

Op-Ed/Editorials - Gambling and the Law®: Making Poker Legal as a Public Service

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What do insurance, commodities trading and state lotteries all have in common? They were all originally outlawed as forms of gambling.

The major fight today over whether poker should be legalized usually revolves around the question of whether it is predominantly skill or chance.

But this unnecessarily gives up part of the political as well as legal battleground. Many activities that are indisputably gambling are now operated under state licenses, or by the state itself. And other activities, such as insurance and commodities, are today generally not even thought of as gambling.

Although they are.

Insurance is, after all, betting a small sum to obtain, that is, win, a much larger sum if a certain future event occurs. Of course, unlike traditional gambling, the buyer usually hopes the future event won't happen. The industry's greatest invention was changing the name of death insurance to life insurance, so that bettors would not be focusing on the fact that to win this wager they have to die.

Insurance eventually overcame its gambling roots because it was seen as creating a benefit for the general public, as an efficient way of spreading and lessening risk.

Still, some anti-gambling prohibitions remain. You cannot take out a life insurance policy on someone you have no connection with. That would be too much like making a bet that another person would die. Plus, government is afraid that you might be tempted to do something to try to increase your chances of winning.

Trading in stocks and commodities is still gambling. The Securities Exchange Act of 1934 expressly preempts state anti-gambling statutes: "No State law which prohibits or regulates the making or promoting of wagering or gaming contracts" can apply to transactions on American exchanges. Congress had to add that provision, and others similar to it, to federal laws regulating stock and futures markets, because too many states still have laws on their books that had been used against trading. Prior to these federal laws, speculators had to concoct legal fictions, such as pretending that they actually planned to accept delivery of tons of pork bellies.

Congress preempted state anti-gambling laws after becoming convinced that markets were an efficient way to raise money for businesses, and to allow farmers and food processors to shift the risk of changing prices of crops to speculators.

Federal preemption does not apply to all trades. A boiler-room operation selling penny stocks and other risky ventures on unregulated or foreign exchanges is probably still today violating state anti-gambling laws.

More conventional forms of gambling have been legalized because the public benefit was seen as outweighing the public harm. State lotteries raise money for education, casinos provide jobs and tax relief, even horseracing was seen as bettering the breed.

Poker, where legal, certainly provides as much public benefit. For example, in California most of the cities with licensed card clubs make significant percentages of their government revenue from their clubs.

We don't have enough evidence, yet, but I predict that studies will find that poker contributes in other ways. Poker players are — probably — smarter, happier and more sociable. They certainly have to know at least a little about math, money management and how to play by the rules.

Maybe we should start thinking up ways to prove that poker should be made legal, not because it is not gambling, but because a society is better with poker without.

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