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# Book Review [Gambling and the Law]

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## BOOK REVIEW

GAMBLING AND THE LAW, by I. Nelson Rose. Hollywood, CA: Gambling Times Incorporated. 1986. Pp. xvii + 308. Hard Cover. \$19.95.

*Reviewed by Richard Gruner\**

Legalized gambling has grown dramatically in recent decades.<sup>1</sup> Legal gambling now thrives in such diverse settings as licensed casinos, state lotteries, off-track betting establishments, commercial card clubs and bingo parlors on Indian reservations. In 1984, gamblers' losses in commercial gambling establishments (and, hence, the gross income of those establishments from gambling activities) totaled \$13.6 billion, a 600% increase during the previous 11 years.<sup>2</sup> Obvi-

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1. This growth can be measured in a variety of ways. Millions of players today participate in gambling activities that were illegal only a few years ago. For example, in Atlantic City, New Jersey, where no casinos existed until 1978, 384,358 bus trips delivered 12.2 million players to casinos in 1984. I. NELSON ROSE, *GAMBLING AND THE LAW* 7 (1986) [hereinafter ROSE].

Millions of other players bet on the lotteries sponsored by a growing number of states. In 1964, New Hampshire voters adopted the first state lottery of this century. Today, 22 states operate lotteries and another 24 states are considering adopting one. *Insight*, March 17, 1986, at 6-8.

Other forms of commercial gambling are also expanding. Nine states have authorized commercial card rooms, while five states permit betting on jai alai games. Indian-operated bingo parlors (some offering jackpots as large as \$50,000) are open in at least five states. Parimutuel betting, having already experienced a growth spurt in the 1930's and 1940's, has continued to prosper. Thirty-three states now permit horse race gambling, with 22 of them allowing betting away from the race site. See ROSE, *supra*, at 3-4.

2. ROSE, *supra* note 1, at 6. Significant portions of these revenues were realized in the following industry segments: casinos — \$5.0 billion; state lotteries — \$4.1 billion; parimutuel betting — \$3.0 billion; charity bingo — \$818 million; other charity gambling — \$53 million. *Gambling and Wagering Business*, July, 1985, at 24 & August, 1985, at 1.

Viewed either as the gross income of a thriving industry or as the economic losses suffered by gamblers, these sums demonstrate the current social importance of legalized gambling.

ously, the total amounts bet in these establishments were much greater.<sup>3</sup>

The growth of legalized gambling has prompted development of a new body of gambling law. In a number of states, recently adopted constitutional, statutory and regulatory provisions have expanded the scope of legal gambling activities.<sup>4</sup> In addition, traditional legal standards in fields such as contract and constitutional law have been newly interpreted to resolve special issues raised by gambling-related disputes.<sup>5</sup>

*Gambling and the Law*<sup>6</sup> by Professor I. Nelson Rose is the first comprehensive survey of this new body of gambling law.<sup>7</sup> Rose treats

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3. The amount of play per dollar lost to the house varies with the type of gambling involved. For example, at Atlantic City blackjack tables, players purchased \$6.21 worth of chips for each dollar lost to the house in 1984. By contrast, the corresponding figure for nickel slot machines was \$6.90 bet per dollar lost. These figures are simply the inverse of the casino "win" percentages of 16.1% and 14.5% for these two games. See *Casino Chronicles*, Feb. 4, 11, 19, & March 4, 1985.

Overall, one estimate places the total amount bet on legal gambling in the United States during 1984 at \$147 billion. See *Gambling & Wagering Business*, July, 1985, at 24 & August, 1985, at 1.

4. In many instances, limited forms of gambling have been legalized by making small amendments to comprehensive gambling prohibitions previously adopted. For example, the California Constitution has for many years prohibited the legislature from authorizing lotteries. This prohibition has been softened by three constitutional amendments: first, to allow horse race betting, second, to allow charity bingo, and third, to establish the California State lottery. See CAL. CONST. art. IV, § 19.

5. One clear example of this common law process at work involves the judicial development of special standards for the enforceability of gambling debts. In many states (including, surprisingly, Nevada), courts have refused to enforce contracts involving gambling debts on the ground that such enforcement would be against public policy. See, e.g., *Dennis v. Weaver*, 103 Ga. App. 829, 121 S.E.2d 190 (1961); *Corbin v. O'Keefe*, 87 Nev. 189, 484 P.2d 566 (1971). However, as the clarity of public policy against gambling diminishes with the legalization of certain types of gambling such as lotteries or charity bingo, courts are having more difficulty determining if gambling debts are enforceable. See, e.g., *Caribe Hilton Hotel v. Toland*, 63 N.J. 301, 307 A.2d 85 (1973).

6. ROSE, *supra* note 1.

7. A number of prior works have addressed aspects of gambling law. For a wide ranging examination of gambling law policy and proposals for improvement of gambling laws, see COMM'N ON THE REVIEW OF THE NAT'L POLICY TOWARD GAMBLING, *GAMBLING IN AMERICA* (1976). The history of gambling law is reviewed in U.S. DEPT. OF JUSTICE, NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, *The Development of the Law of Gambling 1776-1976* (1977); Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923 (1978). The regulation of casino gambling is analyzed in J. GOODWIN, *GAMBLING CONTROL LAW* (1985); J. SKOLNICK, *HOUSE OF CARDS* (1978) [hereinafter SKOLNICK]; Rose, *The Legalization and Control of Casino Gambling*, *FORDHAM URBAN L.J.* 245 (1979). The leading work on the influence of organized crime on gambling enterprises is R. KING, *GAMBLING AND ORGANIZED CRIME* (1969). A variety of gambling law issues are addressed in *New Jersey Casino Gaming Symposium*, 6 SETON HALL L. J. 1 (1982); *Symposium: Legal Aspects of Public Gaming*, 12 CONN. L. REV. 661 (1980).

gambling law as a distinct regulatory field, involving legal issues that are not only technically complex, but philosophically distinct from those in other legal areas.<sup>8</sup> In describing the new legal and social issues surrounding legalized gambling, Rose has produced a remarkably readable text that will be of great interest to judges, lawyers and officials applying gambling laws, as well as to any person concerned about governmental control over gambling.

### I. THE NEED TO STUDY GAMBLING LAW

The significance of Rose's work turns in part on the importance of gambling law itself. Greater attention to gambling law seems justified for several reasons. First, as previously mentioned, commercial gambling enterprises have attained enormous economic significance as service providers, as employers and as businesses.<sup>9</sup> Second, large scale gambling operations involve opportunities for massive fraud or theft due to the handling of large quantities of cash in those operations.<sup>10</sup> Third, even where gambling activities are legal, they may be

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8. One leading analyst has summarized the unusual philosophical dilemmas underlying gambling law as follows:

When a deviant social activity, formerly outlawed because it was regarded as immoral, becomes legal, however restricted, does it lose its stigma through legalization? Is the ill repute of the activity reduced by its association with legal authorities who have declared it to be within the realm of acceptable conduct? Or, does the moral obloquy attaching to the activity discredit the legalizers? The movement to decriminalize deviance thus carries in its weight two associated sets of problems: the problem of how to develop and organize legal institutions to assess, define, and manage the economics of an ill-reputed activity through the use of state power; and the problem of how to insulate the controllers from the stigma associated with the activity.

SKOLNICK, *supra* note 7, at 31.

9. Ironically, the spectacular initial success of many gambling enterprises may ultimately lead to their demise. Professor Rose points out that when a new form of gambling is legalized, initial player enthusiasm and limited industry competition often produce impressive net proceeds. These proceeds attract competition from other states or establishments for subsequent gaming dollars. Once the novelty wears off and more entities attempt to promote gambling with diminishing success, net proceeds necessarily drop. Several state lotteries and licensed gambling establishments have experienced this revenue drop. See ROSE, *supra* note 1, at 13-17.

10. Gambling enterprises offer many opportunities for hidden "skimming" of funds, both in gambling activities themselves and in the distribution of enterprise profits. An official with New Jersey Casino Control Commission gave the following description of the risks of theft in casino operations and the corresponding problems of internal casino financial control:

Unlike other enterprises, two elements join to make the effective control of a casino's internal operation problematical and complex. First, a casino contains a vast amount of liquid assets in the form of cash and gaming chips which are very attractive and susceptible to misappropriation. Second, these liquid assets remain uncounted and unrecorded as the gaming activity takes place. Casinos

used to hide other illegal behavior by providing a ready means to conceal or "launder" criminal gains.<sup>11</sup> Fourth, because typically involves plenary regulatory powers, [gambling industry regulation] often constitutes a valuable laboratory for testing the effectiveness of novel regulatory techniques.<sup>12</sup> Finally, gambling-based disputes raise tough questions about how legal standards applicable to normal social activities should be modified when applied to morally disfavored activities like gambling.<sup>13</sup>

Given such substantial reasons to study gambling law, why have so few legal scholars examined this field?<sup>14</sup> Undoubtedly, much

are unique because millions of dollars are continually changing hands among thousands of people on the casino floor without any record being made of how much money is exchanged, how many people are involved, or who those individuals are. . . . It is this peculiarity that makes a casino especially vulnerable and creates substantial problems in accurately accounting for a casino's revenue, in effectively auditing casino operations, and in detecting and preventing theft by casino management, employees, and patrons.

Santaniello, *Casino Gambling: The Elements Of Effective Control*, 6 SETON HALL L. J. 23, 23-24 (1982). See also SKOLNICK, *supra* note 7, at 67-83, 127-32.

11. Businesses with high cash flows like gambling casinos are attractive objects of organized crime control:

Certain legitimate business are of interest to organized crime groups and individuals. . . . [B]usiness enterprises heretofore selected by organized crime have been so targeted because of the ability to funnel funds (i.e., launder illegally obtained money) through such largely cash businesses. In addition, organized crime members can obtain an air of respectability and employability through such legitimate employment and also obtain thereby a means of reporting a portion of their illegally derived income for tax purposes.

D. HERBET & H. TRITT, *CORPORATIONS OF CORRUPTION* 56 (1984).

12. Casino regulation can serve a variety of purposes, including "preventing corruption in all its forms, assuring the competence of key casino operatives, maintaining the flow of tax dollars and encouraging other revenue raising and economic growth while limiting adverse side effects and expanding the options available to citizens. . . ." Rose, *The Legalization and Control of Casino Gambling*, 8 FORDHAM URBAN L.J. 245, 267-68 (1980). Regulatory techniques furthering these goals will be of interest to regulators having similar aims in other fields.

As an example of gambling regulation as a testing ground, the author has previously examined the merits of executive disqualification as a corporate control technique based on the experience of the New Jersey Casino Control Commission in applying this technique for corporate casino licensing. See Gruner, *Banished From the Boardwalk: The Control of Corporate Casino Operations Through Executive Disqualification*, 16 RUTGERS L.J. 759 (1985).

13. The answers to these questions are significant in other legal areas which, like government control of gambling, involve legal regulation of morally controversial activities. Gambling law shares many similarities with legal standards in areas like liquor control or marijuana possession where behavior formerly outlawed as "immoral" has been legalized. For a summary of the issues raised by this "legalization of deviance," see SKOLNICK, *supra* note 7, at 24-32.

14. While formal scholarship in this field is still rare, there are clear signs of growing interest in gambling law among legal academics and practitioners. The high level of interest in this field is reflected in the success of the six National Conferences on Gambling and Risk

of this neglect arose during the long period of economic insignificance of legalized gambling between the widespread lottery scandals of the 1890's and the renewed interest in state sanctioned gambling in the 1960's. The lack of attention may also have stemmed from the complexities of gambling itself — that is, the need to fully understand gambling techniques before being able to effectively study legal control of those techniques.<sup>15</sup>

Another possible reason for the paucity of gambling law studies is the multiplicity of legal disciplines in which gambling problems may arise. In any given substantive area, gambling-related disputes may form but a small fraction of legal controversies and, therefore, appear not to merit extensive study. Only by taking a broader view encompassing a variety of substantive fields can an observer appreciate the factual and philosophical similarities that justify a coordinated study. Yet, the need for at least some expertise in each of the applicable substantive fields limits the number of persons who can successfully undertake this study.

## II. THE MORAL ENVIRONMENT

The moral disrepute of gambling among large segments of the public has played a key role in shaping the resolution of gambling law controversies by courts, legislatures, and regulatory agencies.<sup>16</sup> Gambling has often been described as an example of social pathology,<sup>17</sup> but there is little agreement about why gambling is immoral. For some, the evil of gambling lies in its misleading promise of easy money that distracts persons from more productive endeavors.<sup>18</sup> To

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Taking held to date, in the organization of the International Association of Gaming Attorneys in 1980, and in the more recent formation of a Gaming Law Committee in the American Bar Association's General Practice Section. See ROSE, *supra* note 1, at 294, 297.

15. For example, one on-going legal dispute in California turns on whether "Texas hold'em poker" is a form of "stud-horse poker" and, hence, prohibited under California statutes. The resolution of this dispute clearly turns on substantial technical knowledge of the characteristics of these obscure poker variants. See ROSE, *supra*, note 1, at 33-42.

16. Of course, public moral attitudes are influenced by actions of the state, as well as the reverse. The legalization of various forms of gambling may make gambling newly "respectable," particularly where the state itself operates and promotes gambling activities. Thus, legalization may make gambling less morally distasteful, at least until a particular scandal again places it in disrepute. See Rose, *The Legalization and Control of Casino Gambling*, 8 FORDHAM URBAN L.J. 245, 264-65 (1980).

17. One leading legal commentator to so characterize gambling was Jeremy Bentham, who felt that gambling was pathologic because it had a tendency to reduce gambler's net happiness. See J. BENTHAM, *THE THEORY OF LEGISLATION*, 102-06 (1876).

18. Even where gambling is legal, its inconsistency with the puritan work ethic may lead to regulatory restrictions. For example, the British Gaming Board sets limits on the amount that can be won in bingo games because the board believes there is something indecent

others, gambling is pathological because it sometimes becomes compulsive, displacing all other life activities.<sup>19</sup> Yet others complain of gambling activities (particularly lotteries) because they promote negative income distribution — i.e., since the poor participate at higher rates, their economic well being is reduced far more by gambling than that of the rich.<sup>20</sup> Still further objections revolve around the unsavory types of persons — organized crime figures, prostitutes, thieves and other criminals — reputedly associated with gambling establishments.<sup>21</sup>

Upon further examination, the immorality of gambling seems less clear. Arguably, gambling is the counterpart of insurance, with the payoff occurring upon a “win” rather than a “casualty loss.”<sup>22</sup>

about a person gaining a larger reward based on chance alone. See SKOLNICK, *supra* note 7, at 20.

Ironically, gambling may be equally inconsistent with Marxist ethics, since it can serve as an “opiate of the masses,” distracting workers from the struggles against class oppression. See Halliday & Fuller, *Gambling: A Secular “Religion” for the Obsessional Neurotic*, *The Psychology of Gambling* 1 (Halliday & Fuller eds. 1974); SKOLNICK, *supra* note 7, at 20.

19. See, e.g., Weinstein & Deitch, *The Impact of Legalized Gambling: The Socioeconomic Consequences of Lotteries and Off-track Betting*, 13 *SOC'Y*, at 86-87 (1975). One 1975 estimate placed the number of compulsive gamblers in the United States at 6 million. *Id.* However, the criteria used in making this estimate have been criticized as too inclusive. See SKOLNICK, *supra* note 7, at 20-21.

Other studies have verified the positive correlation between gambling availability and severe personality disorders. See, e.g., COMM'N ON THE REVIEW OF THE NAT'L POLICY TOWARD GAMBLING, *GAMBLING IN AMERICA* 74 (1976) (percentage of compulsive gamblers, suicides, and alcoholics in Nevada found to be the highest in the United States).

20. Among the various types of legal gambling available in the early 1970's, only Nevada casino gambling was not regressive — all other forms of gambling imposed proportionately greater losses on poor players than rich ones. The progressive impact of Nevada casino gambling was apparently the result of the physical isolation of the Nevada casino centers — most casino patrons were out-of-towners who had the resources to come to Nevada casinos. When only local casino players were studied, Nevada casino gambling was also found to be highly regressive. See COMM'N ON THE REVIEW OF THE NAT'L POLICY TOWARD GAMBLING, *GAMBLING IN AMERICA* 61, 98 (1976); Rose, *The Legalization and Control of Casino Gambling*, 8 *FORDHAM URBAN L.J.* 245, 260-61 (1979). Since it is easily available to lower income players through inexpensive bus tours, Atlantic City casino gambling is probably much more regressive than its Nevada counterpart.

21. Some of these associations and the difficulties Nevada authorities have had in eliminating them are described in SKOLNICK, *supra* note 7, at 35-51, 67-98, 101-33.

22. See *id.* at 16 (provided that small bets at long odds are involved, “the logic of gambling and insurance are strikingly similar”).

Obviously, gambling and insurance contracts serve substantially different social ends. Insurance permits persons to plan their activities without concern over certain risks associated with those activities. On the other hand, gambling is valuable because it entertains players.

Arguably, the planning advantages of insurance have a greater social value than the entertainment provided by gambling, and this difference in social ends may justify some of the disparity in the legal treatment of these practices. However, most of this disparity probably stems from the unusual dangers associated with gambling (such as theft or the involvement of

To the extent that players in commercial establishments tend to lose some of their money, if they enjoy the gambling process and environment, their losses are merely a fee paid for entertainment, much like the admission price of a movie or a Broadway show. Even if viewed as an activity with a high risk of monetary loss, gambling exposes its participants to arguably less significant risks than other respectable forms of entertainment such as skiing, skydiving, or scuba diving.

In a legal context, gambling's questionable morality raises some fascinating problems. Sometimes, this moral character is reflected directly in legal rulings. Under conflicts law, for example, a foreign state's laws governing gambling need *not* be given full effect where to do so would violate the public policy of the state seeking enforcement.<sup>23</sup>

Other times, official views on the immorality of gambling are reflected in strained interpretations of legal standards which disfavor certain gambling activities. Examples of such strained interpretations include the California Attorney General's conclusion that a statutory restriction on a particular type of stud poker prohibits all forms of stud poker<sup>24</sup> and the Federal Communications Commission's view that statutory prohibitions on the broadcast advertising of lotteries bar all advertising of gambling activities.<sup>25</sup>

### III. THE RANGE OF GAMBLING LAW

Professor Rose's new work illustrates the remarkable range of legal issues stemming from legalized gambling. Just a few of the legal problems examined by Rose include statutory drafting ambiguities involved in defining gambling games and activities for purposes of selectively legalizing them,<sup>26</sup> constitutional free speech issues regarding the advertising of gambling activities,<sup>27</sup> federalism issues associated with state control over commercial gambling on federal Indian reservations,<sup>28</sup> tax law questions regarding the tax treatment and reporting of gambling winnings,<sup>29</sup> and the effectiveness of con-

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organized crime), rather than the lesser merit of the ends of gambling. Cf. J. BENTHAM, *THE THEORY OF LEGISLATION* 102-06 (1876) (gambling warrants prohibition because of its tendency to reduce player happiness over time, while insurance deserves protection as a rational social invention).

23. See *infra* text accompanying notes 51-55.

24. See *infra* note 35 and accompanying text.

25. See *infra* text accompanying notes 39-43.

26. ROSE, *supra* note 1, at 33-42.

27. *Id.* at 55-67.

28. *Id.* at 210-12.

29. *Id.* at 109-41, 221-42.

trolling organized crime influence through elaborate licensing schemes for casino operators and their employees.<sup>30</sup> The growing importance of these issues was reflected in the Supreme Court's resolution of its first four gambling law cases during the past year.<sup>31</sup>

### A. *Statutory Poker In California*

Rose's discussion of a major ongoing dispute over the types of poker prohibited under California law illustrates both his emphasis on legal history and his ability to link gambling law discussions to broader legal principles. California statutes specifically prohibit the playing of "stud-horse poker," as well as several other enumerated card games.<sup>32</sup> Rose explains that this prohibition was imposed by the legislature to combat a stud-horse poker craze in San Francisco during the 1880's, in which poker rooms for playing the game flourished in that city.

Unfortunately, the legislature failed to define the characteristics of stud-horse poker, particularly the minimum features a card game must have to fall within this prohibition. Given that the game has not been played since the late 1800's (at least not under the name "stud-horse poker"), historical evidence regarding stud-horse poker is limited. However, the little evidence available suggests that stud-horse poker was a particular variant of 5-card stud poker.

California card sharks, aware that forms of poker other than stud-horse poker were not prohibited, simply shifted to 4-card stud poker, also known as "hokey-pokey."<sup>33</sup> Consequently, in 1891, Cali-

30. *Id.* at 178-93.

31. See *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987) (state control over Indian-operated bingo); *Commissioner of Internal Revenue v. Groetzinger*, 107 S. Ct. 980 (1987) (tax treatment of individual gambling losses); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968 (1986) (commercial speech protections for gambling advertising); *United States v. Hughes Properties, Inc.*, 106 S. Ct. 2092 (1986) (tax treatment of casino slot machine income).

32. CAL. PENAL CODE § 330 (West Supp. 1986). The relevant provisions are as follows:

Every person who deals, plays or carries on . . . any game of faro, monte, roulette, lansquenet, rouge-et-noir, rondo, tan, fan-tan, stud-horse poker, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice or any device, for money, checks, credit or other representative of value, and every person who plays or bets at or against any of said prohibited games is guilty of a misdemeanor. . . .

*Id.* This is an exclusive list of prohibited gambling activities — i.e., the games listed are not merely examples of a broader group of prohibited gambling techniques. See *In re Hubbard*, 62 Cal. 2d 119, 126, 396 P.2d 809, 813, 41 Cal. Rptr. 393, 397 (1964).

33. ROSE, *supra* note 1, at 36, 41. The minimal changes made by 19th century card players to avoid the specific prohibitions of California's gambling statute are akin to more

fornia legislators (presumably with a collective chuckle) enacted statutory language which prohibited citizens from playing "hokey-pokey."<sup>34</sup>

More recently, the California Attorney General has interpreted the statutory prohibition of stud-horse poker as barring stud poker generally.<sup>35</sup> Since draw poker is not prohibited, this interpretation leads to some peculiar legal distinctions. For example, California card players comply with the law so long as their poker games involve a draw from the deck and cards dealt face down, but players break the law when they eliminate the draw and deal stud poker — e.g., 5-card stud with one card down, four cards up, and no draw.

Subtle distinctions concerning card games make little difference to the individual player because criminal penalties for stud poker playing are seldom enforced against private players. However, since California State law permits local governments to license commercial card clubs for the playing of any card game not specifically prohibited by state law,<sup>36</sup> California's statutory distinction between stud poker and draw poker is of vital importance to card club operators and local regulators.<sup>37</sup>

Rose also examines the bizarre legal battle currently underway

recent efforts by illicit drug manufacturers to create "designer" drugs falling narrowly outside statutory restrictions on the sale of dangerous drugs.

34. See CAL. PENAL CODE § 330 (West Supp. 1986).

35. 9 Op. Att'y. Gen. 108 (1947) (For the purposes of CAL. PENAL CODE § 330, "it is our conclusion that 'stud-horse poker' is identical with 'stud-poker'"). *But see* Huntington Park Club Corp. v. City of Huntington Park, No. C550991, May 1, 1987 (unreported opinion of Superior Court Judge Vernon G. Foster concluding that "stud-horse poker" is not the equivalent of "stud poker," meaning that the latter is not prohibited by CAL. PENAL CODE § 330).

36. The California Gaming Registration Act, effective July 1, 1984, gives every city and county in the state a local option to license commercial card clubs for the playing of games not prohibited by California Penal Code section 330. CAL. BUS. & PROF. CODE. §§ 19800-19826 (West 1987).

Several communities have embraced this option to permit large poker casinos. For example, Bell Gardens, a small suburb of Los Angeles, has licensed the largest card casino in the world, The Bicycle Club. The Club has 80,000 square feet of floor space and 120 card tables. ROSE, *supra* note 1, at 3-4.

37. A California card casino can only provide games that are permitted by state law *and* within the scope of the local ordinance authorizing the casino. Consequently, a second set of questions arises concerning the scope of local licensing provisions.

For example, until this ordinance was changed, the city of Huntington Park permitted card clubs in which a short, enumerated list of card games could be played. This list included draw poker, but not hold'em poker. A casino operator seeking to provide facilities for the latter was forced to argue before a local trial court that hold'em poker is a form of draw poker. The court rejected this argument (presumably because hold'em involves no "draw" of cards from the deck) and barred the playing of hold'em poker in Huntington Park card casinos. See ROSE, *supra* note 1, at 38-39.

over the status of "Texas hold'em poker" in California. Hold'em poker is similar to stud poker in the sense that both have no draw and some cards are dealt face up. However, unlike stud poker, each player in hold'em is dealt two cards face down and must make up the remainder of his hand from five community cards dealt face up at the center of the table. In addition, the rules for betting in the two games vary.

The legal issue raised by hold'em poker in California is whether it is a type of stud poker prohibited under the standards discussed above, or another type of card game falling outside California's specific prohibitions. Surprisingly, in light of their dissimilarity of play, the California Attorney General's office has issued a memorandum concluding that hold'em is a form of stud poker.<sup>38</sup> Apparently, the Attorney General considers any version of poker lacking a draw to be a variety of stud poker and, hence, prohibited. This characterization illustrates the difficulties involved in giving legal meaning to even a commonly used gambling term such as "stud poker."

### B. *Constitutional Gambling Law — The Limits Of Commercial Speech*

If most gambling law issues were like the California poker controversy, this field would be a colorful but narrow, domain of interest to only a specialized group of lawyers and legal scholars. However, many gambling law controversies have broader importance, touching on some of our most important constitutional values.<sup>39</sup>

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38. Memorandum from Nancy Sweet, Office of the Attorney General, to Allen Sumner (Aug. 5, 1983) (analyzing the status of "Five-Card Hold'em" under California law).

39. As an extreme example of the disfavored treatment of gambling under the law, some courts have questioned whether the rights of gambling concerns and of individuals seeking to be associated with them are afforded any protection under the federal Constitution. In *State v. Rosenthal*, 93 Nev. 36, 559 P.2d 830 (1977), the Nevada Supreme Court concluded that the regulation of gambling is one of the powers reserved to the states under the tenth amendment to the U.S. Constitution and, hence, is not subject to federal constitutional restrictions. The court applied this notion solely to deny constitutional limitations on initial applications for a gambling license; once a license has been obtained the court felt that a property right was created that could only be extinguished through procedures that met constitutional requirements. *See id.* The Federal Court of Appeals for the First Circuit reached a similar conclusion regarding the constitutional rights of persons seeking greyhound racing licenses under New Hampshire law. *See Medina v. Rudman*, 545 F.2d 244 (1st. Cir. 1976).

At least one federal court has expressly rejected the conclusion of the *Rosenthal* court that gambling regulation operates outside of federal constitutional constraints. *See United States v. Goldfarb*, 464 F. Supp. 565 (E.D. Mich. 1979). In addition, the New Jersey Supreme Court has implicitly rejected this notion by testing the validity of various aspects of New Jersey casino regulation under traditional constitutional standards. *See, e.g., In re Martin*, 90 N.J. 295, 447 A.2d 1290 (1982); *Bally Mfg. Corp. v. N.J. Casino Control Comm'n.*, 85 N.J. 325,

Rose has identified one such problem in the controversy surrounding first amendment protections of gambling advertising. Citing federal laws that expressly prohibit broadcast advertising of privately operated lotteries, the Federal Communications Commission (FCC) has informally told local stations that it views all forms of gambling as equivalent to lotteries and thus not a proper subject of broadcast advertising. Therefore, radio and television stations run advertisements of legal gambling activities (other than state lotteries) at the risk of losing their broadcasting licenses.

The ability of the FCC or the U.S. Congress to impose this advertising limitation without running afoul of first amendment constraints is unclear. The Supreme Court recently upheld a similar prohibition on gambling advertising enacted by the Puerto Rico Legislature.<sup>40</sup> The Court reasoned that since the legislature could have prohibited gambling altogether, it could also take less drastic steps like prohibiting advertising to restrict the prevalence of gambling.<sup>41</sup> However, where the body prohibiting advertising is not a state or territorial government with direct police power over gambling, but is rather a federal agency like the FCC, it remains unclear how this rationale will apply.

Earlier Supreme Court opinions dealing with commercial speech suggest that actions like the FCC's, aimed at the paternalistic protection of listeners through advertising bans, will not be upheld since governments may not "completely suppress the dissemination of admittedly truthful information about entirely lawful activity [out of fear concerning] that information's effect upon its disseminators and its recipients."<sup>42</sup> Under this broader notion of protected commercial speech, legally operated gambling establishments (e.g., licensed casinos, card clubs, or Indian bingo parlors) would appear to have a constitutional right to advertise on American airwaves. The success of gambling concerns in gaining recognition of this right will help determine the breadth of commercial speech protections applicable to other similarly regulated or specially disfavored industries.<sup>43</sup>

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426 A.2d 1000 (1981).

40. See *Posadas*, 106 S. Ct. 296.

41. *Id.*

42. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976); see also *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980); *Bates v. State Bar*, 433 U.S. 350 (1977).

43. Cigarette manufacturers and retailers form another disfavored industry subject to a total broadcast advertising ban. The constitutionality of this total ban, like that on the advertising of legal gambling enterprises, is unclear. For an analysis of the commercial speech protections afforded cigarette advertising, see Welkowitz, *Smoke in the Air: Commercial Speech and*

### C. *Federalism Issues In The Control Of Gambling*

Federalism limitations on state control of Indian bingo parlors illustrate yet another unusual legal problem raised by gambling. An odd combination of state and federal restrictions currently govern these parlors. To promote uniform application of criminal standards, Congress has granted a number of states criminal jurisdiction over federal Indian reservations.<sup>44</sup> Thus, California, one of the affected states, can totally prohibit particular forms of gambling on Indian reservations in that state.<sup>45</sup>

However, the Supreme Court has ruled that once a state legalizes a type of gambling, further state law limitations on how the game can be played or on how large the game stakes can be are components of civil law and therefore not controlling on federal lands.<sup>46</sup> Consequently, in states such as California that have legalized bingo for charitable organizations,<sup>47</sup> commercial bingo parlors opened on Indian reservations are subject to no state restriction.<sup>48</sup>

Largely as a result of this gap in state regulation, commercial bingo parlors are now operated on Indian reservations in California, Maine, Minnesota, North Carolina, Florida, and Washington.<sup>49</sup> Many of these parlors are enormous. In one North Carolina bingo parlor, for example, prizes include a \$50,000 jackpot and an \$18,000 Cadillac. The Seminole Tribe in Florida grossed \$20 million in 1982 from their bingo parlor, producing a \$2.7 million profit.<sup>50</sup>

### D. *The Conflicts Law of Gambling*

Other gambling law controversies hinge on interstate disparities in the treatment of gambling. One such controversy concerns the conflict of law rules applicable to gambling debts. This issue arises where legally incurred gambling debts are sought to be enforced in

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*Broadcasting*, 7 CARDOZO L. REV. 47 (1985).

44. Extension of state criminal jurisdiction to Indian reservations was granted by Congress in 1953 for the six states with the largest Indian populations. See 18 U.S.C. § 1162 (1984 & Supp. I 1987).

45. See, e.g., CAL. PENAL CODE § 330 (West 1985) (prohibiting the playing of an enumerated list of games).

46. *Cabazon*, 107 S. Ct. 1083 (1987).

47. Bingo games operated by charitable organizations are authorized by California's constitution, CAL. CONST. art. IV, § 19(c); however, the amounts that charities can offer as bingo prizes are limited by statute, CAL. PENAL CODE § 326.5 (West Supp. 1986).

48. The freedom of Indian bingo parlors from California state law restrictions was recognized in *Cabazon*, 107 S. Ct. 1083 (1987).

49. See ROSE, *supra* note 1, at 210.

50. *Id.*

states where gambling is illegal.

Under normal conflicts principles, the laws of a state in which a valid debt is incurred and is to be repaid will generally be applied to determine the enforceability of the debt in a court of a remote state.<sup>51</sup> Yet, many state courts refuse to enforce obligations to pay gambling debts legally incurred out of state.<sup>52</sup> They reach this result by applying a public policy exception to the normal conflicts rules regarding contracts — i.e. the rarely applied notion that a state need not apply the contract laws of a remote state where to do so would offend the public policy of the state where enforcement is sought.<sup>53</sup>

In recent years, however, as limited forms of gambling have been legalized in many states, the scope of state public policies against gambling have come into question. Does the adoption of a state lottery imply that gambling is no longer against public policy, making out of state casino debts enforceable? Some courts have answered affirmatively;<sup>54</sup> others have concluded that non-authorized forms of gambling are still against public policy and that related gambling debts should remain unenforceable.<sup>55</sup> The difficulty and

51. Under the conflicts rules of most states, the law applied to a contract issue (in the absence of an effective choice of law by the parties) is that of the state having the most significant contacts with the issue. See *RESTATEMENT (SECOND) CONFLICT OF LAWS* § 188 (1980 & Supp. 1986). Assuming that a player receives an extension of credit to facilitate gambling in a state where gambling is legal and agrees to pay back the debt there as well, that state would have the greatest contacts with the resulting debt contract. See *id.* at § 195. Thus, under normal conflicts principles, the law of the state where the gambling occurs would be applied when enforcement of gambling-related debts is sought in the courts of a remote state.

52. See, e.g., *Dorado Beach Hotel Corp. v. Jernigan*, 202 So. 2d 830 (Fla. Dist. Ct. App. 1968); *Resorts Int'l. Hotel, Inc. v. Agresta*, 569 F. Supp. 24 (E.D. Va. 1983), *aff'd*, 725 F.2d 676 (4th Cir. 1984). See generally 71 A.L.R. 3d 171 (1973).

53. See H. GOODRICH & E. SCOLES, *CONFLICT OF LAWS* 198-202 (1969); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 82-86 (1980).

54. For example, such a change in public policy toward gambling was recognized by the New Jersey Supreme Court in *Caribe Hilton Hotel v. Toland*, 63 N.J. 301, 307 A.2d 85 (1973). There, the court was asked to enforce gambling debts incurred by the defendant in a Puerto Rico casino, despite the fact that casino gambling was not then legal in New Jersey. It viewed the essential question in the case as being, "[s]hould New Jersey any longer remain a privileged sanctuary for those who would play but not pay?" *Id.* The court considered the changing gambling laws of the state and concluded that "[t]he fact that wagering in various different ways is now authorized demonstrate[s] that our public policy no longer can be said to condemn gambling per se." *Id.* Since it felt that there was no longer any public policy against gambling, the court applied normal conflicts principles and recognized the enforceability of the defendant's gambling debts. *Id.*

55. See, e.g., *Dorado Beach Hotel Corp.*, 202 So. 2d at 831 ("[T]he public policy of the State of Florida is well established that the State will condone certain selected forms of gambling, but it has likewise been established that the state will not lend its judicial arm to the collection of monies wagered in such enterprises not authorized by the law of the State of Florida.").

unpredictability of the answers to such questions demonstrates the confusion that can stem from constantly changing public policy limitations on conflict rules.

### E. *Gambling Law As A Regulatory Laboratory*

Gambling law is a worthwhile subject for general study because it serves as a testing ground for new regulatory techniques. Because gambling industry regulation typically involves broad powers to set qualifications for entry into the industry and to limit the activities of persons admitted, gambling regulations involve unusually extensive restrictions on the activities of corporations and individuals in the gambling field. The effectiveness of these restrictions in preventing improper casino activities provide a basis for estimating their usefulness in other regulatory applications.<sup>56</sup>

As an example of an experimental regulatory measure applied to gambling activities, the New Jersey Casino Control Commission currently uses a novel executive disqualification technique to screen corporations for casino operating licenses. Under New Jersey statutory standards, a corporate applicant is only qualified for a casino license if it can demonstrate its good character.<sup>57</sup> A corporation's character is defined as depending, at least in part, on the background of the firm's top executives.<sup>58</sup> However, where a firm has employed an unacceptable executive, it is not necessarily disqualified from licensure. It is given a second chance if it will disassociate itself from the objectionable executives. Most of the firms given this option have taken it, leading to an interesting new form of professional banishment.<sup>59</sup>

The Commission's notion that the mere removal of certain key executives can immediately transform the values observed in a large

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56. New Jersey legislators and regulators have created far more elaborate systems for licensing and monitoring casino operators than their Nevada counterparts. This is due in part to New Jersey's more restrictive regulatory goals and in part to its much larger budget for casino regulation. For a comparison of casino regulation in Nevada and New Jersey, see ROSE, *supra* note 1, at 178-89.

The greater activity of New Jersey casino regulators means that their efforts constitute a much more important testing ground for new regulatory techniques than the relatively limited endeavors of Nevada gaming authorities.

57. See N.J. STAT. ANN. §§ 5:12-84 (West Supp. 1984).

58. See *id.* at §§ 5:12-85(c). See generally Michael, *Whose License is It Anyway? — The Evaluation of the Suitability of a Corporation for a Casino License*, 6 SETON HALL L.J. 41 (1982).

59. The author has examined this practice and its regulatory implications elsewhere. See Gruner, *Banished from the Boardwalk: The Control of Corporate Casino Operators Through Executive Disqualification*, 16 RUTGERS L.J. 759 (1985).

firm is consistent with decisions in other legal fields treating the responsibility of a corporation as identical with the responsibility of its current management.<sup>60</sup> Under this view, a change in executives works a corresponding change in corporate values and, hence, corporate character. However, more sophisticated studies of corporate cultures have suggested that firm values and standards become ingrained and are not necessarily altered by a simple change in a few executives.<sup>61</sup> The success or failure of the Commission's executive disqualification practices may not only help resolve this philosophical controversy, but should also indicate whether executive disqualification would be a useful corporate control measure in other settings.

#### IV. SOME CRITICISMS

Rose's work is not without faults. One of the more serious problems stems from his attempt to cater to a broad range of readers. In order to make his work accessible to lay readers, Rose has included descriptions of very basic legal subjects such as where case opinions can be found. Legal specialists will hardly find these passages revealing.

Fortunately, such rudimentary discussions form only a small portion of the book. Rose quickly relates these basic passages to more sophisticated gambling law analyses. These analyses will hold the attention of lawyers and legal academics alike. They not only serve as a valuable introduction to the gambling law field, but also offer many entertaining reinterpretations of familiar legal issues in colorful gambling contexts.

Rose's analyses are well researched, conceptually sophisticated, and described in highly understandable prose. Furthermore, he brings alive what might have been a very dry subject by keeping in constant touch with the human element underlying gambling law. He accomplishes this primarily by recounting the unusual history of many gambling law controversies.

One wishes that Rose's obviously considerable research was more easily accessible to the reader. Although supplemented by a substantial bibliography and descriptions of sources supporting particular portions of the text, Rose's work has neither an index nor

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60. See, e.g., *Trap Rock Indus., Inc. v. Kohl*, 59 N.J. 471, 482, 284 A.2d 161 (1971), cert. denied, 405 U.S. 1065 (1972). For a discussion of the philosophical link between *Trap Rock* and New Jersey's corporate casino licensing and executive disqualification practices, see Michael, *supra* note 58.

61. See, e.g., C. STONE, *WHERE THE LAW ENDS* 228-48 (1975).

extensive footnotes.

#### V. CONCLUSION

As aggravating as some of the omissions are, they do not detract from the essential success of Rose's work. He sets out to introduce both lay and legal readers to the long neglected field of gambling law. Rose succeeds remarkably well at both tasks, linking this specialized and largely unappreciated legal field with the mainstream of American law.