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
Available at: https://ir.lawnet.fordham.edu/iplj/vol17/iss1/1
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.”

INTRODUCTION

Now that the game of poker has become virtually ubiquitous in North America, 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).

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?  

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 teams 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. “Any ‘Joe Blow from Idaho’ can enter the World Series

---


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.


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

---

6 GROTSTEIN & 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 games\(^{14}\) and “the national card game of

---


\(^{11}\) **MIKE CARO**, **CARO’S BOOK OF 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 Singsen, *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

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.
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.
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

---

23 Id.
24 Id.
25 Id.
26 Paul Haavardsrud, There’s No Holding Back Hold ‘Em, CALGARY HERALD, July 10, 2005, at A7. 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. Poker has been in the Lycos top fifty searched terms since March of 2004, and has at times been the most searched term. 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.

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.” 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. In this case, the Floradora Company created a contest. 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

---

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.\textsuperscript{34} In order to submit an entry, the readers had to send in
cards from cigars.\textsuperscript{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.\textsuperscript{36}
The company was charged with operating an illegal lottery under
New York’s Penal Code.\textsuperscript{37} The sole question before the court was
whether this contest was decided by chance.\textsuperscript{38}

Until this case, the predominant rule was that a lottery had to
consist only of pure chance, the so-called English rule.\textsuperscript{39} Under
the English rule, if there was an exercise of judgment or skill, there
was no lottery.\textsuperscript{40} The Court of Appeals in \textit{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[.]”\textsuperscript{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.\textsuperscript{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

\textsuperscript{34} \textit{Id.} at 753.
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 754.
\textsuperscript{39} \textit{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).}
\textsuperscript{40} \textit{See Opinion of the Justices No. 373, 795 So.2d at 635; Minges, 36 So.2d at 96.}
\textsuperscript{41} 71 N.E. at 755.
\textsuperscript{42} \textit{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 acceptation 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.
[45] Id. at 272.
[46] Id.
[47] Id. at 273–74.
[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.”

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.”

*People v. Bright* involved a defendant who had been charged with the crime of being a common gambler. The defendant organized a poker game where he received a percentage of the wagers. The only witness against the defendant was the uncorroborated testimony of a player in the poker game. 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. 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. 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.

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.”

---

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.
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

---

62 *Id.* at 553.
63 *Id.* at 554–55.
64 *Id.* at 555.
holding a stud poker game at his apartment.\textsuperscript{65} The court ruled that the defendant’s admission that he received twenty-five cents from the winner of each game was clearly admissible.\textsuperscript{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.\textsuperscript{67} In upholding the conviction the court stated, “[t]here is no doubt that playing ‘stud’ poker for money is a game of change [sic] and constitutes gambling. . . . ‘Any game of cards for stakes is technically gambling’\textsuperscript{68}.

The Court of Appeals in \textit{Katz’s Delicatessen, Inc. v. O’Connell} made similar statements about poker as gambling.\textsuperscript{69} In the \textit{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 \textit{suffer or permit any gambling} on the licensed premises.\textsuperscript{70} The State Liquor Authority suspended the delicatessen’s retail beer license for five days.\textsuperscript{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.\textsuperscript{72} There was no element of professionalism and criminal gambling charges directed against the proprietors were dismissed.\textsuperscript{73} Nonetheless, the State Liquor Authority used the incident as the basis of disciplinary charges.\textsuperscript{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.\textsuperscript{75} The court found that the use of the broad language “any gambling” in the Alcoholic Control Law

\textsuperscript{66} \textit{Id.} at 241.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.} at 237 (citing \textit{In re Fischer}, 247 N.Y.S. 168, 178–79 (N.Y. App. Div. 1930)).
\textsuperscript{69} 97 N.E.2d 906, 907 (N.Y. 1951).
\textsuperscript{70} \textit{Id.} at 906.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.} at 906–07.
\textsuperscript{75} \textit{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.
regarding gambling in licensed premises.”

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.”

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.

---


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


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.


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.”

The former gambling article of the old Penal Law did not contain a definition of gambling, nor did the article define pool-selling or bookmaking. While the drafters of the revised Penal Law stated that their gambling article contained “few actual changes of substance,” 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.”

There was a definition of a lottery in the lottery article of the former Penal Law. 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.” 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.

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.

---

88 Id.
90 Gilbert, supra note 89, at § 986.
91 Proposed Penal Law, supra note 86, at 381.
93 Article 130. See Gilbert, supra note 89.
94 Gilbert, supra note 89, § 1370.
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.”\textsuperscript{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.’”\textsuperscript{98}

The end of the dominating element test was emphasized by the New York State Attorney General in an advisory opinion in 1984.\textsuperscript{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.\textsuperscript{100} A similar concept had been found to be valid as a lottery in Delaware.\textsuperscript{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.\textsuperscript{102}

\textsuperscript{97} N.Y. PENAL LAW § 225.00(1) (McKinney 2006) (emphasis added).
\textsuperscript{98} N.Y. PENAL LAW § 225.00 cmt. (McKinney 2006) (William C. Donnino, Practice Commentary).
\textsuperscript{100} Id. at 11–12.
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.”

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. 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. 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.

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. The Boardwalk Regency Casino sought a declaratory judgment asking that its proposed backgammon tournament be held to be proper as a non-gambling activity. The casino argued that backgammon was a game of skill. The court acknowledged “that backgammon, played on its

103 Id.
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.”

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.”

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.”

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

---

Ainslie, Ainslie’s Complete Hoyle, supra note 10, at 350.

10 Boardwalk Regency, 457 A.2d at 850.

11 Id. at 850.

12 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. 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 game . . . .

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


116 Id. at 1155.

117 Id. at 1155–56.
games, in fact, required a combination of skill and chance.\footnote{118}

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.\footnote{119} The lower court had found that poker and bridge were games of chance, and the recreation center appealed from that decision.\footnote{120} The supreme court affirmed the judgment of the lower court.\footnote{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.\footnote{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.”\footnote{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.”\footnote{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.\footnote{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.”\footnote{126} The Colorado Supreme Court again reiterated its position that poker was a gambling game in *Charnes v. Central*

\footnote{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.”).
\footnote{119} 235 N.W.2d 398, 400 (Neb. 1975).
\footnote{120} *Id.*
\footnote{121} *Id.* at 402.
\footnote{122} *Id.* at 401 (citing State v. Prevo, 361 P.2d 1044, 1050 (Haw. 1961)).
\footnote{123} *Id.* at 401.
\footnote{125} *Id.*
\footnote{126} 251 P.2d 926, 929 (Colo. 1952).
City Opera House Association.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{131} Courts in both states have regularly found poker to be a gambling game which involved the element of chance.\textsuperscript{132}

Montana has legalized and regulated poker pursuant to the Montana Card Games Act of 1974.\textsuperscript{133} Montana courts, however,
have found that poker is gambling. 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. 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. 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.

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.”

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. 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.

---

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. In the 1930s, poker clubs started to develop in the city of Gardena, outside of Los Angeles. 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. The games of draw poker and low ball poker were being played at such clubs. 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. The court found that the district attorney needed to rely on specific provisions of the law in order to maintain his action. There were, however, no such statutes making these versions of poker illegal; the statute only specified stud-horse poker. “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.” 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).


Id. at 352.

Id. at 350.

Id. at 357.

Id.

Id.
therefore inapplicable.” 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. The Attorney General, however, nonetheless continued to maintain that stud poker was forbidden by the statutory ban on stud-horse poker.

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[.]” The court determined that because of its community card feature, hold ’em was not a form of stud-horse poker. 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.”

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.”

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. In the wake of the decision, the legislature followed the recommendation of the court, and simply repealed the ban on stud-horse gambling.

---

149 Id. at 358.
153 Id. at 796.
154 Id. at 794.
155 Id. at 796.
156 Id.
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.\textsuperscript{158} In \textit{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.\textsuperscript{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.”\textsuperscript{160}

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

\begin{enumerate}
\item[159] \textit{Id.}
\item[160] \textit{Lavick}, 188 P.2d at 759.
\item[162] \textit{Id.} at 94.
\item[163] \textit{Id.} at 93.
\item[164] \textit{Id.} at 94.
\item[165] \textit{Id.} at 96.
\item[166] \textit{Id.} at 94.
\end{enumerate}
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

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

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.

---


\(^{168}\) 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:

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


\(^{169}\) 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.'" 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. Thus, under New York law, poker would be a contest of chance. 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.

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. 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).

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.
Instead, the legislature added a provision stating that “[n]o game of chance shall involve wagering of money by one player against another player.” 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.”

The 1976 legislation on games of chance was regarded as authorizing far too few games of chance for the charities and non-profit organizations. 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.

Nonetheless, the bill was vetoed by Governor Carey. Both Attorney General Lefkowitz and the New York State Racing and Wagering Board had stated that poker and video horse racing were unconstitutional. 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.” Based on this objection, the governor rejected the legislature’s decree that poker was a game of chance.

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).
189 Id. at 435.
190 Id. at 435–36.
under the state constitution. 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.

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. 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. 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. 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.

---

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

---

197 N.Y. GEN. MUN. LAW § 186 (McKinney 2006).
horses, a state-operated lottery, and charitable bingo and games of chance—is illegal.\textsuperscript{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.\textsuperscript{202} When the bookmaking took place at licensed racetracks, the only applicable sanction was a civil penalty—the recovery of the amount wagered.\textsuperscript{203} The legislature in effect decriminalized bookmaking within the confines of racetracks.\textsuperscript{204} The Court of Appeals found a similar system to be constitutional in the case of \textit{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.\textsuperscript{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:\textsuperscript{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


\textsuperscript{204} See Beach, 298 N.Y.S. at 782.

\textsuperscript{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).

\textsuperscript{206} Sturgis, 46 N.E. at 305.
effect the purpose of the Constitution, it does not fall under its condemnation.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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,\textsuperscript{211} amusement games at certain designated locations,\textsuperscript{212} specific sports pools,\textsuperscript{213} golfing sweepstakes,\textsuperscript{214} bowling sweepstakes,\textsuperscript{215} and social card and dice games.\textsuperscript{216}

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

\textsuperscript{207} Id.
\textsuperscript{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).
\textsuperscript{209} See Will Elliot, Where the Fish Are Biting, BUFFALO NEWS, June 3, 2004, at D4.
\textsuperscript{210} N.Y. ECON. DEV. LAW § 174 (McKinney 2006).
\textsuperscript{211} WASH. REV. CODE § 9.46.0305 (2006).
\textsuperscript{212} WASH. REV. CODE § 9.46.0331 (2006).
\textsuperscript{213} WASH. REV. CODE § 9.46.0335 (2006).
\textsuperscript{214} WASH. REV. CODE § 9.46.0341 (2006).
\textsuperscript{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. 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.

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. 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.” 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?

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.” 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.

Maine has exempted bingo and beano from its gambling provisions by defining them as games of skill. 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.” This is an attempt, subject to local referenda, to authorize electronic gambling games at Arkansas’ two pari-mutuel facilities. 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.”

This definition would appear to authorize video poker, which has an element of skill, 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).

See supra note 83.

---

222 Turner, 629 N.Y.S.2d at 662.
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).
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

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.
235 Van Berkel, 209 N.E.2d at 541.
237 See supra notes 7–12 and accompanying text.
more a game of skill than the games authorized as skill games in Maine\textsuperscript{238} and Arkansas.\textsuperscript{239}

It may be possible for poker in New York to reach the levels W. C. Fields suggested for it in the 1940 movie \textit{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.”\textsuperscript{240} New York now has the potential to make Fields’ view of poker the correct one.

\textsuperscript{238} See \textit{supra} notes 224–225 and accompanying text.

\textsuperscript{239} See \textit{supra} notes 228–229 and accompanying text.

\textsuperscript{240} Memorable Quotes from \textit{My Little Chickadee} (Universal Pictures 1940), Internet Movie Database, \url{http://www.imdb.com/title/tt0032828/quotes} (last visited Aug. 28, 2006). The lines are also quoted in \textsc{Lubet}, \textit{supra} note 8, at 20.