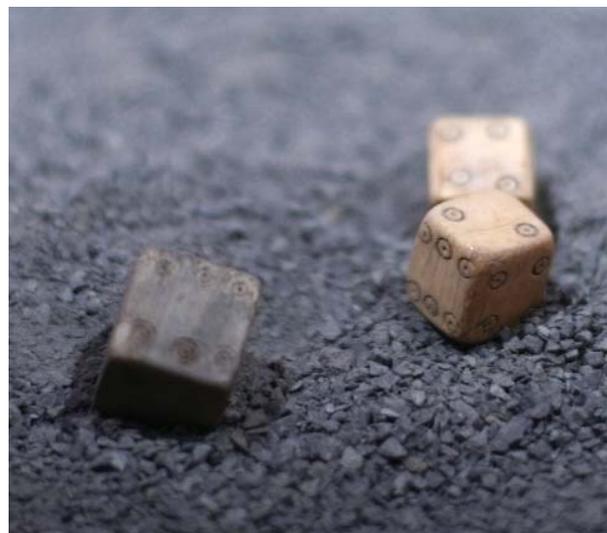


BACKWARDS OR FORWARDS? GAMBLING REGULATION IN HISTORICAL PERSPECTIVE

BY JULIAN HARRIS

In the first of two articles examining the historical context of gambling in the UK, the emergence of organised gambling – especially the 'gaming houses' of the 18th century – and efforts of the state to guard the population against perceived vices and excesses, are given their due place. From Edmund Burke, Napoleon and Wellington to the Royal Commission and the Budd Report, the legitimacy of gaming increasingly emerged. The proliferation of uncontrolled gambling between 1960 and 1968 led to tough Government regulation that forms the bedrock of a responsible and efficient industry noted for its quality and probity today.

Philosopher Edmund Burke, in a speech in the House of Commons in 1780, declared: "Gambling is a principle inherent in nature". It would be difficult to argue otherwise. The dice that we know today were used for gaming by the ancient Egyptians and the Romans. In 1500 BC the Chinese played a form of roulette with spinning discs, and were playing card games as early as the twelfth century. Even Leonardo da Vinci had a rather unsuccessful attempt at developing a gambling machine. Nation states have long seen the possibilities of using lotteries to raise money. The first such example in Britain was when Queen Elizabeth I approved the first lottery in 1588 in order to raise funds to repair the Cinque Ports, the principal defence towns on the South Coast.



But human attitudes to gambling have always been contradictory, as with attitudes to other pleasures, or vices, depending on your point of view. In his *The Last Essays of Elia* (1832), Charles Lamb wrote that "a number of moralists condemn lotteries and refuse to see anything noble in the passion of the ordinary gambler. They judge gambling as some atheists judge religion, by its excesses," and the course of history is littered, as are nineteenth century novels, with examples of those who gamble to excess, sometimes to the point of financial ruin. John Montague, the Fourth Earl of Sandwich (1718-1792), was a hardened gambler and gambled for hours at a time at the Beef Stake Club, sometimes refusing to get up even for meals. It was said that he invented the sandwich, by ordering his valet to bring him meat between two pieces of bread, causing others to order "the same as Sandwich". The famous leader and foreign secretary Charles James Fox was introduced to gambling by his father, Lord Holland, at an early age, and is widely credited with turning Eaton College into a renowned gambling den during his school days.

The eighteenth century in particular saw a boom in gambling, and the development of "gaming houses", generally in taverns, coffee houses and gentlemen's clubs. The first half of the century saw the first attempt by the State to control gambling by legislation, with Queen Anne's Act of 1710 which sought to outlaw the lending of money for the purpose of gambling, and George II's Act of 1745, which prevented the recovery of gambling debts.

By the early years of the nineteenth century, gambling was becoming more organised, and the first recognisable casinos were developed. It is a little known fact that, aside from political enmity and military prowess, those two giants of the age in Europe – the Duke of Wellington and Emperor Napoleon both shared a love of gambling, though Wellington's game was hazard, whilst Napoleons was vingt-et-un. It was Napoleon who first legalised gambling in France in 1806, and reinstated the Redoute Casino, possibly the world's first, in Liège. When William Crockford opened the first purpose built casino in London at 50 St James, it was the Duke of Wellington who became the first Chairman in 1827. William Crockford retired in 1840 with about £1,200,000, a staggering amount of money for those times [over £40 million today].

Aside from the ability of the upper classes to indulge in their favourite games in private, before 1960 a mix of severe restrictions and outright bans, for example on roulette, existed on most forms of commercial gambling.

As with so much legislation relating to social or moral issues, legislation relating to gambling has often sought to reflect the mores of the times. Victorian legislators sought to protect the public from many of the vices by which those who have to work for a living could be corrupted, including gambling as well as drink. The legislation was however

piecemeal, and certainly by the first half of the twentieth century, was complicated and difficult to understand. Horseracing had been given the royal seal of approval by King Edward VII at the beginning of the century; so on-course betting was permitted, whilst all betting off-course was prohibited.

Whilst gaming was not in itself illegal, there was a risk of illegality where chance played a part. However, when the first Royal Commission of 1949/1951 reported, there were no casinos and the law, whilst complicated, in effect prohibited all commercial gaming of any significance. As the Commission put it: "Anyone who plays, elsewhere than in a private house, any gaming in which there is an element of chance for money or money's worth runs a grave risk of committing a penal offence. Indeed there are certain games, such as roulette, which it is illegal to play even in a private house.....".

In some ways the Commission was forward thinking; it concluded that the law relating to betting, lotteries and gaming was obscure, illogical and difficult to enforce. It recommended a need for simplification and clarification of a code. It found no support for the belief that gambling, within "reasonable bounds" does serious harm either to the character of those who take part in it, or to the community generally. Because expenditure on it represented not more than one percent of personal expenditure and the 100,000 people engaged in the industry represented less than one percent of the number of people employed, the economic effects were unimportant.

The Royal Commission also concluded that legislation should interfere as little as possible with individual liberty to take part in the various forms of gambling, but should impose restrictions to discourage and prevent excess. As their report put it: "Gambling as a factor in the economic life of the country, or as a cause of crime is of little significance, and its effects on social behaviour, insofar as they are a suitable object for legislation, are in the great majority of cases less important than has been suggested".

Although the Royal Commission did not actually propose the introduction of commercial gaming, it recognised the need for such facilities to be available in clubs and for legislation to permit the making of charges for the right to take part, provided that the amount of those charges was no more than would be reasonably required to meet the actual cost of the facilities provided.

Unfortunately, the 1960 Act went further than the Commission's recommendations, in allowing a fixed charge to be made in advance to members of a club to participate in gaming. The Act applied to proprietary clubs as well as members clubs, and led directly to the emergence during the 1960s of commercial gaming. This can be attributed to the fact that there was no requirement that the amount of the charge should be limited to the true cost of providing the

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facilities, nor was the right to charge limited to members' clubs. It was this, and the ingenuity of commercial operators in devising arrangements facilitating the playing of unequal chance games on an apparently equal chance basis that led to commercial gaming on a huge and unforeseen scale.

These clubs began to provide casino games with charges for each shoe of chemin-de-fer games, and introduced variations of roulette, blackjack and dice to make these normally equal chance (and therefore lawful) "unequal chance games," and therefore run profitable games for the casinos. Sessional charges were made for each spin of a roulette wheel and the bank was "offered" to players. These and other devices to make commercial casinos profitable were regularly challenged by the Police. The casinos in turn appealed each decision, in some cases as far as the House of Lords. Some arrangements were found to be legal, some illegal.

The consequence was that the 1968 Act was difficult to enforce. In addition, because the creation of a commercial gaming industry had not been foreseen, no restrictions had been placed on it: there were no restrictions on advertising; the Police had no right of entry to the clubs; there was no regulator, and such checks as the Police sought to apply through criminal proceedings were slow. Gaming promoters were able to stay one jump ahead of the law by switching the basis on which they operated. At the same time casino proprietors enlarged their clientele through the provision of cabaret, dancing and entertainment. Whilst the 1960 Act may have failed to achieve its object, in that it created the conditions for the proliferation of commercial gaming, at least it had the socially desirable effect of creating such an industry openly, where everybody could see what was happening, rather than surreptitiously. This led to the sensible realisation that suppression was neither practical, nor desirable.

By the mid 1960s, commercial gaming was out of control. There were more than 1,000 casinos operating in the UK (compared with approximately 160 today), unscrupulous operators were taking advantage of customers, and criminal involvement in gambling was rife. In 1962, the then Colony Club in Berkeley Square was closed down and its proprietor, the famous American movie actor George Raft, famous for his gangster roles both on screen and in reality, given his connections to the Mafia, was deported. Something had to be done.

GAMING ACT 1968

In 1968 the Government wisely concluded that there was no possibility of suppressing commercial gaming, and instead sought to bring it under strict controls. This is a lesson which the US Government could perhaps usefully learn in relation to online gambling. The philosophy of the 1968 Act was that commercial gaming facilities could be provided "under appropriate supervision, but only on the scale needed to meet the unstimulated demand for them". The principle upon which the Act was to proceed was that "no one can claim a right to provide commercial gaming; it is a privilege to be conceded subject to the most searching scrutiny and only in response to public demand". The purpose of the controls was threefold:

1. To purge commercial gaming of its criminal elements;
2. To cut out excessive profits; and
3. To ensure that gaming is honestly conducted in decent surroundings.

Beyond that the intention underlying the Act was to reduce *drastically* the number of commercial clubs providing games other than bingo, to restrict bingo to a neighbourly form of gaming for modest prizes and to check the proliferation of gaming machines.

In 1968 Parliament rightly concluded that the effect of suppression would only be to drive gaming activity underground and "into the hands of crooks and racketeers". It was to be treated as a vice which could not be prevented, and which would therefore be allowed, but subject to significant and stringent control from the Courts, the Gaming Board, the local licensing authorities and the Secretary of State. As such, the 1968 Act was remarkably successful, with the number of casinos being reduced at a stroke from over 1,000 to 115 (of which 20 were in London). This was partly achieved by limiting casinos to certain geographical areas, on the recommendation of the new Gaming Board.

The historical perspective of gaming in the UK, and in particular the uncontrolled explosion of commercial gaming between 1960 and 1968, explain why Parliament created such a strict regulatory framework based on the principle that a licence is a privilege and not a right, and placing such emphasis on the importance of satisfying only "unstimulated demand".

I mentioned earlier that in some ways the first Royal Commission was far-sighted in its attitude in 1951, in seeing only a need to have restrictions to prevent excessive gambling. The free for all of the 1960s, unwittingly created by the 1960 Act, convinced Parliament that this libertarian approach would not work, and a much stricter regime was imposed than might otherwise have been the case.

The industry that the 1968 Act created has been highly regulated, responsible and efficient. It enjoys a worldwide reputation for quality and probity, now operated mainly by public companies with a large proportion of institutional shareholders. The tight regulatory framework intentionally stifles and prohibits most of the normal forms of competition, and in the process created a controlled and protected market for certified staff and licensed operators.

DEREGULATION

Successful though the 1968 Gaming Act was, it reflected the circumstances of the 1960s, and by the late 1980s had become out of date. In 1978 the Rothschild Commission Report summarised its philosophy in regard to gambling as being: "To interfere as little as possible with individual liberty to take part in the various forms of gambling".

That Commission recommended 46 proposals for change, but no legislative time was ever found to implement them. By 1990 there were numerous towns and cities where casinos were not permitted, but which had grown to an extent that they could justify licences on population and minimum travelling time criteria. The prohibition on advertising prevented even listings in trade and telephone directories was anachronistic, as was the rule that no one could enter a casino without a "cooling off" period of 48 hours. It was ironic that legislation supposedly motivated by a desire to protect citizens from themselves, in London at least mainly constrained foreign tourists and business visitors. No other country applied such a restriction.

Under pressure from the industry, the Home Office, still then responsible for gambling matters, produced a Consultation Paper for limited reform in February 1996.

These proposals were for limited deregulation: for example a reduction in the 48 hour rule to a 24 hour rule, some relaxation of the ban on advertising and an increase in the number of permitted areas, whilst retaining the demand criterion. This was not to be wholesale reform, but some liberalisation of the existing regime. The Conservative Government that proposed it lost the election the following year and the proposals were therefore shelved, until the new Labour Government introduced the next important stage of gambling reform, which promised so much, but in the end delivered so little.

THE PROMISE OF BUDD

In the beginning there was Sir Alan Budd. By the late 1990s, it was universally acknowledged that gambling law, and in particular the Gaming Act 1968, was outdated and overdue for reform. Apart from the anachronistic restrictions governing the operation of casinos, such as their inability to advertise, perhaps the most glaring was the inability of the legislation to recognise technological developments since 1968, such as the advent of the internet and automated gaming devices. Aside from the industry itself, even the regulator, the Gaming Board, and the biggest gambling charity, GamCare, agreed that the industry should be freed from the shackles binding it to a past age, to enable competition between operators within the industry and with other leisure facilities. The demand criterion had achieved the objectives of preventing proliferation and unfair competition, but it also served as an enormous barrier to entry, and kept the industry within a small group of operators.

More practically, social mores have changed: gambling was no longer regarded as a vice which had to be licensed and controlled only because it could not be suppressed, but as a perfectly proper adult leisure activity which would be permitted provided that it was offered fairly and in a socially responsible way. The Government and the Gaming Board believed that the piecemeal approach adopted under the Deregulation and Contracting Out Act 1994, which the previous Government had proposed, had revealed inadequacies and would leave inconsistencies. More comprehensive reform was thought to be necessary.

In 1999, the Government appointed a Committee to be chaired by Sir Alan Budd to review gambling regulation and to make recommendations for reform. The Report was published in July 2001 with 176 recommendations for reform, all but 20 of which were accepted by the Government. Sir Alan Budd and his Committee concluded that attitudes to gambling had changed: whereas then existing gambling policy was based on the principle that gambling should be "tolerated", it had now become a mainstream leisure and tourist industry. The Committee's recommendations were designed to simplify the regulation of gambling and extend choice for adult gamblers, whilst seeking to ensure that gambling remained crime free, conducted in accordance with regulation and honest, so that players knew what to expect and would not be exploited, and with proper protection of children and other vulnerable people.

Most importantly for casinos, the demand criterion was to be abolished, and a free market approach adopted, possibly save in relation to resort (now regional) casinos where the Committee's terms of reference did not extend to the question whether a monopoly right should be granted in a particular location.

A draft Bill was published in November 2003, and further draft clauses were published in February and March 2004. The Bill followed on from the publication of a Government White Paper "A Safe Bet for Success" published in March 2002. Following the publication of the draft Bill, there was pre-legislative scrutiny by a Joint Committee of both houses, which produced two reports in April 2004 and July 2004, with Government Responses to these in June and September 2004. The Bill as originally drafted deliberately provided no restriction on numbers, on the basis that the market would decide how many casinos it could sustain to counter any element of unfair competition, in breach of the guiding principles set out in the Act.

What was proposed was therefore a removal of the barriers to entry and the means by which numbers of casinos have been so drastically limited, but coupled with additional regulatory and social responsibility measures, to ensure that the industry would remain crime free and with the exception of the 1960s would not be repeated. The attitude to gambling foreshadowed by the World Commission Report of 1951 was finally to be realised.

Before that could happen however events, and more particularly politics, intervened, and the process envisioned by Budd, pursued by the Government and refined by the Parliamentary Joint Scrutiny committee was derailed. In the next article, I shall look at what happened, examine the consequences and place them in the historical context I have described against the backdrop of the new regulatory system currently being developed.

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Recognised as a leading expert in national and international gambling and licensing law, Julian Harris is highly regarded by both operators and regulators throughout the world. He and John Hagan are the founder partners of Harris Hagan, the first UK law firm specialising in legal services to the gambling and leisure industries. He, John and other members of the firm have been at the forefront of those advising UK and international operators alike on the opportunities presented by the UK Government's major reform of gambling law.

With over 20 years experience of gambling law Julian has advised some of the world's largest gaming and entertainment industry corporations. He and his team have also advised trade associations, including the British Casino Association and the Casino Operators' Association of the UK. Julian came to specialise in this area representing the Gaming Board for Great Britain (the UK regulator) for five years early in his career.

Julian is an experienced advocate, a respected and sought after conference speaker and the author of numerous articles and papers for gaming and legal publications and in the national press. He is recommended in all sides to the legal profession, and has been described by Chambers Guide as "astute" and "never misses a trick". Julian is a Trustee of the International Association of Gaming Attorneys.