

MORAL POLICYMAKING AND INDIAN GAMING: NEGOTIATING A DIFFERENT TERRAIN

Kathryn R.L. Rand, J.D.

Floyd B. Sperry Professor of Law
Associate Dean for Academic Affairs & Research
University of North Dakota School of Law

Steven Andrew Light, Ph.D.

Associate Professor
Department of Political Science & Public Administration
University of North Dakota College of Business & Public Administration

Co-Directors

Institute for the Study of Tribal Gaming Law and Policy
University of North Dakota
<http://IndianGamingToday.com>

Prepared for presentation at

Gambling and the American Moral Landscape
Boisi Center for Religion and American Public Life
Boston College
October 25, 2007

Abstract

As the fastest growing segment of the legalized gambling industry in the U.S., in just two decades Indian gaming has become a \$25 billion industry. Approximately 230 tribes own and operate some 400 casinos in about 30 states. Tribal gaming is transforming the quality of life on many reservations. Yet the spread of Indian gaming has given rise to contentious and polarizing debates over its policy rationale, socioeconomic impacts, and morality. The moral policymaking landscape for Indian gaming is largely uncharted. In this Paper, we explore that terrain and map its contours. We argue that Indian gaming requires adjustment to the models typically used to explain or guide morality or social regulatory policymaking concerning gambling. Indian gaming is distinct from other forms of legalized gambling for three fundamental reasons: (1) Indian gaming is an exercise of tribal sovereignty, which reflects tribes' unique status in the American political system; (2) conducted by tribal governments, Indian gaming is public gaming; and (3) Indian gaming is an effective means to address continuing socioeconomic deficits in many Native communities. We conclude that regardless of the substantive policy outcomes, policymakers have an obligation to take these differences into account in the *process* of developing morally sound public policy on Indian gaming.

INTRODUCTION

Histories of gambling indicate that risk-taking and faith in luck are part of the shared human experience (e.g., Schwartz 2006). Varying degrees of moral objection to gambling have co-existed alongside gambling throughout history and across cultures. In modern times, the tension between gambling's popularity and moral objections to the same have greatly influenced how government treats gambling.

Debates over the morality of gambling are fairly predictable. Some people oppose gambling on religious principles, as the concept of "luck" may be inconsistent with divine power or gamblers may exercise poor stewardship of godly gifts. Others believe that gambling is harmful, emphasizing that it undermines a societal work ethic, leads to crime, or creates human and economic costs related to problem and pathological gambling. Still others argue that the costs of gambling fall disproportionately on the poor. On the other side are arguments related to economic development, "voluntary" taxation to benefit worthy causes or subsidize the public fisc, or the state's appropriate role in maximizing individual freedom.

At different times and in different jurisdictions, government responses to gambling have run the gamut from enforced blanket prohibitions to nominal prohibitions to regulation of select games to state-sponsored lotteries to full-scale casino gambling with the market as the primary constraint. Skolnick (1988) notes that the moral ambivalence toward gambling makes law and policy governing gambling dynamic, unpredictable, and less tethered to either consensus or evidence. As a morally and politically contested "normal vice,"¹ many object to gambling while many more enjoy it.

Collins (2003a, p. 23) wryly notes that an individual's perspective on gambling policy "will depend on whether you think gambling is most relevantly similar to going to the movies, ingesting cocaine, watching soap operas, eating candy, playing golf, consuming pornography, smoking, having a massage, attending a ball game, visiting a brothel, riding a roller coaster, shopping, or having a drink." All such activities result from individual choices, whether based on free will or on compulsion or addiction. All may afford pleasure, require some form of payment, result in overindulgence, or cause harm to the individual or others. The aggregate effects of each behavior affect society to varying degrees and with disparate results. Given their potential harms to individuals or to society, some such behaviors suggest the need for stringent government regulation or even outright prohibition.

Morality or social regulatory policymaking involves the "use of authority to modify or replace social values, institutional practices, and norms of interpersonal behavior with new modes of conduct based upon legal proscriptions" (Tatalovich & Danes 1984, p. 207). Gambling regulation invokes elements of social regulatory policymaking in which the state redistributes values, but that is not its only rationale. The public policy concerning legalized gambling also involves the goal of facilitating the purposive allocation and reallocation of economic resources to different populations and economic sectors. In other words, gambling regulation also involves

¹ Skolnick (2003, pp. 313-19) characterizes gambling as a "normal" rather than "deviant" vice. Normal vices are

the type of distributive and redistributive

simple and straightforward as attempting to prevent underage gambling or as ambitious and contentious as promoting traditional social values.

If this basic responsibility is to be adequately met, government decisions regarding the introduction and regulation of legalized gambling would best be made according to a well-defined public policy, one formulated with specific goals and limits in mind. . . . Generally, what is missing in the area of gambling regulation is a well thought-out scheme of how gambling can best be utilized to advance the larger public purpose and a corresponding role for regulation. Instead, much of what exists is far more the product of incremental and disconnected decisions, often taken in reaction to pressing issues of the

negative externalities, even at the expense of economic growth, by limiting the size and scope of gaming. The state's comprehensive regulatory sche

outgrowth of the prior two models. Unlike most legalized gambling, which is authorized and regulated by state law, the Indian gaming industry is a product of federal and tribal authority. Importantly, IGRA's regulatory scheme is most markedly influenced by tribes' status as governments.

In the late 1970s and early 1980s, a number of tribes opened high-stakes bingo palaces as a means of tribal economic development. Because federal Indian law generally precluded state regulation of tribes, tribal bingo operations frequently did not comply with state restrictions on jackpot amounts and use of gaming profits. In California, the Cabazon and Morongo Bands of Mission Indians operated bingo halls and a card club on their reservations. When the state threatened to shut down the tribes' gaming operations, the tribes challenged the state's enforcement of its gaming regulations on the tribes' reservations, and the case culminated in the U.S. Supreme Court's landmark 1987 decision in *California v. Cabazon Band of Mission Indians* (480 U.S. 202 (1987)).

Congress had granted California criminal and some civil authority over the tribes within its borders through a federal statute known as Public Law 280.⁵ In the state's view, this authorized application of California's bingo regulations on the tribes' reservations. In an earlier case, the Supreme Court had ruled that Public Law 280's civil provision conferred only adjudicatory authority, rather than general regulatory jurisdiction.⁶ Accordingly, the *Cabazon* Court explained, while Public Law 280's broader grant of criminal jurisdiction would allow California to enforce state criminal prohibitions against gambling on tribal lands, the state did not have authority to enforce its civil gambling regulations against the tribes.

Relying on this "criminal/prohibitory-civil/regulatory" distinction,⁷ the Court examined the state's public policy concerning gambling, noting that California operated a state lottery and

California regulates rather than prohibits gambling in general and bingo in particular” (ibid., pp. 210-11).

In its decision, the *Cabazon* Court noted that the relevant federal interests in the case were “traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development” (ibid., p. 216). The tribes’ own interests paralleled those of the federal government:

The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members (ibid., pp. 218-19).

In the end, *Cabazon* was a victory for tribes, as the Court held that tribal gaming was a manifestation of tribes’ governmental authority and thus states could not regulate reservation gaming enterprises. Rather than resolving the issue, though, the Court’s decision raised the stakes of the contest between tribal and state interests and power; the next year, Congress struck a compromise through IGRA.

Congress’s declaration of policy in IGRA reflects its intent to create a comprehensive regulatory framework that ostensibly balanced tribal sovereignty and reservation economic development with state interests in controlling the crime assumed to be associated with high-stakes casino gambling. Thus, the congressional purposes served by IGRA were to codify tribes’ right to conduct gaming on Indian lands as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments, while providing sufficient regulation to ensure legality and to protect the financial interests of the tribes (25 U.S.C. § 2702).

IGRA’s key innovation was its categorization of three classes of gaming for regulatory purposes: Class I, or social or traditional tribal games, to which IGRA does not apply; Class II, or bingo and similar games as well as non-house-banked card games, which are regulated primarily by tribal governments with federal oversight; and Class III, or casino-style games, which requires both tribal regulation and a tribal-state compact (ibid. §§ 2703(6)-(8), 2710(b), (d)). Class II and Class III gaming are legal only in states that “permit such gaming” (ibid. §§ 2710(b)(1)(A), 2710(d)(1)(B)). For Class III gaming, Congress intended the tribal-state compact requirement to encourage states and tries to negotiate, on a government-to-government basis, issues related to the regulation of casino-style gaming on tribes’ reservations.

Indian gaming, then, is regulated by three levels of government: tribal, state, and federal.

reomotily p-7.3(tr)-7.3es: on ofovibal economic developments.9(t)17.5(,) or3.5(r)-7.3(vlpr)-7.3-8.9(key innupr
8-Ao be(4)-2e(4)1(or(is)8r(iswith6 in)19t1(or(is)8r(islons)8t I)- t)1.6(III0s)11.)-7r(ismons)8tisIII0s8r(isllt)8r(isIII

MORAL POLICYMAKING AND LEGALIZED GAMBLING

Moral policymaking can be examined on two levels: process and outcome. As observed by political scientists, the process for considering and adopting policy regarding issues of morality is distinct from that of economic policy. Citizens' involvement in the process of morality policymaking reflects heightened interest in the outcomes, which can be informed by public policy goals (as discussed in the preceding section on gambling regulatory models) as well as principles of moral governance.

Explaining the Process

Lowi's (1964; 1972) landmark insight into the policymaking process was that different types of policy generate different types of politics.⁸ Pierce & Miller (2004) explore the evolution of Lowi's policy typology, which although strong in its explanatory force seemed to be missing an essential policy type: what Tatalovich & Daynes (1984, 1988) labeled "social regulatory policy" (also known as morality policy). Lowi accounted for the regulation of economic or market-based activity, but not necessarily for the state's regulation of individual moral behavior. Hence social regulatory or morality policies came to be identified as value-based forms of social regulation undergirded by moral arguments to support a policy position (Gormley 1986; Hunter 1991, 1994; Meier 1994; Mooney and Lee 1995; Haider-Markel & Meier 1996; Mooney 2001; Patton 2007). Morality policy or social regulation issues include abortion, capital punishment, gay and lesbian rights, euthanasia, gun control, obscenity and pornography, religious free exercise or establishment matters such as school prayer and the teaching of intelligent design, and, of course, gambling.

As the conception of morality policy was refined to encompass the state's redistribution of social values (Meier 1994), the key variable in the politics of morality policy emerged as core values, often rooted in "first principles" with strongly held or even uncompromising religious underpinnings.⁹ Morality policy issues tend to be non-technical; an individual can develop a substantive opinion without much specialized knowledge or expertise. Undergirded by expressions of individuals' core values or first principles, morality policy issues reflect intensely held preferences. The policy questions that give rise to the politics of social regulation generate high degrees of citizen interest and participation (Carmines and Stimson 1980) and interest-group activity (Mooney & Lee 2005; Haider-Markel & Meier 1996; Meier 1994, 2001; Gormley 1986; Patton 2007; Pierce & Miller 2004). The policymaking process concerning morality issues falls under intense public scrutiny as elected officials face electoral imperatives or seek to be responsive to their constituencies (Mooney 2001). Public opinion, which may be mediated by such factors as religious affiliation or religiosity, partisanship, and ideology, influences the type

⁸ Lowi (1972) categorized policy as constituent, distributive, regulatory, and redistributive.

⁹ Pierce & Miller (2004, p. 32) argue that Lowi's typology, into which he later attempted to "squeeze" morality policy, overlooked the essential points that individuals' core values define morality policy, and such policy generates unique costs and benefits.

dependent on Federal funding (Sen. Rep. No. 100-446, reprinted in 1988 U.S.C.C.A.N. 3071, 3072 (1988)).

Congress, as did tribes, saw Indian gaming as a tool for tribal governments. As the

on direct or indirect distributions of tribal gaming revenue to fund state and local public policy initiatives. The potential for partnership and cooperative policymaking is clear, yet may be overlooked.

In short, descriptions of morality policymaking in the area of legalized gambling do not readily apply to Indian gaming. Further, tribal gaming's differences make the strong influence of state citizens' moral beliefs more problematic. The process of morality policymaking in the area of Indian gaming needs to be adjusted to account for these important differences as well as any shared interests among political jurisdictions or between the public and private sectors.

Informing the Outcome

Too, principles guiding moral government action do not adequately account for Indian gaming's differences. Here, the public policy goals related to legalized gambling serve as a starting point.

Sound and responsible policy for legalized gambling generally incorporates some balance between individual freedom of choice and the state's interests in raising funds to accomplish legitimate policy goals as well as minimizing social and economic harms to individuals or to the public interest (e.g., Collins 2003a; Smith & Wynne 2000, p. 28). Gambling regulations typically share two key social-control f

however, are not best implemented in a vacuum—they require sufficient evidence to back them up.

The systematic and scientific study of gambling is relatively new and has yet to reach consensus on how best to specify key questions

*What is the moral responsibility of **tribal** governments to serve the public interest?*

*What is the moral responsibility of **non-tribal** governments to serve the public interest, including that of tribal governments and tribal members?*

Each of the three fundamental differences between Indian gaming and legalized gambling that we identify should guide non-tribal governments' consideration and adoption of policy that impacts Indian gaming. Sound policymaking regarding tribal gaming cannot rely simply on moral views of gambling. Instead, Indian gaming requires specialized knowledge of its differences and the particular public policy goals it is intended to serve. The reality of tribes' unique status within and without the American political system means that non-tribal governments must be cognizant of public policymaking that accounts for tribal interests, not just their own.

CONCLUSION

Legalized gambling has always been and most likely always will be a part of America's moral landscape and therefore of American public life. Given the unique policy rationale and regulatory framework governing Indian gaming, one might reasonably assume that that it, too, is around for the long term as the industry matures and tribal governments become increasingly well-equipped to provide for their members, engage in effective tribal-state intergovernmental

- Haider-Markel, Donald P., and Kenneth J. Meier. 1996. "The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict." *Journal of Politics* 58: 332-49.
- Harrison, Brigid. 1998. "Legislating Morality: The New Jersey Casino Control Act as 'Moral' Public Policy." *Gaming Law Review* 2: 63-ff.
- Harvard Project on American Indian Economic Development et al. 2007. *The State of the Native Nations: Conditions Under U.S. Policies of Self-Determination* (Harvard University Press).
- Hunter, James Davison. 1991. *Culture Wars: The Struggle to Define America* (New York: Basic Books).
- Hunter, James Davison. 1994. *Before the Shooting Begins: Searching for Democracy in America's Culture War* (New York: Free Press).
- Light, Steven Andrew, and Kathryn R.L. Rand. 2005. *Indian Gaming and Tribal Sovereignty: The Casino Compromise* (Lawrence: University Press of Kansas).
- Light, Steven Andrew, and Kathryn R.L. Rand. 2006. "The 'Tribal Loophole': Federal Campaign Finance Law and Tribal Political Participation After Jack Abramoff." *Gaming Law Review* 10: 230-ff.
- Lindaman, Kara L. 2007. "Place Your Bet on Politics: Local Governments Roll the Dice." *Politics & Policy* 35: 274-97.
- Lowi, Theodore J. 1964. "American Business, Public Policy, Case Studies, and Political Theory." *World Politics* 16: 677-715.
- Lowi, Theodore J. 1972. "Four Systems of Policy, Politics and Choice." *Public Administration Review* 32: 298-310.
- Lowi, Theodore J. 1972. "Four Systems of Policy, Politics and Choice." *Public Administration Review* 32: 298-310.
- Lowi, Theodore J. 2007. "Foreword." In Michael Nelson and John Lyman Mason, *How the South Joined the Gambling Nation: The Politics of State Policy Innovation* (Baton Rouge: Louisiana State University Press).
- McAuliffe, Elizabeth Winslow. 2006. "The State-Sponsored Lottery: A Failure of Policy and Ethics." *Public Integrity* 8: 367-79.
- Meier, Kenneth J. 1994. *The Politics of Sin: Drugs, Alcohol and Public Policy* (Armonk, NY: M. E. Sharpe).

- Reith, Gerda, ed. 2003. *Gambling: Who Wins? Who Loses?* (Amherst, NY: Prometheus Books).
- Schwartz, David G. 2006. *Roll the Bones: The History of Gambling* (New York: Gotham).
- Skolnick, Jerome H. 1988. "The Social Transformation of Vice." *Law & Contemporary Problems* 51: 9-30.
- Skolnick, Jerome H. 2003. "Regulating Vice: America's Struggle with Wicked Pleasure," in *Gambling: Who Wins? Who Loses?*, Gerda Reith, ed. (Amherst, NY: Prometheus Books).
- Smith, Garry J., and Harold J. Wynne. 2000. A Review of the Gambling Literature in the Economic and Policy Domains (Alberta, CA: Alberta Gaming Research Institute).
- Smith, Kevin B. 2001. "Clean Thoughts and Dirty Minds: The Politics of Porn." In Christopher Z. Mooney, ed., *The Private Clash of Public Values* (Chatham, NJ: Chatham House).
- Tatalovich, Raymond, and Byron W. Danes. 1984. "Moral Controversies and the Policymaking Process: Lowi's Framework Applied to the Abortion Issue." *Policy Studies Review* 3: 207-22.
- Tatalovich, Raymond, and Byron W. Danes. 1988. *Social Regulatory Policy: Moral Controversies in American Politics* (Boulder, CO: Westview Press).
- Taylor, Jonathan B., and Joseph P. Kalt. 2005. Cabazon, *the Indian Gaming Regulatory Act, and the Socioeconomic Consequences of American Indian Governmental Gaming*, available at <http://www.ksg.harvard.edu/hpaied/pubs/cabazon.htm>.

<http://govinfo.library.unt.edu/ngisc/reports/finrpt.html>.

National Indian Gaming Commission. 2007. *Gaming Revenues 2006-2001*. Available at <http://www.nigc.gov/Default.aspx?tabid=67>.

Nevada Gaming Control Act, Nev. Revised Stat. § 463.0129(1).

Public Law 280. Codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 and other scattered sections in Titles 18 and 28, United States Code (2000).

Sen. Rep. No. 100-446, at 2-3, reprinted in 1988 U.S.C.C.A.N. 3071, 3072 (1988).

U.S. Bureau of the Census. 1990. *Social and Economic Characteristics, American Indians and*