

2006

Poker Flops Under New York Law

Bennett M. Liebman
Albany Law School

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Bennett M. Liebman, *Poker Flops Under New York Law*, 17 Fordham Intell. Prop. Media & Ent. L.J. 1 (2006).
Available at: <https://ir.lawnet.fordham.edu/iplj/vol17/iss1/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Poker Flops under New York Law

Bennett M. Liebman*

“Politics and poker, politics and poker. Neither game’s for children, either game is rough. Decisions, decisions, like who to pick, how to bet, how to play, how to call a bluff.”¹

INTRODUCTION1

I. WHAT IS POKER?.....4

II. POKER UNDER THE NEW YORK PENAL LAW8

III. CHANCE IN THE POKER CASE LAW8

IV. POKER IN CALIFORNIA AND MONTANA.....8

V. WHAT CAN NEW YORK DO TO LEGALIZE POKER AS
A GAME OF CHANCE?.....8

VI. CAN NEW YORK STATE DECRIMINALIZE POKER?.....8

INTRODUCTION

Now that the game of poker has become virtually ubiquitous in North America,² how can it be that this game is illegal in most

* Coordinator, Program on Racing and Wagering Law, Government Law Center, Albany Law School. Former Member, New York State Racing and Wagering Board; J.D. cum laude, New York University School of Law (1974); B.A. summa cum laude, Union College (1971).

¹ SHELDON HARNICK ET AL., *Politics and Poker, on FIORELLO!* (Angel Records 1993) (1959).

states and in the State of New York? The advocates of expanded gambling and poker frequently claim that poker is a game of skill and not a game of chance. Since, in theory, bets placed by participants themselves in games of skill do not constitute gambling, how can poker be an illegal gambling game?³

The one short answer to this question is that, like the origins of the customs of the village of Anatevka in *Fiddler on the Roof*, the ultimate reason is tradition. Poker has always been illegal. Courts in New York State have always stated that poker is illegal without giving the matter significant analysis or thought. For a century, the courts have stated that card games, such as poker, are games of chance in New York. The difficulty today is that the criminal law in New York was subtly altered in 1966, and even if a court took a hard look at poker and found that skill predominated over luck, poker would almost certainly be considered unlawful in New York State.

The World Series of Poker has been played annually since 1970. There have been two three-time winners—Johnny Moss and Stu Ungar. Doyle Brunson and Johnnie Chan have each won two championships. How many teams in professional baseball have won more than two World Series' since 1970? The answer is three. The New York Yankees have six wins, the Oakland Athletics have four, and the Cincinnati Reds have three. Baseball teams compete against a finite number of other teams⁴ in a game of skill where the size of your payroll matters significantly. Poker players compete against all comers willing to put up the entry money.⁵ “Any ‘Joe Blow from Idaho’ can enter the World Series

² See Susan Allan, *Books Offer Advice to Budding Poker Players*, MONTREAL GAZETTE, Jan. 14, 2006, at H6; Cindy Price, *Betting on (and in) Atlantic City, But Playing 21 Will Cost You*, N.Y. TIMES, Mar. 3, 2006, at F1.

³ See Abigail Johnson, *Know When to Hold 'Em: Prosecutor Exercises Discretion in Poker Prosecution*, IND. LAW., May 17, 2006, at 1. Delaware County Prosecutor Richard Reed has said he considers poker a game of skill and not luck and that he would be unlikely to pursue any criminal charges against those gambling on the game. *Id.* See also Larry Riley, *A Safe Bet: Playing Poker Is Gambling*, MUNCIE STAR PRESS, Mar. 26, 2006, at 2B.

⁴ 24 major league teams in 1970 and 30 teams in 2005.

⁵ By 2004, there were 2,576 entrants in the World Series of Poker. JONATHAN GROTENSTEIN & STORMS REBACK, ALL IN, THE (ALMOST) ENTIRELY TRUE STORY OF THE WORLD SERIES OF POKER 265 (2005). In 2005, there were 5,619 entrants in the World

of Poker, and every once in a while, one of these nobodies actually wins it.”⁶ Once the entry money is put up, every competitor is on equal terms. Stu Ungar over the course of his life entered thirty-two poker tournaments with buy-ins of \$5,000 or more. He won ten of them, a record that would more than equal the skill level of any baseball or golf Hall of Famer.⁷ If baseball and golf are games of skill, why isn’t poker?

One poker authority has stated:

Expert players do not rely on luck. They are at war with luck. They use their skills to minimize luck as much as possible. Over the long run, everybody gets the same proportion of good and bad cards, of winning and losing hands. Beginning poker players rely on big hands and lucky draws. Expert poker players use their skills to minimize their losses on their bad hands and maximize their profits on their big hands.⁸

Renowned gambling expert John Scarne has found that both draw poker and stud poker are games of skill, and estimated that 63 million Americans played poker in 1974.⁹ Prominent gambling author Tom Ainslie has written that “poker demands an enormous range of skills—far more diverse than those of Contract Bridge or

Series of Poker. Nick Papps, *Flush with Fortune: Champagne All the Way for Joe and Jeannie*, S. AUSTL. SUNDAY MAIL, July 24, 2005, at 80.

⁶ GROTENSTEIN & REBACK, *supra* note 5, at 3.

⁷ *Id.* at 200. See also PHIL HELLMUTH, JR., PLAY POKER LIKE THE PROS 7 (2003) (“Although the same people don’t win *all* the poker tournaments, by the time year’s end rolls around the same people always seem to end up having won several tournaments, year in and year out. This is one of the appealing aspects of poker tournaments: the record is out there for everyone to see; some players are consistently successful, and others are not. . . . If serious poker were a game where luck predominated, this would not and could not happen.”); JAMES MCMANUS, POSITIVELY FIFTH STREET 107–23 (2003). See generally NOLAN DALLA & PETER ALSON, ONE OF A KIND (2005).

⁸ DAVID SKLANSKY, THE THEORY OF POKER 2 (5th ed. 1999). “In poker, the best players do not depend all on luck. Based on their ability to calculate precise odds, they bet only on positive expectations and predictable outcomes.” STEVEN LUBET, LAWYERS’ POKER 20 (2006).

⁹ JOHN SCARNE, SCARNE’S NEW COMPLETE GUIDE TO GAMBLING 670–71 (1st ed. 1986). Of Scarne, it was once said, “Scarne is to games what Einstein is to physics.” Joan Cook, *John Scarne, Gambling Expert*, N.Y. TIMES, July 9, 1985, at B6.

Chess.”¹⁰ Famed poker player Mike Caro has written that “[o]nce you’ve mastered the basic elements of a winning poker formula, psychology becomes the key ingredient in separating break-even players from players who win consistently. The most profitable kind of poker psychology is the ability to read your opponents.”¹¹

Author Henry Stephenson has written of poker:

It is not a game of chance in which players play against the house or buy a ticket at a statistical disadvantage. Poker is a contest of skill in which players compete against each other on neutral terms. Chance is obviously an important element of every poker hand, but that chance simply creates the environment in which players match their skills. Good players will win money from poor players, giving the winners the ability to profit from the game over the long run.¹²

I. WHAT IS POKER?

“Poker is a generic name for literally hundreds of games, but they all fall within a few interrelated types.”¹³ Poker is considered the most American of all games¹⁴ and “the national card game of

¹⁰ TOM AINSLIE, AINSLIE’S COMPLETE HOYLE 233 (1975). Ainslie is the author of numerous books on gambling such as *Ainslie’s Complete Guide to Thoroughbred Racing* (reprint ed. 1988), *Ainslie’s Encyclopedia of Thoroughbred Handicapping* (1981), *Ainslie’s Jockey Book* (1967), and *How to Gamble in a Casino* (1987). Under his actual name, Richard Carter, he wrote *Breakthrough: The Saga of Jonas Salk* (1966).

¹¹ MIKE CARO, CARO’S BOOK OF POKER TELLS 11 (2003). Cf. LARRY PHILLIPS, ZEN AND THE ART OF POKER 80 (1999) (“It is sometimes difficult for even an expert player to fully grasp the concept of a game that requires a large degree of both skill and luck.”). Caro’s qualifications as an expert on poker are discussed in *Bell Gardens Bicycle Club v. Department of Justice*, 42 Cal. Rptr. 2d 730, 736–37 and 750–51 (Cal. Ct. App. 1995). Caro has also stated that poker playing is fifty-two percent psychology, twenty-two percent mathematics, fifteen percent discipline, eight percent luck, and three percent intuition. See Michael Pierce Singen, *Where Will the Buck Stop on California Penal Code Section 330? Solving the Stud-Horse Poker Conundrum*, 11 HASTINGS COMM. & ENT. L.J. 95, 145 n.315 (1988) (citing MIKE CARO, CARO’S BOOK OF TELLS at xvii (1984)).

¹² HENRY STEPHENSON, REAL POKER NIGHT 13 (2005).

¹³ *Id.*

¹⁴ HENRY CHAFETZ, PLAY THE DEVIL 64 (1960).

the United States.”¹⁵ There are no teams. Players compete against all other players to develop certain structures in their hands consisting of two or more cards of the same value, the same sequences of cards, and cards of the same suit. “The players in the game bet with one another as to which has the best poker hand. Each deal is a separate game, in that its result does not affect any preceding or subsequent deal.”¹⁶ The main variations of poker tend to be closed poker, where a player’s cards are unknown to his or her opponents, and open poker, where some of the player’s cards are face up and known to the player’s opponents while others are face down and unknown to the player’s opponents.¹⁷ There are high games, where the highest hand in the showdown wins, low games, where the lowest hand wins, and mixed high-low split games, where the pot is split between the highest and the lowest hand.¹⁸

For much of the twentieth century, draw poker (the main form of closed poker) and stud poker (formerly the major type of open poker) were the major poker games played in America. The World Series of Poker, however, has catapulted the once obscure Texas poker game of hold ‘em into far and away the most popular version of poker.¹⁹

In hold ‘em, each player is initially dealt two cards face down, called the pocket cards.²⁰ There is a round of betting. Then, five community cards that are shared by each of the players are placed

¹⁵ RICHARD L. FREY ET AL., *THE NEW COMPLETE HOYLE REVISED* 7 (1991).

¹⁶ *Id.* at 6.

¹⁷ ALBERT H. MOREHEAD ET. AL., *HOYLE’S RULES OF GAMES* 241 (3d ed. 2001). See also AINSLIE, *supra* note 10, at 234.

¹⁸ MOREHEAD ET. AL., *supra* note 17, at 241. See also AINSLIE, *supra* note 10, at 234.

¹⁹ JOHN SCARNE, *SCARNE’S GUIDE TO MODERN POKER* 14 (1980). In fact, in *Scarne’s New Complete Guide to Gambling* which was revised in 1974, there is but one passing reference to hold ‘em poker. JOHN SCARNE, *SCARNE’S NEW COMPLETE GUIDE TO GAMBLING* 729 (1974). Similarly in *Ainslie’s Complete Hoyle*, written in 1975, one paragraph of a 51-page description of poker is devoted to hold ‘em, although the author notes that hold ‘em is now favored among high-stakes championship freeze-out players. AINSLIE, *supra* note 10, at 268. Hold ‘em is described as a “relatively new hybrid game” in Singsen, *supra* note 11, at 102. The game is relegated to one paragraph treatment in MOREHEAD ET. AL., *supra* note 17, at 257.

²⁰ A legal description of hold ‘em can be found in *Tibbetts v. Van de Kamp*, 271 Cal. Rptr. 792, 795 (Cal. Ct. App. 1990).

in the center. In the flop, the first three community cards are revealed followed by a round of betting. A fourth card—known as the turn—is revealed, followed by a round of betting. Finally, the fifth and final community card—the river—is revealed followed by a final round of betting.²¹

Poker's most recent renaissance—specifically the rise of hold 'em poker—can be traced to developments in the Internet and television.²² Internet poker sites first started in 1998, allowing players to log into games from across the world to play poker. In 2003, “television producers used reality-show-style editing and clever camera angles to make the game look exciting and deceptively easy. Viewers responded by taking out their credit cards, sitting down at their computers, and playing the game online.”²³ The World Poker Tour shows featured “an obscure English innovation: hidden cameras that allowed the television audience to see each player's two ‘hole’ cards.”²⁴ “The hole-card cams, along with on-screen graphics that instantly calculate each hand's odds of winning, cut viewers in on the action: once you know who's bluffing and who's holding the best hand, players' facial expressions become legible and entertainingly full of portent.”²⁵ “The simple technology proved to be a revelation. Goodbye boring TV, hello gripping drama.”²⁶ Without the hold-card camera, Chicago Tribune columnist Steve Rosenbloom has stated, “[i]f you were to simply stand and watch live poker . . . you would die of boredom.”²⁷

By now, the search engine Lycos reports that “poker” was the fourth most searched term on the Internet in 2005 topped only by

²¹ See ANDY BELLIN, POKER NATION 5 (2002).

²² Kevin Conley, *The Players*, THE NEW YORKER, July 11, 2005, at 52.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Paul Haavardsrud, *There's No Holding Back Hold 'Em*, CALGARY HERALD, July 10, 2005, at AA7. See also, Jeff Wilson, *No Limit: Skyrocketing Popularity Is in the Cards for Poker*, FORT WORTH STAR-TELEGRAM, June 13, 2004, at 1C.

²⁷ Mark Sauer, *Columnist Shows How Pros Handle Hold 'Em*, SAN DIEGO UNION-TRIBUNE, Sept. 9, 2005, at E1 (quoting Steve Rosenbloom).

searches for Paris Hilton, Pamela Anderson, and Britney Spears.²⁸ Poker has been in the Lycos top fifty searched terms since March of 2004, and has at times been the most searched term.²⁹ The website www.pokerpulse.com provides statistics on poker users on the Internet and estimates that by the conclusion of 2005, there were 100,000 Internet bettors playing daily for pots in excess of \$275,000 per day.³⁰

The short legal history is that poker is a card game, and courts, including New York's courts, have traditionally, without significant analysis, categorized card games as gambling. Thus, one finds the categorical statement in the *American Law Reports, Annotated* "that games of cards are games of chance even though the element of skill is more or less involved, since the element of chance predominates."³¹ In many cases, a finding that poker constitutes gambling has been expressed in dicta, but courts have tended to adhere to such observations in subsequent decisions involving poker.

In many ways, New York's seminal case on poker and card games is *People ex rel. Ellison v. Lavin*.³² In this case, the Floradora Company created a contest.³³ The participants would win if they guessed how many cigars of all brands the United States would collect taxes on during the month of November in

²⁸ See Dean Tsouvalas, *Paris Hilton: Web's Most Wanted 2005*, LYCOS, Dec. 7–8, 2005, <http://50.lycos.com/120705.asp> (last visited Aug. 28, 2006). In 2004, poker was the tenth most searched term.

²⁹ See Dean Tsouvalas, *Poker Power: The New Lycos 50*, LYCOS, June 28, 2005, <http://50.lycos.com/062805.asp> (last visited Aug. 28, 2006).

³⁰ See PokerPulse.com, About Poker Pulse, <http://www.pokerpulse.com/about.htm#size> (last visited Aug. 28, 2006).

³¹ D.A. Norris, Annotation, *What Are Games of Chance, Games of Skill, and Mixed Games of Chance and Skill*, 135 A.L.R. 104, 126 (1941).

³² 71 N.E. 753 (N.Y. 1904). The case of *People ex rel. Ellison v. Lavin* was a landmark in American law. It was the first American case to reject the "pure chance" rule derived from English law, and was universally followed in other jurisdictions. As one commentator remarked of *Lavin*, "[t]his case marked the end of the 'pure chance doctrine' in the United States. Ever since, the 'dominating element' test has prevailed." R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 MISS. L.J. 565, 645 (2002) (citing L.C. Thomas, Note, *Contests of Skill and Lottery Laws*, 23 VA. L. REV. 431, 434–35 (1937)).

³³ *Lavin*, 71 N.E. at 753–54.

1903.³⁴ In order to submit an entry, the readers had to send in bands from cigars.³⁵ The Floradora Company supplied a chart which showed how many cigars that the United States had collected taxes on in each month during 1900, 1901 and 1902.³⁶ The company was charged with operating an illegal lottery under New York's Penal Code.³⁷ The sole question before the court was whether this contest was decided by chance.³⁸

Until this case, the predominant rule was that a lottery had to consist only of pure chance, the so-called English rule.³⁹ Under the English rule, if there was an exercise of judgment or skill, there was no lottery.⁴⁰ The Court of Appeals in *Lavin* saw the law differently, finding that “[t]he test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game[.]”⁴¹ Under these circumstances, the court had little difficulty in determining that the contest, where the number of cigars subject to United States taxation in November of 1900, 1901 and 1902 was always in excess of 500,000, was clearly dominated by luck rather than skill and the Floradora Company's game was a lottery under New York law.⁴²

In the course of this determination the court had cause to give its opinions on a variety of games. The court stated,

Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of skill because at times, especially in the case of tyros, their result is determined by some unforeseen accident, usually called “luck.” The test of the character of

³⁴ *Id.* at 753.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 754.

³⁹ See Opinion of the Justices No. 373, 795 So.2d 630, 635 (Ala. 2001); *Minges v. City of Birmingham*, 36 So.2d 93, 96 (Ala. 1948).

⁴⁰ See Opinion of the Justices No. 373, 795 So.2d at 635; *Minges*, 36 So.2d at 96.

⁴¹ 71 N.E. at 755.

⁴² *Id.* at 756.

the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game[.]⁴³

The court relied in its ruling on the 1848 decision of the North Carolina Supreme Court in *State v. Gupton*.⁴⁴ There, the court found that ten pins—a game similar to bowling—was a game of skill not subject to the State’s gambling laws, unlike “idle and vicious practice[s]”⁴⁵ such as “playing at cards in a public house, and betting thereon, and suffering such gaming at cards by the keeper of the house, or supplying the players with refreshments.”⁴⁶ The *Gupton* court held,

[T]hat, in the popular mind, the universal acceptance of “a game of chance” is such a game, as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance. As intelligible examples, the games with dice which are determined by throwing only, and those, in which the throw of the dice regulates the play, or the hand at cards depends upon a dealing with the face down, exhibit the too [sic] classes of games of chance.⁴⁷

The general statements of the courts in *Lavin* and *Gupton* broadly categorizing all card games as games of chance have been continued by many sources. For example, it has been stated that “[g]ames of cards, perhaps without exception, have been held to be games of chance.”⁴⁸ Similarly, “there are dicta to the effect that games of cards are games of chance even though the element of skill is more or less involved since the element of chance predominates.”⁴⁹ There is still support today for the statement that

⁴³ *Id.* at 755.

⁴⁴ 30 N.C. (8 Ired.) 271 (1848).

⁴⁵ *Id.* at 272.

⁴⁶ *Id.*

⁴⁷ *Id.* at 273–74.

⁴⁸ Annotation, *What Is Game of Chance?*, 60 A.L.R. 343, 344 (1929).

⁴⁹ Norris, *supra* note 31, at 126. “The well-known game of poker, of which there are several kinds, has generally been held to be a game of chance as that expression is used in the popular sense to connote a game in which the result depends upon chance as distinguished from certainty or skill.” *Id.* at 130.

“[e]ngaging in playing any game of cards in which money, property, or any other thing of value is won or lost is gaming within the meaning of statutes prohibiting and penalizing gambling.”⁵⁰

New York courts have generally been in the forefront in finding that poker—since it is a game of cards—is a game of chance. In the case of *Luetchford v. Lord*, for example, involving the foreclosure of a mortgage which was given in order to repay a debt from a poker game, poker was described without discussion as “a game of chance.”⁵¹

People v. Bright involved a defendant who had been charged with the crime of being a common gambler.⁵² The defendant organized a poker game where he received a percentage of the wagers.⁵³ The only witness against the defendant was the uncorroborated testimony of a player in the poker game.⁵⁴ The defendant sought to have his conviction dismissed based on the argument that the player was an accomplice of the defendant, and a conviction based on the uncorroborated testimony of an accomplice could not stand.⁵⁵ The court, however, found that an ordinary player in a poker game was not a common gambler and therefore was not an accomplice of the defendant.⁵⁶ The conviction of the defendant as a common gambler was affirmed with there being no occasion to question whether poker was a game of chance.⁵⁷

In the case of *People v. Cohen*, where a court found that a device called the “electric eye” was a game of skill, the court, in dicta, stated, “[t]he throwing of dice or the playing of cards delivered face down depends solely and entirely upon chance or luck, the element of ability or skill being wholly lacking.”⁵⁸

⁵⁰ 38 AM. JUR. 2d *Gambling* § 49 (2006).

⁵¹ 11 N.Y.S. 597, 597 (N.Y. Gen. Term. 1890), *rev'd on other grounds*, 30 N.E. 859 (N.Y. 1892).

⁵² 96 N.E. 362, 363 (N.Y. 1911).

⁵³ *Id.* at 364.

⁵⁴ *Id.* at 363.

⁵⁵ *Id.*

⁵⁶ *Id.* at 364–65.

⁵⁷ *Id.*

⁵⁸ 289 N.Y.S. 397, 399 (N.Y. Magis. Ct. 1936).

In the case of *In re Fischer*, which involved the disbarment of an attorney who held an interest in an establishment where card games were played, the court said “any game of cards for stakes is technically gambling, and respondent degraded his profession by maintaining his interest for some years in a resort maintained for the purpose of playing cards for money stakes.”⁵⁹ The statement that “any game of cards for stakes was technically gambling” was similarly echoed in *People v. Pack*.⁶⁰

In *People ex rel Fleming v. Welti*, the court even found that duplicate bridge was a game of chance in New York.⁶¹ Despite the fact that four experts testified that duplicate bridge was a game where skill predominated over chance,⁶² the court found after careful study that “the element of chance predominate[s] over the element of skill.”⁶³

The presiding magistrate judge stated,

I am of the opinion that as long as cards have to be shuffled in any game before being dealt out, it is the element of chance that becomes master of the situation. True, the skillful player may make a better score than a mediocre player, but with skillful players playing against each other it is the cards that count as to what score can be made.

Duplicate bridge, like any other card game is a game of chance. . . .

It seems that every card game is a game of chance and if played for money constitutes gambling under our statute.⁶⁴

Several New York gaming cases specifically address poker. In *People v. Dubinsky*, the defendant was charged with keeping a room for the purposes of gambling where he was paid a fee for

⁵⁹ 247 N.Y.S. 168, 178–79 (N.Y. App. Div. 1930).

⁶⁰ 39 N.Y.S.2d 302, 305 (N.Y. Ct. Spec. Sess. 1947) (citing *Fischer*, 247 N.Y.S. at 178–79).

⁶¹ 37 N.Y.S.2d 552, 555 (N.Y. Ct. Spec. Sess. 1942), *rev'd on other grounds*, 65 N.Y.S.2d 747 (N.Y. App. Div. 1946).

⁶² *Id.* at 553.

⁶³ *Id.* at 554–55.

⁶⁴ *Id.* at 555.

holding a stud poker game at his apartment.⁶⁵ The court ruled that the defendant's admission that he received twenty-five cents from the winner of each game was clearly admissible.⁶⁶ It further held that this admission, when coupled with additional evidence showing that the defendant knowingly used his apartment for gambling, rendered him guilty of keeping a room for the purposes of gambling in violation of the Penal Law.⁶⁷ In upholding the conviction the court stated, "[t]here is no doubt that playing 'stud' poker for money is a game of chance [sic] and constitutes gambling. . . . 'Any game of cards for stakes is technically gambling.'"⁶⁸

The Court of Appeals in *Katz's Delicatessen, Inc. v. O'Connell* made similar statements about poker as gambling.⁶⁹ In the *Katz's Delicatessen* case, the delicatessen was charged by the State Liquor Authority with violating the provision of the Alcoholic Beverage Control Law that licensees would not *suffer or permit any gambling* on the licensed premises.⁷⁰ The State Liquor Authority suspended the delicatessen's retail beer license for five days.⁷¹ A social game of poker was played in a basement room of the licensed premises between officers of the licensee corporation and five others.⁷² There was no element of professionalism and criminal gambling charges directed against the proprietors were dismissed.⁷³ Nonetheless, the State Liquor Authority used the incident as the basis of disciplinary charges.⁷⁴ The issue was whether social—not criminal—gambling for nominal stakes on the licensed premises constituted grounds for discipline within the Alcohol Beverage Control Law.⁷⁵ The court found that the use of the broad language "any gambling" in the Alcoholic Control Law

⁶⁵ 31 N.Y.S.2d 234, 236 (N.Y. Ct. Spec. Sess. 1941).

⁶⁶ *Id.* at 241.

⁶⁷ *Id.*

⁶⁸ *Id.* at 237 (citing *In re Fischer*, 247 N.Y.S. 168, 178–79 (N.Y. App. Div. 1930)).

⁶⁹ 97 N.E.2d 906, 907 (N.Y. 1951).

⁷⁰ *Id.* at 906.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 906–07.

⁷⁵ *Id.* at 907.

was capable of only one meaning, and that it encompassed both casual and professional betting.⁷⁶ Thus, the court upheld the suspension of the liquor license, implicitly determining that a social poker game constituted gambling under applicable New York law.⁷⁷

While New York's penal law was altered in 1968 to consolidate and redefine the meaning of gambling, even under the new Penal Law, there have been times that the courts have repeated the language of *Lavin* to state that card games are gambling games. In *People v. Turner*, involving a prosecution for three card monte, the court noted,

Games of chance range from those that require no skill, such as a lottery to those such as poker or blackjack which require considerable skill in calculating the probability of drawing particular cards. Nonetheless, the latter are as much games of chance as the former, since the outcome depends to a material degree upon the random distribution of cards. The skill of the player may increase the odds in the player's favor, but cannot determine the outcome regardless of the degree of skill employed.⁷⁸

New York state courts have similarly used such language in dealing with video poker machines that have popped up over the years in taverns and bars. These cases have often involved efforts by the State Liquor Authority to discipline licensees who have installed poker machines in their establishments. In *Plato's Cave Corp. v. State Liquor Authority*, the court found that while there was a degree of skill involved in playing a joker-poker machine, the outcome depended to a material degree on chance.⁷⁹ *Plato's Cave* was followed by similar cases such as *O'Carroll Restaurant Corp. v. New York State Liquor Authority*, where the court stated, "Joker Poker" is a game of chance, and that even if the only prize offered is a free game, it violates the Authority's regulations

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995) (citations omitted).

⁷⁹ 496 N.Y.S.2d 436, 438 (N.Y. App. Div. 1985), *aff'd*, 498 N.E.2d 420 (N.Y. 1986).

regarding gambling in licensed premises.”⁸⁰ Similarly, in *Rontim Restaurant v. New York State Liquor Authority*, the court found that it was well-settled that “Joker-Poker” machines are “gambling devices, which violate the statutory provisions regarding gambling on premises licensed for the consumption of alcohol.”⁸¹

The video poker cases in New York do not at all distinguish between the game of video poker and traditional poker, yet these two games are not particularly similar. Video poker is a banking game, played by a player against the house. In traditional poker, the players all compete against each other while the house simply takes a piece of the pot or imposes a fee on the players for participating in a game. The payoffs in video poker are generally set in such a manner as to insure a profit for the house.

[I]t is not hard to see that video poker machines (and other related gambling devices) do not depend upon the same skills that real poker does. Real poker involves five “skill” features: (1) knowledge of the game’s mathematics, (2) money management, (3) psychological deception, (4) card memory and analysis, and (5) betting courage. Video poker, however, does not involve the “skills” of holding, folding, bluffing or raising. In fact, the only “skill” that can work to the gambler’s advantage on a video poker machine is the knowledge of the game’s mathematics. The game is based on the luck of the draw—clearly a matter of chance.⁸²

⁸⁰ 509 N.Y.S.2d 17, 18 (N.Y. App. Div. 1986).

⁸¹ 614 N.Y.S.2d 749, 750 (N.Y. App. Div. 1994). See also *In re Crosstown Operating Corp.*, 595 N.Y.S.2d 445, 445 (N.Y. App. Div. 1993); *Tego’s Tavern, Inc. v. N.Y. State Liquor Auth.*, 551 N.Y.S.2d 697, 699 (N.Y. App. Div. 1990); *Turkey’s Nest, Inc. v. N.Y. State Liquor Auth.*, 542 N.Y.S.2d 741, 742 (N.Y. App. Div. 1989); *Cos Dei San, Inc. v. N.Y. State Liquor Auth.*, 537 N.Y.S.2d 536, 537 (N.Y. App. Div. 1989).

⁸² Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. REV. 555, 570 n.80 (1990) (citing *Illegal Use of Video Gambling Machines: Hearing Before the Perm. Subcomm. on Investigations of the S. Comm. On Govtl. Aff.*, 98th Cong., 2d Sess. 11 (1984) (statement of William L. Holmes, Special Agent, Federal Bureau of Investigation)). See *United States v. 294 Various Gambling Devices*, 718 F. Supp. 1236, 1243 (W.D. Pa. 1989); *Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Comm’n*, 451 S.E.2d 306, 309 (N.C. Ct. App. 1994); *Commonwealth v. Two Elec. Poker Game Machines*, 465 A.2d 973, 978 (Pa. 1983); Michael William Eisenrauch, Note, *Video Poker and the Lottery Clause: Where Common Law and Common Sense Collide*,

Thus, while it has not been acknowledged as such in New York State, video poker is not traditional poker. Video poker clearly involves more luck than talent, and in such games chance plainly predominates over skill.⁸³

II. POKER UNDER THE NEW YORK PENAL LAW

In 1965, the New York State Legislature completely rewrote the state's Penal Law.⁸⁴ The former gambling legislation comprised fifty-four sections of law.⁸⁵ The revised law contained only seven sections.⁸⁶

Instead of separate offenses for lotteries, bookmaking, pool-selling, policy and slot machines, the new penal law specifically defined gambling and distinguished “between gambling activity of a player and that of a promoter, entrepreneur, or other person who, in some role other than a player, advances a gambling project.”⁸⁷ Thus, the legislature created the basic offense of promoting gambling which “encompasses all forms of promotional conduct

49 S.C. L. REV. 549, 565 (1998). On the need for courage under pressure see LUBET, *supra* note 8, at 68. *See also* Commonwealth v. Club Caravan, Inc., 571 N.E.2d 405, 406 (Mass. App. Ct. 1991) (noting an expert FBI agent's testimony that video poker machines involve less than twenty-five percent skill). *But see* Gallatin County v. D & R Music & Vending, 676 P.2d 779, 782–83 (Mont. 1984) (Morrison, J. dissenting); Mills-Jennings of Ohio, Inc. v. Dep't of Liquor Control, 435 N.E.2d 407, 408–09 (Ohio 1982); Games Mgmt., Inc. v. Owens, 662 P.2d 260, 264 (Kan. 1983).

⁸³ While video poker is a gambling game, courts have been divided over whether it constitutes a lottery. In jurisdictions where only games of pure chance are lotteries, video poker has not been considered a lottery. *See* United States v. Dobkin, 423 S.E.2d 612, 614–15 (W. Va. 1992). *See also* Harris v. Mo. Gaming Comm'n, 869 S.W.2d 58, 64 (Mo. 1994). In states where lotteries are defined as including those enterprises where chance outweighs skill, video poker has been considered to be a lottery. *See* United States v. Marder, 48 F.3d 564, 569 (1st Cir. 1995), *cert. denied*, 514 U.S. 1056 (1995); Opinion of the Justices No. 373, 795 So. 2d 630, 642–643 (Ala. 2001); *Games Mgmt.*, 662 P.2d at 264.

⁸⁴ Act of July 20, 1965, ch. 1030, 1965 N.Y. Laws 2343 (codified as amended at N.Y. PENAL LAW §§ 1.00–500.10 (McKinney 2006)).

⁸⁵ N.Y. PENAL LAW § 225.00 cmt. (McKinney 2006) (William C. Donnino, Practice Commentary).

⁸⁶ TEMP. N.Y. STATE COMM'N ON THE REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK PENAL LAW, Sen. Intro. 3918; Assem. Intro. 5376, 381 (1964) [hereinafter PROPOSED PENAL LAW].

⁸⁷ *Id.* at 382.

and concomitantly excludes from criminality bare ‘gambling’ or ‘player’ activity.”⁸⁸

The former gambling article of the old Penal Law⁸⁹ did not contain a definition of gambling, nor did the article define pool-selling or bookmaking.⁹⁰ While the drafters of the revised Penal Law stated that their gambling article contained “few actual changes of substance,”⁹¹ the new article nonetheless spelled out for the first time a statutory definition of gambling, and the legislative wording of the article certainly “represent[ed] careful legislative drafting.”⁹²

There was a definition of a lottery in the lottery article of the former Penal Law.⁹³ A lottery however, was simply defined as a “scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance.”⁹⁴ There was no indication in the statute as to the degree of chance required to constitute a lottery. The absence of a meaningful definition for a “lottery” or “gambling” in the Penal Law required the courts to substitute their own standard, and the New York courts employed the test of whether skill or chance was the dominating element.⁹⁵

The current penal law remedies the prior absence of a definition of gambling. It defines gambling by stating:

A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.⁹⁶

⁸⁸ *Id.*

⁸⁹ Article 88. *See* GILBERT, CRIMINAL CODE AND PENAL LAW (1965).

⁹⁰ GILBERT, *supra* note 89, at § 986.

⁹¹ PROPOSED PENAL LAW, *supra* note 86, at 381.

⁹² 6 RICHARD A. GREENBERG, N.Y. PRACTICE SERIES: N.Y. CRIMINAL LAW § 27:2 (2005).

⁹³ Article 130. *See* GILBERT, *supra* note 89.

⁹⁴ GILBERT, *supra* note 89, § 1370.

⁹⁵ *See, e.g.*, *People v. Rivero*, 75 N.Y.S.2d 255, 257 (N.Y. Ct. Spec. Sess. 1950).

⁹⁶ N.Y. PENAL LAW § 225.00(2) (McKinney 2006).

A “contest of chance” is further defined to mean “any contest, game, gaming scheme, or gaming device in which the outcome depends in a *material degree upon an element of chance*, notwithstanding that skill of the contestants may also be a factor therein.”⁹⁷ Thus, in New York, gambling involves wagering on a future contingent event and/or on a contest or game where the outcome depends in a material degree upon chance.

The McKinney’s Practice Commentary on the Penal Law states that the current definition of a contest of chance “does not adopt the ‘dominating element’ test. In many instances, it may be virtually impossible to determine whether chance or skill dominate; it should be sufficient that, despite the importance of skill in any given game, ‘the outcome depends in a material degree upon an element of chance.’”⁹⁸

The end of the dominating element test was emphasized by the New York State Attorney General in an advisory opinion in 1984.⁹⁹ In that opinion, the Attorney General took issue with a proposal of the State Division of the Lottery to establish a lottery utilizing a pool card for football games.¹⁰⁰ A similar concept had been found to be valid as a lottery in Delaware.¹⁰¹ As part of his finding that a sports parlay card would not be a valid lottery, the Attorney General emphasized the change in the skill/chance distinction in the Penal Law, explaining:

In 1965, the same Legislature which wrote the language of the State lottery amendment and gave it first passage also recodified the Penal Law. In doing so it grappled with the problem of the skill/chance continuum and its implication for various types of gambling activity defined in new section 225.00 of the Penal Law.¹⁰²

⁹⁷ N.Y. PENAL LAW § 225.00(1) (McKinney 2006) (emphasis added).

⁹⁸ N.Y. PENAL LAW § 225.00 cmt. (McKinney 2006) (William C. Donnino, Practice Commentary).

⁹⁹ 1984 N.Y. Op. Att’y Gen. 11, 19 (1984).

¹⁰⁰ *Id.* at 11–12.

¹⁰¹ Nat’l Football League v. Governor of Delaware, 435 F. Supp. 1372, 1384 (D. Del. 1977).

¹⁰² 1984 N.Y. Op. Att’y Gen. at 19.

After citing the McKinney's Commentary on the end of the dominating element test, the Attorney General noted, "[t]his test is, of course, a more liberal one allowing a greater degree of better skill to be implicated in a game. Indeed, skill might even dominate as long as chance affected outcome in a material degree."¹⁰³

Case law from New Jersey also supports the proposition that the dominating element test no longer applies in New York. New Jersey in 1978 amended its criminal laws to establish a Code of Criminal Justice based largely on the Model Penal Code.¹⁰⁴ New Jersey's revised gambling laws are modeled on New York's gambling laws. In fact, the definition of "gambling" in New Jersey is the same as the definition of "gambling" in section 225.00.2 of the Penal Law in New York.¹⁰⁵ Similarly, the definition of a "contest of chance" in New Jersey is the same as the definition of "contest of chance" in section 225.00.1 of the Penal Law in New York.¹⁰⁶

In the case of *Boardwalk Regency Corp. v. Attorney General of New Jersey*, a New Jersey court was called on to determine the meaning of a contest of chance.¹⁰⁷ The Boardwalk Regency Casino sought a declaratory judgment asking that its proposed backgammon tournament be held to be proper as a non-gambling activity.¹⁰⁸ The casino argued that backgammon was a game of skill.¹⁰⁹ The court acknowledged "that backgammon, played on its

¹⁰³ *Id.*

¹⁰⁴ Act of Aug. 10, 1978, ch. 95, 1978 N.J. Laws 482 (codified as amended at N.J. STAT. ANN. §§ 2C:1-1-2C:104-9 (West 2006)).

¹⁰⁵ Compare N.J. STAT. ANN. § 2C:37-1(b) (West 2006) (defining gambling under the New Jersey Code of Criminal Justice), with N.Y. PENAL LAW § 225.00(2) (McKinney 2006) (defining gambling under New York Penal Law).

¹⁰⁶ Compare N.J. STAT. ANN. § 2C:37-1(a) (West 2006) (defining "contest of chance" under the New Jersey Code of Criminal Justice), with N.Y. PENAL LAW § 225.00(1) (McKinney 2006) (defining "contest of chance" under New York Penal Law).

¹⁰⁷ 457 A.2d 847, 848 (N.J. Super. Ct. Law Div. 1982).

¹⁰⁸ *Id.* at 847. For a description of the playing of backgammon, see MOREHEAD ET. AL, *supra* note 17, at 321-33.

¹⁰⁹ *Boardwalk Regency*, 457 A.2d at 848.

The skill of the expert doubler does not bear comparison with that of, say, an expert Bridge player. Nonetheless, Backgammon requires a good deal of memorization, more than a little gaming sense and a higher level of general intellectual attainment than is required in most other path games. The good

highest level, can and does involve complex strategies and maneuvers incorporating sophisticated theories of mathematics and statistics which at least some highly intelligent players are able to utilize.”¹¹⁰ It found, however, that “the proper focus of the inquiry here is not on the level of skill which may affect the outcome of the contested activity but rather on whether the element of chance is a factor that is material to the final result.”¹¹¹ Viewing the evidence in its totality, including the evidence submitted by the casino’s witnesses, the court came to the conclusion that the use of dice in backgammon “removes all doubt from this court that the element of chance plays at least a material role in determining the outcome of this activity on which money is risked, no matter how much it is claimed that the role of skill predominated.”¹¹² In short, the court ruled, using the same law that governs in New York, that backgammon was a gambling game. If a game like backgammon, which combines elements of skill and chance is a gambling game, how can poker not be a gambling game? The answer depends upon whether courts view the results of a poker game as depending on a material degree of chance.

III. CHANCE IN THE POKER CASE LAW

The problem for poker advocates in New York is that nationally, most courts find that poker is a game of chance. Even in those cases where courts have held that poker is not a lottery due to the presence of skill in the playing of the game, or those where courts have found poker to be authorized under the applicable statutes, the courts have almost always found that a significant level of chance is involved in playing poker.

In *State ex rel. Schillberg v. Barnett*, for example, the Washington Supreme Court was called upon to determine whether

Backgammon player beats even a talented novice at least nine times out of ten.
It is not all luck.

AINSLIE, AINSLIES’ COMPLETE HOYLE, *supra* note 10, at 350.

¹¹⁰ *Boardwalk Regency*, 457 A.2d at 850.

¹¹¹ *Id.* at 850.

¹¹² *Id.* at 852. *See also* Fleming v. Bills, 3 Or. 286, 290 (1871). *But see* Wetmore v. State, 55 Ala. 198, 198 (1876).

certain versions of poker were gambling games.¹¹³ The court determined that while poker was not a lottery, it remained a gambling game because of the reliance on chance inherent in the game:

While *reliance* upon the chance element in the instant games may depend in some degree upon how evenly matched in skill the participants are, the trial court's finding that these games involve a substantial element of chance is sustained by the evidence. The element of chance in the instant card games satisfies the requisite element of chance for a gambling game¹¹⁴

In *People v. Mitchell*, a jury found the defendants, who participated in a game of hold 'em poker, guilty of violating Illinois' gambling laws.¹¹⁵ The defendants challenged their convictions by arguing that they were playing in a bona fide contest for the determination of skill.¹¹⁶ The court found otherwise and affirmed the convictions.¹¹⁷ The court held that:

Although there was some testimony tending to indicate that the poker games involved some degree of skill, we do not find the jury's implicit conclusion that they were not "bona fide contests for the determination of skill" so improbable as to warrant a reversal. Both direct and circumstantial evidence was introduced to support the conclusion that the

¹¹³ 488 P.2d 255, 256 (Wash. 1971). *See also* State v. Coats, 74 P.2d 1102, 1106 (Or. 1938) ("Poker, when played for money, is a gambling game, but, since it involves a substantial amount of skill and judgment, it cannot reasonably be contended that it is a lottery."); State v. Randall, 256 P. 393, 394 (Or. 1927) ("In all card games there is more or less an element of skill. Take . . . the great American game of poker; we have no doubt, if a couple of gamblers sat down to play this game against a couple of ministers, who presumably do not indulge in it, that the ministers would soon be destitute of 'chips' and the gamblers' pile augment accordingly. It is true there is an element of chance in poker, and a very large element at that").

¹¹⁴ *Schillberg*, 488 P.2d at 258.

¹¹⁵ 444 N.E.2d 1153, 1154 (Ill. App. Ct. 1983).

¹¹⁶ *Id.* at 1155.

¹¹⁷ *Id.* at 1155-56.

games, in fact, required a combination of skill and chance¹¹⁸

The Nebraska Supreme Court has also rejected the argument that there is no luck involved in poker. In *Indoor Recreation Enterprises, Inc., v. Douglas*, a Lincoln, Nebraska recreation center sought a declaratory judgment that poker, bridge, chess, and checkers were games of skill not subject to the state's gambling laws.¹¹⁹ The lower court had found that poker and bridge were games of chance, and the recreation center appealed from that decision.¹²⁰ The supreme court affirmed the judgment of the lower court.¹²¹ It found that the question of whether a game was one of skill was to be measured not by the play of experts, but by the average skill of the majority of players.¹²² The supreme court found "that there was sufficient factual basis in the record to support the District Court's conclusion that the predominate purpose of the games in issue was chance."¹²³

In Colorado, the State Attorney General found that while the decision was a close call, poker is "a game in which skill, not chance, dominates."¹²⁴ This meant that poker was not a lottery—which was constitutionally prohibited in Colorado—but the game was still illegal under the State's gambling laws.¹²⁵ As the Colorado Supreme Court stated in *Ginsberg v. Centennial Turf Club, Inc.*, "[n]o one would contend that a game of poker, in which money is bet upon the relative value of the cards held by the participants, constitutes a lottery, but it most certainly is a form of gambling."¹²⁶ The Colorado Supreme Court again reiterated its position that poker was a gambling game in *Charnes v. Central*

¹¹⁸ *Id.* at 1155. See also *State v. Terry*, 44 P.2d 258, 260 (Kan. 1935) ("Five-card stud poker is not a 'confidence game or swindle,' but is a game of skill and chance.").

¹¹⁹ 235 N.W.2d 398, 400 (Neb. 1975).

¹²⁰ *Id.*

¹²¹ *Id.* at 402.

¹²² *Id.* at 401 (citing *State v. Prevo*, 361 P.2d 1044, 1050 (Haw. 1961)).

¹²³ *Id.* at 401.

¹²⁴ 1993 Colo. Op. Att'y Gen. No. 93-5 (Apr. 21, 1993), 1993 Colo. AG LEXIS 5, at *13, available at <http://www.ago.state.co.us/agopinions/ago9305.cfm>.

¹²⁵ *Id.*

¹²⁶ 251 P.2d 926, 929 (Colo. 1952).

City Opera House Association.¹²⁷ The court held in this case that a Las Vegas night fund-raising gala conducted by the Central City Opera House Association in Denver which involved playing cards constituted illegal gambling.¹²⁸ Poker was one of the games played at the event, and the court found that “while poker and perhaps some of the wagering games might involve some skill, these games certainly are contingent ‘in part’ upon chance, and when, as here, the games involve risking a thing of value for gain, they constitute a form of ‘gambling’ in its commonly understood sense.”¹²⁹ Thus, while poker may not be a lottery in Colorado, it is certainly considered gambling because of the considerable presence of chance as a factor in the playing of the game.

In short, even the jurisdictions that recognize the great level of skill involved in playing poker nonetheless conclude that the degree of chance involved in the playing of the game renders poker an activity constituting gambling.

IV. POKER IN CALIFORNIA AND MONTANA

Even before the onslaught of legalized gambling and casinos in the 1990’s, Montana and California had legalized most versions of the game of poker.¹³⁰ These legalizations, however, were precipitated not by findings that poker was a game of skill, but rather because the wording of specific statutes in both states legalized most poker games.¹³¹ Courts in both states have regularly found poker to be a gambling game which involved the element of chance.¹³²

Montana has legalized and regulated poker pursuant to the Montana Card Games Act of 1974.¹³³ Montana courts, however,

¹²⁷ 773 P.2d 546, 555 (Colo. 1989).

¹²⁸ *Id.* at 551.

¹²⁹ *Id.*

¹³⁰ See MONT. CODE ANN. § 23-5-311 (2006); CAL. PENAL CODE § 330 (West 2006).

¹³¹ See § 23-5-311; § 330.

¹³² See, e.g., *State ex rel. Dussault v. Kilburn*, 109 P.2d 1113, 1116 (Mont. 1941); *People v. Philbin*, 123 P.2d 159, 161 (Cal. App. Dep’t Super. Ct. 1942).

¹³³ § 23-5-311. The statute was held constitutional in *Palmer v. State*, 625 P.2d 550, 551 (Mont. 1981).

have found that poker is gambling.¹³⁴ In 1876, the Montana Supreme Court was presented with a case where a lower court had, in a criminal trial, instructed the jury that poker was a game of chance.¹³⁵ The issue for the court was whether this instruction was a question of fact for the jury or a question of law to be decided by the court.¹³⁶ The court found that the instruction given by the trial court was proper, holding that:

[T]he word “poker,” as applied to a game of cards, has, so far as we know, but one meaning, and its definition was correctly given in the instructions of the court. We see no reason for calling proof as to the meaning of this word that would not apply, with equal propriety, to the words deed, lease, contract, river, city, church, or any other word in general use, and whose meaning is universally understood.¹³⁷

The same court later opined, “[a] game of poker may involve more skill than chance and is innocent when played for pastime and amusement, but constitutes gambling when played for money.”¹³⁸

California presents an even more intriguing example. California does not have a constitutional provision against gambling. Instead, it has long employed a provision of its Penal Code to specify which forms of gambling are banned.¹³⁹ Under this provision, certain specified games such as faro, monte, and roulette, plus “any banking or percentage game played with cards, dice, or any device” are proscribed.¹⁴⁰

¹³⁴ See, e.g., *Dussault*, 109 P.2d at 1116.

¹³⁵ *Kennon v. King*, 2 Mont. 437, 437 (1876).

¹³⁶ *Id.*

¹³⁷ *Id.* at 438.

¹³⁸ *Dussault*, 109 P.2d at 1116.

¹³⁹ CAL PENAL CODE § 330 (West 2006).

¹⁴⁰ Section 330 currently reads:

Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of

From 1885 until 1991, the game of stud-horse poker was one of the banned games.¹⁴¹ In the 1930s, poker clubs started to develop in the city of Gardena, outside of Los Angeles.¹⁴² The city of Gardena had passed an ordinance governing the licensing of the card clubs for the playing of “draw poker,” and the proprietors of the clubs had received licenses from the city.¹⁴³ The games of draw poker and low ball poker were being played at such clubs.¹⁴⁴ The local district attorney sought an injunction to prevent the card clubs from continuing with these games based on the theory that the playing of these games was a nuisance.¹⁴⁵ The court found that the district attorney needed to rely on specific provisions of the law in order to maintain his action.¹⁴⁶ There were, however, no such statutes making these versions of poker illegal; the statute only specified stud-horse poker.¹⁴⁷ “Whatever games may have been outlawed by the common law, the statutes of this state have undertaken to enumerate and define those games the playing of which is unlawful, and draw poker is not one of them.”¹⁴⁸ The court added that California’s “statutes further declare that what is not unlawful cannot be made the subject of a nuisance. Whatever may have been the rule at common law with reference to gambling, such rule has been superseded by the statutes of this state, and is

those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment.

CAL PENAL CODE § 330 (West 2006).

¹⁴¹ Compare Act of Mar. 14, 1885, ch. 145, 1885 Cal. Stat. 135 (criminalizing the playing of stud-horse poker), with Act of June 24, 1991, ch. 71, 1991 Cal. Stat. 71 (codified as amended at CAL. PENAL CODE § 330 (West 2006) (amending the Penal Code to decriminalize the playing of stud-horse poker)). The story of stud-horse poker is related in Singsen, *supra* note 11.

¹⁴² See Tim Waters, *Bond Voyage: Pay-As-You-Go Policy Going Fast in Gardena*, L.A. TIMES, Jan. 26, 1986, § 9, at 1 (noting that Gardena had an effective monopoly on poker clubs in Los Angeles County from the 1930s until approximately 1980).

¹⁴³ *Monterey Club v. Super. Ct. of L.A. County*, 119 P.2d 349, 351 (Cal. Ct. App. 1941).

¹⁴⁴ *Id.* at 352.

¹⁴⁵ *Id.* at 350.

¹⁴⁶ *Id.* at 357.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

therefore inapplicable.”¹⁴⁹ Accordingly, draw poker became legal in California, and even the Attorney General recognized that as long as it was not played as a percentage or banking game, the game of poker was legal.¹⁵⁰ The Attorney General, however, nonetheless continued to maintain that stud poker was forbidden by the statutory ban on stud-horse poker.¹⁵¹

That general ban on poker games, other than draw poker games, was eventually challenged in the case of *Tibbetts v. Van de Kamp*, in which the court decided the issue of whether “the poker card game known as ‘Texas Hold ’em was a form of ‘stud-horse poker’ proscribed by Penal Code section 330[.]”¹⁵² The court determined that because of its community card feature, hold ’em was not a form of stud-horse poker.¹⁵³ The court held “that whether stud-horse poker refers to a specific card game played in the 1800’s or encompasses a broader category of stud poker games played today, Texas Hold ’em is not a form of stud-horse poker proscribed by section 330.”¹⁵⁴

The court stated that “Texas Hold ’em falls within a separate category of card games known as ‘community’ or ‘Spit-in-the-Ocean,’ recognized by poker authorities as distinct from stud poker in numerous respects. Accordingly, Texas Hold ’em does not fall within the stud poker category.”¹⁵⁵

The court ended its decision by saying that gambling regulation was a legislative issue in California and suggesting that the legislature alleviate the stud-horse issue by taking appropriate legislative action.¹⁵⁶ In the wake of the decision, the legislature followed the recommendation of the court, and simply repealed the ban on stud-horse gambling.¹⁵⁷

¹⁴⁹ *Id.* at 358.

¹⁵⁰ See 2 Cal. Op. Atty. Gen. 378, 379 (1943).

¹⁵¹ See 9 Cal. Op. Atty. Gen. 108, 108 (1947).

¹⁵² 271 Cal. Rptr. 792, 793 (Cal. Ct. App. 1990).

¹⁵³ *Id.* at 796.

¹⁵⁴ *Id.* at 794.

¹⁵⁵ *Id.* at 796.

¹⁵⁶ *Id.*

¹⁵⁷ See Act of June 24, 1991, ch. 71, 1991 Cal. Stat. 71 (codified as amended at CAL. PENAL CODE § 330 (West 2006) (amending the Penal Code to decriminalize the playing of stud-horse poker).

Even though the holding and playing of a poker game may now be non-criminal under the California Penal Code, California courts have continued to find that poker constitutes gambling under California law.¹⁵⁸ In *People v. Philbin*, the court stated:

For reasons commending themselves to the legislature, the playing of stud-horse poker is expressly made a misdemeanor, section 330, while draw poker is not prohibited. Draw poker for money is nevertheless gambling, and while it may now lawfully be engaged in, equally lawfully the legislature could attack such evil as it sees in it by providing that no one should be prevailed upon to play it.¹⁵⁹

Following upon this decision, another California court dealing with the issue of recovering poker debts said, “[d]raw poker is assuredly a game of chance, or, in other words, gambling.”¹⁶⁰

These cases culminated in *Remmer v. Municipal Court of City and County of San Francisco*.¹⁶¹ In *Remmer*, despite the fact that draw poker was not prohibited by the California Penal Code, the City and County of San Francisco had a long-established ordinance banning the utilization of a house for gambling.¹⁶² The local police raided an establishment where draw poker was being played and charged a violation of the local ordinance.¹⁶³ The poker establishment argued that the local ordinance was in violation of the state law under which draw poker was not banned.¹⁶⁴ The court held that there was no conflict with the state law, and that localities had the power to ban gambling.¹⁶⁵ In the course of its ruling, the court wrote, “[d]raw, and draw low ball, poker, when played for money, are gambling games.”¹⁶⁶ Thus, under California

¹⁵⁸ See, e.g., *People v. Philbin*, 123 P.2d 159, 161 (Cal. App. Dep’t Super. Ct. 1942); *Lavick v. Nitzberg*, 188 P.2d 758, 759 (Cal. Dist. Ct. App. 1948).

¹⁵⁹ *Id.*

¹⁶⁰ *Lavick*, 188 P.2d at 759.

¹⁶¹ 204 P.2d 92 (Cal. Ct. App. 1949), *appeal dismissed*, 338 U.S. 806 (1949).

¹⁶² *Id.* at 94.

¹⁶³ *Id.* at 93.

¹⁶⁴ *Id.* at 94.

¹⁶⁵ *Id.* at 96.

¹⁶⁶ *Id.* at 94.

law, poker games—while they may not be criminal under the state’s Penal Code—are nonetheless gambling.¹⁶⁷

About the only case where a court attested to the skill of a professional poker player was the federal tax case involving the poker player William Baxter.¹⁶⁸ In that case, the government argued that Mr. Baxter’s poker earnings were not “personal service income.”¹⁶⁹ The court rejected this notion, finding that Mr. Baxter’s \$1.2 million in poker earnings over a four year period constituted earned income.¹⁷⁰ It found that Baxter’s gaming income

[W]as not derived from his passive investment of capital in a series of risky ventures. Baxter expended substantial time and energy playing poker. Baxter consistently won at poker because he possesses extraordinary poker skills. Any argument that Baxter’s gaming income is not based upon his personal expenditure of time, energy, and skill is meritless.¹⁷¹

Yet, there is little in the Baxter case that would constitute a finding that poker does not depend in a material degree upon an element of chance.

¹⁶⁷ See *Brunzell Constr. Co. of Nev. v. Harrah’s Club*, 62 Cal. Rptr. 505, 512 (Cal. Ct. App. 1967); *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.*, 14 Cal. Rptr. 805, 807 (Cal. Ct. App. 1961); 2 B.E. WITKIN ET AL., CALIFORNIA CRIMINAL LAW § 271 (3d ed. 2000).

¹⁶⁸ *Baxter v. United States*, 633 F. Supp. 912 (D. Nev., 1986). The case coming closest to finding that poker is not a game of chance is probably the Australian case of *Fowler v. Davidson*, where one of the judges found poker not to be a game of chance under the particular statute, writing:

It may be that if only one or two rounds were played chance would greatly predominate, and it may be that if the players were all profound mathematical calculators, and equally imperturbable, and played for a very long time, they would eliminate the effects of chance; but with ordinary players playing ordinary games, while the effect of chance would be very great, the effect of skill would also be substantial. As has been said in some of the cases, if anyone not pretending any or much skill holds a contrary opinion, he might be convinced by a short practical trial.

1918 V.L.R. 356, 366–67 (Cussen, J., concurring). See also *Hook v. Mousad* (Dec. 8, 1983), CLD 14032 of 1982, 1983 NSW LEXIS 25, at *16 (Austl.).

¹⁶⁹ *Baxter*, 633 F. Supp. at 916.

¹⁷⁰ *Id.* at 917.

¹⁷¹ *Id.* See also *Comm’r Internal Revenue v. Groetzinger*, 480 U.S. 23, 26 (1987).

The case law aptly sums up the comments of the famed poker player Perry Green. Green once remarked, ““When I win it’s a game of skill. When I lose it’s a game of chance.””¹⁷² Under the case law involving the game of poker, it is hard to argue that chance is not a material element of the game of poker.¹⁷³ Thus, under New York law, poker would be a contest of chance.¹⁷⁴ While merely playing the game of poker would not be a crime, promoting the game of poker would be a crime under the Penal Law.¹⁷⁵

V. WHAT CAN NEW YORK DO TO LEGALIZE POKER AS A GAME OF CHANCE?

While the case law in New York has established that the promotion of the game of poker would be criminal, this fact has not prevented the National Indian Gaming Commission (NIGC) from allowing poker as a Class II game under the Indian Gaming Regulatory Act in New York.¹⁷⁶ The NIGC reasoned that the game of poker—as opposed to the promotion of poker—was not illegal in New York, and that therefore, New York regulated rather than banned gambling in general: “[t]he determining question is

¹⁷² Editorial, *Opinion*, ANCHORAGE DAILY NEWS, Sept. 4, 2005, at E2 (quoting Perry Green). See also Barry Shulman, *Poker—Luck vs. Skill*, CARD PLAYER, Apr. 12, 2002, available at <http://www.cardplayer.com/magazine/article/12470> (“There seems to be a very nice balance of luck and skill in poker, in that the hard-working pros and serious students of the game are going to win a disproportionately large amount of the prize money, but the casual amateur still can beat any or all of the pros on any given day. That is what makes poker so popular.”).

¹⁷³ Much of this analysis of poker should also apply to fantasy league sports. Besides the material element of chance, fantasy league participants are wagering upon future contingent events. See generally Neville Firdaus Dastoor, Note, *The Reality of Fantasy: Addressing the Viability of a Substantive Due Process Attack on Florida’s Purported Stance against Participation in Fantasy Sports Leagues that Involve the Exchange of Money*, 6 VAND. J. ENT. L. & PRAC. 355 (2004); Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201 (2002).

¹⁷⁴ See N.Y. PENAL LAW § 225.00(1) (McKinney 2006).

¹⁷⁵ See N.Y. PENAL LAW § 225.05 (McKinney 2006).

¹⁷⁶ See Letter from Barry W. Brandon, General Counsel for the National Indian Gaming Commission, to Markham C. Erickson, Attorney at McGuiness & Hulch (June 17, 1999) (on file with author), available at <http://www.nigc.gov/Default.aspx?tabid=429>.

whether the state criminal laws prohibit the play of the game, in this case poker. As we have seen, the penal code does not make the play of poker a criminal violation.”¹⁷⁷ Since the playing of poker was not banned in New York, and since there was “no serious dispute that poker is played within private homes and public locations throughout the State of New York,” the NIGC took the position that Indian casinos in New York could offer their patrons the ability to play poker by establishing non-profit clubs with annual dues—which would be subject only to federal and tribal oversight.¹⁷⁸ Thus, the NIGC determined that the tribes are permitted to do what social clubs and poker clubs cannot do: charge people, and profit from playing poker.

Apart from Indian casinos, there are no places where an individual can promote poker playing in New York. A question remains, however, as to whether New York could by law authorize additional avenues by which poker promoters could earn a profit through other individuals playing the game.

The most likely way to accomplish this would be via an expansion of the games of chance laws in New York. Games of chance as played by certain charitable non-profit organizations are an exception to New York State’s general constitutional ban on gambling.¹⁷⁹ In 1975, New York voters approved an amendment to the state constitution authorizing games of chance nights.¹⁸⁰ The measure was not self-executing, and the state legislature passed legislation in 1976 that established the parameters for games of chance nights.¹⁸¹ Even though poker had been a staple of the games of chance nights that had existed before such games were formally legalized, the legislature chose not to legalize poker in 1976.¹⁸²

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See N.Y. CONST. art. I, § 9.

¹⁸⁰ See Edith Evans Asbury, *Charity Gambling Seems Approved*, N.Y. TIMES, Nov. 16, 1975, at 24.

¹⁸¹ Act of July 27, 1976, ch. 960, 1976 N.Y. Laws 1 (codified as amended at N.Y. GEN. MUN. LAW §§ 185–195n (McKinney 2006)).

¹⁸² See Letter from Joseph Lentol to the Hon. Judah Gribetz (June 30, 1977), at 3, Veto Jacket, Veto No. 123 of 1977.

Instead, the legislature added a provision stating that “[n]o game of chance shall involve wagering of money by one player against another player.”¹⁸³ Since poker is a non-banking game, poker was not authorized. The legislative debate on this subject makes this point explicitly. When Senator Rollison, the sponsor of the bill, was asked whether poker would be authorized under his legislation, he stated, “[p]oker is played player on player and this is only against the house.”¹⁸⁴

The 1976 legislation on games of chance was regarded as authorizing far too few games of chance for the charities and non-profit organizations.¹⁸⁵ In order to make games of chance nights more inviting to these organizations, the legislature in 1977 passed legislation that would have authorized poker and betting on filmed horse races.¹⁸⁶

Nonetheless, the bill was vetoed by Governor Carey.¹⁸⁷ Both Attorney General Lefkowitz and the New York State Racing and Wagering Board had stated that poker and video horse racing were unconstitutional.¹⁸⁸ In his veto message, the governor wrote, “[t]he Attorney-General has advised me that there are serious constitutional questions raised by this bill. Specifically, he states that poker and filmed horse races are not ‘games of chance’ within the definition contained in Article 1, Section 9, subdivision 2 of the New York State Constitution.”¹⁸⁹ Based on this objection, the governor rejected the legislature’s decree that poker was a game of chance.¹⁹⁰

Attorney General Lefkowitz had written the governor advising him that filmed horse races and poker were not games of chance

¹⁸³ N.Y. GEN. MUN. LAW § 186.3 (McKinney 2006).

¹⁸⁴ Debate on A. 13022, June 26, 1976, N.Y.S. Deb. at 9,648.

¹⁸⁵ See Edith Evans Asbury, “Las Vegas Nights” in *New York Could See Light of Day on February 1*, N.Y. TIMES, Nov. 4, 1976, at 43.

¹⁸⁶ Assemb. B. No. 8647-A, 1977 Leg., Reg. Sess. (N.Y. 1977).

¹⁸⁷ Assemb. B. No. 8647-A, 1977 Leg., Reg. Sess. (N.Y. 1977) (vetoed by Governor Carey, Veto No. 123 of 1977).

¹⁸⁸ Hugh Carey, Memorandum on Veto No. 123 of 1977 (Aug. 11, 1977), in PUBLIC PAPERS OF GOVERNOR CAREY 434, 435–36 (1987).

¹⁸⁹ *Id.* at 435.

¹⁹⁰ *Id.* at 435–36.

under the state constitution.¹⁹¹ The Racing and Wagering Board wrote the governor that poker was not a game of chance because it involved players playing against each other and because the prizes are not awarded by the organization sponsoring the game but come from the wagers of the individual players.¹⁹²

This might have finished the debate over the constitutionality of poker as a game of chance, were it not for subsequent actions of the legislature. In the years after 1977, the legislature has authorized games of chance which have all the alleged constitutional defects that poker possesses. In 1988, for example, the legislature authorized the game of bell jars as a game of chance.¹⁹³ Bell jars are more commonly known as pull tabs in other jurisdictions. They function in much the same manner as instant lottery tickets. The winning tickets have already been predetermined, and the patterns or symbols on the paper ticket are concealed. A player pulls the tabs on the paper tickets to reveal whether the ticket contains winning symbols or patterns.¹⁹⁴ The players play against other players to determine the winner. Bell jars are not banking games; they are games involving wagering of money by one player against another player.

The same is true of the game of raffles, which was legalized by the New York State Legislature as a game of chance in 1994.¹⁹⁵ In games of raffles, the players similarly play against one another to determine who possesses the winning ticket. Again, this is not a banking game. Additionally, in 1998 the legislature further amended the games of chance provisions to authorize raffles where the prize is a percentage of the moneys wagered by the ticket

¹⁹¹ Memorandum from Louis J. Lefkowitz to Hugh Carey, N.Y. Governor (June 30, 1977), at 2, Veto Jacket, Veto No. 123 of 1977.

¹⁹² Memorandum from Richard F. Corbisiero to Hon. Judah Gribetz (July 19, 1977), at 1, Veto Jacket, Veto No. 123 of 1977.

¹⁹³ Act of Apr. 15, 1988, ch. 46, 1988 N.Y. Laws 119.

¹⁹⁴ For a good description of a pull tab game, see Letter from Barry W. Brandon, General Counsel for the National Indian Gaming Commission, to Jerry C. Straus, Attorney at Hobbs, Straus, Dean & Walker (June 8, 1998) (on file with author), available at <http://www.nigc.gov/Default.aspx?tabid=482>. See also *Chickasaw Nation v. United States*, 208 F.3d 871, 874, (10th Cir. 2000), *aff'd*, 534 U.S. 84 (2001); *Doffin v. Comm'r Internal Revenue*, 61 T.C.M. (CCH) 2157, 2159 (T.C. 1991).

¹⁹⁵ Act of July 26, 1994, ch. 550, 1994 N.Y. Laws 3196.

purchasers.¹⁹⁶ Thus, in New York, “[i]n the game of raffle, a series of prizes may include a percentage of the sum of cash received from the sale of raffle tickets.”¹⁹⁷ Raffles not only involve players wagering against each other; the prizes in raffles can be derived directly from the bets of the players. All the reasons given by Governor Carey in 1977 for rejecting poker as a game of chance have now been accepted by the legislature. Additionally, there is nothing in the legislative history of the games of chance provision of the state constitution that would indicate that the legislature meant to exclude non-banking games from any definition of a game of chance.¹⁹⁸

Were the state legislature to include poker as a game of chance, the possible model to follow might be the State of Delaware. Delaware in 2005 authorized “the play of No Limit Texas Hold ’em Poker for the purpose of raising funds, by certain nonprofit organizations, for the promotion of charitable or civic purposes.”¹⁹⁹ The statute enacted by Delaware provides for an elaborate scheme which might be utilized by other states like New York in authorizing charitable poker games.²⁰⁰

VI. CAN NEW YORK STATE DECRIMINALIZE POKER?

If the State of New York wished to decriminalize the playing of poker, it surely could do so. All it would need to do is specifically exempt poker from the definition of gambling in section 225.00(2) of the New York Penal Law. This is hardly a unique method of operation.

The main difficulty in New York is that while the legislature could decriminalize the playing of poker, all gambling in New York—except for the exceptions of pari-mutuel wagering on

¹⁹⁶ Act of July 7, 1998, ch. 252, 1998 N.Y. Laws 2948.

¹⁹⁷ N.Y. GEN. MUN. LAW § 186 (McKinney 2006).

¹⁹⁸ See Debate on A. 9686, Senate Debates of May 7, 1974. Debate on S. 2509, Senate Debates of June 19, 1975.

¹⁹⁹ DEL. CODE ANN. tit. 28, § 1801 (2006).

²⁰⁰ See Act of July 7, 2005, ch. 117, 2005-2 Del. Code Ann. Adv. Legis. Serv. 565 (LexisNexis) (codified as amended at DEL. CODE ANN. tit. 28, §§ 1801–1835 (2006)).

horses, a state-operated lottery, and charitable bingo and games of chance—is illegal.²⁰¹ Even if the legislature exempted poker from sanctions, it would still be illegal under the state constitution.

In New York, the sport of horse racing has at times—most recently from 1934 to 1940—existed under a system where bookmaking was criminal except if the bookmaking took place at a licensed racetrack.²⁰² When the bookmaking took place at licensed racetracks, the only applicable sanction was a civil penalty—the recovery of the amount wagered.²⁰³ The legislature in effect decriminalized bookmaking within the confines of racetracks.²⁰⁴ The Court of Appeals found a similar system to be constitutional in the case of *People ex rel. Sturgis v. Fallon*, where it held that while the New York State Constitution made gambling illegal, the extent of the penalty for gambling was up to the discretion of the legislature.²⁰⁵ A system under which gambling at the racetracks was only subject to a civil penalty was not unconstitutional, because the provision of the state constitution proscribing was not self-executing:²⁰⁶

It being in a degree appropriate, we are aware of no principle of constitutional law which would authorize this court to condemn it as invalid or unconstitutional, because, in our opinion, some more effective or more appropriate law might have been devised and enacted. So long as this legislation was in any degree appropriate to carry into

²⁰¹ See N.Y. CONST. art. I, § 9; *Dalton v. Pataki*, 835 N.E.2d 1180, 1185–86 (N.Y. 2005), *cert. denied*, 126 S. Ct. 742 (2005); *Intercont'l Hotels Corp. v. Golden*, 238 N.Y.S.2d 33, 35 (N.Y. App. Div. 1963), *rev'd on other grounds*, 203 N.E.2d 210 (N.Y. 1964); *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 846 (N.Y. Sup. Ct. 1999).

²⁰² See Act of Apr. 19, 1934, ch. 233, 1934 N.Y. Laws 717. See also Act of May 26, 1887, ch. 479, 1887 N.Y. Laws 604; *Brennan v. Brighton Beach Racing Ass'n*, 9 N.Y.S. 220, 222 (N.Y. Sup. Ct. 1890).

²⁰³ See Act of Apr. 19, 1934, ch. 233, 1934 N.Y. Laws 717; *Beach v. Queens County Jockey Club*, 298 N.Y.S. 777, 780–81 (N.Y. Sup. Ct. 1937).

²⁰⁴ See *Beach*, 298 N.Y.S. at 782.

²⁰⁵ 46 N.E. 302, 305 (N.Y. 1897). See also *People v. Mumford*, 12 N.Y.S.2d 925, 927 (N.Y. Magis. Ct. 1939).

²⁰⁶ *Sturgis*, 46 N.E. at 305.

effect the purpose of the Constitution, it does not fall under its condemnation.²⁰⁷

Numerous other states exempt certain gambling activities from the reach of their general penal laws. For example, fishing derbies—where contestants pay an entry fee and obtain prizes based on the size or species of the fish that they catch—constitute gambling. There is consideration in the form of an entry fee, reward for a prize, and the outcome is largely dominated by luck. Many states, however, exempt fishing derbies or contests from their penal laws involving gambling.²⁰⁸

Even New York has some recognition of the legal status of fishing derbies. Not only are there a plethora of fishing derbies in New York,²⁰⁹ there is a near exemption for such events: the state commissioner of economic development is empowered to authorize grants to municipalities for fishing derbies for the state's Erie Canal.²¹⁰

The State of Washington not only exempts fishing derbies from its penal laws proscribing gambling, the state also provides a wide range of exemptions from penal laws for other activities that entail gambling. For instance, Washington exempts dice or coin contests for music, food, or beverage payment,²¹¹ amusement games at certain designated locations,²¹² specific sports pools,²¹³ golfing sweepstakes,²¹⁴ bowling sweepstakes,²¹⁵ and social card and dice games.²¹⁶

In short, New York certainly would not be doing anything unusual if it exempted the playing of poker from its penal laws

²⁰⁷ *Id.*

²⁰⁸ *See e.g.*, ALASKA STAT. § 16.05.662 (2006); CONN. GEN. STAT. § 26-27 (2006); ME. REV. STAT. ANN. tit. 12 § 12504 (2006); MINN. STAT. § 97C.081 (2006); MO. REV. STAT. § 311.211 (2006); MONT. CODE ANN. § 23-5-165 (2006); N.D. CENT. CODE § 20.1-02-05(20) (2006); WASH. REV. CODE §§ 9.46.0237, 9.46.293 (2006).

²⁰⁹ *See* Will Elliot, *Where the Fish Are Biting*, BUFFALO NEWS, June 3, 2004, at D4.

²¹⁰ N.Y. ECON. DEV. LAW § 174 (McKinney 2006).

²¹¹ WASH. REV. CODE § 9.46.0305 (2006).

²¹² WASH. REV. CODE § 9.46.0331 (2006).

²¹³ WASH. REV. CODE § 9.46.0335 (2006).

²¹⁴ WASH. REV. CODE § 9.46.0341 (2006).

²¹⁵ WASH. REV. CODE § 9.46.0345 (2006).

²¹⁶ WASH. REV. CODE § 9.46.0351 (2006).

proscribing gambling. The state has provided such exceptions in the past, and other states regularly provide similar exceptions.²¹⁷ The problem for New York is that poker would still be illegal gambling under both the state constitution and the state's General Obligation Law.²¹⁸

One potential way for the state to address the issue of making poker legal under the Penal Law, the General Obligations Law, and the New York State Constitution is to say that poker played under certain specific conditions is a game of skill. New York State already has a provision authorizing handicapping contests on horse racing, so long as all of the entry fees are utilized for prizes.²¹⁹ The statute specifically states, “[a] handicapping tournament operated in accordance with the provisions of this section shall be considered a contest of skill and shall not be considered gambling.”²²⁰ If the legislature were to find that poker was a game of skill, or a game whose outcome did not depend in a material degree upon an element of chance, would that exempt poker from all of the state's laws making gambling unlawful?²²¹

²¹⁷ The fact that mere players are not subject to the State's penal laws on gambling could be viewed similarly as another exception to the general gambling laws.

²¹⁸ An additional question would arise in the event that New York exempted poker from its penal laws: would poker still be considered gambling under the provisions of the state's General Obligations Law that classify all gaming “unlawful” and provide remedies for lost wagers? *See* N.Y. GEN. OBLIG. LAW §§ 5-401–5-423 (McKinney 2006). The Second Circuit used these sections of the General Obligations Law, coupled with article I, section 9 of the state constitution, to lay the foundation for its holding that bets placed over the Internet from New York violate the federal Wire Wager Act, 18 U.S.C. § 1084 (2000). *See* *United States v. Cohen*, 260 F.3d 68, 73 (2d Cir. 2001), *cert. denied*, 536 U.S. 922 (2002). Arguably, if poker was exempted from the definition of gambling under the Penal Law, the game could still be subject to the provisions of the General Obligations Law. Thus, if the legislature would ever exempt poker from the penal provision on gambling, it might also wish to deal with poker under the General Obligations Law. A court might also hold that the General Obligations Law should be treated *in pari materia* with the Penal Law. *See* *Plato's Cave Corp. v. State Liquor Auth.*, 496 N.Y.S.2d 436, 437–38 (N.Y. App. Div. 1985), *aff'd*, 498 N.E.2d 420 (N.Y. 1986).

²¹⁹ N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 908 (McKinney 2006).

²²⁰ *Id.*

²²¹ The legislature might also need to contend with the additional issue of whether poker games involve wagers on future contingent events. The definition of gambling in § 225.00(2) of the New York Penal Law involves either wagering on a contest of chance or on a “future contingent event” not under the control of the player. *See* N.Y. PENAL LAW § 225.00(2) (McKinney 2006). While courts have traditionally analyzed poker

Again, the notion that a game of skill is not gambling is hardly an outlier. New York courts have repeatedly stated that “[t]he principle that a game of skill is not within the compass of a gambling statute is one of long standing in this State.”²²² Many states have statutory provisions explicitly stating that “bona fide contests of skill . . . in which awards are made only to entrants or to the owners of entries” do not fall under the ambit of gambling.²²³

Maine has exempted bingo and beano²²⁴ from its gambling provisions by defining them as games of skill.²²⁵ These are, in fact, games of pure chance, but they have been legalized by the legislature as games of skill. Arkansas has passed the “Local Option Horse Racing and Greyhound Racing Electronic Games of Skill Act.”²²⁶ This is an attempt, subject to local referenda, to authorize electronic gambling games at Arkansas’ two pari-mutuel facilities.²²⁷ The statute defines games of skill as “games played through any electronic device or machine that afford an opportunity for the exercise of skill or judgment when the outcome is not completely controlled by chance alone.”²²⁸ This definition would appear to authorize video poker, which has an element of skill,²²⁹ but not traditional slot machines, which operate solely based on chance. Clearly, this skill requirement is designed to

under the contest of chance framework, aspects of the game certainly entail wagering on a future contingent event, i.e. the deal of the cards. Any legislative attempt to treat poker as a game of skill should also address the future contingent event. For an explication of a future contingent event, see *People v. Turner*, 629 N.Y.S.2d 661, 663 (N.Y. Crim. Ct. 1995) (dealing with the legality of the “shell game,” also known as three card monte).

²²² *Turner*, 629 N.Y.S.2d at 662.

²²³ See WYO. STAT. ANN. § 6-7-101(a)(iii) (2006). See also COLO. REV. STAT. § 18-10-102(2)(a) (2006); CONN. GEN. STAT. § 53-278a(2) (2006); IDAHO CODE ANN. § 18-3801(1) (2006); IND. CODE § 35-45-5-1 (2006); N.D. CENT. CODE § 12.1-28-01(1) (2006).

²²⁴ Beano is the precursor to the current game of bingo. See *History of Bingo*, <http://www.thevirtualbingo.net/history.html> (last visited Aug. 25, 2006).

²²⁵ Maine defines games of skill as games other than games of chance; bingo and beano are specifically cited as not being games of chance. See ME. REV. STAT. ANN. tit. 17, § 330 (2006).

²²⁶ Act of Mar. 22, 2005, No. 1151, 2005-4 Ark. Adv. Legis. Serv. 1080 (LexisNexis) (codified as amended at ARK. CODE ANN. §§ 23-113-101–23-113-604).

²²⁷ See ARK. CODE ANN. § 23-113-101 (2006).

²²⁸ ARK. CODE ANN. § 23-113-103(5)(A) (2006).

²²⁹ See *supra* note 83.

evade Arkansas' constitutional prohibition on lotteries and the sale of lottery tickets.²³⁰

Thus, it might be possible for New York to pass legislation stating that "poker is a bona fide game of skill, and that poker games in which awards, prizes, or items of value are distributed only to individual poker players do not constitute gambling under the Penal Law and the General Obligations Law." It might also be possible to require a legalized game of poker to be played in a fashion that emphasized skill elements.²³¹

Thus constituted, a legalized poker statute in New York would have the strong benefit of the presumption of validity.²³² "[S]tate courts should uphold state regulation whenever possible. They should be clearly convinced that a statute is unconstitutional before they declare it invalid."²³³ Unless a statute shows itself to be unconstitutional beyond a reasonable doubt, it should be upheld.²³⁴ "This presumption is accompanied by another as to the statute: that the Legislature has investigated and found the existence of a situation showing or indicating the need for or desirability of the legislation."²³⁵ If the legislature held hearings and made findings that poker was a game of skill, this would only further establish that the statute was not passed in a frivolous manner.²³⁶

Armed with the strong presumption of constitutionality, the legislative findings, a means of preventing non-participants from profiting from poker games, and the extensive literature establishing the significance of skill in poker,²³⁷ a statute legalizing poker in New York could be seen as reasonable. It is certainly

²³⁰ ARK. CONST. art. XIX, § 14. See *Scott v. Dunaway*, 311 S.W.2d 305, 306 (Ark. 1958); *Longstreth v. Cook*, 220 S.W.2d 433, 437 (Ark. 1949).

²³¹ Perhaps placing limits on the amount of money that can be bet or raised in a game so that one hand will not be outcome determinative might be considered a way of limiting the chance element of a poker game.

²³² N.Y. Stat. Law § 150 (McKinney 2006). See *Cook v. Binghamton*, 398 N.E.2d 525, 528 (N.Y. 1979).

²³³ *People v. Nebbia*, 186 N.E. 694, 699 (N.Y. 1933), *aff'd*, 291 U.S. 502 (1934).

²³⁴ See *Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp.*, 813 N.E.2d 587, 594 (N.Y. 2004); *Moran Towing Corp. v. Urbach*, 787 N.E.2d 624, 627 (N.Y. 2003); *Van Berkel v. Power*, 209 N.E.2d 539, 541 (N.Y. 1965).

²³⁵ *Van Berkel*, 209 N.E.2d at 541.

²³⁶ See *Pharm. Mfrs. Ass'n v. Whalen*, 430 N.E.2d 1270, 1273 (N.Y. 1981).

²³⁷ See *supra* notes 7–12 and accompanying text.

more a game of skill than the games authorized as skill games in Maine²³⁸ and Arkansas.²³⁹

It may be possible for poker in New York to reach the levels W. C. Fields suggested for it in the 1940 movie *My Little Chickadee*. Fields' character, Cuthbert J. Twillie, is asked about a poker game by the prototypical rube Cousin Zeb, played by the actor Fuzzy Knight: "Uh, is this a game of chance?" Fields' response is, "Not the way I play it, no."²⁴⁰ New York now has the potential to make Fields' view of poker the correct one.

²³⁸ See *supra* notes 224–225 and accompanying text.

²³⁹ See *supra* notes 228–229 and accompanying text.

²⁴⁰ Memorable Quotes from MY LITTLE CHICKADEE (Universal Pictures 1940), Internet Movie Database, <http://www.imdb.com/title/tt0032828/quotes> (last visited Aug. 28, 2006). The lines are also quoted in LUBET, *supra* note 8, at 20.