

CARNIVAL GAMES: WALKING THE LINE BETWEEN ILLEGAL GAMBLING AND AMUSEMENT

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I. INTRODUCTION

Carnival games¹ have a long and checkered history with the law.

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1. This article focuses on the traditional games of amusement that are operated at local fairs, amusement parks, and boardwalk locations in which contestants pay money for the chance to win a prize. A carnival is defined by the Illinois Carnival Regulation Act as:

[A]n aggregation of attractions, whether shows, acts, games, vending devices or amusement devices, whether conducted under one or more managements or independently, which are temporarily set up or conducted in a public place or upon any private premises accessible to the public, with or without admission fee, and which, from the nature of the aggregation, attracts

Beyond the battles to keep fraudulent games off the midway,² there have also been legal battles to determine whether carnival games constitute illegal gambling. For example, in the summer of 1972, the Iowa Attorney General concluded nine of the carnival games played on the midway of the Iowa State Fair had to be shut down because they constituted illegal gambling under the state's anti-gambling law.³ The attorney general was roundly criticized for this decision,⁴ but attempts to block his actions through declaratory judgment failed.⁵ Ultimately, his decision to shut down the games prompted a major legislative overhaul of the state's gambling laws, with specific exemptions for carnival games.⁶ Other states followed suit, and today there is an uneven patchwork of state laws, regulations, and local ordinances exempting certain types of carnival games in certain locations under certain conditions.⁷

Part II of this Article is a brief overview of the business aspects of carnival games. Part III of this Article examines the common law definition of gambling and the skill-based exception that draws the line between illegal gambling and legal games of amusement. Part IV analyzes whether several popular carnival games qualify for the skill-based exception to gambling. Part V highlights some of the common statutes and regulations exempting carnival games from gambling prohibition. Finally, the Article concludes in Part V with a discussion addressing why so many illegal carnival games continue to persist throughout the United States.

attendance and causes promiscuous intermingling of persons in the spirit of merrymaking and revelry.

225 ILL. COMP. STAT. ANN. 205 / 1 (West 2007).

2. Some authorities still actively search for fraudulent activity on the midway. See *Opening Day of Florida State Fair Colorful, Aromatic*, TAMPA BAY ONLINE.COM (Feb. 4, 2010), <http://www.tbo.com/news/brandon/2010/feb/04/fair-story-ar-88237/> ("The state requires the annual inspection of [every fair] game[] to ensure people can actually play and win.").

3. See *Midway Closings Called Unwarranted*, AMES DAILY TRIB., Aug. 25, 1973, at 1, available at <http://www.newspaperarchive.com/SiteMap/FreePdfPreview.aspx?img=100451299>.

4. See *id.* (summarizing criticisms of the decision).

5. See *Report of the Attorney General: Gambling*, in STATE OF IOWA, THIRTY-NINTH BIENNIAL REPORT OF THE ATTORNEY GENERAL FOR THE BIENNIAL PERIOD ENDING DECEMBER 31, 1972 (1972) [hereinafter *Report of the Attorney General*].

6. *Timely Observations: Iowa Legalizes Many Forms of Gambling*, ST. JOSEPH NEWS-PRESS, June 3, 1973, at 8A, available at <http://news.google.com/newspapers?id=sdxeAAAIAIAJ&sjid=dFMNAAAIAIAJ&pg=821%2C364475>.

7. See *infra* Part V.

II. THE BUSINESS OF CARNIVAL GAMES

When you put aside the glitz and barkers, carnival game owners are simply merchants who sell both the intangible thrill of playing a game and the chance to walk away with a tangible prize, which is ostensibly worth more than the price of playing the game in the first place.⁸ While some carnival games are owned by the carnival itself, many carnival game operators are individual owners that pay a daily fee, known as a “privilege,” for the opportunity to operate on the carnival midway.⁹ The size of the game trailer and its location on the carnival lot dictate the amount of the privilege.¹⁰ For example, in 1995, one game owner paid \$1,600 per day to operate his game at the Florida Mid-State Fair.¹¹ In order to simply pay his privilege for one day at the fair, he needed customers to play 534 times at \$3 per play¹²—but those 534 plays may not cover all of his costs.¹³ Independent game operators also have to pay for labor expenses and the “stock,” or prizes distributed to winning players.¹⁴ The privilege, along with electricity and other service fees, are fixed costs for the game owner.¹⁵ Labor and stock are the variable expenses that make the difference between a profitable or unprofitable carnival operation.¹⁶

In order to control variable expenses, game operators willingly hand out the thrill of playing the game,¹⁷ but they limit the number of prizes

8. Cf. *Kraus v. City of Cleveland*, 19 N.E.2d 159, 160 (Ohio 1939) (“Amusement is a thing of value. Were it not so, it would not be commercialized.”).

9. See Bruce Walstad, *Carnivals: Law Enforcement on the Midway*, FBI L. ENFORCEMENT BULL., Feb. 1997, at 12, 12–13 (“With the smaller carnivals, owners hire employees to run the[ir] rides and operate the games Independent games and ride owners pay for the opportunity to operate with the carnival . . . known as ‘privilege.’”).

10. *Id.* at 13.

11. *Id.*

12. See *id.* at 13–14.

13. See, e.g., *id.* (“Game, ride, and concession owners also pay additional fees, known as ‘dings,’ to the carnival. Dings guarantee a good spot on the carnival lot, get the electricity hooked up, and allow operators to run a nonwinning game.”).

14. See THERON FOX, HOW TO MAKE MONEY WITH CARNIVAL GAMES 27–28 (1956) (describing common types of stock and implying game operators are responsible for purchasing stock). Today, stock commonly consists of stuffed animals, posters, or decorated mirrors. Fifty years ago carnival games also awarded hams, bags of groceries, cigarettes, plaster statuary, and live animals. See *id.*

15. See *id.*; Walstad, *supra* note 9, at 14 (noting game and ride operators pay “additional fees” for particular benefits or amenities).

16. FOX, *supra* note 14, at 28 (indicating the cost of stock varies by the type of stock and whether it was purchased wholesale or damaged).

17. Cf. *Kraus v. City of Cleveland*, 19 N.E.2d 159, 160 (Ohio 1939)

awarded to paying customers.¹⁸ If everyone were a winner, there would be little or no profit.¹⁹ However, customers would not play if their only goal was entertainment. People also play for the chance to win, and this is why some carnival games run afoul of the gambling laws in many states.²⁰ As discussed in Part III of this Article, the broad definition of gambling in the United States means many carnival games, absent specific statutory exceptions, constitute illegal gambling.²¹

III. THE THREE-PART GAMBLING TEST

Gambling has been regulated since the early 1900s through a combination of state constitutional amendments and state statutory code.²² These statutes and constitutional provisions broadly defined “gambling,”²³ but the United States Supreme Court interpreted the term to mean any scheme where people are induced to tender consideration for the

(“Amusement is a thing of value. Were it not so, it would not be commercialized.”).

18. See MATTHEW GRYZAN, *CARNIVAL SECRETS: HOW TO WIN AT CANIVAL GAMES 1–2* (1st ed. 1988) (“Carnies freely admit they can control the number of prizes, or stock, they give out by making a game easier or harder to win.”).

19. Some carnival games operate strictly on the premises that everyone is a winner. See, e.g., BRET WITTER, *CARNIVAL UNDERCOVER 88–89* (2003) (“Hanky-panks are games that guarantee the player a win.”). The customer pays a few dollars to play a game where the potential prize is worth far less than the entry fee—perhaps pennies on the dollar. See *id.* (“most of the prizes are lousy”). Every customer is assured of winning something, with only a select few winning anything close to the value of the consideration paid to play the game. See *id.* While the markup on these prizes is much higher than they would be if purchased at a typical brick and mortar retail store, the carnival customers, normally children, pay for the thrill of winning the prize themselves. Cf. *Kraus*, 19 N.E.2d at 160 (“Amusement is a thing of value.”).

20. See *infra* Part IV.

21. See *infra* Part III.

22. See generally NAT’L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP’T OF JUSTICE, *THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776–1976* (1977); see also I. Nelson Rose, *Gambling and the Law—Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 96–97 (1992).

23. See, e.g., N.J. STAT. ANN. § 2C:37-1(b) (West 2005) (defining gambling as “staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor’s control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome”). In many states, this broad language exists because “gamblers are ingenious in devising ways to evade the letter of the law when only specific games are prohibited.” *Walker v. Meehan*, 240 Cal. Rptr. 171, 176 (Ct. App. 1987) (citing *McCall v. State*, 161 P. 893, 895, 899 (Ariz. 1916)) (upholding constitutionality of city gaming ordinance).

possibility of receiving a prize distributed by chance.²⁴ The legal definition of gambling is now interchangeable with the legal definition of lotteries, which requires consideration for the distribution of a prize awarded by chance.²⁵ While there was once a practical difference between the use of the terms “gambling” and “lotteries,” any line of demarcation between the two terms has disappeared.²⁶ “Although there are statutes specifically defining the word ‘lottery,’ in the general sense it refers to a gambling game or device wherein one gives up something of value for the chance of obtaining a prize in money or property of value.”²⁷ If all three elements—consideration, prize, and chance—are present, the activity constitutes gambling.²⁸ Innocent motives are irrelevant—there is no common law exception for carnival games or charitable activities.²⁹ The only exceptions

24. See *Fed. Commc'ns Comm'r v. Am. Broad. Co.*, 347 U.S. 284, 290 (1954) (“[T]here are three essential elements of a ‘lottery, gift enterprise, or similar scheme’: (1) the distribution of prizes; (2) according to chance; (3) for a consideration.” (footnote omitted)); Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Economic Value, Equal Dignity and the Future of Sweepstakes*, 1 UNLV GAMING L.J. 1, 2 (2010), available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1000&context=glj>.

25. See *Fed. Commc'ns Comm'r*, 347 U.S. at 290.

26. Willard W. McInturff, Note, *Lotteries—Nature and Elements—Regulations*, 16 OR. L. REV. 164, 167 (1937); see *Commonwealth v. Lund*, 15 A.2d 839, 840–41 (Pa. 1941); see also Roland J. Santoni, *An Introduction to Nebraska Gaming Law*, 29 CREIGHTON L. REV. 1123, 1129 (1996) (“Courts, concerned that clever operators would find ways to subvert the lottery prohibitions, frequently held that a game or activity constituted a lottery if these three elements existed. Those familiar with traditional forms of gaming know that prize, chance, and consideration are the three characteristics common to all forms of gaming. Therefore, this definition of the term ‘lottery’ makes all forms of gaming prohibited lotteries.” (citations omitted)); see generally Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201, 230–67 (2009) (detailing state-by-state use of the common law definition of gambling).

27. *Johnson v. Phinney*, 218 F.2d 303, 306 (5th Cir. 1955).

28. See *People v. Li Ai Hua*, 885 N.Y.S.2d 380, 383 (Crim. Ct. 2009) (indicating the state must prove all three elements because the court will not presume the element of chance); see also MO. ANN. STAT. § 572.010(4) (West 2003 & Supp. 2011) (“[A] person engages in ‘gambling’ when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.”).

29. See Charles Pickett, *Contests and the Lottery Laws*, 45 HARV. L. REV. 1196, 1199–1200 (1932). The numerous cases analyzing whether carnival games constitute illegal gambling demonstrate there is no common law exception for carnival games. See, e.g., *Boies v. Bartell*, 310 P.2d 834, 841 (Ariz. 1957) (holding chance predominates over skill in claw and digger machines, and, therefore, they are unlawful gambling devices); *Miss. Gaming Comm'n v. Henson*, 800 So. 2d 110, 116 (Miss. 2001)

are legislative enactments or administrative regulations that authorize the specific type of gambling activity and, as explained below, contests that are decided on skill rather than chance.³⁰

A. Consideration

In most cases, it is easy to identify the consideration in an alleged gambling scheme because the participant must tender something for the chance of winning a prize. The consideration could be money, services, or property.³¹ Some courts define consideration in the same terms as what is necessary for a simple contract.³² Under this broad definition, a number of courts have held that the act of traveling to a store to pick up a free entry form constitutes sufficient consideration to satisfy the first element of the gambling test because the store receives the benefit of direct advertising.³³

(holding “Cherry Master Video” and “Quarter Pusher” amusement games constituted illegal gambling devices); *Carl & Ramagosa, Inc. v. Ash*, 129 A.2d 433, 433, 438–39 (N.J. 1957) (holding the boardwalk games of “Ring the coke bottle,” “Guess your weight and age,” “Bear Pitch Game,” “Bottle Game,” and “Dart Game,” while amusing, are illegal gambling); *Ruben v. Keuper*, 127 A.2d 906, 907, 910 (N.J. Super. Ct. Ch. Div. 1956) (holding a boardwalk game for passersby is primarily a game of chance and thus constitutes gambling).

30. See *infra* Parts IV.A, V.

31. See, e.g., *Loveland v. Bode*, 214 Ill. App. 399, 400–02 (1919) (holding a scheme designed to secure workers’ services constituted a lottery).

32. See, e.g., *Lucky Calendar Co. v. Cohen*, 117 A.2d 487, 495 (N.J. 1955) (“It is hornbook law that if the consideration is sufficient to sustain a simple contract (if otherwise legal), it is sufficient to satisfy this third alleged element of lottery.”).

33. See, e.g., *Blackburn v. Ippolito*, 156 So. 2d 550, 553–55 (Fla. Dist. Ct. App. 1963) (“[C]onsideration [is] flowing from . . . [t]he registrant [who] is out his time and trouble in going to register in order to be eligible for participation.” (quoting *State v. Lynch*, 137 P.2d 949, 953 (Okla. 1943))); *State ex rel. Line v. Grant*, 75 N.W.2d 611, 613, 615–16 (Neb. 1956) (holding the requirement that registrants “enter defendants’ new car salesroom and pass by the new . . . automobiles” was sufficient to satisfy the consideration requirement); *Knox Indus. Corp. v. State ex rel. Scanland*, 258 P.2d 910, 913–14 (Okla. 1953) (“The resultant benefits from the public good will must be recognized. The value of the advertising can neither be doubted nor minimized By such appearances, they are . . . subject[] to the sales appeal of the defendants assorted merchandise.”); *Maughs v. Porter*, 161 S.E. 242, 243–44 (Va. 1931) (“So we conclude that the attendance of the plaintiff at the sale was a sufficient consideration.”); *State ex rel. Regez v. Blumer*, 294 N.W. 491, 492 (Wis. 1940) (“The trial court was of the opinion that the facts of the registrants’ going to the store each day to get the daily coupon and that the operation of the scheme paid the defendant or he would not operate it, constitute consideration.”); see also *McFadden v. Bain*, 91 P.2d 292, 295 (Or. 1939) (“To constitute a lottery, it is not necessary for all participants to pay for their chances, but it is sufficient if some do though many do not pay a valuable

However, some states have restricted this broad interpretation by statutory or constitutional amendments so that consideration now constitutes money, property, or some substantial expenditure of effort.³⁴

B. Prize

The second element, prize, is also easily identifiable in most cases. The prize does not need to be pecuniary,³⁵ and it is immaterial whether the ultimate prize is worth more than the consideration tendered for the chance to receive it.³⁶ Years ago, some slot machine operators attempted to circumvent the gambling laws by awarding nominal prizes to all players and limiting the choice prize to a select few.³⁷ Under this theory, if the machine dispensed a mint or piece of chewing gum for each play, it became a vending machine rather than a gambling device.³⁸ Courts roundly rejected such schemes.³⁹ It is immaterial that every person who participates receives something of value, so long as there is a chance that one person will get more than another.⁴⁰ In essence, the prize must be “some

consideration. The legal effect of the transaction is not changed by the fact that some do not pay. If it is a lottery as to those who do pay, it necessarily is a lottery as to those who do not pay for their chances.”).

34. See, e.g., CAL. PENAL CODE § 319 (West 2010) (requiring consideration to be “valuable”); GA. CODE ANN. § 16–12–20 (West 2009) (exempting promotional giveaways from constituting lotteries); IOWA CODE § 725.12 (2011) (exempting contests “where no purchase or payment is required to enter or win”); MINN. STAT. ANN. § 609.75 (West 2009 & Supp. 2011) (“An in-package chance promotion is not a lottery if . . . participation is available, free and without purchase of the package.”); N.Y. PENAL LAW § 225.00 (McKinney 2008 & Supp. 2011) (“‘Lottery’ means . . . the players pay or agree to pay something of value.”); OR. REV. STAT. ANN. § 167.117 (West 2003 & Supp. 2011) (“‘Lottery’ . . . means . . . [t]he players pay or agree to pay something of value.”); 2010 Kan. Sess. Laws 88.

35. See *United States v. Wallis*, 58 F. 942, 943 (D. Idaho 1893).

36. See *Pickett*, *supra* note 29, at 1207 (“As the quantum of consideration derived from each participant is immaterial, the courts have fairly uniformly held that the gift enterprise remains a lottery even though the contestants pay no more than the goods are worth.” (citations omitted)).

37. See *State v. Apodoca*, 251 P. 389, 389 (N.M. 1926).

38. See *id.* (“The appellant contends that the player operating the machine in question is not engaged in a game of chance, because, while he enjoys the possibility of winning, there is no chance of loss, since, for each nickel deposited, he is sure to obtain value in chewing gum.”).

39. See *id.* at 389–90 (citations omitted) (citing several cases in which these schemes were rejected).

40. See, e.g., *State v. Willis*, 2 A. 848, 850 (Me. 1885) (“Of course all cannot win the highest prize or present. It is not an opportunity for a chance to win.”); *Pickett*,

advantage or inequality in amount or value”⁴¹ received by some, but not all, of the participants.⁴²

C. Chance

The third element, chance, is the fighting issue in most modern gambling cases.⁴³ If the scheme distributes the prizes by chance, then the scheme constitutes illegal gambling.⁴⁴ As stated by one court, chance is “the evil principle against which all [gambling] laws are aimed.”⁴⁵ This element reflects the states’ desire to protect its citizens from “spending money blindly” without any control over what they will receive in return.⁴⁶ Conversely, if the participant’s skill or judgment dictates whether he or she will take home the prize, the “lure to improvidence” is missing and there is no need to prohibit the activity.⁴⁷ As noted by one court, contests of skill or judgment between participants are commendable because they encourage citizens to practice and develop their skills and induce “efforts

supra note 29, at 1202–03 (“[A] contest is not saved from legal odium by awarding every competitor a prize, if there is disparity between the value of the awards.” (citations omitted)).

41. Carl Co. v. Lennon, 148 N.Y.S. 375, 376 (Sup. Ct. 1914).

42. Pickett, *supra* note 29, at 1202.

43. See I. NELSON ROSE, GAMBLING AND THE LAW 79 (1986). One debate concerns whether Texas Hold’em Poker constitutes a game of chance or a game of skill. See Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. COOLEY L. REV. 443, 445 (2005) (“Historically, the presence of skill in poker has perplexed courts when determining whether to classify poker as illegal gambling or permitted activity.”); Blake Griffin & Barbara Osborne, *The Legality of Charity Poker in North Carolina*, 19 J. LEGAL ASPECTS OF SPORT 7, 14–23 (2009) (discussing North Carolina caselaw that evaluates whether Texas Hold’em is a game of chance or skill); Bennett M. Liebman, *Poker Flops Under New York Law*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 19–22 (2006) (discussing cases where courts have evaluated whether Texas Hold’em is a game of chance or skill).

44. See *State ex rel. Schillberg v. Barnett*, 488 P.2d 255, 258–59 (Wash. 1971) (“The element of chance in the instant card games satisfies the requisite element of chance for a gambling game.”).

45. *State v. Shorts*, 32 N.J.L. 398, 401 (N.J. 1868).

46. See L.C.T., Note, *Contests of Skill and the Lottery Laws*, 23 VA. L. REV. 431, 436 (1937).

47. See *Corporate Org. & Audit Co. v. Hodges*, 47 App. D.C. 460, 465–66 (1918). Some states expressly exclude from the definition of gambling any “bona fide contests of skill, speed, strength, or endurance.” See, e.g., COLO. REV. STAT. § 18-10-102 (2011); IDAHO CODE ANN. § 18-3801 (2004 & Supp. 2011); IND. CODE ANN. § 35-45-5-1(d)(1) (LexisNexis 2009); WYO. STAT. ANN. § 6-7-101 (2011).

of great benefit and merit.”⁴⁸

Because the law creates a distinction between games of chance and games of skill, the crucial element of chance lies in the test that distinguishes games of chance from games of skill.⁴⁹ Clearly, some games are based purely on chance. A bingo player has no ability to determine the outcome of the game through the use of skill or judgment.⁵⁰ So long as a player accurately marks the game card, the player can do nothing to increase his or her chances of winning the game. On the other hand, chess is the classic example of a skill game.⁵¹ Outside of the initial decision as to who goes first, the outcome of the game depends solely on the skill and judgment of each participant.⁵²

The distinction becomes more difficult when a game contains a mixture of both chance and skill.⁵³ Early English courts solved this problem by creating a simple bright-line test.⁵⁴ If the participant had any ability to influence the result of the game through skill or judgment, no matter how minimal its impact on the ultimate outcome, the game was merely a contest of skill, not illegal gambling.⁵⁵ As a result, a game only

48. *Hodges*, 47 App. D.C. at 466 (citing *Brooklyn Daily Eagle v. Voorhies*, 181 F. 579, 582 (E.D.N.Y. 1910)); *see also* *People v. Stiffel*, 308 N.Y.S.2d 64, 64 (App. Div. 1969) (“Wagering by the *participants* on the outcome of a game of skill is not gambling”) (emphasis added); L.C.T., *supra* note 46, at 436–39 (explaining the requisite characteristics of a game of skill).

49. *See* L.C.T., *supra* note 46, at 436 (“In contests of skill, the blind chance is missing.”).

50. *See* *Sec. of State v. St. Augustine Church/St. Augustine Sch.*, 766 S.W.2d 499, 501 (Tenn. 1989). A bingo player may increase his or her chance of winning by purchasing more cards, but the winning card is still determined by chance. *See id.* (noting the game “turns almost wholly on the random drawing of numbers”).

51. *See* *ROSE*, *supra* note 43, at 79 (“Chess is considered entirely a game of skill.”).

52. *See id.*

53. As noted by one court, “A peculiar combination of luck and skill is the *sine qua non* of almost all games common to modern life. It is hard to imagine a competition or a contest which does not depend in part on serendipity.” *Pennsylvania v. One Electro-Sport Draw Poker Mach.*, 443 A.2d 295, 298 (Pa. Super. Ct. 1981).

54. L.C.T., *supra* note 46, at 433 (“[T]o constitute a lottery it must be a matter *depending entirely on chance*.” (quoting *Hall v. Cox*, (1899) 1 Q.B. 198)). This bright line test was eventually riddled with exceptions. *See id.* at 434.

55. *See* *People v. Elliott*, 41 N.W. 916, 917 (Mich. 1889) (“A lottery is a scheme by which some result is reached by some action or means taken, in which result man’s choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished.”).

constituted gambling when the outcome was dictated purely by chance.⁵⁶

Most American courts rejected the “pure chance” doctrine, opting for a stringent standard that required much more than a minimal element of skill or judgment.⁵⁷ As explained in the seminal case⁵⁸ *People ex rel. Ellison v. Lavin*, “[t]he 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.”⁵⁹ Under this “dominating element” standard, when the participant’s skill or judgment is ultimately “thwarted by chance,” the game is characterized as one of chance.⁶⁰ Subsequent courts have interpreted this language to mean that “[s]kill must control the final result, not just one part of the larger scheme.”⁶¹ Therefore, a game will not escape prohibition merely “because its result may be affected by some slight extent by the exercise of judgment.”⁶² If the result of the contest depends, in the end, on chance, then skill does not predominate.⁶³

For example, in the case of *Pennsylvania v. Two Electronic Poker Game Machines*, the court considered expert testimony concerning whether an “Electro-Sport” machine that simulated five-card draw poker was a game of chance or a game of skill.⁶⁴ The operator’s expert witness, a professor of statistics, stated that by using strategy he could win at a rate four and one-half times greater than someone who used the initial hand

56. See *United States v. Rosenblum*, 121 F. 180, 182 (S.D.N.Y. 1903) (“[T]o constitute a lottery, it must be a matter depending entirely upon chance.” (quoting *Hall v. Cox*, (1899) 1 Q.B. 198)).

57. See *Opinion of the Justices*, 795 So. 2d 630, 635–36 (Ala. 2001) (“American courts have consistently rejected the English Rule.”).

58. L.C.T., *supra* note 46, at 434 (noting *People ex rel. Ellison v. Lavin* is the leading case that marked the end of the pure chance doctrine in the United States).

59. *People ex rel. Ellison v. Lavin*, 71 N.E. 755, 755 (N.Y. 1904) (emphasis added); see also *State ex rel. McKittrick v. Globe-Democrat Pub. Co.*, 110 S.W.2d 705, 713 (Mo. 1937) (“[A] contest may be a lottery even though skill, judgment, or research enter therein to some degree, if chance in a larger degree determine the result.”).

60. See *Ellison*, 71 N.E. at 755 (quoting *State v. Gupton*, 30 N.C. 271 (1848)).

61. See, e.g., *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973) (citing *Commonwealth v. Plissner*, 4 N.E.2d 241 (Mass. 1936)).

62. *Ellison*, 71 N.E. at 755.

63. *People v. Babdaty*, 30 P.2d 634, 635–36 (Cal. App. Dep’t Super. Ct. 1934) (“As to each player, the fact remained that he won or did not win, depending perhaps not at all, at most only in part, on his ‘skill’ in throwing a ball into a compartment of his choice. Essentially . . . the award was based on a contingency determined by chance.”).

64. *Pennsylvania v. Two Elec. Poker Game Machs.*, 465 A.2d 973, 978 (Pa. 1983).

dealt by the machine.⁶⁵ Based on these results, he concluded skill was a “definite factor” in the game.⁶⁶ The appellate court, however, found the testimony insufficient to prove skill was the dominant factor in the game.⁶⁷ The court ruled the random dealing of the cards dominated the outcome.⁶⁸ Therefore, finding that the other two elements were also satisfied, the court held the game constituted an illegal game of chance.⁶⁹ The court noted:

While skill, in the form of knowledge of probabilities, can improve a player’s chances of winning and can maximize the size of the winnings, chance ultimately determines the outcome because chance determines the cards dealt and the cards from which one can draw—in short, a large random element is always present. . . . Skill can improve the outcome in Electro-Sport; it cannot determine it.⁷⁰

When applying the dominating element standard, the *Ellison* court also noted the pool of game participants—which in that case consisted of the public-at-large rather than a pool of experts—made the contest one of chance rather than skill.⁷¹ The *Ellison* court indicated that in a contest between experts, skill or judgment plays a significant role in determining the ultimate winner, but in a contest between members of the general public, the winner is more likely to prevail because of luck.⁷²

Many courts incorporate this pool-of-participant analysis into the dominating element standard.⁷³ They consider whether a majority of the

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.* at 978–79.

70. *Id.* at 978 (citation omitted). The court also noted “the skill involved in Electro-Sport is not the same skill which can indeed determine the outcome in a game of poker between human players.” *Id.* Specifically, there is no opportunity to hold, fold, bluff, or raise in Electro-Sport poker. *See id.*

71. *See People ex rel. Ellison v. Lavin*, 71 N.E. 753, 756 (N.Y. 1904).

72. *See id.* (“If the contest for a prize was to be had among experts, the award of the prize, despite the many elements affecting the result, which no one could foresee, might possibly be held dependent on judgment, and not on chance. But the competition before us is not at all of that character.”).

73. *See, e.g., Johnson v. Phinney*, 218 F.2d 303, 307 (5th Cir. 1955) (“If, as appellant argues, his patrons are primarily business men and salesmen who amuse themselves on the machines during leisure periods, it is all the more apparent that success depends upon . . . the element of chance.”); *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973) (“Where the contest is aimed at the capacity of the general public, the average person must have the skill, but not every person need have the skill. . . . The

participants likely to play the game would have the skills necessary to influence the results of the game, not whether some limited class of experts could have the level of skill necessary to influence the result of the game.⁷⁴ In short, these courts consider whether chance or skill is the prevailing factor by the people who actually play the game;⁷⁵ their analysis is not a theoretical inquiry into possible contests between experts. In *Ruben v. Keuper*, the court used this reasoning to discount expert testimony describing the differences between skilled and novice players.⁷⁶ In *Ruben*, the court analyzed the carnival game “Fascination,”⁷⁷ and focused on the

scheme cannot be limited or aimed at a specific skill which only a few possess.” (citation omitted)); *State v. Prevo*, 361 P.2d 1044, 1050 (Haw. 1961) (citations omitted) (“[T]he test of whether a game is one of skill or of chance, or one in which skill greatly predominates over chance, is not to be measured by the standard of experts or any limited class of players, but by that of the average skill of a majority of players likely to play the game.”); *State ex rel. McKittrick v. Globe-Democrat Pub. Co.*, 110 S.W.2d 705, 713–14 (Mo. 1937) (quoting *Lavin* for its holding regarding the participant pool); *State ex rel. Dussault v. Kilburn*, 109 P.2d 1113, 1115 (Mont. 1941) (“While the evidence shows that by long practice a certain amount of skill may be developed, yet we must view the operation and result of the machine as it is played by the mass of the patronizing public, with whom it is purely a game of chance.”); *State v. Ricciardi*, 114 A.2d 257, 258–59 (N.J. 1955) (citations omitted) (“The vast majority of the playing public necessarily wager their money against a result dictated by chance alone, and certainly as to them the play is a gamble no less than the play of the traditional ‘one-armed bandits.’”); *State v. Coats*, 74 P.2d 1102, 1106 (Or. 1938) (“If it be conceded that an exceptional person might, after long practice, develop such proficiency in the business as to be able on occasion to influence the result of the play in any substantial or perceptible degree, yet it is apparent that, so far as the patronizing general public is concerned, it involves nothing more than mere chance.”).

74. See, e.g., *Prevo*, 361 P.2d at 1050; *Ricciardi*, 114 A.2d at 258–59.

75. See, e.g., *Prevo*, 361 P.2d at 1050; see also *Commonwealth v. Lake*, 57 N.E.2d 923, 925 (Mass. 1944) (“So here, even if it might be possible by long practice to acquire a substantial degree of skill . . . the jury might well find that few, if any, of the persons who would play the machine at a place of public resort would be likely to possess any appreciable degree of skill; that to the great majority of players the game would be primarily a game of chance; and that the appeal of the game to the public would be a gambling appeal, with all the evil consequences of a lottery.”).

76. *Ruben v. Keuper*, 127 A.2d 906, 908–10 (N.J. Super. Ct. Ch. Div. 1956).

77. See *id.* at 908. The court described the game as follows:

The player rolls a small rubber ball along a table on a gradient plane at the end of which there is a square arrangement of 25 holes consisting of five vertical and five horizontal rows of holes. After propulsion, the ball rolls back to the player for the next play. As a ball enters a hole an electrical device lights up the location on a reproduction of the playing grid set up on a vertical backboard of the device. Between the player and the holes is placed a plastic barrier which the ball must surmount before reaching the hole area. . . . The

pool of novice players rather than an atypical player who has the unique combination of skills to dominate the game.⁷⁸ The court stated:

There is no denial of the factual premise that a player can develop an expertness in either of the games presently under examination sufficient to enable him to compete successfully in a contest with a novice. But plaintiffs' operations do not consist of the conduct of contests of that kind. [Game operators] must be judged by what they actually do, not by a theoretical analysis of an experiment that does not characterize what occurs in their establishments. The average game they run is one in which a score or more of casual boardwalk passersby of various degrees of inexpertness try their hand in competition with others of the same ilk, and against the house. These are games in which comparative novices can win an occasional prize and thus titillate themselves and others into continued participation. To them the lure is chance and not an opportunity to match skills.⁷⁹

Courts do not always engage in a pool-of-participants analysis when deciding whether skill or chance is the predominating element in a game.⁸⁰ As a result, it is difficult to predict whether all courts will find pool-of-participants arguments persuasive.

IV. APPLYING THE GAMBLING TEST TO COMMON CARNIVAL GAMES

For the multitude of carnival games populating the midways, boardwalks, and amusement parks of the United States, there is no doubt that the first two elements of gambling are present. Participants tender consideration for a chance to win a prize. The only issue is whether the prizes are distributed based on chance or skill.

When analyzing carnival games under the dominating element test, it is useful to picture the games on “a continuum with pure skill on one end

first player who lights up an entire 5-hole row, either vertically, horizontally, or diagonally, is the winner, and, for his ten-cents playing fee, receives \$1; if he “makes” the bottom row, the prize is \$5; if the second horizontal row, \$2. The other players lose their dimes to the house.

Id.

78. *See id.* at 909–10.

79. *Id.*

80. *See, e.g.,* *People v. Cohen*, 289 N.Y.S. 397, 400 (Mag. Ct. 1936) (considering only whether an individual, not all possible participants, would be able to develop the skill necessary to win the game in a game of chance or game of skill analysis).

and pure chance on the other.”⁸¹ The end points of this continuum are easy to identify. A pure game of skill “is one, in which nothing is left to chance; but superior knowledge and attention, or superior strength, agility, and practice gain the victory.”⁸² On the other side of the continuum are games of pure chance, “determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance.”⁸³ The rest of the games lie somewhere in the middle.

A. Skill Games

Some carnival games are undoubtedly based solely on the skill of the participant and, therefore, do not constitute illegal gambling. In one New York case, the court observed that skill is so essential in the game of Skee-Ball that it “cannot be . . . a game of chance, even though occasionally an unskilled player may make a lucky shot.”⁸⁴ In another case, a Texas court determined that the knife rack game, which consists of a sloping board adorned with knives arranged so that rings can be thrown and lodged upon a knife, is a game of skill because “the success of the pitcher depended upon his practice, experience, or skill.”⁸⁵

Although not specifically addressed by the courts, other carnival games are easily identified as skill games. In the game shoot-out the star, the participant is challenged to completely eliminate a star-shaped target from a piece of paper by shooting a limited number of BBs at the target.⁸⁶ Because courts have long held that shooting games are games of skill,⁸⁷ it is

81. Anthony N. Cabot et al., *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) (quoting *INTERNET GAMBLING REPORT X*, at 14 (Mark Balestra & Anthony Cabot eds., 2007)).

82. *State v. Gupton*, 30 N.C. 271, 274 (1848).

83. *Id.* at 273–74; *see also* *Baedaro v. Caldwell*, 56 N.W.2d 706, 709 (Neb. 1953) (“A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player.” (citation omitted)).

84. *Cohen*, 289 N.Y.S. at 399.

85. *See McRea v. State*, 81 S.W. 741, 741 (Tex. Crim. App. 1904).

86. *See* GRYCZAN, *supra* note 18, at 33–36.

87. *See, e.g., Cohen*, 289 N.Y.S. at 399 (“In such games as tennis, golf, billiards, bowling, skee-ball, or *even in shooting galleries*, where skill is so essential, it cannot be said that any one of them is a game of chance, even though occasionally an

unlikely that this is a game dominated by chance. Similarly, the balloon-dart game, in which the participant pays money to throw a limited number of darts at a wall of balloons and is awarded a predetermined prize based upon the number of balloons popped,⁸⁸ is obviously a game of skill because the outcome is determined solely by the participant's ability to accurately throw a dart.⁸⁹

B. Games of Chance

On the other side of the continuum are games in which chance clearly determines the outcome. Many of these games blatantly imitate popular casino games akin to roulette. Such games, loosely categorized as wheels of fortune, are virtually identical, except for the details of marketing the game.⁹⁰ One of the more colorful designs is the wild mouse game, where the carnival operator drops a live mouse onto a horizontal spinning wheel.⁹¹ The wheel is divided into colored wedges, with each wedge containing an escape hole for the mouse.⁹² Players place their bets by guessing which hole the mouse will choose.⁹³ Skill has no place in this game, and it undoubtedly constitutes illegal gambling. Because these games closely resemble roulette, they are easily identified and many authorities ban them from the midway.⁹⁴ Games based on casino-type dice games, such as birthday block and color block, are also strictly games of chance.⁹⁵

unskilled player may make a lucky shot.” (emphasis added)); *State v. Abbott*, 11 S.E.2d 539, 545 (N.C. 1940) (noting, in dictum, that “shooting for turkey” is a game of skill).

88. See GRYCZAN, *supra* note 18, at 69–72.

89. See Michael Flynn, *Lessons from Florida: Swing Low, Sweet Charity*, 19 ST. THOMAS L. REV. 429, 439 (2007) (“[T]hrowing darts would seem to have the requisite skill to be classified as a game of skill.” (footnote omitted)). This game is commonly referred to as the “break four” balloon game. WILLIAM A. RIEDTHALER, *CARNIVAL GAMES, GAMBLING AND FRAUDS* 27 (2d prtg. 1987).

90. See JOHN SCARNE, *SCARNE’S NEW COMPLETE GUIDE TO GAMBLING* 565–67 (1986) (describing the structure and gameplay of wheels of fortune); GRYCZAN, *supra* note 18, at 101–04 (describing various specific wheel of fortune games and noting “[w]heels are strictly a game of chance”); see also *Chavannah v. State*, 49 Ala. 396, 396–97 (1873) (noting the game “is strictly a game of chance” and “[t]wo witnesses . . . testified that the game resembled roulette”).

91. SCARNE, *supra* note 90, at 568–69.

92. *Id.*

93. *Id.*

94. See, e.g., *Chavannah*, 49 Ala. at 396; see also GRYCZAN, *supra* note 18, at 99 (noting these games are “strictly a matter of chance” and are thus often banned from the midway).

95. In these games, a multi-sided object is rolled onto a table. A color or

Other carnival games do not blatantly imitate casino-style gambling, yet they clearly constitute games of pure chance. Innocuous games like the “duck pond,” in which participants grab a plastic duck from a flock of plastic ducks floating in a trough filled with circulating water, are undoubtedly games of pure chance.⁹⁶ There is no skill or judgment involved; the prize is determined solely by chance because the letter on the bottom of the duck, which is obscured from view by the water, determines which prize the participant will receive.⁹⁷ It does not matter that every participant wins a prize. So long as there is a chance that one participant could receive a more valuable prize than another participant, the prize element is satisfied.⁹⁸ Another example is the balloon dart game, where a tag under each balloon indicates whether the player wins a small, medium, or large prize.⁹⁹ If the player gets to throw darts until he or she pops a balloon, then chance, not skill, will determine the prize received by the participant.¹⁰⁰ Other games based on this principle, such as the string game,¹⁰¹ clearly constitute illegal gambling.

C. Games of Mixed Skill and Chance

Many carnival games do not lie on either end of the continuum because they combine elements of chance and skill. In this grey area, the

month is listed on each side of the object. Players bet on whether the color or month of their choice will be on top when the object stops rolling. RIEDTHALER, *supra* note 89, at 2–3, 20.

96. See Flynn, *supra* note 89, at 438–39.

97. See GRYCZAN, *supra* note 18, at 119–21.

98. See *Carl Co. v. Lennon*, 148 N.Y.S. 375, 376 (Sup. Ct. 1914) (noting the prize must be of “some advantage or inequality in amount or value” received by some, but not all, of the participants); Pickett, *supra* note 29, at 1203 (“[A] contest is not saved from legal odium by awarding every competitor a prize, if there is disparity between the value of the awards.” (footnote omitted)).

99. See GRYCZAN, *supra* note 18, at 71 (describing Tag Balloon Dart as a game where “[p]layers throw darts at balloons that conceal tags bearing letters or numbers”).

100. See *id.* (“Tag Balloon Dart is really a game of chance, not a game of skill.”).

101. See SCARNE, *supra* note 90, at 615. In the string game, the player pays for the privilege of pulling one of many strings that are all attached to prizes displayed in the shop. See *id.* If the participant is lucky—and the game is not rigged—he or she will pick a string that is attached to a favorable prize. Otherwise, the participant will win a cheap prize worth a fraction of the money paid to play the game. See *id.*; GRYCZAN, *supra* note 18, at 167.

question of legality depends on the dominating element standard.¹⁰² Carnival operators may try to influence the question by labeling their games as ones of skill, but courts will ultimately pierce any disguise of legitimacy and ascertain the real activities involved.¹⁰³

For some games, skill appears to control the outcome, but upon closer inspection, the amount of skill required is minimal and the game is truly determined by chance. One example is the classic penny fall or quarter pusher machine. In this game, a player uses a chute to deposit a coin into a machine containing other coins in the hope that the coin will start a chain reaction that ultimately dispenses more coins or other prizes resting on top of the coins.¹⁰⁴ The coins are moved by a mechanical device that, outside the control of the player, pushes the coins towards a ledge.¹⁰⁵ On its face, the player's skill in placing the coin in a particular spot appears to dictate whether the player will receive a prize.¹⁰⁶ However, the game's setup virtually eliminates any hope that skill will control the result.¹⁰⁷ Numerous courts have concluded that chance predominates over skill in these games and thus the games constitute illegal gambling.¹⁰⁸

Another example is a variation of the previously mentioned balloon dart game—Tag Balloon Dart.¹⁰⁹ In this version, the player is given one

102. See, e.g., *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904) (“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?”).

103. See *Bayer v. Burke*, 338 N.W.2d 293, 294 (S.D. 1983) (explaining “gambling contracts often try to take the form of legitimate contracts”).

104. See *GRYZAN*, *supra* note 18, at 24.

105. See *id.*

106. See *id.*

107. See *id.* Many coins do not fall off the front edge. Instead, they fall off chutes on the side, which are obscured by prizes. These side spills, when coordinated with a slightly inclined lip on the front edge of the machine, produce a heavy advantage for the operator. See *id.*

108. See, e.g., *Noel Shows, Inc. v. United States*, 721 F.2d 327, 329–30 (11th Cir. 1983); *United States v. Two (2) Quarter Fall Mach.*, 767 F. Supp. 153, 155–56 (E.D. Tenn. 1991); *Miss. Gaming Comm'n v. Henson*, 800 So. 2d 110, 114 (Miss. 2001). The Attorney General of South Dakota and the California Bureau of Gambling Control have reached similar conclusions. See *Legality of Quarter Pusher Machs.*, S.D. Op. Att'y Gen., No. 08-04, 2008 S.D. AG LEXIS 4, at *3–7 (Apr. 30, 2008); OFFICE OF THE ATTORNEY GEN., CAL. DEP'T OF JUSTICE, BUREAU OF GAMBLING CONTROL, *ILLEGAL GAMBLING DEVICES 1* (2010), available at <http://www.abc.ca.gov/trade/Law%20Enforcement%20Advisory%20-%20Illegal%20Gambling%20Devices.pdf>.

109. See *GRYZAN*, *supra* note 18, at 71.

dart or a limited number of darts.¹¹⁰ If the player does not pop a balloon, the player loses and receives nothing.¹¹¹ If the participant does pop a balloon, he or she will receive some sort of prize.¹¹² However, the quality of the prize depends entirely on chance, as the prize listed on the tag underneath the balloon—small, medium, or large—determines the result.¹¹³ Under the dominating element standard, “[s]kill must control the final result, not just one part of the larger scheme”;¹¹⁴ if the ultimate outcome of the game depends on chance, skill does not predominate.¹¹⁵ The ultimate outcome of any carnival game is the prize.¹¹⁶ In this case, the player’s skill has no impact on the quality of the prize received, so the result is determined by chance.¹¹⁷ These games, along with similar variations where the participant uses a cork gun to shoot a cup off a table,¹¹⁸ are illegal games of chance because they satisfy all three elements of the gambling test.¹¹⁹

Another game where skill appears to affect the outcome in a meaningful fashion, but likely does not, is the Ring a Bottle game.¹²⁰ In this game, the participant tosses plastic rings at a table full of soft drink

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.* To avoid outright fraud, operators must place some medium or large prize tags on the board; however, some operators rig the game by leaving the tags behind popped balloons or placing the tags on the sides of the board that are strategically placed behind the operator of the game. *See id.*

114. *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973) (citing *Commonwealth v. Plissner*, 4 N.E.2d 241, 245 (Mass. 1936)).

115. *See People v. Babdaty*, 30 P.2d 634, 635–36 (Cal. App. Dep’t Super. Ct. 1934) (“As to each player, the fact remained that he won or did not win, depending perhaps not at all, at most only in part on his ‘skill’ in throwing a ball into a compartment of his choice. Essentially . . . the award was based on a contingency determined by chance.”).

116. *See State v. Schwemler*, 60 P.2d 938, 941 (Or. 1936) (Rossman, J., concurring) (“The provision for skill, as in many other like schemes, appears to be a mere subterfuge to give an appearance of lawfulness and to conceal its real nature. The record undoubtedly shows that the predominating factor in the award of prizes in dart games is chance.”).

117. *See id.* (finding that chance, not skill, was the predominant factor in the award of prizes in dart games).

118. RIEDTHALER, *supra* note 89, at 24–25.

119. *Id.* at 29.

120. *See GRYCZAN*, *supra* note 18, at 47 (“The result is that the [Ring a Bottle] game could not be considered a game of skill” (quoting an FBI Investigator)).

bottles.¹²¹ If one of the rings drops on the neck of the bottle, the participant wins a prize.¹²² Thirty years ago, FBI investigators performed two different tests to determine how difficult it is to win this game.¹²³ Under one test, the participants were successful only once out of every 583 throws.¹²⁴ In the other test, the participants were successful only once out of every 700 throws.¹²⁵ The successful attempts all had one thing in common: the ring only landed on a neck if it ricocheted off the neck of another bottle.¹²⁶ Even if this skill could somehow be mastered,¹²⁷ a court utilizing the pool-of-participants analysis would likely find that the controlling factor in the award of prizes is chance.¹²⁸

Similarly, in Crazy Ball, a participant throws a ball onto a large board riddled with 100 colored holes arranged in a random pattern.¹²⁹ Before throwing the ball, the participant places a bet on a color.¹³⁰ If the ball lands in the appropriately colored hole, a prize is awarded.¹³¹ Because the ball is thrown by the participant, the participant theoretically controls where it lands.¹³² But, because the player must arch the ball over a wall and onto a plastic playing surface, the ball merely rolls until it settles in a hole.¹³³ The possibility that someone, let alone a member of the general public, would have the ability to control where the ball stops rolling is doubtful.¹³⁴ Therefore, it is likely a court would consider this to be a game dominated by chance, rather than skill.¹³⁵

121. *See id.* at 45–47.

122. *See id.* at 45.

123. *See id.* at 45–47.

124. *See id.* at 47.

125. *See id.* at 46–47.

126. *See id.*

127. *See id.* (explaining FBI’s finding that the Ring a Bottle game could not be considered a game of skill).

128. *See State v. Ricciardi*, 114 A.2d 257, 259 (N.J. 1955) (stating if chance is the dominant factor in achieving a particular result, the activity is considered gambling even if a degree of skill is involved).

129. *See GRYCZAN, supra* note 18, at 95.

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.* at 97 (“Crazy Ball . . . belongs to that family of carnival games that is strictly a matter of chance.”).

135. *See id.* (“Most law enforcement agencies accept the argument that there is skill involved when the player tosses the ball into the clear plastic box, although they concede that the skill element is so small, it is inconsequential.”).

Finally, there are some games that are undoubtedly dependent on skill, but it is unclear whether courts would still exempt them from gambling under the skill-based exception. Games such as bottle set up,¹³⁶ ladder climb,¹³⁷ and cover the spot¹³⁸ are known as winnable games because participants who possess the required skill can easily win them repeatedly.¹³⁹ Indeed, many of these games limit participants to only one prize per day.¹⁴⁰ What distinguishes these games from the previously mentioned games of chance is the fact that a determined participant could spend countless hours practicing until the skill is mastered.¹⁴¹ Therefore, for these experts, it becomes a game of skill. However, for the rest of the general public who has not spent the time to practice carnival games at home, a winning play is most likely just a lucky break. Under a pool-of-participants analysis, such games could be classified as games of chance.¹⁴²

V. MODERN DAY ENFORCEMENT OF GAMBLING LAWS ON THE MIDWAY

The previous analysis begs the question: if so many common carnival games constitute illegal gambling, why do they continue to exist today? There are several reasons why many carnival game operators avoid

136. This game consists of a bottle and a ring attached to a string dangling from a pole. “The object of the game . . . is to bring upright a bottle lying on its side by slipping the ring over its neck and raising the end of the stick.” *Id.* at 27.

137. The object of the game is to crawl up an angled rope ladder that is supported by swivels on both ends. *See id.* at 149.

138. In this game the participant must completely cover one large circle by dropping five smaller circular discs from a height of one to six inches. *See id.* at 9, 13.

139. *See id.* at 9, 27, 149.

140. *See, e.g., id.* at 152.

141. One man did so by building the games at home and practicing until he became an expert. *See id.* at 14, 31.

142. *See State ex rel. Dussault v. Kilburn*, 109 P.2d 1113, 1115 (Mont. 1941) (“While the evidence shows that by long practice a certain amount of skill may be developed, yet we must view the operation and result of the machine as it is played by the mass of the patronizing public, with whom it is purely a game of chance.”); *State v. Ricciardi*, 114 A.2d 257, 258–59 (N.J. 1955) (“[A] small percentage of the players have achieved the degree of skill necessary to cause the balls to follow the desired, rather than a random, route. The vast majority of the playing public necessarily wager their money against a result dictated by chance alone, and certainly as to them the play is a gamble no less than the play of the traditional ‘one-armed bandits.’” (citations omitted)); *State v. Coats*, 74 P.2d 1102, 1106 (Or. 1938) (“If it be conceded that an exceptional person might, after long practice, develop such proficiency in the business as to be able on occasion to influence the result of the play in any substantial or perceptible degree, yet it is apparent that, so far as the patronizing general public is concerned, it involves nothing more than mere chance.”).

prosecution. First, carnival operators freely admit there is a long history of bribing local law enforcement agencies to avoid enforcement of state gambling laws.¹⁴³ Second, some enforcement agencies simply choose not to enforce the laws,¹⁴⁴ possibly because carnival games constitute minor infractions that have persisted for so long there is little incentive to start prosecuting them now.

In some states, prosecutors did enforce the gambling laws against these illegal games of chance.¹⁴⁵ In a series of cases during the 1950s, local prosecutors in New Jersey successfully argued that the carnival games lining the seaside boardwalks constituted illegal gambling.¹⁴⁶ The public reacted negatively to this campaign, and in 1959 New Jersey became the first state to officially legalize most carnival games.¹⁴⁷ New Jersey's Legalized Games of Chance Control Commission¹⁴⁸ now oversees the operations of carnival-type games in statutorily prescribed locations.¹⁴⁹ Initially, New Jersey regulations strictly limited the impact of these games, and operators were limited to charging a maximum of 25 cents per play,

143. See RIEDTHALER, *supra* note 89, at i–ii; *see also* United States v. Welch, 656 F.2d 1039, 1045–46 (5th Cir. 1981) (detailing how a sheriff accepted a \$1,000 bribe to not enforce gambling laws on the local fair's midway).

144. *See, e.g.*, Rich Margittay, *Margittay: Carnival Scams Plague Wayne County, Police Culpable*, PRESS & GUIDE (July 12, 2010), <http://www.pressandguide.com/articles/2010/07/12/opinion/doc4c389ea2ab075178856813.txt> (explaining police officers from two cities refused to take action or complete police reports after notification of illegal “dozer” or “pusher” games at area festivals).

145. *See, e.g.*, Carll & Ramagosa, Inc. v. Ash, 129 A.2d 433, 433, 439 (N.J. 1957) (affirming Chancery Division's dismissal of plaintiffs' complaint “which sought to restrain the county prosecutor and the local chiefs of police from interfering with the operation of their games along the boardwalk”).

146. *See, e.g., id.* at 433–34; Martell v. Lane, 123 A.2d 541, 542, 545–46 (N.J. 1956) (upholding gambling conviction); Ruben v. Keuper, 127 A.2d 906, 910 (N.J. Super. Ct. Ch. Div. 1956) (denying boardwalk operators' action seeking to restrain prosecutors from enforcing the gambling laws against their games); *see also Ricciardi*, 114 A.2d at 258–60 (upholding gambling conviction).

147. SCARNE, *supra* note 90, at 563; *see also Governor Approves Jersey Game Vote*, BILLBOARD, June 22, 1959, at 78, *available at* http://books.google.com/books?id=WCAEAAAAMBAJ&pg=PA78&lpg=PA78&dq=billboard,+governor+approves+jersey+game+vote&source=bl&ots=JS8K76jHid&sig=TFYus4NxBzciyWrn1AD1puFLbBw&hl=en&ei=dLbjToXcD5G8tgeghbmQCg&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBkQ6AEwAA#v=onepage&q=billboard%2C%20governor%20approves%20jersey%20game%20vote&f=false.

148. N.J. STAT. ANN. § 5:8-1 (West 1996).

149. This includes amusement parks, seashore, other resorts or agricultural exhibitions (county fairs). *See id.* § 5:8-101, -121.

with a maximum prize value of \$15.00.¹⁵⁰ Today, the carnival games can be aimed at high-stakes gamblers because operators may now charge up to \$10.00 per play, with a maximum prize value of \$10,000.¹⁵¹

In Iowa, the attorney general led the charge to eliminate illegal gambling from the midway.¹⁵² Despite strict prohibitions against lotteries and gambling,¹⁵³ casino-style carnival games persisted throughout Iowa for decades, prominently operating mere miles from the State's capitol building. No one prosecuted the carnival games until 1972 when Iowa Attorney General Richard Hunter, after being chastised for enforcing the state's gambling laws against church sponsored bingo nights and other fundraising activities,¹⁵⁴ also threatened to shut down many of the carnival games offered at the Iowa State Fair.¹⁵⁵ Efforts by carnival and fair associations to enjoin the attorney general from enforcing the state's gambling laws failed in both state and federal courts.¹⁵⁶ However, the carnival interests eventually prevailed, as anger over the decision to close down the carnival games fueled a bid to amend the Iowa constitution and overhaul the state's gambling laws.¹⁵⁷ Carnival games are now permitted, with appropriate licenses, at fairs, amusement parks, and celebrations sponsored by a bona fide civic group, service club, or merchants group if authorized by the local city council or board of supervisors.¹⁵⁸ Initially, amusement game operators could charge up to \$1.00 to play a game, with the maximum prize of \$25.00 worth of merchandise.¹⁵⁹ Today, these limits have seen modest updates of \$3.00 and \$50.00 respectively.¹⁶⁰

After these highly publicized legal battles, many other states passed

150. 15 N.J. Reg. 682 (May 2, 1983) (proposing first change in maximum participation fee); 15 N.J. Reg. 1254 (Aug. 1, 1983) (adopting proposed change), available at http://law.njstatelib.org/slic_home/law_library/new_jersey_legal_resources/new_jersey_register.

151. 15 N.J. Reg. 682; 15 N.J. Reg. 1254.

152. See, e.g., *supra* notes 3–6 and accompanying text.

153. See IOWA CONST. art. III, § 28 (1971) (“No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed.”).

154. See *Report of the Attorney General, supra* note 5, at *Gambling*.

155. See *Century 21 Shows, Inc. v. Iowa*, 346 F. Supp. 1050, 1051 (S.D. Iowa 1972); see also *Report of the Attorney General, supra* note 5, at *Gambling*.

156. *Report of the Attorney General, supra* note 5, at *Gambling*.

157. See *Timely Observations, supra* note 6, at 8 (noting Iowa passed new and less stringent gambling laws).

158. See IOWA CODE § 99B.4 (2011).

159. See *Timely Observations, supra* note 6, at 8.

160. See IOWA CODE § 99B.3(1)(d), (h).

legislation legalizing carnival games, with various restrictions. One common restriction is that the carnival games must be conducted by charitable organizations or for some charitable purpose.¹⁶¹ For example, in South Dakota, the state constitution indicates that the legislature can only authorize games of chance if the games are conducted by charitable organizations and “the entire net proceeds of such games of chance are . . . devoted to educational, charitable, patriotic, religious, or other public spirited uses.”¹⁶² Similarly, in Rhode Island, charitable organizations can obtain a license to offer a game of chance so long as the game is conducted by members of the organization and the entire net receipts of the game are applied solely to the “bona fide charitable purposes of the organization.”¹⁶³ As a result, many traveling carnivals are sponsored by local charities, with a certain percentage of profits allocated to the sponsoring organization.¹⁶⁴ Other common restrictions are the aforementioned limits on the cost to play the games and the value of the prizes offered.¹⁶⁵ In many states, carnival game operators cannot offer cash prizes.¹⁶⁶

Some states went so far as to legislate which specific games are allowed within their borders.¹⁶⁷ For example, in Montana, duck pond is one of the many games exempted from gambling prohibition.¹⁶⁸ Montana also provides a mechanism whereby carnival game operators can seek exemptions for new games.¹⁶⁹ However, the Montana Department of Justice will not authorize the game unless, “after careful review, it can be demonstrated that winning is not contingent upon lot or chance and is based upon the skill of the player.”¹⁷⁰

Ohio also enacted a very comprehensive scheme to regulate the

161. See, e.g., MD. CODE ANN., CRIM. LAW §§ 13-201(b)–(c), 13-204 (LexisNexis 2002 & Supp. 2010); TEX. PENAL CODE ANN. § 47.01(1)(C) (West 2011).

162. See S.D. CONST. art. III, § 25.

163. See R.I. GEN. LAWS § 11-19-36(3) (2002). In Maryland, the event must be managed “personally” by the members of the qualifying organization. See MD. CODE ANN., CRIM. LAW § 13-205 (LexisNexis 2002).

164. See, e.g., RIEDTHALER, *supra* note 89, at ii.

165. See *supra* notes 159–60 and accompanying text.

166. See, e.g., IOWA CODE § 99B.3(1)(f) (2011).

167. See, e.g., MONT. CODE ANN. § 23-6-104 (2009) (listing, among others, “Crane games,” “Fish pond (duck pond),” and “Hoop or ring toss”).

168. See *id.* § 23-6-104(2)(a).

169. MONT. ADMIN. R. 23.16.3801(1) (2007).

170. *Id.*

carnival game industry.¹⁷¹ The Ohio Code expressly forbids “games of chance,”¹⁷² exempts skill games,¹⁷³ and defines the test for the skill-based exemption.¹⁷⁴ This definition specifically refers to the dominating element test, but it does not discuss the pool-of-participants analysis:

[C]ontests, games, tournaments, and other activities, the outcome of which is *predominantly determined by the skill of the contestants, participants, or players*, whether or not the contestants, participants, or players pay a price for the opportunity to win a prize, do not constitute a game of chance or gambling within the meaning, purpose, and intent of this section The foregoing definition does not apply where the contest, game, tournament, or other activity contains or includes any mechanical or physical device which directly or indirectly impedes, impairs, or *thwarts the skill of the contestant*, participant, or player.¹⁷⁵

The Ohio Administrative Code further clarifies this definition by providing lists of prohibited and exempted games.¹⁷⁶ The list of prohibited games includes several of the games of chance discussed above: duck pond, the string game, penny fall games, and “wheels of all kinds.”¹⁷⁷ The ring the bottle game, which was identified earlier as a game in which skill is likely not a factor in the ultimate outcome, is specifically exempted from prohibition.¹⁷⁸

Carnival game regulation is not just limited to state legislation. Some cities have used their police power specifically to regulate carnival games.¹⁷⁹

171. See OHIO REV. CODE ANN. § 1711.09, .11(H) (LexisNexis 2009).

172. See *id.* § 1711.09.

173. See *id.* § 1711.11(H).

174. See *id.*

175. *Id.* (emphasis added).

176. OHIO ADMIN. CODE 901:9-2-07, 9-2-10 (2007).

177. *Id.* at 901:9-2-07.

178. *Id.* at 901:9-2-10.

179. See, e.g., CAMBRIDGE, MASS., CODE § 9.08.030 (2011), available at http://library.municode.com/HTML/16889/level2/TIT9PUPEMOWE_CH9.08OFAGPUPEDE.html#TIT9PUPEMOWE_CH9.08OFAGPUPEDE_9.08.030GA (“No person shall expose, in or upon any street, public ground or common, any table or device of any kind, by or upon which any game of hazard or chance can be played; nor shall any person play any such game at such table or device, in or upon any street, public ground or common.”); MINNEAPOLIS, MINN., CODE § 267.520 (2011), available at http://library.municode.com/HTML/11490/level4/COOR_TIT13LIBURE_CH267AM_ARTVCA.html#COOR_TIT13LIBURE_CH267AM_ARTVCA_267.520GACHIN (“No person shall operate or cause to be operated any gambling device, lottery, number or paddle wheel, number board, punchboard or other game of chance.”); L.A.,

For example, in Cambridge, Massachusetts; Minneapolis, Minnesota; and Los Angeles, California; “games of chance” are not allowed at carnivals.¹⁸⁰ As discussed above, courts interpreting these ordinances will use the dominating element test to distinguish which games constitute legal games of skill and which constitute illegal games of chance.¹⁸¹

Because of the uneven regulation of carnival games throughout the United States, it can be very difficult to determine which specific games are exempted from prohibition in each specific jurisdiction. This may account for the overall lack of enforcement throughout the United States.

VI. CONCLUSION

Because of the broad definition of gambling in the United States, many carnival games straddle a fine line between illegal gambling and amusement.¹⁸² Several years ago, prosecutors in two states took action to enforce the gambling laws against carnival games.¹⁸³ The prosecutors were successful, but negative public reaction persuaded the legislatures in both states to change the gambling laws so as to formally legalize certain types of carnival games under certain circumstances.¹⁸⁴ Many other states followed suit, with each state carving out its own unique exceptions for carnival games.¹⁸⁵ Individual cities and counties have also legislated in this area,¹⁸⁶ with a resulting patchwork of state laws, regulations, and local ordinances exempting certain types of games in certain locations under certain conditions.

Because most carnivals travel nomadically throughout the United States,¹⁸⁷ many carnival games likely do not meet the unique exemptions in

CAL., COUNTY CODE § 7.25.260 (2011), available at <http://search.municode.com/html/16274/index.htm> (“Games of chance are prohibited.”).

180. See *supra* note 179 and accompanying text.

181. See *supra* notes 59–83 and accompanying text.

182. See *supra* Part IV.

183. See *supra* notes 146–47 and accompanying text.

184. See, e.g., *Timely Observations*, *supra* note 6 (discussing how Iowa relaxed its anti-gambling laws to permit many carnival games); see also *supra* notes 147–48 and accompanying text.

185. See *supra* Part V (discussing the landscape of modern day enforcement).

186. See *supra* note 179 and accompanying text.

187. See Edward Martin, *Game of Chance: That’s How Corky Powers Won the State Fair Midway Contract. But Will His Fortune Be Tolded?*, BUSINESSNC.COM (Sept. 2006), <http://www.businessnc.com/index.php?src=directory&view=articles&srctype=detail&refno=252&category=2006-09> (describing how one traveling carnival

each jurisdiction. However, because many law enforcement officials do not actively enforce the gambling laws on the midway, illegal games of chance continue to operate throughout the United States.¹⁸⁸ As more states begin to rely upon state-sponsored gambling as a source of revenue,¹⁸⁹ state enforcement agencies may begin to enforce the gambling laws on the midway in order to protect their own stream of revenue.¹⁹⁰ If state authorities shine the bright light of prosecution on the carnival game industry, many of the carnival games will likely be shut down.

spends the summer moving between events in North Carolina, Virginia, Maryland, New York, and Pennsylvania).

188. See, e.g., Margittay, *supra* note 144.

189. See Jeff Perlee, *State-Sponsored Gambling: Promise of More Revenue and More Questions for Policymakers*, THE NELSON A. ROCKEFELLER INST. OF GOV'T (Oct. 2009), http://www.rockinst.org/observations/perleej/2009-10-state-sponsored_gambling.aspx (noting how industry estimates indicate state-sponsored "gaming accounts for more than 60 percent of all monies legally wagered in the United States").

190. See *Kansas Orders Arcades to Remove Games: Commission Targets Games That Return Tickets for Prizes*, KMBC.COM (Apr. 23, 2010), <http://www.kmbc.com/r/23246454/detail.html> (speculating that the Kansas Racing and Gaming Commission removed certain "pushers or sliders" games because the commission wants to see the gambling casinos capture the entire gambling market).