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Gambling and the Law®: 19th Century Games, 21st Century Players

Can an industry built around 19th Century games evolve to attract 21st Century players?

Almost all of the most important forms of gambling were invented in the 1800s, or even earlier.

Lotteries were very big in England in the late 1700s. In fact, they were used to raise money to help the loyalists who had sided with the King during the unpleasantness we call the American Revolution.

The oldest game is probably Keno. It is derived from Pok Kop Piu, the White Pigeon Ticket, which is at least 2,000 years old. It is possible that it may be far older, since a version originated in China during the Han Dynasty 3,000 years old.

Casinos, outside of Asia, make most of their gaming revenue from slot machines. It is generally agreed that the first slots were invented in the 1890s. Charles August Fey, a San Francisco mechanic, unveiled his three-reel Liberty Bell in 1896. Whether or not Fey deserves the credit for the modern slot machine, there is no doubt that San Francisco quickly became the center for manufacturing the new gaming devices. Slot machines became so connected with the City by the Bay that they were popularly called “Californians,” at least until the factories were devastated by the great 1906 earthquake and fire.

So, the mechanical heart of 21st century land-based casinos is a device developed when society and technology were radically different from today. Fey used the now well-known symbols of cherries and bells because so few people in the 19th Century could read or write.

Blackjack, until recently, generated the most revenue for casino table games in U.S. casinos.¹ The game, then known as Vingt-et-Un, French for “21,” was popular in European casinos in the 1700s. But the game may be even older. According to Wikipedia, “The first written reference is found in a book by the Spanish author Miguel de Cervantes, most famous for writing Don Quixote.” Cervantes, himself a gambler, wrote about a couple who were experts at cheating at Ventiuna, Spanish for “21.” “The

¹ Due to the influx of high-rollers from China, Baccarat now generates more income for casinos in Las Vegas than does Blackjack.

short story was written between 1601 and 1602, implying that Ventiuna was played in Castilla since the beginning of the 17th century or earlier.”²

In Macau and Singapore, the most profitable game is Baccarat. James Bond may have played it in Ian Fleming’s 1953 book, *CASINO ROYALE*. But the game and its revolving deal counterpart, Chemin de Fer, is at least 100 years older. Often spelled Baccara, the banking game was popular in the legal and illegal casinos of France, England and the U.S. that catered to upperclass gamblers in the 1800s.

The number nine has special significance in China, having been associated with the Emperor. So games built around the number, like Baccarat and its predecessor Pai Gow (“make nine”), still played in card clubs in California, are popular with Chinese gamblers. After all, you cannot have more luck or success than being the Emperor.

Blackjack and Baccarat came together in the 19th Century in a game with the intriguing name “Macao.” Players are dealt only one card. As with Baccarat, tens and face cards count zero, aces are always one and the object is to get closer to nine than your opponents. But as with Blackjack, naturals are paid bonuses, players can draw as many cards as they want, but they lose if they go over – in this case – nine.

The other casino games are equally as old. As shown by its name, Roulette came from France. The “little wheel” became popular in the 1790s. The only significant difference from today’s game is that the zero and double-zero were red and black; they were made green in the early 1800s.

The history of Craps is not as well-settled. This is in part because it was a game played more in back alleys and below decks by blacks than by whites in fancy salons. Craps has also been associated with soldiers: One version has it invented during the Crusades in the 12th Century; its modern popularity arose from dice sent to enlisted men in World War II. Whatever the connection with the ancient game of Hazard, there is no dispute that John H. Winn, a dice-maker, created the modern game and layout. Winn is known as the father of casino craps because he developed the idea of making the dice game into a banking and percentage game, including giving players the option of betting against the shooter. This was in 1907.

Versions of Poker were played as early as the 1820s. Players were dealt five cards face down and made their bets. Gambling games developed during wars, when young men sat around together for long periods of time. So, it appears that the idea of being able to replace cards, Draw Poker, and having some cards face up, Stud Poker, became popular during the Civil War. Seven-Card Stud spread during World War I. So did community card games, primarily Spit In The Ocean, which evolved a couple of decades later into Texas Hold ‘Em.

² <http://en.wikipedia.org/wiki/Blackjack>.

Baccarat, Fan Tan, Wheel of Fortune, Chuck-A-Luck and other casino games have equally long histories. I have a rule book from 1897 that lists Baccara; Chemin de Fer; Chuck-Luck; Craps; Draw Poker; Chinese Fan Tan, to distinguish it from the card game Fan Tan; Keno, also known as Lotto; Macao; Rouge et Noir, also known as Trente et Quarante, still played in casinos in South America; Roulette; Stud Poker; Vingt-et-Un; and, of course the most popular banking game of the era, now gone, Faro.³

But you don't have to haunt used and antique book stores to confirm what the Internet tells you were the most popular gambling games of the 19th Century. Just look at old criminal statutes.

Changes in the law follow changes in society. The law is reactive, not proactive. Legislators do not sit around debating what to do if, say, the Internet is invented. Instead they react to situations brought to their attention, often by stories in the media.

Horse-racing, for example, has been around forever. But the invention of the telegraph and parimutuel machine, in the mid and late 19th century, allowed poorer people to bet on contests. They did not even have to be present at the track: "pool rooms" – today we would call them off-track betting parlors – sprang up in cities. So state legislatures started passing anti-bookmaking laws.

The same is true of dog racing, which also started in the 19th century. There was not much concern, because the straight tracks and use of live rabbits as lures turned off most bettors. Owen Patrick Smith, known as O.P. Smith, developed the circular track and mechanical bunnies in 1912. He opened the first professional dog-racing track with stands like in horseracing in 1919. Society's views toward animals, including greyhounds, became more compassionate, resulting in the sport being greatly restricted or, usually, outlawed.

Ancient Romans bet on their favorite gladiators. Tour guides at the Colosseum in Rome point out that gladiators were athletes, whose training cost their owners a lot of time and money. So they usually did not fight to the death, despite what you see in movies.

Sports Betting was popular in the U.S. in the 19th Century, once the games of baseball, basketball and American-style football got uniform rules and professional players. The rising popularity of betting on games like baseball, called "the national pastime," can be seen in the infamous "Black Sox" scandal. Gamblers, in particular Arnold Rothstein, bribed members of Chicago's White Sox team to throw the 1919 World Series.

One form of parimutuel betting popular in the 1800s was Auction Pool, also call Calcutta Auctions, Calcutta Pools or simply Calcuttas. Although today most commonly

³ Foster, R. F., FOSTER'S COMPLETE HOYLE: AN ENCYCLOPEDIA OF ALL THE INDOOR GAMES PLAYED AT THE PRESENT DAY (Frederick A. Stokes Company 1897).

found associated with the game of golf, legal Calcuttas on other sports events can still be found in Alaska, North Dakota and Wyoming.⁴

You know your business needs to be updated when the most modern product you have may be Bingo. Bingo developed out of the 200 year old parlor board game of lotto. The artist Charles Joshua Chaplin captured this early version of bingo in his mid-19th century painting "le jeu de lotto". The painting shows cards divided into rows and columns, with three down and nine across and blacked out free spaces; the same as in England today. An entrepreneur, Edwin Lowe, is credited with inventing the modern American version of bingo – a five-by-five card with one center free space – in 1929. The game was originally played on hard cards, and players used beans to cover the numbers as they were called. In Massachusetts, Bingo is still referred to as Beano in state statutes.⁵

It is easy to see what games were being played in casinos in the 19th Century, by looking at the statutes passed to outlaw them. California Penal Code § 330 is typical of the criminal codes of the era:

Every person who deals, plays, or carries on . . . any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value . . . is guilty of a misdemeanor . . .

It was virtually the universally accepted practice to list the games that were prohibited. In fact, the anti-gambling statutes of states such as Oregon, Oklahoma, Texas, and Arkansas contained lists of prohibited games that were almost word for word identical to the California statute. The city of Portland, Oregon, for example, made it a crime to play "faro, monte, roulette, rouge-et-noir, rondo, twenty-one, poker, draw poker, bluff, brag, tantan or fan-tan, for or with anything of value."⁶

Lawmakers felt it was necessary to specifically enumerate the games that were to be outlawed. This tradition derives from the common law restriction laid down in the *Case of Monopolies* in 1603, which prevented courts from defining illegal games independent of statute.⁷ As can be seen by the inclusion of "any banking or percentage game" along with the list of specific games, the change to prohibiting games broadly by type took many decades to be generally accepted.

⁴ Alaska Stat. § 05.15.180, NDCC, 53-06.1-03(1), WY ST § 6-7-101(a).

⁵ See, e.g., M.G.L.A. 10 § 38.

⁶ Ordinance number 3,911, passed 1883, quoted in *In re Lee Tong*, 18 F. 253, 254 (D.Ore. 1883).

⁷ Law Enforcement Assistance Administration, United States Department of Justice, *THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976*, at 8.

So, what does it mean for the gaming industry of the 21st Century, that it is selling products that are 200 hundred years old? Maybe nothing, or everything. Something like telephones survive, and a website ad may say, "Dial this number," even though phones no longer have dials. But, although automobiles still sell their "horsepower," the manufacturers of buggy whips are few and far between.

The bad news for the casino industry is that Millennials hate slot machines. Americans in their 20s or 30s do not even carry enough cash to pay for their, admittedly overpriced, Starbucks® coffee. When you ask them where they would get the money to play a slot machine, the answer you get is, "Why would I want to play a slot machine? They're stupid."

And to people who have always carried the best games ever invented in their pockets, they may be right.

Of course, things could always be worse. As one state lottery executive recently told me, the only thing Millennials hate worse than slot machines is traditional lottery games.

The good news for casinos is that older patrons, who do like traditional casino games, are living longer.

There are also regional differences. Gamblers from Mainland China still like Baccarat, which might qualify as the world's dumbest casino game. The mystical number nine is involved. Plus, many Chinese gamblers actually think there is something akin to skill involved. Why "squeeze" the cards, that is, bend the corner and turn it over slowly? It is not just to prolong the excitement of gambling. Many actually believe they can change the number of a card that has already been dealt.

Gamblers from China are also being introduced, for the first time, to slot machines. So, they like them. For now.

The two major changes facing the gaming industry in the 21st Century are social and technological. It is hard to imagine that, in 1961, when the federal Wire Act⁸ was passed to help the states enforce their public policies toward gambling, there were no state lotteries and the only state with casinos was Nevada. It is rare to see the majority of a society change their attitudes toward something as universal as gambling, and the law struggling to keep up.

Technology is also forcing change. But it is here where the gaming industry faces its greatest challenges.

The most important developments for legal gambling have been the computer and video screen, tied in with improvements in communication. Every game, in fact, every

⁸ 18 U.S.C. § 1084.

form of gambling, can now be played on a machine. But that does not mean that gamblers will play them.

The slot machine evolved from the purely mechanical, to electro-mechanical, to server-based and other pure computerized versions. But the games remained overwhelmingly the same. Instead of three mechanical spinning reels, the vast majority of slot machines have five simulated spinning reels, usually with large “Q”s and “K”s, in homage to video poker. More interesting variations have been tried, but they have not been widely successful. Perhaps that is because slot machines are primarily played by people, more women than men, over 40, who don’t want to have to learn new, complicated games.

Internet casinos naturally started with simulations of the games being offered in their brick and mortar counterparts. But Internet poker in Nevada has been a failure, as have the wider range of casino games available online in New Jersey and Delaware.

The major question for online gaming, and eventually for landbased casinos, is whether the problems with introducing remote wagering are procedural or substantive. Nevada’s regulatory system, which worked for brick and mortar casinos, is too slow and expensive for the Internet.

England had already proved this. The idea was that operators would leave their current jurisdictions for the prestige of having a license from the United Kingdom. But operators realized that players did not care; the cost, and U.K. taxes, were higher than in other licensing nations; and, the English system was too strict. The last is the most scary. Legitimate operators were afraid that they would be refused a license by the U.K. This would put all their other licenses in jeopardy.

We know that legal gambling requires strict licensing. But, for the first time, an operator can choose which state or nation to call its official home. It can then take, often legally, players from many other jurisdictions. This poses a risk of a race to the bottom, with the regulator who is cheapest and easiest giving out the most licenses.

Even more fundamental is the question of whether these 19th Century games will succeed in direct competition with their 21st Century competitors. So far, the answer appears to be no. Games like Angry Birds® and Candy Crush® not only have hundreds of millions more players. Even though technically not gambling, they make hundreds of millions more dollars.

Ironically, it is the oldest legal gambling operations that are going to be the first to break out of the trap of offering the same games in cyberspace that worked for decades in the real world. State lotteries know that their younger potential patrons do not want to merely pick numbers and wait hours or days to find out whether they have won. The Christmas Present of the Obama Administration’s Department of Justice declared that the Wire Act is limited to sports events, opening the door to all other forms of in-state

Internet gambling.⁹ Six states were already selling lottery ticket subscriptions online. They, and at least an equal number more, had statutory authorization allowing them to sell individual tickets over the Internet. Some, like the Minnesota Lottery's eScratch Games, have made instant winner games available anywhere at any time. The next step is taking games like Candy Crush® and turning it into true gambling.

The challenge for the rest of the gaming industry, and its suppliers, but especially its regulators, is how to do the same thing with parimutuel betting, bingo and casinos.

The quant games of Macao and Faro have disappeared. To find out what they are, we have to search for them online. Our great-grandchildren will be looking up Blackjack, Craps and Roulette, on whatever comes after the Internet, because those, too, will no longer exist.

Will they also have to look up "Las Vegas casino"?

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⁹ See, Rose, I. Nelson, "Gambling and the Law®: The Future of Internet Gambling," *Gaming Law Review and Economics*, Vol. 18, No. 8 at p. 788 (October 2014).