

## Card Counting and the Casino's Reaction

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**B**LACKJACK IS THE MOST POPULAR casino betting game in the world, both in gambling establishments and in online casinos. Blackjack's popularity stems from its simplicity and the theory that, when played with proper basic strategy, the game typically has a "house edge," or advantage for the casino, of about .5%–1%. This house edge is significantly lower than that of other casino betting games, such as slots and roulette. Blackjack is also a game that is not based solely on chance. This gives players the impression that they have control of the outcome. However, even when players dedicate considerable amounts of time learning proper basic strategy, the casino will always have an advantage that is systematically built into the game structure.

Most importantly, blackjack's popularity stems from the highly publicized idea that players can actually beat the casino. The most popular and controversial way players attempt to beat the game is through a complex system of card counting. Card counting has been the subject of thousands of books and is featured in several blockbuster films, such as *Rain Man* and *21*. Although many of the books and movies are mostly fictional depictions of card counting, it is possible to successfully eliminate the casino advantage through the use of card counting. The most successful card counters can even gain an advantage over the casino. Card counting does not guarantee winning millions of dollars as the movies portray, but with proper strategies, winning becomes much more probable.

The casino industry enjoys the added popularity of blackjack in their gaming establishments, however, they do not appreciate the publicity card counting has received through popular books and movies. Card counting, without the use mechanical devices,

is completely legal under the laws of Nevada and New Jersey. However, gaming establishments implement numerous countermeasures in an attempt to cripple card counters' ability to beat the casino at its own game.

Many blackjack experts, as well as the author, oppose the use of exclusion and shuffle-at-will countermeasures in an attempt to stop card counting. Players using superior knowledge, skill, and practice in a legal manner should be permitted to continue doing so until their actions cross the line and become illegal under the laws of the United States of America.

Blackjack involves a player (or players) and a dealer employed by the gaming establishment. Players compete against the dealer, who acts on behalf of the casino (the "house"), but not against other players at the table. The basic premise of the game is to end with a combined card value of 21, or at least a value closer to 21 than that of the dealer, without going over. A "blackjack" occurs when a player is dealt his initial two cards with a combined value of 21. Therefore, a "blackjack" requires the first two cards to be an ace and any ten-valued card.

The challenge players face, and the excitement of the game, are derived from making a decision based on an uncertain outcome. Players must decide whether or not to draw additional cards by comparing the combined value of their own cards with the value of only one of the two initial cards the dealer possesses (the second card is face down). Although the rules of the game are fairly simple, thousands of different combinations of cards, all with different probabilities of winning, makes the player's decision thousands of times harder. The dealer, however, makes no independent decisions and must follow the rules of play, which dictate his move.

The process of dealing cards in blackjack and the cards' values are fairly simple and straightforward. Initially, each player is dealt two cards facing up. Like the player(s), the dealer is initially dealt

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two cards; however, only one of the dealer's cards is turned face up for players to see. The dealer's unknown, downward-facing card is known as the "hole card." The hole card requires players to speculate on its value and enhances the element of chance, while the dealer's visible card has a significant impact on strategy.

Each card in a deck, with the exception of the ace, has a specific number or point value. In blackjack, the cards are valued as follows: face cards (kings, queens, and jacks) are counted as 10; cards 2–10 are counted as their face value; and an ace can be counted as either 1 or 11. Generally, the suit of each card has no meaning or effect on the classic version of blackjack. In each hand of blackjack, it is the combined value of all the player's cards which must be equal to or less than 21 to possibly win, depending on the dealer's cards.

Using one or several of the options described below, players attempt to win by beating the dealer's hand. Beating the dealer's hand can be accomplished in one of the following ways: (1) get twenty-one points on the player's initial two-card hand, which is called a "blackjack"; (2) have a combined value higher than the dealer without exceeding twenty-one; or (3) let the dealer hit and draw additional cards until his or her hand exceeds a value of twenty-one.

Once all players receive their initial two-card hand, the real game begins. First, players have the option to "hit," or take an additional card or cards. Second, players have the option to "stand," in which they take no additional cards and use the combined value of the initial two-card hand against the dealer. Third, players have the option to double their initial bet, known as "doubling down," by placing an additional bet on the table equal to the initial bet. However, players choosing to "double down" commit to taking *exactly* one additional card and no more. Finally, if the player's first two cards are the same or have equal value, players may place an additional bet equal to the initial bet and request a "split." The dealer will then separate the two cards, and draw an additional card on each, resulting in two separate and independent hands. Unlike doubling down, where players receive exactly one additional card, players splitting may choose to stand or hit as many times as desired. In addition, depending on the casino's rules, players may be permitted to split again or double down on the two independent hands.

After every player and the dealer receive the initial two-card hand, the dealer goes around the table

providing each player the opportunity to choose one or several of the options above before the dealer reveals the hole card and plays his hand. The most fortunate situation for players occurs when a player is dealt an ace and a card with a value of ten (10, jack, king, or queen) as his initial two cards, resulting in a combined value of 21. This is called a "blackjack." A blackjack typically pays 3:2, as opposed to the usual 1:1 payout on a non-blackjack win. A blackjack can never lose; however, blackjack does not guarantee a win. If the dealer also gets a blackjack, the hand will result in a tie, also known as a "push," in which no money is won or lost. A player may also reach 21 after hitting one or more times or after splitting two aces and drawing a ten-values card as the second card on either split. However, this is not considered a blackjack. The distinction is important for several reasons. First, a winning blackjack will pay the player 3:2, while a winning non-blackjack 21 pays the player 1:1. Also, a blackjack beats any hand other than blackjack, while a non-blackjack 21 can be beat by a blackjack.

When a player decides to hit and draws one or more additional cards, or doubles down and receives one additional card, and gets a total card value that exceeds 21, the player "busts." Busting results in an automatic loss, regardless of how the dealer's hand plays out. Therefore, there is no push or tie when both the player and dealer bust.

Winning blackjack does not require the player to get a blackjack or reach a total of 21 on each hand. A player will win with any combined value not exceeding 21 if the dealer subsequently busts. A player may choose not to hit even when his hand is at a very low number if he speculates that the dealer will draw higher cards, causing a dealer bust. Players are generally free to hit or stand in any situation, while the dealer's decision is dictated by the casino's rules of play. Once the dealer begins playing his hand and reveals the hole card, he is required to play his hand in a specific way with no deviation from the rules. Typically, the dealer must continue to hit until he has a total of 17 or more. A skilled player will take into account not only his own cards, but also the card that the dealer is showing when making the decision of whether to hit or stand. For example, if the player holds a nine card and a seven card for a total of sixteen, while the dealer is showing a five card, the player's best move would be to stay at sixteen. The reason for this is that even if the dealer's hole card is ten-

valued card, he is required to hit and his probability of busting is high.

Mathematical probability is the foundation of the gaming business. Casinos structure payouts for the various casino games to give themselves a mathematical advantage over the players. This is commonly referred to as the "house edge." Casinos typically pay less than the "true odds" on each bet. The result is an automatic house edge over the player on each hand. In a perfect game of blackjack, where each player executes with proper basic strategy, the casino typically has a 0.5%–1% advantage over the players. However, when players fail to follow basic strategy, make risky or wild bets, or become intoxicated, the house edge increases and the player's odds of winning decrease. Studies show that the actual house edge over the player is typically around 2.0%. A 2.0% house edge may not seem like much, but it adds up quickly, as hand-after-hand is played. In the short run, a player may win more than he loses, but in the long run, the house edge should result in the player's losses exceeding the player's wins.

*Advantage play* involves a highly skilled player who analyzes the statistical probability of the game and, based on the probability, develops a playing strategy which may afford him an advantage over the casino.<sup>1</sup> Card counting is one of the most common and publicized forms of advantage play. The idea of any form of advantage play, including card counting, is to turn the tables on the casino and create a "player edge" over the house.

*Card counting* is a process of counting the value of cards as they are played in order to figure out when the remaining cards in the deck are more favorable to the player, at which point he increases his wager. The purpose of tracking the value of the cards as they are played is because as cards are removed from the deck, the player's probability of winning can increase or decrease depending on which cards have already been played. Generally, as low-value cards are played and removed from the deck, the player's probability of winning increases as the proportion of higher-valued cards remaining in the deck increases. Conversely, as high-value cards are played and removed, the player's probability of winning decreases: low-valued cards tend to benefit the dealer due to the typical casino rules of play which require dealers to hit when they have a hand valued at 16 or below. A high proportion of low-valued cards raises the probability of

safely hitting one or more times to reach the threshold of 17.

Knowing the number of low- and high-value cards has several practical effects on a card counter's strategy. First, a high concentration of aces and ten-valued cards increases a player's chance of getting a natural blackjack, which pays 3:2. Also, high-valued cards will increase the dealer's chances of busting. Proficient card counters are able to utilize the probability of high-valued cards when determining bet size and whether to double down or split, thus maximizing profits each hand.

Successful card counters are masters of recognizing the statistical effect each card previously played has on future cards yet to be dealt. The following list reveals the statistical effect the removal of each card has on the player's decisions and expectations. The effect of removal for each card played are as follows, with positive percentage shifts favoring the player, while negative percentage shifts favor the dealer:<sup>2</sup>

- 2: +.38%
- 3: +.44%
- 4: +.55%
- 5: +.69%
- 6: +.46%
- 7: +.28%
- 8: .00%
- 9: −.18%
- 10, Jack, Queen, or King: −.51%
- Ace: −.61%

Understanding the exact effect of each card as it is played forms the basis for card-counting strategies. Increasing or decreasing the amount bet, and doubling down or splitting, in accordance with the statistical probabilities allows a proficient card counter to eliminate the house edge and achieve a player advantage.

The most common and least complex form of card counting is the "Hi-Lo" counting system. Hi-Lo counting involves assigning each card a positive one (+1), negative one (−1), or neutral (0) point value to each card. The point values for each card

<sup>1</sup>Bartolo v. Boardwalk Regency Hotel Casino, Inc., 449 A.2d 1339 (N.J. Super. Ct. Law Div. 1982).

<sup>2</sup>See Anthony Cabot and Robert Hannum, *Advantage Play and Commercial Casinos*, 74 Miss. L.J. 681 (2005).

are as follows: cards two through six equal +1; cards seven through nine equal 0; ten and face cards equal -1. From the beginning of a freshly shuffled card shoe, the card counter will begin by tracking the "running count" in which he will start the count at zero and add or subtract the applicable point value for every card played at a blackjack table. At any time the running count can then be calculated into a "true count." Calculating the true count involves dividing the running count by the amount of cards or decks yet to be played, which is known as "deck penetration." For example, a running count of +10 with about five decks yet to be played results in a true count of 2.00. Finally, the card counter will determine the bet to play by comparing the true count with a complex table of "index numbers."

### NEVADA LAW ON CHEATING

The Nevada Gaming Control Act is a complex set of rules and regulations designed to ensure that the gaming industry does not negatively impact the quality of life and public welfare of the residents and visitors within the state. The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming is conducted honestly and competitively.<sup>3</sup> Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, activities, and procedures relating to the operation of licensed gaming establishments.<sup>4</sup> Therefore, all establishments where gaming is conducted must be licensed, controlled, and assisted to protect the public health, safety, morals, and general welfare of the residents of Nevada. An important aspect of the Nevada Gaming Control Act, as opposed to the laws of some other states, is that the Act specifically states that it does *not* abrogate or abridge any common law right of a gaming establishment to exclude any person from gaming activities, or eject any person from the premises of the establishment for any reason.<sup>5</sup> Furthermore, the Act does not prohibit a licensee from establishing minimum wagers for any gambling game.<sup>6</sup>

The Nevada Gaming Commission (Commission) and the State Gaming Control Board (Board) make up the state's administrative agencies designed to ensure that the Act's rules, regulations, and procedures are enforced in a way that promote public

safety and welfare. The Commission generally has the authority to adopt, amend, or repeal regulations of the Act as it deems necessary or desirable in the public interest, in carrying out the policy and provisions of the Act. Regulations of the Act control nearly every aspect of gaming in Nevada, including but not limited to: (a) the application and procedure for obtaining gaming licenses; (b) the criteria to be considered in a license application; (c) the fees and applicable methods of collection and payment of such fees; (d) defining and limiting the area, games, and devices permitted at a gaming establishment; and (e) the method and operation of games and devices in a gaming establishment.<sup>7</sup> In effect, the state legislature has delegated its power to the Commission and Board to make laws and regulations governing casino gambling. Additionally, even with such comprehensive regulation and control, the Commission and Board allow each gaming establishment to set their own rules on how specific games should be played and who can play them.<sup>8</sup> As discussed below, problems arise when a casino implements its own rules of play that conflict with regulations of the Act.

Under common law, *cheating* is defined as manipulating the play of a game in a way not allowed by the game's rules.<sup>9</sup> There are three general categories of cheating which include: acquiring knowledge of the outcome of the game or any event affecting the outcome that is not available to all players; altering the selection of outcome; and increasing or decreasing a wager after learning the result of the random event.<sup>10</sup> Most jurisdictions, including Nevada and New Jersey, contain statutes in their respective Gambling Acts that define cheating using some variation of the three general categories.

The Nevada Revised Statutes (NRS) contains specific codified sections concerning the conduct of casino personnel and patrons participating in various casino games. Specifically, Nevada has two

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<sup>3</sup>NEV. REV. STAT. ANN. § 463.0129 (West 2015).

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>NEV. REV. STAT. ANN. § 463.150 (West 2015).

<sup>8</sup>I. Nelson Rose, *Card Counting*, in BLACKJACK AND THE LAW 23-24 (RGE Publishing 1998).

<sup>9</sup>*Id.* at 11.

<sup>10</sup>Cabot and Hannum, *supra* note 2, at 681 (citing DUSTIN D. MARKS, CHEATING AT BLACKJACK AND ADVANTAGE PLAY 101 (1994)).

state statutes that make it illegal to cheat or conspire to cheat at a gambling game. First, NRS § 465.015 defines “cheat” as altering the elements of chance, method of selection, or criteria, which determine: (a) the results of a game; (b) the amount or frequency of payment in a game; (c) the value of a wagering instrument; or (d) the value of a wagering credit.<sup>11</sup> Second, NRS § 465.083 states that, “it is unlawful for any person, whether the person is an owner or employee of or a player in an establishment, to cheat at any gambling game.”<sup>12</sup> In other words, illegal cheating occurs when a casino owner, employee, or player attempts to alter the element of chance, changing both the nature of the game and the criteria for winning. In a landmark cheating case, *Sheriff of Washoe County v. Martin*, the court, in light of the legislative purpose, interpreted the anti-cheating statutes to prohibit the alteration of the group of characteristics which identify and define the game in question.<sup>13</sup> Furthermore, the attributes of the game—its established physical characteristics and basic rules—determine the probabilities of the game’s various possible outcomes.<sup>14</sup> Changing the attributes of the game to affect the probability of an outcome is a criminal act.<sup>15</sup>

In *Martin*, the court also concluded that fraudulent intent is an element of cheating, and that legislative history does not suggest that legislatures intended for it to be removed.<sup>16</sup> Combining the anti-cheating statutes with the fraudulent intent requirement results in an overall rule making cheating illegal. Therefore, as *Martin* stated, “if a player or dealer deceitfully alters an identifying characteristic or attribute of a game with the intent [to] deprive another of money or property by affecting the otherwise established probabilities of the game’s various outcomes, he or she is guilty of cheating within the meaning of NRS 465.015 and NRS 465.083.”<sup>17</sup>

In addition to the cheating statutes discussed above, NRS § 465.070 makes fraudulent acts in casino gaming unlawful.<sup>18</sup> Nevada Revised Statutes § 465.070 states, “[i]t is unlawful for any person: (1) [t]o alter or misrepresent the outcome of a game or other event on which wagers have been made after the outcome is made sure but before it is revealed to the players.”<sup>19</sup> It is also unlawful for any person “[t]o place, increase or decrease a bet or determine the course of play after acquiring knowledge, not available to all players, of the outcome of the game or any event that affects the outcome of the

game or which is the subject of the bet. . . .”<sup>20</sup> Nevada Revised Statutes § 465.070 mirrors the categories of cheating under common law. Whether the information used in making a decision during the course of play was known to other players or only the individual player will be considered in the classification of cheating or fraudulent acts.

## NEW JERSEY LAW

The New Jersey Casino Control Act is the state’s codified body of law consisting of rules and regulations implemented to promote substantial contribution to the general welfare, health, and prosperity of the state and its residents.<sup>21</sup> As in Nevada, the essential element of regulation and control of casino gaming rests in the public confidence and trust in the credibility and integrity of the regulations, procedures, and casino operations.<sup>22</sup> To ensure the public confidence and trust, the regulations, rules, and procedures are to be strictly enforced on all persons, location, and practices related to the operation of a licensed casino.<sup>23</sup> Importantly, unlike Nevada, the New Jersey Casino Control Act makes no exception for the common law right to exclude or eject any person from the gaming establishment for any reason. However, New Jersey Gaming Control Act does contain provisions regarding the right to exclude or eject specific individuals who have been placed on a list. The list, provided by the Division of Gaming Enforcement (DGE), is comprised of individuals who do not meet certain standards set out in the Act.<sup>24</sup> As described in more detail below, standards for exclusion generally include: persons convicted of a criminal offense under the laws of any state or of the United States, which is punishable

<sup>11</sup>NEV. REV. STAT. ANN. § 465.015 (West 2015).

<sup>12</sup>NEV. REV. STAT. ANN. § 465.083 (West 2015).

<sup>13</sup>*Sheriff of Washoe County v. Martin*, 662 P.2d 634, 637–38 (Nev. 1983).

<sup>14</sup>*Id.* at 638.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>NEV. REV. STAT. ANN. § 465.070 (West 2015).

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>N.J. STAT. ANN. § 5:12-1 (West 2011).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>N.J. STAT. ANN. § 5:12-71 (West 2011).

by more than six months in prison, or any crime involving moral turpitude; persons whose presence in a casino would be harmful to the interest of the casino or of the state; and persons known to have a history of cheating at casino games.

The New Jersey Casino Control Commission (NJCCC) and the DGE are the primary administrative agencies employed to ensure the Act's rules, regulations, and procedures are applied to ensure the public safety and welfare in the gaming industry. The NJCCC and DGE possess the power and authority to control nearly every aspect of the gaming industry, from requirements for gaming licenses down to casino architecture and interior layouts.<sup>25</sup> Generally, the duties and powers of NJCCC and DGE are similar to that of the Nevada Gaming Commission and Nevada Gaming Control Board. Specific differences in authority that apply to card counting and casinos' rights to exclude patrons and implement countermeasures will be discussed in more detail below. In addition to the NJCCC and DGE rules and regulations, licensed casinos must strictly adhere to the Act's statute regarding conditions of operation, which includes the requirement to create and maintain descriptions of the casino's internal controls and regulations.<sup>26</sup>

Like Nevada, New Jersey implemented its own cheating statutes that are similar to cheating under common law. New Jersey's primary statute prohibiting swindling and cheating, New Jersey Statutes Annotated § 5:12-113 states that "[a] person is guilty of swindling and cheating if the person purposely or knowingly by any trick or sleight of hand performance or by a fraud or fraudulent scheme, cards, dice or device, for himself or herself or for another, wins or attempts to win money or property or a representative of either or reduces a losing wager or attempts to reduce a losing wager in connection to casino gaming."<sup>27</sup> Furthermore, it unlawful for a person to use a computerized, electronic, electrical, or mechanical device which is designed and utilized to gain an advantage at playing any game in a licensed casino.<sup>28</sup>

## COMMON FORMS OF CHEATING

Certain methods of play that players use for various casino games in hopes of gaining an advantage over the casino fall clearly within the confines of cheating under Nevada and New Jersey anti-

cheating statutes. One example includes a trick known as card crimping. Card crimping is the act of deforming a playing card, often by bending a corner or marking with a fingernail, so the crimper can recognize the card's value even when it is face down.<sup>29</sup> The act of crimping or marking a card, making it readable on both sides, alters a crucial characteristic of the game by eliminating the element of chance.<sup>30</sup> As a result, a player or conspiring players equip themselves with knowledge of certain cards values and can make higher bets.<sup>31</sup>

Other acts that clearly fall within the confines of cheating is the use of mirrors, weighted dice, electronic equipment, or other devices to alter the game so as to increase the probability of winning or even guarantee winning. All of these acts are considered intentional alterations of the characteristics of the game and the criteria for winning. Most importantly, they allow the player to reduce or eliminate the element of chance, which is the foundation of casino gaming. In addition, the acts listed in this paragraph constitute fraudulent acts and are prohibited by NRS § 465.070 because they allow the player to access information not available to all players and base decisions on such information. New Jersey has several specific statutes covering the use and possession of cheating devices or machines.<sup>32</sup>

Finally, players may actually change bets or remove a bet completely to increase the amount won or decrease losses. This method, known as "past-posting," "pinching bets," or "pressing bets," is achieved through the use of a hand trick or distraction to increase or decrease the amount of chips placed on the gaming table after the result of a given game has been made known to the player. Increasing or decreasing the amount wagered is the most flagrant form of cheating and is prohibited in every jurisdiction. The applicable anti-cheating and fraud statutes of Nevada<sup>33</sup> and New Jersey<sup>34</sup>

<sup>25</sup>N.J. STAT. ANN. §§ 5:12-63, -69, -70, -76 (West 2011).

<sup>26</sup>N.J. STAT. ANN. §§ 5:12-96 to -106 (West 2015).

<sup>27</sup>N.J. STAT. ANN. § 5:12-113.

<sup>28</sup>*Id.* at § 5:12-113.1.

<sup>29</sup>*Martin*, 662 P.2d 634, 636 (Nev. 1983).

<sup>30</sup>*Id.* at 638.

<sup>31</sup>*Id.*

<sup>32</sup>See N.J. STAT. ANN. §§ 5:12-113, -113.1, -114, -115, -116.

<sup>33</sup>NEV. REV. STAT. ANN. § 465.070.

<sup>34</sup>N.J. STAT. ANN. § 5:12-113(a).

prohibit any method of changing a wager once the outcome of a given game has been revealed. Past-posting, pinching, or pressing bets is not an alteration of the element of chance, but it is an alteration of a wager under the rules of the game, which is a fundamental characteristic of a casino game. Increasing the amount won or decreasing the amount lost at any given game constitutes a theft from the casino.

### CARD COUNTING IS NOT CHEATING

The applicable anti-cheating and fraud statutes of Nevada and New Jersey do not specifically mention or discuss card counting as a prohibited form of cheating (nor, for that matter, do the statutes specifically permit card counting). However, the legality of card counting, without the use of a cheating device, is mentioned in many of the most important gambling cases over the years. In 1983, the Supreme Court of Nevada held that card crimping constituted cheating because the player eliminated the element of chance as to himself concerning the point value of certain cards, while the other players' knowledge of the cards was based solely on observation of the cards already played and the laws of probability.<sup>35</sup> The court then went on to make a very important statement concerning card counting: "[b]y way of contrast, a card counter—one who uses a point system to keep track of the cards that have been played—does not alter any of the basic features of the game. He merely uses his mental skills to take advantage of the same information that is available to all players."<sup>36</sup> Since the *Martin* case was decided, no casino has arrested or charged a player with cheating resulting from simple card counting without the use of a cheating device, machine, or computer.<sup>37</sup>

The Supreme Court of Nevada's decision in *Martin* made it clear that it did not consider card counting to be cheating under the laws of the state. New Jersey courts have never been confronted with the primary issue of whether card counting was legal; however, the New Jersey Casino Control Commission has implemented regulations regarding a casino's right to use countermeasures against card counters. If card counting constituted cheating in New Jersey, there would be no need to implement such regulations. Therefore, New Jersey courts generally consider card counting to be a permissible

method of play under the rules and regulations set out by the Casino Control Commission. In an appeal brought by Kenneth Uston, a professional blackjack player, the court stated, "[t]he Casino Control Commission, which is responsible for promulgating the rules of the games played at the casinos, established the rules of blackjack in such a fashion that a card counter could use his special skill to advantage and equalize or better the odds normally favoring the house."<sup>38</sup> The language in *Uston v. Resorts International Hotel, Inc.*, makes it clear that card counting itself is not prohibited.

In both Nevada and New Jersey, cheating is defined as acting in a way that alters the normal random chances or results of the game.<sup>39</sup> Card counting does not alter the elements of chance in a given game of blackjack because the next card in the deck is never certain. Card counting allows a player to calculate the probability of subsequent card values, but it is impossible to eliminate chance completely without the use of some illegal means to obtain information otherwise unknown or unascertainable to the players. Therefore, the courts have correctly concluded that card counting is legal within the confines of state law and blackjack's rules of play.

### EXCLUDING CARD COUNTERS

The real controversy with card counting is not whether it is illegal or against the rules for a player to count cards. The courts' decisions in *Martin* and *Uston*, among others, as well as both states' gaming commission regulations, settled the issue of card counting's legality. The main controversy involves the casino's right to exclude or prohibit card counters from playing blackjack. Card counters have challenged the casino's right to exclude in Nevada and New Jersey; however, the courts of these states came to opposite conclusions. Generally, exclusion or barring from a casino is permitted in Nevada and

<sup>35</sup>*Martin*, 662 P.2d 634, 638 (Nev. 1983).

<sup>36</sup>*Id.*

<sup>37</sup>I. Nelson Rose, *Card Counting Is Not Cheating*, in BLACKJACK AND THE LAW 10–12, 12 (RGE Publishing 1998).

<sup>38</sup>*Uston v. Resorts International Hotel, Inc.*, 431 A.2d 173, 173 (N.J. 1981).

<sup>39</sup>I. Nelson Rose, *Preferential Shuffling*, in BLACKJACK AND THE LAW 52–54, 52 (RGE Publishing 1998).

prohibited in New Jersey. This section will discuss the legal theories and regulations used to come to such opposing conclusions.

Nevada's interpretation of the law generally allows a casino to exclude or bar any person for any reason as long as the exclusion is not based on race, color, creed, national origin or ancestry, or sex. Nevada's conclusion is based on the common law right to exclude and is specifically referenced in NRS § 463.0129. The public policy of the Nevada Gaming Control Act specifically states that it does not "abrogate or abridge any common law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason[.]"<sup>40</sup> Nevada's Gaming Commission gives great discretion to casinos to implement rules and guidelines for how the day-to-day operation is run. However, application of the common law right in the context of casino regulation is unclear because Nevada courts have not fully addressed the issue: cases were dismissed or resulted in summary judgment for the casino due to procedural issues; other cases involving exclusion were settled out of court.

The first attempt to challenge a Nevada casino excluding a player based on card counting was brought in 1978. Ken Uston, a professional blackjack player and well-known card counter, was peacefully asked to leave the premises because he was a "better than average black jack ('21') player."<sup>41</sup> Uston's complaint contained various causes of action for state law and federal law violations. However, the court found that Uston's federal discrimination claims failed to establish significant state involvement. The court found that "mere state regulation of a private industry in and of itself does not constitute state action."<sup>42</sup> In addition, the court found that citizens have no constitutional right to gamble, and that not being on an exclusion list (as set out in NRS § 463.151) does not require a licensed gaming establishment to permit gambling.<sup>43</sup> "The law of Nevada on excluding card counters is unclear to this day because the federal judge was forced to dismiss the complaint. Nevada casinos have continued to kick out card counters whenever they find them."<sup>44</sup>

Another case involved well-known card counter Mark Estes. This case was brought in state court, to avoid the procedural issues that arose in *Uston*. The trial judge granted summary judgment for the casino, holding that a casino has the right to exclude

card counters virtually at will.<sup>45</sup> The court declared that the common law right still exists in Nevada, and that casino owners could exclude anyone they wanted since casinos were private property. Estes appealed, but the Nevada Supreme Court order dismissed the appeal. Unfortunately, the Supreme Court order was never published. "Apparently, the Nevada Supreme Court did not want to go on public record as siding with the casinos on the dubious claim that a casino can discriminate against whom-ever they wish."<sup>46</sup>

As a result of Ken Uston's federal lawsuit and Mark Estes's unpublished state opinion, Nevada law is somewhat unclear regarding exclusion of card counters. The high cost of litigation and the procedural hurdles involved in bringing a discrimination claim against a casino as a result of complex state regulations have precluded further attempts to support card counters' rights to continue playing blackjack in Nevada. Accordingly, Nevada casinos will continue to justify exclusion of card counters with an ancient common law rule that may be inconsistent with modern casino regulation.

On the other end of the exclusion spectrum, New Jersey generally does not allow exclusion based on suspected card counting. Unlike Nevada, New Jersey courts have been forced to confront the subject and issue a determination. After Ken Uston's lawsuit in Nevada ended with summary judgment for the casino, Uston filed a similar complaint in New Jersey. The Supreme Court of New Jersey held that the Casino Control Act gives the NJCCC exclusive authority to set casino rules, including the rules for casino games. Therefore, the court held that the Casino Control Act precluded the casino from excluding Uston for card counting, since the casino could not set the rules of play.<sup>47</sup>

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<sup>40</sup>NEV. REV. STAT. ANN. § 463.0129 (West 2015).

<sup>41</sup>*Uston v. Hilton Hotels Corp.*, 448 F. Supp. 116, 118 (D. Nev. 1978).

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>I. Nelson Rose, *The Nevada Law on Card Counting: Part II*, in *BLACKJACK AND THE LAW* 14–17, 17 (RGE Publishing 1998).

<sup>45</sup>I. Nelson Rose, *The Nevada Law on Card Counting: Part III*, in *BLACKJACK AND THE LAW* 17–20, 18 (RGE Publishing 1998).

<sup>46</sup>*Id.* at 19.

<sup>47</sup>*Uston v. Resorts International Hotel, Inc.*, 445 A.2d 370, 371 (N.J. 1982).



The *Uston* court recognized the comprehensive control the NJCCC exercised over the casino operations under by the Casino Control Act. The Act states that "all games shall be conducted according to the rules promulgated by the commission."<sup>48</sup> "The exhaustive statutes and regulations make clear that the Commission's control over the rules and conduct of licensed casino games is intended to be comprehensive."<sup>49</sup> The ability of casino operators to independently determine how the games will be played would undermine this control and subvert the important policy of ensuring the credibility and integrity of the regulatory process of casino operations.<sup>50</sup> Put simply, the NJCCC, and not the casinos, makes the rules and controls every aspect of the casino industry. Since *Uston's* card counting was allowed under the rules set out by the NJCCC, the casino had no right to exclude him from playing.<sup>51</sup>

In addition to the comprehensive control by the NJCCC, the court also disagreed with the casino's reliance on the common law right to exclude. The court found that the common law right to exclude must be applied on a case-by-case basis.<sup>52</sup> The more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property.<sup>53</sup> "When property owners open their premises to the general public in pursuit of their own property interests, they have no right to exclude people unreasonably."<sup>54</sup> *Uston's* actions did not threaten the security of any casino occupant and he was not disrupting casino operations. Therefore, absent a contrary rule by the Commission, *Uston* possessed the right to reasonable access to the casino blackjack tables.<sup>55</sup>

As a result of *Uston*, it is up to the NJCCC to create rules and regulations for excluding card counters. The casino may not rely on the common law, or make its own rules about excluding a blackjack player suspected of card counting. However, the court also expressed the opinion that the state has a duty to make sure casinos succeed; therefore, the NJCCC should promulgate rules to make sure that the house always has an advantage. As a result of *Uston*, the NJCCC began implementing numerous countermeasures to make up for the decision to prohibit excluding card counters. The countermeasures eventually made it nearly impossible to count cards in the state of New Jersey, while still allowing players to attempt to do so.

## COUNTERMEASURES

Countermeasures against card counting are used in both Nevada and New Jersey; however, they are particularly important in New Jersey, where the casino's ability to exclude players is much more limited. In Nevada, a casino can simply bar a card counter from playing blackjack, but New Jersey casinos do not have exclusion as an option to limit card counting. As a result, New Jersey's rules and regulations, as promulgated by the NJCCC, allow casinos to use a variety of countermeasures to keep the odds of the game in the casino's favor. Countermeasures, when used in an appropriate manner, are both fair and legal. However, it is possible for casinos to abuse the countermeasures to create an unreasonable house advantage. The line between appropriate use and abuse of countermeasures is particularly apparent with the rules for shuffling at will and preferential shuffling.

As a result of the New Jersey Supreme Court's decision in *Uston*, the NJCCC adopted specific countermeasures to help minimize the threat of card counters when exclusion was not an option. Several countermeasures include (1) the continuous shuffling card shoe; (2) shuffling-at-will, which allows casinos to shuffle after any round of play; (3) increasing the number of decks from which the cards are dealt; (4) setting minimum and maximum bets allowed on a table; and (5) allowing selective application of countermeasures against all players or against suspected card counters only.

The shuffling-at-will countermeasure can be abused by a casino to gain an unreasonable house advantage. Some experts believe that casinos actually use their sophisticated security systems, known as the "eye in the sky," to keep count of cards in the same manner as a card-counting player. When the count becomes favorable to the player, the casino shuffles the cards at the table, which is allowed under the rules. Although no action has been brought to court alleging such actions, it is

<sup>48</sup>N.J. STAT. ANN. § 5:12-100 (West 2014).

<sup>49</sup>*Uston*, 445 A.2d 370, 373 (N.J. 1982).

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 375.

<sup>53</sup>*State v. Schmid*, 423 A.2d 615 (N.J. 1980).

<sup>54</sup>*Uston* at 375.

<sup>55</sup>*Id.*

possible that casino card counting to decide when to shuffle would constitute cheating, since this form of shuffling could alter the house advantage in the game and change the game's outcome.<sup>56</sup> In a typical game, the house advantage is about 0.5% to 1.0%. However, when a casino uses security cameras or dealers to count the cards and intentionally shuffle when the remainder of the deck favors the player, the house advantage becomes much great-

er.<sup>57</sup> Implementing a countermeasure in such a way affects not only a card counter, but also any other players at the blackjack table. Shuffling in such a way is contrary to public policy, because it is damaging to the public confidence and integrity of the casino industry. Without stricter control over the countermeasures, allowing shuffling-at-will and other such measures which affect all players, effectively permits casinos to cheat players with impunity.

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<sup>56</sup>Robert A. Loeb, *Casino Countermeasures, Preferential Shuffling and Casino Cheating*, in BLACKJACK AND THE LAW 23–24 (RGE Publishing 1998).

<sup>57</sup>*Id.*