

Appendix B

Gambling

Gambling generally describes an activity that is prohibited under criminal law.

Gaming refers to games of chance, which are considered legal. A card game among friends, for example, may be exempted from criminal statutes in some states.

States apply a dominant factor or predominance test to determine whether an activity constitutes gambling. An activity involves gambling if the element of luck is the dominant factor or predominates over skill. Social gambling between friends on card games is permitted under most state statutes. This generally is defined as a “social context” in which everyone participates in the activity and no one profits by conducting or sponsoring the game. Some states limit the amount of money that an individual may win in a single hand and require that the game be conducted in a residence or other “private place.” All states allow nonprofit charitable organizations to raise money by sponsoring certain types of gambling activities. Another common exception is “drawings” conducted by stores in which the “winner” receives a prize. Virtually every state treats gambling as a misdemeanor, although several states treat subsequent arrests for gambling as felonies.

The early American colonists brought with them games of chance that were popular in England, and there were few restrictions on gambling. Lotteries were used in the eighteenth and nineteenth centuries to raise revenues for universities and to support education. By the early twentieth century, gambling had become viewed as immoral and was driven underground. Unlawful gambling, along with the illegal sale of alcohol, became the cash cow for organized crime.

In 1931, Nevada legalized most forms of gambling, and over the next thirty years, Las Vegas became known as the center of gambling in the United States. In 1977, New Jersey established legalized gambling in Atlantic City. Twenty-four states now allow commercial casinos in some form. According to the American Gaming Association, the more than one thousand river-based, land-based, and racetrack commercial casinos and card rooms in these states produced a gross gaming revenue of \$38.54 billion and contributed \$8.85 billion in tax revenues in 2015. The total gaming revenue is \$68.44 billion including American Indian casinos (discussed below) (American Gaming Association 2016).

Each state determines whether to allow gambling, what forms of gambling to permit, and who may gamble. States differ on whether to permit betting on horse races and dog races, allow card or table games, and permit slot machines and video poker, as well as on where these forms of gambling may be located. Some states require a minimum age for gambling, and in other states, a minimum age is established for particular forms of gambling. In New Jersey, you can buy a lottery ticket and bet on horse racing at age 18 although you must be 21 years of age to enter an Atlantic City casino. Every state allows gambling activities such as bingo games that benefit charities.

American Indian tribes are legally entitled to establish casinos on tribal land. In 1979, the Florida Seminole tribe began sponsoring bingo games. American Indian gaming is regulated by the federal Indian Gaming Regulatory Act of 1988, and jurisdiction over various aspects of American Indian gaming is shared by the federal and state governments and the tribes. Profits may be used only for community welfare purposes. There are roughly 473 American Indian-owned gaming enterprises in twenty-eight states, and 241 of the 500 tribes in the United States operate gaming establishments. In 2015, American Indian casinos earned a total of \$29.9 billion.

New Hampshire established a state lottery in 1963, which marked the first time in the twentieth century that a state directly established a lottery. By 1999, thirty-seven states had established lotteries to raise money, and today, forty-three states have lotteries.

In the past decade, Internet gambling has become enormously popular. Delaware, New Jersey, and Nevada are the only states to have legalized Internet gambling, although several other states likely will provide for online gambling in the near future.

Gambling historically has been condemned as immoral for focusing attention on material gain rather than on spiritual matters. The modern justification for criminalizing gambling is that it diverts money from the support of families and can lead to addictive behavior. The American Psychiatric Association labels pathological gambling as an impulse control disorder. Addicted gamblers may engage in crime to support their habit, and their compulsive behavior may lead to borrowing money at high interest rates. Gambling disorders can severely disrupt families and lead to financial chaos, domestic violence, and divorce. Studies indicate between 1 percent and 2 percent of the population are problem gamblers, and in Las Vegas, problem gamblers may constitute as much as 7 percent of the population. In recent years, a large number of older individuals increasingly have turned to gambling to escape boredom and to increase their incomes (Lesieur 1992).

There is obvious inconsistency in allowing gambling in casinos, in state-sponsored lotteries, and at racetracks while prohibiting other forms of gambling. Gambling laws are difficult to enforce because most unlawful gambling is hard to detect. Gambling is a lifestyle, and making gambling illegal has failed to deter individuals from wagering. Organized crime has been able to fill the demand for gambling and controls most large-scale betting on sports outside of Las Vegas. Wagering is one of the largest sources of income for organized crime, and individuals who owe money may be subjected to threats and retaliation. The unlawful nature of gambling means that cheating and threats often are unreported to the police. The large amount of money involved in unlawful gambling operations makes the police susceptible to bribery. Another concern is that with well over \$6 billion wagered legally and illegally on the Super Bowl and \$8.5 billion on March Madness in 2018, there is the danger of athletes being bribed to influence the outcome of athletic events. In recent years, there have been betting scandals in the English and German football leagues, in college and professional basketball, and in Major League Baseball.

Police investigation of gambling is time-consuming and requires the cultivation of informants and the use of electronic surveillance. Relatively few arrests are made for unlawful gambling. According to the FBI Uniform Crime Report, in 2017 there were 2,510 gambling arrests involving 955 whites and 1,294 African Americans. Studies of prosecutions for unlawful gambling indicate that most individuals receive modest fines and rarely are imprisoned.

There is particular concern over the growth of gambling among college students. A study sponsored by the National Center for Responsible Gaming in conjunction with Harvard Medical School found that 40 percent of college students reported having gambled in the past year, and between 3 percent and 11 percent of college students are considered to have a “gambling problem.” Only about one-fifth of colleges have written policies on gambling.

Gambling in the United States has been transformed by the fantasy sports industry. The two largest companies, FanDuel and DraftKings, which represent 90 percent of the industry, have attracted well over \$400 million in investments and are each valued at more than \$1 billion and at one point were scheduled to merge. Professional sports leagues that traditionally have opposed gambling are some of the largest investors along with major media companies. Investors include the National Basketball Association, Major League Baseball, NBC Comcast and Fox Sports, and various prominent owners of sports teams (J. Kang 2016).

This fantasy industry has been made possible by the fact that in 2006 Congress enacted a provision in the Unlawful Internet Gambling Enforcement Act that declared fantasy sports legal. An estimated fifty-seven million people play fantasy sports (FS), and over four million play daily fantasy (DF) sports, by paying an entry fee and compiling teams of players.

Winning and losing in FS is based on the performance of the players over the course of the season. DF is based on a player's performance on a single day in a 182-game baseball season or 82-game basketball season.

New York, which is one of the biggest FS markets, in 2016 after opposing FS as unlawful gambling recognized FS as a game of skill in time for the 2016 National Football League season. A number of states, however, continued to categorize DF sports as unlawful gambling rather than as a game of skill. The primary source of controversy was over DF sports in which players compete against other players for money paid into the pool by each player based on the performance of professional sports athletes in a single day of competition, which critics contend involves more luck than skill.

The debate over whether sports betting should be legalized was significantly impacted by the 2018 U.S. Supreme Court decision in *Murphy v. National Collegiate Athletic Association*. The Court held that the 1992 Professional and Amateur Sports Protection Act, a federal law that banned commercial sports betting in all but a handful of states, was unconstitutional. In 2011, New Jersey voters passed a constitutional amendment legalizing sports betting, and three years later the state legislature repealed the state's law against sports betting. Justice Samuel Alito in *Murphy* recognized that although sports gambling may generate revenue and may serve to weaken illegal sports betting there is a risk that young people will be drawn to gambling and that individuals of modest means may "squander their savings and earnings" and that gambling may result in corruption in college and professional sports. He nonetheless held that Congress had unconstitutionally legislated on a matter that is the preserve of the states and stressed that "[a] more direct affront to state sovereignty is not easy to imagine" (*Murphy v. National Collegiate Athletic Association*, 584 U.S. __ [2018]).

The issue now is whether a state legislature will legalize sports betting. As of September 2019, FS companies operate in roughly forty states. This will allow individuals to bet on the outcome of both college and professional sports. States are moving toward allowing FS companies to operate at casinos and racetracks or in betting parlors. Thus far state tax revenues are far below projections because the state sports betting operations remain in their initial stages of development.

In 2018, DraftKings generated \$14 million in revenue, while FanDuel generated \$10 million. This likely is the tip of the iceberg. According to the Fantasy Sports Trade Association (now the Fantasy Sports & Gaming Association), FS is a \$7 billion industry, with 59.3 million people in the United States and Canada playing FS. The overwhelming percentage of people who play FS lose money. A study by the consulting firm McKinsey of Major League Baseball found that 91 percent of profits were won by 1.3 percent of players. A survey of 1,400 DF sports players by Eilers Research (now Eilers & Krejcik Gaming) found that 70 percent of players lost money. McKinsey found that the top 11 DF sports players risked an average of \$2 million in entry fees and profited \$135,000 per person over three months, and the remaining individuals in the top 1.3 percent paid \$9,100 and made an average of \$2,400 per person (E. Miller and Singer 2015). At this point, roughly 80 percent of the country allows individuals to engage in daily FS.