Yale Law Journal

Volume 14
Issue 1 *Yale Law Journal*

Article 4

1904

GAMBLING AND COGNATE VICES

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Matthew Paris, the learned historian, writing in the reign of Henry III of England, said: "The case of the historical writers is hard, for if they tell the truth they provoke men, and if they write what is false they offend God."

Writers upon social evils, in this age, are in much the same plight. If they speak out bluntly, they are apt to be charged with encouraging vice; yet if they know the truth and do not express it, they are charlatans or demagogues.

So far as my observations are concerned, no public man or writer in the State of New York has ever ventured to treat the subject of gambling, keeping houses of prostitution and the Excise laws with intelligence, frankness and broadness. The politician, regardless of the inherent right or nature of the question, shapes his views to meet temporary conditions. The clergyman tunes his sermons in the impracticable key of absolute annihilation of these vices. The press is negative. The nature of these crimes seems to be totally misapprehended by legislators and officials who have to deal with them, and to be almost unknown by the general public. Hence the incalculable confusion in the law, the unconstitutional exercise of its processes, and a consequent failure to establish a fair equilibrium between these and other offenses; and what is worse than all, an increased growth of the evils which are sought to be removed.

To the legislator truly anxious for the welfare of the people, nothing offers more difficulty than the treatment of gambling, prostitution and the misuse of liquor. They are all vices inherent in the human system. In using the word "cognate" as applicable to prostitution, I do not mean to class that offense in the same moral category with that of gambling, or to break down the distinction between them. In its moral aspects it is one requiring another and far more delicate treatment. It is only that, like gambling, it is not and cannot be treated as *mala in se* in the legal sense, that I class it as cognate.

Two suggestions naturally occur to every reformer when he

approaches the subject: first, an absolute elimination of these evils from the habits of the people; or, second, such a control and subjection of them as will result in the least bad effects to the community from their pernicious influences. The former being vain to hope, all thought must be concentrated upon the latter problem.

A full knowledge of the inherent nature of these acts, and their relation to other crimes, is absolutely necessary to a correct solution of the question.

Gambling, prostitution and offenses growing out of the use of intoxicating liquors, are not crimes against nature, but offenses against society. They are not *mala in se*—wrong in themselves; but they have been declared crimes, like many other acts, because the predominating moral sense of the community, operating through the legislature, has condemned them as detrimental to its welfare; just as swearing, expectorating in certain public places, violation of building laws, etc., etc., are forbidden. Morality and ethics, although kindred sciences, are perfectly distinct from jurisprudence. The latter sometimes assists the former by embodying their principles in a prohibitory statute.

Gambling, the keeping of houses of ill fame and the violation of the Excise laws, are acts *mala prohibita* because of legislative prohibition.

Murder and theft are inherently criminal, because no organized society can exist where they are tolerated. Such acts produce anarchy, and they are, have been and always will be, condemned. They are acts *mala in se*—wrong in themselves.

Gambling and the regulation of the use of intoxicating liquors are created crimes, made by the legislature, and are punishable only because a statute ordains it. Even at common law the distinction between crimes *mala in se* and *mala prohibita* was regarded, and although the keeping of gambling houses was an indictable offense, this distinction was never lost sight of.

Murder is a crime repugnant to all natural conditions; gambling is an inherent human weakness. The first is denounced by God; the other by man. The punishment of the one is necessary to the preservation of human society. The other is a municipal regulation. Crimes *mala in se* imply guilt; those *mala prohibita*, misconduct. While they are both prohibited and punishable, the difference between them is wide and deep.

The distinction becomes clearer when these acts are considered separately.

No writer of merit and distinction, so far as my reading extends, has ever claimed that in the abstract it was immoral to bet. Lecky, whose rank as a scholar and moral philosopher is indisputable, says: "Gambling is not in itself a crime. Few moralists will pretend that a man is committing an immoral act if he stakes a few pence or shillings on a game of chance; or if, on the chance of obtaining an unusually large return, he invests a sum which he can well afford in some highly fluctuating security or in some undeveloped mine, or in some insurance or tontine investment." Jeremy Bentham, whom I may call the great legal diagnostician, advocates betting on certain lines. And wagers, in general, by the common law, were lawful contracts.

So far as the regulation of the subject of gambling has been guided by principle or rule, the view has been followed not to punish private or individual gambling, but to make professional gambling and the keeping of gambling houses or instruments of gambling, criminal. At common law the whole subject was treated under the head of public nuisances, being such inconvenient and troublesome offenses as annoy the whole community in general. And all disorderly inns or ale houses, bawdy houses, gambling houses, stage plays, unlicensed booths and stages for rope dancers, and the like, were public nuisances and indictable as such.

The principle underlying the punishment of these offenses was that they were flaunted in the face of the public and tainted the tastes, habits and morals of the people. The law seemed satisfied to shut them out from public gaze. But law is a potent factor, and by indirectly making them disgraceful it may have aided the public conscience.

The distinction between these several acts when conducted in private and when carried on as a business or profession in a way that would or might offend the eye, taste or sense of the community, runs through all intelligently-framed statutory law on these subjects. Even in the State of New York, where much blundering and ignorant legislation upon these subjects has been made, it can be traced.

To-day, in that State, it is not a crime for individuals to gamble. They can do so with perfect impunity. In fact, gambling for small sums seems to be expressly sanctioned, because if one wins or loses less than twenty-five dollars within

twenty-four hours, a recovery cannot be had, under Section 341 of the Penal Code, in a civil action for the benefit of the poor. If he loses or wins over twenty-five dollars within such period, he is liable to this penalty, but he commits no crime.

Honest gambling is, by the statutes of New York, enforced, and *cheating* frowned upon, for under the 339th Section of the Penal Code one *who, by fraud or false pretence, while playing at any game*, or while having a share in any wager played for, or while betting on the sides or hands of such a play, wins or acquires to himself, or to any other, a sum of money, or other valuable thing, is guilty of a misdemeanor.

Again, no law prevents a citizen from gambling in his own house. No officer can break into his castle to interfere with such an act, and no legislature would dare to make a law by which the privacy and sacredness of home life—domesticity—could be invaded. Such a license—for it would be nothing else—would put an end to the fundamental principles of social organization protecting personal security. Think as we may upon the subject, it is absolutely true that a man may gamble, get drunk or prostitute in his own house without liability to criminal prosecution; except in the case of rape or voluntary illicit connection with a female under eighteen years of age, or other specially prohibited crimes. Into his own home the law does not follow him; in that forum he is left to the rules of religion and conscience. But a citizen cannot commit a murder or robbery in his house; and this further illustrates the distinction between crimes *mala prohibita* and *mala in se*. It also illustrates a theory of criminal jurisprudence almost unknown or disregarded—that many acts committed in private are legally innocuous, which, when committed in public, become crimes.

That it is foolish for individuals to gamble who cannot afford to lose their money, goes without argument; and that public gambling should be checked by proper legislation is universally acknowledged. But it is a venial act, and it should be discriminatingly treated and mildly punished. It has existed from the beginning of the world, and, unhappily, will continue to exist. "Gaming is a principle in human nature. It belongs to us all," says Burke. It comes in cycles. Sometimes whole communities are immersed in it; at other times society is comparatively clear of the vice. Many who rail at it in public indulge in it in private. They play cards on Saturday night and listen to the pastor's fulminations against gambling, on Sunday morning.

The laws upon the subject of gambling in the State of New York are supremely inconsistent, and, as well from that cause as from the indulgences and habits of the people, are practically unenforceable. The Constitution of New York provides: "Nor shall any lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling hereafter be authorized or allowed within this State; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." Ask any member of the Constitutional Convention, at which this article was framed, for the history of its passage, and he will tell you that it was put forward as a mere piece of partisan bluff; each political party represented in the convention seeking to outdo its rival by a show of excessive virtue; and the gambling clause was cast forth without any particular advocacy of it by anybody and with no hope that it would be eventually adopted by the people.

Indeed, the provision should have found no place in the constitution at all, for the reason that a constitution of government is not a body of laws. To confuse them is to impair the authority of both. If that principle needed illustration, the selection of such a subject as gambling in any of its forms would conspicuously afford it. To the student of institutions it reads like a travesty.

One of the immediate results of its adoption was to force our Court of Appeals to uphold gambling on the race tracks, thus producing the paradoxical result of sustaining *public* betting and condemning *private* gambling in pool rooms.

Has gambling been eradicated by this constitutional bull? No. It has increased. Why? Because, apart from the distinction between gambling in private and gambling in public, the habit is practiced in a thousand multiplied forms in all branches of private and commercial life. How futile and vain laws against professional gambling are when great masses of the community, from morn to night, openly indulge in the vice. To attack and eradicate the disease, reformers must go below the skin—to the root of the malady; the people must be taught to feel and believe that all gambling is evil. This instruction cannot primarily be communicated by legislative mandate. The education against the vice must originate in the schools, temporal and religious, and in the churches—not in the halls of legislation. The pastors fulminate against the vice only after it is full grown. They do not seek to prevent its sowing in the habits of the people.

I have often said, and I never tire of repeating the thought, that a law passed in opposition to the real sentiments or habits of the people can never be effectually enforced. Such a mandate is a mere *brutum fulmen*, standing out in prominent mockery of the weakness of human legislation. But let me proceed a step further and unfold what the Legislature of the State of New York has from time to time enacted upon this subject. The laws are contained in Chapter IX of the Penal Code, from Section 336 to Section 352, inclusive. Section 724 is also an instructive law as keeping in force the crime of disorderly conduct heretofore referred to. A more incongruous body of statutes, when read in connection with the judicial utterances of our highest courts, can hardly be found in the records of legislation.

The Penal Code does not aim to stop gambling between individuals. That were impossible from the nature and organization of society, which guards the sacredness of domestic life, as I have attempted to show. Private gambling is, in fact, the rage. What lady or gentleman of fashion fails to make a bet at the race track? Indeed, it is quite *a la mode*, as testified to recently in a prominent case, for well-known business men to engage rooms at fashionable hotels for weekly or bi-weekly gambling seances. At the great foot ball and base ball games, the college students and their sweethearts openly stake their money upon their respective sides. With this great prevalence of the gambling habit, running through all the ramifications of life and business, the difference between the amateur and professional gambler becomes very slight—it is superficial rather than substantial. This fact cannot be lost sight of in making laws to suppress the vice, or in the government of metropolitan cities. The purpose of the New York Constitution and Penal Code is to close gambling houses and confiscate gambling implements. It goes no farther. It is no crime for an individual to visit a gambling house and bet. He cannot be indicted for such an act. But the proprietor, who affords the bettor the opportunity to wager, is subject to be adjudged a felon for furnishing the means and place. Of course, now that it has been attempted to compel bettors to be witnesses against the professional gambler (if that be a constitutional possibility), the bettor subjects himself to the humiliation and obloquy of making a public acknowledgment of his gambling proclivities; but that statute is an extreme one, of doubtful constitutionality, and of still more doubtful propriety.

The *piece de resistance*, however, of anti-gambling legislation, is contained in the 351st Section of the Code of Criminal Procedure. That is a species of net which drags in all of the acts covered by antecedent sections, and undertakes to make the crimes of pool-selling and book-making *felonies*. The modern distinction between misdemeanors and felonies in New York is that the former is punished by imprisonment in the penitentiary for one year or less, or a fine. After the imprisonment is over, the law is satisfied. A felony is totally different. The convict is consigned to a State prison. He is tatooed for life with the brand of crime. He can never vote—one of the most important attributes of citizenship—nor can he ever hold any office of trust or profit.

When the nature of the offense is considered, and when the crime of keeping a gambling house is compared with other crimes more heinous, the punishment and degradation attending the former is out of all proportion—it throws the necessary grades and balances of crimes and punishment into complete disorder.

For example, at the most drastic period of the English common law—when one hundred and sixty offenses were punished capitally, and when one who broke down the mound of a fish pond or cut down a cherry tree in an orchard was guilty of felony, and punished by hanging—the keeping of gambling houses or of being a professional gambler were misdemeanors, and the offenders regarded merely as disorderly persons, or guilty of disorderly conduct.

The punishment for gambling, under this 351st Section of the Penal Code, is more severe than that provided for offenses of greater moral dereliction and public wrong, such as "embracery" (Sec. 75, Penal Code), "conspiring to commit a crime" (Sec. 168, Penal Code), "indecent exposure" (Sec. 316, Penal Code), "petit larceny" (Sec. 535, Penal Code), which are misdemeanors.

To sum up, gambling, amateur or professional, public or private, thrives because the laws are unnaturally harsh, confused and conflicting, and convictions cannot be obtained against technical defenses skilfully pleaded. But soaring far above all of these considerations is the impressive fact that this vice is deeply intrenched in the habits of the people. Now and then some Chivalric Knight, like District Attorney Jerome, will leap into the arena and begin a fruitless and expensive campaign for the total extinction of all vices; but after he is

fatigued, or becomes *functus officio*, or the people tire of the subject, they will still be found to exist.

Nothing in the history of modern legal reform has been found, in the treatment of the acts of gambling, prostitution and the illegal sale of intoxicating liquors, more efficacious than the remedies of the old common law. The mischief sought to be remedied was not to sanction any of these acts, but to sternly keep them from public view. The persons guilty of committing these offenses were justly characterized as disorderly persons and persons guilty of disorderly conduct, and punished as misdemeanants.

For a variety of reasons, some of which I have alluded to, it is impossible to enforce the present criminal law of New York relative to these offenses. Yet I do not for one moment advocate that the reformer should abate his ardor and determination to suppress them. Laws against the non-observance of the Sabbath, swearing, gambling, prostitution, breach of the Excise laws, while not always enforceable, are of value as evidencing the moral sense of the community upon these subjects, and they operate as powerful deterrents to the commission of these acts. Contrasting, in this connection, the number of individuals who break the laws upon these subjects, with the great mass of those who do not, the result is far from unsatisfactory. The main purpose of all laws, however, against these social evils, must be primarily aimed to keep gambling, prostitution and the illegal use of liquors from the public gaze. The example corrupts the manners, habits and tastes of the people. It is perfectly practicable, in my judgment, to make and enforce laws whose effect will be to drive these vices behind sealed doors and windows. We can suspect that an evil exists, but as long as it is not seen, as long as it is frowned upon by the statutes, and condemned by the highest moral sense of the community, as long as it must be practiced surreptitiously and in private and involves moral obliquity, it must be assumed to be well under control. In the meantime, as a handmaid to modern repressive legislation, let the batteries of morality, ethics and religion keep up an incessant fire against these habits; let the eloquence of the lecture platform, the Pulpit and the Press be used to inculcate abstinence among the masses.

With reasonable and moderate laws, executed with certainty and promptness, restraining public gambling and immorality, and with a full performance by the Press, Pulpit and Platform, of their respective duties, society does all it can to restrain and

to uproot these evils. What we may wish is one thing; what is attainable is quite a different affair. There is no solid bridge which may be built from a hope to a realization in the efforts to suppress vices inherent in the human flesh.

Without attacking, or even questioning, the motives of the police, or of a well-known public prosecutor, I venture to assert that the raids which have been made upon pool and gambling rooms, without any previous real complaints, have been wholly inefficacious and generally illegal. Being inconsistent with the spirit, if not always with the letter, of legal liberty, they introduce an evil quite as great as that which they seek to suppress. Some of these transactions, as they are carried out, provoke instinctively shame and disgust. A sentiment of révolt against law is not the best means of securing its administration. To be effective, the administration of criminal law must be put into operation by a real and *bona fide* complainant, who has suffered from the effects of gambling or other vices. Attacks upon vices made by voluntary societies or by officials of their own volition without previous genuine acts and formal complaints, are apt to be inspired by a mistaken view of official duty or false sentiment, and sometimes, unfortunately, by political ambition, and they rarely accomplish any good result. Stimulated by a thorough misapprehension of the general subject, they are consequently abortive. John Doe and Richard Roe were fictitious characters known to the civil law only. Their introduction into criminal law is altogether anomalous. The District Attorney and the grand juries can carry on the most sweeping investigation in their own way, but when a complaint is made and a warrant is issued, there must be a real complainant behind the charge, or mischief to the administration of the law will ensue.

It seems to me, in conclusion, that so far, at least, as the State of New York is concerned, the subjects discussed must be taken up by the Legislature *de novo*. Instead of involved sentences, intelligible to those who pen them, but obscure and ambiguous to those whose duty it is to subsequently interpret them, these acts can be classified under the head of disorderly conduct or disorderly offenses, as they existed at common law. If the Legislature should, preparatory to a new statute, deem it necessary to have full information and statistics, it can appoint a commission to report upon the general subject. Wise legislation in the great State of New York will be in the interest of the general community, and will no doubt be quickly followed by other States.

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