Gambling, Commodity Speculation, and the "Victorian Compromise"

Joshua C. Tate*

INTRODUCTION

In 1851, a few years after Texas was admitted to the Union, the Texas Supreme Court was asked in *Crow v. State* to decide whether the licensed games of ten-pins and billiards fell within a general statutory prohibition of "gambling devices."[1] The statute mentioned several different games that were prohibited, namely "A, B, C, or E, D, or roulette, rowley powley, or rouge et noir, or . . . faro bank, monte bank, or any other gaming-table, or bank of the like kind."[2] Although the defendant did not bet at any of the enumerated games, he did bet at ten-pins, which the state alleged to be another type of "gambling device." Ruling in favor of the defendant, the court decided that ten-pins and billiards were different from the other games named in the statute:

> It is not a reasonable presumption that games so well known for centuries, without having undergone a change of name, should have been intended to be included in the vague expression of "gambling device." . . . We are brought to the conclusion, from what we conceive to be a fair construction of the language used, and taking in connection also with it the fact that billiard tables and tenpin alleys are licensed on the payment of tax, when no others are so taxed and licensed, that an indictment cannot be sustained for betting a game at either of those tables.[3]

---

* Assistant Professor of Law, Southern Methodist University. I would like to thank Robert Gordon, Lisa Hasday, Joseph McKnight, Wesley Oliver, Lawrence Solum, and James Whitman for their comments on this Essay.

1. *See* Crow v. State, 6 Tex. 334 (1851). The statute being construed in *Crow* was Act of Mar. 20, 1848, § 70, 1848 Repub. Tex. Laws 231 (repealed 1856), *reprinted in* HARTLEY'S DIGEST OF THE LAWS OF TEXAS 460, art. 1477 (1850).

2. Act of Mar. 20, 1848, § 69, 1848 Repub. Tex. Laws 231 (repealed 1856), *reprinted in* HARTLEY'S DIGEST OF THE LAWS OF TEXAS 460, art. 1476 (1850).

3. *Crow*, 6 Tex. at 336.

The decision in *Crow* made clear that some forms of gaming were an acceptable part of Texas society and could not have been within the purview of the legislation on the subject.

Half a century later, traditional forms of gambling seemed to be losing ground to a different craze, at least in the more industrialized regions of the United States. The rise of the great exchanges allowed those with spare income to speculate on an unprecedented scale, buying and selling in the hope that fortuitous changes in stock and commodity prices would bring quick riches. Those who were prevented from speculating on the legitimate exchanges, moreover, could gamble their wages in curious nineteenth-century institutions called "bucket shops," a term that apparently originated from the limitations that the Chicago Board of Trade imposed on buying and selling small "buckets" of grain.[4] In the bucket shops, any individual with a few dollars to spare could bet against the bucket-shop operator on whether the price of grain would go up or down.[5] Some of these bucket shops were relatively legitimate, but in others the telegraph wire supposedly leading to the exchange went no further than the rug.[6]

The rise of the bucket shops produced new anti-gambling statutes, and eventually led the U.S. Supreme Court to decide whether commodity speculation in a more respectable venue, the Chicago Board of Trade, violated these statutes. In an opinion by Justice Holmes, the Court decided that the statutes could not apply to the Board.[7] State courts, however, had shown a long history of skepticism toward commodity speculation, particularly when engaged in by those who could not afford to lose.

Lawrence Friedman has characterized the history of criminal law in nineteenth-century America as involving a "Victorian compromise."[8] Nineteenth-century criminal codes were filled with moral prohibitions such as Sunday laws, but these laws were about public order, not private sin. So long as the general social fabric was preserved, it did not matter if vice continued to exist beneath the surface.[9] So-called "victimless" sex crimes such as adultery and fornication were increasingly prosecuted only when committed in a flagrant manner, and prostitution was tolerated so

---

4. The term "bucket shop" was originally used to describe "an unauthorized office . . . for smaller gambling transactions in grain, and subsequently extended to offices for other descriptions of gambling and betting on the markets, the stocks, etc." 2 THE OXFORD ENGLISH DICTIONARY 613 (2d ed. 1989). The word is apparently derived from the fact that the Chicago Board of Trade did not allow its members to trade in amounts less than 5000 bushels; those who wanted a smaller quantity would order a "bucketful" from the unauthorized speculators. *See id.*

5. *See* JONATHAN LURIE, THE CHICAGO BOARD OF TRADE 1859-1905: THE DYNAMICS OF SELF-REGULATION 76 (1979).

6. ANN FABIAN, CARD SHARPS, DREAM BOOKS & BUCKET SHOPS: GAMBLING IN NINETEENTH-CENTURY AMERICA 191-92 (1990).

7. Board of Trade of Chicago v. Christie Grain & Stock Co., 198 U.S. 236, 247 (1905).

8. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 127 (1993).

9. *See id.*

long as it remained in the red-light districts and out of sight.[10]

As compared with the previous century, moreover, the nineteenth-century legal system seems to have evinced a greater concern for the social, as opposed to spiritual, aspects of criminal justice.[11] A corollary of this new orientation toward public order was that activities such as gambling, which diverted the working class "'from the regular pursuits of industry,'"[12] received special condemnation from the legislature, although the system was lenient to many individual offenders.[13] The desire to keep the working classes under control may not have been the only force behind nineteenth-century criminal law, but it certainly played a role.

The nineteenth-century judicial treatment of gambling—whether on the faro table or in the commodity exchanges and bucket shops—reflected a variant of the Victorian compromise, whereby the worst forms of vice were dealt with harshly, while less dangerous vices were allowed to go unpunished. It is a well-known fact that the early regulation of various forms of financial speculation was tinged with a moral aversion to what was, after all, a form of gambling.[14] Less obvious, however, is the manner in which the nineteenth-century judiciary interpreted legislation against both conventional gambling and speculative contracts. Judges had their own ideas about what sort of gambling the state ought to prohibit, and statutes that seemed excessive in their zeal were construed narrowly or evaded through legal fictions.

Here, two different categories of judicial opinions are discussed that are not usually considered together: cases from the antebellum South interpreting criminal gambling statutes, and civil cases from other jurisdictions, such as Illinois and Pennsylvania, considering whether particular speculative transactions constituted illegal gambling. In this approach, I suggest that the interpretation of nineteenth-century state gambling statutes was a

---

10. *Id.* at 127-32.

11. *See* William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: A Historical Perspective*, 42 N.Y.U. L. REV. 450, 461-62 (1967). This new concern with social order rather than spiritual discipline does not mean, however, that morals ceased to be regulated in the nineteenth century: if anything, morals were increasingly a subject of legislative attention. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 151-52 (1996). As prosecution moved out of the hands of private citizens and into the emerging police force, however, it became difficult to enforce unpopular laws such as those regulating gambling and alcohol. *See* ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 53-54 (1989).

12. FRIEDMAN, *supra* note 8, at 133 (quoting speaker at New York constitutional convention of 1821).

13. *See id.*

14. *See* REUVEN BRENNER & GABRIELLE A. BRENNER, GAMBLING AND SPECULATION: A THEORY, A HISTORY, AND A FUTURE OF SOME HUMAN DECISIONS 90-112 (1990); FABIAN, *supra* note 6, at 9; NATIONAL INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976, at 341-42 (1977) [hereinafter DEVELOPMENT]. On the stigma attached to life insurance as gambling in the nineteenth-century United States, see VIVIANA A. ROTMAN ZELIZER, MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES 67-89 (1979).

problem in both civil and criminal cases, from the district court in Nacogdoches County, Texas, all the way to the Supreme Court of the United States.

In Part II, I will show how Southern judges prior to the Civil War went about deciding whether particular locations constituted "public places" for the purposes of state gambling acts. In general, the courts sought to distinguish between private gambling, which was considered acceptable, and public gaming, which fell within the scope of criminal prohibition. The public sport of horse-racing, however, was treated differently and deemed to fall entirely outside the reach of the gambling statutes.

Part III will discuss the later judicial treatment of futures contracts, and how the fiction of intent to deliver—evidenced in some cases by the possession of sufficient capital—was used to distinguish between illegal gambling wagers and legitimate contracts. Although these two categories of nineteenth-century cases involved different legal concepts, the basic Victorian compromise was evident in both. Whether in the context of card playing or futures speculation, nineteenth-century judges sought to preserve the semblance of a strict prohibition against gambling while allowing more socially acceptable forms of speculation to pass muster.

GAMBLING REGULATION ON THE SOUTHERN FRONTIER: DEFINING APPROPRIATE USES OF PUBLIC AND PRIVATE SPACE IN THE NINETEENTH-CENTURY SOUTH

In 1837, the legislature of the newly formed Republic of Texas passed an act to criminalize various forms of gambling, including "faro, roulette, monte, rouge et noir, and all other games of chance."[15] Judging by records surviving from Nacogdoches County, local implementation of the act was swift.[16] Several grand jury indictments were returned against various individuals for unlawfully playing or dealing illegal banking games, especially faro and monte.[17] One defendant, Baptiste Chirino, was acquitted of the charges made against him,[18] but many others were not. At least nine arrest

---

15. Act to Suppress Gambling, § 1, 1838 Repub. Tex. Laws 228 (repealed 1840), *reprinted in* HARTLEY'S DIGEST OF THE LAWS OF TEXAS 457, art. 1458 (1850).

16. *See* Legal Documents Relating to Gambling in Nacogdoches County, Texas: District Court, Nacogdoches County, Texas, 1838-1839 (on file with Beinecke Library, Yale University) [hereinafter Nacogdoches Documents]. These documents are part of the Beinecke Library's Western Americana collection.

17. *See* indictments dated 1838 against Juan Ariola (Monte), Baptiste Chirino (Faro and Monte), Leonard H. Mabbit (Faro), John McDougal (Faro), David M. Shropshire (Faro), and Ephraim Tally (Faro), *in* Nacogdoches Documents, *supra* note 16. Faro, a card game played against a house bank, was probably the most popular gambling game in the United States during the nineteenth century, and also arguably the game in which there was the most cheating. *See* CARL SIFAKIS, ENCYCLOPEDIA OF GAMBLING 113-14 (1990). Monte, also called Spanish Monte, has Hispanic origins and is today played primarily in private clubs in the Southwest. *See id.* at 284-85.

18. The words "We the jury find the Defendant not Guilty" are written on the obverse of Chirino's indictment, presumably by the clerk or the jury foreman. *See* Chirino Indictment, *in* Nacogdo-

warrants were issued and signed by Hayden Arnold, the provisional district clerk.[19] The efforts of the deputy sheriff to locate the indicted gamblers, however, do not seem to have been very successful: only George Bondies and David M. Shropshire were found within the county and taken into custody for trial.[20]

The legal documents relating to George Bondies differ in several respects from the other Nacogdoches records. First, Bondies was not charged alone, but in conjunction with another individual named William Dankworth. Second, Bondies and Dankworth were indicted on two separate charges, one "for permitting Gambling and Faro at their house" and one "for keeping a Billiard Table without licence."[21] Finally, and most importantly, Bondies had a lawyer, who filed a motion in arrest of judgment regarding the latter charge. Bondies' defense attorney, a certain Mayfield, argued that the keeping of a billiard table without license was "no offence at law," and the indictment "does not charge the defendants with any offence." [22] There is no record of how the judge ruled on Mayfield's motion.

The issue presented by Mayfield's motion was squarely presented in the later case of *Crow v. State*, discussed above.[23] The court, speaking through Lipscomb, J., reasoned that the legislature could not have intended to include billiard tables and tenpin alleys among the list of "gambling devices," particularly given that they were subject to tax, unlike the games specifically enumerated in the statute. In construing the term "gambling device," the court turned to the Bible as well as a dictionary for assistance:

> According to Webster the word 'device', in one sense, means artificial contrivance, stratagem.

---

ches Documents, *supra* note 16. Interestingly, Chirino's is the only indictment to charge the defendant with permitting faro to be played in his home. It has been suggested that Hispanic residents of Texas had a tradition of private, social gambling that predated the Anglo conquest of the region. *See* DEVELOPMENT, *supra* note 14, at 380 n.13. One might conjecture that Chirino's acquittal had something to do with the jury's sympathy for this Hispanic tradition of private gambling at home, but not enough legal documents are preserved in the Beinecke collection to corroborate this hypothesis.

19. See the warrants for the arrest of Juan Ariola, Francisco Cordoway, William Dankworth and George Bondies (two separate warrants, each naming both defendants), John McDougal (two separate warrants), Jonathan Park, David M. Shropshire, and Ephraim Tally, *in* Nacogdoches Documents, *supra* note 16.

20. See the notations made on the warrants for Shropshire and for Bondies and Dankworth, *in* Nacogdoches Documents, *supra* note 16. Shropshire was eventually convicted, as evidenced by a notation on his bill of indictment signed by the jury foreman. The other warrants all state that a due search was made but the respective defendants were not found in the county. No mention is made of Dankworth's arrest. Perhaps the deputy thought that he had fulfilled his duty under the warrant by arresting Dankworth's partner Bondies.

21. *See* Bondies and Dankworth warrants, *in* Nacogdoches Documents, *supra* note 16.

22. *See* Motion in Arrest of Judgment, *in* Nacogdoches Documents, *supra* note 16. The Motion does not mention the other charge made against Bondies and Dankworth (permitting gambling and faro at their house).

23. *See supra* text accompanying notes 1-3.

'He disappointeth the devices of the crafty.' Job, v.

'They imagined a mischievous device.' Psalms, xxi.[24]

On its face, the court's decision in *Crow* is based on a narrow reading of the statute supported by the fact that billiard tables and tenpin alleys, unlike faro and monte banks, were taxed by the state. The quotations from the Bible, however, suggest a more subtle reason for Lipscomb's decision. Billiards could be played for amusement, without any gambling involved. By contrast, faro and monte were nothing more than "devices for the crafty," through which fools were led to part with their money. Such notorious swindles appeared to Lipscomb as traps laid by the devil for the weak.

Legislative attitudes toward gambling in the United States varied widely, and a comprehensive treatment of all jurisdictions would fill many pages.[25] Many states authorized state-run lotteries in the eighteenth and early nineteenth centuries, which served to finance a number of public projects and universities.[26] Such lotteries were often tainted by fraud, resulting in "sweeping anti-gambling legislation,"[27] but lotteries continued in some Southern states until the 1850s and 1860s.[28] An examination of the nineteenth-century case law regarding gambling, therefore, must be carefully focused in order to yield any useful conclusions.

The regulation of gambling in three Southern states—Texas, Virginia and Alabama—illustrates instances when judges were frequently called upon to determine the meaning of state statutes prohibiting gambling. Judges in Southern states seem to have been more concerned than their Northern counterparts with striking a balance between punishing public gaming on the one hand and upholding private gaming on the other.[29]

---

24. Crow v. State, 6 Tex. 334, 336 (1851).

25. For a discussion of the history of gambling regulation across the United States, see DEVELOPMENT, *supra* note 14. Even this 934-page report barely scratches the surface of the nineteenth-century case law.

26. *See, e.g.*, Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 13-38 (1992). Harvard and Yale, among other universities, were either established or improved by funds raised from state lotteries. *See id.* at 25. Lotteries were also used to fund prisons. *See* Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J. L. & LIBERTY 727, 736 (2005).

27. Rychlack, supra note 26, at 37; *see also* DEVELOPMENT, *supra* note 14, at 74-88 (describing the rise and fall of state-run lotteries in Northern states).

28. *See* DEVELOPMENT, *supra* note 14, at 272. The infamous Louisiana State Lottery, called "the Serpent," is a different story altogether. *See id.* at 267-69. Founded at a time when most lotteries were being abolished, the Louisiana Lottery sold tickets throughout the nation by mail until congressional legislation brought about its demise. *See id.* at 282-86.

29. Of the 117 entries under the Century Digest title dealing with the definition of a "public place, house, or resort" in state gambling statutes, fifty-three are from Alabama and forty-two are from Texas. Other states with entries are Virginia (11), North Carolina (8), New York (1), South Carolina (1), and West Virginia (1). *See* 24 CENTURY EDITION OF THE AMERICAN DIGEST §§ 168-186 (1901). The preponderance of cases from Southern states, particularly Alabama, Texas, and Virginia, is striking.

Gambling was a favorite pastime of the plantation-holding elite of Southern society.[30] Southern gambling statutes, therefore, tended to be aimed at "casino games enjoyed by the masses in taverns and public places," not the "civilized poker games of gentlemen planters."[31] Southern judges tended to respect this tradition of elite private gambling, and applied legislative prohibitions primarily to the forms of gambling preferred by the masses. The Southern legal system presented a stern position against gambling on the surface, but preserved the traditional privileges of the leisured elite.

From the mid-eighteenth century onward, Virginia's legislature took the lead among the Southern states in passing an act penalizing gambling and betting in public places.[32] This statute apparently sought to counter the threat that popular gambling posed to the social order without violating the Southern tradition of elite gambling.[33] Several years later, however, the legislature found it necessary to pass an additional statute banning the use of gambling tables and faro banks, whether in public or in private.[34] The history of gambling legislation in Alabama and Texas followed a different path, but eventually arrived at the same result. In both states, laws were initially passed to prohibit the playing of specific games such as faro.[35] Persons who knowingly permitted such games to be played in their houses were fined.[36] These initial laws against particular games were supplemented, in both Texas and Alabama, by later prohibitions on gambling with cards or dice in public. The language of the Alabama statute makes

---

30. *See* DEVELOPMENT, *supra* note 14, at 243.

31. *See id.* at 247-48.

32. *See* DEVELOPMENT, *supra* note 14, at 239-40 (citing Act of May 6, 1744, c. 5, 5 VA. STAT. 229 (Hening ed., 1819)). The relevant statute is reprinted in A DIGEST OF THE LAWS OF VIRGINIA 276, § 5 (Joseph Tate ed., 1823).

> If any person or persons shall, at any time, play in an ordinary, race-field, or any other public place, at any game or games whatsoever, except bowls, backgammon, chess, or draughts, or shall bet on the sides or hands of such as do game, every such person . . . shall forfeit and pay twenty dollars . . . ."

Id. The games excluded from the ban appear to be those favored by Virginia gentlemen.

33. *See* DEVELOPMENT, *supra* note 14, at 242-44.

34. Act of Feb. 17-May 1, 1816, *reprinted in* DIGEST OF THE LAWS OF VIRGINIA 279, § 17 (1821).

35. *See* Act to Prevent the Evil Practice of Gaming, § 1 (Miss. Territorial Leg. 1807), *reprinted in* A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 375 (Harry Toulmin ed., 1823) (outlawing ABC, EO, billiards, rowley-powley, rouge et noir, and faro); Act to Suppress Gambling, § 1, 1838 Repub. Tex. Laws 228 (repealed 1840), *reprinted in* HARTLEY'S DIGEST OF THE LAWS OF TEXAS 457, art. 1458 (1850) (outlawing faro, roulette, monte, rouge et noir, "and all other games of chance"). It is interesting to note the regional variations in the games prohibited: presumably Spanish Monte was not popular in the Mississippi Territory. The Mississippi Territory statute was amended by, inter alia, an 1811 act authorizing counties to license billiard tables, *see* Act of Dec. 17, 1811, § 1 (Miss. Territorial Leg. 1807), *reprinted in* A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 378 (Harry Toulmin ed., 1823), and the various amendments to the gambling statute were consolidated in 1812, *see* A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 379 (Harry Toulmin ed., 1823).

36. See the Texas Act to Suppress Gambling, § 3, *reprinted in* HARTLEY'S DIGEST OF THE LAWS OF TEXAS 457, art. 1460 (1850), and the Mississippi Territory act of 1812, § 2, *reprinted in* DIGEST OF THE LAWS OF THE STATE OF ALABAMA 379 (1823).

the point clearly:

> [I]f any person shall hereafter play at any tavern, inn, store-house for retailing spirituous liquors, or any other public house or in any street or highway, or in any other public place, or in any out-house where people resort, at any game or games with cards or dice, such person or persons so playing shall on conviction thereof by indictment, be fined a sum not less than twenty nor exceeding fifty dollars.[37]

Although both statutes were amended several times over the course of the nineteenth century, the amendments usually preserved the distinction between particular types of gambling (prohibited everywhere) and all games with cards (prohibited only in public places).[38]

If they could afford an experienced lawyer like Mayfield, the defender of George Bondies' civil rights at Nacogdoches, defendants prosecuted under such gambling statutes often challenged the indictments under which they were charged. Many such challenges were purely technical, as when an Alabama defendant successfully challenged an indictment for gambling in a "public *place*" when the evidence showed that he had in fact played at a "public *house*," even though both were illegal under the statute.[39] More relevant for present purposes are cases where defendants claimed that the site of their gambling activities was not a "public place" or "out-house where people resort" as specified in the statute. Over a hundred such cases were reported by appellate courts in Southern states during the nineteenth century,[40] and countless more must have been decided by lower courts whose records, unlike those of the Nacogdoches District Court, do not survive.

In deciding whether particular locations were "public" within the meaning of the gambling statutes, Southern courts tended to weigh two factors: (1) the extent to which the gambling took place outside of an ordinary dwelling house, and (2) the extent to which the location involved was frequented by gamblers on multiple occasions. Both these factors are illustrated in a series of three Texas Supreme Court cases, all captioned *Wheelock v. State*.[41] William H. Wheelock, the defendant, seems to have been

---

37. Act of Jan. 15, 1828, § 1, 1828 Ala. Acts 73. The language of the larger Texas statute is quite similar, apart from imposing a larger fine of fifty to five hundred dollars and a mandatory prison sentence of one day to twelve months. Act to Suppress Gaming, § 1, 1840 Repub. Tex. Laws 106, *reprinted in* HARTLEY'S DIGEST OF THE LAWS OF TEXAS 457, art. 1464 (1850).

38. Later statutes directed their general prohibitions at gambling tables more than particular games. The Alabama Code of 1852 deals separately with the keeping or exhibition of gaming tables, *see* ALA. CODE. §§ 3249-50 (1852), and gaming in public, *see id.* §§ 3243-44. The Texas Penal Code of 1856 also prohibits gaming tables, while retaining a list of names of individual games prohibited everywhere, *see* OLDHAM & WHITE'S DIGEST OF THE LAWS OF TEXAS 506, arts. 412 & 414 (1859), and expands the definition of public places where card-playing is prohibited, *see id.*, arts. 409-10.

39. Windham v. State, 26 Ala. 69 (1855) (emphasis added).

40. *See supra* note 29.

41. Wheelock v. State, 15 Tex. 253 (1855) [hereinafter *Wheelock I*]; Wheelock v. State, 15 Tex. 257 (1855) [hereinafter *Wheelock II*]; Wheelock v. State, 15 Tex. 260 (1855) [hereinafter *Wheelock*

an itinerant gambler,[42] and his arrests for gambling in various different locations provided the court with an opportunity to define the precise circumstances under which it would consider gambling to be private and therefore exempt from prosecution under the statute.

In the first *Wheelock* case, the court was careful to emphasize that the word "outhouse" in the statutory phrase "outhouse where people resort" meant "any house standing out and apart from houses occupied and used as dwellings or business houses."[43] The gambling in the first and second *Wheelock* cases had taken place, respectively, in an "unoccupied dwelling house"[44] and a vacant house "used for a sleeping apartment only."[45] These locations were assumed to constitute "outhouses" under the gambling statute, and the issue therefore turned on whether they were resorted to frequently. Evidence had been introduced in *Wheelock II* to suggest that this was the case,[46] and so many observers had been found in the abandoned house in *Wheelock I* that the court deemed it reasonable for the jury to have concluded that the house was frequently used for such purposes.[47]

In the third case, however, although the location was an abandoned house similar to that in *Wheelock I*, the court found that it failed the frequency-of-use test, since only those who were actually gambling were found there and there was no evidence that the location had been used before.[48]

In justifying its decision in *Wheelock III*, the Texas Supreme Court took the opportunity to express its views on the purpose of gambling legislation. "The legislature would, perhaps, more effectually have suppressed the evil they aimed to suppress, if they had prohibited all gaming, in whatever place . . . . But they appear to have intended the prevention of *the evil example* rather than the suppression of the evil itself."[49] The idea that legislation is meant to suppress "the evil example," not gambling itself, is a major theme throughout the nineteenth-century Southern cases on the subject of gambling. When gamblers went into the woods,[50] or to a secluded

---

III].

42. Wheelock was convicted for gambling twice in the eponymous town of Wheelock, Robertson County, once in the summer of 1854, *see Wheelock II*, 15 Tex. at 257, and again in September, *see Wheelock I*, 15 Tex. at 254. The third Wheelock case is an appeal from Limestone County; the time and place of the incident are not reported. *See Wheelock III*, 15 Tex. at 260.

43. *Wheelock I*, 15 Tex. at 255.

44. *Id.* at 254.

45. *Wheelock II*, 15 Tex. at 258.

46. *Id.* at 257.

47. *Wheelock I*, 15 Tex. at 255-56.

48. *See Wheelock III*, 15 Tex. at 264.

49. *Id.* (emphasis added); *see also* Parker v. State, 26 Tex. 206 (1862) ("The object of the law is to prevent gaming at places which are within the observation of persons indiscriminately, because of the consequences resulting from the evil example.")

50. *See, e.g.*, Bythwood v. State, 20 Ala. 48 (1852); Bledsoe v. State, 21 Tex. 224 (1858).

hollow,[51] for a single act of gambling, the law had no quarrel with their pursuit—provided, of course, that they did not make a habit of it or invite the attention of others. "Public" gambling was defined in terms of the extent to which it set a bad example for others. Thus gambling could take place with impunity in an undoubtedly public building such as a jail-house, so long as people did not "resort there for ease or amusement."[52]

Some of the most interesting cases applying the public/private gambling distinction are those that involve gambling in places of work or rooms adjoining business offices. One can detect a certain class bias in these cases. After business hours, a physician's office was deemed not to be a public place within the Alabama gambling statute,[53] even if it adjoined a merchant's counting room.[54] Likewise, the offices of attorneys or court clerks could be used for gambling after hours, provided that appropriate measures were taken to prevent outsiders from entering.[55] Less elite places of business, however, such as those of barbers,[56] shoemakers,[57] toll-bridge keepers,[58] and dealers in liquor,[59] along with dry-goods "store-houses,"[60] were considered public and therefore fair targets for the gambling prohibition. Southern judges, it seems, were more likely to criminalize gambling in venues where neither they themselves nor their professional friends would ever gamble.

While drawing a line between public and private gaming, however, the judges were careful to make an exception for the public sport of horse racing, enjoyed by the Southern gentry.[61] Confronted, in the 1851 case of *Commonwealth v. Shelton*, with the conviction of several defendants for betting on a horse race, the General Court of Virginia took note of the fact that, in the century since the statute banning gambling was enacted, it had

---

51. *See, e.g.*, Smith v. State, 23 Ala. 39 (1852).

52. *See* State v. Alvey, 26 Tex. 156 (1861).

53. *See* Clarke v. State, 12 Ala. 492 (1847).

54. *See* Sherrod v. State, 25 Ala. 78 (1854). *But cf.* Reditt v. State, 17 Tex. 611 (1856) (holding that a place where medicines were kept was a storehouse under the Texas gambling statute and therefore public).

55. *See, e.g.*, McCauley v. State, 26 Ala. 135 (1855) (lawyer's office); Burdine v. State, 25 Ala. 60 (1854) (lawyer's office); Roquemore v. State, 19 Ala. 528, 531 (1851) (office of Register in Chancery). *But see* Smith v. State, 37 Ala. 472 (1861) (deeming a lawyer's office where business is transacted to be a "public house"); Burnett v. State, 30 Ala. 19 (1857) (holding the office of a justice of the peace to be a "public house").

56. *See* Moore v. State, 30 Ala. 550 (1857). The court remarks in passing that the shop was owned by "one Sandy Jones, a free man of color," who used the second floor for experiments in daguerreotype photography. *Id.* at 551. One suspects here the possibility of racial bias against the defendant.

57. *See* Campbell v. State, 17 Ala. 369 (1850).

58. *See* Arnold v. State, 29 Ala. 46 (1856).

59. *See* Johnson v. State, 19 Ala. 527 (1851).

60. *See* Skinner v. State, 30 Ala. 524 (1857). In Virginia, however, storehouses were considered to be private places by night. *See In re* Windsor, 31 Va. (4 Leigh) 680 (1833); Commonwealth v. Feazle, 49 Va. (8 Gratt.) 585 (1851).

61. *See* McElroy v. Carmichael, 6 Tex. 454 (1851); Commonwealth v. Shelton, 49 Va. (8 Gratt.) 592 (1851).

never been enforced against horse racing.[62] The language of the court is almost sentimental:

> No sport or pastime has, during all that time, been more favorably and extensively indulged by all ranks and professions of society in Virginia than horse racing. It seems to have been universally regarded as a licensed amusement to all classes; which none in former times more encouraged than those holding official stations, the obligations of which would have constrained them to have enforced the denunciations of the law against the amusements which they were patronising and enjoying, if the same had been illegal.[63]

Without more, the argument that betting on horse racing had never been punished under the century-old statute would have been enough to overturn the convictions. By explicitly referring to the participation of Virginia's elite citizens in the sport of horse racing, however, the *Shelton* court left no doubt that their personal biases influenced their holding that horse racing was excluded from the gambling statutes. Barring an unmistakable legislative act to the contrary, horse racing was too firmly embedded in the social framework of the South to be outlawed by judicial fiat. Similar concerns presumably motivated a Texas case that came to the same conclusion.[64] Thus, even as the Southern courts sought to draw a careful line between illegal public gambling and legal private gambling, their love for an indelible Southern tradition led them to tolerate gambling on horse races, a quintessentially public activity.

One could argue that *Shelton* and similar cases might have been decided the same way even if Southern judges had been less enamored of the practice of horse racing: deference to the presumed intention of the legislature need not imply agreement with its values. To be sure, some Southern judges were hostile to gambling in all its forms, whether elite or otherwise. In *Wheelock III*, the Texas Supreme Court expressed a wish that the legislature had banned gambling altogether.[65] On balance, however, the Southern courts were concerned not so much with private morality as with the maintenance of public order, and they construed the gambling statutes accordingly. This approach to statutory construction can be seen in another nineteenth-century context: the interpretation of state laws declaring futures contracts void as gambling wagers.

---

62. *See Shelton*, 49 Va. at 598-99.
63. *Id.* at 598.
64. *See McElroy*, 6 Tex. at 456.
65. *Wheelock III*, 15 Tex. at 264.

DISTINGUISHING THE SPECULATOR FROM THE GAMBLER: JUDICIAL INTERPRETATION OF NINETEENTH-CENTURY FUTURES CONTRACTS

To many Midwestern farmers in the nineteenth century, grain speculators looked like evil wizards or demons intent on driving agricultural prices down by trading imaginary bushels of wheat.[66] In turn, the Chicago Board of Trade sought to direct the farmers' anger against the activities of the bucket shops, characterized as pure gambling in contrast to the honest buying and selling on the Board of Trade.[67] The Illinois legislature responded first to the farmers' general outrage and then to the more specific complaints of the Board of Trade, banning all futures contracts in 1874[68] and legislating against the bucket shops in 1887.[69] Although the Illinois statutes were particularly important due to Chicago's status as the center of the grain futures trade, similar acts were adopted in many states.[70] Criminal statutes directed specifically at bucket shops do not seem to have been enforced with great success;[71] in any event, these statutes did not generate many appellate decisions.[72] By contrast, whether or not particular speculative transactions were void as gambling contracts was a question often treated in state appellate courts.

From the outset, courts emphasized that statutes banning gambling con-

---

66. *See* FABIAN, *supra* note 6, at 153-54 (quoting farmers who compared speculators to "devils" and described them as "'ghouls' who depressed the price of farm products"); *see also* LURIE, *supra* note 5, at 52-53 (describing farmers' objections to "the manipulation of prices by gamblers and speculators").

67. *See* FABIAN, *supra* note 6, at 188.

68. Noting:

> Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity . . . shall be fined not less than $10 nor more than $1000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

ILL. REV. STAT. ch. 38, § 131 (1874).

69. An Act to Suppress Bucket-Shops and Gambling in Stocks, Bonds, Petroleum, Cotton, Grain, Provisions or Other Produce, 1887 Ill. Laws 96 ("[I]t shall be unlawful . . . to keep or cause to be kept within this State any bucket-shop, office, store or other place wherein is conducted or permitted the pretended buying or selling of . . . produce, either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold . . . .").

70. *See* Note, *Legislation Affecting Commodity and Stock Exchanges*, 45 HARV. L. REV. 912, 917 (1932) (providing a comprehensive list of state statutes in force during the early years of the Great Depression). State bucket-shop statutes continued to be enacted in the early years of the twentieth century. *See, e.g.*, Act of June 1, 1907, 1907 Pa. Laws 359. State "bucket-shop" legislation is recognized as a prologue to the federal statutory regulation of futures contracts. *See, e.g.*, JERRY W. MARKHAM, THE HISTORY OF COMMODITY FUTURES TRADING AND ITS REGULATION 9-10 (1987). Plaintiffs who lost money speculating, however, did not have to wait for their state to pass such a statute to recover their losses. For centuries, the common law had allowed the recovery of gambling losses. *See* Act for the Better Preventing of Excessive and Deceitful Gaming, 1710, 9 Ann., c. 14, *cited in* DEVELOPMENT, *supra* note 14, at 15 n.37. The common law may not have been much use against keepers of faro banks like the Nacogdoches defendants, who presumably had their own methods of enforcing gambling debts, but it might have provided a useful cause of action in disputes with bucket shops.

71. *See* FABIAN, *supra* note 6, at 197-200.

72. Only four cases are listed under the relevant title in the Century Digest. *See* 24 CENTURY EDITION OF THE AMERICAN DIGEST § 189 (1901) (under heading of "Gaming" and subheading of "Keeping Bucket Shop").

tracts did not apply to cases where a party merely contracted to sell something that he did not currently possess.[73] According to the Illinois Supreme Court, for example, the statutory prohibition against gambling contracts applied to contracts "where neither party intends to perform them, but simply to cancel them before or at their maturity."[74] The supposed "intention" of the parties to deliver on the contract became the standard test in most states for whether the contract was enforceable or void as a gambling transaction.[75]

In the world of nineteenth-century commodities trading, the "intent to deliver" test devised by the courts was something of a farce. Although the rules of the Chicago Board of Trade required delivery, traders and merchants could easily "intend" delivery, form a contract, but then change their minds and reach a monetary settlement instead.[76] Actual delivery was effected in less than ten percent of the contracts made on the Board of Trade.[77] Instead, the parties often settled their accounts by "ringing" or "clearing the contracts," accounting methods whereby various transactions back and forth between parties, or in a complete circle from A to B to C and back to A, canceled each other out at the end of the trading day.[78] More complicated were so-called "hedging" transactions, when parties bought and sold commodities for future delivery in order to protect themselves against price fluctuations.[79] Few, if any, parties to such hedging contracts actually expected to deliver the products sold.

Nineteenth-century economists were aware that these practices, particularly hedging, brought benefits in the form of price equalization that eventually benefited everyone.[80] In applying their "intent to deliver" test, however, the courts retained the same moralistic language used earlier in the century to describe the "evils" of faro and public card-playing. Speculating in differences in market values was decried by an 1875 Illinois Supreme Court case as "inhibited by a sound public morality,"[81] and subsequent cases employed similar terminology. Options trading was deemed to

---

73. *See, e.g.*, Sanborn v. Benedict, 78 Ill. 309, 315 (1875) ("To say a man perpetrates a fraud by contracting to sell that which he has not in present possession, is saying too much, and, if admitted, would put a stop to much of the trade and commerce of the country."); *see also* Tenney v. Foote, 4 Ill. App. 594, 599 (1879) (defining an "option," void under the Illinois statute as a gambling transaction, as "a mere choice, right or privilege of selling or buying . . . as contradistinguished from an actual sale or purchase").

74. Lyon & Co. v. Culbertson, Blair & Co., 83 Ill. 33, 40 (1876).

75. *See* 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS §§ 1670, 1673 (1920); Edwin W. Patterson, *Hedging and Wagering on Produce Exchanges*, 40 YALE L.J. 843, 851-863 (1931).

76. *See* LURIE, *supra* note 5, at 61.

77. *See id.* at 59.

78. *See id.* at 60.

79. *See* Patterson, *supra* note 75, at 847.

80. *See, e.g.*, Albert C. Stevens, *Futures in the Wheat Market*, 2 Q.J. ECON. 37, 63 (1887).

81. Pickering v. Clark, 79 Ill. 330 (1875).

be a "pernicious" practice[82]: even if options contracts themselves were not per se immoral, "the evil [that] . . . grew out of such contracts . . . was most malignant."[83] In an 1879 case voiding an option contract, an Illinois appellate judge expressed the prevailing sentiment in his closing words: "Perceiving no reason why this species of gambling, though wearing the more respectable aspect of business, should be looked upon with any less disfavor by the courts than any other species, I am constrained by the facts of this case to sustain the defense."[84]

Such melodramatic language seems out of place to the modern reader, accustomed to view the regulation of prices through futures contracts as a necessary lubricant in the nation's economy. Many nineteenth-century judges, however, were not comfortable with the notion that anyone with money to spare could buy and sell fictitious quantities of grain, oil, and other commodities that they never intended to receive or deliver. The practice was viewed with particular disdain when ordinary citizens outside the financial elite attempted to play the investment game by buying and selling futures contracts, as exemplified in the Illinois case of *Colderwood v. McCrea*.[85] Holding that the plaintiff in error, John W. Colderwood, never intended certain grain that he purchased on the Board of Trade to be delivered, the court called attention to his financial condition:

> Here were purchases and sales which, if real and made with a bona fide intention and expectation that the property was to be actually delivered or received, would have necessitated the use of a large amount of capital. McCrea & Co. knew that Colderwood had no means other than a moderate salary. It is testified by Colderwood, and not denied by Young, that he repeatedly informed the latter as to his financial condition, and told him he had no business to gamble on the Board of Trade, and that Young coincided with him in thinking he would do well to keep away, that it was a dangerous place, etc. Is it within the range of probabilities that a man thus situated, with very small means, and engaged in a wholly dissimilar avocation, would go outside his ordinary business and contract for the purchase of half a million dollars worth of grain and pork, in the space of nine months, with any idea or expectation of receiving or paying for it on delivery?[86]

In the view of the court, men like Colderwood were not meant to waste time with futures investments that were at best a distraction from honest work and at worst potentially ruinous.

---

82. Lyon & Co. v. Culbertson, Blair & Co, 83 Ill. 33, 39 (1876).
83. Schneider v. Turner, 130 Ill. 42 (1890).
84. Tenney v. Foote, 4 Ill. App. 594, 601 (1879).
85. Colderwood v. McCrea, 11 Ill. App. 543 (1882).
86. *Id.* at 547.

Kirkpatrick v. Bonsall,[87] a Pennsylvania case, is a clear illustration of the concern with maintaining social order that may have motivated nineteenth-century judges in their application of the "intent to deliver" test. *Kirkpatrick* involved an 1870 futures contract to sell 5000 barrels of oil during the first six months of 1871 at a specified price.[88] While holding that the question of whether the agreement was a gambling contract should have been left to the jury, the court proceeded to engage in a lengthy discursus on the difference between gambling and speculation:

> We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words they think of and weigh, that is speculate upon, the probabilities of the coming market, and act upon this lookout into the future, in their business transactions; and in this they often exhibit high mental grasp, and great knowledge of business, and of the affairs of the world. . . . But when ventures are made upon the turn of prices alone, with no bonâ fide intent to deal in the article, but merely to risk the difference between the rise and fall of the price at a given time, the case is changed. . . . Then the bargain represents not a transfer of property, but a mere stake or wager upon its future price. The difference requires the ownership of only a few hundreds or thousands of dollars, while the capital to complete an entire purchase or sale may be hundreds of thousands or millions. Hence ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfil . . . . Such transactions are destructive of good morals and fair dealing, and of the best interests of the community. . . .
>
> These remarks perhaps contain nothing new, but they are made to show how a contract, legal on its face, may become an instrument of illegal and ruinous schemes, injurious to the community and contrary to the highest policy of the state.[89]

These remarks are revealing on at least two levels. First, the opinion is positively dripping with words of admiration for the intelligence and business acumen of financial speculators, among whose ranks the author of the opinion may have included himself. Second, the court views the involvement of less wealthy investors in the marketplace as a moral threat, not simply to the individual, but to "the best interests of the community." It is better for everyone if men of little means are kept out of the commodities market altogether.

Cases such as *Colderwood* and *Kirkpatrick* are exceptional in the extent

87. Kirkpatrick v. Bonsall, 72 Pa. 155 (1872).
88. *See id.* at 156.
89. *Id.* at 158-59.

to which they provide us with clues into the considerations that lurk beneath the surface in the courts' application of the "intent to deliver" rule and similar legal fictions. One can only presume, however, that the hundreds of less prolix nineteenth-century cases regarding commodity futures transactions were decided with similar concerns in mind. While theoretically invalidating all futures contracts lacking an intention to deliver, the nineteenth-century courts were more concerned to stamp out the investment activities of non-elite individuals, perceived as a moral and economic threat to the community.

Inevitably, potential competitors to the established exchange tried to wield the "bucket shop" statutes against the Board of Trade itself. In a case closely watched by the nation's business community, the U.S. Supreme Court was called upon to decide whether the Chicago Board of Trade constituted, as their opponents claimed, "the greatest of bucket shops,"[90] in which countless illegal gambling wagers on commodity prices in Illinois took place every day. Writing for the majority, Justice Oliver Wendell Holmes scoffed at the notion that the transactions of this "great market" could fall under the purview of an Illinois gambling statute:

> [T]he plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market, contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future, and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. . . . It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand . . . .
>
> . . . .
>
> . . . It seems to us an extraordinary and unlikely proposition that the dealings which give its character to the great market for future sales in this country are to be regarded as mere wagers or as 'pretended' buying or selling, without any intention of receiving and paying for the property bought, or of delivering the property sold, within the meaning of the Illinois act.[91]

As a result of Holmes's decision, the Chicago Board of Trade was able to enjoin "bucket shops" such as the Christie Grain and Stock Company from using its price quotations in their businesses.

---

90. Board of Trade of Chicago v. Christie Grain & Stock Co., 198 U.S. 236, 247 (1905).
91. *Id.* at 247-49.

The Court's opinion in *Christie Grain & Stock Co.* differs in many respects from the Southern gambling cases discussed above, such as the Texas Supreme Court's decision in *Crow*. First, Holmes, unlike Lipscomb, was far from using quotations from the Bible or other fonts of moral wisdom to support his case. In its callous description of the bitter fate of "weak" investors, *Christie* betrays the same social Darwinist spirit exemplified in Holmes's infamous opinion in *Buck v. Bell*.[92] Second, *Christie* constitutes the final stage in a complex civil dispute between two corporate entities, whereas *Crow* was a simple criminal appeal by an individual. Finally, *Christie* regarded a dispute in the business world of turn-of-the-century Chicago, while *Crow* was written in the slavery-based, agricultural society of Texas prior to the Civil War. The manifestations of the American experience reflected in these two cases are not easily comparable.

Despite these differences, however, a modern reader can come to the conclusion that Lipscomb and Holmes construed the respective state statutes narrowly in response to the same basic dilemma. Faced with uncomfortably broad anti-gambling statutes, both Lipscomb in *Crow* and Holmes in *Christie* refused to extend the scope of the prohibition to institutions that were evidently an entrenched part of the nation's social and economic fabric. One could expect state legislatures to ban the most nefarious magnets for gamblers, whether they were faro banks or bucket shops. But if the legislature intended to ban something long accepted by the state as a necessary evil—such as the ten-pin alley in *Crow* or the Board of Trade in *Christie*—a clear manifestation of such an intention was needed, which both courts found lacking in the respective state statutes. As Friedman has noted, it was the moral outlook of the "people who count" that mattered,[93] and ten-pin alleys and the Chicago Board of Trade did not offend the moral sensibilities of the elite. Gambling became a moral danger only when it was engaged in by those who could not afford to lose.

CONCLUSION

Here have been examined two major strands of nineteenth-century jurisprudence related to gambling: Southern cases defining public and private space for the purpose of state statutes and Northern cases applying the "intent to deliver" test to speculative contracts. The former cases are arguably of purely historical interest, while the latter strand of jurisprudence continued well into the twentieth century.[94] As has been argued, however,

---

92. "It is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." Buck v. Bell, 274 U.S. 200, 207 (1927) (citation omitted).

93. FRIEDMAN, *supra* note 8, at 125.

94. *See, e.g.*, Paine, Webber, Jackson, & Curtis, Inc. v. Lambert, 389 F. Supp. 417, 422-29 (E.D.

both kinds of cases reflect the basic Victorian compromise: A strong official stance against immoral behavior is conjoined with de facto acceptance of many questionable practices, provided that they are conducted in a manner that meets the approval of the elite.

The story of gambling and the law in the nineteenth century differs from other aspects of the Victorian compromise, such as the treatment of prostitution, adultery, and fornication. Whereas those activities were tolerated only so long as they were "driven underground,"[95] some forms of gambling were allowed to take place out in the open. Nothing was more public than the speculation on commodities that occurred on the Chicago Board of Trade or the horse racing that entertained the well-to-do in Virginia. Other forms of gambling, however, were tolerated in private but not in public, and a significant distinction was made between gambling by the elite and gambling by the working class. The law needed to protect working men and women from themselves.

A historian of the European legal tradition has called attention to "the question of how European merchants overcame the queasy conviction that markets were focuses of evil, and that it was dangerous to the soul to participate in ordinary commercial transactions."[96] In their references to options contracts as "pernicious," "malignant" phenomena, nineteenth-century American state cases discussing futures contracts still betray traces of this medieval view of commerce. One also finds in such cases, however, the beginnings of a different worldview, in which the speculator, with his "high mental grasp, and great knowledge of business, and of the affairs of the world,"[97] is a figure commanding the utmost respect. In the cases discussed above the tension between these two views was resolved, in a sense, by the Victorian compromise.

We can find much to dislike about the views of nineteenth-century jurists, whose opinions are often unabashedly elitist. There is something comforting, however, in reading cases decided in an age where the risky world of financial speculation was still regarded with a certain moral unease. The paternalistic approach of nineteenth-century jurists had its benefits, particularly for investors who lost their life's savings gambling on grain futures. In any case, those who wish to understand the history of financial regulation must understand this nineteenth-century moral perspective and the impact it had in the courts.

Tenn. 1975) (applying the intent to deliver test under Tennessee law to a commodity futures contract).

95. FRIEDMAN, *supra* note 8, at 127-32.

96. James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1888 (1996).

97. Kirkpatrick v. Bonsall, 72 Pa. 155 (1872).