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## GAMING, LOTTERIES, AND WAGERING: THE PRE-REVOLUTIONARY ROOTS OF THE LAW OF GAMBLING

*G. Robert Blakey\**

"The laws of a nation form the most instructive portion of its history. . . ."<sup>1</sup>

### I. INTRODUCTION

"Such is the unity of all history," Pollack and Maitland began their classic study of English law, "that anyone who endeavors to tell a piece of it must feel that his first sentence tears a seamless web."<sup>2</sup> The tracing of the history of the law of gambling in the United States is similar. Our present

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In publishing this Article, the *Rutgers Law Journal* is departing from its standard sourcing practice. In order to save space, sourcing, with limited exceptions, is confined to legal materials. Matters relating to general history are unreferenced. Professor Blakey also wishes to express his thanks to Roger Jacobs, the director of the Notre Dame Law School, and his able staff, particularly Carmella Kinslow, for their help in locating documents that no one else could find.

1. 2 E. GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 669 (1932).

2. 1 F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW 1 (2d ed. 1952).

legal policy is a complex tapestry, an unwieldy textile with a multi-colored design whose fibers have independent derivations. Untwisting those individual filaments is essential to understanding not only the design of the tapestry itself but also any effort, in whole or in part, to reweave it into a new design.

Unquestionably, the design of our gambling law tapestry is being reexamined and rewoven. Prior to 1950, there were few exceptions to a general prohibition against gambling at the federal and state levels.<sup>3</sup> In the last several decades, however, there has been an increasing trend toward the legalization of various forms of gambling.<sup>4</sup> During this period, national attention has also focused on the threat of organized criminal syndicates,<sup>5</sup>

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3. See generally Blakey, *Legal Regulation of Gambling Since 1950*, 47 ANNALS AM. ACAD. POL. & SOC. SCI. 12 (1984).

4. A survey of the fifty states and the District of Columbia shows that today only four states ban all types of gambling activities. Thirty states permit pari-mutual betting on horses, while thirteen states permit it on dogs. Betting on jai alai is lawful in four states, and sports betting is legal in three states. More than eighteen states, as well as the District of Columbia, have authorized lotteries. Bingo is legal in all but eight states. Nevada and New Jersey allow casino gambling, while North Dakota permits low-limit blackjack and California permits poker. Some state legislatures are reconsidering their gambling laws. See *Gambling Rage: Out of Control?*, U.S. NEWS & WORLD REP., May 30, 1983, at 27, 28.

5. "Organized crime" is a phrase with many meanings, and may be analogized to the fictional crime portrayed in Akira Kurosawa's 1950 film, *Rashoman*, in which a ninth-century nobleman is killed and his bride raped by a bandit. The film portrays versions of the crimes from the perspectives of each of the three participants and a witness. Each version is different. Similarly, there are different views on the definition and existence of "organized crime." Some have seen nothing and decided that nothing was there. See, e.g., Hawkins, *God and the Mafia*, 14 PUB. INT. 24 (1969). Others, examining the phenomenon from an anthropological perspective, have seen a "social system." See, e.g., F. IANNI, *A FAMILY BUSINESS* (1972). One commentator, relying on press accounts, has seen organized crime as only a public relations gimmick. D. SMITH, *THE MAFIA MYSTIQUE* (1975). An organizational theorist sees a functional division of labor. D. CRESSEY, *THEFT OF THE NATION* (1969). Some lawyers view it as a conspiracy. Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases*, in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME app. C, at 80, 81-93 (1967). The President's Crime Commission in 1967 adopted a view that termed conspiratorial behavior "organized crime" when its organizational sophistication reached a level where division of labor included positions for an "enforcer" of violence and a "corrupter" of the legitimate processes of our society. *Id.* at 8.

The particular organized crime syndicate known as the Mafia was termed only the "core" of organized crime; it was not considered identical to it. *Id.* at 6. The tendency of some to identify organized crime with the Mafia has been decried by no less than the sponsor of the Organized Crime Control Act, Senator John L. McClellan. COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA 181-82 (1976) ("in none of the hearings or in the processing of legislation in which I have been involved has the term been used in this circumscribed fashion") [hereinafter cited as GAMBLING]. It is evident that other ethnic groups are deeply involved in organized crime on both the syndicate and enterprise level. PENNSYLVANIA CRIME COMM'N, A DECADE OF

which are thought to derive a major, although declining, source of revenue from illegal gambling.<sup>6</sup> Unfortunately, our society tends to approach issues

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ORGANIZED CRIME 1980 REPORT 18-20 (1980) ("Black Mafia" in Philadelphia). For a further breakdown of the concept of "organized crime" into "syndicate," "enterprise," and "venture," see NATIONAL COMM'N FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 190-92 (1976) (concurring statement of Commissioner Blakey).

Ultimately, the definition of organized crime is a question of not only perspective, but also purpose. Definitions may differ according to the purpose for which a person intends. Even persons within the same profession may legitimately define it differently in different contexts. Accordingly, no one should expect a single definition to command universal adherence. G. BLAKEY, R. GOLDSTOCK & C. ROGOVIN, *RACKET BUREAUS: INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME* 3 (1978). Nevertheless, the quest for a universal definition continues. See, e.g., Maltz, *Toward Defining Organized Crime*, in *THE POLICIES AND ECONOMICS OF ORGANIZED CRIME* 21 (1984). In addition, the absence of a universal definition troubles those who should know a single definition is impossible. See, e.g., Bradley, *Racketeering and the Federalization of Crime*, 22 CRIM. L. REV. 212, 259-61 (1984).

6. The flow of illicit funds in the area of gambling is a matter of dispute. Compare GAMBLING, *supra* note 5, at 63-65 with Kallick-Kaufmann, *The Micro and Macro Dimensions of Gambling in the United States*, 35 J. SOC. ISSUES, No. 3, at 7 (1979). The social scientists who conducted a national survey for the Commission estimated illicit gambling revenue to be five billion dollars. The Department of Justice, however, told the commission that its estimate was between \$29 billion and \$39 billion. GAMBLING, *supra* note 5, at 63. The Commission expressed reservations about the lower figure. *Id.* at 63-65. Other estimates of the handle and take are higher. See TASK FORCE ON LEGALIZED GAMBLING, *EASY MONEY* (1974) (handle \$22.9 billion, gross take \$3.5 billion, net take \$1.6 billion) [hereinafter cited as *EASY MONEY*]. No matter what estimate is used, gambling cannot be accepted any longer as the chief source of income for organized crime, as it was in 1967. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 188 (1967) [hereinafter cited as *CHALLENGE*]. For other estimates of the flow of illicit funds, see INTERNAL REVENUE SERVICE, DEP'T OF THE TREASURY, *INCOME TAX COMPLIANCE RESEARCH* 35-39 (July 1983) (unreported income for 1981: drugs (\$23.4 billion), gambling (\$3.4 billion), prostitution (\$7.4 billion)). The service has recently completed more comprehensive estimates which continue to differ with the estimates of the Department of Justice. See ABT ASSOC., INC., *UNREPORTED TAXABLE INCOME FROM SELECTED ILLEGAL ACTIVITIES* 108 (report prepared under contract with Internal Review Service) (unreported income of \$2.4 billion, composed of \$1.6 million on numbers, \$348 million on horses, \$422 million on sports, and \$19 million in casinos). On the difficulties of estimating the size of various aspects of the underground economy, see S. REP. No. 122, 98th Cong., 1st Sess. 2-4 (1983).

The link between gambling and organized crime first received national public attention through the investigations of Senator Estes Kefauver. E. KEFAUVER, *CRIME IN AMERICA* (1951). The Kefauver Committee's origins lay in work done in California by then-Governor Earl Warren, who created the California Crime Commission, which conducted a comprehensive review of organized crime in California. L. KATCHER, *EARL WARREN: A POLITICAL BIOGRAPHY* 243-47 (1967). At the time, the work of the committee was not well received. See Wilson, *The Kefauver Committee 1950*, in 5 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 3439 (A. Schlesinger & R. Burns eds. 1975). Significantly, at the beginning of the probe, "Attorney General McGrath [said] that the Justice Department had no persuasive evidence that a 'national crime syndicate' did exist." *Id.* at 3450.

of legal reform from a narrow, utilitarian perspective.<sup>7</sup> The experience of others in different times and places is seldom brought to bear on contemporary issues. When history is ignored, its lessons must be relearned. Therefore, it may be not only enlightening but also useful to discuss how the background of our current law of gambling was woven in our pre-revolutionary period. It is on that background that any new design must be stitched.

English life and English law played a major role in shaping legal thought and social institutions in the colonies prior to 1776. Indeed, many of the separate filaments that comprise the modern American tapestry of gambling law were first brought together, albeit in different combinations, in the early history of the Mother Country. Each of the major forms of gambling: gaming, lotteries and wagering had appeared, and various efforts had been made to control them.<sup>8</sup> A wide range of questions had been

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Kefauver made an effort to offer the evidence, but did not persuade scholars. See W. MOORE, *THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME 1950-1952* at 241 (1974) (referring to the committee's "debatable judgments on the structure of organized crime"). Senator Kefauver's investigation into organized crime was continued by Senator John L. McClellan. The McClellan committee's efforts focused on the infamous Apalachin organized crime gathering in upstate New York in 1957 and the testimony of the Mafia informer Joseph Valachi. That work also had its academic critics. A. SCHLESINGER, *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 696* (1965) ("criminologists . . . were . . . skeptical of . . . the notion of a centrally organized . . . Mafia"); A. SCHLESINGER, *ROBERT KENNEDY AND HIS TIMES* (1978) (skeptic's position is "more persuasive"). Evidence obtained more recently by the Department of Justice and presented in court supports the Senate investigations of Kefauver and McClellan. Compare *United States v. Bufalino*, 285 F.2d 408, 419 (2d Cir. 1960) (Clark, J., concurring) ("not a shred of legal evidence that the Apalachin gathering was illegal") with *United States v. Licavoli*, 725 F.2d 1040, 1043 (6th Cir. 1984) (prosecution of "crime family" of Cleveland); *United States v. Riccobene*, 709 F.2d 214, 216 (3d Cir. 1983), *cert. denied*, 464 U.S. 849 (1983) (prosecution of "crime family" of Philadelphia); *United States v. Brooklier*, 685 F.2d 1208, 1213 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (prosecution of "crime family" of Los Angeles) ("Appellants are members of La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling, and loansharking"); and *United States v. Bufalino*, 683 F.2d 639, 647 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) (Bufalino, who was at Apalachin, was a member of "La Cosa Nostra, an organization whose members performed murders for one another as a matter of professional courtesy").

7. Bentham and his followers shaped the course of law reform . . . [But they] neglected all the complex social evolution which had gone to the making of . . . [the] world and . . . individuals in it. It is for this reason that they considered that the study of history was a matter of minor importance.

W. HOLDSWORTH, *THE HISTORIANS OF ANGLO-AMERICAN LAW* 23-24 (1927).

8. The three key forms of gambling are gaming, lotteries and betting. Gaming may be defined as "the playing of any game for stakes hazarded by the players." A lottery may be defined as "a distribution of prizes by lot or chance." Betting may be defined as "promise[s] to give money or money's worth upon the determination of an uncertain or unascertained event in a particular way, and (unlike a lottery) may involve skill or judgment." ROYAL

asked about each of the various forms of gambling and its consequences. Who operated them? Who participated in them? Where did they take place? How were they promoted? Should they be prohibited or regulated? To what ends? The answers that were given to these questions were not always those that we would give today; nevertheless, they are instructive in any modern reexamination and reform of legal policy.

## II. THE ENGLISH BACKDROP — LAW AND PRACTICE BEFORE 1776

### A. Gaming

#### 1. The Early Statutes

Gaming in England was recorded as early as the Middle Ages.<sup>9</sup> By 1190, gaming had become so prevalent in the army of Richard I that the King was forced to issue an edict forbidding the playing of any game for money by anyone below the rank of Knight.<sup>10</sup> Knights and clergymen were forbidden to lose more than twenty shillings in a single day, and the King was exempt.<sup>11</sup> Playing cards appeared soon after, originating, it is thought, in the Far East and brought westward by gypsies. Their use also became widespread. However, no legislation was promulgated in England relating to gaming before the reign of Richard II. It appears that at least as far as the Kings' courts were concerned, "All games [were] lawful at common law."<sup>12</sup>

The earliest English statute to affect gaming directly arose from a perceived martial necessity. In 1388, Richard II, fearing that military preparation was endangered, enacted a statute that directed laborers and serving men to secure bows and arrows and "to leave tennis, football, coits,

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COMM'N ON LOTTERIES AND BETTING 1932-33, FINAL REPORT, CMD. —, No. 4341, at 4 (1933) [hereinafter cited as ROYAL COMM'N 1932-1933]. In the United States, the definition of a lottery usually, but not always, includes the additional element of "consideration." See, e.g., *Federal Communications Comm'n v. American Broadcasting Co.*, 347 U.S. 284, 290 (1954).

9. Ordericus Vitalis (1075-1143) wrote of the fondness of the clergy for "dice-playing," while John of Salisbury (1110-1182) decried "the damnable art of dice-playing." J. ASHTON, *THE HISTORY OF GAMBLING IN ENGLAND* 12-13 (1968).

10. *Id.* at 13.

11. *Id.*

12. *The Case of Monopolies*, 11 Co. Rep. 84, 86, 77 Eng. Rep. 1260, 1263 (1602). In the Middle Ages, the English King, sitting in his court, could be appealed to directly to decide disputes according to customary law. Later, when the courts developed into a judicial system, they also decided cases under a body of customary rules thought to be common to the entire realm and known as the "common law." For the common law position on gaming, see *Rex v. Rogier*, [1823] 1 B. & C. 272, 275, 107 Eng. Rep. 102, 103; *Jenko v. Turpin*, 13 Q.B.D. 505, 513, 516 (1884).

dice, casting of stone kaileg, and other such importune games," so that they could practice their archery.<sup>13</sup> In 1477, Edward IV, having returned from an expedition in France, secured the passage of an act forbidding the playing of a variety of games common at that time in public houses.<sup>14</sup> The 1477 act introduced the crucial factor — place — which was to be reflected in much of the subsequent gambling-related legislation.

A new statute in 1541 prohibited laborers and serving men from playing forbidden games, except at Christmas time while in their masters' homes; cards, dice, talles, and bowls were added to the list of the proscribed games.<sup>15</sup> Like the statute of Richard II, this enactment of Henry VIII, entitled "An Acte for Mayntenance of Artyllarie and debarringe of unlawful Games,"<sup>16</sup> was prompted by the perceived effect of the games on military preparedness. The games were objected to due to their detrimental impact on the well-being of the state. The statute's preamble explained the Crown's concern with the increase in the number, types and locations of games being played. These games were perceived as the cause of the decline in archery skills in the country.<sup>17</sup>

Similar to previous provisions, this act was ultimately aimed at constraining not the forbidden games themselves, but their collateral consequences. The crown abhorred the popular forms of gaming because of their impact on military preparedness and their disruption of the public peace. Gaming, in short, gave rise to public disturbances and diverted attention from archery, the mainstay of the English army at that time.<sup>18</sup>

13. 12 Rich. 2, ch. 6 (1388). A 1409 Act added "handball" to the list of prohibited games. 11 Hen. 4, ch. 4 (1409).

14. 17 Edw. 4, ch. 3 (1477) ("closeshekeyles, half-bowl, hand-in hand-out and queke borde").

15. 33 Hen. 8, ch. 9, § 11 (1541).

16. 33 Hen. 8, ch. 9 (1541).

17. The statute's preamble states:

[F]or the advancement and Maintenance of Archery, the better to be maintained and had within the same, and for the Avoiding of divers and many unlawful Games and Plays, occupied and practised within this Realm, to the great Hurt and Lett of Shooting and Archery, divers good and lawful Statutes have been devised, enacted and made, . . . the which good and laudable Act notwithstanding, divers and many subtil inventative and crafty Persons, intending to defraud the Same Estatute, . . . have found, and daily find many and sundry new and crafty Games and Plays, . . . keeping Houses, Plays and Alleys for the Maintenance thereof; by Reason whereof Archery is fore decayed, and daily is like to be more and more minished, and divers Bowyers and Fletches, for lack of Work, gone and inhabit themselves in *Scotland*, and other Places out of this Realm, there working and teaching their Science, to the Puissance of the same, to the great Comfort of Estrangers, and Detriment of this Realm.

*Id.*

18. Until replaced by gunnery in the 1600's, archery was one of England's chief

The gambling associated with the playing of games impoverished many. The consequent poverty prevented individuals from purchasing bows and arrows and resulted in "many heinous Murders, Robberies, and Felonies."<sup>19</sup> Remedial legislation seemed necessary.

The statute of 1541 also carried forward the important distinction between private gaming and public gaming or gaming-house activities. In addition to prohibiting the lower-class from playing various specified games, the statute provided a forty shillings per day fine for the keeping or maintaining of any common gaming-house.<sup>20</sup> Those who frequented such illicit places were also subject to a fine.<sup>21</sup> Although a game might not have been unlawful per se, it was deemed illegal if it was played for money in public or in a gaming-house. As stated in a classic legal treatise, *Hawkins's Pleas of the Crown*, "all common Gaming Houses, are Nuisances in the Eye of the Law, not only because they are great Temptations to Idleness, but also because they are apt to draw together great Numbers of disorderly Persons, which cannot but be very inconvenient to the Neighbourhood. . . . [Such houses] cannot but be Nuisances."<sup>22</sup>

## 2. The Interregnum

Just as Tudor England gave way to Stewart England, so too did Stewart England give way to a new order of things. After Charles I was executed in 1649, control of English life and law passed to the Lord Protector, Oliver Cromwell, and his New Model Army. Old Royal sensibilities were succeeded by the new Puritan ideals of a rising middle-class. During the Interregnum, gaming passed from favor, although not because Puritans abhorred games. They countenanced games as long as they did not lead to a waste of time.<sup>23</sup> However, the Puritans objected to the excesses and abuses of gaming. A 1657 statute which allowed any loser in a gaming transaction to sue for the recovery of twice the sum lost was a

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offensive weapons systems. It suffices to recall the effect of English long bows in the Battle of Agincourt, in which Henry V's outnumbered bowmen routed the French knights in 1415, to understand the Crown's fear of bowmen deserting the ranks of the English army.

19. 33 Hen. 8, ch. 9, 2 (1541).

20. *Id.* § 11.

21. *Id.* § 12.

22. 1 W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN*, ch. 75, 6-7 (Reprint 1980).

23. P. MILLER, *THE PURITANS* 392-93 (Rev. ed. 1965). As Benjamin Coleman, a New England Puritan, wrote in 1707, "we daily need some respite & diversion, without which we dull our Powers; a little intermission sharpens 'em again. It spoils the *Bow* to keep it always bent, and *Viol* if always strain'd up." B. COLEMAN, *THE GOVERNMENT AND IMPROVEMENT OF MIRTH* 29 (1707), *quoted in* P. MILLER, *supra* note 15, at 392.



precursor to later legislation in England and the colonies.<sup>24</sup> More significantly, the statute also declared all gambling debts arising after a certain time to be "utterly void and of none effect."<sup>25</sup> This statute of Cromwell's era did not survive the return of the Stewart monarchy,<sup>26</sup> but one of its key concepts, the general unenforceability of gambling debts, did survive.<sup>27</sup>

24. Act of June 26, 1657, 2 ACTS & ORDS. INTERREGNUM 1249 (reprint 1972) ("an Act for punishing such Persons as live at High Rate and have no visible Estate, Profession or Calling answerable thereunto").

25. *Id.* at 1250.

26. Upon the restoration of the monarchy, all legislation enacted under the Puritan regime was "apparently eliminated." 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 148 (2d ed. 1927).

27. At common law, debts arising out of gambling unregulated by statutes were generally thought to be enforceable in court. *See* G. STUTFIELD, THE LAW RELATING TO BETTING TIME-BARGAINS AND GAMING 1 (2d ed. 1886). The courts, however, viewed such suit as nuisances, and "took upon themselves to postpone all actions of this kind until the rest of [their] business had been disposed of; or, in the language of Lord Ellenborough, . . . 'until the courts have nothing better to do.' " *Id.* (citation omitted). While this policy was apparently the established practice of the courts at an early date, it was not recognized explicitly by the judiciary until 1774. *See* *Jones v. Randall*, 1 Cowp. 37, 39, 98 Eng. Rep. 954, 955 (K.B. 1774) (Mansfield, J.). In addition, wagers which violated "public policy" were not enforced. In *DaCosta v. Jones*, 2 Cowp. 729, 98 Eng. Rep. 1331 (K.B. 1778), a wager concerning the sex of a French soldier and statesperson was found to violate public policy because the question involved required the introduction of "indecent" evidence that would expose the subject of the wager to ridicule. Lord Mansfield offered examples of other kinds of wagers that would violate public morality or policy:

Suppose a wager between two people, that one of them, or that a third person, shall do a criminal act. . . . Such a wager would be void: because it is an incitement to a breach of the peace. Suppose the subject matter of a wager were a violation of chastity, or an immoral action: "I lay I seduce such a woman." Would a court of justice entertain an action upon such a wager? Most clearly not; because it is an incitement to immorality. . . . [S]uppose a wager that affects the interest or the feelings of a third person. . . . For instance: that such a woman has committed adultery. . . . Would a Court of Justice try the adultery in an action upon such a wager? . . . Would it be endured? Most unquestionably it would not. Because it is not only an injury to a third person, but it disturbs the peace of society. . . .

*Id.* at 735, 98 Eng. Rep. at 1334.

The American courts ultimately rejected the English general rule of enforceability. *See, e.g., Perkins v. Eaton*, 3 N.H. 152, 155 (1825). Even in Nevada, where casino gambling is legal, the courts still refuse to enforce gambling debts. *West Indies, Inc. v. First Nat'l Bank*, 67 Nev. 13, 214 P.2d 144 (1950); *Scott v. Courtney*, 7 Nev. 419 (1872). That policy is under reconsideration elsewhere. *Compare Caribe Hilton Hotel v. Toland*, 63 N.J. 301, 308-09, 307 A.2d 85, 88 (1973) (legal Puerto Rico gambling debt enforced in New Jersey) ("[New Jersey's] public policy no longer can be said to condemn gambling *per se*. Rather our policies have become one of carefully regulating certain permitted forms of gambling. . . .") *with Resorts Int'l, Inc. v. Zonis*, 577 F. Supp. 876, 877 (N.D. Ill. 1984) (federal court in diversity case applying Illinois law refused to enforce otherwise valid New Jersey gambling debt); *Hotel Riviera, Inc. v. First Nat'l Bank & Trust Co.*, 580 F. Supp. 122, 129 (W.D. Okla. 1983) (federal court in diversity case applying Nevada and Oklahoma law refused to order payment of cashier's check taken with knowledge that it was

### 3. The Restoration

The Restoration in 1660 was accompanied by a great release of the tension and anxiety that had built up during the Puritan era, shown by a surge in the popularity of gambling.<sup>28</sup> The new king, Charles II, had spent the Interregnum in France, where he developed a taste for luxurious living and a passion for horses and gambling. The king instituted the office of groom-porter, a powerful position that controlled all English gambling, including arbitration of disputes.<sup>29</sup> In keeping with his love of horse racing, Charles II also established the first official track at Newmarket in 1667.

Following Charles's lead, the English aristocracy began to indulge freely in gaming, which became a recognized entertainment of the court, along with dancing and theater. "Unless one gambled freely, it was quite impossible to be counted a gentleman, or, for that matter, a lady of fashion, in the Court of Charles the Second. . . ."<sup>30</sup> The new rich of the merchant-class also began to gamble, in large numbers and for large stakes. Charles's predilection for gaming was shared by his niece, Anne, who ascended to the throne in 1702, and by the members of the House of Hanover, who succeeded her in 1714 by virtue of the 1701 Act of Settlement.<sup>31</sup> Gambling virtually became a national pastime during this period.

Not surprisingly, gambling houses flourished in most large cities, although London offered by far the best. The well-to-do frequented exclusive clubs such as White's, Almack's, Crockford's and Cavendish's. These clubs were exquisitely furnished; their wine cellars rivalled the best in France; the food was unexcelled, and the service was impeccable. Arthur Wellesley, the Duke of Wellington, British soldier and statesman, never gambled. Nevertheless, he joined friends at Crockford's. The gambling houses were convenient places to meet and have congenial talks, even for those who did not gamble.

The clubs lived up to their reputation as "gold and silver hells."<sup>32</sup>

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in payment of gambling debt and therefore void) *and* *Nemtin v. Zarin*, 577 F. Supp. 1135, 1147-48 (D.N.J. 1983) (gambling debt incurred in violation of regulations of Casino Control Act not enforceable).

28. See J. ASHTON, *supra* note 9, at 42-48, 178.

29. A contemporary of the King described a visit to the royal court: "I saw deep and prodigious gaming at the Groom-Porter's, vast heaps of gold squandered away in a vain and profuse manner. This I looked on as a horrid vice, and unsuitable in a Christian Court." 2 *DIARY AND CORRESPONDENCE OF JOHN EVELYN*, F.R.S. (Bray ed. 1900).

30. E. PERKINS, *GAMBLING IN ENGLISH LIFE* 10 (1950) (*quoting* *GAMES AND GAMESTERS OF THE RESTORATION* (1674-1714) introd. (C. Hartmann ed. 1930)).

31. 1 Anne ch. 22 (1701). See G. CURTIS, *THE LIFE AND TIMES OF QUEEN ANNE* 42-43 (1972).

32. S. TENENBAUM, *THE INCREDIBLE BEAU BRUMMELL* 169 (1967).

According to one author, the clubs "had a desperate fascination for the nobleman arriving in London from quiet country seats."<sup>33</sup> Despite the statute of Henry VIII,<sup>34</sup> games flourished at public houses where the stakes were astronomical. "To lose £10,000, £15,000 or £20,000 in an evening was . . . all too common."<sup>35</sup> Entire estates often changed hands. Even respected Parliamentarians played.<sup>36</sup> Horace Walpole described the gamester of the day:

Nor were the manners of the gamesters, or even their dresses for play, undeserving of mention. They began by pulling off their embroidered clothes, and put on frieze greatcoats, or turned their coats inside out for luck. They put on pieces of leather (such as is worn by footmen when they clean knives) to save their lace ruffles; and to guard their eyes from the light, and to prevent tumbling their hair, wore high-crowned straw hats with broad brims, and adorned with flowers and ribbons and masks to conceal their emotions when they played. . . .<sup>37</sup>

One author captured the image of these Englishmen when he described one of the most renowned of the gambling aristocrats of that time, William Douglas, the Duke of Queensberry:

My Lord March has not one devil, but several devils. He loves gambling, he loves horse-racing, he loves betting, he loves drinking, he loves eating, he loves money, he loves women; and you have fallen into bad company, Mr. Warrington, when you lighted upon his lordship. He will play you for every acre you have. . . .<sup>38</sup>

Horseracing was Queensberry's passion, but he was willing to wager on anything. He often resorted to trickery, as when he bet that a letter could travel fifty miles in one hour. He won by placing the letter in a cricket ball, which was tossed around a large circle until it had gone fifty miles in well under an hour. Queensberry was a disciplined gambler, never betting with someone unlikely to pay his losses. He took only fifty pounds to a gambling club at one time and if he lost it all, he quit for the night, and he never

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33. *Id.*

34. See *supra* note 15 and accompanying text.

35. E. PERKINS, *supra* note 30, at 11.

36. Parliamentarians who were known gamblers included Lord Chesterfield, Phillip Dormer Stanhope, and William Pitt, the First Earl of Chatham and Prime Minister in 1757.

37. S. TENENBAUM, *supra* note 32, at 167.

38. H. BLYTH, OLD Q, *THE RAKE OF PICCADILLY: A BIOGRAPHY OF THE FOURTH DUKE OF QUEENSBERRY* 53 (1967) (quoting W. THACKERAY, *THE VIRGINIANS* reprinted in 10 *The Works of William Makepeace Thackeray* 309 (University Press, Cambridge Pub. 1911)). William Makepeace Thackeray was an English novelist and satirist of the era. William Douglas was also known as Lord March, or "Old Q."

played past dawn. Queensberry left an estate of over one million pounds.

In contrast, Charles James Fox, an able Whig member of Parliament and three-time foreign minister (1782, 1783, 1806), was destroyed by an addiction to gambling. He frequented Almack's, the house where the highest stakes were played, and lost frequently. He was always in debt to usurers. Fox knew no discipline; he would play night and day, losing heavily and at times neglecting his responsibilities in the House of Commons. He spent much of his time at the racetrack, much to the consternation of Lord North,<sup>39</sup> who found it necessary to send secret messages to Fox at Newmarket at great risk to security. Fox died a pauper in 1806.

London's West End was full of seamy dens where the games were open to all, not just to aristocrats. The London gaming scene of the time has been aptly described as follows: "The fact is our public institutions and schools, city offices and workshops, mills and mines, factories and fashionable resorts have been so completely captured by gambling that it seems almost impossible for the young worker to escape its abuses and temptations."<sup>40</sup>

The most popular games in England were faro, which was banned by Parliament in 1739<sup>41</sup> as too vicious, only to be revived at the end of the century; roulette, called the "prompt murderer;" and hazard, which offered a field day to cheaters. Gambling dens were illegal, but existed by means of graft and lax law enforcement. Proprietors often operated restaurants or saloons as fronts, with a circuitous route to the gaming room. In a raid on the Bedford Arms in 1791, it took the police an hour to find their destination.

Wagering on horseraces was every bit as popular as gaming. It began as a gentlemen's sport, for the pleasure of victory and the development of good stock, but it was not long before it became the foremost gambling sport. There was much cheating at the races in the form of substituting ringers, bribing jockeys and forcing a horse to perform poorly to increase future odds. Although horse owners cheated, the real culprits were the sharpers who hung around the tracks. They not only rigged the races, but were ready for any game they could persuade a sucker to play. The most prevalent of these games was thimblerrigging, a game where the victim tried to pick the cup that hid the pea. One chronicler of the period described Newmarket as:

[A] wily labyrinth of loss and gain, a fruitful field for the display of

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39. Frederick North, no friend of the colonies, was the Second Earl of Gifilford and the Prime Minister from 1770-1782.

40. J. GLASS, *GAMBLING AND RELIGION* 11 (1924).

41. 12 Geo. 2, ch. 28 (1739) (providing £200 fine to be levied by a distress sale of the offender's goods).

gambling activities, the school of the sharpening crew, the academy of the Greeks, the unfathomable gulf that absorbed princely fortunes. . . . The turf to [the gamblers] is but a wider and more vicious sort of *tapis vert* — the racing but the rolling of the balls — the horses but animated dice.”<sup>42</sup>

The extent to which gambling pervaded English life was evidenced by its appearance in literature. Shakespeare and the Restoration wits took liberal advantage of gaming allusions, as did eighteenth century poets and satirists such as Alexander Pope and Samuel Johnson. Gambling also was responsible for many additions to the English language: “harpers,” “rooks,” “huffs,” “hectors,” “settlers,” “gilts,” “pads biters,” “divers,” “lifters,” “nickers,” and “wolves” for the cheaters, and “bubbles,” “pubbs” and “pigeons” for the suckers. Some modern words stem from early gambling terms, such as “lurch” (as in “left in the lurch”), which came from the French game *l'ourche*, or “pique” from the game *piquet*.

Sir William Blackstone, jurist, influential lecturer on law at Oxford and member of Parliament, reflected on the policy perspectives and practices of his class:

Luxury naturally [leads to] . . . gaming, which it generally introduced to supply or retrieve the expenses occasioned by the former: it being a kind of tacit confession that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft, and debauchery among those of a lower class: and, among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honour and virtue, and too often hath ended in self-murder.<sup>43</sup>

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42. 2 A. STEINMETZ, *THE GAMING TABLE* 364, 368 (Reprint 1969).

43. 4 W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* \*171-72. Blackstone wrote for the educated gentlemen of his day in a language accepted by all with a common, classical schooling. However, Blackstone was also widely read by others, particularly in the colonies. Edmund Burke in his famous Conciliation Speech in the House of Commons in 1776 noted that the publishers had sold nearly as many of Blackstone's Commentaries in America as in England. A. HOWARD, *THE ROAD FROM RUNNYMEDE* 131-32 (1968). Men as different as James Kent (1763-1847), the first professor of law at Columbia College and Chancellor of New York, and Abraham Lincoln, a self-taught Illinois country lawyer and President, learned their law from Blackstone. D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3-4 (1958). “From Blackstone,” Boorstin observed, “we can learn even more about what the American colonists were defending than by reading the violent tracts of Thomas Paine.” *Id.* at 3. Blackstone's books were tutor and library to two or more generations of American lawyers.

#### 4. The Statutes of Charles and Anne

Efforts were made to control these excesses. In 1644, a statute was passed under Charles II to curb what was then considered the worst abuses, cheating and gaming on credit.<sup>44</sup> The statute was primarily designed to protect "the younger sort" from debauchment at the hands of "sundry, idle, loose, and disorderly Persons . . . to the Loss of their precious Time and utter Ruin of their Estates and Fortunes."<sup>45</sup> Its provisions applied to games of both skill and chance, including "cards, dice, tables, tennis, bowles, kittles, shovel-board . . . cockfighting, horseraces, dogmatches, foot-races, or other pastimes. . . ."<sup>46</sup> Unlike earlier statutes, this act did not outlaw the playing of these games. Instead, it aimed to limit fraudulent and excessive gambling. The law provided for recovery in the event of cheating or fraud. Moreover, it declared gaming debts over £100 incurred "at any one time or meeting" and contracts or securities for payment of such debts unenforceable; it even allowed a person to sue the winner where the gains resulted from "excessive gaming."<sup>47</sup>

The perceived deficiencies of the statute were addressed by "An Act for the better preventing of excessive and deceitful Gaming," popularly known, even today, as the Statute of Anne.<sup>48</sup> This statute was unquestion-

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44. 16 Car. 2, ch. 7 (1664) ("act against deceitful, disorderly, and excessive gambling").

45. *Id.* § 1.

46. *Id.* § 2.

47. *Id.* § 3. Litigation under the statute focused on the phrase "at any one time or meeting," with contradictory results. Compare *Walker v. Walker*, 12 Mod. 258, 88 Eng. Rep. 1306 (K.B. 1700) (one meeting, but combined debt owed to two persons exceeded £100, void) with *Stanhope v. Smith*, 5 Mod. 352, 87 Eng. Rep. 700 (K.B. 1697) (contra).

48. 9 Anne, ch. 14 (1710). The Statute of Anne has an important place in more than the history of gambling. Sections 3 and 4 introduced into the law of England the concept of immunity as an antidote to the privilege against self-incrimination, which by the "end of Charles II's reign" had become a fixed feature of the law. 8 J. WIGMORE, EVIDENCE § 2250, at 289-90 (McNaughton rev. 1961). See *id.* for the history of the development of the immunity concept in English law. Based on that history, the Supreme Court upheld the constitutionality of the use of the immunity technique in *Brown v. Walker*, 161 U.S. 591, 600 (1896) ("the construction given to [the privilege and its exceptions] . . . by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them."), a ruling that "has become part of our constitutional fabric." *Ullman v. United States*, 350 U.S. 422, 438 (1956). See also *Kastigar v. United States*, 406 U.S. 441, 445-47 (1972) ("Immunity statutes . . . seek a rational accommodation between the imperatives of the privilege [against self-incrimination] and the legitimate demands of government to compel citizens to testify"). That the first immunity statute was passed to facilitate the enforcement of a private civil cause of action rather than a public criminal prosecution is ironic in light of the Supreme Court's comment in *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 n.20 (1983) ("We . . . need not decide" if current law presently authorizes use of immunity in private civil litigation). See also *id.* at 270 n.4 (Marshall, J.,

ably, the most important development in English gambling law prior to the American Revolution. Its provisions constitute a revealing commentary on attitudes of the time toward gambling; moreover, its policies were to be widely reflected in much subsequent legislation in the colonies. Gaming had resulted in large transfers of wealth which were considered disruptive to England's land-based society. The Statute of Anne, like the Statute of Charles II, was to be the remedy. Introduced by the phrase, "Whereas the Laws now in Force for preventing the Mischiefs which may happen by Gaming hath not been found sufficient for that Purpose,"<sup>49</sup> the Statute of Anne sought to constrain the impact of gaming on the English social structure. Its purpose was to protect the landed aristocracy from the consequences of their own folly.

The first and most significant section of that statute made "all Notes, Bills, Bonds, Judgments, Mortgages, or other Securities or Conveyances whatsoever" given in payment of gambling debts "utterly void, frustrate, of none Effect, to all Intends and Purposes whatsoever."<sup>50</sup> The statute's other sections outlined a framework to facilitate the implementation of Section One. Section Two provided that the loser at gaming of any sum over ten pounds could sue within three months to recover the loss.<sup>51</sup> If the loser failed to sue within this period, anyone not in collusion could sue for triple the amount lost.<sup>52</sup> One-half of the amount recovered went to the plaintiff, the other half to the poor.<sup>53</sup>

Sections Three and Four established a discovery process whereby the defendant was required to reveal under oath the precise amount of money he had won from the plaintiff.<sup>54</sup> Any winner who returned winnings was immune from further prosecution or penalty.<sup>55</sup> Section Five of the statute established penalties for individuals who fraudulently won any money or things of value, worth over ten pounds, at gaming.<sup>56</sup> Gamesters convicted of fraudulent gaming forfeited five times the winnings, were deemed infamous and suffered corporal punishment as perjurers.<sup>57</sup> In addition,

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concurring ) (it is an "open question" whether Government has authority to immunize a witness in a civil proceeding and "constitutionality of such a statute . . . is doubt[ful]").

49. 9 Anne, ch. 14 (1710). However, Blackstone noted "[o]ur laws against gaming are not so deficient, as ourselves and our magistrates in putting these laws in execution." 4 W. BLACKSTONE, *supra* note 43, at \*174.

50. 9 Anne ch. 14 § 1 (1710).

51. *Id.* § 2.

52. *Id.*

53. *Id.*

54. *Id.* § 3.

55. *Id.* § 4.

56. *Id.* § 5.

57. *Id.*

Sections Six and Seven provided that any two justices of the peace could imprison professional gamblers, those "lewd and dissolute persons, [who] live at great expense, having no visible estate, profession or calling to maintain themselves, but support those expenses by gaming only,"<sup>58</sup> who were unable to furnish sureties for their good behavior in the subsequent twelve months.<sup>59</sup> If the gamester was able to secure a surety, it was forfeited if he gambled for more than twenty shillings at one sitting.<sup>60</sup> Finally, to prevent the quarrels that regularly arose from gambling, Section Eight provided that any person convicted of instigating a fight over a gambling debt would forfeit all his worldly possessions, excluding realty, to the Crown and suffer two years imprisonment.<sup>61</sup>

In contrast to these prohibitive sections, the statute contained a permissive section. Gaming for ready money at Saint James, Whitehall or other royal palaces, during the actual residence of the Queen or her successors, was allowed under Section Nine of the statute.<sup>62</sup>

The judiciary's subsequent treatment of the Statute of Anne was typical of eighteenth and nineteenth century attitudes toward legislation. On the whole, its provisions were faithfully followed, although courts occasionally read its language too literally, forgot its policy, or handed down inconsistent decisions that were difficult to justify. The only games explicitly mentioned in the statute were cards, dice, tables, tennis, and bowles. Nevertheless, the courts appropriately extended the scope of the statute's general language to include horseraces,<sup>63</sup> footraces,<sup>64</sup> dog-coursing,<sup>65</sup> cricket,<sup>66</sup> all sports as well as games,<sup>67</sup> all games whether of skill or chance,<sup>68</sup> and all games played at both public and private tables.<sup>69</sup>

While it did not mention contracts, the Statute of Anne did affect the enforceability of some gaming contracts. Any such contract for which a security had been given was void. If a gaming contract exceeded ten pounds, the loss was recoverable, and the contract was illegal whether or

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58. *Id.* § 6.

59. *Id.*

60. *Id.* § 7.

61. *Id.* § 8.

62. *Id.* § 9.

63. *Hay v. Ayling*, 117 Eng. Rep. 941 (Q.B. 1851); *Appelgarth v. Colley*, 152 Eng. Rep. 663 (Ex. 1842); *Blaxton v. Pye*, 95 Eng. Rep. 828 (K.B. 1766).

64. *Lynall v. Longbothom*, 95 Eng. Rep. 671 (K.B. 1756).

65. *Daintree v. Hutchinson*, 152 Eng. Rep. 392 (Ex. 1842).

66. *Hodson v. Terrill*, 149 Eng. Rep. 621 (Ex. 1833); *Jeffreys v. Walter*, 95 Eng. Rep. 584 (K.B. 1748).

67. *Blaxton v. Pye*, 95 Eng. Rep. 828 (K.B. 1766).

68. *Sigel v. Jebb*, 171 Eng. Rep. 747 (Nisi Prius 1820).

69. *McKinnell v. Robinson*, 150 Eng. Rep. 1215 (Ex. 1838).



not a security was given. The statute did not affect gaming contracts for less than ten pounds; these claims remained enforceable,<sup>70</sup> but enforcement actions were rare. In 1794, Lord Kenyon remarked "that he had never before known an action of this sort brought; but as the play was fair, and under £10, that under the Statute, 9 Anne ch. 14, such an action might be maintained."<sup>71</sup> In *Applegarth v. Colley*,<sup>72</sup> the owner of the winning horse in a sweepstakes race was permitted to recover the fifty-pound sweepstakes from its holder because each bettor involved had wagered less than ten pounds. The court reasoned:

One great object of the Statutes of Charles II and Anne (both of which must be construed together) was to prevent gaming on credit, and to confine parties who were playing for money to such sums as they should pay down at the time of play. [We] are of the opinion, that money deposited in the hands of a stake-holder before a game is played or a race is run, to be handed over to the winner, is precisely that sort of transaction that the legislature, supposing the parties were to engage in play at all, meant to encourage and not to prohibit.<sup>73</sup>

Even if a wager was for less than ten pounds and was enforceable as such, the courts declined to act if the subject of the bet was forbidden by statute.<sup>74</sup> Nevertheless, an unfortunately narrow reading of the statute often led to an opposite result. In *Pugh v. Jenkins*,<sup>75</sup> the plaintiff had won fifty pounds on a bet that a particular horse had finished first in the Derby the day before. Lord Denman explained that "no latitude of construction can bring such a wager within these words ['betting on the side . . . of such as do game']. It can hardly be said to be a wager on the event of the game, but rather on the accuracy of the information respecting it that either party possessed."<sup>76</sup> Similarly, in *Pope v. St. Leger*,<sup>77</sup> a decision prior to the Statute of Anne, a wager on the rules of a prohibited game was held to be distinct from a bet on its outcome.

Although the Statute of Anne was enacted to reform gambling practices, it also produced, in a least one area, an undesirable result. By voiding *all* bills and notes issued as security for gaming transactions, the

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70. *Emery v. Richards*, 153 Eng. Rep. 668 (Ex. 1845); *M'Allester v. Haden*, 170 Eng. Rep. 1210 (K.B. 1810).

71. *Bulling v. Frost*, 170 Eng. Rep. 341 (Nisi Prius 1794).

72. 152 Eng. Rep. 663 (Ex. 1842).

73. *Id.* at 667.

74. *McKinnell v. Robinson*, 150 Eng. Rep. 1215 (Ex. 1838); *Johnson v. Bann*, 100 Eng. Rep. 861 (K.B. 1790).

75. 113 Eng. Rep. 1273 (Q.B. 1841).

76. *Id.* at 1275.

77. 125 Eng. Rep. 254 (C.P. 1693).

Statute of Anne unjustly injured innocent holders of such security.<sup>78</sup> Initially, a bona fide purchaser for value of a note issued in payment of a gambling debt was unable to recover on the note in court.<sup>79</sup> This rule was gradually modified through the years to allow innocent third parties to recover in some instances.<sup>80</sup> Thus, the enactment of the Statute of Anne illustrates a recurring theme in the history of the law of gambling; unintended consequences are sometimes more harmful than the beneficial objectives realized.

The high life of the Restoration continued unabated in Georgian England. By the mid-eighteenth century, however, certain games came to be regarded as "undesirable because they had led to excessive gaming, or were unduly favourable to the promoters, or opened the way to fraud."<sup>81</sup> Under George II, several gaming statutes were promulgated: in 1739, ace of hearts, pharoah, basset and hazard were outlawed;<sup>82</sup> in 1740, all games involving dice except backgammon were prohibited,<sup>83</sup> and in 1745, roulette was abolished.<sup>84</sup> In 1740, an effort was made to curtail gaming on horse races. A statute was passed prohibiting the running of matches under fifty pounds in value, upon penalty of two hundred pounds to be paid by the owner of each horse running.<sup>85</sup> A further effort was made in 1752, with the passage of an act "for the better preventing Thefts and Robberies, and for regulating Places of public Entertainment, and punishing Persons Keeping disorderly Houses."<sup>86</sup> The statute provided that if two inhabitants of a parish notified the constable of the existence of a bawdy or a gaming-house, and the constable subsequently convicted the keeper of the house, the two informers would each be entitled to a reward of ten pounds.<sup>87</sup> The statute was made perpetual in 1755.<sup>88</sup>

### B. Lotteries

If the history of early efforts to control gaming form an essential

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78. "The *Statute of Anne*, in making securities 'void to all intents and purposes,' worked great injustice in the case of innocent holders for value of bills and notes which had originally been given for gaming transactions." G. STUTFIELD, *supra* note 27, at 9-10.

79. See, e.g., *Shillito v. Theed*, 131 Eng. Rep. 156 (C.P. 1831); *Bowyer v. Bampton*, 93 Eng. Rep. 1096 (K.B. 1741).

80. See *Edwards v. Dick*, 106 Eng. Rep. 915 (K.B. 1821).

81. ROYAL COMM'N 1932-1933, *supra* note 8, at 8.

82. 12 Geo. 2, ch. 28, § 2, 3 (1739).

83. 13 Geo. 2, ch. 19, § 9 (1740).

84. 18 Geo. 2, ch. 34, §§ 1, 2 (1745).

85. 13 Geo. 2, ch. 19 (1740).

86. 25 Geo. 2, ch. 36 (1752).

87. *Id.* § 5.

88. 28 Geo. 2, ch. 19 (1755).

backdrop to our current gambling policies, so, too, do similar efforts to deal with various forms of lotteries. The first lotteries to raise revenue appeared in sixteenth-century Europe when Italian merchants sold lottery tickets to attract customers and to dispose of unsold goods.<sup>89</sup> Unable to finance his profligate court through taxes, Francis I of France established a governmental lottery in 1539.<sup>90</sup> The first recorded lottery in England was initiated by Elizabeth I in 1566 and drawn in 1569.<sup>91</sup> Its purpose was to raise capital for the repair and maintenance of the country's harbors and for other public works. A total of 400,000 lots were sold and drawn, with prizes consisting of plate, tapestry and money. Over the next hundred years, the state promoted lotteries to raise capital for a variety of public and semi-public purposes: to support the English plantations in Virginia (1612), to bring fresh water to London (1627 and 1631), to repair the damage done to the fishing fleet by the Spanish navy (1640), to raise money to ransom English slaves held in Tunis (1660) and to aid poor and disabled soldiers (1660).<sup>92</sup>

Treated as a monopoly, a lottery could be run only after its promoters had secured a patent from the Crown. During the sixteenth and seventeenth centuries, the state sought to regulate lotteries by limiting the number of licenses issued. Toward the end of the seventeenth century, however, control of lotteries passed from the Crown to Parliament. Since the state was unable to attract investment funds without special inducements, lotteries continued to be used to raise revenue. In 1694, Parliament authorized the first state lottery, which became the model for subsequent lotteries.<sup>93</sup> It was run by Thomas Neale<sup>94</sup> and was a great success, largely because it was more similar to a modern bond issue than to a lottery. To secure a loan of £1,000,000, the Exchequer sold shares costing ten pounds.<sup>95</sup> Even if the share drew a blank, the holder was paid a pound a

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89. See generally Blakey, *State Conducted Lotteries: History, Problems, and Promises*, 35 J. Soc. Issues, No. 3, at 62 (1979).

90. G. SULLIVAN, *BY CHANCE A WINNER* 5 (1972). It was another Frenchman, Jean Baptiste Colbert (1619-1683), finance minister to Louis XIV and a great exponent of mercantilism, who once described the art of taxation as plucking the goose as to obtain the largest amount of feathers with the least possible amount of hissing. *EASY MONEY*, *supra* note 6, at 28. Similar comments might well be made about modern state run lotteries.

91. ROYAL COMM'N 1932-1933, *supra* note 8, at 5. Lotteries, as such, were not considered illegal at common law. *Id.* Change in their legal status had to come from legislation.

92. *Id.* See also J. ASHTON, *A HISTORY OF ENGLISH LOTTERIES* 28-32 (1969).

93. 5 W. & M., ch. 7, § 34 (1694).

94. *Id.* § 57.

95. *Id.* § 34.

year for sixteen years.<sup>96</sup> In effect, the losing ticketholder was making the government a long-term loan at a rate of ten percent. The lottery also established larger annuity payments for 2,500 subscribers and a principal prize of £100 per year. A similar lottery was set up three years later.<sup>97</sup>

In 1698, all existing lotteries were suppressed as common and public nuisances and all previously issued patents were voided. All future lotteries would be authorized by Parliament. The preamble of the Act suppressing the lotteries set forth its purpose:

[S]everal evil-disposed persons, for diverse years past, have set up many mischievous and unlawful games, called lotteries . . . and have thereby most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen, traders and merchants, and from other unwary persons, to the utter ruin and impoverishment of many families, and to the reproach of the *English* laws and government. . . .<sup>98</sup>

One common fraud had been the so-called insurance game, in which a player would bet that a certain number would be drawn on a given day, often the number did not exist. This game, a forerunner of the modern urban numbers racket, was particularly attractive to the poor. As with their modern counterparts, these people were the least able to afford to play. Other abuses were common, including the selling of numbers already drawn and the forging of tickets.

Parliament, however, was not loath to authorize new lotteries, over the next fifty years it established many, "usually as a means of finding money for the general needs of the State, less frequently for some special purpose. . . ."<sup>99</sup> "By 1755 the lottery had become virtually an annual event . . . [used by the state as] a regular financial instrument [no longer] associated with loans."<sup>100</sup>

In 1739, Parliament enacted a stiff Gaming Act to eliminate all sideline activities to lotteries.<sup>101</sup> To consolidate its monopoly over this source of revenue in the first half of the eighteenth century the government enacted, revised and broadened a series of statutes to deal with private and foreign lotteries.<sup>102</sup> No one, however, seemed fully satisfied with the operation of the statutes and opposition to the lotteries soon emerged.

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96. *Id.*

97. 8 & 9 Will. 3, ch. 22 (1697).

98. 10 & 11 Will. 3, ch. 17, § 1 (1698).

99. ROYAL COMM'N 1932-1933, *supra* note 8, at 5-6.

100. *Id.* at 6.

101. 12 Geo. 2, ch. 28, § 1 (1739).

102. 9 Anne, ch. 6, § 56 (1710); 10 Anne, ch. 26, § 109 (1711); 8 Geo. 1, ch. 2, §§ 36-37 (1721); 9 Geo. 1, ch. 19, § 4 (1722); 6 Geo. 2, ch. 35, § 29 (1733).

Lottery office keepers were cheating their customers by tying the purchase of tickets to the purchase of other articles, by failing to pay the full price to holders of winning tickets and by disappearing a few days before the lottery was drawn. The insurance game became increasingly widespread. "Morocco-men," named for their red leather wallets, roamed the countryside soliciting illegal bets. In addition, although for a time the odds of winning were high, in 1769 the government stopped paying annuities to almost all players, making state lotteries high-risk gambles.

In 1773, the City of London petitioned the House of Commons for a ban on further lotteries, asserting that the ones then operating were "highly injurious to the commerce of the kingdom and to the welfare and prosperity of the people."<sup>103</sup> The government argued that it could not afford to relinquish this source of substantial revenue. In 1776, the economist Adam Smith wrote:

The chance of gain is by every man more or less overvalued, and the chance of loss is by most men undervalued . . . . That the chance of gain is naturally overvalued, we may learn from the universal success of lotteries. The world neither ever saw, nor ever will see, a perfectly fair lottery; or one in which the whole gain compensated the whole loss. . . .<sup>104</sup>

Nevertheless, between 1694 and 1826, when the lottery was finally abandoned, the take had been at least £35,000,000, not including postal fees and other indirect income, a considerable sum.

### *C. Controversies*

During these years, the evolution of English gambling law, particularly the gaming statutes, was accompanied by controversy. Much of it appeared in the pamphlets so characteristic of the times. One mid-eighteenth century pamphlet, for example, advocated the complete repeal of anti-gaming laws, arguing that they protected wealth and the aristocracy.<sup>105</sup> Gaming, the argument continued, promoted the redistribution of wealth: "[g]aming like the Law abhors Perpetuities. Property is in constant Circulation, but then, like the Sea, what it loses on one Shore, it gains on another. . . ."<sup>106</sup> It was even suggested that gaming developed the British military officer corps. Officers accustomed to heavy losses and changing fortunes in gambling, it was contended, were more suited for

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103. ROYAL COMM'N 1932-1933, *supra* note 8, at 6.

104. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 45 (Great Books ed. 1952).

105. R. DODSLEY & J. DODSLEY, A MODEST DEFENCE OF GAMING 13-18 (1754).

106. *Id.* at 17-18.

command than non-gamesters.<sup>107</sup> Other pamphleteers maintained that the laws should not distinguish between "the King and the cobbler; they should extend to all or to none."<sup>108</sup>

Advocates of the anti-gaming laws, on the other hand, came from the developing commercial society whose growth required the productive employment of laborers.<sup>109</sup> Gamblers were unproductive laborers who inhibited economic development. Since men were "weak enough to trust the improvement of their money to schemes [that depend] on mere Chance, instead of employing it in [skilled trade],"<sup>110</sup> the anti-gaming statutes were a necessary means of encouraging commerce. Others, however, supported the statutes precisely because they served to promote rank and quality. The destruction of rank and quality, it was thought, encouraged official corruption and endangered the constitutional balance. If gaming debts were enforceable, indebted English aristocrats might lose their hereditary estates, a possibility that posed a grave threat to the land-based social order. For many, therefore, gaming was abhorred because it threatened the foundations of English civil liberties. Paradoxically, the rights of Englishmen derived from a constitution in which the aristocracy checked the power and abuses of the state. When gambling debts were enforced, the aristocracy had to turn to the Crown to secure money for payment. The result, according to one pamphleteer, was that the liberty of the class would be entirely at the mercy of the reigning monarch.<sup>111</sup>

Accordingly, the questions raised and arguments advanced in eighteenth-century England would be raised and answered again in the New

107. *Id.* at 36-39.

108. E. MUMFORD, A LETTER TO THE CLUB AT WHITE'S 9-11, 30 (1750).

109. Adam Smith aptly illustrates the eighteenth century attitude toward the unproductive laborer:

The prodigal . . . pays the wages of idleness with those funds which the frugality of his forefathers had, as it were, consecrated to the maintenance of industry. By diminishing the funds destined for the employment of productive labour, he necessarily diminishes, so far as it depends upon him, the quantity of that labour which adds a value to the subject upon which it is bestowed, and consequently, the value of the annual produce of the land and labour of the whole country, the real wealth and revenue of its inhabitants. If the prodigality of some was not compensated by the frugality of others, the conduct of every prodigal, by feeding the idle with the bread of the industrious, tends not only to beggar himself, but to impoverish his country.

A. SMITH, *supra* note 104, at 146.

110. R. HEY, A DISSERTATION ON THE PERNICIOUS EFFECTS OF GAMING 62-63 (3d ed. 1812).

111. E. MUMFORD, *supra* note 108, at 38-39. The pamphlet stated, ". . . my Lords and Gentlemen, we may expect in a little time to see, by the Progress of this Science only, . . . our Liberty entirely in the Hands, and at the Disposal of the Reigning Monarch." *Id.*

World by a young republic creating for itself a new way of life and a new legal order. In many ways, colonial life was but a reflection of this aspect of English life.

### III. THE COLONIAL PERIOD: LAW AND PRACTICE 1629-1776

Gambling was an early import to the New World; it was introduced by English settlers, although the Indians had some forms of gambling before the Europeans arrived.<sup>112</sup> As in England, the gambling laws of the colonies reflected the ideas prevalent in the society and the character of colonial life.

#### A. *The Applicability of English Law*

English gambling law did play a role in the development of gambling laws in the colonies, although the extent to which the English common law or acts of Parliament were directly in force in the colonies remains a matter of scholarly debate. Three conflicting theories have been offered on the extent to which the English common law obtained in the colonies.<sup>113</sup> One theory states that the English common law went into force immediately upon settlement of the colonies.<sup>114</sup> A second theory advocates that, for a long period after the settlement of the New World, the colonists employed their own brand of local law and only received the rules of English common law over an extended period.<sup>115</sup> A third theory states that the settlers did not bring to the colonies the common law, which consisted of the decisions and doctrines of the royal courts in London, but brought instead the law administered in the courts of the country towns, boroughs, and manors outside London's sphere of influence.<sup>116</sup> Under this third theory, the common law, as such, did not become the law of the colonies until after the Revolution.

The reception of Parliamentary statutes in the colonies presents a somewhat clearer picture, but it is still difficult to offer a definitive

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112. See H. CHAFETZ, *PLAY THE DEVIL* 10-11 (1960).

113. See Chafee, *Colonial Courts and the Common Law*, 68 *PROC. MASS. HIST. SOC.* at 132 (1952), *reprinted in* *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 53, 61-78 (1969) [hereinafter cited as *ESSAYS*].

114. See *Van Ness v. Packard*, 27 U.S. (2 Pet.) 137, 144 (1829) (Story, J.); 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 163-65 (4th ed. 1873) ("Practically speaking, it seems to have been left to the judicial tribunals in the colonies to ascertain what part of the common law was applicable. . . .").

115. P. REINSCH, *THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* (1970). See also R. POUND, *THE SPIRIT OF THE COMMON LAW* 113-16 (1921).

116. Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 *COLUM. L. REV.* 416 (1931), *reprinted in* *ESSAYS*, *supra* note 113, at 83.

interpretation.<sup>117</sup> The question whether a given English statute was effective in an American colony is also complicated by the distinction made in English jurisprudence between the realm of England and the non-English holdings of the Crown. In the seventeenth and eighteenth centuries, the English considered the realm of England to be the geographical unit of England proper. The non-English holdings of the Crown consisted of all of the dominions over which the Crown exercised control, whether the Isle of Man or the American colonies. Unless explicitly stated otherwise, an act of Parliament was generally deemed to apply only within the realm of England. English law could, however, become effective within a colony by an act of the colonial legislature or by "long uninterrupted usage."<sup>118</sup>

A distinction must also be drawn between legal theory and popular belief. Popular belief tended to have more impact on day-to-day practice in the colonies. Typically, the provisions of the royal charters,<sup>119</sup> granted to the colonies, stated that neither the colonists nor their descendants could be deprived of the "liberties and immunities" of English citizenship.<sup>120</sup> Until the Revolution, many colonists believed and passionately argued that basic English law, duly modified to fit local conditions, extended across the Atlantic.<sup>121</sup>

### B. *The Colonies*

The creation of a new nation in America was a grim, dirty and risky enterprise. In the beginning, no one thought of the New World as a new nation. The many natural ports on the long Atlantic coastline lent themselves to the establishment of several small colonies. Thirteen colonies (fifteen if Nova Scotia and Quebec are counted) were soon settled, and they became the nucleus of what was to be the United States. It is a mistake, however, to read back into their pre-Revolutionary history, or even

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117. See J. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 465-522 (1965); E. BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776-1836* 1-22 (1964). See also 1 J. STORY, *supra* note 114, at 187-97 ("[T]here was . . . much obscurity and still more jealousy spreading over the whole subject.")

118. 1 G. CHALMERS, *OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE* 196-97 (1814) (1729 memorandum of Attorney General Yorke). See also E. BROWN, *supra* note 117, at 12.

119. The history of the various charters is set out in 1 J. STORY, *supra* note 114, at 39-146.

120. E. BROWN, *supra* note 117 at 6-7.

121. See, e.g., R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 64 (1957). "Andrew Hamilton's argument at the trial of Zenger (1735), [James] Otis's argument against writs of assistance (1761) . . . and the Declaration of Rights of the Continental Congress (1774) all insist upon the common law rights of Englishmen as the rights of the colonists." *Id.*



immediately thereafter, a unity that they did not have.<sup>122</sup> For example, in his papers compiled between 1770 and 1783, Thomas Jefferson classified the statutes of Massachusetts and Connecticut with those of Barbados and Bermuda as "Foreign Law," because those statutes were in fact foreign to him.<sup>123</sup> Nevertheless, the colonies did reflect broad regional patterns, which lend themselves to useful descriptions: New England, a land of small, rocky, well-tilled farms, of lumbering and maritime endeavors; the Middle Colonies, chiefly New York and Pennsylvania, with both small farms and large estates, along with manufacturing and shipping interests in New York City and Philadelphia; and the Southern Colonies, characterized by large estates and plantations, slaves, tobacco and rice, along with a way of life sharply contrasted to their sister colonies to the north. Finally, there was the wooded and mountainous region to the west, from which a unique American approach would emerge to influence law and life.

## 1. New England

### a. *Plymouth*

The first permanent settlement in the New England area was founded

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122. Different physical environments alone guaranteed different statutory developments:

Apart from differences in their English cultural heritage, the people who settled in Massachusetts and Virginia also found themselves living in very *different* physical environments that imposed their own limits upon Old World aspirations. Colonial historians usually take for granted climate, soil types, natural resources, flora and fauna. Such indifference, however, is unwarranted. Some environments obviously were more conducive than were others to the smooth transfer of local English cultures. . . . [T]he founders of New England were fortunate to land in an area much like the one that they had just departed. The Bay colonists raised the same crops and breeds of livestock as they had in England; their environment did not call forth extraordinary adjustments in lifestyle.

If Winthrop's fleet had sailed by chance up the James River in Virginia or the Ashley in South Carolina, the Puritans would still have attempted to create a "city on a hill," but the results of their efforts would have been far different from — and one suspects much less successful than — what they actually were in Massachusetts Bay. By the same token, the accidental discovery that tobacco could be produced profitably on scattered riverfront plantations preserved the central features of seventeenth-century Virginia culture — its competitiveness, individualism and materialism — for without the planters' realistic expectation of striking it rich in America, the first colonies would have been abandoned in short order. The various New World environments did not determine the shape of colonial cultures. Rather, they set general parameters on the institutional expression of English values in the New World.

T. BREEN, PURITANS AND ADVENTURERS introd. at XIV (1980).

123. Goebel, *Law Enforcement in Colonial New York: An Introduction*, in ESSAYS, *supra* note 113, at 387.

in 1620 by a 102-member group of Pilgrims,<sup>124</sup> a branch of the Puritan movement, at Plymouth, an area on the south coast of Cape Cod. The party that landed at Plymouth had intended to settle south of the Hudson River, but a storm blew their ship, the *Mayflower*, off course. During the colony's first winter, nearly half its inhabitants died. By 1640, however, it boasted eight towns and a population of over 2,500, principally uneducated farmers and artisans.

Since the Pilgrims had landed outside the jurisdiction of any established colony, the male settlers drew up the Mayflower Compact. This document bound them to be governed by majority will, "forming, if not the first, at least the best authenticated case of an organized social contract for the establishment of a nation which is to be found in the annals of the world."<sup>125</sup> The laws of the new colony were "few and brief."<sup>126</sup> They adopted the common law of England as the general basis of their jurisprudence, varying it only to conform "more exactly to their stern notions of the absolute authority and universal obligation of the Mosaic institutions."<sup>127</sup> Among their first laws were some laws directed at various forms of gambling.

By 1639, Plymouth had enacted a general idleness statute.<sup>128</sup> By 1656, it had passed a gaming law aimed at dice and playing cards, the preamble of which revealed its intent:

Whereas complaint is made that some have brought cards into some of the towns of this jurisdiction whereby seemingly young persons, mens both

124. Governor William Bradford in his *History of Plymouth Colony* wrote of his company as "pilgrims" in the spiritual sense. W. BRADFORD, HISTORY OF PLYMOUTH COLONY 66 (1630); *See Hebrews* 11:13. The phraseology subsequently became familiar in New England and then in the nation.

125. 1 J. STORY, *supra* note 114, § 54.

126. *Id.* § 60, at 33.

127. *Id.* § 55, at 30-31.

128. THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 64 (1836) [hereinafter cited as COMPACT]. The legal history of the colonies is largely the history of legislation, because printed reports of judicial decisions did not appear until after the Revolution.

One of the reasons we know so little about American law in the colonial era is that so many of the judges were laymen. They seem to have paid little attention to English precedents, only a few of which were available in the colonies, or to American precedents, none of which were yet reported in print. Their own opinions usually went unreported. We know very little of the judges' notions of substantive law, for even when a decision was permanently recorded, the reasons were seldom given.

D. BOORSTIN, THE AMERICAN: THE COLONIAL EXPERIENCE 199 (1958). The legal history of legislation may, however, be more easily written of the colonial period than of most modern state legislation. The colonial legislature saw law as one means of education and often prefaced legislation with findings and statements of justification, a practice now largely abandoned.

children and servants have been drawne together to spend their time in playing at such unlawful games to the corrupting of youth with sundry other sadd consequences that may follow by the permission of such practices.<sup>129</sup>

By 1671, it had prohibited all gaming for money, liquor or wine in a public house.<sup>130</sup> In the same year, it also prohibited private games "wherein there is a lottery,"<sup>131</sup> marking the first explicit attack in the colonies on the element of chance in gambling.

Despite Plymouth's status as the first New England colony, Plymouth did not occupy a leadership position in the New England area or among the other colonies in terms of trade, religion or law. That role was played by the Massachusetts Bay Colony, particularly after 1691, when the two colonies were incorporated into one under a new charter granted by William and Mary.

b. *Massachusetts*

In March of 1630, under the direction of Puritan lawyer John Winthrop, the first of the two Great Migrations associated with the English Civil War began. In ten years, the 25,000 British citizens, who sailed for Massachusetts Bay to escape the tyranny of Charles I, secured permanent settlements in the northerly latitudes of America and established a place for the dissatisfied of the Old World.

i. *Gaming*

The Puritans condemned gaming from the start, although their disapproval did not originally stem from a belief that such activity was evil per se or directly contrary to the teachings of God as reflected in the Bible. Instead, the Puritans fundamentally opposed idleness. This opposition was principally rooted in the harsh and unfamiliar American wilderness, the danger of hostile Indians and the stark possibility of starvation and disease. As one scholar observed:

It was the paramount need of a primitive pioneer society for the whole-hearted cooperation of the entire community that fastened upon the first Americans a tradition of work which still weighs heavily upon their descendants. The common welfare in those difficult and perilous days could not permit any "mispende of time." Those who would not work of their own volition had to be driven to it under the lash of compulsion . . . in all the

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129. COMPACT, *supra* note 128, at 101.

130. *Id.* at 250.

131. *Id.*

colonies there was this basic fact: if the settlers did not direct all their energy to their work, they could not hope to survive.<sup>132</sup>

Puritan opposition to gaming also stemmed from their past experiences in England. Puritanism emerged as a reaction to the extravagance of the English aristocracy and the Church of England. The Puritans, who had struggled for spiritual reform in England, had developed a deep scorn for the lifestyles of those who opposed them. Intertwined with this contempt was probably a touch of economic envy, for the Puritans originally came from the lower and middle classes.

Finally, the Puritans' disapproval of frivolous use of time was rooted in the religious concept of a "calling." This "calling" was the intellectual origin of the Puritan's work ethic: each man was called upon to serve God in a specific occupation. The concept was traced to the Biblical story of Christ selecting Matthew, a tax collector, to become a disciple.<sup>133</sup> According to the Puritans, each person was called upon to follow a particular vocation and the dedication with which he performed his duties was a measure of his devotion to God. A person's calling was also considered a manifestation of his "election"; the calling evidenced that he had been chosen by God to enjoy eternal life in heaven. Thus, work was of prime importance, and a person who did not work with diligence and devotion was suspect and could not hope to be saved.

The Puritans also felt compelled to make the entire society conform to their ideals, for they believed that a society, as well as an individual, that failed to obey God's word would be punished by God's hand. Idlers were among the damned, and they had to be punished in the present to stave off societal calamity in the hereafter. On this basis, the General Court of the Massachusetts Bay Colony passed, in 1631, an anti-idleness statute that outlawed the possession of cards, dice or gaming tables, even in private homes.<sup>134</sup> Games themselves, no doubt, also fell under the proscription of the anti-idleness statute of 1633: "It is Order that no person householder or other, shall spend his time, idely or unprofitably, under paine of such punishment, as the County Court shall think meet to inflict. . . ."<sup>135</sup> Other prohibited activities included dancing, singing and unnecessary walking on

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132. F. DULLES, *A HISTORY OF RECREATION* 5 (2d ed. 1965).

133. *Mark* 2:13-17; *Luke* 5:27-39.

134. 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY, 1630-1692 at 12 (1904). *See infra* text accompanying note 224 for similar Virginia legislation.

135. E. RAWSON, *THE BOOK OF THE GENERAL LAWES AND LIBERTYES* 38 (Cambridge 1660), reprinted in *LIBRARY OF CONGRESS, RECORDS OF THE STATES OF THE UNITED STATES OF AMERICA* (1949) (Microfilm Comp.) (Mass. B.1, reel 1, unit 8).

Sundays. However, it was not until 1646 that Massachusetts enacted its first colonial law that specifically dealt with gaming. This law prohibited the playing of shuffle-board, bowling or "any other play or game" anywhere in the colony.<sup>136</sup> The law enumerated, for the first time, specific penalties for both players and keepers of houses of common entertainment.

In 1668, the Massachusetts idleness statute was amended to provide that all idlers, "for remedy of these great and unsufferable evils," would be committed to a "house of correction."<sup>137</sup> In 1682, that statute was amended a second time in a renewed effort to eliminate any unproductive use of time. Idleness, stated the preamble, not only jeopardized the economic welfare of the individual and his family, but also fostered negligent pursuit of one's calling.<sup>138</sup>

## ii. Lotteries

America was a land of great opportunity and abundant natural resources. Nevertheless, one limitation on progress existed everywhere: capital was scarce. Before 1790, only three incorporated banks existed in America.<sup>139</sup> In addition, the colonies were ruled by a mercantilistic English monarch, who wanted to keep the colonies politically and economically dependent. The colonies, however, were in desperate need of bridges, roads, schools, churches and forts, as well as other defenses. Money was in short supply, and the techniques of taxation were primitive. The colonists, therefore, turned to the lottery as a means of raising revenue. The first lotteries in Massachusetts were private, offering goods or real estate as prizes.<sup>140</sup> As lotteries became more widespread, opposition to them also grew.<sup>141</sup> That opposition occasioned the articulation of the first purely

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136. *Id.* at 33.

137. THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 128 (Wait 1814).

138. *Id.* at 128-29. Both practical concern for the idler's family and disapproval of idleness itself can be discerned in the preamble to the statute:

[T]here are in sundry of our towns and especially in Boston many idle persons in families as well as other single persons who are greatly if not altogether negligent in their particular callings, and some that do not follow any employment for a livelihood, but misspend their time and the little which they earn to the impoverishing if not utter undoing of themselves and families. . . .

*Id.* Tithing men in each town were to inspect all persons, families, and homes in search of idlers or those with no lawful calling. The culprits were forced to work at assigned jobs, either in town or in jail. Wages were withheld from the individual and kept by the local magistrate for the idler's family. *Id.*

139. L. CHANDLER, THE ECONOMICS OF MONEY AND BANKING 81 (5th ed. 1969).

140. J. EZELL, FORTUNE'S MERRY WHEEL 17 (1960).

141. In 1699, leading Massachusetts churchmen issued a statement:

### Biblical attacks on gambling.

The Puritans had a distinct distrust of authority, whether secular or religious. Each man stood free before God, and only God's will could command obedience. Each man was to be *with* one another, but not *over* one another. The Puritans came to Massachusetts not to find religious freedom, but to establish the church-state that they had failed to form in England. The legitimacy of law, therefore, had to rest on God's will as expressed in the Bible, not man's will. Law and morality were identical, and crime was equated with sin.<sup>142</sup>

In the period from 1644 to 1728, Increase Mather and his pedantic son Cotton, both ministers of renown in Boston, preached that the law should condemn gambling as a form of profanity. Increase Mather noted:

Now a Lot is a serious thing not to be trifled with; the Scripture saith not

Not only the undertakers of lottery, have a certain gain unto themselves, but so likewise have they, who in the lottery draw tickets of benefit; and every one who ventures, does it with a desire to fall upon those tickets in drawing. It is very certain, that for this benefit, none of these can pretend that they do any one thing beneficial to human society. They only hire the undertakers to transfer the estates of others unto themselves, without any service done by them to the interest of any under heaven.

In a lottery so contrived, that when all the prizes are drawn, they do not make up, and fetch out, near the whole sum that was deposited by the adventurers, there is a plain cheat upon the people. The undertakers in such a lottery only resolve to pilage the people of such a considerable sum, and invite a number to assist them in their actions, in hopes of going shares with them in the advantage; and such is the corruption of mankind, that the mere hope of getting the riches of other men without doing the service of anything for it, will engage men to run the hazard of being losers.

*Id.* at 17-18.

142. See Marcus, "*Due Execution of the Generall Rules of Righteousnesse*": *Criminal Procedure in New Haven Town and Colony, 1638-1658*, in *SAINTS & REVOLUTIONARIES* 99 (1981).

To the Puritan founders of New England, the punishment of crime was a religious imperative. They saw themselves as a "New Israel," joined with God, like the Israel of old, in a national covenant. If they used "all due means to prevent sin" in their communities, God would reward them with prosperity and peace. If they allowed sin to flourish, He would loose His wrath upon them. Since the Puritan God's anger took the form of indiscriminate disasters, from storms and droughts to shipwreck and disease, fulfilling the national covenant was a matter not of inclination but of survival.

Puritan communities could protect themselves from God's "revenging justice" by punishing those sins, or crimes, which came to public attention. Through punishment, Puritan governments "bore witness" before a jealous God to the community's effort to combat sin. The sentencing magistrates were God's instruments, attracting the lightning of His wrath away from the group and conducting it, in the form of criminal punishment, to the particular evildoers who incurred it.

*Id.* at 99-100.

only (as some would have it) of *Extraordinary Lots*, but of a Lot in general, that *the whole disposing* (or Judgment) *therof is of the Lord*. . . . He that makes use of a Lot, wholly commits his Affair to a superior Cause than either Nature or Art, therefore unto God. But this ought not to be done in a Sportful Lusory way.<sup>143</sup>

Expanding upon his father's preachings, Cotton Mather argued' that:

[L]ots, being mentioned in the sacred oracles of Scripture as used only in weighty cases and as an acknowledgement of God sitting in judgment . . . cannot be made the tools and parts of our common sports without, at least, such an *appearance* of evil as is forbidden in the word of God.<sup>144</sup>

It was not until 1719, however, that the General Court passed "An Act for the Suppression of Lotteries," which made anyone who "publicly or privately" set up or operated a lottery liable for a twenty pound fine.<sup>145</sup> Lotteries themselves were declared public nuisances, as they had been leading "Children and Servants of Several Gentlemen, Merchants and Traders . . . [into] a vain and foolish Expense of Money, Which tends to the utter Ruin and Impoverishment of many Families, and is to the Reproach of this Government, and against the Common Good, Trade, Welfare and Peace of the Province."<sup>146</sup>

The secular, not religious, rationale for the prohibition was symbolic of a shift that had occurred in political and economic power in Massachusetts by 1719. The Civil War and the Interregnum had distracted England's attention from the colonies. Massachusetts' independent ways, however, finally led to the revocation of the Royal Charter of the Bay Company. In 1691, a new charter was granted, a major result of which was lessening the theocratic influence in the colony. Power soon passed from the clerics to the merchant class, which "by the late 17th century had begun those prudent compromises which would produce 18th century Congregationalism and 19th century Unitarianism."<sup>147</sup> Laws that had only a

143. I. MATHER, TESTIMONY AGAINST PROPHANE CUSTOMS 31-32 (1953).

144. H. CHAFETZ, *supra* note 112, at 14. Boorstin rightly observes that the "hatred of generations of liberal historians" has been "focused" on Cotton Mather; "sober scholarship has lately begun to divest Mather of his Mephistophelian character, so that we can now see him as a vivid symbol" of his time. D. BOORSTIN, *supra* note 128, at 221.

145. THE CHARTER AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY §§ 2, 3, at 751 (Wait 1814). Players were to suffer a £10 penalty, half of which was to be an informant's fee to encourage enforcement. *Id.*

146. *Id.*

147. D. BOORSTIN, *supra* note 128, at 125. Even during the Great Migration, only about one-fourth of the settlers were committed church members. The other elements of the society, which were present in the colony from the beginning, steadily grew as more people migrated to Massachusetts Bay Colony for other than religious reasons. For a detailed

religious justification, such as those prohibiting blasphemy, soon ceased to be enforced, but the regulation of the various forms of gambling continued for secular reasons.

It was relatively easy for Massachusetts citizens to avoid the 1719 Lottery Act by drawing lots in neighboring colonies.<sup>148</sup> By 1733, evasion had become so widespread that the General Court concluded:

[the anti-lottery law had] not been found sufficient to put a stop to that practice, but sundry persons have exposed their estates, as well real as personal, to sale by lotteries, projected and ticke[t]s disposed of within this province, reserving the drawing of lots in some neighbouring colonies: whereby the good and wholesome design and true intent and meaning of the aforesaid act is very much eluded and evaded.<sup>149</sup>

Accordingly, the provisions of the 1719 law were strengthened by raising the penalties.<sup>150</sup> Nevertheless, lotteries were not considered evil per se; there was an exception for any lottery authorized by the General Court itself or the Parliament in London.<sup>151</sup>

During the first half of the eighteenth century, Massachusetts was plagued by a serious currency shortage, which led to rioting in 1740. The shortage was aggravated by the economic dislocations relating to wars from 1689 to 1763. In 1744, the General Court authorized the first state-run lottery in the colonies to raise public revenue:

not only for the protection of the seacoast, but for the defence of the frontier of New England, and also for the protection of his majesty's province of Nova Scotia, and the inhabitants having already been subjected to a heavy tax on polls and estates the present year, and a debt still remaining which the representatives of the said province are desirous should be provided for in a manner least burthensome of the inhabitants.<sup>152</sup>

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description of the gradual transformation of the criminal law in Massachusetts from an agent of God punishing sin to an agent of the state maintaining public order, see Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era*, in *CRIME, LAW AND SOCIETY* 72-86 (A. Goldstein & J. Goldstein ed. 1971).

148. J. EZELL, *supra* note 140, at 21.

149. 5 Geo. 2, ch. 14 (Mass. Bay 1733), *reprinted in* 2 *THE ACTS AND RESOLVES, PUBLIC AND PRIVATE OF THE PROVINCE OF MASSACHUSETTS* BAY 663 (1874) ("An Act in Addition to the several Acts or Laws for the Suppressing of Lotteries").

150. The fine for selling tickets was raised to £500, anyone found guilty of selling tickets was barred from public office, and a person publishing accounts of lotteries was subject to a £100 fine. *Id.* § 2.

151. *Id.* § 3.

152. 15 Geo. 2, ch. 20 (Mass. Bay 1744), *reprinted in* 3 *THE ACTS AND RESOLVES, PUBLIC AND PRIVATE OF THE PROVINCE OF MASSACHUSETTS* BAY 195 (1878) ("An Act for Raising, by a Lottery, The Sum of Seven Thousand Five Hundred Pounds, for the Service of this Province in the Present Year"). The lottery was not implemented without moral



The general success of the lottery encouraged other colonies to establish their own public lotteries and spurred Massachusetts itself to authorize other special lotteries for bridge construction<sup>153</sup> and easing river navigation.<sup>154</sup> Not all of the lotteries, however, were as successful as the first. In 1750, the drawing of a government lottery had to be postponed twice because the mandated number of tickets (5,000) had not been sold.<sup>155</sup> In 1753, another law was passed that attacked playing the lotteries of neighboring colonies.<sup>156</sup> Ironically, its preamble strongly condemned lotteries in general.<sup>157</sup> Increased taxation by England after 1763 dried up much of the money available for lotteries, which declined in the period immediately preceding the Revolution.<sup>158</sup>

### iii. *Wagering*

The third major form of gambling in the colonies was wagering on horseracing, which went back to the beginning of the colonial period. The earliest American horseraces were far different from those of today. The first horses to race were not specifically bred for that purpose; rather, they

concern. Six weeks later, by special resolution, the General court prohibited the sale of tickets to Indians, Negros and mulattoes to avoid "mischievous consequences." J. EZELL, *supra* note 140, at 30-59.

153. 21 Geo. 2, ch. 14 (Mass. Bay 1750), *reprinted in* 3 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY 538 (1878) ("An Act for Raising the Sum of Twelve Hundred Pounds by Lottery, for Building and Maintaining a Bridge over the River Parker, in the Town of Newbury, at the Place Called Oldtown Ferry").

154. 1 Geo. 3, ch. 36 (Mass. Bay 1760), *reprinted in* 4 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY 327 (1881) ("An Act for Raising a Sum of Money by Lottery, For Removing the Rocks and Shoals in Taunton Great River, and Thereby to Render the Navigation in said River More Easy and Less Hazardous").

155. 3 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY at 548, 575 (1878).

156. 24 Geo. 2, ch. 22 (Mass. Bay 1753), *reprinted in* 3 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY at 652 (1881) ("An Act in Addition to the several Acts or Laws for the Suppressing of Lotteries").

157. It provided:

Whereas divers good and wholesome laws have been made and pass'd by this governm[en]t for [the] suppressing of lotteries, and thereby preventing a vain and foolish expence, tending to the impoverishment of unwary people; which laws are in a great measure rendered ineffectual by the lotteries which are frequently set up in the neighboring governm[en]ts.

*Id.* For the first time, buying as well as possessing lottery tickets was made an offense. Immunity from prosecution was extended to a purchaser or publisher who testified against a seller. *Id.* § 3.

158. J. EZELL, *supra* note 140, at 43-59.

"had some other more legitimate employment."<sup>159</sup> In an unmechanized society, the horse was both the principle mode of transportation and a valuable factor in the agrarian economy; its use for sport or entertainment was purely secondary. The race courses were also much larger and better approximated "the actual working situations of the animals than the race course of Suffolk Downs."<sup>160</sup> Thus, American horseracing was initially shaped by the role of the horse in the culture of the colonies.

The earliest wagering on horseraces similarly differed, consisting of wagers among the participants themselves, and among the spectators. Because racing was still primarily a sport, most bets reflected the bettor's loyalties to a particular horse or rider.<sup>161</sup> Thus, wagering on horseraces was essentially private gambling.

The earliest horseracing regulations arose from a legislative concern more for public safety than for morality. In 1674, Plymouth Bay Colony imposed a five shilling fine or one hour in the stocks for anyone found racing on the highway.<sup>162</sup> At about the same time, the Massachusetts Bay Colony fined anyone racing near private or meeting houses. Such conduct was described as being "to the hazard of [the racers], children and other persons," as well as "contrary to the rules of modesty and sobriety."<sup>163</sup> Within three years, the General Court also outlawed racing within four miles of any town, highway or common, noting that "there is practiced by some that vanity of Horse racing, for mony, or monyes worth, thereby occasioning much misspence of precious time, and the drawing of many persons from the duty of their particular Callings, with the hazard of their Limbs and Lives."<sup>164</sup>

## 2. The Middle Colonies

The Middle Colonies had a different history of settlement prior to the Revolution. The majority of people depended on agriculture, but in

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159. 1 E. DEVEREUX, *GAMBLING AND THE SOCIAL STRUCTURE: A SOCIOLOGICAL STUDY OF LOTTERIES AND HORSE RACING IN CONTEMPORARY AMERICA* 217 (1980).

160. *Id.* English style racing was not introduced in America until 1745, when the first such race was conducted at Annapolis. See J. HUMPHREYS, *RACING LAW* 6 (1963).

161. 1 E. DEVEREUX, *supra* note 159, at 229.

162. *COMPACT*, *supra* note 128, at 171.

163. 5 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY, MASSACHUSETTS 1672-1674 at 39 (1916).

164. THE COLONIAL LAWS OF MASSACHUSETTS REPRINTED FROM THE EDITION OF 1672, WITH SUPPLEMENTS THROUGH 1686 at 347 (1890). Those involved in racing for money were subject to a forfeiture of triple the sum wagered. The fine and forfeiture were to be divided between the Colony and the informant. Constables were "enjoined" to report transgressors to the local magistrates. *Id.* §§ 1, 2, 3.

contrast to the New England farmers, many landowners rapidly grew wealthy. The Hudson Valley in New York was divided into the great manorial estates of the Van Rensselaers, the Cortlandts and the Livingstons; Long Island and upper New York were characterized by small farms. In Pennsylvania, Quaker farms had substantial brick or stone houses, papered walls and good china and glassware. In both areas, there were also an increasing number of merchants, tradesmen and mechanics. Traders were involved in shipping lumber, furs, grain and other natural products and the importing of manufactures, sugar and wines. As Boston dominated New England, New York City and Philadelphia dominated the Middle Colonies. As wealth increased, professional men, including lawyers, grew more common. Because life was different, law was different.

a. *New York*

Although the area now known as New York was first discovered in 1524 by Giovanni de Verrazano, a Florentine in the service of the French king, settlement of the region did not actually begin until 1624, when the Dutch West India Company established Fort Orange (Albany) and New Amsterdam (Manhattan). The Dutch had gained a foothold in 1609 when Henry Hudson, an English mariner employed by the Dutch to find a new route to India, happened upon the Hudson River which he mistook for the much sought-after passage to the Orient. Additional explorations of the river and its environs revealed the potential for a successful fur trade. The Dutch West India Company settled the area, which was generally known as New Netherlands.

The Dutch in New Netherlands were primarily interested in high profits from the fur trade. In contrast to the Puritans, neither permanent settlements nor religion were of great importance to many Dutch settlers, "rough and unruly characters who became notorious for their addiction to strong drink."<sup>165</sup> Gaming and gambling were equally widespread. The Dutch were great enthusiasts of bowling and they were also fond of betting on a card game known as "Iansquenet." Given the secular orientation of both the leaders and settlers of New Netherland, it is not surprising there were few prohibitions against gambling.<sup>166</sup>

From its earliest years, New Netherlands was also unique among the

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165. D. ELLIS, J. FROST, H. SYRETT & H. CARMAN, A HISTORY OF NEW YORK STATE 26 (1967).

166. As one historian observed, "The Dutch were concerned with neither the conversion of the Indians to the 'true' faith nor the establishment of a wilderness zion ruled by God's elect." *Id.*

American settlements for the heterogeneity of its population. The first settlers were primarily French Protestants, although the Dutch soon became a majority. By 1644, a visitor to New Amsterdam observed that eighteen different languages were spoken by the fewer than 1,000 inhabitants and that the settlement had the "arrogance of Babel."<sup>167</sup> The same religious tolerance that had made the Netherlands a haven for persecuted religious groups made New Netherlands similarly attractive. Large numbers of Jews, Catholics, Germans, French and Scandinavians, including many from neighboring colonies, moved to the colony. Slaves from Angola and Brazil formed the core of the largest black population of the northern colonies.

During the middle of the seventeenth century, New Netherlands prospered and its economy diversified. New Amsterdam had excellent harbors which led to the rise of many mercantile establishments and a solid middle class. Farming also flourished. By the mid-1660's, New Amsterdam alone had over 2,000 residents and was rapidly expanding.

#### i. *Gaming*

The first mention of gaming appeared in a 1656 ordinance, which was passed to enforce proper observance of the Sabbath. Among the amusements prohibited were card-playing, ticktacking (a type of backgammon), playing at bowls and nine pins.<sup>168</sup> Unlike legislation in the Puritan colonies, this ordinance banned these activities only during the hours when services were held. To the secular Dutch, the remainder of the Sabbath was like any other day.

In only one circumstance was gambling per se opposed: aboard ship. Citing the fact that "many misfortunes occur through gambling and diceing," another 1656 ordinance declared that anyone who brought "dice, cards, or other implements of gaming" aboard a vessel would be placed in irons for eight days with only bread to eat and water to drink.<sup>169</sup> Gambling winnings had to be returned and gamblers could be fined. The severity of the gambling problem aboard ships may be judged from the fact that the penalties for illegal gambling exceeded those for fist fights or use of tobacco, which was considered a fire hazard. Interestingly, however, the law did permit ships' captains to make exceptions.

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167. *Id.* at 21.

168. Ordinance of Oct. 26, 1656, reprinted in LAWS AND ORDINANCES OF NEW NETHERLAND 1638-1674, at 258-63 (O'Callaghan ed. 1868).

169. Ordinance of Dec. 18, 1656, LAWS AND ORDINANCES OF NEW NETHERLAND 1638-1674, at 282 (O'Callaghan ed. 1868).

Prosperity notwithstanding, serious challenges arose in the 1650's to Dutch rule in New Netherlands. The settlers resented Governor Peter Stuyvesant's autocratic manner, Connecticut and Massachusetts were laying claim to Dutch territory and the Indians were engaging in raids. Dutch rule came to an end in 1660, when Charles II, annoyed by New Amsterdam's interference with British trade, awarded most of New Netherlands to his brother James, the Duke of York and Albany. English warships were sent to the area, and since Stuyvesant had little popular support, the English prevailed without difficulty.

In order to maintain stability, the new English rulers wisely permitted the established settlers to retain their properties, but the life of the colony slowly began to change. Attitudes toward gaming and gambling shifted toward a greater concern with proper behavior.

Although gambling was apparently widespread throughout the first part of the eighteenth century, it was not until 1741 that the New York General Assembly passed its first gaming law. It was apparently prompted by the realization that gaming was a serious threat to the existence of their society.<sup>170</sup> The law imposed severe penalties on tavern- and inn-keepers who permitted billiard, truck or shuffleboard equipment. Anyone who sold liquor was forbidden to permit either youths under twenty-one or apprentices to gamble; youths and apprentices who were found drinking and gambling could also be fined. As an incentive, informants were awarded half the fine collected, the other half going to the poor.

The significance of the public order purpose of controlling gambling in taverns should not be underestimated. Social life centered around these institutions, which provided newspapers, special rooms for negotiating business deals and, of course, refreshments. By 1772, there was an estimated ratio of one tavern for every fifty-five inhabitants of New York City. Moreover, these taverns catered to different classes of society, so that one could find special taverns for the wealthy and more modest ones, known as grog-houses, for the poor.

On the eve of the Revolution, the General Assembly passed "An Act

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170. Act of Nov. 27, 1741, ch. 722, *reprinted in* 3 THE COLONIAL LAWS OF NEW YORK 194-95 (1894) (Reenacted by Act of Nov. 20, 1745, ch. 796, *reprinted in* 3 THE COLONIAL LAWS OF NEW YORK 460-62 (1894)). The Act states:

[G]aming in the Colony of New York at Taverns & Other Publick Houses, for Moneys or Strong Liquors hath by Fatal Experience been found to be attended with many evil Consequences, not only by Corrupting & Vitiating the manners of many of the People of the said Colony, Encouraging Them to Idleness, Deceit & many other Immoralities but hath moreover a manifest Tendency to the Ruin of many.

*Id.* at 194.

for the better preventing of excessive and deceitful Gaming,"<sup>171</sup> which was based on the Statute of Anne. New York and England apparently shared a concern about the loss of its great estates through gaming. All conveyances and securities made in consideration of winning from "Cards, Dice, Tables, Tennis, Bowls, or [any] other . . . Games" were declared void.<sup>172</sup> Reimbursement of money knowingly lent for such gambling was prohibited, and winnings could, under certain conditions, be recovered. In order to ease the burden of bringing cases, the law, like the Statute of Anne, compelled testimony under oath.<sup>173</sup>

The criminal aspects of the law were primarily aimed at discouraging cheating and professional gambling. As in the Statute of Anne, professional gamblers were described as "leud and dissolute Persons," who live "at great Expenses, having no visible Estate, Profession or Calling to maintain themselves, but support those Expenses by gaming only."<sup>174</sup> Both cheaters and professional gamblers were subject to stiff sanctions similar to those provided in the English statute.

## ii. Lotteries

Early attempts in New York to control lotteries were motivated by the same economic considerations that played such a dominant role in New England.<sup>175</sup> Along with the other colonies, New York was plagued by a currency shortage throughout the early seventeenth century. It was extremely difficult to sell expensive property, since few buyers could afford high prices. The lottery allowed the seller to realize his price and appeared to satisfy the buyers, who, in Thomas Jefferson's words, "[ran] small risks for the chance of obtaining a high prize."<sup>176</sup> The method proved valuable, for example, to one John Blood, who in 1746 was able to dispose of a brick house, an annuity of five pounds and numerous lots in New Jersey by selling 2,000 chances at thirty shillings each.<sup>177</sup>

Lotteries provided enticing opportunities for cheaters, motivating the Assembly in 1721 to pass New York's first lottery control law. The

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171. Act of March 9, 1774, ch. 1651, *reprinted in* 5 THE COLONIAL LAWS OF NEW YORK 621-24 (1894).

172. *Id.* at 621-22. Not all gambling was condemned. Instead, the law focused on casino-like gambling based on specific games. A few decades later a more generalized anti-gambling law was passed.

173. *See supra* note 54 and accompanying text.

174. Act of March 9, 1774, ch. 1651, *reprinted in* 5 THE COLONIAL LAWS OF NEW YORK at 635 (1894).

175. *See* H. CHAFETZ, *supra* note 112, at 17.

176. J. EZELL, *supra* note 140, at 13.

177. *Id.* at 14.

Assembly was concerned that lotteries and the like had been:

Used and Practised to the Manifest prejudice of Trade, and Obstructions of Commerce and Vendues, and proved of pernicious Consequence to Merchants, Shop-keepers and Traders, by which great Frauds have been and Dayly are Committed in the Goodness and Quality of Such Goods, wares and Merchandize, as well as the Value thereof, by which there has been Some times Double the Vallue [sic] advanced and put on the commodities, beyond their Intrinsick worth.<sup>178</sup>

In spite of the 1721 statute, lotteries continued to flourish, many with official sanction. Between 1746 and 1774, the General Assembly authorized more than a dozen public lotteries for such projects as the establishment of Kings College (Columbia University),<sup>179</sup> the fortification of New York City,<sup>180</sup> the construction of a lighthouse at Sandy Hook,<sup>181</sup> and the erection of a jail.<sup>182</sup>

Many of the public lotteries were not fully subscribed, in part due to the competition from those in neighboring states. In order to protect its own enterprises, New York imposed, in 1759, a fine of six pounds on anyone who sold foreign lottery tickets within the state.<sup>183</sup>

Despite this added protection, New York still had difficulty floating its lotteries, and several had to be postponed or cancelled.<sup>184</sup> Finally, in 1772, the Assembly enacted a comprehensive anti-lottery statute.<sup>185</sup> It condemned the commercial harm lotteries caused and cited their tendency to encourage idleness, fraud and impoverishment as well as their ability to engender "a dangerous spirit of Gaming."<sup>186</sup> It declared all unauthorized

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178. Act of July 27, 1721, ch. 411, *reprinted in* 2 THE COLONIAL LAWS OF NEW YORK 61 (1891) (this act was substantially reenacted by the Act of Nov. 25, 1747, ch. 856, *reprinted in* 3 THE COLONIAL LAWS OF NEW YORK 675-76 (1894)). The law did not, however, prohibit lotteries per se; it merely outlawed unauthorized lotteries. A private lottery then being conducted by one William Lake was, for example, explicitly exempted from the law's prohibitions. *Id.*

179. Act of Dec. 6, 1746, ch. 840, *reprinted in* 3 THE COLONIAL LAWS OF NEW YORK 607 (1894).

180. Act of Feb. 27, 1746, ch. 817, *reprinted in* 3 THE COLONIAL LAWS OF NEW YORK 528 (1894).

181. Act of May 19, 1761, ch. 1147, *reprinted in* 4 THE COLONIAL LAWS OF NEW YORK at 524 (1894).

182. Act of Dec. 1, 1756, ch. 1032, *reprinted in* 4 THE COLONIAL LAWS OF NEW YORK 126 (1894).

183. Act of Dec. 24, 1759, ch. 1100, *reprinted in* 4 THE COLONIAL LAWS OF NEW YORK 377-78 (1894).

184. J. EZELL, *supra* note 140, at 34-38.

185. Act of Mar. 24, 1772, ch. 1542, *reprinted in* 5 THE COLONIAL LAWS OF NEW YORK at 351-54 (1894).

186. *Id.* at 352.

lotteries, by "whatever Name Denomination or Title [they] may be called known or distinguished," to be common nuisances.<sup>187</sup> The law imposed penalties for promoting lotteries or buying or selling tickets. It contained incentives to encourage informants. The seriousness with which the lottery problem was viewed is shown by the extraordinary manner in which evidence could be obtained. If any justice of the peace had reasonable cause to suspect illegal lottery activity, he could summon all parties believed to have knowledge of it. These parties, granted immunity, were compelled to answer all questions, even those which were incriminating, or face prison. All public officials were commanded to oppose illegal lotteries with all vigor. As with the 1774 gambling law, the 1772 lottery statute included civil sanctions that voided transfers of land or chattels.<sup>188</sup>

### iii. *Wagering*

New York's policy toward wagering on horseracing was more closely aligned with its southern neighbors than with its New England neighbors. The first English governor of New Netherlands, Richard Nicolls, had established the state's first race track, Newmarket, in 1664, in what is now Garden City, Long Island.<sup>189</sup> It was there, in 1666, that America's first horserace for a stake was run.

Throughout the seventeenth and eighteenth centuries, horseracing on Long Island was a passion of New York's aristocratic upper class. Elsewhere, the poorer people held races along highways, and betting usually accompanied those races. The people of New York declined to forego this favorite pastime when, in 1774, the Continental Congress attempted to divert the public's energies from frivolity to the more serious political problems of the day. The Continental Congress called upon the colonies to "discountenance and discourage every Species of Extravagance and Dissipation, especially all Horse Racing, and all Kinds of gaming,

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187. *Id.*

188. *Id.* at 353. The Lottery Act of 1772 was reenacted in 1774 with a single addition which gave justices of the peace the power and the duty to order grand jury investigations of violations of the act and to prosecute indictments. Act of Mar. 9, 1774, ch. 1655, *reprinted in* 5 THE COLONIAL LAWS OF NEW YORK 639-42 (1894). During the Revolution, the British vigorously used the 1772 law to frustrate patriotic groups who had resorted to clandestine lotteries to help finance the rebels' cause. In 1783, when the Revolution was over, the New York state legislature pardoned all those who had been convicted under the 1772 law for activities occurring after July 4, 1776. *See* Act of Feb. 14, 1783, ch. 12, 1 N.Y. LAWS 89 (1789), *reprinted in* LIBRARY OF CONGRESS, RECORDS OF THE STATES OF THE UNITED STATES OF AMERICA (1949) (microfilm compilation) (N.Y. B.1, reel 4, unit 3).

189. H. CHAFETZ, *supra* note 112, at 18.



Cock Fighting. . . ."<sup>190</sup> When a New York justice attempted to apply this request to horseracing, he was unable to empanel a jury.<sup>191</sup>

b. *Pennsylvania*

The English, Dutch, Swedes and Finns explored the land along the lower Delaware River during the early days of colonization. After Henry Hudson visited the area in 1609, the English and Dutch established temporary trading posts, but the Swedes and Finns founded the first permanent settlements.<sup>192</sup> In 1655, the Dutch seized the Swedish colony and held it until 1664, when they were ousted by the English.<sup>193</sup>

Charles II then assigned the area to his brother, the Duke of York and Albany (later James II). In order to govern the colony, the duke promulgated "the Lawes,"<sup>194</sup> which were in effect from 1676 to 1682. These laws were administered by colonial courts, which were established in three judicial districts along the Delaware. One of these districts, known as the Uplands, included a substantial part of what is now eastern Pennsylvania.

The territory held by the Duke of York was conveyed to William Penn in 1681 as payment of a debt that Charles II owed to William Penn's father. According to the proprietary charter, which gave Penn great latitude in governing the colony, English law was to remain in effect pending the promulgation of new laws. These laws were to be subject to acceptance by the freemen settlers and repeal by the Crown.

As Proprietary Governor, Penn sent his cousin, William Markham, to the colony to serve as Deputy Governor of Pennsylvania. The Deputy

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190. F. DULLES, *AMERICA LEARNS TO PLAY* 65 (1940).

191. H. CHAFETZ, *supra* note 112, at 28.

192. For an entertaining discussion of these early years that refers to many important sources, see HISTORICAL SOCIETY OF PENNSYLVANIA, *THE RECORD OF THE COURT AT UPLAND, IN PENNSYLVANIA 1676 TO 1681* (1860) [hereinafter cited as *RECORD*].

193. The Dutch regained possession by conquest in 1673, but the territory was returned to England in 1674 under the terms of the Treaty of Westminster.

194. The first allusion to "the Lawes," the rules and regulations published by the Duke of York for the governance of the lands seized from the Dutch, was made in 1668. It was recommended that they merely be shown and frequently communicated to the inhabitants, so that they could become accustomed to "the Lawes" prior to their establishment. The Duke recognized that his control over the people was somewhat tenuous and that he should endeavor not to agitate them. In general, the laws were a compilation of those in force in other English colonies and plantations. They were collected under approximately 90 different headings. Additions were made from time to time, but most gaps were filled in by judicial opinions consistent with the known laws of England. *RECORD*, *supra* note 192, at 25. The laws enacted prior to 1700 are no longer considered to be in force as part of Pennsylvania heritage. *Blackmore v. Gregg*, 2 Watts & S. 182, 188 (1841).

Governor was given the authority to administer certain "Conditions and Concessions" that bound all settlers to observe the law of England, to safeguard the liberty and fair treatment of the native Indians and to promote orderly agricultural and commercial development. Viewing the colony as a "Holy Experiment," Penn decreed the "First Frame of Government" on April 20, 1682.<sup>195</sup> This document was based on the Quaker belief that there is a divine right to "man-made government." The ordering principle for this Quaker Constitution was the inviolate freedom of the individual's conscience with the correlative right of uninhibited religious worship for those who acknowledged one almighty God.

### i. Gaming

In addition to issuing the First Frame of Government, Penn and the freemen settlers entered into a covenant of the "Laws Agreed Upon in England" on May 5, 1682. This covenant included a provision prohibiting swearing, drunkenness, stage-plays, cards, dice, cockfighting, and all other activities that tended to incite rudeness, cruelty, looseness and irreligion in men.<sup>196</sup> Accordingly, on December 7, 1682, the first General Assembly enacted "The Great Law,"<sup>197</sup> which included provisions outlawing bull-baiting, cockfighting, card and dice games, lotteries and similar games.<sup>198</sup>

On November 27, 1700, the General Assembly approved "An Act Against Riots, Rioters and Riotous Sports, Plays and Games," which included, among other provisions, a codification of the gaming policies expressed in "The Great Law."<sup>199</sup> The 1700 Act outlawed games involving animals and provided a fine of twenty shillings. The 1700 Act also outlawed the playing of cards and casino games. Players could be fined five shillings

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195. The complete text of the charters, grants and laws enacted during this period can be found in *CHARTER TO WILLIAM PENN AND THE LAWS OF THE PROVINCE OF PENNSYLVANIA* (1879) [hereinafter cited as *DUKE OF YORK'S BOOK OF LAWS*].

196. This covenant and other early statutes in Pennsylvania prohibited games or activities regardless of the presence or absence of gambling. *DUKE OF YORK'S BOOK OF LAWS*, *supra* note 195, § 37, at 103.

197. *Id.* at 107 ("The Great Law or The Body of Laws").

198. Those found guilty of participating in a bull-baiting or cockcefighting contest were subject to, at least, 10 days imprisonment at hard labor or a fine of 20 shillings. *Id.*, ch. 26, at 114.

199. Act of Nov. 27, 1700, *reprinted in* 2 PA. STAT. 1682 TO 1801, at 4 (1896). The "Great Law" was abrogated in 1693 by the English Monarchs William and Mary. *DUKE OF YORK'S BOOK OF LAWS*, *supra* note 195, at 114 n.†. The anti-gambling provisions were reenacted the same year by the Act of June 1, 1693. *Id.* at 188 ("A Petition of Right"). The "Petition of Right" included provisions for the licensing of public drinking houses as a means of controlling and suppressing drunkenness and disorderly conduct. *Id.* § 10, at 195.

for these offenses.<sup>200</sup>

The colony passed its first law to preserve the sanctity of the Sabbath on January 12, 1706.<sup>201</sup> This statute prohibited all labor and game playing on Sundays. Constables were authorized to apprehend all offenders. This early "blue law" served as the basis for a more comprehensive law, passed eighty-eight years later, which also proscribed all sporting and betting games.<sup>202</sup>

Other legislation attempted to establish controls over all aspects of colonial life in which gaming could occur. During the 1710-1711 legislative session, the General Assembly established a license application procedure for taverns and public houses.<sup>203</sup> This legislation mandated a fine of forty shillings for any licensed tavern keeper who condoned disorder, drunkenness or unlawful games upon his premises.<sup>204</sup> During the 1710-1711 legislative session, the General Assembly revised and updated the 1700 Act outlawing riotous games and sports.<sup>205</sup> The owners or operators of any house where games prohibited by the laws of England or any similar games thereafter invented were played could be fined as much as six shillings, eight pence.<sup>206</sup> Law officers were granted the power to search upon suspicion and to arrest and imprison houseowners and players until they exhibited "assurances of rehabilitation." Interestingly, the statute singled out artisans, servants, and other common laborers for larger fines.<sup>207</sup> A one-

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200. Act of Nov. 27, 1700, *reprinted in* 2 PA. STAT. 1682 TO 1801, at 4-5 (1896).

201. Act of Jan. 12, 1706, *reprinted in* 2 PA. STAT. 1682 TO 1801, at 175 (1896) ("An Act to Restrain People from Labor on the First Day of the Week"). Ale-house drinkers were subject to a fine of one shilling and sixpence; tavern keepers were subject to a fine of ten shillings for operating their taverns on Sundays. *Id.* at 177.

202. Act of Apr. 22, 1794, *reprinted in* 15 PA. STAT. 1682 TO 1801, at 110 (1911).

203. Act of Feb. 28, 1711, *reprinted in* 2 PA. STAT. 1682 TO 1801, at 357 (1896). This act was the predecessor of future local licensing laws.

204. *Id.* at 358. A second offense could result in suspension of the keeper's license and a five pound fine. *Id.*

205. Act of Feb. 28, 1711, *reprinted in* 2 PA. STAT. 1682 TO 1801, at 360 (1896).

206. *Id.* These games include bowling, tennis, dice, cards and casino games. Section 1 of the Statute refers to an Act of Henry VIII, 33 Hen. 8, ch. 9 (1541) (for the "Maintaining of Artillery and the Debarring of Unlawful Games"). The two statutes are similar in structure and content; both explicitly prohibit gaming among artisans, craftsmen and workmen. The English statute, however, was fundamentally different; it expressly condoned certain games by the nobility and aristocracy within the confines of their private homes. This policy reflected the King's belief that gaming detracted from diligent training in the martial arts and impoverished many men to the point where they could not properly equip themselves for war. *See supra* text accompanying note 16. The colonial Quakers, on the other hand, opposed gaming for degrading the virtues of hard work and fervent moral character in the working classes. The Quakers, of course, opposed war and preparations for war.

207. Act of Feb. 28, 1711, *reprinted in* 2 PA. STAT. 1682 TO 1801 at 361 (1896). They

year statute of limitations applied to prosecutions under this Act.

## ii. *Lotteries*

The attitudes of the Pennsylvania legislature towards gambling were made apparent during the 1729-1730 session, when the General Assembly enacted Philadelphia's first lottery suppression bill.<sup>208</sup> The preamble of the statute reflected the desire of the General Assembly to maintain the public peace by enjoining "idle and disorderly" persons from assembling in the city streets to engage in lotteries and public auctions. The Statute, nevertheless, only penalized those who set up or operated public or private lotteries. Although the terms of the 1730 Act were general, the Pennsylvania General Assembly passed numerous special bills, as did the Massachusetts and New York legislatures, to authorize lotteries for the financing of church building construction,<sup>209</sup> road improvements,<sup>210</sup> and piers.<sup>211</sup> In fact, Dickinson College was constructed with proceeds from one of these lotteries.<sup>212</sup>

During the eighteenth century, political factionalism ended William Penn's dream of an egalitarian society, and the Philadelphia Quaker merchant class soon formed a distinct upper-class. The schism between the upper-class and middle-class elements of Pennsylvania's society widened when a flood of German and Scotch-Irish immigrants, seeking inexpensive farmland and a chance for material advancement, inundated the territory.

Penn's death in 1718 occurred at the time the City of Philadelphia, under the leadership of the Quakers, had begun to assume its role as a commercial and cultural center. The religious pacifism of the General Assembly under the domination of the Quakers kept the colony from becoming involved in the Crown's European squabbles.<sup>213</sup> When the Assembly declined to finance self-defense measures during the French and Indian War, leading to widespread Indian massacres on the frontiers, Benjamin Franklin and his "Association" rose to the occasion by establishing a lottery to raise the necessary revenue for men and arms. Viewed as

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could be fined ten shillings or arrested and imprisoned without bail.

208. Act of Feb. 14, 1730, *reprinted in* 4 PA. STAT. 1682 TO 1801, at 141 (1897).

209. *See, e.g.*, Act of Feb. 21, 1767, *reprinted in* 7 PA. STAT. 1682 TO 1801, at 72 (1900) (Presbyterian Church); Act of May 20, 1767, *reprinted in* 7 PA. STAT. 1682 TO 1801, at 133 (1900) (German Lutheran Church).

210. Act of Mar. 26, 1762, *reprinted in* 6 PA. STAT. 1682 TO 1801, at 196, 203 (1899) (Lottery for Paving the Streets of Philadelphia).

211. Act of Mar. 16, 1798, *reprinted in* 16 PA. STAT. 1682 TO 1801, at 49, 50 (1911) (Lottery for Erecting Piers on The Riverbanks of Pittsburgh).

212. Act of Mar. 27, 1789, *reprinted in* 13 PA. STAT. 1682 TO 1801, at 276 (1899).

213. D. BOORSTIN, *supra* note 128, at 48-54.

radical by Quaker leaders, the "Association" attracted many middle-class merchants and farmers. This popular "democratic party" eventually gained control of the proprietary government from the conservative Quakers.

Even though the political influence of the Quakers subsided, they continued to exert a strong influence on various social issues in the community. For example, the first Assembly not controlled by the Quakers passed an "Act for the More effectual preventing Accidents which may happen by Fire, and for Suppressing Idleness, Drunkenness, and Other Debaucheries."<sup>214</sup> The act condemned the use of horse races or shooting matches as a method of promoting drinking houses.<sup>215</sup>

In 1759, the Assembly suppressed lotteries by enacting an "Act for the More effectual Suppressing and preventing of Lotteries and Plays," which repealed the 1729-1730 Peddler-Vendor Law.<sup>216</sup> The preamble of the Act expressed the view that lotteries tended to corrupt youth, ruin and impoverish families, introduce vice, idleness and immorality, injure commerce and industry, and undermine the common good, welfare and peace of the province. Hence, all lotteries, both public and private, were declared to be public nuisances.

### 3. The Southern Colonies

The weatherbeaten, cramped and dirty ships that sailed into Hampton Roads in the Spring of 1607 under the leadership of Captain Christopher Newport carried men, financed by London capitalists, who called themselves the London and Virginia Company or the London Company. There, they laid out Jamestown: a fort, a church, a storehouse and a row of tiny huts. This was the first permanent English settlement in the New World. The colony was hardly an immediate economic success.<sup>217</sup>

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214. Act of February 9, 1751, *reprinted in* 5 PA. STAT. 1682 TO 1801, at 108 (1898).

215. Tavern keepers who encouraged such conduct or sold liquor on such occasions were subject to a fine of 40 shillings. Persons who participated in or advertised such horse races or shooting matches were subject to a fine of three pounds. If the offender was a servant or a slave, he could receive 15 lashes and six days imprisonment at hard labor. *Id.* at 109.

216. Act of June 20, 1759, *reprinted in* 5 PA. STAT. 1682 TO 1801, at 445 (1898). Other sections of the Act censored plays and theaters on the grounds that they caused the poor and weak to neglect their labor and industry. In 1762 lottery suppression legislation reenacted the 1759 Act with minor revisions. *See* Act of Feb. 17, 1762, *reprinted in* 6 PA. STAT. 1682 TO 1801, at 184 (1900). Post-revolutionary legislation included an extraterritorial provision that provided for a fine of five pounds for *each* lottery ticket, regardless of where the lottery was conducted, "offered for sale or sold" within Pennsylvania. Act of Jan. 20, 1792, *reprinted in* 14 PA. STAT. 1682 TO 1801, at 198 (1909).

217. *See generally* P. BRUCE, ECONOMIC HISTORY OF VIRGINIA IN THE SEVEN-

When Sir Thomas Dale, appointed Marshall of Virginia, arrived in 1611, he found the colonists lazy and insubordinate. He placed them under martial law, publishing a rigorous set of laws (Dale's Code), causing the years 1611 to 1616 to be known as "five years of slavery." His efforts, however, turned the colony around.<sup>218</sup> By 1618, the Company abandoned its initial effort to establish a quasi-feudal system of governance of land and declared that real property might be held by individuals in fee simple absolute. The result was an immediate "tobacco boom" and the commitment of most of the settlement's arable land to "cash crop" agriculture.<sup>219</sup> In later years, Virginia, as well as other colonies of the South, would develop new cash crops, first indigo and rice, then cotton, peanuts and soybeans. Nevertheless, the basic commitment to one crop and exploitative agriculture would remain. Periodically, especially when the rich soil showed signs of becoming depleted, reformers would plead for greater crop diversification. Their efforts toward this end always seemed to be frustrated by the opening of new lands or the discovery of new cash crops that

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TEENTH CENTURY (1935).

218. As one author stated:

Dale's code — the "Lawes Divine, Morall and Martiall" of 1611 — set up a stern, undifferentiated system of authority; a single ruling group held tight control of the colony; there was little division of governmental labor. The "Martiall" part of the code dealt with the duties of soldiers. The "Divine" and "Morall" parts consisted of general criminal provisions and special regulations for the colony. The code was clearly neither lawyer's law nor English law in the usual sense. But neither was it foreign. It reflected the crudities of life in Virginia: the Indians, the "starving time," real or imagined problems of discipline. On paper, the code seemed very severe; it threatened death even for trivial crimes. But the harsh "penalties for embezzlement of public stores or the stealing of boats, speak not so loudly of severity as they do of the importance of the stores and of the boat." . . . Once the colony had a firmer footing, Dale's code was no longer needed. It was gone by 1620.

L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 36-37 (1973).

219. See T. BREEN, *supra* note 122, at 110-11. The "tobacco boom" had a great effect on Virginia's society:

Although early Virginians shared certain general ideas, attitudes and norms with other English migrants, their operative values were quite different from those that shaped social and institutional behavior in places such as Massachusetts Bay. Virginia's physical environment — its extensive network of navigable rivers, its rich soil, its ability to produce large quantities of marketable tobacco — powerfully reinforced values which the first settlers carried to America. . . . By all accounts, early Virginians were ambitious, self-confident men who found themselves in a position to take advantage of an unusual economic opportunity. Whatever religious and political ideas they may have held in England, however much they revered common-law institutions and accepted the general tenets of Anglicanism, they flocked to the New World prepared to exploit their surroundings for quick profits. They were extraordinarily individualistic, fiercely competitive, and highly materialistic.

*Id.* at 107-09.

revived the flagging economy. Thus, the Southern Colonies, particularly Virginia and South Carolina, became — and were to remain — a land-based agricultural society, whose economic health would be tied to the world market for one or another “raw material.”

The year 1619 was an important turning point for Virginia, though it still had fewer than two thousand settlers, for three reasons. One was the arrival of a ship carrying ninety young women to be given as wives to those who would pay 130 pounds of tobacco for their transportation. This meant that the settlement could be made permanent. Second, the meeting of the first legislative assembly in the New World occurred. A governor, six councilors and two burgesses each from ten plantations participated in the assembly. Third, a Dutch vessel arrived in the colony with a shipload of blacks, twenty of whom were sold to the colonists for servants. The meeting of the legislative assembly and the purchase of the blacks set in motion two forces, freedom and slavery, whose contradictions have yet to be resolved.

When the English Civil War began in 1642, the Puritan migration to New England ebbed, but the Cavalier exodus to the South soon began, particularly after Charles's execution in 1649. This migration did not slacken until the Restoration in 1660. By 1670, Virginia's population had risen to more than 35,000. The immigration included names like Lee, Washington, and Marshall. As a result of this migration, the character of the settlement changed. The wealth of the Cavaliers and those who migrated with them made possible the ownership and cultivation of large estates worked by slaves. Virginia, and later South Carolina, became a transplanted England controlled by a relatively small class of aristocratic planters who carried on direct trade with England or northern cities without the assistance of a large mercantile class.<sup>220</sup> While Virginia by 1776 was the most populous of the colonies, containing twice as many people as Massachusetts or Pennsylvania or one fifth of the population of all of the colonies, Williamsburg had a year round population of only 1,500. The other colonies were dominated by their major cities: Boston, New York, Philadelphia and Charleston. These cities ranged in population from Philadelphia's 40,000 to Charleston's 12,000. In contrast, life in Virginia centered around the great estates spread along tidewater rivers such as the Potomac, the Rappahannock, the York and the James. These estates existed independently of one another.

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220. Boorstin observed that “Virginia was governed by the men of property. There was no family of substance without members in the Governor's council, the House of Burgesses, the county court or other governing bodies and there was no governing body of the colony that was not dominated by the men of substance.” D. BOORSTIN, *supra* note 128, at 119.

a. *Virginia*

As the history of the growth of the law of gambling in New England was largely the story of its development in Massachusetts, so the history of the growth of the law in the South was largely the story of its development in Virginia and, to a lesser extent, in South Carolina.

i. *Gaming*

Virginia's early laws were, like Plymouth's, few and brief, relating chiefly to the church government or to the defense of the colony against the Indians. Nevertheless, in 1619, an important year in the development of the colony, important colonial efforts to control various forms of gambling developed. It is common, of course, to attribute our traditional legal policy toward gambling to the Puritans.<sup>221</sup> However, the first law regarding gambling in the New World was enacted in Virginia, hardly a Puritan stronghold. In an act "Against Idleness, gaming, drunkenness and excesses in apparel," the newly formed House of Burgesses provided:

First in detestation of idlers, be it enacted, that if any man be found to live as an Idler, though a freed man, it shall be lawful for the Incorporation or Plantation to which he belongeth to appoint him a Master to serve for wages till he shewe apparent signes of amendment.

Against gaiming at Dice & cards be it ordained by this present Assembly that the winner or winners shall lose all his or their winnings & both winners and losers shall forfeit ten shillings a man, one ten shillings whereof to goe to the discover, & the rest to charitable & pious uses in the Incorporation where the faults are committed.<sup>222</sup>

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221. See, e.g., EASY MONEY, *supra* note 6, at 27-28:

The First American gambling law, a Boston ordinance, was proclaimed barely a decade after the Mayflower arrived. . . . Although unsuccessful in suppressing a favorite colonial pastime, the Boston Gambling Act became the model for laws governing most of the colonial territory. The offspring of these early enactments remain in the criminal codes of all but one of the fifty states.

*Id.* Boorstin made a valuable point:

[T]he public mind has had difficulty in catching the flavor of early Virginia life. Here, too, a large "organizing" concept has been the enemy of our understanding, but for the Virginians the tag-idea has been a favorable one. While "Puritanism" with which we have tagged early New Englanders has dark overtones of provincialism, bigotry, persecution and narrowness, the cliché for Virginians has been The Enlightenment or The Age of Reason — expressions bright with eulogistic overtones. In both areas the clichés have concealed the real character of colonial life.

D. BOORSTIN, *supra* note 128, at 388. These modern misconceptions have made understanding the development and reform of the law of gambling more difficult.

222. 1 G. BRYDON, VIRGINIA'S MOTHER CHURCH AND THE POLITICAL CONDITIONS UNDER WHICH IT GREW 1607-1727 app. 4, at 422 (1947).



The significance of this provision is that it does not reflect the voice of a dissenter class seeking to purify the corrupted life style of the English aristocracy and churchmen, and remake them in the image of a narrow reading of a biblical text. The views expressed in the Act were majoritarian views.

In the same enactment, the Church of England became the established church in the colony:

All ministers shall duely read divine service, and exercise their ministerial function according to the Ecclesiastical Lawes and orders of the church of Englande, and every Sunday in the afternoon shall Catechize suche as are not yet ripe to come to the Communion. And whosoever of them shall be found negligent or faulty in this kinde shall be subject to the censure of the Governour and Councell.<sup>223</sup>

The ministers of the new colony, however, apparently found time to do more than read divine service. In 1631, the House of Burgesses had to direct a special provision at the ministers to curb their drinking, rioting and gambling.<sup>224</sup>

Virginian society soon changed from a frontier culture to a planter dominated culture, in which "competitive gaming involving high stakes became a distinguishing characteristic of gentry culture."<sup>225</sup> T.H. Breen, in his valuable *Puritans and Adventurers*, observed: "The exclusiveness of horse racing strengthened the gentry's cultural dominance. By promoting these public displays the great planters legitimized the cultural values which racing symbolized — materialism, individualism, and competitiveness."<sup>226</sup> Needless to say, gaming also risked the stability of the land-based society. It is not surprising, therefore, that, like New York, Virginia passed legislation modeled on the Statute of Anne; however, unlike New Yorkers, Virginians acted well before the revolution. In 1727, the House of Burgesses passed its first gaming legislation.<sup>227</sup> As in the case of its English counterpart, it was more civil than criminal in character. The Statute of Anne had only voided "securities" given for gaming debts; the 1727 Act went further, declaring void all promises arising out of gaming or loans for

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223. *Id.* at 424.

224. 7 Car. Act 11 (Virginia Colony 1632), reprinted in 4 VA. LAWS 158 (1823) (collection of laws of Virginia). The Act provided that "[m]ynisters shall not give themselves to excesse in drinkeinge, or riott, spendinge theire tyme idellye by day or night, playinge at dice, cards, or any other unlawfull game." *Id.*

225. T. BREEN, *supra* note 122, at 149.

226. *Id.* at 163.

227. 1 Geo. 2, ch. 8 (Virginia Colony 1727), reprinted in 4 VA. LAWS 214 (1820) (collection of laws of Virginia).

gaming. Both statutes provided that a loser could sue within three months to recover any losses over ten pounds. If a gambler did not sue the winner within three months, any other person could sue to recover treble damages; in such cases, one-half of the recovery went to the poor of the country. Anyone convicted of cheating at any game was liable for five times the amount won. A common gambler, one who supported himself principally by gaming, was required to show sufficient security for his good behavior the next year, upon penalty of being committed to jail until such security could be produced. Anyone convicted of fighting over money won at gambling forfeited ten pounds to the aggrieved party. The policy behind the Virginia statute faithfully mirrored the rationale behind the English Act. The concern was not with evil behavior, but with bad consequences; the loss of lands and chattels by the upper classes through imprudent gaming. "Land — land to use, to waste, to divide among one's children — was the foundation of all the governing families and for those of Virginia."<sup>228</sup>

Following the passage of the 1727 Act, disputes arose about money bet at horseraces and cockfights. No prior statute existed in Virginia which could be referred to an illustration of the meaning of "gaming." Accordingly, the House of Burgesses found it necessary to pass a second statute in 1740 which declared that "gaming" in the 1727 statute should also be read to encompass these pastimes.<sup>229</sup> It noted that the Act of 1727 had been construed not to extend to horseracing and cockfighting, which had been found to produce mischiefs as great as any of the games prohibited by the 1727 Act.

The fourth section of the 1740 Act prohibited gaming at "ordinaries."<sup>230</sup> Ordinary keepers were fined ten pounds and lost their licenses for permitting gambling, while players were fined five pounds, and one half of all fines being used for the support of the poor in the colony.<sup>231</sup> In a 1744 amendment to the 1727 Act, gaming at any public place was made a criminal offense, as was betting "on the sides or hands of such as do

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228. D. BOORSTIN, *supra* note 128, at 119.

229. 13 Geo. 2, ch. 8 (Virginia Colony 1740), *reprinted in* 5 VA. LAWS 102 (1819) (collection of laws of Virginia).

230. The term "ordinary" was defined in *Talbott v. Southern Seminary*, 131 Va. 576, 578, 109 S.E. 440, 441 (1921), as designating "a public house where food and lodging were furnished to the traveler and his beast, at fixed rates, open to whoever might apply for accommodation, and where intoxicating liquor was sold by retail. It was a house of public entertainment and a common designation of it was a 'tavern.'" *Id.*

231. 13 Geo. 2, ch. 8 (Virginia Colony 1740), *reprinted in* 5 VA. LAWS 103 (1819) (collection of laws of Virginia).

game."<sup>232</sup>

Most of Virginia's early gambling laws related solely to gaming in public houses. Virginians were free to gamble privately, provided they did not cheat.<sup>233</sup> As in English statutes, the motivating force behind this gaming legislation was not moral fervor, but a concern with unwanted social consequences, particularly in a public setting. In 1748, for example, in its preface to a gaming statute, the House of Burgesses stated that its purpose was:

to prevent gaming at ordinaries, and other public places, which must be often attended with quarrels, disputes, and controversies, the impoverishment of many people and their families, and the ruin of the health, and corruption of the manners of youth, who upon such occasions frequently fall in company with lewd, idle, and dissolute persons, who have no other way of maintaining themselves but by gaming. . . .<sup>234</sup>

The effects of gaming which concerned Virginia are illustrated in the career of Francis Fauquier, who became Lieutenant-governor in 1758.<sup>235</sup> Fauquier, the eldest son of Dr. John Fauquier, a director of the Bank of England, according to tradition, lost his patrimony in a single night of gaming in London. The victor, a police official, was so impressed by the gallant manner in which Fauquier accepted defeat that he procured for Fauquier his post in Virginia. There, Fauquier continued his reckless style of gaming among the leading citizens of the colony late into the night at the Governor's palace at Williamsburg. Fauquier also served as a mentor for numerous students at the College of William and Mary, including young Thomas Jefferson, with whom he is known to have played more than one game. During recesses of the House of Burgesses, Fauquier visited plantations throughout the Tidewater region, assessing the situation in the colony by conversing with proprietors over high stakes games. Fauquier, who died in 1768, was known in Virginia as a good man who appreciated the colonial conditions, and against whom the colonists raised no complaint for his policies or his lifestyle.

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232. 18 Geo. 2, ch. 5 (Virginia Colony 1744), *reprinted in* 5 VA. LAWS 230 (1819) (collection of laws of Virginia). All fines were put to the use of the poor in the parish where the offense occurred. *Id.* at 231.

233. 22 Geo. 2, ch. 31 (Virginia Colony 1748), *reprinted in* 6 VA. LAWS 79-80 (1819) (collection of laws of Virginia).

234. *Id.* at 78.

235. See E. RANDOLPH, HISTORY OF VIRGINIA 170 n.40 (1970).

ii. *Lotteries*

Elizabeth I introduced the English public to the lottery in 1566.<sup>236</sup> In her version *all* participants won a prize. While most received less than the cost of the ticket, a few won "plate and certaine sorts of merchaundizes."<sup>237</sup> Shortly after Elizabeth's death, colonists brought the first lottery to the New World.<sup>238</sup> In 1612, James I authorized the Virginia Company to conduct lotteries for one year. Commissioners were selected by the Company and sworn to honesty. Prizes ranged up to £5,000. A massive promotional campaign began. A ballad was composed to appeal to the public's patriotic and religious sentiments. One verse went as follows:

It is to plant a Kingdome sure,  
    where savadge people dwell;  
God will favour Christians still,  
    and like the purpose well.  
Take courage then with willingnesse,  
    let hands and hearts agree:  
A braver enterprize than this,  
    I thinke can never bee.<sup>239</sup>

The lottery proved successful, and it appears to have been conducted with an uncommon degree of honesty. Plans for further lotteries were announced, but tradesmen began to complain that the lotteries were demoralizing business and industry.<sup>240</sup> The Company's lottery franchise was revoked, creating great financial devastation.<sup>241</sup> Within five years, the Company lost its charter, and Virginia was made a Royal Colony.

Despite the revocation of the lottery franchise, private lottery activity was widely tolerated in Virginia.<sup>242</sup> In August 1736, within a year of the founding of the colony's first newspaper, advertisements of raffles appeared.<sup>243</sup> Even in 1755, when the colonial government found it necessary to authorize a drawing for its own benefit to help in the financing of the French and Indian War, no attempt was made to curtail the competition from private schemes.<sup>244</sup> The managers of a lottery to raise funds to build a

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236. See generally Blakey, *supra* note 89, at 63-67.

237. G. SULLIVAN, *supra* note 90, at 5.

238. J. EZELL, *supra* note 140, at 5-9.

239. *Id.* at 5.

240. *Id.* at 7.

241. *Id.* at 8.

242. See generally *id.* at 26.

243. *Id.*

244. 28 Geo. 2, ch. 1 (Virginia Colony 1755), *reprinted in* 6 VA. LAWS 453-61 (1890) (collection of laws of Virginia).

church and market house at Belhaven in 1751 included Colonel George William Fairfax, Major Lawrence Washington, Colonel William Fitzhugh, George Mason and Major Augustine Washington.<sup>245</sup>

George Washington's papers give some evidence of the numerous Virginia lotteries:

He won a parcel of land with a £50 investment in the Colonel Byrd raffle, put £5 10 s. in an unidentified venture in 1760, gambled £5 in "Strother's" undertaking in 1763, and in 1766 recorded a gain of £16 in the "York Lottery." Two years later Washington signed the tickets for the Cumberland Mountain road scheme and in 1769 aided in "Col. Moore's" drawing.<sup>246</sup>

The policy of toleration was revised in 1769. The abuses of cheating, fraud and undrawn lotteries lead to the suppression of all private lotteries that had not been authorized by the legislature.<sup>247</sup>

### iii. *Wagering*

Horseracing for sport and money reflected the social stratification of the colony's transplanted English way of life. In 1674, one James Bullocke, a tailor, ran "his mare . . . with a horse belonging to Mr. Matthew Slader for two thousand pounds of tobacco and caske."<sup>248</sup> Since it was against the law for a laborer to participate in a gentlemen's sport, Bullocke was fined one hundred pounds of tobacco and caske.<sup>249</sup>

Virginia's enthusiasm for horseracing was evidenced by the many excellent tracks that had been built by 1700. According to one historian,

The racing sessions at Williamsburg, Annapolis, Alexandria, and Fredericksburg were country-wide attractions. George Washington was a steward of the Alexandria Jockey Club and often ran his horses there and at Annapolis. At the time it was the sole right of the gentry not only to enter horses in a race but also to bet on the outcome. . . .<sup>250</sup>

### b. *South Carolina*

Early European authority in the area that is now South Carolina was

245. J. EZELL, *supra* note 140, at 26.

246. *Id.* (footnotes omitted).

247. 10 Geo. 3, ch. 17 (Virginia Colony 1769), reprinted in 8 VA. LAWS 353 (1821) (collection of laws of Virginia). The penalty was forfeiture of the sum to be raised by the lottery. This penalty was paid to the local parish for the use of the poor.

248. D. BOORSTIN, *supra* note 128, at 104.

249. *Id.*

250. H. CHAFETZ, *supra* note 112, at 16.

exercised only sporadically by the Spanish.<sup>251</sup> "Carolina" is a term derived from the Latin *Carolus*, or Charles. The name, honoring Charles I, was given to the territory which was granted in 1629 to Sir Robert Heath, the King's Attorney General. When Heath failed to consolidate his title by establishing a permanent settlement, Charles II regranted the area in 1663 to eight proprietors, including Edward Hyde (Lord High Chancellor of England), Anthony Cooper (Chancellor of the Exchequer) and Sir William Berkeley (Governor of Virginia). The first permanent English settlement was founded at Charlestown (later Charleston) in 1680.<sup>252</sup>

With the rapidly expanding indigo and rice production and an active trade with the Indians in hides and furs, the South Carolina colony soon developed a relatively stable economy, largely based on slave labor and a plantation system. The period from 1725 to 1775 was a time of great prosperity.<sup>253</sup> In contrast to the Tidewater area, however, the plantations of South Carolina were operated by absentee owners, most of whom spent a majority of their time in Charleston. Charleston, more than a natural outpost against Spain, became the richest metropolitan area in the southern colonies and a center of colonial culture.<sup>254</sup>

#### i. *Gaming*

Cockfighting was a popular sport during the eighteenth century. It was not unusual to find pits near taverns or even court houses, and newspapers regularly printed advertisements publicizing fights.<sup>255</sup> However, as the wealth of the plantation owners increased, their diversions became more refined. While cockfighting remained popular with the common people,<sup>256</sup> the wealthiest citizens of Charleston played cards, especially poker, at the exclusive Old Charleston Club House, where many plantations are said to have changed hands in the course of a single all-

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251. O. CHITWOOD, *A HISTORY OF COLONIAL AMERICA* (1931).

252. *Id.* at 224-30.

253. For an excellent short treatment of South Carolina society, see C. BRIDENBAUGH, *MYTHS AND REALITIES* 54-118 (1980).

254. Boorstin has observed that:

Charleston . . . , which was the only large town south of Philadelphia . . . showed an aristocratic character unique on the continent. Its upper class, newly-rich in rice, indigo, and slaves, enjoyed their exclusive private clubs and mimicked the ways of the London rich more successfully than did Americans anywhere else. With its busy round of concerts, dances, hunts, horse-races, cock-fights, and card games, the city became famous also for its beautiful and well-dressed women.

D. BOORSTIN, *supra* note 128, at 312.

255. H. CHAFETZ, *supra* note 112, at 16.

256. *Id.*

night game.<sup>257</sup> Faro was also a favorite gambling game of the French Huguenots, religious exiles who settled in the Carolina province in 1680.<sup>258</sup>

The impact of the gaming habits of the colony's better citizens on its economic life gave rise to reform legislation. In 1712, two years after the Statute of Anne, the colonial legislature, known as the Commons House of Assembly, adopted the Statute of Anne by reference.<sup>259</sup> The Statute of Anne and the Act of 1712 were not aimed at preventing gambling, but rather at controlling "the Mischiefs, which may happen by Gaming."<sup>260</sup> All notes, securities and mortgages in consideration of gambling debts were to be void and without effect. Money actually lost could be recovered. If the loser did not act to recover his loss within three months, a third party could seek treble recovery of winnings. The winner could avoid other punishment if he testified under oath how much he won. Anyone convicted of quarreling with or challenging others to fight over a gambling debt or transaction was subject to two years imprisonment and the forfeiture of his entire personal estate.<sup>261</sup>

In 1762, the legislature passed another statute "for Preventing Excessive and and [sic] Deceitful Gaming."<sup>262</sup> The new Act prohibited

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257. *Id.* at 188.

258. H. ASBURY, *SUCKER'S PROGRESS* 6 (1938).

259. Act of Dec. 12, 1712, § 11, *reprinted in* J. GRIMKE, *THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA* 100 (Phila. 1790).

260. 9 Ann. ch. 14 (1710). For a discussion of the Statute of Anne *see supra* notes 48-61 and accompanying text.

261. *Id.* The term "gaming debts" was defined quite comprehensively as: Any Money or other valuable Thing whatsoever, won by gaming or playing at Cards, Dice, Table, Tennis, Bowls or other Game or Games whatsoever, or by betting on the Sides or Hands of such . . . or for the reimbursing or repaying any Money knowingly lent, or advanced for such gaming or betting. . . .

*Id.*

262. Act of May 19, 1762, 1762 S.C. Acts 3, *reprinted in* LIBRARY OF CONGRESS, *RECORDS OF THE STATES OF THE UNITED STATES OF AMERICA* (1949) (microfilm comp.) (S.C. B.1, reel 4a, unit 1). The Act of 1762 reenacted similar legislation enacted in 1752. "Public acts" in the colonial legislature were of limited duration, usually from three to ten years. The 1762 Act expired after seven years. As the preamble of the 1762 Act indicates, its purpose was to discourage the earning of a living by gambling, not to prohibit gambling itself:

Whereas games and exercise should not be other ways used than as innocent and moderate recreations, and not as constant trades or callings, to gain a living or make unlawful advantage thereby: And Whereas, by the immoderate use of them, many mischiefs and inconveniences do arise, and are daily found, to the maintaining and encouraging sundry idle, loose and disorderly persons, in their dishonest, lewd, and dissolute course of life, and to the circumventing, deceiving and debauching of many of the younger sort of people, and others, to the loss of their time, and the ruin of their estates and fortunes. . . .

*Id.*

keepers of public houses from knowingly permitting on their premises gaming with "cards, dice, draughts, shuffleboards, billiard tables, skittles, nine pins" or any other games.<sup>263</sup> As an aid to enforcement, constables and justices of the peace were authorized to break open the door of public houses and to search and seize persons violating the statute.

## ii. Lotteries

The lottery in South Carolina was an integral part of colonial life and an essential feature of public finance. No legal sanctions were in force to prohibit or limit the operation of lotteries, and many people tried to use lotteries to raise funds for public and charitable works. In 1762, however, the colonial legislature sought to eliminate unauthorized competition and fraud with "An Act for Suppressing and Preventing of Private Lotteries."<sup>264</sup> The preamble described private lotteries as "highly prejudicial to the public, and to the trade of this Province . . . tend[ing] to defraud his Majesty's subjects."<sup>265</sup> Steep fines, up to £1,000, could be levied against one who set up a lottery; smaller fines, £100, could be assessed against those who participated.

## iii. Wagering

In 1735, the first opera performed in the colonies took place in Charleston. That same year, several of the city's more successful planters and merchants formed the world's first "jockey club," fifteen years ahead of its famous London counterpart, "to schedule race meets, authorize prize purses and define and regulate track rules."<sup>266</sup> "[I]ts members were indeed 'jockeys,' since the horse breeders rode their own horses and incidentally bet on them steeply."<sup>267</sup> Except as it might give rise to an action under the Act of 1727, wagering on horse or other races was not directly dealt with in the law.

## IV. CONCLUSION

Attitudes toward gambling were embodied in the law of the American colonies prior to the Revolution and had become a fixed part of the legal tapestry as it stretched down the long Atlantic coastline. Yet, the colonies

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263. *Id.* at §§ 4-5.

264. Act of September 13, 1762, reprinted in J. GRIMKE, *THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA* 256 (Phila. 1790).

265. *Id.*

266. H. CHAFETZ, *supra* note 112, at 188.

267. *Id.*



were not legally one nation, nor were their attitudes reflective of a common experience. Each region had its own perspective, formed out of its own special encounter with gaming, lotteries or wagering. In New England, the hardy Puritans eschewed gambling out of a distaste for the perceived dissolute and corrupt lifestyle of the English upper classes. Respect for the harsh necessities of pioneer society added to the Puritan antipathy toward gaming, for those who would not work in the summer could not expect to eat in the winter. The middle colonies, especially New York and Pennsylvania, where Dutch and Quaker influences held sway, had a far more cosmopolitan and tolerant society, perhaps less elevated, but also less austere. Despite these more permissive attitudes toward gambling, the Quakers were an early opponent of the lottery. In the southern colonies, most of the leaders of Tidewater Virginia, as well as the city dwellers of Charlestown, were large estate or plantation aristocrats. Following the lead of their English peers, these colonists regulated gambling to promote public order and, more importantly, to preserve the stability and viability of a land-based social and economic system. Thus, the basic questions about gambling, first formed and answered in the mother country, had been formed and answered in the colonies. The development of a common perspective toward gambling, however, would have to await shared experiences after the Revolution. Anyone attempting to understand our law today can profit from the study of these early beginnings. How these experiences<sup>268</sup> should be considered in our modern society remains, of

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268. Such experiences are relevant today:

Gambling makes an awkward appearance in capitalist societies. Its get-rich-quick appeal appears to mock capitalism's core values: disciplined work habits, thrift, prudence, adherence to routine, and the relationship between effort and reward. At the same time, betting bears a disquieting resemblance to transactions on the stock market, characterized by boldness, daring, and willingness to take risks. Economists are usually anxious to distinguish between stock speculation, which they call functionally useful and legitimate, and pure gambling, which they describe as dysfunctional and wasteful. When market speculation itself gets out of hand, with obvious dysfunctional consequences, the blame is placed not on businessmen but on "gamblers" who have somehow invaded the stock exchange. The distinction is lost on many observers, to whom gambling is a familiar but widely disapproved feature of our financial system.

Optimistic analysts argue that legal gambling provides a healthy outlet for potentially harmful speculative tendencies that might otherwise be unloosed in the market place; pessimists maintain that widespread gambling will undermine rigorous work habits and traditional family commitments.

EASY MONEY, *supra* note 6, at 75-76. The Commission on the Review of National Policy Toward Gambling declined to consider these larger societal questions, GAMBLING, *supra* note 5, at 1-2. The Commission believed that they did not facilitate an "objective" approach. *Id.* at 1. Presumably, an examination of history would be at least the first step toward arriving at a more objective decision.

course, less than clear. However, one position is clear. As Santayana aptly stated: "Those who cannot remember the past are condemned to repeat it."<sup>269</sup>

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269. 1 G. SANTAYANA, *THE LIFE OF REASON* at 284 (2d ed. 1922). There are other views. History, like life, may be opaque, a meaningless succession of unintelligible events. As such, it contains no lessons. It is also possible that its lessons are ambivalent, so we may draw from history whatever conclusion that suits our purpose. Finally, the melancholy truth may be that what "experience and history teach is this — that peoples and governments never have learned anything from history. . . ." G. HEGEL, *THE PHILOSOPHY OF HISTORY* 6 (rev. ed. 1900).

