Op-Ed/Editorials: Gambling and the Law®: A Modest Proposal

October 10, 2008
Is poker a game of skill?

In states without licensed cardrooms, the answer will almost always determine whether it is legal to operate the game as a business. In about half the states, it would also determine whether merely playing in a commercial game is a crime.

States do have the right to put restrictions on games of skill played for money. They may even be able to outlaw them completely, although there is case law holding that governments cannot discriminate by picking on only certain skill games.

But all states outlaw unauthorized gambling, defined as games with three elements:

1) A prize of value;
2) Consideration, meaning it costs something to play; and
3) An outcome determined predominantly by chance, not skill.

There are cases being fought in the U.S. and Europe on whether poker has the third element.

Courts and commentators have looked at the issue from many angles. I like to think that we can put all games on a spectrum, from pure chance, like roulette, to pure skill — chess.

But even roulette can involve some skill: knowing what bets not to make. Wizardofodds.com mentions one bet available at a tribal casino where the house advantage is 23.55%! And Russell T. Barnhart wrote an entire book in 1992 called "Beating the Wheel," discussing biased wheels and clocking.

I think that any factor beyond the players' control, such as having the flu, should count as "chance." But even if these should be counted as part of the players' "skill," there is still the coin flip to determine who gets white and the right to move first.

I am involved as a consultant and expert witness in some of the court cases being fought over proving poker, especially tournaments, is predominantly skill. So, I have to make it clear that the modest proposal I am presenting in this column is not necessarily the actual law of any state or nation.

In 1870, Mark Twain wrote a column entitled "Science vs. Luck." It concerned a fictional Kentucky case involving whether the card game "seven up" or "old sledge" fell under the prohibition on "games of chance." According to my copy of "The American Hoyle; or Gentleman's Hand-Book of Game," published in 1885, the game was also known as "all-fours." It was similar to the modern game of hearts, with players getting points for most tricks, and for taking the highest, lowest and Jack of trumps.

Like our modern cases, the courtroom battle came down to a battle of experts. The prosecutors called in deacons and other clergymen, all testifying that old sledge was a game of chance.

Mark Twain doesn't go into detail on the experts the defendants called. But we know, today, they would be mathematicians, professional players and people like me, who can testify about the law and history of the game.

With experts on both sides, the judge "said there was no way of coming to a determination…" The defense attorney suggested a solution: "Impanel a jury of six of each, Luck versus Science. Give them candles and a couple of decks of cards. Send them into the jury-room and just abide by the result."

After playing all night, with some clergymen coming out to borrow more money, the jury reached their unanimous verdict: "old sledge" was a game of skill.

I propose the poker world do the same. Bring out of their forced retirements Sen. Bill Frist and Rep. Jim Leach, the architects of the UIGEA. They can be joined by the other leading "anti's" in Congress: Sen. Jon Kyl and Rep. Frank Wolf. Throw in the leading religious opponents, Rev. Tom Grey and Dr. James Dobson, and you have half the jury. We can give each of them a sheet with the rankings of the hands.

The big question: Which six players should represent the poker world?

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