

A LICENSE TO BET: LIFE INSURANCE AND THE GAMBLING ACT IN THE BRITISH COURTS

Timothy Alborn

More directly than any other enterprise apart from slavery, life insurance set a price on human life. As it evolved in Britain during the nineteenth century, the insurance industry introduced a dizzying number of variations on this theme. For the individual purchasing an insurance policy, the value of life was translated into the sum required to care for dependents, loss of access to a wife's inheritance should she die before her father, the sum lost to a creditor in the event of death occurring prior to repayment, and the loss of livelihood suffered by a tenant whose lease ended with the life of a third party. All these reasons for buying insurance established an equivalence between mortality and monetary value—a "death nexus" that precisely and morbidly expressed the "cash nexus" derided by Thomas Carlyle as the moral failing of British society. Insurance companies were fond of reminding people that this sort of commodification was often productive of much social and even moral good, and it indisputably met a growing economic demand. But since nobody knew for certain when they would die, a life insurance policy was also, by definition, a wager. And since wagers occupied a quite different category—"intensely selfish in [their] action, and therefore anti-social and anti-christian," as one insurance writer called them in 1891—there was always at least the potential for the life office to take on the darker colors of the gambling den.¹

Lawmakers first became concerned about the slippery slope between life insurance and gambling during the third quarter of the eighteenth century, when the industry still catered to a relatively small, mostly aristocratic market.² Their concern grew out of a rash of cases in which people had taken out policies on the lives of perfect strangers, often celebrities, on the morbid chance that they would die prematurely.³ As Geoffrey Clark has noted, the Hanoverian gentry preferred this form of

1. C. Little, *Fire Insurance: Is It a Species of Gambling?*, NORWICH UNION MAGAZINE, 1891, at 2-3.

2. See GEOFFREY CLARK, *BETTING ON LIVES: THE CULTURE OF LIFE INSURANCE IN ENGLAND 1965-1775*, 49 (Manchester University Press 1999).

3. *Id.* at 49-53.

gambling over nearly all other varieties; a quarter of all bets in one gentleman's club in the 1770s was on the death of a third party, compared to only 2.5% on horse races.⁴ Prior to 1750 gambling on human life was only condemned on account of accompanying criminal acts, such as poisoning a man to collect on his life policy; after that time the wager itself came under increased scrutiny.⁵ Clark has plausibly linked this development to growing unease over slavery, since both "threatened to shatter the emerging free-market ethos that individuals should have the liberty to engage in a commerce of things, but not of each other."⁶ In the event, Parliament intervened much earlier in the former case, with the passage of the Gambling Act of 1774.⁷

The Gambling Act worked by requiring claimants to have a legitimate financial interest in the life of the insured.⁸ To prevent the "mischievous kind of gaming" that had arisen in the previous half-century, it declared all other insurances on human life "null and void, to all intents and purposes whatsoever."⁹ After 1774, it was only legal to collect on an insurance policy if a person (typically a wife or child) relied on the insured for income or was a creditor who stood to lose if the insured died before repaying the loan.¹⁰ Clark has argued that although the Act "was fairly successful at suppressing outright wagers, it could not uniformly segregate the prudential motives prompting proper, indemnifying insurance from the uninterested passions fueling speculation."¹¹ Even so, this statute remained on the books as the official dividing line between life insurance and gambling for the next 135 years, leaving judges, customers and life offices to make do with its uncertain provisions as best they could.¹²

The Gambling Act's ambiguity recurrently threatened to impede the expansion of life insurance throughout the nineteenth century. As Clark indicates, the chief problem in this case lay in life insurance's dangerous commingling of things and people.¹³ The challenge for judges and insurance companies alike was to keep those two categories as separate as

4. *Id.* at 50.

5. *Id.* at 51-53.

6. *Id.* at 62-63.

7. *See id.* at 9.

8. *Id.*

9. DERMOT MORRAH, A HISTORY OF INDUSTRIAL LIFE ASSURANCE 74 (1955).

10. *See* Clark, *supra* note 2, at 9.

11. *Id.* at 26.

12. It was modified in the 1909 Life Assurance Companies Act, which is discussed below.

13. CLARK, *supra* note 2, at 53.

possible without overly hindering the growth of the industry. Their efforts were tolerably successful in the case of upper-class life insurance.¹⁴ The increasingly impersonal and standardized nature of these transactions allowed judges to come to terms with the fact that many life policies, though formally instruments of gambling, were largely irrelevant to the moral issues raised by the specter of betting on human life. The result was that judges followed companies in adopting a set of principles which rendered the Act all but a dead letter after mid-century.

The case was far different once life insurance spread from the upper-class market to working-class customers after 1850. For one thing, the primary reason working people bought life insurance—to pay for a relative's funeral costs—did not formally qualify as an "insurable interest" under the Gambling Act; hence at least half of the tens of millions of such policies issued between 1850 and 1909 were technically illegal.¹⁵ Adding to the problem, judges doubted the companies' ability to deter their customers' alleged passion for gambling; company directors doubted their ability to prevent salesmen from attracting business by taking bets on neighborhood fatalities; and customers soon realized that the formal illegality of their policies entitled them to a refund if the life insured failed to die soon enough to "pay."¹⁶ The result was that companies sporadically appealed to the Gambling Act to quash what they saw as egregious cases of black-market wagering, while customers increasingly sued for back premiums.¹⁷ In response, late-Victorian judges wavered between punishing working-class "gamblers" for their depravity in treating neighbors like race horses, and punishing the companies for encouraging (through their agents) such allegedly immoral behavior.¹⁸

This article begins by recounting the relative ease with which companies and judges stabilized the meaning of "insurable interest" in the case of upper-class insurance, by examining the two leading cases of *Godsall v. Boldero*¹⁹ and *Dalby v. India and London Life*.²⁰ It then turns to the more complex case of working-class life insurance, by sampling a

14. I use the term "upper-class" in this chapter to connote the aristocrats, professionals, and merchants who comprised the primary market for life insurance up to the 1850s, as distinct from the working-class or "industrial" customers discussed below.

15. See MORRAH, *supra* note 9, at 75.

16. See *infra* notes 81-88 and accompanying text.

17. See *infra* notes 70-73 and accompanying text.

18. See *infra* notes 87-92 and accompanying text.

19. (1807) 103 Eng. Rep. 500 (K.B.).

20. (1854) 139 Eng. Rep. 465 (C.P.).

succession of trials which exhibited a variety of appeals to the Gambling Act. Finally, it briefly discusses efforts by companies to clarify the Act in 1909 by lobbying legislators to revise the meaning of "insurable interest" for working-class customers, by increasing supervision over agents and customers, and by introducing new forms of marketing which sought to teach their customers to associate insurance with financial security rather than gaming. What was at stake in each of these cases was the determination of a boundary between legitimate and illegitimate insurance, in an insurance market which appealed to all social classes because of—not in spite of—the fact that it often shaded imperceptibly into gambling.

I. GAMBLING AND LIFE INSURANCE, 1807-1854

The branch of upper-class life insurance that did most to expose the Gambling Act's ambiguous language concerned policies taken out by creditors against the contingency of debtors dying before they could repay the loan. To guarantee the legality of such policies, life offices routinely ascertained the fact of the loan; as long as the insurance did not exceed the sum of money that was lent, the lender could not be said to be speculating on the death of the debtor. Once such policies had been in force a few years, however, their legal status became more difficult to determine. What happened if a creditor continued to keep up the insurance policy after the debt had been repaid? Or what if the debt was repaid in installments, but the creditor kept up the original level of coverage? Such questions raised the distinct possibility that many, perhaps the majority, of such policies were technically illegal when the claim was actually paid. And the legality of third-party policies was a major issue in the early nineteenth century, when roughly a third of all policies, and probably half of the sums assured, were of this variety.²¹

Lord Ellenborough clarified these legal questions at King's Bench in 1807, although he did so in a way that would create intolerable levels of

21. Between 30% and 47% of clerical, medical & general policies issued between 1824 and 1895 were on third parties, as were 34.4% of legal and general policies in force in 1870. Renewal Ledgers, Clerical, Medical and General Life Assurance Society (unpublished manuscript, on file with Clerical Medical Group Archives, Edinburgh); Life Policy Registers, Legal and General Life Assurance Society (unpublished manuscript, on file with Guildhall Library, MS 18,473, London).

unpredictability for prospective third-party insurers.²² The decisive case, *Godsall v. Boldero*, concerned a seven-year term policy for £500 on the life of William Pitt, which was taken out from the Pelican life office as security against a debt.²³ The Pelican had resisted the claim on the grounds that by the time it was ready to pay, the debt had already been canceled by means of a special Parliamentary grant which cleared the former Prime Minister's outstanding commitments.²⁴ When Godsall sued for his £500, the company's lawyer invoked the Gambling Act, arguing that "if this policy may be enforced... every creditor may gamble upon the life of his debtor by way of insurance, ... and upon his death he would be entitled to double satisfaction of his debt."²⁵ He also compared the case to that of a marine policyholder who claimed a total loss even though he had already been indemnified by means of salvage.²⁶ Godsall's lawyer countered that the Pelican should pay the claim since they had been fairly compensated for the risk, urging that in such contracts "the premium is not calculated upon the risk of the insolvency of the person whose life is insured, but solely on the probability of the duration of the life."²⁷ Ellenborough sided with the Pelican, ruling that the policy was "in its nature a contract of indemnity, as distinguished from a contract by way of gaming or wagering."²⁸

By restricting third-party life policies to the indemnification of remaining sums owed by insured debtors after they died, Ellenborough endowed life offices with blanket deniability in the event of such policies falling due. Companies soon discovered that such power was double-edged, since they threatened to dissuade creditors from taking out policies for fear that a company would postpone payment until other means of securing the debt had been exhausted. After the Asylum Life Assurance Company successfully appealed to the Gambling Act to dispute a child endowment policy in 1830, insurers "received applications for written acknowledgments that the Directors will not avail themselves of any such advantage, in cases which bear a great analogy to that which has just been decided against the public."²⁹ A typical company response to this sort of

22. This was in keeping with Ellenborough's wider pattern of decisions which "barred the way repeatedly to attempts to modernize the law." P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 422 (1979).

23. (1807) 103 Eng. Rep. 500 (K.B.).

24. *Id.* at 500-02.

25. *Id.* at 503.

26. *Id.* at 502-03.

27. *Id.* at 502.

28. *Id.* at 504.

29. H.B. & Co., *To our Subscribers*, 94 CIRCULAR TO BANKERS 329, 330 (1830).

fear was by the Alliance, which spent a decade pondering the proper course to take when "the Assured has a shifting interest in the Life" after first learning in 1827 that it could challenge any policy that failed Ellenborough's strict standard.³⁰ Eventually its board decided that it was not worth the trouble to determine the technical legality of the insurance beyond its initial issue.³¹ Other offices followed a similar trajectory, first disputing claims in isolated cases, then eventually guaranteeing customers that *Godsall* would have no impact on their decision to meet an initial obligation.

In *Dalby v. India and London Life Assurance Company* (1854), the Court of Common Pleas caught up with the life offices' practice, deciding (in the words of Justice Parke) that a "much more reasonable construction" of the Gambling Act was "that, if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered, in exact conformity with the words of the contract itself."³² The case involved an attempt by the India and London to deny payment on a policy which it had originally accepted as a reinsurance from the Anchor life office, but which had subsequently been taken over by an Anchor director who kept the policy in force.³³ In ordering the India and London to pay, Parke appealed both the customer's right to know the exact value of his purchase and to the fact that *Godsall* had been "universally disregarded" by nearly all life offices.³⁴ The lawyer who argued the Anchor's case, George Bramwell, repeated the earlier claim in *Godsall*'s defense that a life policy was "a simple and absolute contract to pay a given sum of money on the death of the life," and hence did not qualify as an indemnity.³⁵ He added that Ellenborough had bestowed powers on life offices that they had, in practice, been unwilling to exercise: for instance, the right "to demand the money back, if the debtor's executors,—say, ten years after his death,—become possessed of funds wherewith to pay the debt."³⁶

30. *Id.*

31. Alliance Assurance Company board minutes (May 23, 1827, Feb 22, 1837 and July 10, 1839), unpublished manuscript, on file with Guildhall Library, MS 12, 162, London).

32. (1854) 139 Eng. Rep. 465, 476 (C.P).

33. *Id.* at 466-69.

34. *Id.* at 473-76.

35. *Id.* at 469. Bramwell went on to be a leading architect of "freedom of contract" doctrine in English law. See ATIYAH, *supra* note 22, at 374-80.

36. *Dalby*, 139 Eng. Rep. at 469-70.

Parke's decision in *Dalby*, closely following Bramwell's arguments, firmly established that the payment of a life claim was not the same as an indemnification for a loss. To this extent, his reasoning was sound.³⁷ What his ruling overlooked, however, was the fact that any insurance policy that professed to do more than indemnify against a contingent loss is, by definition, equivalent to a wager. This had been Ellenborough's point when he implied that life insurance was *either* "a contract of indemnity" *or* "a contract by way of gaming or wagering."³⁸ Judges in the *Dalby* case claimed that their decision left the Gambling Act intact as a secure protection against "colourable insurances" such as when a "man might lend another 5l., to enable him to insure for 10,000l."³⁹ But this example was no different from lending a man £10,000 for a few weeks, then keeping all but £5 of that sum in force as a life policy—which is exactly what *Dalby* legalized. Parke's contrary claim notwithstanding, it was illogical to assert that an insurable interest at the outset necessarily meant that it was "not a wagering policy."⁴⁰

The fact of the matter was that few people by the mid-nineteenth century were concerned about the possibility that life insurance might qualify as a subset of "wagering." Hence the mathematician Augustus De Morgan, in an 1838 critique of *Godsall*, argued that "the contract of insurance, be it gambling, or be it not, rests entirely upon the permission given by the law to consider a high chance of a small sum as good consideration for a low chance of a large sum."⁴¹ A half-century later, industry spokesmen were even more brazen in their identification of life insurance and gambling, as when the Law Union's medical officer urged that his line of work was "a very moral thing, and is very charitable; but there is no doubt it is a form of gambling... and we all go to the office, and

37. See VIVIANA A. ROTMAN ZELIZER, *MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES* 71-72 (1979) (describing the influence of the insurable interest doctrine on the relationship between pecuniary loss and emotional loss).

38. *Godsall v. Boldero*, (1807) 103 Eng. Rep. 500, 504 (K.B.).

39. *Dalby*, 139 Eng. Rep. at 473.

40. On the *Godsall* and *Dalby* cases, and their impact on American life insurance practice. See Sharon Ann Murphy, "Security in an Uncertain World: Life Insurance and the Emergence of Modern America" (Ph.D. dissertation, University of Virginia), 145-159 (2005).

41. AUGUSTUS DE MORGAN, *AN ESSAY ON PROBABILITIES, AND ON THEIR APPLICATION TO LIFE CONTINGENCIES AND INSURANCE OFFICES* 247 (London: Longman, Orme, Brown, Green, and Longmans, 1838).

back lives instead of horses."⁴² One reason for this departure from earlier efforts to segregate insurance and gambling into two distinct categories is that late-Victorians had started to distinguish between different sorts of gambling, some of which were apparently good for society. Viviana Zelizer's comments regarding American life insurance in the late-nineteenth century are just as relevant to British opinion at the time: "as risk increasingly became an integral part of the... economic system, certain forms of risk taking and speculation assumed new respectability. Rational speculation that dealt with already existent risks was differentiated from pure gambling which created artificial risk."⁴³

Alongside such shifts in perception had evolved changes in the practice of life insurance, which erased many of its earlier overlaps with "pure gambling." One of these was a new willingness by most offices after 1850 to offer standardized "surrender values" to parties who wanted to drop their policies—a category of people which included many creditors whose debts had been repaid.⁴⁴ This practice superseded the previous course taken by customers in such cases, which was to auction off the policy to the highest bidder, who would continue to pay the premiums then collect the claim when the insured party died.⁴⁵ Hence a precisely calculable, private and wholly impersonal transaction took the place of an unseemly public spectacle, one which the insurance reformer Elizur Wright pointedly compared to slavery.⁴⁶ Once such changes were underway, upper-class customers and companies benefited equally from the predictable playing field which was achieved by pretending that the Gambling Act did not apply to them, and neither side had an incentive to take the other to court as a means of resolving their grievances.

42. R. Hingston Fox, "The Assurance of Impaired Lives, Chiefly with Reference to Special Forms of Assurance," *Clinical Journal* 6 (1895), 258.

43. Zelizer, *supra* note 3, 86. See also G.R. SEARLE, *MORALITY AND THE MARKET IN VICTORIAN BRITAIN* 78-86 (1998).

44. *ECONOMIST*, June 18, 1892 at 789.

45. Until the Insurance Policies Act of 1867 officially legalized such purchases (assuming the title to the policy was properly assigned to the purchaser), such auctions were technically illegal under the Gambling Act. But, as in the case of creditors collecting claims despite the cancellation of the debt, the Act was seldom applied to them. See CORNELIUS WALFORD, *INSURANCE CYCLOPEDIA* 203 (London, Layton) (1871).

46. William Clendenin, *A Brief Sketch of the Life and Works of Elizur Wright*, in *THE BIBLE OF LIFE INSURANCE* 66, 67 (1932).

II. THE GRAY MARKET IN WORKING-CLASS LIFE INSURANCE

When companies started to extend life insurance to a working-class market after 1860, they opened the way for a whole new crop of technically illegal third-party policies. The main contingency which these "industrial" offices guarded against, in exchange for weekly premiums of several pence, was the cost associated with providing a "proper" burial for a family member.⁴⁷ Unlike third-party policies involving loans, however, which were at least legal at the outset of the contract, the Gambling Act did not recognise liability to pay funeral expenses as an "insurable interest" in another person's life. The only exception was when the family member was an adult male who took out the policy in his own name, since the benefit (usually between £10 and £50) could be said to be used to support the man's dependents. No such "interest" existed in the millions of cases in which husbands wanted to take policies out on their wives, parents on their children, and on through the family tree to grandchildren, cousins and in-laws.⁴⁸ Most of these people could usually find a company willing to sell them a policy on someone else's life, but until 1909 they could not find a statute declaring its legality.⁴⁹

Beyond buying policies that were merely technically illegal, many working-class policyholders broke the spirit as well as the letter of the Gambling Act—although the extent to which this happened is difficult to determine. At the very least, reported cases indicate that conditions existed for this sort of street betting to flourish.⁵⁰ When a Bradford poor law guardian told of a man suffering from "cancer in the mouth" who died with twelve policies on his life, the guardian observed that "[t]he agent insured the man without ever seeing him, but his friends knowing that it was cancer, knew it would be fatal in the end."⁵¹ Many court cases similarly told of people dying prematurely with several policies on their lives, implying that customers took advantage of their superior knowledge of

47. LAURIE DENNETT, *A SENSE OF SECURITY: 150 YEARS OF PRUDENTIAL* 5-9 (1998).

48. MORRAH, *supra* note 9, at 74-76. Partial legal recognition of the widespread practice of insuring children's lives was achieved in the 1875 Friendly Society Act. This Act allowed families to insure up to £6 per child. While this formally extended only to mutual "collecting societies," the courts soon extended this provision to joint-stock companies under common law. See Sidney Webb, *The Working of the Insurance Act*, *NEW STATESMAN* 2 (1914 & Supp.).

49. See MORRAH, *supra* note 9, at 74-75.

50. *Id.* at 74.

51. SELECT COMMITTEE ON CHILDREN'S LIFE INSURANCE BILL, REPORT, 1890, H.L. 70.

sickly neighbors to profit at the distant office's expense. The agents who sold such policies were either assumed to be overly lax (as in the Bradford case) or complicitous.⁵² Companies were usually willing to fight such claims in court, often with a successful outcome, although even here they needed to keep one eye fixed on the tender subject of public relations. Hence when Sophie Haberschitz of the East End was found burned to death in 1909 with ten policies on her life, the implicated offices decided to pay the claims on the grounds that "it was undesirable lest the world know that such a thing was possible."⁵³

If industrial life offices were sometimes reluctant to challenge claims that they assumed to be guilty of criminal intent, they were even less likely to resist "legitimate" claims on third-party policies just because the Gambling Act said they could. Although any office might, in theory, cart out the Act whenever a claim by a nephew or grand-daughter involved it in a loss, they did no such thing, for the same reason that upper-class offices ignored *Godsall*: it would have driven away half their business. Unfortunately for the companies, the same reasoning did not work in reverse. The Gambling Act enabled people who held "legitimate" but illegal policies to exercise an especially brutal form of selection against industrial offices, by suing for a refund when their premiums had exceeded the value of the claim. The associated legal costs were enough to restrict the number of such cases until around 1900, but after this time lawyers started to appear on the scene who were willing to try them on a contingency basis.⁵⁴ These lawyers, Edwardian cousins of the ambulance chaser, naturally earned the wrath of industrial insurance managers, as when Alfred Henri of the Liverpool Victoria railed against, "solicitors of a certain type . . . who were willing to take up these cases for what they might get out of them."⁵⁵ Their reputation was substantially higher among the large number of working-class policyholders who were stuck in what had become an unprofitable contract. Yet even customers who won their suits learned that illegal insurance economics came with troubling fine

52. See, e.g., 19 ASSURANCE AGENT'S REVIEW 42-43 (1906).

53. Industrial Life Offices Association Minute Book (July 13, 1909) (unpublished manuscript, on file with Guildhall Library, MS 29,802, London).

54. Officially, Edwardian lawyers were barred from charging contingency fees. The legal challenges described below, however, would only have been feasible on such a basis; hence it seems likely that lawyers informally accomplished this, for instance by voluntarily foregoing their fee in the event of a negative verdict. I am grateful to Joshua Getzler for pointing out this problem.

55. Industrial Life Offices Association Minutes Book (unpublished manuscript on file with Guildhall Library, London) MS 29,802.

print: legal fees could run nearly as high as the claim, once lawyers averaged in their time from cases they lost.⁵⁶

As *Dalby* demonstrates, the prevalence of business-friendly, judge-made law often allowed Victorian markets to operate quite efficiently despite statutory obstacles.⁵⁷ Yet no judge delivered a *Dalby*-style ruling in the late-nineteenth century which clearly stated that working-class "life-of-another" policies were not equivalent to wagers. There are several reasons for this, relating to distinctive traits of industrial insurance, popular assumptions about working-class gambling, and conflicting views held by different judges. First, the large scale and unpopular reputation of industrial insurance companies, affected both sides of the blurry line separating "pure gambling" from "rational speculation." The three largest industrial offices, the Prudential, Refuge, and Pearl, dominated their competitors, and each were writing millions of new policies a year by 1910.⁵⁸ The companies' size and central organization rendered them vulnerable to losses to parties whose local knowledge was an advantage in insurance wagers; but it also made them more capable of surviving an expensive court battle if they chose to resist payment. The companies' unpopular reputation, especially that of their salesmen, gave customers a fighting chance to convince a judge that they had been hoodwinked into buying an illegal policy and deserved to get a refund. Part of this reputation was derived from the assumption that burial insurance qualified as illicit "gambling" on the deaths of neighbors and relatives; but much of it also stemmed from the assumption that even the "bona fide" service offered by the companies—financial security against the cost of burial—encouraged needlessly lavish funerals among the poor.⁵⁹

Assuming that burial insurance did qualify as gambling, people who bought it, and companies that sold it, were far more likely than upper-class customers to be viewed by the rest of society to be practicing "pure gambling" instead of "rational speculation." Gambling of any variety appeared darker to Victorians whenever the gamblers were poor people.⁶⁰

56. DENNETT, *supra* note 47, at 403 n.15.

57. *See Dalby v. India & London Life Assurance Co.*, 15 C.B. 365 (1854).

58. Timothy Alborn, *Senses of Belonging: The Politics of Working-Class Insurance in Britain, 1880-1914*, 73 J. MOD. HIST. 561, 576 (2001).

59. Alborn, *supra* note 58, at 579.

60. This may very well be due to the fact that "already existent risks"—for instance, a joint-stock company's financial future—were off limits to working-class gamblers, who lacked the requisite capital to become shareholders. They did, in contrast, have access to "artificial risks" such as the outcome of card games, lotteries, or horseraces. *See SEARLE, supra* note 43, at 232.

The Gaming Act of 1845, as distinct from the Gambling Act which only applied to insurance, was mainly enforced among the poor.⁶¹ Hence, private clubs and racetracks remained effectively legal, while off-course betting did not.⁶² This double standard reflected the middle classes' "paternalistic care for the poor who might be led astray by the machinations of bookmakers;" a sentiment that stood in clear tension with the contrary middle-class, "drive to cash in on the demand for gambling."⁶³ The result was that working-class gambling "inhabited a twilight world" in late-Victorian legal and moral discourse, not unlike that which enveloped industrial insurance at the same time.⁶⁴

The scale and reputation of industrial insurance helps to explain why companies and their customers took so many cases to court between 1880 and 1909.⁶⁵ But, it does not explain why judges had so much trouble discovering a "reasonable construction" of the Gambling Act that would settle the cases.⁶⁶ The problem was not that judges lacked opinions where industrial insurance was concerned; law's "hortatory aspect" was as much on display in this realm of insurance law as in any other.⁶⁷ The problem was that judges could not decide exactly what or whom they should be exhorting. To add to the confusion, a clear split developed after 1900 between the higher courts and the county courts. The higher courts became increasingly concerned with establishing "principles" that would allow the companies to get on with their business, and the county courts tended to ignore the higher courts rulings in order to "get at the agents" by forcing

61. See SEARLE, *supra* note 43, at 232 (mentioning the "widely held view that the operation of the law was being grossly distorted by class bias"). See also CLARK, *supra* note 2, at 22 (explaining that "The Gambling Act . . . introduced the first appreciable regulation of life insurance . . .").

62. See Roger Munting, *Betting and Business; the Commercialisation of Gambling in Britain*, 31 *Bus. Hist.* 67, 68 (1989). See also SEARLE *supra* note 43, at 232.

63. See Munting, *supra* note 62, at 68.

64. SEARLE, *supra* note 43, at 232. See also MORRAH, *supra* note 9, at 27-29 (discussing industrial insurance of the same time period, and comparing the advances made in mathematical and psychological analysis to the difficulties of the early companies).

65. See MORRAH, *supra* note 9 at 31 (talking about the difficulties with industrial insurance during this time period, and the increase in contracts issued).

66. See CLARK, *supra* note 2 at 26 (noting the "intractable problems that courts encountered in meaningfully distinguishing a legitimate insurable interest from an illegitimate gamble . . .").

67. ATIYAH, *supra* note 22, at 395 (talking about the "hortatory aspect" of law); see also MORRAH, *supra* note 9 at 24 (discussing the Select Committee being favorable towards industrial insurance).

companies to pay.⁶⁸ The result was a patently uncertain legal framework, which industrial life offices ultimately found to be intolerable.

III. THE GAMBLING ACT ON TRIAL

In their respective battles to stack the deck in their favor, working-class customers and companies told stories at trial in order to convince judges that the Gambling Act entitled them to gain at the other's expense. When policyholders sued for a return of premiums, they presented themselves as victims of the insurance agent's misleading claim that such policies were legal. In their defense, depending on the circumstances of the case, life offices tried to shift blame back onto the policyholder or the agent. The insurance agent, who received so much of the blame in these trials, was the least likely to be asked to testify, lest he refute the other parties' professions of innocence.

When a Liverpool woman sued the Refuge in 1903 after paying £82 on two policies worth £72, she argued that the agent had told her "it would be all right—she could draw the money!"⁶⁹ The judge agreed that this was tantamount to fraud on the company's part, and awarded her £34—ruling that the rest of the payment lay outside the statute of limitations.⁷⁰ Alice Crosty used the same argument to win £53 back from the Scottish Temperance life office in 1909, on a policy she had taken out on her aunt's life.⁷¹ With less success, Johanna Butt of Swansea tried to claim that "people came and asked her to pay premiums" in a case where she was accused of taking out fifteen policies on the same man's life.⁷² For the most part, the fact that all these allegations of misrepresentation were made by women simply reflects the economic reality that buying insurance—like pawning, food shopping, and rent payment—qualified as "women's work"

68. See PATRICK POLDEN, *A HISTORY OF THE COUNTY COURT, 1846-1971*, 68-69, 94 (1999) (discussing the difference in treatment of creditors and debtors between the two courts, and how the county court judges sought to "impose a paternalist regime on the improvident and incompetent"). This work also discusses the relationship between county courts and high courts in the late nineteenth century.

69. Industrial Life Offices Association Minute Book (unpublished manuscript, on file with Guildhall Library, MS 29,802, London). In this and subsequent cases, monetary sums are rounded to the nearest pound.

70. *Id.*

71. 47 *Ins. Rec.* pg. #, 529 (1909).

72. *Id.* at 336.

in the working-class division of household labor.⁷³ Yet probably it also indicated a conscious strategy by such women and their lawyers to capitalize on the middle-class assumption, shared by many working men, that insurance salesmen habitually took advantage of their female customers' naiveté as they made their way from the doorstep into the front room.⁷⁴

Life offices tried to counter such claims by insisting that their customers, far from being innocent victims, were seasoned veterans at the "game" of demanding back premiums when the life they had "gambled" on refused to die in a timely fashion. When two Walworth women sued the Liverpool Victoria in 1909 for £26 in back premiums after their father died, claiming "misrepresentation of one of their agents," the society's lawyer countered that it had offered the women the £10 due at the death, "but it had been refused by them because their father lived longer than they expected, and the transaction had been unprofitable to them."⁷⁵ Although successful in the Liverpool Victoria case, such reasoning proved to be a risky legal strategy since companies could all too easily incriminate themselves along with their customers. Hence, a judge found against the Royal Liver in 1903 when it refused to refund Mary Wilson of Padiham £36 in premiums paid on a policy on her father-in-law's life, despite its lawyer's argument that she "had been speculating in insurance for a considerable time, and... was prepared to take the risk." The judge was not impressed by the society's efforts to counter Wilson's charge of misrepresentation with the claim that "many insurance companies took and honoured those wagering policies, as the Royal Liver was prepared to do in the case."⁷⁶

In responding to these stories, late-Victorian judges sent a decidedly mixed set of messages to customers and companies alike. Some, especially at the county level, blamed the companies for making a mockery of the Gambling Act and punished them by requiring them to return the premiums paid for illegal policies.⁷⁷ Others did not accuse the directors of

73. See ELLEN ROSS, *LOVE AND TOIL: MOTHERHOOD IN OUTCAST LONDON, 1870-1918* 193(1993).

74. See, e.g., the Trades Union Congressional resolution from 1909 which states that "[u]nfair advantage is often taken [by insurance salesmen] of the womankind when the husband is away": *reprinted in* Industrial Life Offices Association Minute Book (unpublished manuscript, on file with Guildhall Library, MS 29,802, London).

75. 47 INS. REC. 25 (1909).

76. 41 INS. REC., 509 (1903).

77. 8 ASSURANCE AGENTS' REV. 147 (1895); 9 ASSURANCE AGENTS' REV. 62 (1896).

encouraging gambling, but did fault their agents. For example, a Swansea judge forced the Royal Counties Friendly Society to refund a collier's premiums with costs in 1902. Although the judge claimed that he "would not think of blaming the directors," he did feel the need to "warn people about this, so that they will not enter into these contracts," and he concluded: "These agents behave so badly. I should like to hit some of these societies through their agents."⁷⁸ Another judge allowed the Liverpool Victoria to deny five claims on the short life of a girl who died of tuberculosis in 1906, but required it to pay £20 in costs, arguing that "[s]o long as there are agents who lend themselves to this trafficking... there will always be found people weak enough or greedy enough to listen to the tempters."⁷⁹ A third set of judges similarly blamed the agents, but had ample suspicion left over for the policyholders as well. Hence the judge in the Walworth case admitted that "canvassers for insurance companies were apt to misstate things," but also offered this taunt to the allegedly victimized sisters: "The whole mischief is that your father lived too long. Is that not it?"⁸⁰ A Bristol judge similarly denied £25 in back premiums for a £19 policy against the death of "an elderly man called Mark Barnes," appending to his ruling the wry observation that "[o]wing to Mr. Barnes's perversity in continuing to live, poor Mr. Tilley had overpaid."⁸¹

Harse v. Pearl (1904) held that policyholders should be assumed to be parties to illegal insurances unless fraud on the part of the agent could be proven.⁸² In that case, the Court of Appeals did make some strides towards stabilizing the meaning of the Gambling Act in application to working-class insurance.⁸³ Lord Mathew, expressly grounded his ruling in *Harse* on the principle that life offices were, "entitled to the administration of the law on fixed principles."⁸⁴ The Court arrived at these "fixed principles" in *Harse* by invoking the legal fiction that insurance salesmen could not be expected to understand how the Gambling Act had defined insurable interest; and hence could not be guilty of misrepresentation.⁸⁵ That case

78. 40 INS. REC. 174 (1902).

79. 19 ASSURANCE AGENTS' REV. 42-43 (1906).

80. 47 INS. REC. 25 (1909); 70 POST MAG. 53 (1909).

81. 47 INS. REC. 593 (1909).

82. *Harse v. Pearl*, (1904) 1 Eng. Rep. 558, 560-61 (K.B.).

83. *See id.* at 560, 564. *See also* 70 Post Mag. 207 (1909). In a second ruling, *Griffiths v. Fleming*, the court was able to accomplish greater levels of certainty for the narrower category of husbands taking out policies on their wives. *See Griffiths v. Fleming*, (1909) 1 Eng. Rep. 805, 808 (K.B.).

84. 70 POST MAG. 207 (1909).

85. *Harse*, 1 Eng. Rep. at 560-61.

was a typical one: Harse had taken out policies on his parents' lives and then demanded back premiums from the Pearl once his payments had exceeded his claim.⁸⁶ The trial jury had found for the Pearl on the grounds that the Agent represented that the Policy would be valid and did not know that what he was saying was untrue.⁸⁷ The Court of Appeals confirmed this verdict, on the assumption that salesmen's claims regarding the validity of third-party policies were statements of the general law of the land in relation to insurance, which were made innocently to a person who was most desirous of entering into an illegal Contract.⁸⁸

In reaching its verdict, the judges offered a unique twist on the usual brand of moralizing about dodgy agents preying on innocent, or even not-so-innocent, working-class victims.⁸⁹ The court argued that most industrial insurance salesmen were cut from the same cloth as their customers, and hence were unlikely to be in a position to lead their customers too far astray.⁹⁰ This corresponded with the socioeconomic reality of most insurance salesmen at the time, and it certainly corresponded with the agents' self-ascribed mission to put themselves, "on a level with all the policy-holders, no matter how humble their position in life may be."⁹¹ From this premise, the judges concluded that customers and agents were similarly *ignorant* of the Gambling Act—hence relieving insurance salesmen of any "greater obligation to know the law than the persons they approach for the purpose of effecting policies." Since the Pearl was not "in any way bound to appoint Agents with some special knowledge of law," it stood to reason that *caveat emptor*, not the Gambling Act, was the relevant "general principle" in such cases.⁹²

Unfortunately for the life offices, *Harse* was only partially successful at putting an end to the rising tide of litigation that had been such a problem since 1900. This was especially the case in county courts,⁹³ where judges were often determined to punish the industrial offices by assuming fraud on

86. *See id.* at 558.

87. *See id.* at 559.

88. *See id.* at 563-64. *See also* Industrial Life Offices Association Minutes Book, Law Reports (unpublished manuscript, on file with Guildhall Library, MS 29,802, London).

89. Industrial Life Offices Association Minutes Book, Law Reports (unpublished manuscript, on file with Guildhall Library, MS 29,802, London).

90. *Harse*, 1 Eng. Rep. at 564.

91. FREDERICK H. GISBOURNE, *HOW TO CONDUCT AN AGENCY* 5 (1895).

92. Industrial Life Offices Association Minutes Book, Law Reports (unpublished manuscript, on file with Guildhall Library, MS 29,802, London).

93. *See* POLDEN, *supra* note 68, at 94 (stating that cases heard by judges in the county court rose from 1,046 in 1900 to 5,289 in 1913).

the part of their agents. Hence when Hannah Brown sued the Britannic life office in 1907 in the Preston County Court to recover premiums for a policy on her mother's life, the office failed in its attempt "to prove that both the Company and the assured were in *pari delicto*, as in the Harse case."⁹⁴ Instead, the judge sternly insisted that the Britannic was responsible for its agents' actions: "The policy was signed by five officials, including two directors, yet not a single one thought it incumbent upon him to consider whether the insurable interest was valid under an Act 125 years old."⁹⁵ Although *Brown* was subsequently reversed on appeal, as were a number of similar lower court rulings, the trickle of such rulings grew to a flood in 1909.⁹⁶ A November 1909 editorial in the *Insurance Record* entitled "Trouble in the Industrial Assurance World" cited the case of a Welsh district in which "one company alone has had no fewer than one hundred and forty County Court actions brought against it in about two months, for the return of premiums on alleged illegal assurances."⁹⁷ It was the Edwardian equivalent of a class-action suit: "In several districts during the past six weeks circulars confidently believed to emanate from a firm of solicitors, have been distributed, inviting policyholders to take proceedings for the recovery of premiums; and in Lancashire certain solicitors, have called and addressed public meetings with the same object."⁹⁸ As with many modern class-action suits, new legislation soon followed to prevent the recurrence of such alarming disruptions to business as usual.

After 1909: From Judgment to Surveillance

The new law in question was the Assurance Companies Act of 1909⁹⁹, most of which had to do with upper-class life insurance business.¹⁰⁰ As the Act was making its way through Parliament, the industrial offices lobbied strenuously to include a provision that would prevent customers from being able to cite "the old Act of George III" in order to recover their premiums.

94. Industrial Life Offices Association Minutes Book, Law Reports (unpublished manuscript on file with Guildhall Library, MS 29,802, London).

95. 45 INS. REC. 564 (1907).

96. 70 POST MAG. 53-54 (1909).

97. INS. REC. (1909).

98. 47 INS. REC. 567 (1909).

99. 9 Edw. 7, c. 49 (Eng.).

100. MORRAH, *supra* note 9, at 73 (1955) (emphasizing that "[t]he main purpose of the Act was to strengthen the statutory guarantees for the security of the insuring public" and similarly to "the Act of 1870 life assurance did not begin until the insurers had deposited £20,000 ... with no power of withdrawal,").

Their preferred solution, endorsed in section 37 of the Act, was to legalize retroactively all existing "bona fide" third-party policies, "having regard to the change in the social condition of the people, and to the obligation which the law has placed upon the children and grandchildren since 1774."¹⁰¹ A different clause dealt with future insurances by legalizing "life of another" policies on parents, grandparents, grandchildren, brothers and sisters.¹⁰² These modifications left some legal uncertainty intact, mainly because they defined the amount of a "bona fide" policy (whether issued before or after 1909) as the sum which "the relative reasonably might expect" to pay for a funeral. "Reasonable" funeral expenses remained a bone of contention, with some trial judges setting the bar as low as £10 and companies issuing policies up to £25, and nobody was too sure what to do about people who took out several policies from different offices.¹⁰³ Furthermore, the new law's extended definition of legitimate kinship still excluded thousands of step-children, half-siblings, and cousins who continued to buy third-party policies after 1909, and hence continued to provide fodder which enterprising attorneys could use to initiate new litigation.¹⁰⁴

To prevent these remaining issues from becoming a commercial liability, life insurance offices began to pay more attention to their agents' methods of attracting business. Sidney Webb reported in 1915 that they had started to "scrutinize closely all policies purporting to be on the 'life of another,'" to require signatures from lives insured, and to fine agents who exceeded the cap on policy size although he doubted that this was enough to rein in agents' bad behavior.¹⁰⁵ More significant than these partial concessions to the spirit of the 1909 Act was the increasing tendency after 1918 to extend middle-class marketing devices to their customers.¹⁰⁶ Although "surrender values" for such policies continued to be rare, owing to the fees involved, companies like the Prudential began awarding "free policies" and bonuses to customers after several years.¹⁰⁷ They also started

101. Industrial Life Offices Association Minute Book, unpublished manuscript, on file with Guildhall Library, MS 29,802, London.

102. The Assurance Companies Act, 1909, 9 Edw. 7, c. 49, § 36 (Eng.).

103. Webb, *supra* note 48, at 28. See, e.g., *Tofts v. Pearl Life Assurance Co.* (1913) 110 LT 190; *aff'd* [1915] 1 KB 189 (rejecting Pearl's claim that £40 covering the deaths of Tofts' mother and father constituted, "an unreasonable amount for mourning.").

104. MORRAH, *supra* note 9, at 75-76.

105. Webb, *supra* note 48.

106. PAUL JOHNSON, SAVINGS AND SPENDING: THE WORKING-CLASS ECONOMY IN BRITAIN, 1870 – 1939 39-43 (1985).

107. ARNOLD WILSON & HERMANN LEVY, INDUSTRIAL ASSURANCE: AN HISTORICAL AND CRITICAL STUDY 191-93 (1937).

to offer endowment insurances, which had already replaced whole-life coverage as the most popular middle-class policy around 1900.¹⁰⁸ Endowment insurance provided term coverage for ten to twenty years, then converted to an annuity if the policyholder was still alive to collect.¹⁰⁹ Industrial offices went from issuing 3.5 million endowment policies in 1912 to thirteen million in 1931, comprising a quarter of their sales.¹¹⁰ By offering free policies, and by combining life insurance with an old age pension, the companies gave customers a reason to hold onto their policies even after they survived their predicted time of death.

Legislative and administrative reforms solved most of the strictly economic problems that the Gambling Act had once put in the way of industrial insurance. The 1909 revisions greatly reduced the number of people who could claim that their policy was illegal, and the companies' new marketing methods greatly reduced their customers' incentive to sue.¹¹¹ Hence from the industrial insurance industry's perspective, it made sense to pretend, as their upper-class counterparts had been doing for a century, that "gambling" no longer had anything to do with their business. As J.A. Jefferson of the Britannic confidently assured Sir Benjamin Cohen's parliamentary committee on industrial insurance in 1931, "[t]he British working classes of to-day are not gambling and thinking only of having a bit on the old man";¹¹² the fact that nearly 80% of his company's business was comprised of "life of another" policies—all of which would have been technically illegal under the Gambling Act—was "all part and parcel of the assurance."¹¹³

Many social critics were not as willing to let the matter rest. In his 1915 Fabian Society report on industrial insurance, Webb scolded the companies for having gotten Section 37, "smuggled into the Life Assurance Companies Act almost without discussion," and called the companies' high caps on funeral expenses, "an abuse which calls for a remedy."¹¹⁴ Cohen accused the 1909 Act of giving "a right . . . to the poor man and not to the rich" and the Cohen Committee berated the companies for encouraging, if

108. JOHNSON, *supra* note 106, at 41.

109. ROBERT T. GREEN, LIFE INSURANCE BLINDNESS 132 (1929).

110. JOHNSON, *supra* note 106, at 41.

111. See DENNETT, *supra* note 47, at 173-74.

112. DEPARTMENTAL COMMITTEE ON THE LAW AND PRACTICE RELATING TO INDUSTRIAL ASSURANCE, MINUTES OF EVIDENCE, 1931, H.M.S.O. 233, 249.

113. *Id.*

114. Sidney Webb, *The Special Supplement on The Working of the Insurance Act*, THE NEW STATESMAN, Mar. 1914, at 27-28.

not gambling *per se*, "economic waste on expenses of every kind in connection with death in working-class homes."¹¹⁵ Once Parliament had solved the "gambling" problem to their own satisfaction, however, the industrial offices were just as successful at keeping these continuing "collectivist" criticisms at bay. Two interwar inquiries produced no significant new laws, and a further attempt to nationalize industrial insurance in 1950 came to nothing.¹¹⁶ One reason why companies were able to resist such reforms for as long as they did was because they had figured out when to move their problem out of the courts and back into the market, where "collectivist" judges could rarely touch them.

115. Wilson & Levy, *supra* note 107, at 141-42.

116. See Dennett, *supra* note 47, at 260-62, 294-99.