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Chance v. Skill in New York's Law of Gambling: Has the Game Changed?

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In *People ex rel. Ellison v. Lavin*,[1] the New York Court of Appeals in 1904 established the classic test to determine whether a contest or a game constituted gambling. As announced by the court, "The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element."[2] Under this test, a gambling game is one where chance is the dominating element in determining the outcome of the game. The element of chance is determined where "after the exercise of research, investigation, skill and judgment we are unable to foresee its occurrence or non-occurrence—or the forms and conditions of its occurrence."[3]

The court reasoned that under the dominating element test games such as chess, checkers, bowling, and billiards were games of skill. Dice games and card games were games of chance.[4]

In this particular game, the Florodora Tag Company placed an advertisement in a trade newspaper that required potential contestants to guess the number of cigars that the United States would collect taxes on during the month of November 1903. The company projected 35,000 contestants, and in its advertisement, it actually provided the "principal data requisite for making an estimate."[5] The court ultimately determined that the game was dominated by chance. By providing this data the company, while allowing for an element of judgment and skill, made "the contest as fair a gamble for the . . . customers as possible."[6] By doing such, the court found that the company had made the distribution in this case "controlled by chance within the meaning of the statute."[7] With 35,000 likely contestants provided the same basic information, the contest was clearly one dominated by the element of chance.[8]

The dominating element test of the *Lavin* case became the basic law in this country on whether a contest was a lottery or not.[9] The dominating element test similarly became the principal test in the nation for determining whether a game was a gambling game,[10] and in New York state, it became the measure of all gambling throughout the life of New York's former Penal Law.[11] "The case of *People ex*

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[1] 179 N.Y. 164, 71 N.E. 753 (1904).
[2] *Id.* at 170–171.
[3] *Id.* at 169.
[4] *Id.* at 170.
[5] *Id.* at 174. The advertisement provided a chart showing the actual number of taxes cigars over a 35-month period. *Id.* at 166.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 173. See also *State ex rel. McKittrick v. Globe-Democrat Pub. Co.*, 341 Mo. 862,882 (1937), citing *Lavin* for the proposition that if a "contest were solely between experts possibly elements affecting the result which no one could foresee might be held dependent upon judgment; but not so when the contest is—unrestricted."
[9] *See generally* R. Randall Bridwell and Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 Miss. L.J. 565, 645 (2002). "It was the first American case to reject the 'pure chance' rule derived from English law, and was universally followed in other jurisdictions. As one commentator remarked of *Lavin*, 'This case marked the end of the "pure chance doctrine" in the United States.' Ever since, the 'dominating element' test has prevailed." *See, e.g.*, National Football League v. Governor of Delaware, 435 F. Supp. 1372, 1383–1384 (D. Del. 1977). See also the cases listed at footnote 10 in the dissenting opinion in *Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 115 (1998).
[10] Anthony N. Cabot, Glenn J. Light, and Karl F. Rutledge, *Article: Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define The Legality of Games of Mixed Skill and Chance*, 57 Drake L. Rev. 383, 390 (2009).
[11] Kamins, Mehler, Schwartz and Shapiro, New York Criminal Practice 7-76, § 76.02 (2009).

rel. Ellison v. Lavin was a landmark in American law,"[12] and it is still the basic law in most states.[13]

THE FORMER PENAL LAW

Until it was amended thoroughly by legislation passed in 1965,[14] the former Penal Law governed the definition of crimes in New York. As of the date of its repeal in 1965, the former Penal Law in Article 88, the Gambling Article, contained 35 separate provisions on gambling.[15] None of these 35 provisions defined the actual act of gambling. Instead, the courts had applied the dominating element test of the *Lavin* case to determine whether a game or event constituted gambling.[16]

THE REVISED PENAL LAW

The former Penal Law was subject to numerous criticisms. It dated from 1909 and was considered archaic.[17] It was disorganized and contained provisions that were marginally criminal in nature.[18] Moreover, "there had been no examination of the overall philosophy of the criminal law in the light of twentieth century experience."[19]

As result, the legislature in 1961 created a Temporary Commission on Revision of the Penal Law and Criminal Code.[20] Since the task was so enormous the Temporary Commission continued into subsequent legislative sessions.[21] The Temporary Commission issued a study bill in 1964.[22] The study bill was revised by the Temporary Commission in 1965,[23] and ultimately enacted by the legislature that year.[24] It did not go into effect until Sept. 1, 1967.

CHANGES TO THE GAMBLING ARTICLE IN THE REVISED PENAL LAW

As enacted, the 1965 legislation made numerous changes to the Gambling Article of the former Penal Code. The provisions of the former Penal Code which provided civil penalties and for the civil illegality of gambling were moved into a new title of the General Obligations Law.[25] The remaining portions of the former Penal Law on gambling were compressed into seven sections.[26] The Temporary Commission believed that there was no need to distinguish between the various forms of gambling (i.e., lotteries, numbers games, betting on contingent events, slot machines, and ordinary games of chance).[27] Instead the revised Penal Law tried to keep all forms of gambling under the same rubric. Thus the basic issues under the revised code are (1) whether the game or scheme is gambling and (2) whether the defendant is merely a player of the game or scheme or an operator/promoter of the game or scheme. Only if the game or scheme is a gambling game, and the defendant is an operator/promoter of the game is there criminal conduct.[28]

The revised law defined gambling to include a "contest of chance"[29] which term is then further de-

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[12] *See* Bridwell and Quinn, *supra* note 9.
[13] Ryan P. McCarthy, *Informational Markets as Games of Chance*, 155 U. Pa. L. Rev. 749, 767 (2007); Anthony N. Cabot and Louis V. Csoka, *The Games People Play: Is it Time for a New Legal Approach to Prize Games?*, 4 Nevada L. J. 197, 202–203 (2003).
[14] L. 1965, Ch. 1030.
[15] *See* Gilbert, Criminal Law and Practice of New York (1965).
[16] People v. Miller, 271 N.Y. 44 (1936); People ex rel. Ehrman v. Kearney, 266 A.D. 793 (2d Dept. 1943); Cotroneo v. Townsend, 111 N.Y.S.2d 491, 494 (Sup. Ct., Monroe County 1952); S. & F. Corp. v. Wasmer, 195 Misc. 860, 861 (Sup. Ct., Onondaga County 1949); Hoff v. Daily Graphic, Inc., 132 Misc. 597, 600 (Sup. Ct., New York County, 1928); People v. Rivero, 190 Misc. 1050, 1054 (N.Y. Spec. Sess. 1947); appeal dismissed, 80 N.Y.S.2d 726 (2d Dept. 1947); People ex rel. Love v. Schapiro, 77 N.Y.S.2d 726 (N.Y. Magis. Ct. 1948); People ex rel. Fleming v. Welti, 179 Misc. 76 (N.Y. Magis. Ct. 1942). rev'd on other grounds, 271 A.D. 785 (1st Dept. 1946); People v. Cohen, 160 Misc. 10 (N.Y. Magis. Ct. 1936).
[17] Interim Report of the State of New York, Temporary Commission on Revision of the Penal Law and Criminal Code, Legislative Document No. 41 (1962), at 8.
[18] *Id.* at 9–10.
[19] *Id.* at 8.
[20] L. 1961, Ch. 346.
[21] *See* L. 1962, Ch. 546; L. 1963, Ch. 210; L. 1964, Ch. 251.
[22] Proposed New York Penal Law, Senate Int. 3918, Assembly Int. 5376 at the 1964 Legislative Session. *See also* Third Interim Report of the State of New York, Temporary Commission on Revision of the Penal Law and Criminal Code, Legislative Document No. 14 (1964).
[23] *See* Fourth Interim Report of the State of New York, Temporary Commission on Revision of the Penal Law and Criminal Code, Legislative Document No. 25 (1965).
[24] L. 1965, Ch. 1030.
[25] N.Y. Gen. Oblig. Law Title 4, §§ 5-401 et seq.
[26] *See* Third Interim Report of the State of New York, *supra* note 22, at 381.
[27] *Id.*
[28] *See* N.Y. Penal Law art. 225.
[29] N.Y. Penal Law § 225.00.2.

fined to mean "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon any element of chance, notwithstanding that skill of the contestants may also be a factor therein."[30] This definition of a "contest of chance" has not been amended since the enactment of the revised Penal Law in 1965.

The question has become whether the use of the "material degree" language has altered in any significant fashion the "dominating element" test of *People ex rel. Ellison v. Lavin*. In short, are there games and schemes which would constitute gambling under the "material degree" language which would not constitute gambling under the "dominating element" test? Granted that the wording of the purported tests is not the same, is there, in fact, any major substantive difference between the two purported tests?

ANY DIFFERENCES BETWEEN THE "DOMINATING ELEMENT" TEST AND THE "MATERIAL ELEMENT" LANGUAGE ARE MINIMAL IN NATURE

It is the contention here that any differences between the "dominating element" test and the "material degree" language are minimal in nature. At most, the "material degree" language has altered the mathematical exactitude of the "dominating element" test and amended it with a test where if skill and chance are basically equal, the scheme or game will be considered to be gambling. The basic test of gambling (skill v. chance) is not altered, but the weighing of the test factors is altered slightly. Given the inherent difficulties in weighing whether skill or chance is the dominating element in any game, the "material element" has simply added a codicil or gloss to the preexisting "dominating factor" test. In short, under the "material degree" language, if skill and chance are basically the same, the "tie" goes to chance and gambling.

There was no legislative intent to change the definition of gambling

Other than providing for a definition of gambling, the Temporary Commission on Revision of the Penal Law and Criminal Code showed no intent to change the substantive law of gambling in New York State. In introducing its initial proposal in 1964,[31] the Temporary Commission stated in its discussion of the gambling article that its revision had "few actual changes of substance, but with considerable revision with respect to form."[32] The Commission notes that its proposal defines gambling,[33] but does not in any manner indicate that it has any intention to change the meaning of gambling. Instead the purpose of the revision is to "simplify the framing and lodging of charges in gambling cases."[34]

Similarly, the revisions to the 1964 proposal again show no intent of the Temporary Commission to alter the definition of gambling utilized under the former Penal Law. Instead, the 1965 revisions focused on the definitions of "gambling records" and "bookmaking records."[35]

One would assume that if the substantive definition of the term "gambling" had been significantly changed by § 225.00.1, the Temporary Commission would have made some note somewhere of this fact. Yet not only is there no indication of any such intent, the Temporary Commission stated that its basic goal was one of achieving "few actual changes of substance."[36] Under applicable rules of statutory construction, commission reports "are in some circumstances extremely persuasive on the question of legislative intent, especially when the statute is enacted in the identical or similar language as proposed."[37] "It is logical to assume that commission reports or notes issued prior to the passage of legislation were available

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[30] N.Y. PENAL LAW § 225.00.
[31] This proposal contained the language on "material degree."
[32] *See* THIRD INTERIM REPORT OF THE STATE OF NEW YORK, *supra* note 22, at 381.
[33] *Id.* at 382.
[34] *Id.*
[35] *See* FOURTH INTERIM REPORT OF THE STATE OF NEW YORK, *supra* note 23, at 46–47.
[36] *See* THIRD INTERIM REPORT OF THE STATE OF NEW YORK, *supra* note 22. The New York State Court of Appeals has relied on the report of the Temporary Commission in determining the legislative intent of provisions of the Penal Law and the Criminal Procedure Law. *See* People v. Sanchez, 98 N.Y.2d 373 (2002); People v. Hernandez, 98 N.Y.2d 175, 181 (2002); People v. Feerick, 93 N.Y.2d 433, 445 (1999); People v. Giordano, 87 N.Y.2d 441 (1995); People v. Collier, 72 N.Y.2d 298, 303 (1988). *See also* People v. Lucarelli, 300 A.D.2d 1013, 1014 (4th Dept. 2002).
[37] N.Y. STAT. LAW § 125(a) cmt. *See* In re Pink, 179 Misc. 46, 49 (Sup. Ct., Bronx County 1942).

to all legislators; and, therefore, are persuasive indicia of legislative intent."[38]

Given the stated objective of limiting any substantive changes in the gambling article, it is hard to conceive that the use of the "material degree" language in § 225.00.1 was intended to work any major change in the seminal test established by *People ex rel. Ellison v. Lavin* governing the definition of "gambling."[39]

If the penal law substantively changed the definition of gambling, such changes would be incongruous with the gambling provisions of the general obligations law

In the course of revising the former Penal Law, L. 1965, ch. 1031 moved eight non-criminal provisions from the former Penal Law into a newly established Title 4 of Article 5 of the General Obligations Law.[40] All these provisions which basically make gambling contracts illegal[41] and void,[42] and establish certain recovery provisions for property wagered[43] were governed by the "dominating element" test. Since their emigration to the General Obligations Law, they continue to be governed by the "dominating element" test.[44]

If the "material degree" language differed markedly from the "dominating element" test, you would have the anomalous and bizarre result where a game (for example, bridge) with mixed chance and skill elements could be considered gambling and criminal activity under the allegedly stricter "material degree" language while it could be considered non-gambling under the General Obligations Law. If bridge was gambling under the "material degree" language, the promoters/operators of a bridge tournament would be criminally liable. Yet, if bridge was not gambling under the "dominating element" test, the contracts entered into by these same promoters/operators would be lawful and enforceable. This quite simply makes no sense. Conduct that would be valid under contract law could be a crime. Promoters/operators of a game could be prosecuted for a game that would be deemed perfectly legal under the General Obligations Law. A finding that the "material degree" language in the Penal Law significantly changed the "dominating element" test is totally incongruous with the civil statutes governing gambling in the General Obligations Law.[45]

The cases decided under Article 225 of the penal law continue to utilize the "dominating element" test

If the "material degree" language in § 225.00.1 of the Penal Law had replaced the "dominating element" test, one would expect that there would no longer be any continued references to the "dominating element" test or to *People ex rel. Ellison v. Lavin*. After all, the New York State Attorney General had opined in 1984 that "the 1965 Legislature, in codifying the case law on gambling, dropped the *Lavin* test and adopted a more liberal one."[46] Similarly, the Attorney General wrote, "An attentive reading of the 1965 Penal Law shows that the Legislature rejected this test in crafting a new definition for 'lottery.'"[47]

Yet despite this viewpoint of the Attorney General, the courts in New York have continued to apply *People ex rel. Ellison v. Lavin* and its "dominating interest" test. As recently as June 2009, a

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[38] People v. Bailey, 105 Misc. 2d 772, 780 (N.Y. City Crim. Ct. 1980), rev'd, 108 Misc. 2d 1075 (N.Y. App. Term 1981).
[39] As the New York Court of Appeals stated in *People v. Collier*, *supra* note 36, the "Commission comprehensively studied the entire body of law . . . Surely, their work would have reflected such a fundamental change had it been intended." 72 N.Y.2d at 303 n.1.
[40] Five were from the former Penal Article, and three derived from the former Lottery Article 130.
[41] N.Y. GEN. OBLIG. LAW § 5-401.
[42] N.Y. GEN. OBLIG. LAW § 5-411.
[43] N.Y. GEN. OBLIG. LAW §§ 5-419, 5-421, 5-423.
[44] Valentin v. La Prensa, 103 Misc. 2d 875, 878 (N.Y. Civ. Ct. 1980). *See also* WNEK Vending & Amusements Co. v. Buffalo, 107 Misc. 2d 353, 364 (Sup. Ct., Erie County 1980); Solon v. Meuer, 141 Misc. 2d 993 (N.Y. Civ. Ct. 1987).
[45] This conclusion is further enhanced by § 5.10.3 of the Penal Law which states that the Penal Law "does not bar, suspend, or *otherwise affect* any right or liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action" (emphasis added). Also if the legislature wished the "material degree" language to apply to the General Obligations Law gambling provisions, it would have explicitly so provided, just as it did in § 369-ee.(b)(i) of the General Business Law governing prize award schemes. If Article 225 of the Penal Law and Title 4 of Article 5 of the General Obligations Law were construed as suggested by this memorandum, they could justifiably be viewed in pari matera.
[46] N.Y. Op. Att'y Gen. 1 (1984). The Attorney General relied in part on the commentaries contained in the Penal Law in Article 225. N.Y. PENAL LAW art. 225 (2000). The commentary now states that while the Penal Law has a "rather similar definition" to that of *People ex rel. Ellison v. Lavin*, it "does not adopt the 'dominating element' test." (William C. Donnino, Practice Commentary).
[47] *Id.*

criminal court judge in Queens County in New York City, in the case of *People v. Li Ai Hua*,[48] dismissed a gambling prosecution for failure to establish that the game of mah jong was a game of chance. The judge quoted the *Lavin* case writing, "The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?"[49]

Many other post-1967 cases have cited the "dominating element" test of *People ex rel. Ellison v. Lavin*. For example, in *People v. Stiffel*, a billiards case, the court cited *Lavin* for the proposition that wagering on the outcome of a game of skill is not gambling.[50] Other cases have cited *Lavin* include: *People v. Hawkins*,[51] *People v. Davidson*,[52] and *People v. Melton*.[53]

A number of commentators on New York criminal law have continued to stress the factors enunciated in the *Lavin* case. For example, the authors of *New York Criminal Practice* state, "The definitions of chance versus skill, though, relied on by earlier case law still are valid. In a game of chance, success or failure depends less on the cognitive or physical skill and experience of the player, and more on fortuitous or accidental circumstances which are incidental to the playing of the game itself. One example is when there is a device which governs the outcome of a play or of the game and that device is not under the player's control."[54]

The language from *Lavin* is cited in *Charges to the Jury and Requests to Charge in a Criminal Case*.[55] The treatise states, "It is often difficult to draw the line between 'chance' and 'skill.' While throwing dice is purely a game of chance and chess is purely a game of skill, there are many games which are in a grey area, such as where a player is very skilled at playing a game which depends upon the luck of the draw."[56]

New York Jurisprudence, while noting the "material degree" language of the Penal Law, states, "A game of skill is one in which the success of the player depends mainly upon his superior attention, knowledge, skill and experience, by which the elements of chance or luck are overcome, improved, or turned to the player's advantage. *The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the results of the game.*"[57]

In fact, while the Attorney General may have questioned the viability of *People ex rel. Ellison v. Lavin*, in 1996, the succeeding Attorney General cited the case favorably.[58]

In short, based on the court cases and the commentators, *People ex rel. Ellison v. Lavin*, and its "dominating element" test remain viable law in New York State.

EVEN IN THOSE PENAL LAW CASES THAT HAVE NOT MENTIONED THE "DOMINATING ELEMENT" TEST, THE OUTCOMES HAVE BEEN THE SAME AS IF THE "DOMINATING ELEMENT" TEST HAD BEEN APPLIED

In a number of cases defining gambling under Article 225 of the Penal Law, the courts have not referred to the "dominating element" test or to *People ex rel. Ellison v. Lavin*. Nonetheless, the results in these cases have been the same as if the "dominating element" test had been applied.

This has occurred frequently in the "joker poker" or "video poker" cases. These are electro-mechanical or random number generating machines which simulate, in part, the game of draw poker. They are a mixture of chance and skill, but the fact is that video poker is substantially different than traditional poker. Video poker is played against the house. Traditional poker is a pari-mutuel game played by one player against the other players. There is no bluffing, no need for money management, no need for

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[48] People v. Li Ai Hua, 2009 N.Y. Slip. Op. 29241 (N.Y. City Crim. Ct. June 5, 2009).
[49] *Id.* at 3.
[50] People v. Stiffel, 61 Misc. 2d 1100 (N.Y. App. Term 1969).
[51] 2003 N.Y. Slip. Op. 51516U, 2 (N.Y. City Crim. Ct. 2003).
[52] 181 Misc. 2d 999 (Sup. Ct., Monroe County), *rev'd on other grounds*, 291 A.D.2d 810 (4th Dept. 2002), app. dismissed, 98 N.Y.2d 738 (2002).
[53] 152 Misc. 2d 649 (Sup. Ct., Monroe County 1991). See also *Dalton v. Pataki*, 11 A.D.3d 62— (3d Dept. 2004), affirmed in part and modified in part, 100 N.Y.2d 801 (2005), where *Lavin* was cited in a civil case.
[54] See KAMINS, MEHLER, SCHWARTZ AND SHAPIRO, *supra* note 11.
[55] 2 LEVENTHAL, CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE (2008).
[56] *Id.* at 85–86.
[57] 62 N.Y. JUR. *Gambling* § 2 (2009) (emphasis added).
[58] N.Y. Op. Att'y Gen. 1 (1996).

psychological skills, and no need to memorize the cards in play.[59]

The courts in New York have treated video poker as a game of chance under the Penal Law. In *Plato's Cave Corp. v. State Liquor Authority*, the Court of Appeals found that the machine "joker poker" constituted gambling under the Alcoholic Beverage Control Law.[60] The *Plato's Cave* decision, without citing the "dominating element" test, has been followed in a number of New York decisions[61] and a federal case interpreting New York law.[62]

Yet, the results would be the same under the "dominating element" case. Video poker is certainly a game where the elements of chance overwhelm the elements of skill. Video poker is a so-called "L game."[63] If you play video poker long enough, you must lose.[64] "Although players may be tempted to believe that some skill is involved, the outcome of these games is completely controlled by chance. In these games, the odds favor the house; therefore, over time the house wins and the player loses. A player may end a playing session with a positive return on aggregate wagers, but if the player returns and continues playing, the laws of statistics will catch up with that gambler."[65] The list of courts that, using the "dominating element" test, have found that video poker/joker poker is a game of chance is a lengthy one.[66]

New York courts have struggled under Article 225 of the Penal Law to deal with the traditional shell game, often called three-card monte. "In the 'shell game' the operator manipulates shells (usually three) and a single ball or similar small device, and then encourages players to guess under which shell the ball is located."[67] Some courts have found the game to be one of skill.[68] Others have found it to be a game of chance,[69] and one has found it to be a form of larceny.[70] Yet, while the "dominating element" test might not technically have been utilized by the individual judges to determine whether the activity was gambling, the results would have been the same under the "dominating element." The judges finding that three-card monte was a game of skill found that when played fairly, it was totally a game of skill.[71] Thus, it would have been a non-gambling game under the "dominating element" test. Similarly, the courts finding three-card monte to be a game of chance concluded that it was totally a game of chance.[72]

Again, while these cases may not have mentioned the "dominating element" test, they clearly would have been decided the same way under the "dominating element" case. Given the difficulties the three-card monte courts have experienced in weighing skill and chance factors, perhaps the New York State legislature was correct in using the "material degree" language to avoid the mathematical rigor of the strict "dominating element" test.

The one "material element" case that might be problematical under the "dominating element" test is not even a New York case. It is the New Jersey case of *Boardwalk Regency Corp. v. Attorney Gen. of New Jersey*[73] finding that backgammon was a game of chance. New Jersey had adopted a statute similar to New York's where a game of chance included games in which "the outcome depends in a material degree—upon an element of chance."[74] Employing the "material degree" language as a test separate from the "dominating element" test, the court found that backgammon was a game of chance under New Jersey law. It is not possible to deter-

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[59] Ronald J. Rychlak, *Video Gaming Devices*, 37 UCLA L. Rev. 555, 570 (1990); Anthony N. Cabot and Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. Cooley L. Rev. 443, 483 (2006).

[60] 68 N.Y.2d 791(1986).

[61] 2700 Tavern, Inc. v. State Liquor Authority, 146 A.D.2d 552 (1st Dept. 1989); Muidallap Corp. v. State Liquor Authority, 143 A.D.2d 9, 10 (1st Dept. 1988); MNDN Restaurant, Inc. v. Gazzara, 128 A.D.2d 781, 782 (2d Dept. 1987); People v. Delacruz, 2009 N.Y. Slip. Op. 29043, 1 (N.Y. City Crim. Ct. 2009).

[62] United States v. Gotti, 459 F.3d 296 (2d Cir. 2006).

[63] Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. Rev. 371, 379 (2006).

[64] *Id.* at 379–380.

[65] *Id.* at 380.

[66] See the cases listed at footnote 10 in the dissenting opinion in Johnson v. Collins Entertainment Co., 333 S.C. 96, 115 (1998).

[67] John M. Norwood, *Symposium: Gaming Law and Technology: Gambling in The Twenty-First Century: Judicial Resolution Of Current Issues*, 74 Miss. L.J. 779, 786 (2005).

[68] People v. Mohammed, 187 Misc. 2d 729 (N.Y. City Crim. Ct. 2001); People v. Hunt, 162 Misc. 2d 70 (N.Y. City Crim. Ct. 1994).

[69] People v. Denson, 192 Misc. 2d 48 (N.Y. City Crim. Ct. 2002); People v. Turner, 165 Misc. 2d 222 (N.Y. City Crim. Ct. 1995).

[70] People v. Williams, 93 Misc. 2d 726, 733 (N.Y. City Crim. Ct. 1978).

[71] *See* People v. Mohammed, 187 Misc. 2d at 732.

[72] *See* People v. Turner, 165 Misc. 2d at 225. "The outcome is still determined by the player's selection at random."

[73] 188 N.J. Super. 372 (Law. Div. 1982).

[74] N.J. Stat. § 2C:37-1.a.

mine whether the result would have been the same under the "dominating element" test.[75] It does not appear that New Jersey has the same legislative history on games of chance as New York, and the court may have been influenced by credibility issues of the expert witness of the group plaintiff trying to assert that the game was one of skill.[76] Moreover, in the quarter century since *Boardwalk Regency* was decided, no case in America has cited to either its finding on backgammon or to its interpretation of the "material degree" language in the New Jersey statute.

CONCLUSION

Based on legislative history, case law, common sense, and the views of many commentators, it ought to be clear that the "dominating element" test for gambling as established by *People ex rel. Ellison v. Lavin* remains valid law in New York State. It may have been modified by the "material element" language added by § 225.00.1 of the Penal Law, but the gist of this change was to end the unpredictable mathematical rigor of the original "dominating element" test and make the test more subjective.[77] There was absolutely no intent to change the substantive law of gambling in New York State. In summary, the law in New York governing whether a game or contest is a game of chance is much like Mark Twain's famous quip about his death. "The reports of the death of the 'dominating element' test in New York have been greatly exaggerated."

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[75] See Wetmore v. State, 55 Ala. 198 (1876), finding backgammon to be a game of skill.
[76] *See* Boardwalk Regency Corp. v. Attorney General of State of N.J., 188 N.J. Super. at 380.
[77] *See* Cabot, Light, and Rutledge, *supra* note 10, at 393.