

15 Hastings Comm/Ent L.J. 93

**Hastings Communications and Entertainment Law Journal (COMM/ENT)**  
Fall, 1992

GAMBLING AND THE LAW—UPDATE 1993

I. Nelson Rose<sup>a1</sup>

Copyright (c) 1993 by the Hastings College of the Law; I. Nelson Rose

**Table of Contents**

- I. Spread
- II. Indian Gambling
- III. Debts
- IV. Winners and Losers
- V. Taxes
- VI. The Bizarre
- VII. Limits

**\*94 Introduction**

The largest and fastest growing segment of the entertainment industry is legal gambling.<sup>1</sup> In terms of sales, legal gambling dwarfs every other form of entertainment. For example, in 1992, Americans spent \$4.9 billion at movie theater box offices.<sup>2</sup> By comparison, in 1991, the thirty-five operating state lotteries sold \$20.9 billion in tickets.<sup>3</sup> Add in parimutuel betting on horses, dogs, and jai alai; casinos and slot machines; sports bookmaking; card rooms; and charity and Indian bingo. The total annual amount bet legally in this country is conservatively estimated to be \$294.6 billion.<sup>4</sup>

As recently as two hundred years ago, gambling in America was considered a sin—a topic that could not be mentioned in polite society, except to be condemned. The word “gamble” itself was regarded as slang in the 18th century as “a term of reproach,” while “gambler” originally meant “a fraudulent gamester.”<sup>5</sup> The treatment of the gambler by the law and by society followed naturally: if gambling were viewed as something unholy, the gambler deserved to be condemned, although sometimes with pity, and consigned to Hell.

In the 19th century, religious feelings began to die down; gambling came to be viewed not as a sin, but as a vice. This difference is significant: gambling could now be discussed, under proper circumstances, much as prostitution can sometimes be discussed in “proper society” today. \*95 More importantly, the gambler was viewed not as fallen in the eyes of God, but as weak. Of course, a man (and in rare cases, a woman) who gambled to excess, having given in to the vice, was viewed as deserving whatever misfortune befell him (or her).

<p><b>GSN Ex. 1006</b> GSN v. Bally Gaming</p>
--

The view of gambling as a vice is still the dominant one in the law of the United States, especially the common law. Even while legal gambling spreads throughout the country, the public policy of virtually every state makes legal gambling debts unenforceable, treating a casino marker the same as a contract for prostitution.<sup>6</sup> As with prostitution, the law punishes the illegal gambling operator for exploiting the weaknesses of his customers. A bettor is not often seen as committing a crime, even though it takes two to make a wager.<sup>7</sup>

A new view of gambling is coming into direct conflict with the old. Helped in part by the advent of state lotteries (where the state itself is promoting gambling), gambling is increasingly viewed as merely another form of entertainment. But legal gambling runs head-on into the majority view that gambling is a vice. In Nevada, for example, the only legal businesses that cannot generally advertise are licensed casinos and brothels.<sup>8</sup>

The first wave of legal gambling began with the earliest settlements of America, funded, in part, by lotteries, and lasted through the 1820s and 1830s.<sup>9</sup> The English practice of banning rowdy houses while allowing lotteries for worthy causes was carried over into the United States.<sup>10</sup>

Feelings against gambling games ran so strongly in the Massachusetts Bay Colony that the possession of cards, dice, or gaming tables, even in private homes, was outlawed.<sup>11</sup> On the other hand, lotteries, both government approved and private, were not only allowed, but actively encouraged during the colonial period. This era of widespread \*96 legal lotteries ended with the spread of Jacksonian morality, aided by numerous well-publicized scandals.<sup>12</sup> During this period, the first federal anti-lottery laws were adopted.<sup>13</sup> By 1862, Missouri and Kentucky were the only states that had not banned lotteries altogether.<sup>14</sup>

The Civil War and the expansion of the western frontier brought about the second wave of legal gambling. The states of the old South needed a way to raise money to rebuild their devastated economies; they turned briefly to lotteries as a voluntary tax.<sup>15</sup> However, the great Louisiana Lottery scandal of the 1890s led to the passage of strong federal anti-lottery laws<sup>16</sup> and a complete prohibition of state lotteries for seventy years, until they were reintroduced by New Hampshire in 1963.<sup>17</sup>

Throughout the Wild West gambling was often legally tolerated, since it was effectively impossible to outlaw this common diversion.<sup>18</sup> When the frontier developed it was common to see gaming, both casino and round games such as poker, being played openly, although whether these games were technically legal was not considered a major issue at the time. Often the gaming houses were made legal, so that governments could raise revenue through licensing, and to avoid the problem of having criminal statutes on the books that no one obeyed.<sup>19</sup>

Eventually, the casino games were outlawed, although poker was allowed to continue virtually uninterrupted. The rise of Victorian morality, scandals, and the desire for respectability brought the second wave crashing down in the West.<sup>20</sup> Soon, only Nevada and the territories of New Mexico and Arizona remained as outposts of casino gambling.<sup>21</sup> Even Nevada and the last territories of the Wild West outlawed all forms of gambling shortly after the turn of the century.<sup>22</sup> At the same time, \*97 betting on horse races fell into disfavor and the tracks were closed; by 1910, only Maryland, Kentucky, and New York were left, and in that year New York closed down its racetracks.<sup>23</sup> The United States was once again virtually free of legalized gambling.

The third wave of legal gambling began with the Great Depression. Nevada re-legalized casino gambling in 1931.<sup>24</sup> Twenty states opened racetracks with parimutuel betting in the 1930s,<sup>25</sup> followed by additional states legalizing parimutuel betting in every passing decade.<sup>26</sup> The big boom began with the first legal state lottery opening in New Hampshire in 1964.<sup>27</sup> Today, the majority of the states have legal state lotteries and racetracks, with betting on horse races, dog races, and jai alai. Social gambling has been decriminalized in many states, although often only in practice, not in law. In addition, charity gambling is the rule, not the exception, and it is virtually impossible to keep up with the various proposals for additional legalization being

discussed in every state.<sup>28</sup> These developments mark an important change in public policy from nearly complete prohibition to grudging permission.

But the early 1990s saw another tidal change taking place. Public policy in this country is undergoing a subtle, but enormously important, transformation. Government no longer merely allows some forms of gambling to exist—it now actively promotes gambling.<sup>29</sup> This difference is significant, particularly as it affects established forms of gambling. Given their enormous resources, billions of dollars, and millions of people, state operators can effectively wipe out casinos and racetracks. For example, the states themselves are entering the casino business. The Oregon State Lottery has on-line keno and video poker machines in thousands of bars<sup>30</sup> and sports bets on National Football League games. \*98 These games are deemed quasi-casinos; “quasi” only because a trial court ruled that the games do not violate the state constitution's prohibition on casinos.<sup>31</sup> Other state governments are interested in operating their own casinos, with blackjack, craps, and slots. Provincial lotteries in British Columbia and Manitoba already operate full-scale casinos, and Ontario has proposed opening casinos near America's largest cities.<sup>32</sup>

Even without casinos, state lotteries are formidable enterprises. Casinos in Atlantic City had a combined net loss of over \$250 million in 1990.<sup>33</sup> However, state lotteries showed a combined net profit of about \$8 billion.<sup>34</sup> Undoubtedly, more people buy lottery tickets every year than visit casinos, racetracks, and cardrooms in this country. Once the state itself operates the biggest game, government is in no position to deny requests for other forms of legalized betting.

This opportunity has not gone unnoticed by the investment community. The best performing stock on the New York Stock Exchange in 1991 was WMS Industries, up 607% for the year.<sup>35</sup> Other winners were those involved in the startup of Indian and riverboat gambling.<sup>36</sup> Spectacular returns will likely continue, until a particular local market becomes saturated, as is already happening in Iowa.<sup>37</sup>

## \*99 I

### Spread

In the 1990s, it is the general belief that anyone, including any government, can get rich quick by owning, operating, or taxing some form of legal gambling. In other words, we are in the midst of a classic speculative bubble.

For connoisseurs of mass money manias, the current craze is more like the South Sea Bubble in England than the Dutch Tulipmania. In the 1720s, the government of England actively promoted companies' exploitation of new opportunities created by the opening of the tropics, the “South Seas.” In the 1630s, however, the Dutch craze for trading in tulip bulbs was purely a runaway market; the government played no role.<sup>38</sup> Today, state governments, as well as individual entrepreneurs, are trying to bring in Video Lottery Terminals or riverboat casinos.

As in the 1920s, the dream of instant, unending riches is not limited to Americans. Canada, Australia, and Europe have caught the legal gambling bug as bad or worse. And nothing compares to the percentage growth of lotteries, casinos, and parimutuel betting in the newly-freed former Soviet bloc.

Unlike tulip bulbs, legal gambling can, in fact, generate revenue. But in the face of direct competition, revenue will not be on the scale imagined. Not every town can become the next Las Vegas. Consider the difference between the only legal casino on the East Coast and an Iowa riverboat with a five dollar limit, only a ten-minute drive from an Illinois riverboat with unlimited stakes.

The advent of riverboat gambling probably fueled the current craze. National television coverage of the picturesque Iowa casino riverboats opening on April 1, 1991 brought the image of wholesome legal gambling into the minds of voters and politicians.

The “big news” for legal gambling was the continued spread of casino gambling onto riverboats, into mountain towns and Indian reservations, and through Video Lottery Terminals into thousands of bars and restaurants throughout the country. This was actually old news, since the enabling statutes were passed in prior years. The real big news was the passage of more laws, which will lead to a nationwide explosion of state-sponsored gambling.

Why the rush to legalize gambling?

Imagine Prohibition has just been repealed. The owner of the first, and only, liquor store in the entire state will make a fantastic return on \*100 his or her investment. But soon, if there are no government controls, there will be a liquor store on every corner.

Government makes the situation worse. The fantasy that there is an endless supply of cash available, an infinitely elastic demand for this now legalized vice, hits local politicians harder than entrepreneurs. Sin taxes are always the easiest to raise.<sup>39</sup> So, while oversupply has caused half the liquor stores to go bankrupt, the state is raising the tax on liquor.

Only one thing could make the situation worse, and it happens. A misguided entrepreneur, often someone who has made a lot of money in another line of business, says, “I will build the biggest, best liquor store ever, with an amusement park and train rides.”

This is exactly what has happened, only the item that had been prohibited is gambling, not alcohol. Resorts International opened the first legal casino on the East Coast on May 26, 1978, spending \$45.2 million to refurbish the old Chalfonte-Haddon in Atlantic City.<sup>40</sup> Its first year gross revenue of \$224.6 million made it the most profitable casino in the world.<sup>41</sup> The state of New Jersey, for merely allowing the casino to open, collected \$18 million from its new casino tax that first year.<sup>42</sup>

Twelve more casinos quickly followed. The Taj Mahal, the thirteenth and last, cost over \$1.1 billion.<sup>43</sup> Seven casinos, including Resorts and the Taj Mahal, have subsequently gone into bankruptcy.<sup>44</sup> These failures, however, have not stopped state governments from jumping on the gambling bandwagon.

In 1991, Louisiana passed its Video Draw Poker Devices Control Law.<sup>45</sup> The law purports to put “gray market” machines out of business. This it will do, while allowing slot machines in every bar in the state. \*101 Riverboat casinos are also coming to Louisiana.<sup>46</sup> Land-based casinos in New Orleans cannot be far behind.<sup>47</sup>

Many states with a river or bay have considered riverboat casinos. For the most part, the idea has been voted down; however, it has passed the Missouri legislature and was approved by the state's voters in the November 1992 general election.<sup>48</sup>

Mississippi does not have a state lottery, and that state's supreme court only recently ruled that charity bingo is legal.<sup>49</sup> However, this state in the heart of the Bible Belt now has riverboat gambling.<sup>50</sup> The state has taken the idea of camouflaged casinos to the ultimate. The Attorney General recently ruled that the new riverboat casino law does not require the boats to have either engines or crews as there is no requirement that the boats be able to leave the dock.<sup>51</sup> In September 1992, the Casino Magic Casino opened in Bay St. Louis, Mississippi. Built on permanently moored barges merged into a land-based reception area, it gives no hint to gamblers that they are over water.<sup>52</sup>

This latest surge, gambling in riverboats, low-stakes mountain towns, and in other casinos by subterfuge is only a transition phase. Already, the real game is beginning, with multi-billion dollar proposals for land-based casino resorts in Chicago, Connecticut, New Orleans, and elsewhere.<sup>53</sup> When there are high-stakes casinos open off Lake Michigan, what Chicago resident is going to drive for hours to play five dollar blackjack on a boat in Iowa?

The South Dakota<sup>54</sup> and Oregon<sup>55</sup> state lotteries opened the door to video poker in other states. The Attorney General of West Virginia ruled that video machines in Mountaineer Park racetrack are legal under \*102 that state's lottery law.<sup>56</sup> In addition, Oregon's keno looks like a winner that is ripe for copying. Although the machines are not yet in place, the Attorney General of Rhode Island ruled that the state's lottery also can operate keno machines.<sup>57</sup>

Casinos in Deadwood, South Dakota were only a partial success, but Colorado's low-stakes casinos in Central City, Black Hawk, and Cripple Creek hit an instant jackpot and have started the mountain states falling like dominoes. There were twenty-six additional Colorado cities on the November 1992 ballot, and a movement is growing to put slot machines in airports.<sup>58</sup> Colorado's two Indian reservations are asking for compacts for higher stakes games.<sup>59</sup> Wyoming has an initiative to allow a local option for twenty-five dollar (instead of five dollar) blackjack, poker, and slot machines.<sup>60</sup> Initiatives are circulating for signatures to legalize high-stakes casinos in Arizona and Adelanto (a town in the high desert of California). In addition, a California assemblyman has submitted a bill to amend that state's constitution to allow competitive casinos within ten miles of the Nevada border.<sup>61</sup>

Foxwoods, a large Mashantucket Pequot Indian casino, recently opened in Connecticut,<sup>62</sup> and other tribes in that state, New York, and New Jersey are attempting to obtain federal recognition. In response to Foxwoods, the state of Connecticut is considering opening its own casinos.<sup>63</sup> As this article goes to press, Connecticut is again in the news. The governor announced that he has signed an agreement giving the tribe \*103 the exclusive right to run slot machines in return for payment to the state of \$100 million per year.<sup>64</sup>

There are more casinos in Minnesota than in Atlantic City. At last count, there were fourteen full-scale Indian casinos in Minnesota, with 4,700 slot machines and 260 blackjack tables,<sup>65</sup> and many more in Michigan, Wisconsin, South Dakota, Washington, Iowa, and North Dakota. With 135,000 square feet of gaming space, the casino at the Shakopee-Mdewakanton Reservation in Minnesota is one of the largest casinos in the world. Compact negotiations and litigation continue in Florida, California, Arizona, and virtually every other state that has a recognized tribe and legal gambling.

The future is foreshadowed by a recent opinion by the Attorney General of Kansas. This opinion states that legalizing a state lottery means that the state's tribes can demand the right to operate "any game involving the three elements of consideration, chance and prize," including, specifically, casino games.<sup>66</sup>

The announcement by Nevada and New Jersey casino corporations that they have signed contracts to manage Indian casinos<sup>67</sup> is not a surprise. The major players, casino corporations and slot machine manufacturers, are waiting only for a firm set of regulations from the National Indian Gaming Commission. In a few years most of the large Indian operations will have professional, established companies managing the games.

The federal government is also now promoting legal gambling. In 1991, the U.S. Attorney General issued a directive greatly restricting "day-trips to nowhere" cruises into international waters for the sole purpose of opening on-board casinos.<sup>68</sup> By requiring the ships to have overnight accommodations for all passengers, the directive effectively put \*104 many companies out of business.<sup>69</sup> Congress responded to the Attorney General's directive by passing the United States-Flag Cruise Ship Competitiveness Act of 1991,<sup>70</sup> which will open up gaming on American flag ships in international waters. The law still has some significant restrictions, such as allowing a state like California<sup>71</sup> to decide whether it will prohibit gaming on ships going from one port to another within the state. In fact, the Act does not directly address the Attorney General's concern, since it did not amend the Gambling Ship Act,<sup>72</sup> in that ships still cannot be used for the principal purpose of gambling. President Bush signed the Act into effect in March 1992, which means that casino games will soon open on almost every large and not-so-large passenger vessel leaving most American ports.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.