981: 73–84. It is important to note that Gray goes on to argue that Hayek is mistaken "in supposing that anything very substantive issues from the Kantian requirements of abstraction and generality which he seeks to apply to law. They are not sufficient conditions of a legal framework having recognizably a liberal character. Nor are they even a necessary condition of a legal code sufficiently stable and predictable in its judgments that it provides a reliable framework for individual action and social cooperation", adding that "a common-law tradition, whose maxims are so indeterminate as to be incapable of universality, may yet (as Bruno Leoni has perceived) be more reliable as providing a background of secure expectations than any sort of liberal legislation". Many of these themes are also discussed in Ellen Frankel Paul's important essay, 'Hayek on Monopoly and Antitrust in the Crucible of United States v. Microsoft', *NYU Journal of Law and Liberty* 1 (0), 2005: 167–204.

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⁴² Philip W. S. Newall, 'Dark Nudges in Gambling', *Addiction Research & Theory* 27 (2), 2019: 65–67.

⁴³ Peter Robison, 'DraftKings is coming for your Dumb Money at Wrigley Field', *Bloomberg*, August 26, 2022, <https://www.bloomberg.com/news/features/2022-08-26/draftkings-sportsbook-at-wrigley-field-aims-to-hook-mlb-fans?leadSource=uverify%20wall>

⁴⁴ Wolfie Christl, *Digital Profiling in the Online Gambling Industry: a report on marketing and risk surveillance by the UK gambling firm Sky Betting and Gaming, TransUnion, Adobe, Google, Facebook, Microsoft and other data companies*, January 2022, <https://cdn.sanity.io/files/btrsclf0/production/e23ea75fe93f775d9f9ed795427f4b5ed8d67016.pdf>

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