The Development of the Law of Gambling
1776 - 1976

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Abstract

The project on the development of the law of gambling had as its purpose providing policy makers with the historical and legal context within which to evaluate proposals for the suppression or decriminalization of gambling. Statutes and cases from 1776 to 1976 from all of the states and the federal government were examined. English materials were also reviewed, and an effort was made to place legal developments in their economic, social and political contexts. General findings and conclusions include the need to examine each form of gambling on its own terms: public and private lotteries, wagering on sporting and other events, machine gambling, and casino type operations. Consideration must be given to who operates it, who participates in it, levels of participation, methods of promotion, places of participation and degrees of regulation. Effective methods of control vary with different forms: publicly operated casinos are the most easily controlled, while clandestine lotteries are the least easily suppressed. Criminal, civil, and tax policy on the state and federal level must be coordinated to effect reform successfully.

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Winds of change are sweeping across the legal horizons in the world of gambling, which was once virtually universally condemned by law. The federal government and the states are now in the process of reconsidering their traditional prohibitions of its various forms. The final outcome is yet in doubt, but the emerging design seems clear; it embraces the de facto decriminalization of various forms of illicit gambling along with the socialization of selected games. The nation seems to be heading, in short, for the worst of both worlds. Illegal gambling will flourish in a twilight zone between formal prohibition and half-hearted enforcement. By its side, there will develop legal games--first lotteries, then off-track betting, finally perhaps state run, or at least state regulated, casinos. Gambling policy will have changed in a hope to increase tax revenues and reform law enforcement, comparatively little income will be realized, organized crime and professional gambling will endure, and the corruption and inefficiency of law enforcement and the obstruction of the courts will continue.

Lacking in this rush toward a new tomorrow has been, among other things, historical perspective. Law is, of course, always the product of the forces of time and place. Law reform that is ignorant of or ignores those sometimes forgotten forces of the past runs the risks of failure if only because it does not learn the simple lessons of history. Santayana's oft quoted phrase is relevant here: he who would not remember the past is doomed to relive its mistakes.

The purpose of the preparations of these materials, therefore, has been to provide policy makers on the federal and state levels with the historical perspective and legal context within which proposals for the legal suppression or decriminalization of gambling must be considered. An effort has been made to trace the development of the law of gambling from its origins at common law through the most recent actions of the Congress of the United States. Cases and statutes from each of the fifty states have been examined. In addition, the intellectual, social and economic context of the times have been included to shed whatever light possible on the development of the law.

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Summary

At common law, gambling was not illegal. Early efforts at regulation served a number of purposes. One statute in 1541 sought to restrict gaming in an effort to promote the arts of war. Other efforts sought to mitigate those aspects of public gaming that were nuisances. Lotteries were used to raise public funds. Private lotteries were restricted to protect authorized lotteries from competition. The collection of gambling debts and cheating at cards were restricted by statutes of Charles II (1664) and Anne (1710) in an effort to protect the landed aristocracy.

In early New England, gaming was restricted in an effort to curtail idleness. The harsh pioneer life left little opportunity for leisure. Indeed, it was dangerous. Efforts, too, were made to restrict tavern gambling and horseracing out of a desire to maintain public order. Theological justifications for anti-gambling legislation rooted in notions of the relationship between gambling as the casting of lots and calling on God to witness profane events developed after control of the colonies passed into secular hands. Nevertheless, attitudes toward the proper role of work in life lay at the bottom of the continuation of anti-gambling legislation in colonial period in the Northeast.

Following the Revolution, English law was received in the United States, but adapted to the conditions and life style of America. Lotteries were at first widely used to sell private goods and to raise public funds. The lack of banking and means of public revenue financing techniques made them essential. Because of corruption, private lotteries were soon outlawed. Public lotteries were abandoned as part

of Jacksonian reforms aimed at the elimination of legislatively granted special privileges.

The growth of modern America brought with it urbanization, industrialization, and new immigration. The religious composition of the society changed, too. These shifts in population carried with them changes in attitudes toward forms of gambling. Organized crime ultimately engaged in a wide variety of criminal endeavors. Horseracing, at first only mildly restricted, was later outlawed, only to be revived in the form of parimutuel racing. Most recently, state run lotteries have been revived and experiments with forms of off-track betting have begun.

In the South, attitudes toward gambling were not dominated by Puritan ideas of play and work. Public gambling was regulated in an effort to maintain public order, particularly in tavern life. Horseracing was widely practiced. The collection of gambling debts, as in England, was restricted to protect the landed aristocracy. Louisiana, following the Civil War, was the scene of the largest and most corrupt privately owned, but publicly run lottery that ultimately required federal legislation to end. Outside of Florida and Maryland, little experimentation with decriminalization of gambling has occurred in the modern South.

The Midwest developed its gambling policies by drawing its people and its legislation from the East and the South. It was also the place where Jacksonian democracy, with its emphasis on the little man and its aversion to privilege, succeeded in writing into many state constitutions provisions against lotteries. In modern times, these constitutions have had to be amended to make possible modern experiments with lotteries. The Midwest, too, was the scene of early efforts to work out legal attitudes towards futures contracts on grain and other agricultural products. Chicago, as well, saw the rise of modern forms of organized crime.

The West was at first characacterized by a male dominated cattle grazing and mining society in which amusement centered in a combination casino, bordello, and saloon. With the arrival of eastern farmers and their families, efforts were made to curtail this aspect of Western life, particularly as statehood was sought. Nevada was one of the last states to bring gambling under control and one of the first to revert to old patterns of life.

Federal law has played mainly a supporting role in the development of gambling policies. For a while, early Supreme Court jurisprudence under the Contract Clause inhibited state efforts to end the state chartered lottery system. Federal legislative intervention was also required to end the corrupt Louisiana Lottery. In modern times, federal policy has been aimed at organized crime. Beginning in the 1950's, a series of federal statutes have virtually eliminated slot machines and large scale casino gambling in a "sin city" context. Federal efforts to restrict the operation of off-track betting and clandestine lotteries have been less successful. Federal

tax policy, too, takes special recognition of gambling income and gambling businesses. As such, it has had a major impact on modern efforts to alter traditional gambling policies at the state level.

Lotteries have played a large role in the development of gambling policy. At first, they were used to raise revenue. Later, when they became corrupt, they were outlawed. Today, they have been revived in an effort once again to raise revenue. They are a particularly objectionable form of taxation: expensive to operate and not dependable. It has been necessary to promote them to keep them in operation. They have been characterized, not by fraud, as in the 19th century, but the manipulators of the bureaucracy, as in the 20th century.

Few modern codes adequately attack syndicated gambling. Even with efforts at decriminalization of social gambling and the creation of legal games, some areas of gambling will apparently remain outside the law and efforts will have to be made to prohibit them with well drawn laws. Bookmaking, numbers, lotteries, casinos, and gambling machines will have to be prohibited.

Efforts at reform of gambling law all too often concentrate solely on the criminal law. The policies of the criminal law have given rise to parallel civil law rules designed to curtail gambling contracts, debts, and other civil obligations. Fraud, too, in connection with gambling has occupied the attention of the law.

English law in modern times has been reformed. Following the American Revolution, England had its Puritan days under Victoria. In 1960, however, English law turned to a libertarian policy. By 1968, it was necessary to curtail abuses, but English law today remains permissive by American standards.

General findings and conclusions include the need to examine each form of gambling on its own terms. Sweeping generalizations should be avoided. Consideration in efforts to suppress or regulate should be given to who operates a particular form, who participates in it, levels of participation, methods of promotion, places of participation, and degrees of regulation. Effective methods of control vary with the form: publicly operated casinos are the most easily controlled, while clandestinely operated lotteries are the least easily suppressed. Criminal, civil, and tax policies on the state and federal levels must be coordinated if reform is to be effective.

CHAPTER I. COMMON LAW

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Since the World is but a kind of Lottery, why should Gamesters be begrudged the drawing a Prize? If. . . a Man has his Estate by Chance, why should not my Chance take it away from him.

Jeremy Collier, An Essay

Upon Gaming In a Dialogue between Gallimachus and Dolomedes 10 (1713).

A. Early English Law

1. Introduction

Gaming in England apparently dates back to the earliest times.[1] An early recorded instance of it appeared in the Middle Ages. Ordericus Vitalis (1075-1143) wrote of the fondness of the clergy for "dice-playing," while John of Salisbury (1110-1182) decried "the damnable art of dice-playing."[2] Nevertheless, as declared in 1603 in The Case of Monopolies:[3] "All games [were] lawful at common law." Under the common law, however, any activity that ran the risk of a breach of the peace or public morals could be dealt with by the courts as a public nuisance.[4] Statutes, too, reflected similar principles. No sure dividing line can be drawn between early English statutes that merely declared custom and those that in fact

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[1]The three key species of gambling are "gaming," "betting or wagering," and "lotteries." "Gaming" is best defined as "the playing of any game for stakes hazarded by the players." "Betting" and "wagering" are generally used interchangeably, and are best defined as "promise[s] to give money or money's worth upon the determination of an uncertain or unascertained event in a particular way; [they]. . . may involve skill or judgment." Finally, a "lottery" is best defined simply as "a distribution of prizes by lot or chance." Royal Commission on Lotteries and Betting 1932-33, Final Report, Cmd. No. 4341, at 4 (1934)[hereinafter cited as Royal Commission 1932-33].

[2]J. Ashton, The History of Gambling in England 12-13 (1969) [hereinafter cited as Ashton Gambling].

[3]11 Co. Rep. 84, 87, 77 Eng. Rep. 1260, 1263 (1603). See also, Rex v. Rogier, 1 B. &. C. 272, 275, 107 Eng. Rep. 102, 103 (1823); Jenko v. Turpin, 13 Q. B. D. 505, 513, 516 (1884).

[4]H. Street, The Law of Gaming 14 (1937)[hereinafter cited as Street].

declared new customs. Prior to 1700, it was generally accepted that the legislature could not modify the basic principles of the common law. Consequently, early English statutes do not purport to overrule the common law. Like the common law itself, the early statutes merely penalized any game that was in itself, or owing to the manner of its playing, injurious to society or to the state.

The course of judicial decisions remained more or less uniform. English statutes on gaming, however, can be divided into two distinct classes by the year 1660. Pre-1660 statutory material purportedly reflected the common law on gaming, an embodiment of the customs of English society. Gaming per se was not viewed as unlawful; the law tried to proscribe not games, but their collateral consequences. Post-1660 legislation, on the other hand, began to reflect the judgment of a developing social conscience. Gaming, while generally tolerated, was unacceptable when it was engaged in to an excess.

2. The Statute of Richard II (1388)

The earliest English statute to affect gaming directly arose from a perceived military necessity; gaming apparently interfered with the pursuit of the martial arts. Consequently, in 1388, Richard II secured the passage of a statute which directed all laborers and serving men to secure bows and arrows and to abandon the pursuit of "tennis, football, coits,

dice, casting of stone kaileg, and other such importune games."[5] A 1409 act supplementing this statute added handball to the list of prohibited games.[6]

3. The Statute of Edward IV (1477)

In 1477, an act forbade the use of houses for "divers new imagined plays called closhekeyles, half-bowl, hand-in-hand-out, and queke borde."[7] The objective of this act apparently was not to proscribe games, but to control activity collateral to their play; it sought to prevent games from degenerating into riotous assemblies in breach of the public peace. Having just returned from an expedition in France, Edward IV had disbanded his army and unruly veterans were terrorizing the kingdom. Edward had hoped, by forbidding these games, to prevent their congregating to the danger of the public tranquility.[8]

4. The Statute of Henry VIII (1541)

In 1541, laborers and serving men, too, were prohibited from playing the forbidden games, except at Christmas time

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[5]12 Rich. II, c. 6 (1388). Street argues that early statutes were declaratory and not in derogation of the common law. "Importune" in the Statute of Richard II encompassed all the other mentioned games and was determined by harmfulness to the state. Street at 5.

[6]11 Hen. IV, c. 4 (1409).

[7]17 Edw. IV, c. 3 (1477).

[8]Hawkin's Pleas of the Crown Bk. I, c. 32, §5 at 721 (8th ed. 1824).

while in their masters' homes. Cards, dice, talles, and bowls were also added to the list of forbidden games at this time.[9]

Like the statute of Richard II, this enactment by Henry VIII was prompted by the effect of games on military preparedness. The illegality was seen in terms of activity detrimental to the well-being of the state. Entitled "An Acte for Mayntenence of Artyllarie and debarringe of unlawful Games,"[10] the statute's preamble asserted:

> Most humbly complaining. . . the Bowyers, Fletchers, Stringers and Arrowhead-makers of this your Realm, that where for the Advancement and Maintenance of Archery, the better to be maintained and had within the same, and for the Avoiding of divers and many unlawful Games and Plays, occupied and practised within this Realm, to the great Hurt and Lett of Shooting and Archery, divers good and lawful Statutes have been devised, enacted and made, . . . the which good and laudable Act notwithstanding, divers and many subtil inventative and crafty Persons, intending to defraud the Same Estatute, . . . have found, and daily find many sundry new and crafty Games and Plays, . . . keeping Houses, Plays and Alleys for the Maintenance thereof; by Reason whereof Archery is fore decayed, and daily is like to be more and more minished, and divers Bowyers and Fletchers, for lack of Work, gone and inhabit themselves in Scotland, and other Places out of this Realm, there working and teaching their Science, to the Puissance of the same, to the great Comfort of Estrangers, and Detriment of this Realm.

Like previous statutes, this act ultimately was aimed at constraining not forbidden games, but their collateral consequences. The Crown abhorred popular gaming because it decreased military preparedness and disrupted the public peace: gaming diverted attention from archery, the mainstay of the

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[9]33 Hen. VIII, c. 9, §11 (1541).

[10]33 Hen. VIII, c. 9 (1541).

English army at that time.[11] The gambling associated with the playing of games impoverished many, and while its consequent poverty prevented many from purchasing bows and arrows, it also resulted in ". . . many heinous Murders, Robberies, and Felonies."[12] Thus, remedial legislation seemed in order.

The statute of 1541 also made an important distinction between gaming in private and gaming in public or in a gaming-house. In addition to prohibiting the lower class from playing various specified games, the statute forbade the keeping or maintaining of any common gaming-house upon the penalty of a forty shillings fine per day.[13] Those who frequented such illicit places were subject to a fine of 6s.8d.[14] Although a game might not have been unlawful per se, it was deemed illegal if it were played for money in a particular place, i.e., in public or in a gaming-house. As stated in Hawkin's Pleas of the Crown:[15]

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[11]Until replaced by gunnery in the 1600's, archery was one of England's chief offensive weapons in battle. One only need recall the archer's effect in the Battle of Agincourt (1415) to understand the Crown's fear of bowmen deserting the ranks of the English army.

[12]33 Hen. VIII, c. 9, §2 (1541).

[13]33 Hen. VIII, c. 9, §11 (1541).

[14]Id. §12

[15]Bk. I, c. 75, §4, at 228 (1728).

> [A]ll common gaming houses are nuisances in the eyes of the law, not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons, which cannot but be inconvenient to the neighborhood. . . [S]uch houses cannot but be nuisances.

5. The Case of Monopolies (1603)

The Case of Monopolies[16] marked a transition in the law. In Monopolies, the court, finding that the Crown had no right to limit the production or importation of playing cards to a single patent, also declared that the common law did not prohibit the playing of games.[17] The court, nevertheless,

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[16] 11 Co. Rep. 84, 77 Eng. Rep. 1260 (1603).

[17] 11 Co. Rep. at 87b, 77 Eng. Rep., at 1264. At least one author, Street, contends that games per se could be unlawful under the common law. To support his argument, Street cites the language of the early English statutes. In the early statutory material, he finds phrases like ". . . other importune games"[12 Rich. II, c. 6 (1388)], ". . . avoiding. . . many unlawful Games and Plays" [33 Hen. VIII, c. 9 (1541)] which, he concludes, were declaratory and not in derogation of the common law.

Street also notes that the records of the court leet (a form of police court) support his contention. Under the court leet, when someone was charged with playing cards, dice, or bowling, the statute of 1541 was always recited. When someone was indicted for playing a game not included in the statute, the statute of 1541 was never mentioned in the records. According to Street, therefore, the illegality of games not listed in the statute was being defined by the common law.

Finally, Street cautions against the holding of Monopolies:

> 1) The decision was political rather than legal. Representing the struggle of the common lawyers, the case inevitably overemphasized the common law.
> 2) 'The statement as to the unlawfulness of games was dragged in only to deny, what the Queen had never asserted, that the [games] could be forbidden under the prerogative.'

agreed that immoderate play was contrary to the common law.[18]

This case is important for two reasons. First, this decision effectively emasculated the courts' ability to define illegal games independent of statute. Second, after Monopolies, the law abandoned its indirect approach to proscribing the collateral effects of gaming. Rather than prohibiting games, the law directly focused on limiting the perceived anti-social consequences of games.

B. Gaming Laws of the Interregnum (1649-1660)

Except for the Case of Monoplies, no further development occurred in English gaming law for 100 years after the 1541 statute. During this period, gaming was apparently common among the lower classes; dicing and cards, too, grew in popularity. On the other hand, gaming was not widespread among the Tudor nobility. In 1603, Tudor England gave way to Stuart England when James I ascended to the throne. Although one author has described the court of James I as being populated by an "unsavory lot" that drank and gambled to excess,[19] such reports were rare.

Fn. 17 cont.

Street, at 5-14. Monopolies, however, was not a case of gaming, but of liberty. The issue involved was an unlawful restraining of liberty. See R. Pound, The Development of Constitutional Guarantees of Liberty 36-37 (1957).

[18] 11 Co.Rep. at 87b, 77 Eng. Rep. at 1264.

[19] M. Ashley, Life in Stuart England 66 (1964).

Under Oliver Cromwell, the Lord Protector, however, England was dominated by the Puritan ideals of the new middle class. Despite popular belief, the Puritans did not abhor games. Diversions, if moderately indulged, were countenanced as long as they did not lead to "waste of time."[20] Relaxation provided by games refreshed the individual's vigor. As Benjamin Coleman stated:

> We daily need some respite and diversion, without which we dull our Powers; a little intermission sharpens 'em again. It spoils the Bow to keep it always bent, and the Viol if always strain'd up. Mirth is some loose or relaxation to the labouring Mind or Body, it lifts up the hands that hang down in weariness, and strengthens the feeble knees that cou'd stand no longer to work: it renews our strength, and we resume our labours again with vigour. 'Tis design'd by nature to cheat and revive us thro' all the toils and troubles of life, and therefore equally a benefit with the other Rests which Nature has provided for the same end. 'Tis in our present Pilgramage and Travel of Life refreshing as the Angels provision for Elijah in his sore travel.[21]

Excesses and abuses of gaming, on the other hand, were not tolerated by the Puritan regime. An effort was also made to limit some of the adverse social consequences gaming produced. New legislation enacted in 1657 allowed any loser in a gaming transaction to sue for the recovery of twice the sum lost.[22] If the suit were successful, the loser and the Protector would divide the recovered sum. The statute also declared all

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[20] P. Miller, The Puritans 391-94 (1938) [hereinafter cited as Miller].

[21] B. Coleman, The Government and Improvement of Mirth 29 (Boston, 1707), as quoted in Miller at 392.

[22] II Acts and Ordinances of the Interregnum 1249, 1250 (1657).

gambling debts arising after June 24, 1647, to be "utterly void and of none effect."[23] While this legislation as such did not survive, its objectives forshadowed subsequent civil law on gambling in England.

C. Gaming and Wagering Law: 1660-1776

1. The Restoration

For the English populace, the Restoration of the Stuart monarchy in 1660 was accompanied by a great release of the tension and anxiety that had built up during the years of the Puritan regime's suppression of "immoral" tendencies. The new king, Charles II, had spent the years of the Interregnum in France, where he developed a taste for luxurious living and a passion for horses and gambling. His equestrian interest led him to import, breed, and race horses in his own name. His niece, Anne, who later ascended the throne, shared this passion. Under these two monarchs, horseracing flourished in England, and so too did the wagering that usually accompanied such racing.[24]

At the same time, Charles brought to the throne of England a taste for gaming at cards and a formidable reputation for sexual immorality. After a visit to the royal court, a contemporary, John Evelyn, related:

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[23]Upon the restoration of the Stuart monarchy, all legislation enacted under the Puritan regime was "apparently eliminated." VI W. Holdsworth, A History of English Law 148 (2d ed. 1937).

[24]See Ashton Gambling at 178-79.

> I saw this evening such a sceane of profuse gaming and luxurious dallying, and profanesse, the King in the midst of his three concubines, as I have never before seen.[25]

Following the King's lead, the English aristocracy began to indulge freely in gaming:

> Unless one gambled freely, it was quite impossible to be counted a gentleman, or, for that matter, a lady of fashion in the court of Charles the Second. . . . [C]ards and dice were only two of the many manifestations of gambling which pervaded the whole of society like an insidious poison.[26]

The new rich of the merchant class, in emulation of the aristocracy, also began to gamble in large numbers and for large stakes. Gambling, in effect, became a national pastime.[27]

During this period, Englishmen gambled in their homes and at formal gaming-houses. Despite the 1541 statute, games flourished at public houses where the stakes were often huge:

> The records of the gaming at some of the fashionable clubs, such as Almacks, Whites, and Crocklords, are almost beyond belief. To lose £10,000, £15,000, or £20,000 in an evening was. . . all too common.[28]

Entire estates often changed hands in this fashion.

Not surprisingly, fraudulent card and dice games became prevalent at this time. At common law, such activities were

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[25] IV Diaries of John Evelyn 255 (1755).

[26] C.H. Hartmann, quoted in E. Perkins, Gambling in English Life 9-10 (1953) [hereinafter cited as Perkins].

[27] See generally, Ashton Gambling, at 51-102, 173-84.

[28] Perkins at 10-11.

indictable.[29] During this period, however, there was little respect for stringent enforcement of the law. Rather than depend upon the legal system retrospectively, most gamblers preferred to rely prospectively upon a contemporary publication, The Compleat Gamester, to warn them of the tricks employed by "sharpers."

2. The Statute of Charles II (1664)

A statute designed to curb the worst abuses of the day, namely cheating and gambling on credit, was put into effect in 1664. Entitled "An Act against deceitful, disorderly, and excessive gaming,"[30] the Statute of Charles II was primarily designed to protect "the younger sort" from debauchment at the hands of "sundry, idle, loose, and disorderly Persons . . . to the Loss of their precious Time and utter Ruin of their Estates and Fortunes."[31] Its provisions applied to both games of skill and chance, including "cards, dice, tables, tennis, bowles, kittles, shovel-board. . . cockfighting, horse-races, dog-matches, foot-races, or other pastimes. . . ."[32] Unlike earlier royal statutes, this one did not outlaw the mere playing of these games. Instead, it aimed to limit

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[29] See Street at 234-36.

[30] 16 Car. II, c. 7 (1664).

[31] Id. §1.

[32] Id. §2.

fraudulent and excessive gambling.

The victim of cheating or fraud in gaming could bring suit for the recovery of three times the sum lost. If his suit were successful, he and the Crown would equally divide the amount so recovered. If the victim failed to sue within six months of his loss, during the next year "any person" was permitted to sue in his place and to recover the loser's share as a reward.

Gaming debts secured on credit in excess of £100 were judicially unenforceable if they had been incurred "at any one Time or Meeting." Contracts relating to the payment of these debts were "utterly void of none effect." Further, any securities conveyed in relation to such debts were also declared void. In the case of "excessive gaming," any person could sue the winner for a penalty similar to the one for cheating.

This statute, however, apparently had little effect on English gaming habits. Gaming, provided it was not fraudulent, was permitted for any amount of ready money,[33] and debts for less than £100 remained enforceable in the courts. For the most part, litigation involving this statute centered around the meaning of the ambiguous phrase "at any one Time or Meeting."[34] One case held that because the statute ought to "be construed largely in odium of

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[33] See Danvers v. Thistlewaite, 1 Lev. 244, 83 Eng. Rep. 389 (K.B. 1668).

[34] 16 Car. II, c. 7, §3 (1664).

gamesters," a total debt of more than £100 incurred by a single individual at a single sitting was void, even though it was owed to two individuals, each of whom was entitled to less than the £100 statutory amount.[35] Another case took a completely antithetical position on this point.[36]

3. The Statute of Anne (1710)

The ambiguities of the 1664 statute were rectified in 1710 by "An Act for the better preventing of excessive and deceitful Gaming,"[37] popularly known since as the Statute of Anne. Unquestionably, this statute was the most important development in English gambling law prior to the American Revolution. Introduced by the phrase, "Whereas the Laws now in Force for preventing the Mischiefs which may happen by Gaming have not been found sufficient for that Purpose,"[38] the Statute of Anne sought to constrain the impact of gambling on the English social system. Because it resulted in large transfers of wealth, gambling disrupted England's land-based society. The purpose of the Statute of Anne was, therefore, to protect the landed aristocracy from the

[35]Walker v. Walker, 12 Mod. 258, 88 Eng. Rep. 1306 (K.B. 1700). This holding assumes that the second debt was not contracted solely as a means for avoiding the first. If such were, in fact, the case, then the creditors would be able to bring suit against the debtor for fraud.

[36]Stanhope v. Smith, 5 Mod. 351, 87 Eng. Rep. 700 (K.B. 1697).

[37]9 Anne, c. 14 (1710).

[38]Id.

consequences of their own folly; they were viewed as especially prone to gambling's vices and particularly susceptible to its ruin. William Hawkins, the English jurist, observed:

> The vice of gaming may be ranked amongst the offences against the political economy of the state, inasmuch as it leads. . . to ruin with the opulent. . . . [I]t is notorious that the love of gaming is frequently predominant with those men who have nothing to gain from success, and everything to lose from defeat. It is rather to be sought for in the structure of human nature which finds happiness in the strong excitement of the passions--war, hunting, political intrigue, gaming, all derive their pleasure from the same source. When minds of ardent temperament are not directed to business, but are left to seek employment only in pleasures, they find the greatest in those pursuits which most strongly agitate the passions, particularly the passions of expectation, hope, and fear. This may account for the conduct of those who, by the possession of splendid wealth, have already in their power the means of obtaining all that fortune can supply, and yet many of whom are addicted to the vice of gaming, even to the putting in hazard of all their possessions. . . .[39]

The first and most significant section[40] of the statute made "all Notes, Bills, Bonds, Judgments, Mortgages, or other Securities or Conveyances whatsoever" given in payment of gambling debts "void, frustrate, of none Effect to all Intents and Purposes." Mortgages of hereditaments were made to inure to the benefit of the heir-in-law or next-of-kin of the mortgagor.

Under section two, the loser of any sum over £10

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[39] Hawkin's Pleas of the Crown, Bk. I, c. 32, §5 at 720 (8th ed. 1824).

[40] Id. §1.

might sue within three months to recover the loss.[41] If the loser failed to sue within this period, then anyone not in collusion could sue for treble the amount lost. One-half of the amount recovered went to the plaintiff of the action, and the other half to the poor of the community.

The third section provided a discovery process whereby the defendant was required to reveal under oath the precise amount of money he had won from the plaintiff. Any winner who did so and then indemnified the loser was immune from further prosecution.[42]

Section five penalized individuals who fraudulently won any money or valuable thing at gaming. Gamesters convicted of fraudulent gaming forfeited five times the sum so won, were deemed infamous, and were shipped as perjurers.

The sixth and seventh provisions of the statute allowed any two justices of the peace to imprison professional gamblers who were unable to furnish sureties of their good behavior in the subsequent twelve months. If the professional was able to secure a surety of his good behavior, it was forfeited if he gambled for more than twenty shillings at one sitting.

To prevent the quarrels that regularly arose from gambling during this period, the eighth section provided

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[41] Id. §2. It should be noted that £10 was not an insubstantial sum in 1710. A common laborer at this time, for example, earned a salary of one shilling per day.

[42] Id. §4.

that any person convicted of instigating a fight over a gambling debt would forfeit all of his wordly possessions to the Crown and suffer two years imprisonment.

The statute concluded with a provision[43] that allowed gaming for ready money in any of the royal palaces during the residence of the Queen or her successors.[44]

The only games explicitly mentioned in the statute were cards, dice, tables, tennis, and bowls. Nevertheless, the courts extended its sope to include horseraces,[45] footraces,[46] dog-coursing,[47] cricket,[48] "all sports as well as games,"[49] "all games whether of skill or chance,"[50] and games played

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[43]Id. §9.

[44]For a description of Queen Anne's propensity for gambling, see generally Ashton Gambling at 173-84. See also G. Curtis, The Life and Times of Queen Anne 42-43 (1972).

[45]Blaxton v. Pye, 2 Wils. K.B. 309, 95 Eng. Rep. 828 (K.B. 1766); Applegarth v. Colley, 10 M. & W. 723, 152 Eng. Rep. 663 (Ex. 1842); Hay v. Ayling, 16 Q.B. 423, 117 Eng. Rep. 941 (1851).

[46]Lynall v. Longbottom, 2 Wils. K.B. 36, 95 Eng. Rep. 671 (K.B. 1756).

[47]Daintree v. Hutchinson, 10 M. & W. 85, 152 Eng. Rep. 392 (Ex. 1842).

[48]Jeffreys v. Walter, 1 Wils. K.B. 220, 95 Eng. Rep. 584 (K.B. 1748); Hodson v. Terrill, 1 Cr. & M. 797, 149 Eng. Rep. 621 (Ex. 1833).

[49]Blaxton v. Pye, 2 Wils. K.B. 309, 95 Eng. Rep. 828 (K.B. 1766).

[50]Sigel v. Jebb, 3 Stark. 1, 161 Eng. Rep. 747 (1819).

at both public and private tables.[51]

While it did not mention contracts, the Statute of Anne did affect the enforceability of some gaming contracts. Any such contract for which a security had been given was void. If a gaming contract exceeded £10, the loss was recoverable and the contract was illegal whether a security was given or not.[52]

The statute did not affect gaming contracts for less than £10. These claims remained enforceable,[53] but such actions were rare. One judge, in 1794, remarked "that he had never before known an action of this sort brought; but as the play was fair, and under £10, that under the Statute, 9 Anne ch. 14, such an action might be maintained."[54] In Applegarth v. Colley,[55] the owner of the winning horse in a sweepstakes race was permitted to recover the £50 sweepstakes from its holder because each bettor involved had wagered less than £10. The court reasoned:

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[51]McKinnell v. Robinson, 3 M. & W. 434, 150 Eng. Rep. 1215 (Ex. 1838).

[52]Street at 383.

[53]McAllester v. Haden, 2 Camp. 438, 170 Eng. Rep. 1210 (1810); Emery v. Richards, 14 M. & W. 728, 153 Eng. Rep. 668 (Ex. 1845).

[54]Bulling v. Frost, 1 Esp. 235, 170 Eng. Rep. 341 (1794).

[55]Applegarth v. Colley, 10 M. & W. 723, 152 Eng. Rep. 663 (Ex. 1842).

> One great object of the statutes of Charles II and Anne (both of which must be construed together) was to prevent gaming on credit, and to confine parties who were playing for money to such sums as they should pay down at the time of play. Now we are of the opinion, that money deposited in the hands of a stakeholder before a game is played or a race is run, to be handed over to the winner, is precisely that sort of transaction that the legislature, supposing the parties were to engage in play at all, meant to encourage and not to prohibit.[56]

Even if a wager was for less than £10 and was therefore enforceable per se, the courts would decline to do so if the subject of the bet, the game or the race, were forbidden by statute.[57] A narrow reading of the statute, however, often led to an opposite result. In Pugh v. Jenkins,[58] the plaintiff had won £50 on a bet that a particular horse had won the Derby the day before. Lord Denman explained that:

> [N]o latitude of construction can bring such a wager within these words ["betting on the side . . . of such as do game"]. It can hardly be said to be a wager on the event of the game, but rather on the accuracy of the information respecting it that either party possessed.[59]

Similarly, in Pope v. St. Leger,[60] a wager on the rules of a prohibited game was held distinct from a bet on its outcome.

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[56] Id. at 732-33, 152 Eng. Rep. at 667.

[57] McKinnell v. Robinson, 3 M. & W. 434, 150 Eng. Rep. 1215 (Ex. 1838); Johnson v. Bann, 4 T.R. 1, 100 Eng. Rep. 861 (K.B. 1790).

[58] 1 Q.B. 631, 113 Eng. Rep. 1273 (1841).

[59] Id. at 635, 113 Eng. Rep. at 1275.

[60] 1 Lut. 484, 125 Eng. Rep. 256 (1893).

Although the Statute of Anne was enacted to reform gambling practices, it produced in at least one area, an unexpected and undesirable result.

> The Statute of Anne in making securities 'void to all intents and purpose,' worked great injustice in the case of innocent holders for value of bills and notes which had originally been given for gaming transactions.[61]

Initially, a bona fide purchaser for value of a note issued in payment of a gambling debt was unable to recover on it in the courts.[62] This position, however, was gradually modified through the years to allow the innocent third party to recover in some instances.[63]

4. The Hanovers

The Hanover kings, who ascended to the English throne on Anne's death in 1714, were also confirmed gamblers.[64] The high life of the Restoration continued unabated in Georgian England, except, of course, for the reforms effected by the Statute of Anne. By mid-century, however, certain games came to be regarded as "undesirable because they led to excessive gaming, or were unduly favourable to the promoters,

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[61] G. Stutfield, The Law Relating to Betting, Time-Bargains, and Gaming 9 (1884) [hereinafter cited as Stutfield].

[62] See, e.g., Bower v. Bampton, 2 Str. 1155, 93 Eng. Rep. 1096 (K.B. 1741); Shillito v. Theed, 7 Bing. 405, 131 Eng. Rep. 156 (1831).

[63] See Edwards v. Dick, 4 B. & Ald. 212, 106 Eng. Rep. 915 (K.B. 1821).

[64] See generally Ashton Gambling.

or opened the way to fraud."[65] In an effort to rectify this situation, George II, after Parliamentary action, promulgated three statutes which forbade the playing of certain specified games. In 1739, ace of hearts, pharoah, basset, and hazard were outlawed.[66] In 1740, all games involving dice, except backgammon, were prohibited,[67] and in 1745, roulette was abolished.[68] Interestingly, the prohibitions contained in the first two of these statutes did not extend "to the royal palace."

In mid-century, a half-hearted effort was also made to suppress gaming-houses. This was facilitated by the passage of "An Act for the better preventing Thefts and Robberies, and for regulating Places of publick Entertainment, and punishing Persons Keeping disorderly Houses" in 1752.[69] The statute provided that if two inhabitants of a parish notified the constable of the existence of a bawdy or a gaming-house, and the constable subsequently convicted the keeper of the house, the two informers would each be entitled to a reward of £10. This statute was made perpetual in 1755.[70]

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[65] Royal Commission 1932-33 at 8.

[66] 12 Geo. II, c. 28, §§2, 3 (1739).

[67] 13 Geo. II, c. 19, §9 (1740).

[68] 18 Geo. II, c. 34, §§1, 2 (1745).

[69] 25 Geo. II, c. 36, §5 (1752).

[70] 28 Geo. II, c. 19 (1755).

5. The common law rule regarding wagering

Puritan legislation notwithstanding, at common law debts arising out of wagers were generally thought to be enforceable in the courts.[71] The courts, however, viewed such suits as nuisances, and

> . . .took upon themselves to postpone all actions of this kind until the rest of their business had been disposed of; or, in the language of Lord Ellenborough in Gilbert v. Sykes [16 East 150], "until the courts had nothing better to do."[72]

6. Exceptions to the rule

While wagers were generally enforceable at common law, they were enforceable only insofar as they did not contravene morality or public policy. Although this rule was apparently established in the English courts at an early date, it was not explicitly declared in a judicial opinion until 1774. In Jones v. Randall, a case involving a wager as to whether a decree of the Chancery Court would be reversed on appeal to the House of Lords, Lord Mansfield stated:

> The question then is, Whether this wager is against principles? If it be contrary to any, it must be contrary either to principles of morality--for the law of England prohibits everything which is contra bonos mores, or, it must be against principles of sound policy.[73]

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[71] Street at 363. See also Stutfield at 1.

[72] Stutfield at 1.

[73] Jones v. Randall, 1 Cowp. 37, 39, 98 Eng. Rep. 954, 955 (K.B. 1774).

In DaCosta v. Jones, a wager as to the sex of one M. le Chevalier d'Eon, a French soldier and statesperson, was found to violate public policy because the question involved required the introduction of "indecent" evidence which would expose the subject of the wager to ridicule. In dicta, Lord Mansfield offered examples of other kinds of wagers which would violate public morality or policy:

> Suppose a wager between two people, that one of them, or that a third person, shall do a criminal act. . . . Such a wager would be void: Because it is an incitement to a breach of the peace. Suppose the subject matter of a wager were a violation of chastity, or an immoral action: "I lay I seduce such a woman." Would a court of justice entertain an action upon such a wager? Most clearly not; because it is an incitement to immorality. . . . Suppose a wager that affects the interest, or the feelings, of a third person. . . . For instance: that such a woman has committed adultery. . . . Would you try that? Would it be endured? Most unquestionably it would not. Because it is not only an injury to a third person, but it disturbs the peace of society. . . .[74]

In practice, then, a variety of different types of wagers could be held unenforceable as violative of these principles of public policy.[75]

D. Lotteries: 1660-1776

1. Early English lotteries

Lotteries were not unknown in England in the late Middle

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[74]DaCosta v. Jones, 2 Cowp. 729, 735, 98 Eng. Rep. 1331, 1334 (K.B. 1778).

[75]See Street at 365-69, and see Stutfield at 2-4.

Ages, nor were they considered illegal at common law.[76] The first recorded lottery in England was launched under state auspices in 1566 and drawn in 1569.[77] It purpose was to raise capital for the repair and maintenance of the country's harbors and for other public words projects.[78] A total of 400,000 lots were sold and drawn; the prizes awarded took the form of plate, tapestry, and money.

Over the next hundred years, a number of lotteries were promoted by the state for a variety of public and semi-public purposes. Lotteries were held to raise capital for the English plantations in Virginia (1612), to finance schemes for bringing fresh water to London (1627, 1631), to repair the damage done to the fishing fleet by the Spanish (1640), to raise money for the ransoming of English slaves held in Tunis, and to aid poor and disabled soldiers (1660).[79]

Viewed as a form of monopoly, a lottery could only be run after its promoters had secured a patent from the Crown. By issuing only a limited number of licenses, the state regulated lotteries during the sixteenth and seventeenth centuries.

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[76] Royal Commission 1932-33, at 5.

[77] Id. See also, J. Ashton, A History of English Lotteries 4-16 (1969) [hereinafter cited as Ashton Lotteries].

[78] Id. See also Street at 205.

[79] Id. See also Ashton Lotteries at 28-32.

2. Parliamentary control of lotteries: 1694-1776

Toward the end of the seventeenth century, control of lotteries passed from the Crown to the Parliament. Under state auspices, lotteries became a vehicle for raising revenue. Unable to compete with other investment opportunities, state loans were secured by the Exchequer through the inducement of lotteries.

In 1694 Parliament authorized the first state lottery which became the model for subsequent state lotteries.[80] To secure a loan of £1,000,000, shares were sold by the Exchequer for £10 each, annuities were to be paid at the rate of 10% on each share for 16 years. A lottery provided larger annuity payments to 2,500 subscribers with the principal prize being £1,00 per year.[81] A similar arrangement was promulgated by Parliament and was drawn in 1697.[82]

In 1699, however, lotteries, both private and public, were suppressed by legislation as common and public nuisances.[83] Stating that:

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[80] 5 W. & M., c. 7 (1694).

[81] Id.

[82] 8 Will. III, c. 22 (1697).

[83] Lotteries Act, 10 & 11 Will. III, c. 17 (1699).

> [w]hereas several evil-disposed persons, for divers years past, have set up many mischievous and unlawful games, called lotteries. . . and have thereby most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen, traders and merchants, and from other unwary persons, to the utter ruin and impoverishment of many faimilies, and to the reproach of the English laws and government [84]

the statute placed a blanket prohibition on lotteries of all types. All previously issued patents were also declared void. In the future, the only legal lotteries would be those authorized by parliamentary act.

Parliament, however, was not loathe to authorize new lotteries. Over the next fifty years, a number were authorized, "usually as a means of finding money for the general needs of the State, less frequently for some special purpose. . . ."[85] About twenty lotteries were authorized in the first half of the eighteenth century for the purpose of raising revenue for the Exchequer. Special lotteries were authorized to raise funds for the construction of Westminster Bridge in 1739 and to establish the British Museum in 1753.[86]

> By 1755 the lottery had become virtually an annual event. . . . First adopted as an expedient to meet some special need, and in particular as an inducement to assist in raising a loan, the state lottery became a regular financial instrument and ceased to be associated with loans.[87]

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[84] Id. §1.

[85] Royal Commission 1932-33, at 5-6.

[86] Id.

[87] Id. at 6.

Although private lotteries were first abolished in the seventeenth century because of the many abuses associated with them, the ban became useful in the eighteenth century as a revenue protection device. Through such a prohibition, the English government eliminated competition and secured for itself an unassailable monopoly. For this reason, revised and broadened statutes dealing with private and foreign lotteries were also enacted by the Parliament in the first half of the eighteenth century.[88]

Opposition to the state lotteries, however, began to develop in the second half of the century. Lottery office keepers began to cheat their customers by tying the purchase of tickets to that of other articles, by failing to pay the full price to holders of winning tickets, and, often, by disappearing a few days before a lottery was to be drawn.[89] In 1773, the City of London petitioned the House of Commons, asking that further lotteries be banned, as the ones then operating were "highly injurious to the commerce of the kingdom and to the welfare and prosperity of the people."[90] Nevertheless, prior to 1776 no headway was made against the argument that the state could not afford to relinquish the substantial source of revenue which the lotteries represented.

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[88] 9 Anne, c. 6, §56 (1710); 10 Anne, c. 26, §109 (1711); 8 Geo. I, c. 2, §§36-37 (1721); 9 Geo. I, c. 19, §4 (1722) 6 Geo. II, c. 35, §29 (1733); 12 Geo. II, c. 28, §1 (1739).

[89] See Ashton Lotteries at 293-95.

[90] Royal Commission 1932-33 at 6.

E. Early Futures Law

Difference transactions, although actually wagers on stock market fluctuations, were never regarded as contrary to the common law. These were bilateral bargains under which one party agreed to pay the other the amount of increase or decrease in the price of a stock or stocks between certain dates without transferring the stock. The vast financial ruin wrought by stock speculators of the "South Sea Bubble," however, resulted in a statute of 1734 "to prevent the infamous practice of stockjobbing."[91] Popularly known as Barnard's Act, this statute of George II declared that:

> . . . all and every such Contract and Agreement [difference transaction] shall be specifically performed and executed on all Sides, the Stock or Security thereby agreed to be assigned, transferred, or delivered, shall actually be so done, and the Money, or other Consideration thereby agreed to be given and paid for the same, shall also be actually and really given and paid.[92]

This was the first statute designed to curtail stock speculation; it was to be widely copied in the succeeding years.

F. The Gaming Law Debate

While post-1660 legislation often reflected aspects of the Puritan ethic on excess and luxuries, England experienced

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[91] 7 Geo. II, c. 8 (1734).

[92] Id. §5.

great debate over the value of its anti-gambling laws. Some authors advocated the complete repeal of the anti-gaming laws. Such legislation was attacked as protecting the wealthy and the aristocracy of England.[93] On the other hand, it was argued that gaming promoted the redistribution of wealth:

> Gaming like the Law abhors Perpetuities. Property is in constant circulation, but then, like the Sea, what it loses on one Shore, it gains on another.[94]

A few advocated that gaming developed the nation's officer corps: officers accustomed to heavy losses and changing fortunes in gambling were more suited for command than non-gamesters.[95]

> Men in easy circumstances are not the fittest to go upon desperate Adventures. . . [T]hose who have charged through a Troop of Creditors, are most likely to have the same success when they face an enemy.[96]

Others charged that the law should make no distinction between "the King and the cobbler"; either the gaming laws should extend to all or to none.[97]

Proponents of the anti-gaming laws were the products of a developing commercial society, a society whose rising middle class demanded productive employment of capital to grow. Gamblers, being unproductive laborers, inhibited

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[93] R. and J. Dodsley, A Modest Defense of Gaming 13-18 (1754).

[94] Id. at 17.

[95] Id. at 36-39.

[96] Id. at 38.

[97] E. Mumford, A Letter to the Club at White's 9-11, 30 (1750) [hereinafter cited as Mumford].

economic development.[98] Since men "were weak enough to trust the improvement of their lot to schemes which depend upon mere chance, instead of employing it in [skilled] trade,"[99] the anti-gaming statutes provided for the public good by encouraging commerce. A typical contemporary pamphlet argued:

[98] I. A. Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, 363 (E. Cannan ed. 1966) illustrates the eighteenth century attitude toward the unproductive laborer:

> [The prodigal] pays the wages of idleness with those funds which the frugality of his forefathers had, as it were, consecrated to the maintenance of industry. By diminishing the funds destined for the employment of productive labour, he necessarily diminishes, so far as it depends upon him, the quantity of that labour which adds a value to the subject upon which it is bestowed, and, consequently, the value of the annual produce of the land and labour of the whole country, the real wealth and revenue of its inhabitants. If the prodigality of some was not compensated by the frugality of others, the conduct of every prodigal, by feeding the idle with the bread of the industrious, tends not only to beggar himself, but to impoverish his country.

This attitude also prevailed in the young American republic. As Alexis de Tocqueville noted in II Democracy in America 248 (P. Bradley ed. 1957):

> All those quiet virtues that tend to give a regular movement to the community and to encourage business will therefore be held in peculiar honor by that people, and to neglect those virtues will be to incur public contempt. All the more turbulent virtues, which often dazzle, but more frequently disturb society, will, on the contrary, occupy a subordinate rank in the estimation of this same people; they may be neglected without forfeiting the esteem of the community; to acquire them would perhaps be to run a risk of losing it.

[99] R. Hey, A Dissertation on the Pernicious Effects of Gaming 81 (1784) [hereinafter cited as Hey].

> A Society is upheld by the joint action of the Individuals: and if we should conceive a number of Individuals concerting beforehand a plan for a Society, to be entered into by formal contract, it is evidence that no person would be admitted, who should refuse to contribute his share to the support and welfare of the community.[1]

The anti-gaming statutes were also supported because they preserved the distinction of rank and quality. The same author argued:

> There is a turn of thought suited to each rank singly, which leads a man to act in it habitually with a certain prosperity and decency. And a person of high rank can scarcely degrade himself to those who are greatly his inferiors, and admit them to a constant familiarity, without at the same time degrading his mind to the level of their ideas, or at least sinking it much below the level proper for his own.[2]

By destroying rank and quality, gaming was seen as encouraging official corruption. The pamphlet continued:

> We have reason to dread the fate of the public money, if entrusted to one whose rapacious hand is not restrained by considerations of Prudence, Reputation, Friendship, [and] natural Affection.[3]

The gaming laws did indeed protect the aristocracy.

If gaming debts were enforceable, indebted English aristocrats might, as a consequence, lose their hereditary estates. This posed a grave threat to a land-based social order. As Sir William Blackstone, a leading commentator on

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[1] Id. at 82

[2] Id. at 77-78. Gamesters lacking in education and habit were seen as unable to put their funds to proper public use even if they desired to "return to a discreet use of money." Id. at 79.

[3] Id. at 79.

English law, observed in 1769:

> Next to that of luxury, natural follows. . . gaming, which is generally introduced to supply or retrieve the expenses occasioned by the former: it being a kind of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, [gaming]. . . is an offense of the most alarming nature. . . . [A]mong persons of a superior rank, it hath frequently been attended with the sudden ruin and defolation [sic] of antient [sic] and opulent families, an abandoned prostitutuion of every principle of honour and virtue, and too often hath ended in self-murder. . . . [I]t is the gaming in high life, that demands the attention of the magistrate; a passion to which ever valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors.[4]

Gaming was abhorred because it threatened the foundation of civil liberties. The rights of Englishmen paradoxically resulted from a constitution structured on a distinct role for the state (the Crown) and the aristocracy. In eighteenth-century England, the aristocracy still checked the power and the abuses of the state.[5] In the past, as gambling debts had been enforced, the aristocracy turned to the Crown to secure payment of their debts and, thus, to preserve their

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[4] IV W. Blackstone, Commentaries on the Laws of England 171-72 (1st ed. 1769).

[5] See generally W. Bagehot, The English Constitution (1869).

their style of living. A contemporary author noted:

> [A]s fast as they lost their Patrimony, they must sue to the crown for Places, Pensions, and Gratuities of every Kind, to supply the Want of what their Ancestors handed down to them; and which, according to the State and Dignity of their Character, to their immortal Honour, be it resounded, they Nobly sacrificed to this Science, so productive of every Good to Britain. The Crown, ever Courteous to the Lords and Commons, we may be sure will not refuse the Boon, and by this Means avail itself of their parliamentary Power.
>
> And thus, my Lords and Gentlemen, we may expect in a little time to see, by the Progress of this Science only, . . . our liberty entirely in the Hands and at the Disposal of the Reigning Monarch.[6]

In America, however, this debate lost much of its substance, for there was no pending political need to protect an aristocracy from ruin.

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[6] Mumford at 38-39. Socio-economic position denuded of real power was an imminent threat to disrupt England's social order. In The Old Regime and the French Revolution 30, [S. Gilbert trans. 1955), de Tocqueville concluded that the aristocracy's retention of privileges without real power was a major cause of the French Revolution:

> When the nobles had real power as well as privileges, when they governed and administrated, their rights could be at once greater and less open to attack. In fact, the nobility was regarded in the age of feudalism much as the government is regarded by everyone today; its exactions were tolerated in view of the protection and security it provided. True, the nobles enjoyed invidious privileges and rights that weighed heavily on the commoner, but in return for this they kept order, administered justice, saw to the execution of the laws, came to the rescue of the oppressed, and watched over the interests of all. The more these functions passed out of the hands of the nobility, the more uncalled-for did their privileges appear--until at last their mere existence seemed a meaningless anachronism.

CHAPTER II. THE NORTHEAST

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A. Colonial Era: 1629-1776

"The Lorde hath admonished, threatened, corrected, and astonished us," wrote Puritan lawyer, John Winthrop, of the English people, in the fateful spring of 1629, "yet we grow worse and worse . . . . If the Lorde seeth it will be good for us, he will provide a shelter and a hidinge place . . . ."[1] The following March, under Winthrop's direction, the Great Migration began to the new land from the tyranny under Charles I. In ten years, 25,000 persons sailed for Massachusetts Bay, secured the permanent settlement of the more northerly latitudes of America, and established a shelter and a hiding place for the dissatisfied of the Old World.

In these and the succeeding years, the states of what is now the industrial Northeast[2] shared many significant experiences. These common patterns of social and economic growth were reflected in the history of their gambling law, particularly as it affected gaming, lotteries, and horseracing.[3]

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[1]Quoted in W. Miller, A New History of the United States 31 (Dell ed. 1969).

[2]Massachusetts, Connecticut, Maine, New Hampshire, Vermont, New York, New Jersey, Pennsylvania and Rhode Island.

[3]The common legal history of the colonies is largely the history of legislation. Printed reports did not appear throughout the new land until after the Revolution. To be sure, court records are today available to the historian, but they were not then widely available to the practicing lawyer. Consequently, it is difficult to determine with assurance what was understood to be the law then in common practice.

1. Gaming

John Winthrop's Puritans were, of course, among the earliest settlers of the North American continent. Those who settled

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Fn. 3 cont.

The English legal system itself, of course, played a leading role in shaping the development of American legal thought and institutions in general, and of its gambling law in particular, both prior to and after the Revolution. Nonetheless, the question of the extent to which the English common law and the acts of Parliament were, in fact, received by the American colonies has not yet been answered satisfactorily.

At least three theories have been put forth to explain the extent to which the English common law was received in the American colonies. These theories are set out in Z. Chafee, Colonial Courts and the Common Law 68 Proceedings of the Massachusetts Historical Society 132 (1952), in Essays in the History of Early American Law 53, 61-78 (D. Flaherty, ed. 1969). The first theory states that the common law of England went into force in the American colonies immediately upon their settlement. See, e.g., the opinion of Mr. Justice Story in Van Ness v. Packard, 27 U.S. (2 Pet.) 137, 144 (1829); and see generally, his Commentaries on the Constitution of the United States (1851). Another theory states that for a long period after the settlement of America, the colonists employed their own brand of popular, local law, receiving most of the rules of the English common law over an extended period. See, P.S. Reinsch, The English Common Law in the Early American Colonies (1970); see also, R. Pound, The Spirit of the Common Law 113-16 (1921). A third theory states that it was not the common law, which consisted of the decisions and doctrines of the Crown courts in London, that the settlers brought with them to America. Rather, they brought with them the law administered in the English courts that sat in the country towns, boroughs, and manors outside of the sphere of influence exercised by the Crown courts in London. See J. Goebel, King's Law and Local Custom in Seventeenth Century New England, 31 Colum. L. Rev. 416 (1931), in Essays in the History of Early American Law 83 (D. Flaherty ed. 1969). Thus, the common law, as such, did not become the law of the colonies until after the Revolution. In any event, the existence of these conflicting theories, each respectable in its own right, offers evidence that no firm conclusions can be drawn in this area.

While the reception of parliamentary statutes in America presents a somewhat clearer picture, it remains difficult to

in the area which is now Massachusetts condemned gaming from the start, but their disapproval did not originally rest upon the belief that such activity was evil per se or directly contrary to the teachings of God. Instead, the Puritans were basically opposed to idleness.

Fn. 3 cont.

draw general conclusions. See, E.G. Brown, British Statutes in American Law 1776-1836 at 1-23 (1964) [hereinafter cited as Brown]; see also J. H. Smith, Appeals to the Privy Council from the American Plantations 465-522 (1965). The question of whether a given English statute was effective in an American colony is complicated by the distinction made in English law between the realm of England and the non-English holdings of the Crown.

In the seventeenth and eighteenth centuries, the English mind conceived of the realm of England as consisting of the geographical unit of England proper. The non-English holdings of the Crown consisted of all of the dominions over which the Crown exercised control, whether the Isle of Man or the North American plantations. Unless it explicitly stated otherwise, an act of Parliament was deemed to apply only within the realm of England.

Typical provisions contained within the royal charters of the American plantations, however, stated that neither the colonists nor their descendants could be deprived of the "liberties and immunities" of English citizenship. See Brown at 6-7. Many of the colonists believed that the laws of England extended across the Atlantic. Nevertheless, one noted commentator states that "there is no evidence that this was the intention of the Crown." Id.

A number of distinctions were also drawn by the English to explain which parliamentary acts were effective in each colony at a particular time. A succinct summation of these distinctions is offered id. at 12-13. Neither the common law nor the acts of Parliament in force in England at the time of settlement of a particular colony were considered to be automatically in effect in that colony. The laws of England at the time of a colony's settlement, however, could be made effective within the colony by act of its legislature. Similarly, statutes enacted by Parliament subsequent to a colony's settlement did not extend to it unless the colony was specifically mentioned within the statute or unless the statute was made applicable to the colony by act of the colonial legislature. Id. at 13.

According to Puritan doctrine, all law derived its force and validity from the word of God. That "word" had only one rightful source, the Bible. While theft and adultery were specifically prohibited, the Bible did not expressly condemn gaming. In its first year of existence, however, the Massachusetts Bay Colony outlawed the possession of cards, dice, or gaming tables, even in private homes.[4] In addition, although games in general were not expressly banned, they clearly fell under the idleness statute of 1633:

> It is further ordered that noe pson howse houlder or othr, shall spend his time idely or unpffitably under paine of such punishment as the Court shall thinke meete to inflicte 5

The early colonists opposed any unproductive use of time, and game-playing was condemned as one form of idleness. Other prohibited diversions included dancing, singing, and

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Fn. 3 cont.

Reception of English statutes could also occur by "long uninterrupted usage." According to a 1729 memorandum written by English Attorney General Yorke, a statute enacted by Parliament without reference to a particular colony and not made applicable to that colony by official local action could be

> . . . received there by long uninterrupted usage, or practice, which may impart a tacit consent by. . . the people of the colony, that they should have the force of a law there.

I A. Chalmers, Opinions of Eminent Lawyers on Various Points of English Jurisprudence 196 (1814). See also Brown at 12. Because "long uninterrupted usage, or practice" was never fully defined and because the records of the colonial courts are incomplete, it is, therefore, also difficult to determine which English statutes were effective at given times in individual colonies.

[4] 2 Records of the Court of Assistants of the Colony of Massachusetts Bay 12 (1631)(1904 ed.).

[5] Id. at 37 (1633).

all unnecessary walking on Sundays. The Massachusetts statute took special notice of "common coasters unpfittable fowlers & tobacco takers. . . ."[6]

In 1646, Massachusetts also enacted the first anti-gambling law in the colonies. The law was designed solely for the prevention of idleness:

> Upon Complaint of the disorders, by the use of the Games of Shuffle-board and Bowling, in and about houses of common entertainment, whereby much precious time is spent unprofitably, and much wast of wine and beer occasioned;
> It is Ordered by this Court and the Authority thereof, That no Person shall henceforth, use the said Games of Shuffle-board, or bowling, or any other play or game, in, or about any such house. . . .[7]

Connecticut's laws followed a similar course, and denounced game-playing, whether or not gambling was present, because it prompted ". . . much precious time to be spent unfruitfully."[8] The unlawful games included all those forbidden under British statutes: bowling, tennis, cards, dice, and cockfighting.[9]

Several factors combined to produce the Puritan opposition to entertainment reflected in and exemplified by this early

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[6] 2 Records of the Court of Assistants of the Colony of Massachusetts Bay 37 (1633)(1904 ed.).

[7] Colonial Laws of Massachusetts; reprinted from the edition of 1660, with supplements to 1672, at 153 (1889). For the first time specific penalties were enumerated for both players and keepers of houses of common entertainment.

[8] Blue Laws of Connecticut: The Code of 1650 at 50 (S. Andrus ed.).

[9] 33 Hen. VIII, c. 9 (1541) and 2 & 3 Phil. & M., c. 9 (1555), both found in 2 Statutes at Large (Great Britain) 307, 492.

Northeastern legislation: the harsh and unfamiliar American wilderness, the danger of hostile Indian attack, and the possibility of starvation or disease. Because of the subsequent influence of Puritan ideas on American social and legal ideals, each warrants more extensive treatment.

The first settlers quite naturally opposed idleness out of economic necessity. One scholar observed:

> It was the paramount need of a primitive pioneer society for the whole-hearted coöperation of the entire community that fastened upon the first Americans a tradition of work which still weighs heavily upon their descendants. The common welfare in those difficult and perilous days could not permit any "mispense of time". Those who would not work of their own volition had to be driven to it under the lash of compulsion. Religion provided the strongest moral sanction for every law suppressing amusements. It was one of the vital forces making for a life in which recreation for long played hardly any part. But in all the colonies there was this basic fact: if the settlers did not direct all their energy to their work, they could not hope to survive. 10

Puritan opposition to gaming also stemmed from the settlers' past experiences with the English aristocracy and the Anglican Church. Puritanism emerged as a reaction to the extravagance of the Church of Englsnd. The Puritans condemned many pleasures that the Anglican Church tolerated. During their struggle for spiritual reform in England, the Puritans developed a deep scorn for the lifestyles of those who opposed them. Economic envy was probably intertwined with this contempt, for the Puritans were originally drawn from the lower and middle classes.

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[10] F. Dulles, A History of Recreation 5 (2d ed. 1965).

The aristocrats' penchant for play was one of the primary reasons the Puritans gave to justify their hatred for the British upper classes.

The final factor that contributed to the Puritans' disapproval of frivolous use of time was the idea of a "calling", which was the intellectual origin of the Puritan work ethic. That men might be called upon to serve God in specific occupations is an idea that can be traced to the story of Christ selecting Matthew from the other publicans to become a Disciple. The Puritans, however, did not limit the meaning of "calling" to those who decided to enter the ministry. Instead, each man was called upon to follow a particular vocation, and the devotion with which he performed his duties was a measure of his devotion to God.

Dedication to one's calling was considered a manifestation of one's "election": that one had been chosen by God to enjoy eternal life in heaven. In both early Puritan theology, which measured election by one's skill in following a chosen vocation and one's reputation for doing good among neighbors, and in later simplistic versions, where spiritual accomplishment was measured by the quantity of goods one accumulated, work was of prime importance. A man who did not work with diligence and devotion was suspect and could not hope to be saved. Gamblers, therefore, were among the damned. The true Puritan, who believed that a society which failed to obey God's word to the letter would be punished, felt compelled to make the whole of society conform to his Puritan ideals. Gamblers had to be punished in the immediate present in order to stave off societal calamity in the hereafter.

The clerical leadership of the Massachusetts Bay Colony, however, led a fight to criminalize not gambling as such, but idleness. In 1668, the idleness statute was amended to provide that all idlers, "for remedy of these great and unsufferable evils," would be committed to a "house of correction."[11] In 1682, the statute was amended a second time in a renewed effort to eliminate any unproductive use of time. Idleness, stated the preamble, not only jeopardized the economic welfare of the individual and his family, but also fostered negligent pursuit of one's calling.[12]

The Puritans' concern for the improper conduct of the individual members of their society is evident in a 1677 Massachusetts statute which declared "Horse racing, for mony, or monyes worth" unlawful if conducted on any highway or public road or within four miles of any town.[13] The law summarized

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[11]Charters and General Laws of the Colony and Province of Massachusetts Bay 128 (1814).

[12]Id. at 128-29. Both the practical concern for the idler's family and the disapproval of idleness itself can be discerned in the preamble to the statute:

> [T]here are in sundry of our towns and especially in Boston may idle persons in families as well as other single persons who are greatly if not altogether negligent in their particular callings, and some that do not follow any lawful employment for a livelihood, but misspend their time and the little which they earn to the impoverishing if not utter undoing of themselves and families. . . .

Tithing men in each town were to inspect all persons, families, and homes in search of idlers or those with no lawful calling. The culprits were forced to work at assigned jobs, either in town or in jail. Wages were withheld from the individual and kept by the local magistrate for the idler's family. Id.

[13]Colonial Laws of Massachusetts; reprinted from the edition of 1672, with supplements through 1686, at 347 (1889).

popular attitudes toward this activity, stating:

> [A]mong other Evils that are prevailing among us, in this day of our Calamity, there is practised by some that vanity of Horse racing, for mony, or monyes worth, thereby occasioning much misspence of precious time, and the drawing of many persons from the duty of their particular Callings, with the hazard of their Limbs and Lives. 14

Indeed, this statute seemed to echo the forebodings of the 1670 Massachusetts gambling law which complained of the "expending of much precious time and estate . . . . "[15]

It is a mistake to focus solely on the religious aspects of this anti-gambling legislation. Other policy considerations were clearly involved. Indeed, these early Massachusetts statutes closely resemble subsequent similar acts of other Northeastern states not under Puritan influence in their focus upon secular problems involved in gambling. The original Massachusetts anti-gambling law of 1646 was designed at least in part to control "disorders . . . in and about houses of common entertainment,"[16] in an attempt to minimize the disruptive influence of the tavern on community life. The earlier statutes had been enacted primarily in opposition to idleness. The later statutes considered other problems: the welfare of innocent families, public safety, and juvenile delinquency.

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[14] Id.

[15] Charters and General Laws of the Colony and Province of Massachusetts Bay 119 (1814). Fines for possession of cards and dice were greatly increased by the gambling law of 1670, and for the first time, knowing possession was required. The law contained provisions for witness immunity, liberal rules of evidence, and discretion in sentencing. Today, similar provisions are being suggested as effective judicial measures against gambling activity.

[16] Colonial Laws of Massachusetts, reprinted from the edition of 1660 . . . at 153 (1889).

A 1721 New Hampshire act against gambling, for example, spoke of a need to prevent the unnecessary impoverishment of the gambler's family.[17] A 1741 New York statute expressed concern for the financial ruin of the gambler and the violence connected with gambling ventures,[18] while a 1748 New Jersey act equated idleness and immorality with fraud and the corruption of youth.[19]

In a further attempt to minimize the disruptive influence of gaming in taverns, many anti-gaming statutes of the eighteenth century also punished the owners of such establishments for "keeping" places which encouraged gambling activity. The keepers of the inns were fined more heavily than the individual players. Some statutes prohibited a keeper's mere possession of gaming implements.[20]

Most of the keeping statutes worked through a bounty system: those who reported a tavern where gambling occurred would receive a reward. Financial rewards, of course, would not have been necessary had gambling been solely a religious concern. The act of saving a man's soul and protecting the community from God's wrath would surely merit a spiritual reward far more precious than money. Public policy, however,

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[17]Act of April 25, 1721, ch. 4, 2 [1702-1745] Laws of N.H. at 358-59.

[18]Act of Nov. 27, 1741, ch. 722, 3 [1739-1755] Colonial Laws of N.Y. at 194-95.

[19]Ch. 102, §1, Acts of General Assembly of the Province of New Jersey (1702-1752) at 405-06 (Nevill ed. 1752) [hereinafter cited as Acts of N.J. (Nevill)].

[20]See, e.g., Acts and Laws of His Majesty's English Colony of Connecticut in New England in America 81 (1769); Vermont State Papers 361 (Laws of Feb. 1779)(Slade ed. 1823).

required a reward which would motivate people to inform, for there were no public prosecutors at the time.

The movement toward the predominance of secular concerns in the anti-gambling legislation of the era, moreover, came at a time when control of colonial governments was passing from the Puritan clergy to the rising merchant class. The members of this class gradually converted to the more liberal Unitarian faith.[21] As they gained control, the once strong opposition to idleness lost support from the general populace. In 1737, while attempting to amend existing anti-gambling law, the Massachusetts legislators focused on problems of the habitual gambler who neglected his occupational and familial duties.

> [A]ll lawful games and exercises should not be otherwise used than as innocent and moderate recreations, and not as trades or callings, to gain a living or make unlawful advantage thereby . . . .[22]

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[21]Even during the Great Migration (1630-1640), only about one-fourth of the settlers were church members. The dissident element, which was present in the colony from the beginning, steadily grew as more people migrated to Massachusetts Bay for other than religious reasons. For a detailed description of the gradual transformation in Massachusetts of the criminal law from an agent of God punishing sin to an agent of the state maintaining public order, see Nelson, "Emerging Notions of Modern Criminal Law in the Revolutionary Era," in A. Goldstein and J. Goldstein Crime, Law and Society 72-86 (1971).

[22]Ch. 17, Mass. Province Laws 1736-1737, in 2 Acts and Resolves, Public and Private, of the Province of Massachusetts Bay at 836 (1874).

Yet the movement away from the strict Puritan ideas did not alter the general policy toward gambling in the pre-Revolutionary Northeast. By the time of the Revolution, all of the Northeastern colonies had uniformly banned public gaming and declared such activity a public nuisance.[23] In most of the colonies, particular types of gaming were outlawed entirely, and private players came under legal sanction. In addition, as enforcement became more difficult, most legislatures increased the penalties for keeping gaming-houses and for participating in gaming.[24]

2. Lotteries

The earliest anti-gambling legislation was enacted in reaction to gaming and reflected primarily a policy against idleness and public disorder. Lotteries, however, occasioned the articulation of an argument derived from the Bible which specifically condemned such activity. The Puritan fathers did not take their loss of political power lightly. Prominant Puritan theologians began to interpret recurrent misfortunes as signs of God's anger with the degradation of Puritanism. Increase Mather declared: "that there is

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[23] See 1673 Book of the General Laws of Conn. 26 (1673); Charters and General Laws of the Colony and Province of Massachusetts Bay 119 (1814); 2 Laws of N.H. 358 (1721); Acts of N.J. (Nevill), ch. 102, §§1-7 at 405-08; Vermont State Papers 361 (Laws of Feb. 1779)(Slade ed. 1823); Act of 1749, in Acts and Laws of his Majesty's Colony of Rhode Island and Providence Plantations in New England in America from Anno. 1745 to Anno. 1752 at 68-70 (1752); Act of March 9, 1774, 5 [1769-1775] Colonial Laws of New York at 621; Act of Feb. 17, 1762, ch. 478, 6 [1759-1765] Statutes at Large of Pa. at 184.

[24] See, e.g., Acts and Laws of His Majesty's English Colony of Connecticut in New England in America 81 (1769).

a general defection in New England from Primitive Purity and Piety in many respects is so plain that it cannot be denied."[25] Cotton Mather characterized what he perceived to be the age of departing glory in a less restrained manner:

> Some of our Rising Generation have been given up to the most abominable Impieties of Uncleaness, Drunkeness, and a Lewd, Extravagant sort of Behavior. There are the Children of Blial among them and Prodigies of Wickedness. 26

At this time, the Puritans advanced the first purely theological justification for their position against gambling. This argument represented an attempt to reaffirm a stern anti-gambling position in the face of what the Puritan clergy perceived as mounting dissent. In the seventeenth and early eighteenth centuries, however, proof that gambling violated the commandments of God necessarily involved significant political consequences. According to Puritan doctrine, the sole function of government was to enforce God's will as expressed in the Bible. Law and morality were identical; crime was equated with sin. Men were obligated to obey only one rule, the divine will of the Lord. If any conflict arose between the law of God and the law of men,

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[25]Quoted in T. Wertenbaker, The First Americans 1607-1690 at 197 (1927).

[26]Id.

man's law was declared null and void and exerted no binding force on the individual. The legitimacy of a government and its law could be firmly established only through the invocation of divine law. Thus, all capital crimes enumerated in the Massachusetts Code of 1648,[27] with the exception of rape, cited the Bible as their authority.[28]

Cotton Mather developed a biblical position against gambling which centered around the concept of a lottery. Appeals to chance, he argued, usurped God's power and were therefore profane. Since the lot was used several times in the Bible to determine God's will, the use of chance events for other purposes was a profane assumption of God's authority. He explained:

> [L]ots, being mentioned in the sacred oracles of Scripture as used only in weighty cases and as an acknowledgement of God sitting in judgment . . . cannot be made the tools and parts of our common sports without, at least, such an appearance of evil as is forbidden in the word of God. . . . 29

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[27]The Massachusetts Code of 1648 was the first comprehensive code of laws compiled in the New World. The result of several years of efforts to reduce to writing the laws of Massachusetts Bay, the Code purported to inform the colonists of their rights and thus to reduce the number of disputes. It was also an important step in the attempt to articulate the discretionary power of magistrates. Many of its provisions were subsequently adopted by other colonies.

After having been lost for two and a half centuries, the Code was rediscovered in 1906 in a library in Rye, England, and reprinted in 1929. See T. Wolford, "The Laws and Liberties of 1648," in Essays in the History of Early American Law 147 (Flaherty ed. 1969).

[28]See generally G. Haskins, Law and Authority in Early Massachusetts 113-40 (1960).

[29]Quoted in H. Chafetz, Play the Devil 14 (1960)[hereinafter cited as Chafetz].

Increase Mather expressed similar disapproval:

> He that makes use of a lot wholly commits his affair to a superior Cause than either nature or art, therefore unto God. But this ought not to be done in a sportful way.
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>
> Now a Lott is a serious thing not to be trifled with; the Scripture saith not only (as some would have it) of Extraordinary Lots, but of a lot in general, that the whole disposing (or Judgment) thereof is of the Lord, Prov. 16.33. [30]

Despite these arguments, moves to finance public projects through authorized lotteries were generally successful in the 1700's for various reasons.[31] Taxation in the colonies was poorly organized and produced little revenue. No banking systems had yet been established for the support of internal colonial improvements; this made borrowing against anticipated revenue impossible. The decline of Puritanism and the rise of the merchant class also contributed to the general success of lotteries in this era.

At first, the colonies exercised little control over the operation of these schemes. Nevertheless, as lotteries proliferated, so did incidents of fraud and misrepresentation. In reaction to such problems, a colony normally banned the operation of all lotteries which it had not authorized. Legislatures hoped that by chartering only legitimate operators they could immunize lottery schemes from chicanery. In the early 1700's, New York, New Hampshire, Pennsylvania, Rhode

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[30] I. Mather, "Against Dicing, Cards, and Such Like Games," in Testimonies of Increase Mather 31 (Repr. ed. 1953).

[31] See, e.g., Act of Feb. 18, 1790, ch. 8, [1789-1796] Laws of N.Y., 114-15; J. Ezell, Fortune's Merry Wheel: The Lottery in America 55-59 (1960) [hereinafter cited as Ezell].

Island, and New Jersey had banned all unauthorized lotteries,[32] and moved toward a system of control by charter.[33]

Rhode Island held the largest number of lotteries during this period, following its tremendous success with the Weybosset Bridge Lottery in 1744.[34] Churches, libraries, poor houses, and markets were built and repaired throughout the state with funds from lotteries. Even in 1769, when England tightened its control of colonial affairs, Rhode Island continued to hold numerous lotteries.[35]

Several states that condemned lotteries on moral grounds such as those outlined above continued to operate them despite their supposed immoral nature.[36] Private lotteries, too,

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[32] See Act of July 27, 1721, ch. 411, 2 [1720-1737] Colonial Laws of N.Y. at 61; Act of March 16, 1679, ch. 1, 1 [1679-1702] Laws of N.H. Province Period at 21; Act of Jan. 12, 1706, ch. 127, §2, 2 [1700-1712] Statutes at Large of Pa. at 186-87; Act of the Fourth Tuesday in January, 1732 (1733), in Acts and Laws of His Majesty's Colony of Rhode Island and Providence Plantations in New England in America 170 (1861) (repealed 1806); ch. 102, §§102, Acts of N.J. (Nevill) at 405-06.

[33] See, e.g., Act of Feb. 12, 1751, ch. 212, 14 [1747-1753] Acts and Resolves of the Province of Massachusetts Bay at 492; Act of Sept. 24, 1767, ch. 12, 3 [1745-1774] Laws of N.H. Province Period at 482-83; Act of Aug. 12, 1758, ch. 305, §§3-4, Acts of the General Assembly of the Province of New Jersey at 221 (Allinson ed. 1776) [hereinafter cited as Acts of N.J. (Allinson)]; Act of Feb. 27, 1746, ch. 817, 3 [1739-1755] Colonial Laws of N.Y. at 528-38; Act of Oct. 14, 1764, ch. 517, 6 [1682-1801] Statutes at Large of Pa. at 382-91.

[34] Ezell at 34.

[35] Id. at 49-50.

[36] G. and H. Weiss, The Early Lotteries of New Jersey 25 (1966) (quoting from the New York Gazette Revived in the Weekly Post-Boy, Feb. 20, 1749).

continued to be a problem, even though prohibited. During the 1700's, legislatures enacted increasingly severe statutes that punished those operating unauthorized lotteries with larger fines.[37] Nonetheless, those states which first abolished private lotteries continued to be plagued by the sale of tickets for private lotteries held in neighboring colonies.[38]

3. Horseracing

Horseracing was the third major form of gambling in the colonies. Its long and varied history may be traced to the earliest years of the colonial period. The earliest horseraces in America, however, were far different from those of today. The first horses to race were not specifically bred for racing. Rather, they "had some other more legitimate employment."[39] The races themselves were run on courses much larger than those of today, over terrain that better approximated "the actual working situation of the animals than the race course at Suffolk Downs."[40] Thus merican horseracing was originally

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[37] See, e.g., "An Act more effectually to prevent the erecting of Lotteries, and selling of Lottery Tickets within this Colony," Act of March 11, 1774, ch. 596, §§105, Acts of N.J. (Allinson) at 445-47.

[38] See, e.g., Act of Dec. 5, 1760, ch. 321, §1, Acts of N.J. (Allinson) at 234-35; ch. 10, §11, Laws of Vt., R. 1797 at 180; ch. 14, Mass. Province Laws 1750-1751, in Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay at 538 (1878).

[39] E. Devereux, Jr., Gambling and the Social Structure: A Sociological Study of Lotteries and Horse Racing in Contemporary America 217 (unpublished Ph.D. dissertation, Harvard University 1949) [hereinafter cited as Devereux].

[40] Id. English style racing was not introduced in America until 1745, when such a race was conducted at Annapolis. See 1 J. Humphreys, Racing Law 6 (1963).

shaped by the position of the horse in the culture of the colonies. In an unmechanized society, the horse was both the principle mode of transportation and a valuable factor in the agrarian economy. The use of the horse for sport or entertainment was purely secondary.

The earliest wagering on horseraces also differed from that which takes place today. Early horserace gambling consisted of wagers among the participants themselves and, additionally, among the spectators. Horseracing was still primarily a sport at that time, and most bets of the participants and spectators were a reflection of the bettor's loyalties to a particular horse or rider.[41] Thus, wagering on horseraces represented gambling of an essentially private character, and remained so until the emergence of the professional bookmaker in the 1870's.

The earliest horseracing regulations in Massachusetts arose from a legislative concern for public safety. In 1674, for example, Plymouth Colony imposed a five shilling fine, or one hour in the stocks if the fine were not paid, on anyone found racing on the highway.[42] At about the same time, the Massachusetts Bay Colony levied a forty shilling fine on anyone caught racing near private or meeting houses. Such conduct was described as being "to the hazard of temselves, children and other persons," as well as "contrary to the rules of

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[41] See Devereux at 229.

[42] Brigham, The Compact with the Charter and Laws of the Colony of New Plymouth 171 (1836).

modesty and sobriety."[43]

In 1748, New Jersey declared horseracing for profit to be a public nuisance,[44] although specific exceptions were allowed. Legal races could be run at fairs, and elsewhere on certain days of the year. Betting was permitted if the wagers were small,[45] for purses of up to £25 were said to encourage the breeding of better horses. Enforcement of the limitations on wagering proved to be a problem. Thus, in 1761 New Jersey abandoned its efforts to control racing and prohibited the activity entirely. The new statute stated:

> . . . many Persons of vicious or unguarded Conduct, taking Advantage of the Toleration granted in said Law, assemble themselves together from many Parts of the Country at some of the yearly Fairs . . . and game and lay Wagers to an immoderate Degree 46

No horse could be raced where ten or more people gathered, for the legislature believed that the presence of crowds encouraged wagering.[47]

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[43] 5 Records and Files of the Quarterly Courts of Essex County, Massachusetts (1672-1674) at 39 (1672)(1916 ed.).

[44] Ch. 102, §4, Acts of N.J. (Nevill) at 407.

[45] Ch. 102, §§5-6, Acts of N.J. (Nevill) at 407-08. This exception indicated that the legislature was not so firmly opposed to gambling that it would not authorize it when the state might be benefited.

[46] "An Act effectually to prevent Horseracing and Gaming in the Province of New Jersey," Act of Dec. 12, 1761, ch. 344, §§1-5, Acts of N.J. (Allinson) at 241-44.

[47] Id. §§-13. Concern for the breeding and development of horses produced an exception to this strict rule. When three county magistrates gave written permission and were present to insure that no betting occurred, the race was legal provided it did not take place within two miles of a church. Id. §5.

Rhode Island also took a negative view of horseracing. In 1777, the General Assembly of Rhode Island passed "An Act to prevent Horseracing" ostensibly as a wartime measure. Although the act was probably designed to ensure that all available horsepower would be devoted to the American Revolution, the preamble to the statute suggests additional motives for its enactment:

> Whereas the suffering of Horses to be run for Bets or Wagers is contrary to a Resolve of the Honorable Continental Congress, and is of pernicious Consequences, as it assembles together a great Number of idle Persons, and is a waste of Time and Money, to many who are very unable to bear it; and likewise tends greatly to introduce among the People a set of Sharpers, and other dissolute Persons. . . . 48

The act prohibited wagering on horseraces, fixed a fine of £100 for violations, and further provided for the forfeiture of horses run for a bet or wager.

B. The Formative Era: 1776-1900

1. Reception of English law

In the three-quarters of a century between the Glorious Revolution of 1688 and the glorious Peace of Paris, which concluded the Seven Year War, or the French and Indian War as it was called in the colonies, Britain's rivals on the continent had failed to free their peoples from the autocracy of the crown, the exactions of the nobles, and the dogmas of the church. In the same period, the fortunately situated British Isles had developed those liberties of movement, thought, and enterprise that mark them as unique in history.

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[48] Act of Sept. 22, 1777, [1777] Rhode Island Acts and Resolves 7.

But even during the French and Indian War, American disenchantment with the mother-country had set in. The general causes that brought about the Revolution were numerous and profound. Many of them, too, were ultimately to manifest themselves in the development of the law of gambling. English society was then still aristocratic, while American society was already democratic. In England, good society was Anglican; Puritans were outsiders. In America, Puritanism dominated at least all of New England; except in the South, Anglicanism was unfashionable. English society was old, elaborate and artificial; American society was new, simple, and raw. English society was based on great differences in wealth, while in America property was still divided with comparative equality, and social mobility was a promise offered to all. The ultimate result, therefore, was probably inevitable, even if the particular occasion was accidental.

The particular causes of the Revolution were less significant. The British government forbade settlement beyond the Alleghany mountains out of a concern for the Indians and fear of the French. The Virginians, including George Washington, who were speculating in Western lands, were enraged at British controls. The British government also sought to control trade and secure revenue to pay for the recent war and the pressing needs of national defense. Mercantilist theory, therefore, clashed with the realities of American commercial interests, particularly in New England. Nobody, especially Americans, likes to pay taxes, and men like James Otis and Samuel Adams began to rail against "taxation without

representation." Otis particularly made a lawyer's argument against British Imperial policies; it was, he said, "destructive of English liberty."[49] What began as a lawyer's assertion of the rights of an Englishman soon became in the hands of men like Tom Paine and Thomas Jefferson the assertion of the Rights of Man. The seeds of the Revolution of 1776 were thus planted in the early years of the 18th century. Liberty is an idea that once anywhere is allowed to grow quickly spreads. Ultimately, it brought forth a new nation in the new land, a nation that would have to form itself and remake its own law.[50]

To provide an orderly continuance of judicial processes disrupted by the Revolution between 1776 and 1784 eleven of the original thirteen states[51] incorporated both the common law and English statutes enacted prior to a particular

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[49]Quoted in Stanford v. Texas, 379 U.S. 476, 481 (1966) John Adams said of James Otis's attack on the writs of assistance which were issued to make effective various mercantile measures, that "then and there the child Independence was born." Quoted in Boyd v. United States, 116 U.S. 616, 625 (1888).

[50]There is every indication, too, that the years of war carried with them great changes in social behiavor. President Timothy Dwight of Yale traced a general decline in morality to the French and Indian War, but particularly to the Revolution, which, he said, added "to the deprivation still remaining [from the French and Indian War]. . . a long train of immoral doctrines and practices. . . . The profanation of the Sabbath. . . drunkenness, gambling, and lewdness were exceedingly increased." quoted in Nelson, "Emerging Notions of Modern Criminal Law in the Revolutionary Era," in A. Goldstein and J. Goldstein, Crime, Law and Society at 79 (1971).

[51]Rhode Island did not enact such a provision until 1798. Connecticut did not do so until 1818.

date (usually 1776) into their state constitutions or statutes.[52] From a legal perspective, of course, these reception provisions clarified the scope of the effect of English law.

Complications arose, however, for all of the reception provisions contained qualifying language of some kind.[53] Generally, this language stated that the laws of England prior to a certain date extended to a jurisdiction only insofar as they were "applicable to . . . local and other circumstances," or "heretofore adopted in practice in this state," or "not repugnant" to the provisions of the United States Constitution or the constitution of the state in question. English law, in Dean Roscoe Pound's words,

> . . . was received only so far as applicable to the physical, political, social, and economic conditions of America, and in a later and specialized form in which legal precepts were judged by their conformity to "the nature of A merican government" or the "nature of American institutions." 54

English law was, therefore, put into effect in the new land subject to the new nation's ideals; those diverging aspects of English and American society that gave rise to the revolution itself were thus to mold the law of the new country.

As a result of these legal developments, the gambling statutes enacted by Parliament prior to 1776 were at least prima facie the law in the new land during the period following

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[52] See table in Brown at 25-26. States admitted to the Union after the original thirteen often included similar provisions in their laws, too. See, e.g., "An Act Declaring what laws shall be in force in this Territory," January 19, 1816, 1 Missouri Terr. Laws 436 (1842).

[53] See generally, Brown at 47-156.

[54] R. Pound, The Formative Era of American Law 108 (1938).

the American Revolution. The extent to which each of these statutes would be adopted as suited to local circumstances was the task faced by the American courts during "the formative era of American law."[55]

The process by which American courts determined the applicability of English law has been described as follows:

> What [the courts] did was to determine what was applicable and what was not applicable to America by reference to an idealized picture of pioneer, rural, agricultural America of the fore part of the nineteenth century, and this picture became part of the law. 56

This idealized picture, however, was not drawn by the average American of the day. Instead, it was produced by judges who, many times, continued to reflect basically Puritan ideals and whose feelings toward gambling closely echoed those of their forebears. For the first time, therefore, the judiciary, in addition to the legislature, began to contribute to the growth of gambling law. Since this contribution took the form of written opinions, its most important dimension was its articulation of an anti-gambling rationale.

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[55] Id. at 81-137; see also Brown at 231-73, 295.

[56] R. Pound, The Formative Era of American Law 97 (1938).

2. Enforceability of gambling debts

The English common law rule, for example, that enforced gambling wagers was universally rejected as inconsistent with American life. To justify this conclusion, judges once again mentioned the list of the evils associated with gambling that had first been fashioned primarily by colonial legislators. The most common objection to gambling, therefore, was that it challenged the Puritan notion of work. Courts reasoned that gambling, by encouraging the hope of gaining something for nothing, tended to undermine sober work habits, and led to poverty, crime, and fraud.

> The practice of gaming, by nourishing a constant hope of gain, excites in the mind an interest which engrosses the attention, and withdraws the exertions of men from useful pursuits. By pointing out a speedy, though hazardous, mode of accumulating wealth, it produces a contempt for the moderate, but certain, profits of sober industry. It perverts the activity of the mind, taints the heart, and depraves the affections. By frequent and great reverses of fortune, it becomes not only the source of great private misery, but suggests constant temptations to fraud, and the perpetration of atrocious crimes.
>
> After reflecting on these observations, which every man of experience, and a knowledge of the human character, knows to be well founded, there can, I think, remain no doubt that it would be hostile to the welfare of society that interests, which men may choose to create by such contracts, should be protected by judicial authority. 57

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[57] Sedgwick, J. concurring in Amory v. Gilman, 2 Mass. 1, 11 (1806). Although the court avoided deciding whether wagering contracts were enforceable, dicta in the opinion of the court, as well as in the two concurring opinions, effectively settled the issue. Love v. Harvey, 114 Mass. 80 (1873) explicitly held all wagering contracts unenforceable.

Courts also expressed concern for the economic plight of the gambler's family:

> The vice aimed at is not only injurious to the person who games, but wastes his property, to the injury of those dependent on him, or who are to succeed him. 58

> [T]here are evils . . . . immediate to the parties, culminating from time to time in loss of fortune and character, defalcations, crime and domestic misery, evils which, though they do not always follow, yet follow so often that they have not been overlooked by the courts. 59

The catalogue of the harmful consequences of wagering was seemingly inexhaustible. Yet Puritan thought--how legal ideals--held that they all stemmed from the disrespect for honest toil that gambling induced. Moreover, the idea that property could be acquired by chance was fundamentally in opposition to the notion that it should only be acquired by honest labor. In addition, the courts refused to soil the integrity of the bench by enforcing gambling contracts, thus encouraging such activity. As Judge Parker remarked in Amory v. Gilman:

> It would seem a disgraceful occupation of the courts of any country, to sit in judgment between two gamblers, in order to determine which was the best calculator of chances, or which had the most cunning of the two. There could be but one step of degradation below this--which is, that judges should be the stakeholders of the parties. 60

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[58]Flagg v. Baldwin, 38 N.J. Eq. 219, 226-27 (Ct. Err. and App. 1884).

[59]Flagg v. Gilpin, 17 R.I. 10, 13 (1890).

[60]Amory v. Gilman, 2 Mass. 1, 5-6 (1806).

Finally, the money spent on gambling, it was argued, had a detrimental effect on commerce because it diverted large sums that would normally be spent on commercial products to a highly demoralizing form of entertainment. This view, among others, was expressed by Chief Justice Dana of Massachusetts:

> [A]s wager policies are injurious to the morals of citizens, tend to encourage an extravagant and peculiarly hazardous species of gaming, and to expose their property, which ought to be reserved for the benefit of real commerce, they ought not to receive the countenance of this Court. 61

Once it was decided that wagering contracts were against public policy, it became clear that the recovery provisions of the Statute of Anne[62] gave every losing gambler a chance to recover his squandered fortune in court. Most versions of the statute gave the loser three months to file suit. At the moment the statute of limitations ran, a third party could sue to recover treble damages from the winner.[63] In

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[61] Id. at 12-13 (Dana, C. J. concurring).

[62] 9 Anne c. 14 (1710).

[63] See, e.g., Act of Feb. 27, 1821, ch. 18, §2, [1821-1834] Laws of Maine at 101-02 (Smith ed. 1834). This "bounty hunter" provision appeared frequently in early Maine gambling laws. A similar recovery statute was finally repealed in March, 1976. Ch. 499, §9, [1975] Laws of Maine.

In Massachusetts, half of the sum recovered went to the party suing, and half went to the town poor. Ch. 17, Mass. Province Laws 1736-1737, in 2 Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 836 (1874). This provision caused some problems in jury selection for if the defendant were found guilty, the jurors' town would benefit. See Commonwealth v. Stowell, 50 Mass. 572, 573 (1845).

effect, each citizen was given a financial incentive to act as a private policeman. The invitation to fraud was obvious. A loser could wait three months and then have his friendly neighbor sue, not for restitution, but for punitive damages. A loser could thus recover his losses and a bonanza. Despite this invitation to abuse, courts continued to enforce the statute strictly, and a defense based on collusion seldom defeated a third party's right of recovery.[64]

3. Gaming and gambling

During the Revolutionary period, the Puritan ideals of industry and frugality held a fundamental position in the emerging American value system, even though the rigid ban on all forms of entertainment had long since disappeared. Most Americans remained Protestants and retained many Puritan mores, if not the traditional fervor. In addition, the Puritan work ethic reinforced the popular Lockean conception of the proper role of government in a democracy. According to this theory, the purpose of a democracy was to protect the individual's natural rights of life, liberty, and property. The ownership of property, however, was seen as the anchor of this system. One who lacked material wealth could not be free from obligations to landlords or employers, and thus could not effectively participate in government. A true democracy could not be established without assuring that each citizen had sufficient opportunities to acquire property.

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[64]Thus wives could sue to recover treble damages for money lost by their husbands. A third party could share the recovery with the losing gambler, but only if their agreement occurred after the action was vested in the plaintiff. Morris v. Farrington, 133 Mass. 466 (1882).

In a society which frowned upon special privilege, honest labor represented the only permissible method of acquiring such financial independence.

So central were the ideals of industry and thrift to the thought of the time that they were embodied in many state constitutions. For example, the Pennsylvania Constitution, drafted and adopted in 1776, contained the following provision in its Declaration of Rights:

> That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislators and magistrates, in the making and executing such laws as are necessary for the good government of the state. 65

Even more explicit was the provision that established the right of public officers to receive compensation for their services:

> [E]very freeman, to preserve his independence, (if without sufficient estate) ought to have some profession, calling, trade or farm, whereby he may honestly subsist 66

Thus, the spirit of Puritanism lived on, albeit in a more

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[65]Pa. Const. (Declaration of Rights) §14 (1776). Pennsylvania's first constitution was drafted under the influence of Benjamin Franklin and his political allies. As such, it was the product of the democratic ideals of the middle class merchants and farmers. The old Quaker aristorcracy played little role in its formulation. Its basic principles, however, were a hybrid of William Penn's earliest frame of Government and the political philosophy of John Locke.

[66]Pa. Const. (Plan or Frame of Government) §36 (1776), and Vt. Const. ch. II, §33 (1777). Vermont's constitution, drafted by Ira Allen, the brother of Ethan Allen, the leader of the "Green Mountain Boys," was patterned after the Pennsylvania document. As such, it, too, reflected the revolutionary and social ideas current at the time.

liberal and secular form, and the work ethic continued directly to affect gambling legislation throughout the new nation. More and more, however, legislators seemed concerned with the immediate social and economic consequences of gambling; purely religious concerns passed out of mind.

During the Revolutionary period, anti-gambling legislation focused primarily on the evils of gaming or gambling in public places. Tavern gaming was said to encourage idleness, undermine diligent work habits, and ultimately lead to poverty and other social ills.[67] The major objection to tavern gaming was summarized by Judge Rush:

> It would consume too much time, and is not my intention, to go into a full discussion of the innumerable evils flowing from the practice of gaming. . . . Let it suffice to observe, generally, that as it springs chiefly from idleness, the fruitful, the inexhaustible source of almost every vice, so it has a natural tendency to produce idleness. It operates as cause and effect, and is at once both parent and offspring. When the heart is once thoroughly possessed of this passion, everything is sacrificed to its gratification. In the mad pursuit, health and constitution are gradually destroyed by irregular hours, and disorderly conduct. Sleepless nights, corroding passions, and a neglect of business, accompanied with the intemperate use of ardent spirits, soon plunge both the gamester and his family into one common ruin. 68

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[67] See, e.g., Act of Nov. 27, 1741, ch. 722, 3 [1739-1755] Colonial Laws of N.Y. at 194-95. The preamble to this act expressed concern for the many pernicious consequences of taverns and gambling dens, including "Idleness, Deceit and many Other Immoralities. . . ." See also Preamble, Act of 1749, Acts and Laws of His Majesty's Colony of Rhode Island and Providence Plantations in America from Anno 1745 to Anno 1752 at 68-70 (1752).

[68] J. Rush, "Upon Gaming," in Charges and Extracts of Charges on Moral and Religious Subjects 120-21 (Forman ed. 1804).

General social disruption was thought to be another by-product of the tavern scene.[69] During the Revolutionary period, taverns were community and political centers. A New Jersey grand jury statement indicates that they also had the reputation of being meeting places for dissolute characters:

> [In the taverns] servants, and the sink of ye town and country assembled and congregated together for the more secure indulgence of the several fashionable, and without your Honors interposition, legal diversions of cards, dice, drinking, cursing, swearing and the whole train of debaucheries incident to such infamous places. . . . 70

Gambling generated a large part of the tavern business, because gamblers ate, drank, and tended to be free with their money.[71] Hence, the new statutes levied large fines against keepers of gambling houses and broadened the scope of those indictable thereunder. Statutory preambles condemned the disruptive and pernicious effects of public gambling, including the general noise and disorder that dominated such taverns. The Massachusetts gambling law of 1785, enacted partially in concern for public peace, addressed the protection of the state as well as the individual:

> [T]he practice of gaming for money or other property, is not only injurious, in a high degree, to the individuals concerned therin, but also in its tendency, ruinous and distructive to the State. . . .72

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[69]Anti-gambling laws typically threatened tavern keepers with fines and declared gaming-houses public nuisances. See, e.g., Act of March 9, 1774, ch. 1651, 5 [1769-1775] Colonial Laws of N.Y. at 621.

[70]New Jersey grand jury (1754), quoted in Chafetz at 17.

[71]Id. at 33.

[72]Act of March 4, 1786, ch. 58, [1785] Acts and Resolves of Mass. 547.

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Opponents of gambling also attempted to control those who directly fueled the common passion for gambling--professional gamblers.[73] Most Americans at this time felt that the only acceptable type of occupation was one in which the individual contributed a useful service to society through disciplined and honest work. The professional gambler represented the antithesis of this ideal, for he was lazy, undisciplined, dishonest, and gained his wealth through victimization of others. The full-time gambler was regarded as a parasite and a thief, as the characterization in the New York gaming act of 1774 relates:

> [D]ivers lewd and dissolute persons live at great expenses, having no visible Estate, Profession or Calling to maintain themselves, but support those expenses by gaming only. 74

As the Pennsylvania gambling law of 1847 indicates, professional gamblers were found to be nuisances to the body politic. Further sanctions provided that those who enticed a citizen to visit a gaming-house would be liable to their guests for all of their losses.[75]

Private game-playing by the average citizen did not

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[73]See ch. 17, Mass. Province Laws 1736-1737, in 2 Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay at 836 (1874). Although professional gamblers were singled out as particularly bad influences, in imposing penalties the statutes did not distinguish between the professional gambler and the casual player.

[74]Act of March 9, 1774, ch. 1651, 5 [1769-1775] Colonial Laws of N.Y. at 624.

[75]Act of Feb. 16, 1847, No. 79, §§1-11, [1847] Pa. Laws 111. The fines collected under this statute were allocated to public education. The statute also provided a warrant procedure for arrests and searches and immunity where necessary.

arouse strong disapproval during this period.[76] The prevailing attitude toward such entertainment was effectively stated by the Massachusetts legislature: "games and exercises should not be otherwise used than as innocent and moderate recreations."[77] A post-Revolutionary Massachusetts anti-gambling statute prohibited public gaming and gaming for something of value,[78] but did not forbid private game-playing that did not involve wagers. A person playing any game or possessing gaming implements while in a tavern could be indicted. Further, owners of establishments of all kinds were subject to fines and license revocation for keeping tables used to play billiards or other prohibited games.[79]

New Jersey focused on the punishment of players and those

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[76]For example, in 1774 New York enacted legislation "for the better preventing of all excessive and deceitful Gaming," including among its provisions a penalty for players wagering more than a specified amount. Moderate gaming was not penalized. Act of March 9, 1774, ch. 1651, 5 [1769-1775] Colonial Laws of N.Y. at 621-22 (emphasis added).

[77]Ch. 17, Mass. Province Laws 1736-1737, in 2 Acts and Resolves, Public and Private, of the Province of Massachusetts Bay at 836 (1874).

[78]Act of March 4, 1786, ch. 58, [1785] Acts and Resolves of Mass. 547.

[79]Act of June 27, 1798, ch. 20, §1, [1798] Acts and Resolves of Mass. at 24. Victuallers, inn- and tavern-keepers, and liquor-store owners were all within the scope of the law. See also Act of March 9, 1774, ch. 1651, 5 [1769-1775] Colonial Laws of N.Y. at 621-22; Act of Nov. 27, 1741, ch. 732, 3 [1739-1755] Colonial Laws of N.Y. at 194.

who aided and abetted keepers of gambling establishments.[80] Anyone out for gain or betting for any valuable thing committed a serious indictable offense.[81] For a game to be considered illegal in New Jersey, however, the outcome had to depend on chance rather than strength or skill.[82] The courts looked to the average player to determine whether a game involved primarily skill or chance.[83]

Maine's major gambling statute, patterned after that adopted in Massachusetts, also emphasized keeping a gambling house.[84] The court, however, determined that two separate offenses had been created: keeping a place for gambling, and permitting persons to play any games for money in a house under

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[80]Compare Act of Feb. 8, 1797, §1, Laws of the State of N.J. 225-26 (Patterson ed. 1800), with N.J. Stat. Ann. §2A:112-1 (1969); see also State v. Ford, 86 N.J.L. 73, 90 A. 1025 (Sup. Ct. 1914).

[81]Act of Feb. 8, 1797, §1, Laws of the State of N.J. 224-25 (Patterson ed. 1800).

[82]A supplement to the 1797 anti-gambling law read as follows:

> That all wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance casualty or unknown contingent event whatever, shall be unalwful; and all contracts for or on account of any money or property, or thing in action so wagered bet or stated, shall be void.

Act of April 6, 1871, ch. 578, §1, [1871] Acts of N.J. 109 (emphasis added).

[83]State v. Ricciardi, 18 N.J. 441, 444, 114 A.2d 257, 258 (1955). See also Ruben v. Keuper, 43 N.J. Super., 128, 127 A.2d 906 (Ch. 1956). Some courts have not stressed the chance-skill distinction as much as others. In Martell v. Lane, 22 N.J. 110, 117, 123 A.2d 541, 545 (1956) the court observed, ". . . it does not matter that skill predominates in the process."

[84]Act of March 22, 1836, ch. 221, 4 [1832-1839] Public Laws of Maine at 355-56. The act established fines from $20 to $100 for keeping a place where gambling occurred.

one's care.[85] Thus, the Maine statute had a broader impact than most of those enacted in the Northeast because it sanctioned private gaming whether or not gambling was involved.

In conclusion, therefore, gambling law did not undergo significant changes in the Northeast during this formative period, for the states generally continued to follow the pre-Revolutionary lines of development in their policy against various forms of gambling. Nevertheless, important social and economic changes were virtually to remake the fabric of American life during this period.

The nineteenth century was an important period of change in Massachusetts. The population increased ten percent or more each decade with immigrants from Canada, Italy, and Ireland. Many of these new immigrants were Catholics, who brought with them a tradition of hard work, but it was a tradition that had not crystallized into an anti-gambling position. Rapid industrialization increased urbanization, and a new economic system was born. Even with the immigration of large numbers of people who held less traditional views of gambling, no great changes in Massachusetts' gambling law occurred. The newcomers had not yet transformed their numbers into political power, either legislatively or judicially; the rule of the Protestant establishment thus continued. During this period, Massachusetts law makers did attempt to restructure their anti-gambling statutes to reflect an advancing technology.

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[85]State v. Currier, 23 Me. 43 (1843).

Maine's gambling law underwent similar technical changes as the state's population increased almost 300% from 1820 to 1880. Here, as well, large numbers of Irish Catholics immigrated, helping to develop Maine's shipping and textile industries.

After the turn of the century, Pennsylvania, too, changed significantly. In 1800, 90% of the population lived and worked on farms. By 1860, only 69% worked in agriculture. Irish Catholic immigrants and displaced farmers formed the laboring class in the coal and iron industries. The Democratic-Republicans dominated Pennsylvania's politics for many years, but conservative elements continued to control the legislature.

The story of immigration, urbanization, and industrialization in New York, New Jersey, Connecticut, and Rhode Island followed a similar pattern. Even New Hampshire and Vermont experienced similar, if less dramatic change.[86] Given the tension between

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[86]The population growth and urbanization of the United States has been nothing short of dramatic. In 1790, the nation's population was only four million; by 1850 it was twenty three million. Statistical History of the United States from Colonial Times to the Present (1965). The nation was at first sparsely settled, with five people per square mile in 1790; and by 1850, only eight. Id. at 8. The nation itself was small; in 1790, less than a million square miles. Ibid. Most people lived in rural areas, and the society of those areas was composed of stable, largely homogeneous people who farmed, mainly by hand. In 1790, just over 200,000 lived in cities; by 1850, just over 3,500,000. Id. at 9. The cities, too, were small. In 1790, there were no cities that had more than 50,000 people; by 1850, only ten. Id. at 14. By the beginning of the 20th century, however, change had begun. By 1930, population had risen to 123 million. Id. at 8. Population density was 34 people per square mile. The U.S. Book of Facts, Statistics, and Information 13 (1965). The Northeast was, of course, much higher: 210; cities, too, were even much higher: New York, 20,000. Id. at 13, 20. Indeed, by 1930, the nation was well past the half-way mark in the shift from farm to city. The Statistical History of the United States from Colonial Times to the Present 9 (1965).

the traditional legal and newer popular attitudes toward gambling, enforcement of anti-gambling statutes in the Northeast, therefore, became progressively more difficult.

4. Lotteries

a. The early history

Until the mid-1800's, authorized lotteries played a major role in the development of public institutions in the Eastern states. The thriving lottery business came to an abrupt halt, however, with the discovery of widespread lottery frauds, scandals, and related suicides.

The historical trends were similar in every Eastern state. The authorized lotteries were originally respectable operations. They were usually small, local affairs, sponsored and managed by disinterested and public-minded citizens who were earnestly concerned with aiding the legislatively-approved beneficiary. Tickets were sold either by volunteers or by shopkeepers whose chief source of income came from other transactions. The public drawings were ceremonious occasions and the operations were generally honest. The public wholeheartedly supported authorized lotteries, particularly when the proceeds went to worthy causes. Only the Quakers consistently opposed lotteries, but they had lost control of the Pennsylvania Assembly to the rising middle class typified by Ben Franklin

by the 1750's.[87]

Although the general public recognized lottery abuses, these were not attributed to lotteries per se, but rather to corrupt management, which most citizens felt could be controlled through regulation. Indeed, in the early days of the formative era, the authorized lottery was not viewed as a form of gambling and therefore was not subject to the common objections to games of chance. The most common rationalization for lotteries was that they were simply an efficient method of voluntary contribution to worthwhile causes:

> [L]otteries organized for public projects . . . were not regarded at all as a kind of gambling; the most reputable citizens were engaged in these lotteries, either as selected managers or liberal subscribers. It was looked upon as a kind of voluntary tax for paving the streets, erecting wharves, buildings, etc., with a contingent profitable return for such subscribers as held the lucky numbers. 88

During and immediately after the Revolution, public enthusiasm for lotteries waned. Some lotteries were cancelled for lack of support or for failure to attract managers.[89]

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[87]As in Pennsylvania, the vocal Quaker minority in Rhode Island expressed strong opposition to all forms of gambling. This sentiment is reflected in the preamble to a 1732 law:

> [U]nwary People have been led into a foolish Expense of Money, which may tend to the great Hurt of sundry Families; and also the Reproach of this Government, if not timely prevented.

Preamble, Act of the Fourth Tuesday in January 1732 (1733) in Acts and Laws of His Majesty's Colony of Rhode Island and Providence-Plantations in New England in America 170 (1861) (repealed 1806).

[88]A. Spofford, "Lotteries in American History," (1892) Amer. Hist. Assoc. Annual Rep. 174-75 [hereinafter cited as Spofford].

[89]Ezell at 67.

While this may have influenced the public negatively, the impressive success of other lotteries muted public concern. The Harvard College Lottery, for example, sold 25,000 tickets at $5 each, although the population of Boston at that time was only 25,000.[90] Such successful lotteries proved that the device could still provide a source of needed revenue.

In 1776, economist Adam Smith denounced the lottery as an inherently losing venture for the participants:

> The chance of gain is by every man more or less overvalued, and the chance of loss is by most men undervalued . . . that the chance of gain is naturally overvalued, we may learn from the universal success of lotteries. The world never saw, nor ever will see a perfectly fair lottery; or one in which the whole gain compensated for the whole loss; because the undertaker would make nothing by it . . . . The more tickets you [wager] . . . upon, the more likely you are to be a loser. Buy them all and you are sure to lose. 91

But as long as the lottery was viewed as a form of voluntary taxation few objected to the fact that purchasers faced losing odds.

The attitude toward unregulated lottery schemes was in sharp contrast to the widespread endorsement of licensed lotteries. Most of the colonies had already banned private lotteries, and efforts to suppress them continued throughout the formative period. Private or unregulated lotteries were initially declared illegal for several reasons. First, lotteries provided a convenient and profitable means of

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[90] Id. at 97, 110.

[91] 1 Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 83-84 (1893).

raffling off merchandise.[92] Their sponsors were able to gain a competitive advantage over other merchants by charging less for a ticket than the retail price of the goods. Legislators finally heeded the claims of merchants that private lotteries were detrimental to trade. Second, unregulated lotteries led to abuses. For instance, the goods raffled off were frequently of inferior quality: ". . . ill minded persons" managed "to put off their unsaleable, and sometimes useless wares . . ."[93] in this manner. Some of the drawings were rigged so that the valuable prizes were never drawn. Individuals bought tickets only to discover that the seller had left town before the date of the drawing. In response to this dishonesty and corruption, laws were enacted licensing lotteries, and unregulated schemes were declared illegal.[94]

Most citizens believed that governmental regulation would eliminate the undesirable aspects of lotteries:

> To understand why authorities began licensing lotteries rather than abolishing them altogether, it is necessary first to remember that the people as a whole wanted them, believing that the drawings could be kept honest. Most vocal opposition ceased with the assumption of governmental regulation; it was one's own affair if he risked his money in an honest lottery. 95

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[92]The merchandise raffled off was not always commercial. The sad, almost pathetic, and unsuccessful effort to 83-year old Thomas Jefferson to secure licenses from a number of states to hold a lottery of some of his lands and to pay off his accummulated debts of some $80,000 is told in Ezell at 168-70.

[93]Ch. 55, §1, Acts of N.J. (Nevill) at 202.

[94]Ezell at 19.

[95]Id. at 29.

Thus, the third factor prompting the ban on unregulated schemes was the desire to decrease competition with authorized lotteries. Unlicensed lotteries were banned for other reasons, all of which were inconsistent and stand in sharp contrast with the general approval of public lotteries.[96] Lotteries tempted "the children and servants of several gentlemen, merchants and traders, and other unwary people . . . into a vain and foolish expense of money, which tends to the utter ruin and impoverishment of many families . . . ."[97] Borrowing arguments used against gaming, critics said unregulated lotteries induced disrespect for industry and had an especially harmful effect on the poor:

> These games appealed particularly to the poor. Flushed with great expectations, they neglected their less exciting pursuits to loiter around the tavern where the raffles were commonly held. 98

Some legislators recognized the similarities between gambling and unauthorized lotteries, yet failed to extend such a view to authorized schemes. The reason for this paradox may be found in the nature of the beneficiaries of the two forms of lotteries. Money invested in authorized operations usually went to build roads, schools, bridges, and churches, whereas money spent on unlicensed schemes went directly into the pockets of self-interested profiteers. Not

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[96] Id. at 20-22.

[97] Charters and General Laws of the Colony and Province of Massachusetts Bay 751 (1814). See also ch. 22, Mass. Province Laws 1752-1753, in 3 Acts and Resolves, Public and Private, of the Province of the Masaschusetts Bay at 652 (1878); Act of March 24, 1772, ch. 1542, 5 [1769-1775] Colonial Laws of N.Y. at 351-54.

[98] Ezell at 20.

until the middle of the nineteenth century were both unlicensed schemes went directly into the pockets of self-interested profiteers. Not until the middle of the nineteenth century were both unlicensed and licensed lotteries viewed in the same light.

The dramatic reversal in attitudes toward the lottery can also be attributed to the American reaction to the War of 1812, the changes in the lottery system itself, and the activities of reformers who eventually convinced the public that lotteries were responsible for many social ills.

The War of 1812 marked a turning-point in American history; after the war, Americans gained a new self-confidence and a new desire for wealth. They saw their country

> . . . growing in size and strength and many of its citizens of low birth attaining social and political heights impossible in Europe. . . . Ignorant of other paths to distinction and superiority, many turned to money-getting. The get-rich-quick ideal spread. 99

The lottery reform movement, with its renewed emphasis on the work ethic, stood in firm opposition to the get-rich-quick ideal. At the same time, authorized lottery entrepreneurs whose quest for public service had little to do with the common good prompted the quick gain idea.

b. The seeds of corruption

At the beginning of the nineteenth century, professional lottery management companies emerged, replacing the disinterested citizens who had previously promoted and operated the lotteries. For a fee, the lottery companies assumed complete control. Unfortunately, these operations were run by individuals who

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[99] Ezell at 185.

were more interested in personal gain than in the beneficiaries of the schemes they were promoting. These companies greatly expanded the size of the lotteries and tended to oversell tickets. The promotional and organizational techniques they developed, geared toward economic self-interest and efficient operation, placed them among the first of American big businesses.[1] In addition to geographic expansion, the lotteries were extended over time by the exploitation of the lottery charter system which existed in most states. Legislatures continually extended individual lottery charters, thus perpetuating the schemes until the the full amount authorized for the beneficiary was returned.[2] Over time, lotteries became disassociated with local improvements, and the principle of voluntary taxation was lost in the scramble for wealth.

Tickets were sold on a national scale by ticket brokers, who bought large shares at a discount from the lottery management companies and then distributed them to the public at a profit. Selling tickets was no longer an incidental occupation, but a profitable business in itself. Lottery offices multiplied across the country, and the brokerage firms developed interstate connections. Finally, a small number of companies merged to monopolize the national market.

The character of lottery drawings also changed. Instead

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[1] Id. at 82.

[2] Devereux at 103-05.

of the ceremonious occasions conducted by prominent local citizens, the drawings were daily events run by paid employees. As a result, both the dignity and the honesty of the drawings suffered.

In short, the lottery lost its local character and people ceased to identify it with the beneficiary. What began as a simple economic expedient developed into a complicated system aimed at exploitation of the public. The primary attraction shifted from contribution to worthy causes to quick personal gain. As a result, the lottery's reputation as a means of voluntary support of local projects suffered irreparable harm.[3]

c. Reform

By the 1830's, it was clear that even tighter regulation could not eliminate the dishonesty and corruption of the lotteries. Abuses became so flagrant that they triggered significant opposition.[4] American newspapers took strong positions against the authorized lotteries, denouncing them as victimizing the poor, causing crime, and encouraging vice. The vitiation of the lotteries was widely publicized. Riches-to-rags stories began appearing in abundance, and a full-scale reform movement gained a high degree of public support.[5]

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[3] Ezell at 271, 273.

[4] See id. at 177 -203.

[5] See Ezell at 177-203; Devereux at 108-09.

The lottery reform movement, however, was merely one element of a more general movement for social reform that swept the country in the 1830's and 40's. It was a time when the Democratic Party, newly led by Andrew Jackson, dominated the political realm with its celebration of the common working man and its opposition to big business and privilege. Religious revivals sprang up across the country. Americans believed that they could build a model society led by righteous men who were motivated by pure altruism. The belief in a divine mission prompted a wave of self-criticism, and the general optimism of the period fostered the conviction that the defects in American society could be remedied. The reformers looked to a society . . .

> . . . full of industry and abundance, full of wisdom, virtue and the poetry of life; a state with unity among all, with freedom for each; a church without tyranny, a society without ignorance, want, or crime, a state without oppression; yes, a world with no war among the nations to consume the work of their hands, and no restrictive policy to hinder the welfare of mankind. 6

The reformers focused their attention on a wide variety of social ills, including slavery, war, intemperance, and the treatment of criminals, paupers, and the insane. They also crusaded for women's rights and free public education.

The principal argument invoked by the reformers against the lottery system concentrated on its efficiency as a revenue-raising measure. For example, Job Tyson, one of the more articulate reformers, conducted a thorough examination of

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[6] T. Parker, quoted in J. Blum, The National Experience 239 (3d ed. 1973).

the finances of the Union Canal Lottery, Pennsylvania's only state-authorized lottery at that time. He listed the entire cost of the scheme over its twenty years of existence, and demonstrated that the actual returns to the public project were minimal in relation to the enormous expense which was born by the subscribers. Tyson also emphasized the fact that in 1832, 420 illegal schemes were sold in Pennsylvania lottery offices.[7] The cost of the illegal activities, considered in conjunction with the Union Canal Lottery, produced a net loss to the state.

A second objection to the lottery system focused directly on fraud and corruption, and drew support from the numerous instances of lottery scandals which had occurred during this period. The highly publicized abuses which past experience had proved to be characteristic of the lottery system as it existed in the nineteenth century were instrumental in turning public opinion against the lotteries:

> Undoubtedly, the major factors leading to the abolition of lotteries were the social effects and the frauds, which occurred at every level from the ticket vendors up through the contractors. Outstanding examples of abuse actually acted as catalysts for public opinion, and people began to realize that even the most careful supervision was ineffective . . . . General knowledge that less and less money was going to the intended beneficiary and more and more into the pockets of others made it urgent not only to interdict new schemes but also to terminate quickly those in legal operation. 8

A third argument made by the reformers was designed to

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[7] J. Tyson, The Lottery System in the United States 33 et seq. (1837). See also Ezell at 209.

[8] Ezell at 205-06.

demonstrate that lotteries were a form of gambling. Once this was established in the public mind, the plethora of social ills associated with gambling could be paraded for the purpose of prohibiting lotteries. The eventual acceptance of this position by the public represents one of the more noteworthy shifts in national ideology which resulted from the reform efforts.

A closely related objection stressed that lotteries were even more evil than the common forms of gambling because of their aura of respectability and legality. Tyson expounded an argument which emphasized that lotteries, unlike tavern gambling, were accessible to and played by all types of people, and were deceptive in their appearance of harmlessness.[9]

On a more abstract level, the rejection of the lottery represented an objection to special privilege, a cardinal tenent of Jacksonian democracy. With the emergence of Jacksonian democracy came renewed efforts to eliminate monopolistic privileges and Hamiltonian fiscal policies, as exemplified in Jackson's attack on the Bank of the United States. Distinctions in society, it was thought, ought to result solely from "superior industry, economy, and virtue" rather than from special favors granted to influential minorities. Jackson summarized this attitude toward special privilege in his messages to Congress on the National Bank:

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[9]See generally J. Tyson, The Lottery System in the United States (1837).

> [W]hen the laws undertake to add to these natural and just advantages [superior industry, economy and virtue] artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society--the farmers, mechanics, the laborers--who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. 10

Lottery charters were a form of special privilege. A charter had to be obtained from the legislature before a lottery could be lawfully instituted. Those who operated or managed these lotteries were able to make handsome profits by deducting a fee for their services from the proceeds. Lottery businessmen thus formed a strong lobby for the financing of public works through lottery schemes. Further, many charters continued for years with a single lottery company in charge. Although the number of legal competitors varied with a legislature's willingness to grant new authorizations, it was possible for one lottery company to gain a virtual monopoly on intrastate legal lottery schemes. Thus, the anti-lottery movement directed some of

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[10] A. Jackson, quoted in J. Blum, The National Experience 220 (3d ed. 1973). It is probably also not without significance that the banking community, a central target of the attack against privilege, had much of its origins in the lottery systems. The lottery-brokerage firm of S. & M. Allen provides an interesting study, for example, in the evolution of lotteries and their relationship to modern banking. The Allen group not only transformed itself into a banking and stock brokerage firm, it also was the learning place of Enoch W. Clark, a relative of the Allens, who established E. W. Clark & Company of Philadelphia, the largest dealers in domestic exchange in the 1840's and 1850's. The Clark firm in turn sired Jay Cooke and Company, the leading investment house of the Civil War. Other prominent banking concerns that had their origins in the lotteries include the First National Bank of New York and the Chase Manhatten National Bank. See Ezell at 82-84.

its efforts to curb the power of state legislatures to grant special privileges and to enact special legislation.[11]

Ultimately, many states passed constitutional provisions revoking the legislative power to authorize lotteries.[12]

Finally, the burden of the lottery system was believed to fall most heavily on those who could least afford to bear it--the poor and the servant class.[13] As a result, the lottery's reputation as a voluntary tax paid by those who could easily afford such charity was replaced by the view that the lottery was actually a highly regressive levy.[14] Further, the tendency of lottery promoters to appeal to greed and to make misleading promises of wealth to which the poor were thought to be particularly susceptible was perceived as little better than fraud. The poor came to be regarded as the principal victims of these operations, and the new political movement which sought to represent this class demanded the abolition of the lotteries.

Opposition was also generated by particular events, including a suicide in Massachusetts. An investigation of the death of one Ackers revealed that he had lost all of his

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[11] R. Pound, The Formative Era of American Law at 38-80 (1938).

[12] See, e.g., N.Y. Const. art. I, §10 (1846); N.J. Const. art. IV, §7, ¶2 (1844); Ezell at 204-29.

[13] Spofford at 177.

[14] Ezell at 273.

property and $18,000.00 of his employer's money gambling on lotteries.[15] This incident gave ammunition to religious groups opposing lotteries,[16] and the combination of religious and political forces secured the abolition of lotteries in Massachusetts by 1833.[17]

Nevertheless, not all of the Northeastern states had banned lotteries by this time. The legal lotteries of some states created problems in those states which had prohibited them. In the courts, conflicts of laws problems arose when citizens of a state where lotteries were deemed illegal attempted to buy tickets for out-of-state lotteries. The Massachusetts court held that possession of tickets for the authorized School Fund Lottery of Rhode Island would violate Massachusetts law.[18] The end, however, was in sight, and by 1860, every state in the Northeast had forbidden the authorization of lotteries within their boundaries.[19]

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[15] Ezell at 211.

[16] Id. at 197.

[17] Act of March 23, 1833, ch. 148, [1833] Laws of Mass. 721.

[18] Commonwealth v. Dana, 43 Mass. 329 (1841).

[19] Rhode Island was the first state to prohibit lotteries. [1822] R.I. Public Laws 1408. Vermont generally banned lotteries in 1839, and to this day continues to oppose them in any form. Tit. 28, ch. 110, §§5-6, Vt. Rev. Stat. (1839) at 564. New Hampshire prohibited lotteries in 1842. Ch. 220, N.H. Rev. Stat. (1842). In 1844, New Jersey constitutionally banned any lottery authorizations. N.J. Const. art. IV, §7, ¶2 (1844). Connecticut prohibited lotteries in 1849. Tit. 6, ch. 8, §§95-96, Rev. Stat. of Conn. (1849) at 241; also Tit. 32, §§1-2 Rev. Stat. of Conn. (1849) at 470. Maine acted in 1855. Act of March 16, 1855, ch. 173, §§1-6, [1855] Acts and Resolves of Maine at 198-201. Pennsylvania followed suit in 1860. Act of March 31, 1860, tit. 5, §§52-54, [1860] Pa. Laws 374.

For more than a century after the abolition of the lottery system, the arguments of the anti-lottery forces were widely accepted. During most of the twentieth century, the prohibitions of the 1840's and 50's remained good law. Recently, however, the arguments of lottery opponents have been challenged by a new group of lottery proponents. It now appears that these pro-lottery forces are destined to prevail, at least in the Northeastern part of the country.

5. Horseracing

Horseracing gained some favor during the Civil War years, when the great demand for speedy cavalry horses "made America aware of its need for the fastest type of horses."[20] Racing, viewed as the best means of promoting improvement of the breed, was encouraged. In 1864, John Morrissey, a former bareknuckle prizefighter, promoted the first race meeting at Saratoga Springs, New York. He named the first stake race the "Travers," after the aristocratic New York family of that name. This race, "the oldest contest of its kind in the United States," is being run today.[21]

Racing became more popular soon after the opening of the Saratoga track, when three other major racetracks were established: Pimlico, at Baltimore in 1870; the Fair Grounds, at New Orleans in 1873; and Churchill Downs, at Louisville in 1875. Other racetracks followed, and by the 1880's horseracing's

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[20] Select Committee at 98.

[21] Id.

influence was felt "in or near the larger cities in all parts of the United States."[22] The increasing popularity of racing resulted in the development of the American thoroughbred, and horse farming became a profitable business, particularly in Kentucky.

The advent of "big time" racing was accompanied by the appearance of professional bookmakers on the racetracks. Further, the character of wagering on horseraces underwent a major transformation at this time. Not only had the bookie entered the picture, but so too had an entirely new system of gambling at the races.

The parimutuel system of wagering (from the French pari, "bet," and mutuel, "mutual") was developed in France in 1869 by Joseph Oller. The methodology of parimutuel wagering is relatively simple: the players place their bets on the horses of their choice, all bets are then pooled, and the winners are paid from the pool, after the track or the bookie deducts a commission or take. Odds are determined by the amount and number of bets placed on each horse. Thus, the less money bet on a particular horse, the higher the odds on that horse and the greater the payouts should it win. The system has a certain degree of fairness built into it, an attribute that might make parimutuel wagering less offensive to a legislature or court sitting in judgment.

Although parimutuel wagering made its initial appearance on the American tracks in the 1870's, it failed to achieve

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[22] Id.

widespread popularity and was soon dropped at most of the tracks. This same system of wagering, however, eventually saved racing from total prohibition in America. Today, it is the dominant form of horserace gambling, both legal and illegal.

Legislative efforts to curb gambling in connection with horseracing were widespread during the late eighteenth and early nineteenth centuries. A 1796 Connecticut statute, for example, provided for the forfeiture of any horse participating in a race where a stake was offered or bets were allowed.[23] The act further provided that

> . . . every Person or Persons concerned in laying any Bet or Bets or Wagers on such Race or Races shall forfeit the Sum of Seven Dollars, in all Cases where the Bet or Wager laid shall be Seven Dollars, or under; in all other Cases the Value of the Bet or Wager laid as aforesaid. 24

An 1846 New Jersey statute declared all participants in horseracing ventures guilty of misdemeanors and subject to a moderate fine or imprisonment. Stakeholders, advertisers, riders, those making up purses, those lending their premises for races, and those betting on races were all subject to punishment.[25] In addition, the 1846 law had a dramatic

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[23][1796] Acts and Laws of Conn. 232. The stated policy of the law was consistent with the New England position that gambling was

> . . . a growing Evil, productive of Dissipation, Idleness, and many other Vices ruinous to Individuals and detrimental to the public weal.

[24]Id.

[25]§§1-5, [1846] N.J. Laws 133-34.

effect on the civil law horserace gambling. Under an earlier statute, the losing party to a horserace wager was permitted to recover his losses.[26] The 1846 act, however, made both bettors and stakeholders guilty of a crime and declared wagers on races to be null and void.[27] This statute led the court in Sutphin v. Crozer[28] to take the position "that where the two parties to a transaction are equally criminal, the law will render no aid to either."[29] The court refused to order a stakeholder to return wagered money to the bettor even though the race in question never occurred.

> The statute to prevent horse-racing, makes the persons who bet, and those who aid them by holding the stakes, guilty of a crime. The one is dependent on the other. By accepting the stakes the stakeholder becomes something more than an innocent stakeholder--he becomes an aider and abettor of the persons betting, and becomes so by their procurement. The persons thus using him have no claim to the aid of a court of justice if he proves false to his trust, nor can they be allowed to say that they have repented of their illegal proceeding, and desire to stop the race and reclaim their money. Their crime has been consummated by making and receiving the bet, a crime the statute declares punishable with the same severity as the actual running of the race. 30

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[26] Act of Feb. 15, 1811, §4, Compiled Laws of the State of New Jersey 228-29 (Bloomfield ed. 1811)(repealed in 1846).

[27] §7, [1846] N.J. Laws 134.

[28] 32 N.J.L. 462 (Ct. Err. and App. 1865).

[29] Id. at 464.

[30] Id. at 464-65.

By 1860, most Northeastern states had taken some legislative action against gambling on horseraces. As noted earlier, Rhode Island acted first, and in 1777 declared horseracing and related gambling illegal.[31] In 1820, Pennsylvania passed a statute similar to the 1846 New Jersey law described above, but took a more stringent position by treating violators as felons.[32] In 1823, Vermont stiffened its 1779 penalties against horserace wagering in an act which closely resembled the 1796 Connecticut statute.[33] Finally, in 1846, the Massachusetts legislature stiffened its 1802 prohibition.[34]

Throughout the Northeast, the adverse social consequences of gambling at the races were perhaps the principal spur to the enactment of these anti-racing acts. The Clinton Reader, a standard school textbook of the 1830's, provides an example of this anti-racing sentiment:

> Who loves a race horse? Are not too many fond of it? Does it not lead to many evils, and to frequent ruin? Never go to a horse race. Mr. Nix had one child, whom he called Irene; he also had a good farm, and some money. He went to the races with his child, dressed in black crepe for the loss of her mother. Here Mr. Nix drank freely, and bet largely, and lost

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[31]Act of Sept. 22, 1777, [1777] Rhode Island Acts and Resolves 7.

[32]Act of Feb. 17, 1820, ch. 20, §§1-9, [1820] Pa. Laws at 20-22.

[33]Act of Oct. 27, 1823, ch. 32, no. 5, [1797-1824] Laws of Vt. at 273 (Slade ed. 1825).

[34]Act of April 8, 1846, ch. 200, §§1-2, [1846-1848] Laws and Resolves of Mass. 135-36.

> all he was worth. At night he went home a beggar; took a dose of brandy, and died before morning, leaving his child a pennyless orphan. Never go to a horse race. 35

Even where horseracing was prohibited, however, the law frequently went unenforced.[36] Moreover, betting at the races was such a popular activity in nineteenth-century America that "in spite of the efforts of reform-minded educators even the very young took to betting."[37]

C. The Modern Era: 1900-1976

1. Early 1900's

a. Gaming and gaming-houses

In the first decades of the twentieth century, the Eastern states continued to condemn gambling of any form, and the law evolved to prohibit new forms as they developed. In each state, the courts and the legislature relied on the expansion of existing law to suppress new forms of gambling. As a result, very little new legislation was enacted during this period.

Modern gambling schemes, however, presented definitional problems for the courts. Poolselling or bookmaking on horseraces developed in the 1880's. The courts responded by expanding existing anti-gambling and anti-lottery laws to reach this

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[35] Chafetz at 258.

[36] Devereux at 296.

[37] Chafetz at 259.

activity. The New Hampshire court, for example, defined gambling generally as the act of wagering on a game.[38] It then held that horseracing constituted such a game and bookmaking was therefore found to fall within the scope of the existing prohibition; no new legislation was needed.[39] Other Eastern states also adhered to this rule, and it was not until later in the century that further definitional problems developed.[40]

Many states used their gambling house statute as a catch-all provision to cover new forms of gambling.[41] Maine, for example, expanded its gambling house statute to include within its scope all those found in such an establishment whether or not they were actually discovered while gambling.[42]

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[38]Opinion of the Justices, 73 N.H. 625, 628, 63 A. 505, 507 (1906). See also ch. 254, §§8, 9, 12, 13 N.H. Gen. Stat. (1867) at 512-14.

[39]Some gambling-related transactions are lawful, though. A New Hampshire bookkeeper who telegraphed his customer's money to agents in New York who placed wagers as directed was not guilty of gambling in New Hampshire. The court held that the wagering activity occurred in New York. McQuesten v. Steinmetz, 73 N.H. 9, 58 A. 876 (1904).

[40]These problems related to lotteries and bank nights.

[41]New Jersey courts held that anyone who maintained a place with knowledge that the patrons engaged in illegal conduct was guilty of the indictable offense of keeping a disorderly house. The statutory requirements included both intent and the knowledge that the place was used illegally. State v. Costa, 11 N.J. 239, 94 A.2d 303 (1952).

[42]Act of March 21, 1905, ch. 105, §1, [1905] Acts and Resolves of Maine at 109-10, superseded in part by Act of March 29, 1909, ch. 162, [1909] Acts and Resolves of Maine at 164-65; see also Act of Aug. 20, 1951, ch. 207, [1951] Acts and Resolves of Maine, which included bookmaking and numbers establishments as gambling houses.

The statute was designed to punish those who profited from gambling--the professional gambler and those who helped or enticed others to gamble.

b. Gambling devices

Several states enacted separate legislation for the control of gambling machines, although these devices logically appear to fall within the scope of the general gaming and gambling house statutes. Perhaps the frequent invention of new devices which escaped prosecution under existing law, combined with the ready availability and flagrantly open use of such devices caused the legislatures to give special treatment to gambling machines.

A New Jersey law enacted at this time, which is still in effect today, declared the possession of a slot machine to be a criminal offense.[43] The statute was designed to prohibit those instruments ". . . which stimulate the gambling instinct in the public generally, and in children particularly."[44]

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[43]Act of May 7, 1907, ch. 140, §1, [1907] Laws of N.J. at 375. The present law states:

> Any person who has or keeps in his place of business or other premises, any slot machine or device in the nature of a slot machine, which may be used for the playing of money or other valuable thing, is guilty of a misdemeanor.

N.J. Stat. Ann. §2A: 112-2 (1969). See also Act of June 14, 1898, ch. 235, §60, [1898] Laws of N.J. at 811.

[44]Stirling Distributors, Inc. v. Keenan, 38 A.2d 570, 571 (N.J. Ch.), aff'd en banc, 135 N.J. Eq. 508, 39 A.2d 79 (Ct. Err. and App. 1944). Pinball or slot machines which provide no free plays or prizes remain outside the scope of the act as they do not stimulate the gambling instinct. Conviction requires either actual gambling on the machine or evidence that the machine is so constructed that it could be used only for such a purpose. See also State v. Bally Beach Club Pinball Machine, 119 Vt. 123, 119 A.2d 876 (1956).

Most Eastern states enacted statutes similar to that of New Jersey,[45] but during the Depression, Vermont legislators saw a potential revenue source and licensed the machines.[46] The plan failed to raise the desired funds, however, and the licensing system was shortlived.[47]

c. Futures and bucket shops

The increasingly sophisticated commodity markets of the early twentieth century led to the common practice of speculating on the future prices of commodities. Americans have always shown hostility to those forms of economic activity that smack of pure speculation. The tendency to

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[45] See, e.g., ch. 125, §12, Maine Rev. Stat. (1883); Act of Nov. 29, 1898, No. 121, [1898] Vt. Laws at 92-93. In 1917, the scope of the Vermont Law was broadened to include any device used for winning money or valuable things, including free games. The law also allowed the contents of the machines to be forfeited to the state. Act of March 23, 1915, No. 214, [1915] Vt. Laws at 348.

[46] Act of April 10, 1937, No. 38, Pt. 2, §§1-18, [1937] Vt. Laws at 60-64. See Sowma v. Parker, 112 Vt. 241, 247, 22 A. 2d 513, 516 (1941), where the court stated:

> It may be assumed that the purpose for the enactment of No. 38 of the Acts of 1937 was in part, at least, to raise revenue.

[47] Act of March 14, 1941, No. 190, [1941] Vt. Laws at 252-53. In Sowma v. Parker, 112 Vt. 241, 248, 22 A.2d 513, 517 (1941), the court addressed the question of whether the state had taken a property interest by confiscating the machines and their contents. The re-enactment of the earlier law had not provided for a grace period in which the owners could lawfully dispose of their machines. The court held that this was a lawful exercise of police power as long as it was not arbitrary and was reasonably related to a permissible state purpose. Vermont law still prohibits dealing in gambling machines. Vt. Stat. Ann. tit. 13, §§2135, 2136 (1974).

distinguish between investment and speculation can probably be traced to the of the Puritan work ethic, even in modern American society. The public remains wary of speculative activities whose appeal lies in the prospect of "getting rich quick," and doing so without any physical or intellectual effort. Thus, the enormous profits that speculators gained by luck in the marketplace probably shocked the average farmer of the early twentieth century as sinful, if not immoral.

While the conservative banker made a steady income from his investments, the speculator was likely to go from rags to riches, or vice versa, in a short period of time. Further, the banker aided the community by offering needed credit and security, while the speculator's only purpose was personal enrichment. Whatever advantages such speculation offered to the general economy, for example, a ready market for securities that enhances liquidity of wealth--such positive results were extremely complex and thus were not highly visible to most of the public. The incredible tales of the rise and fall of speculators, however, received concentrated public attention. Thus, it was easy for the general public to view the speculator as a gambler, and the type of economic activity in which speculators engaged as gambling. These attitudes resulted in the crusade against the futures trader and his dealings.[48]

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[48]Vermont law treated bucket shops as common gambling houses and thus public nuisances. No. 146, §1, [1888] Vt. Laws. See State v. Carrick, 78 Vt. 1, 61 A. 35 (1905). The prohibition of bucket shops is still in effect today as Vt. Stat. Ann. tit. 13, §§2171-2177 (1974).

In all of the Eastern states, judicial definitions established the distinction between a wager and an investment. In Rumsey v. Berry, an early case decided by the Supreme Court of Maine, the court stated:

> A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure. 49

By 1907 Maine had enacted a special bucket shop law which adopted the court's policy.[50]

Even earlier, Massachusetts had enacted a law to combat speculation.[51] This statute used the traditional approach and treated wagering contracts as void and unenforceable, and gave losers the right to recover their losses. Massachusetts, too, looked to its judiciary to distinguish legitimate speculative transactions from wagering contracts. Contracts

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[49]Rumsey v. Berry, 65 Me. 570, 574 (1876).

[50]Act of Mach 26, 1907, ch. 152, [1907] Laws of Maine at 173. The penalty for a first offense was a fine of up to $3,000 or up to one year in jail. A second offense could result in two to five years in jail. Cf. Wheeler v. Metropolitan Stock Exchange, 72 N.J. 315, 56 A. 754 (1903), an earlier New Hampshire case, which held that a contract for the future sale of a commodity, where delivery was not contemplated, was void as a wagering contract.

[51]Act of June 23, 1890, ch. 437, §§1-4, [1890] Acts and Resolves of Mass. at 479-80.

found to be unenforceable were those where payment of the full price of the stock bought on margin and actual delivery of the stock was not intended.[52] Culpability rested on the intention and knowledge of the parties to the transaction.[53]

Futures gambling and the spurious contracts it produced presented a serious problem to the stability of the economy. It also affected the predictability of economic events upon which the young business community depended to effectuate positive economic planning. Thus, the Boston Stock Exchange forbade factitious sales, and brokers could be evicted from their seats on the exchange for violations.[54] By 1907, the Massachusetts legislature had also attacked the futures problem.[55] To protect innocent purchasers, the law required brokers to issue, upon a customer's request, a written statement supplying the names of persons selling the property involved.[56]

Eastern commodity futures law has remained stable since the early 1900's. The commodities market, however, found its

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[52]See Harvey v. Merrill, 150 Mass. 1 (1889); Barnes v. Smith, 159 Mass. 344, 34 N.E. 403 (1893).

[53]In Connecticut, though, buying and selling stock on margin did not constitute gambling as long as the brokers purchased the stock and delivery was intended. Hatch v. Douglass, 48 Conn. 116 (1880).

[54]See Act of June 23, 1890, ch. 437, §§1-4, [1890] Acts and Resolves of Mass. at 479-80, and Davy v. Bangs, 174 Mass. 238, 54 N.E. 536 (1899).

[55]Act of May 15, 1907, ch. 414, §§1-4, [1907] Acts and Resolves of Mass. This law is currently in effect as Mass. Ann. Laws ch. 271, §§35-38 (1968).

[56]Act of May 15, 1907, ch. 414, §4, [1907] Acts and Resolves of Mass.

home in the Midwest, and Chicago is now the leading center of trade. For this reason, a system which permits futures trading for the purpose of giving the farmer necessary economic security did not develop in the East. Elsewhere, futures trading under the strict supervision and guidelines of commodities exchanges and regulatory commissions has effectively controlled the problem of futures gambling.

d. New forms of lotteries--bank nights

Bank nights, which were an interesting phenomenon of the Depression, prompted judicial action which expanded the definition of lotteries in the Northeast. This definitional revision engendered important legal consequences for the remainder of the modern era.

The legislatures which enacted the first anti-lottery legislation made plain their intention to prohibit absolutely all lottery activity within their states. This clear purpose left the courts little flexibility when they were forced to deal with new promotional schemes designed to stimulate consumer buying during the Depression. If a promotional scheme included the basic features of a lottery, courts tended to find that it was prohibited by law. Thus, legislative action originally intended to ban large-scale, state-chartered lotteries became a weapon against charity bazaars and theater bank nights. In states in which lotteries were constitutionally forbidden, legislators confronted a much more difficult task when they attempted to discriminate between permitted and prohibited lotteries.

In their efforts to decide whether particular schemes constituted illegal lotteries, state courts tried to isolate the elements of a lottery in a variety of ways. Traditionally, the elements of a lottery included chance, a prize, and consideration.

In New Hampshire, the court heard arguments concerning a movie theater bank night drawing. In that particular situation, anyone could participate without purchasing an admission ticket. The management would announce the winning number outside the theater and invite "outside" winners into the establishment to collect their prizes. Because no purchase was needed to win in the drawing, and because the theater derived only indirect commercial benefit from the scheme, the court found it legal. The court noted that the game lacked the element of consideration, and therefore was not a lottery.[57]

During the nineteenth century in Maine, the element of chance alone determined whether a scheme was a lottery. Neither the courts nor the legislature had yet determined the role of consideration. Finally, in 1959, the Supreme Court of Maine adopted the New Hampshire ruling noted above. In State v. Bussiere,[58] the court found that a supermarket's "Goodwill Cash Night" did not constitute a lottery because there was no fee for playing the game. The Bussiere court

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[57]State v. Eames, 87 N.H. 477, 183 A. 590 (1936).

[58]155 Me. 331, 154 A.2d 702 (1959).

went further than this, however, and held that only where substantial consideration existed would a lottery prosecution be upheld. Thus, for a lottery to be found, a participant had to risk something of material value with the hope of winning a larger sum by chance.[59]

Connecticut courts, on the other hand, used a different approach and found bank nights to be illegal lottery enterprises.[60] Though these schemes seldom involved consideration, the courts held that even "free" lotteries fell within the scope of the state's ban on lotteries. The reasoning used was that the evil generated by bank nights was equal in its effect on public morals to any other form of gambling or wagering.

In dealing with the problems presented by bank nights, the judiciary of each state helped determine the definition of a lottery. The bank night controversy demonstrates that the court-made definitions of lotteries could be stretched in either direction, and throughout the period, the jurisdictions of the Northeast remained split on the issue.

e. Illegal lotteries

State prohibitions of lotteries remained in effect well into the twentieth century. The sting of the fraudulent and mismanaged schemes of the 1800's continued to have a significant

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[59]Such a merchandising scheme would now be permissible under Me. Rev. Stat. Ann. tit. 17-A, §952, 6.A (1975).

[60]State v. Doran, 124 Conn. 160, 163, 198 A. 573, 574 (1938). Currently, Connecticut law requires the risk of something of value to constitute gambling. Conn. Gen. Stat. Ann. §53-278a (Supp. Pamphlet 1976).

effect. The judicial and legislative anti-lottery sentiment in the East also reinforced the old laws and led to an increase in penalties and an expansion of their scope to cover new enterprises. In Massachusetts, the mere possession of lottery tickets constituted prima facie evidence that the possessor had violated the law.[61] It was not until 1963 that lotteries were once again accepted as a legitimate form of fund-raising.

f. Horseracing

In the Northeast, the prohibitions of the formative era on horseracing remained in force in the early twentieth century. Yet problems arose from the combined influence of legalized horserace gambling in other states and an improved national communications system.

During the early 1920's- parimutuel wagering was legal in only three racing states--Kentucky, Maryland, and Louisiana.[62] Horseracing and gambling on such races, however, prospered in the United States during this period, for laws prohibiting racing and bookmaking largely went unenforced.[63] Numerous clever evasions practiced by gamblers made enforcement of anti-gambling provisions difficult, if not impossible.

Against this background of widespread illegal gambling in the face of ineffectual anti-gambling laws, the legalization movement of the 1920's began to take shape. Many argued that

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[61] 9A Mass. Ann. Laws ch. 271, §20 (1968).

[62] Devereux at 274.

[63] Id. at 274-78.

such action offered the only solution to illegal bookmaking.

The principal opposition to parimutuel wagering came from two sources--Protestant church groups and certain business interests.[64] The church arguments articulated were twofold: "That gambling [was] wrong in principle, and that legalization of one form of gambling would completely break down enforcement of all other forms of anti-gambling statutes."[65] Left unarticulated, but nevertheless always present, was the fear that legalized gambling would undermine the traditional work ethic, and that chance would replace hard work and merit as the ideal path to success.

The business interests limited their objections to what they considered to be the adverse economic effects of legalized on-track betting. The New Jersey State Chamber of Commerce, for example, listed the following problems connected with legalization:

> Department stores, clothing and shoe stores, manufacturers and wholesalers dealing in staple lines of merchandise were usually injured. Other established entertainment industries, such as motion picture theaters, suffer during the local racing season. Collections fall off, large numbers of individuals get behind on installment payments, and the incidence of defalcations and other petty crimes increases enormously during the racing season. 66

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[64] Id. at 282-83.

[65] Id. at 283. "The Roman Catholic Church did not oppose the legalization move, nor did any of the Jewish religious groups." Id.

[66] Id. at 284.

The business community cited other problems associated with racetracks, including increased employee absenteeism, a general slackening of interest in work, and "an increasing tendency for workers to ask for advances on their salaries."[67] Finally, businessmen complained that horseracing attracted large numbers of prostitutes, pettycriminals, and other characters of generally low repute who created an undesirable atmosphere in the community.[68]

On the other side of the debate, however, were the racing interests and the revenue-hungry states themselves. Their arguments also centered on economic issues.[69] They cited the predicted increases in state revenue to be gained from parimutuel taxes, license fees, and admissions taxes. They argued that racing would bring increased employment, albeit of a seasonal nature, to the areas where racetracks were located; that, moreover, racing would attract out-of-state bettors who would spend maoney in local businesses, as well as in parimutuel machines. Finally, the pro-legalization forces advanced the theory that legal horserace gambling would drive the illegal "bookmakers out of business [and] cut off the corrupting flow of graft to police and political officials. . . ."[70]

The pro-legalization forces won in many states. The

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[67] Id.

[68] Id.

[69] Id. at 283-84.

[70] Id. at 278.

economic realities of a practically unlimited demand for state services, coupled with severely limited sources of state revenue, logically led to this result. Demographic composition of the state was another factor in the move for legalization. The typical racing state was an increasingly urban, increasingly Catholic state with limited sources of tax revenue and increasing demands for public services. Thus, during the 1930's and 40's, all of the Northeastern states legalized parimutuel wagering at state-authorized tracks.[71] On the other hand, rural Southern states, dominated by other faiths, refused to legalize parimutuel wagering.

g. Civil sanctions

The Eastern state courts continued to refuse to enforce gaming contracts during the modern era. This policy, in addition to criminal sanctions and loss recovery provisions, proved to be the states' primary expression of the public attitude toward gambling.

Though the states continued to grow and change during the early 1900's, the attitudes of the public changed far more slowly. The notion that gambling was to be discouraged remained strong throughout this era, and can still be felt today. By declaring gambling contracts void and unenforceable,

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[71]Conn. Gen. Stat. Rev. §12-575 (1975); Me. Rev. Stat. Ann. tit. 8, §333 (Cum. Supp. 1975); Mass. Gen. Laws Ann. ch. 128A, §5 (Cum. Stat. 1975); N.J. Rev. Stat. Ann. §284:22 (Supp. 1975); N.J. Stat. Ann. §5:5-62 (1973); N.Y. Unconsol. Laws §7952 (Cum. Supp. 1975); Pa. Stat. Ann. tit. 15, §2655 (Cum. Supp. 1976); R.I. Gen. Laws Ann. §41-4-1 (1970); Vt. Stat. Ann. tit. 31, §615 (1970).

the state legislators hoped to eliminate private illegal gambling.

Problems arose, however, when the state deemed gambling contracts unenforceable on the one hand, and endorsed certain games on the other. These problems are particularly visible today.

In Connecticut and New Jersey, for example, where all gambling agreements are still considered to be void, and where recovery by a loser is still allowed, statutes fail to provide for those forms of wagering which have been legalized.[72] Nonetheless, the general rule resolving conflicts between statutes in favor of the one most recently enacted would probably prevent a loser in a state-authorized game from recovering his money.

Some states have enacted, and their courts have clarified, various provisions designed to deal with modern gambling problems. Vermont courts, for example, held that the recovery of unused gambing implements is possible under a theory of implied contract.[73] Thus, if the primary gambling contract is not acted upon, the court may allow the recission of a collateral contract. This support of gambling-related contracts, however, is merely an exception to the general rule.

In a more recent case, a New Jersey court upheld a gambling

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[72] See Conn. Gen. Stat. Ann. §52-554 (1958) and N.J. Stat. Ann. §§2A:40-1 et seq. (1952).

[73] Canfield Mfg. Co. v. Paddock, 96 Vt. 41, 116 A. 115 (1922).

debt incurred in Puerto Rico. This was a reversal of the old unenforceability rule which formerly extended even to those places where such gambling was permitted.[74]

More recent cases show further erosion of the gambling contract unenforceability rule. Certainly, the original rationale behind the doctrine no longer exists, for more and more states have adopted state-run gambling games. Still, vestiges of the old rule remain. Many states appear to take a questionable position as they enforce civil sanctions yet encourage other legalized forms of gambling.[75]

2. Mid-1900's: Significant demographic change

From the turn of the century to the late 1950's, the population in the Northeast increased dramatically. At the same time, and perhaps as a result of the availability of a cheap immigrant labor pool, industrialization and urbanization increased.

In many states, the Eastern European immigrant virtually replaced the traditional Yankee farmer. After the First World War, Blacks moved North in massive numbers. The shifts in ethnic composition and economic patterns beginning in the 1930's contributed to the changing attitudes toward gambling in the East. Moral opposition to gambling disappeared in the waves

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[74]Caribe Hilton Hotel v. Toland, 63 N.J. 301, 307 A.2d 85 (1973). Contrast Ciampitiello v. Ciampitiello, 134 Conn. 51, 54 A.2d 669 (1947).

[75]See generally Conn. Gen. Stat. Rev. 1930, §6280; State v. Tolisano, 136 Conn. 210, 70 A.2d 118 (1949); State v. Moriarty, 97 N.J. Super. 458, 235 A.2d 247 (Law Div. 1967), aff'd, 55 N.J. 31, 259 A.2d 201 (1969); Spagnuolo v. Bonnet, 16 N.J. 546, 109 A.2d 623 (1954); Cotto v. Martinez, 26 Conn. Supp. 232, 217 A.2d 416 (1965).

of immigration. The furor over lottery scandals slowly died, and people forgot the corruption of the older lotteries.

Charitable and religious groups were the first to be exempted from the anti-gambling laws. At the same time, the invention and introduction of the parimutuel totalizer made horserace betting far more palatable to most people, as it reduced the possibility of fraud.

In the 1950's, the demand for social services, including welfare, medical services, and state education, increased significantly. This problem, coupled with a decreasing tax base and an already overtaxed populace, plunged the Eastern cities and states into a severe financial crisis. As a result, all of the states of the East experimented with legalized gambling in one form or another as a revenue source.

New Jersey, for example, had no income tax, and for years refused to implement one. Vermont has an income tax, and it provides 42% of the total tax revenue. Both states have legalized horserace betting, but Vermont has not instituted a state lottery. New Jersey established its innovative lottery in the hope of raising enough money to avoid the imposition of an income tax, but was recently forced to institute such a tax.[76]

Illegal gambling organizations gained their foothold in America during the early part of the twentieth century. States that legalized gambling hoped that state-regulated

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[76] N.Y. Times, July 11, 1976, §4 (Week in Review), at 4, col. 1.

schemes could compete with organized crime,[77] as well as provide needed revenue. Because an estimated 1.67 billion

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[77]The concept of "organized crime" is much like the fictional crime portrayed in Akira Kurasawa's 1951 film, "Rashomon." In it, a ninth century nobleman's bride is raped by a bandit, and the nobleman lies dead. This double crime is then acted out in the film in four versions, as seen by the three participants and a witness. Each version is not quite like the other

Those who have looked at "organized crime" have been much like those whose stories were told in Kurosawa's film. Some have seen nothing, and decided that nothing was there. See, e.g., G. Hawkins, "God and the Mafia," The Public Interest No. 14, Winter 1969, pp. 24-51; compare the summaries of wiretaps reprinting in H. Zeiger, The Jersey Mob (Signet ed. 1975). Others have examined the phenomenon through the senses of an anthopologist, and have seen not a "conspiracy" but a "social system." See, e.g., F. Ianni, A Family Business (Simon and Schuster 1972). Others have looked only at press accounts and have seen in it little more than a public relations gimmick. D. Smith, The Mafia Mystique (Basic Books 1975). Others have looked at it as an organizational theorist, and have seen its special character in its functional division of labor. D. Cressey, Theft of a Nation (Harper and Row 1969). Some have examined it as a lawyer, and seen it as a "conspiracy." See, e.g., G. Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases," in Task Force Report: Organized Crime, President's Commission on Law Enforcement and Administration of Justice at 80, 81-83 (1967). This, too, was the view taken of it by the President's Crime Commission; the Crime Commission identified "organized crime" not with the Mafia (La Cosa Nostra was termed only the "core" of organized crime, id. at 6; other groups were recognized to be involved), but with conspiratorial criminal behavior, when its sophistication had reached the level where its division of labor included positions for an "enforcer" of violence and a "corrupter" of the legitimate processes of our society. Id. at 8. For a discussion of the concept of "organized crime" broken down into "enterprises," "syndicates" and "ventures" see G. Blakey, Electronic Surveillance: Report of the National Commission on the Review of Federal and State Laws Relating to Wire Tapping and Electronic Surveillance, pp. 190-92 (1975).

dollar illegal profit is generated annually,[78] the general trend toward legalization of gambling continues today in an effort to capture those profits for the state.[79]

3. Trend toward legalization

a. Bingo and beano

In many states, the first form of gambling to be decriminalized was bingo run by charitable and religious organizations. Today, most Northeastern states have similar charitable gambling exceptions.[80]

The first step toward legalization occurred in Massachusetts in 1931, with the passage of a law exempting certain persons who conducted card games for charitable purposes from prosecution under the state's gambling laws.[81]

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[78]Task Force on Legalized Gambling, Easy Money 55 (1974) [hereinafter cited as Easy Money]. The Easy Money estimate is the best of the private surveys. Recently, the Commission on the Review of National Policy Toward Gambling [hereinafter referred to as the Gambling Commission] published its estimates. Second Interim Report: Commission on the Review of the National Policy Toward Gambling 39-46 (1976) [hereinafter cited as Second Interim Report]. The Commission's study shows that fully 61% of the adult population participated in some form of gambling in 1974. Only 11%, however, participated in some form of illegal gambling; the rest gamble among friends or in a state-sanctioned enterprise. A total of $24 billion was wagered, $5 billion of it illegally. The Commission acknowledges that its illegal figure, lower than all previous estimates, is open to question.

[79]See N.Y. Times, Nov. 7, 1974, at 40, col. 6.

[80]See Conn. Gen. Stat. Ann. §§7-169 et seq. (Supp. 1975); Me. Rev. Stat. Ann. tit. 17, §§311 et seq. (Supp. 1975); N.H. Rev. Stat. Ann. §§287:1 et seq. (Supp. 1975); N .J. Const. art. IV, §7, ¶2 (1969 Amend.).

[81]Act of May 18, 1931, ch. 331, [1931] Acts and Resolves of Mass. at 393. The current corresponding provision is Mass. Gen. Laws Ann. ch. 271, §22A (1968). Both bingo and beano are now exempt from prosecution when properly licensed. See Mass. Gen. Laws Ann. ch. 271, §22B (Supp. 1975).

In 1937, the Rhode Island General Assembly acted to permit certain charitable or religious organizations to conduct bingo or beano games, subject to licensing conditions and regulations.[82] Since 1974, all proceeds of such games must be spent exclusively for charitable purposes.[83]

The exemption in Maine includes hotels in addition to the usual bona fide charitable, educational, fraternal, or religious organizations. To help promote the tourist industry, legislators voted to allow hotels to conduct bingo games for the amusement of their guests, but forbade the establishments from realizing a profit on such activities.[84]

New Jersey games, controlled by the state's Legalized Games of Chance Control Commission, must devote their entire net proceeds to "educational, charitable, patriotic, religious, or public-spirited uses."[85] As in the horseracing law, a local option exists. The commission carefully controls the legal games, and those who properly operate such activities under a license are immune to the state's criminal gambling statutes.[86]

Indeed, all states which have bingo or charitable organization exceptions have been careful to regulate the

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[82]Law of April 15, 1937, ch. 2495, [1937] Acts and Resolves of R.I. at 25-26.

[83]Law of May 14, 1974, ch. 289, §1, [1974] Acts and Resolves of R.I. at 1383-84.

[84]Me. Rev. Stat. Ann. Tit. 17, §315 (Supp. 1975).

[85]N.J. Bingo Licensing Law, N.J. Stat. Ann. §5:8-25 (1973).

[86]Id. §§5:8-40, 5:8-67.

games to avoid criminal influence. The difficulty has been to define a charitable organization so that it can be readily distinguished from a criminal front.

b. Horseracing

In the 1930's the invention of the totalizer, the Depression, and strong public reaction to Prohibition all helped to bring about the legalization of parimutuel betting in most Eastern states. New Hampshire was the first state to do so in 1933.[87] All states which now have legalized horseracing have established state racing commissions to control the sport, to insure that it is kept free from criminal influence and corruption, and to receive and audit the revenues for the state.[88] In a typical arrangement, the New Hampshire State Racing Commission, whose members are appointed by the governor, controls racing through its power to issue licenses and promulgate betting and racing

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[87] N.H. Rev. Stat. Ann. §§284:1 et seq. (Repl. Vol. 1966). Massachusetts legalized horseracing in 1934. Act of June 29, 1934, ch. 374, §3, [1934] Acts and Resolves of Mass. 528-36. Rhode Island followed suit in 1934. Law of April 27, 1934, ch. 2086, [1934] Acts and Resolves of R.I. at 22-36. Maine legalized parimutuel betting in 1935, Act of April 4, 1935, ch. 130, [1935] Laws of Maine at 319-23, and authorized the running of races in 1949. Act of Aug. 6, 1949, ch. 289, [1949] Laws of Maine at 227-31. New Jersey followed in 1940, N.J. Stat. Ann. §§5:5-22 to 5:5-91 (1973); New York in the same year, Act of March 31, 1940, ch. 254, [1940] Laws of N.Y. at 860-79. Pennsylvania legalized parimutuel betting in 1959, Act of Dec. 22, 1959, No. 728 [1959] Laws of Pa. 1978, and racing in 1967, Act of Dec. 11, 1967, [1967] Laws of Pa. 707. Vermont authorized parimutuel betting in 1961, Vt. Stat. Ann. Tit. 31, §§601 to 626 (1970). The most recent authorization of horseracing and parimutuel betting occurred in Connecticut. Conn. Gen. Stat. Ann. §§12-571 to 12-578 (1976 Supp.).

[88] See generally id.

regulations.[89] It is also empowered to investigate track operations by subpoenaing witnesses.[90] Unlicensed parimutuel betting or violation of Commission rules is a misdemeanor for natural persons, and a felony for corporations.[91] Before a track is established in a town, the Commission must obtain local approval, either from popular vote or from the town council involved.[92]

In an effort to keep undesirable persons out of the business and to insure local employment as an additional benefit, most states require that 85% of the track employees reside in the state for a specified length of time, usually one or two years.[93] New Hampshire allows its tracks to refuse to admit any person whose presence is "inconsistent with the orderly and proper conduct of a race meeting."[94] Racing commisions usually forbid entry or betting to minors in a

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[89] N.H. Rev. Stat. Ann. §§284:12 and 284:16 (Repl. Vol. 1966). See also Vt. Stat. Ann. Tit. 31, §§602, 605, 606 (1973); Law of April 27, 1934, ch. 2086, §8, [1934] R. I. Public Laws 324; Act of Dec. 22, 1959, No. 728, §7, [1959] Laws of Pa. 1984; Mass. Gen. Laws Ann. ch. 128A, §§3, 9, 11 (1972).

[90] N.H. Rev. Stat. Ann. §284:13 (Repl. Vol. 1966).

[91] Id. §284:21 (Supp. 1975).

[92] N.H. Rev. Stat. Ann. §284:17 (Repl. Vol. 1966). In New Jersey, both the county and the municipality where the races will be held must approve the racing application. If either vote fails, it cannot be reconsidered for five years. N.J. Stat. Ann. §5:5-39.1 (1973).

[93] See, e.g., N.H. Rev. Stat. Ann. §284:3 (Repl. Vol. 1966); N.J. Stat. Ann. §5:5-36 (1973).

[94] N.H. Rev. Stat. Ann. §284:39 (Repl. Vol. 1966).

further effort to protect public morals.[95]

Since all forms of gambling except bingo were condemned in the East when legal parimutuel betting began, the commissions' major roles involved careful regulation and tight control.

The secondary role of the state commissions is to insure that the states receive their share of the parimutuel pools. Each state has its own procedure for taking a tax and a percentage, both defined by statute, from every track.

In Massachusetts, for example, wagering is limited to on-track betting, and the track may take 18% of the total amount wagered, plus the breakage.[95] The track then deducts the state's share from this amount, takes out its legal profit, and pays off its patrons.[96]

In New Hampshire, the state receives one-half the breakage,[97] and taxes the running pools at 8%; the harness pools are taxed at the same rate.[98] In addition, the state receives all unclaimed winnings at the end of each year.[99] The Commission deposits the funds from both harness and

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[95]Mass. Gen. Laws Ann. ch. 128A, §5 (Supp. 1975).

[96]Id.

[97]N.H. Rev. Stat. Ann. §284:22 (Supp. 1975).

[98]Id. §284:23 (Supp. 1975).

[99]Id. §284:31 (Supp. 1975).

running pools into the State General Fund every three months.[1]

c. Legal lotteries

Beginning in 1963, one Eastern state after another legalized lotteries in response to fiscal pressure. The first lottery, which began in New Hampshire as a sweepstakes, served as a prototype for the other state lotteries.[2] The profits of the sweepstakes, which was

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[1]Id. §284:2 (Supp. 1975). In Maine, the tracks receive 19% of the total pool plus breakage; 5% of this must be paid to the state for the General Fund. Me. Rev. Stat. Ann. tit. 8, §274 (Supp. 1975). Vermont uses a graduated commission table, with all revenue used for public welfare and agricultural fairs. Vt. Stat. Ann. tit. 31, §§601 to 626 (1973). In New Jersey, the Commission receives between 6 and 10% of the total contributions to the harness-racing pools, depending on the type of race and total amount of contributions. N.J. Stat. Ann. §5:5-66 (Supp. 1975). The Pennsylvania Department of Revenue collects a 15% tax on the price of all admission tickets. Pa. Stat. Ann. tit. 15, §2656 (Supp. 1976). New York is divided into two zones, by judicial district. One zone pays a 12% tax and 80% of its breakage, and the other zone pays a 5 to 11% tax on a sliding scale, and 65% of its breakage. N.Y. Unconsol. Laws §7959 (Supp. 1975). In Rhode Island, approximately 9% of the handle in 1969 went to the benefit of the state. [1970] Rhode Island Almanac 282.

[2]N.H. Rev. Stat. Ann. §§284:21-a et seq. (Repl. Vol. 1966). From their earliest history, New Hampshire's men and women seem to have taken the Devil somewhat less seriously than their Puritan neighbors to the south. Not that New Hampshire was noticeably less devout than the Bay Colony. Indeed, for almost two centuries congressionalism was for all practical purposes the established religion. But by 1819, it was no longer dominant politically. Post-Civil War immigration of Roman Catholics further diluted traditional anti-gambling sentiment. By 1960, too, the state's population was 58.3% urban, and only 3% were actively employed in agriculture. The image of a New Hampshire dominated by rugged Yankee farmers is thus illusory. In 1963, these demographic changes combined with New Hampshire's peculiar state constitution to set the stage for the first modern return to the lottery. New Hampshire's constitution, the oldest in the nation except for Massachusetts', forbids the levying of a progressive income tax. N.H. Const. Pt. II, Art. 6 (1970). The rule was inflexible, too, for until a 1964 amendment only a constitutional convention could alter the state's basic charter. To avoid excessive taxation on real property, New Hampshire has had to rely heavily on "sin taxes." In 1963, these forces produced the first modern lottery.

based on parimutuel races, benefited public education. A special fund paid the school districts yearly on a per pupil basis.[3]

In 1967, the New Hampshire legislature authorized the regulatory commission to conduct pure lotteries, with at least one drawing per year based on a sweepstakes race.[4] To keep the lottery in competition with other forms of gambling, the state eliminated all state taxes on prizes in 1971.[5] In 1973, the state began offering "Lucky Seven" tickets to improve marketing of its sweepstakes.[6]

Again, as part of the state's effort to protect the public, the sweepstakes commission maintains strict control of the lottery. Only state liquor stores, tracks, and offices may sell tickets, minors may not purchase tickets, and the state may not advertise other than at the point of sale.[7] Thus, the state does not openly condone gambling.

In 1967, New York instituted its own lottery.[8] Most of the other Northeastern states soon followed suit.[9] Though

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[3] Id. §284:21-j.

[4] N.H. Rev. Stat. Ann. §284:21-h (Supp. 1975).

[5] Id. §284:21-r.

[6] Id. §284:21-ii.

[7] Id. §284:21-h.

[8] Act of April 18, 1967, ch. 278, [1967] Laws of N.Y. at 963.

[9] Pub. Act No. 865, §12, [1971] Conn. Pub. and Spec. Acts; Mass. Gen. Laws Ann. ch. 10, §24 (Supp. 1975); N.J. Stat. Ann. §5:9-4 (1973); Act of Aug. 26, 1971, No. 91, [1971] Laws of Pa. at 351; Law of March 14, 1974, ch. 20, §§42-61-1 to 42-61-17, [1974] R.I. Public Laws; Me. Rev. Stat. Ann. tit. 8, §§351 et seq. (Supp. 1975).

a study of the New Hampshire lottery had shown a large percentage of out-of-state buyers,[10] the other states of the Northeast hoped that their more dense populations would support their own particular lotteries.

New York, mindful of its past problems with organized crime, studied the New Hampshire lottery in search of evidence of criminal influence and found none.[11] The original New York lottery scheme attempted to curb the threat of criminal infiltration and limit moral objections to the lottery by tightly controlling accessibility and setting rigid rules for its operation.[12] Perhaps because of these restrictions, only limited revenues could be raised. Soon after the institution of the neighboring New Jersey lottery, however, many of these restrictions were removed.[13]

New Jersey took note of the practices of its neighbor states and tailored its lottery for maximum revenue return.[14] Reaching for the largest market, New Jersey lowered ticket prices to 50¢ and instituted weekly drawings. The New Jersey

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[10]N.H. Sweepstakes Commission News Release, Jan. 21, 1972.

[11]Wisconsin Legislative Reference Bureau, State Lotteries: Research Bulletin 73-1 at 7 (1973).

[12]Act of April 18, 1967, ch. 278, §§1305, 1310, [1967] Laws of N.Y. The statute permitted only twelve drawings per year, fixed ticket prices, and limited the agents who could sell lottery tickets to banks, telegraph companies, hotels, and offices. Tickets were not to be sold to minors, nor were they negotiable.

[13]Act of April 22, 1970, ch. 165, [1970] Laws of N.Y. at 1162-67.

[14]N.J. Stat. Ann. §5:9-4 (1973).

Lottery Commission continually studies the effect of gambling and the actions of other states in this area.[15] New Jersey had a significant incentive to develop a highly profitable lottery system, for it had firmly refused to institute a state income tax for years. In its first year of competition with New York, the New Jersey lottery out-grossed the New York lottery three to one.[16] After eighteen months of operation it had generated $102 million for state institutions and schools. Nevertheless, this was apparently an insufficient sum to solve the state's financial problems. In July 1976, the New Jersey legislature reluctantly enacted a graduated income tax.[17]

In 1971, Pennsylvania set up a state lottery with a unique purpose.[18] The net proceeds of the lottery provide property tax relief for the elderly. A 1972 amendment allows the profits to subsidize free local transit to persons 65 years of age or older.[19] Impressive sums have been realized. In 1973, for example, the state returned $53 million in tax

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[15] N.J. Stat. Ann. §§5:8-13 and 5:9-7(F), (G) (1973).

[16] Easy Money at 50.

[17] N.Y. Times, July 11, 1976, §4 (Week in Review), at 4, col. 1.

[18] Act of Aug. 26, 1971, No. 91, [1971] Laws of Pa. at 351.

[19] Act of Dec. 27, 1972, No. 338, [1972] Laws of Pa. at 1629-30.

or rent refunds, and provided one million free mass transit rides.[20]

In 1971, the Massachusetts Senate also set up a state lottery, over Governor Sargent's veto.[21] The governor feared the potential for political influence,[22] and questioned the ability of a lottery to produce more than "incidental usable funds."[23]

Eight Northeastern states now have legalized lotteries.[24] Public attitudes toward lotteries have definitely changed in the last 100 years. For an example, 85% of those surveyed in Rhode Island felt the lottery was "good" for the state.[25] Forty-eight percent of the residents of lottery states bought tickets in 1974, spending an average of $25 each; whites and suburbanites were the most frequent lottery

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[20] Introductory Statement of the Honorable Hugh Scott, U.S. Senator, Pennsylvania at Philadelphia Hearings of the Commission on the Review of the National Policy Toward Gambling, May 28 -29, 1975 [hereinafter cited as Scott Statement].

[21] Boston Globe, Sept. 28, 1971, at 1, col. 5.

[22] Boston Globe, Sept. 21, 1971, at 1, col. 3.

[23] Boston Globe, Sept. 21, 1971, at 1, col. 3; at 6, col. 2.

[24] N.H. Rev. Stat. Ann. §284:21-a (Repl. Vol. 1966); Act of April 18, 1967, ch. 278, [1967] Laws of N.Y. at 963; Pub. Act No. 865, §12, [1971] Conn. Pub. and Spec. Acts; Mass. Gen. Laws Ann. ch. 10, §24 (Supp. 1975); N.J. Stat. Ann. §5:9-4 (1973); Act of Aug. 26, 1971, No. 91, [1971] Laws of Pa. at 351; Law of March 14, 1974, ch. 20, §§42-61-1 to 42-61-17, [1974] R.I. Public Laws; Me. Rev. Stat. Ann. tit. 8, §§351 et seq. (Supp. 1975).

[25] C.T.C. & B. Research, "Rhode Island State Lottery: A Report on the Second Phase of Attitudinal Research for which Interviewing was done Between June 14 and 19, 1974" at 4 (No. 4-0570, July 9, 1974).

participants; there is apparently no evidence to show that the burden of the lotteries is resting disproportionately on the poor.[26]

After the first few years of legalized lotteries, however, it seems that legalized gambling is not a panacea for the states' fiscal troubles. Although lotteries do produce millions of dollars in net revenue, this represents only a small percentage of the states' total budgets. Further, lottery revenues are not easy to predict and are greatly affected by promotion and interstate competition. The New Hampshire lottery initially grossed $5 million in 1964. After the New York lottery opened in 1967, revenues plummeted to $2.5 million, and continued to shrink until 1971, when New Hampshire followed New Jersey's example and began weekly drawings. Even in New Jersey, however, lottery sales never returned to their original levels after the novelty value declined.

4. Corruption and organized crime

a. Development of organized crime

Organized crime, specifically the gambling syndicates, developed in the early 1900's. Policy and off-track bookmaking were the first syndicated types of gambling, beginning in the late 1800's.[27] At the turn of the century, financial backers coordinated policy in New York, and off-track bookmakers

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[26] Second Interim Report at 44.

[27] M. H. Haller, "Gambling and Urban Neighborhoods: A History," Testimony before the Commission on the Review of the National Policy Toward Gambling, May 28, 1975.

flourished because horseracing was prohibited in the East but not in the rest of the country.

Various factors solidified gambling syndicates. The development of the railroad led to the expansion of racing as a national sport, and those who wanted to place bets on races in other cities turned to off-track bookies. Syndicates developed to offer individual bookies the financial backing they needed. The communications industry advanced to the point where a ticker could quickly receive race results and odds from across the country. Telephones were used to relay the information gleaned from the telegraph ticker to the neighborhood bookie.[28]

The local political structure of the early 1900's also helped syndicates gain a firm foothold in urban neighborhoods. "[I]n many neighborhoods, gambling syndicates were the political machines."[29] The bookies' backers knew the residents, participated in politics, and often belonged to the police department or the judicial branch of the government. The culture of the urban neighborhood, before the advent of the automobile or the widespread use of public transportation systems, also encouraged gambling as part of everyday life. Many small local shopkeepers would take bets on horses, thus everyone became familiar with his bookie and grocer. In modern urban communities, this link no longer exists, but the gambling syndicates remain. They continue most strongly

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[28] Id.

[29] Id.

in the Black and Italian walking neighborhoods, which seem to foster the gambling syndicate as a way of life more than their suburban counterparts.[30] Today, organized criminal syndicates control an estimated 50% of all illegal gambling in the Northeast.[31]

b. New codes and enforcement statutes

Many Eastern states recently enacted new statutes to deal with gambling and organized crime. Since many of the old statutes dealt primarily and ineffectively with gaming and keepers of gaming-houses, they ignored the new forms of gambling and their relationship to organized crime.

In most states, the basic substantive criminal law relating to gambling remains unchanged, but the evidence-gathering process, sentencing procedure, and legalization of certain forms of gambling have sought to keep pace with organized crime.[32] Unfortunately, the underworld has quickly taken advantage of new technology, while the investigative methods of government prosecutors take years to catch up to such innovations. For example, bookmakers in New York used telephones for fifty years before the state authorized wiretaps. Recently, however, several states have adopted

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[30] Id.

[31] Easy Money at 9.

[32] As early as 1938, Pennsylvania had adopted a law regulating the use of telegraph wires and telephone in an effort to control illegal nationwide racetrack betting. See Act of Dec. 1, 1938, No. 45, [1938] Laws of Pa. 111, as amended by Act of June 24, 1939, No. 315, [1939] Laws of Pa. 674.

more modern approaches.[33]

Connecticut, for example, enacted a Modern Anti-Gambling Act in 1973.[34] The act makes all organized professional gambling a misdemeanor, yet exempts state-approved and social wagering from criminal sanction. Professional gambling is defined as accepting for profit anything of value risked in gambling. Any person who gambles with a professional gambler commits a criminal act, and may be punished with the operator of the scheme. All money and devices used in such operations may be forfeited to the state.[35] Two recently enacted provisions aid enforcement of these sanctions. Prosecutors may now gain a grant of transactional immunity for witnesses,[36] and wiretaps and electronic surveillance may be employed in gambling cases.[37] These provisions could be an aid in prosecuting the leaders of organized crime who are often isolated from the public and the police.[38]

To deter those violating wagering laws at racetracks,

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[33] See, N.H. Rev. Stat. Ann. §647:2 (Supp. 1973); Pa. Stat. Ann. tit. 18, §§5512 to 5514 (Supp. 1973); R. I. Gen. Laws Ann. §§12-5.1-1 and 1205.1-2 (Supp. 1974); Vt. Stat. Ann. tit. 13, §§2101 to 2177 (1974).

[34] See Conn. Gen. Stat. Ann. §§53-278a to 53-278g (Supp. 1975).

[35] Id. §53-278c.

[36] Conn. Gen. Stat. Ann. §54-47a (Supp. 1976).

[37] Conn. Gen. Stat. Ann. §§54-41a et seq. (Supp. 1976). On the use of wiretaps in gambling cases, see Electronic Surveillance: Report of the National Commission for the Review of the Federal and State Laws Relating to Wiretapping and Electronic Surveillance 607 (1976) (use recommended).

[38] The drafting of the Connecticut wiretap statute apparently leaves much to be desired. Id. at 62, 63-64.

Massachusetts penalizes anyone who uses a telephone to place or accept bets.[39] When an individual has been convicted of an illegal gambling activity, he cannot have a telephone re-installed without written approval of both the head of the local police department, and the state police.[40] Massachusetts also punishes organized crime leaders through special legislation directed at anyone who "knowingly supervises, manages or finances at least four persons" in illegal gambing activities.[41] A "supervising" provision such as this is directed at those on the top, the managers of illegal gambling organizations.

c. Philadelphia--a case study of a city

Philadelphia illustrates the relationship between gambling, corruption, and organized crime in a large urgan center. Philadelphia's populace has voiced little moral or religious objection to gambling. Numbers and bookmaking, the two most popular forms, moreover, are completely controlled by illegal operators.

As stated earlier, a successful illegal gambling enterprise, and especially the numbers rackets, requires high public visibility and accessibility. These schemes rely on a large number of small bets, placed in local bars and shops, to net

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[39]Mass. Gen. Laws Ann. ch. 271, §17A (Supp. 1975).

[40]Mass. Gen. Laws Ann. ch. 271, §47 (Supp. 1975).

[41]Id. §16A.

large profits. Thus, an elaborate pay-off system has developed in Philadelphia to guard against police harrassment of numbers runners and bookies.[42]

The numbers racket is the largest and the most highly organized illegal gambling activity in Philadelphia. The city is divided into several districts, and the handle of just one major "bank" within a district may involve millions of dollars per year.[43] Off-track and sports betting is often placed through the same people who write numbers.

Although the police made thousands of arrests for violations of the gambling laws, for example, in 1974, only 2% resulted in jail sentences.[44] Largely formalities, these arrests served only to crowd the court calendar and make the police look busy. The organizers, bankers, and backers have little contact with the public or the police and are rarely arrested. In fact, the police extort so much money in payoffs that the individual bettor is hurt. The return on a numbers bet is lower in Philadelphia than in New York.[45] Unfortunately, Philadelphia typifies the modern urban gambling problem in the Northeast. But if Philadelphia is typical of the problems

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[42]Pennsylvania Crime Commission, Report on Police Corruption and the Quality of Law Enforcement in Philadelphia 100 (1974).

[43]Pennsylvania Crime Commission, Report on Organized Crime 27-29 (1970).

[44]Statement of J. R. Glancey, President Judge of the Philadelphia Municipal Court, 1975 Philadelphia Hearings.

[45]Statement of Walter Phillips, Jr., Deputy Attorney General, Office of the Special Prosecutor, 1975 Philadelphia Hearings.

of the urban center, New York can be said to illustrate in its own unique way all of the issues that have arisen in the Northeast in the development of the law in an urban state. It warrants a more detailed examination.

D. New York--A Detailed Picture

1. The colonial era: 1524-1776

a. Historical background

Although the area now known as New York was first discovered in 1524 by Giovanni de Verrazano, a Florentine in the service of the French king, actual settlement of the region did not begin until 1624, when the Dutch West India Company established Fort Orange (Albany) and New Amsterdam (Manhattan). The Dutch gained a foothold in this area in 1609 when Henry Hudson, an English mariner employed by the Dutch to find a new route to India, happened upon the Hudson River, which he mistook for the much sought-after passage to the Orient. Further explorations of the river and its environs revealed the potential for a successful fur trade and inspired the Dutch West India Company to settle the area which was generally known as New Netherlands.

The Dutch in New Netherlands were primarily interested in making high profits from the fur trade.[46] In contrast to the Puritans of Massachusetts, neither permanent settlement of the region nor religion was of great importance to the

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[46] According to a 1638 report to the States-General of Holland "Nothing comes from New Netherland but beaver skins, mincks, and other furs." D. Ellis et al., A History of New York State 19 (rev. ed. 1967) [hereinafter cited as Ellis].

Dutch. As one historian has described them,

> The Dutch were concerned with neither the conversion of the Indians to the "true faith" nor the establishment of a wilderness Zion ruled by God's elect. 47

Many of the Dutch settlers of this time were "rough and unruly characters who became notorious for their addiction to strong drink."[48] Gaming and gambling were also widespread in New Netherlands. The Dutch were great enthusiasts of bowling and were also very fond of betting on a card game known as lansquenet.[49] Given the secular orientation of both the leaders and settlers of New Netherlands, it is not surprising that there were few early prohibitions against gaming and gambling.

From its earliest years, New Netherlands was also unique among the American settlements for the heterogeneity of its population. The first shipload of settlers to arrive consisted primarily of French Protestants, although the Dutch soon became a majority. By 1644, one visitor to New Amsterdam observed that eighteen different languages were spoken by the fewer than 1,000 inhabitants and that the settlement had the "arrogance of Babel."[50] The same religious toleration which had made the Netherlands a haven for persecuted religious groups, such as the Pilgrims, made

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[47] Id. at 26.

[48] Id.

[49] H. Chafetz, Play the Devil 14 (1960) [hereinafter cited as Chafetz].

[50] Ellis at 21.

New Netherlands a similarly attractive area. Large numbers of Jews, Catholics, Germans, French and Scandinavians,including many who first settled in neighboring colonies, moved to New Netherlands. Slaves brought from Angola and Brazil formed the core for the largest Black population north of the Mason-Dixon line.[51]

New Netherlands prospered and its economy diversified during the middle of the seventeenth century. The excellent harbors around New Amsterdam led to the rise of great numbers of mercantile establishments. A solid middle class evolved and farming became widespread. By the mid-1660's New Amsterdam alone had over 2,000 residents and was expanding rapidly.

b. First gaming laws

During this expansion the first mention of gaming appeared in the law. In 1656 an ordinance was passed to enforce proper observance of the Sabbath.[52] Among the amusements prohibited by the law were card playing, tick-tacking (a type of backgammon), playing at bowls, and minepinning. Unlike the Puritan colonies' legislation, however, the New Netherlands' ordinance only banned these amusements during hours when services were held. To the secular Dutch, the remainder of the Sabbath was like any other day.

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[51] Id. The diversity of New York's population exists today. Religious denominations in 1965 broke down roughly along the following lines:

	New York City	New York State
Roman Catholic	49%	40%
Protestant	23%	40%
Jewish	27%	15%

Id. at 659

[52] Ordinance of Oct. 26, 1656, [1638-1674] Laws and Ordinances of New Netherland (O'Callaghan ed. 1868) 258-63 [hereinafter cited as Laws of New Netherland].

Gaming and gambling per se were opposed in only one circumstance--when they occurred aboard ship. Citing the fact that "many misfortunes occur through gambling and diceing", an ordinance of 1656 declared that

> . . . no person shall bring or make on board any dice, cards, or any other implements of gaming, on pain of being placed eight days in irons, on bread and water . . . 53

The severity of the gambling problem aboard ships may be judged from the fact that penalties for illegal gambling exceeded those for fist fights or using tobacco, which was considered a fire hazard.[54]

The pragmatic need to avoid dissention while on long voyages rather than any moral considerations appears to have motivated the prohibition of gambling aboard ships, for the law permitted ships' captains to make exceptions to the ordinance and permit gaming for pastime.

The penalties for betting aboard ship required that the winner return any winnings to the loser. If he refused to do so, the money would be deducted from his pay. Both the winner and loser were also subject to a fine "at the discretion of the ship's council" or any other punishment found proper.[55]

c. English influence

The 1650's presented serious political challenges to

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[53] Ordinance of Dec. 18, 1656, tit. 11, Laws of New Netherland at 282.

[54] Id. at 282-83.

[55] Id.

the Dutch rule in New Netherlands. The settlers resented Governor Peter Stuyvesant's autocratic manner. Moreover, Connecticut and Massachusetts were laying claim to Dutch territory and the Indians were in rebellion. The much weakened Dutch rule ended in 1660 when Charles II of England, annoyed by New Amsterdam's interference with British trade, awarded most of the New Netherlands territory to his brother James, the Duke of York and Albany. Several English warships were sent to the area. At first Stuyvesant attempted to oppose the take over, but when the people refused to support him, the English prevailed with ease. The new rulers wisely permitted the established settlers to retain their property and businesses, thus avoiding friction during the transition of power.

Both the English and other Northeastern colonists, however, strongly opposed open public gambling. The tone of the law as it pertained to gambling began to undergo a subtle change during the English rule. It became more concerned with proper standards of behavior than the Dutch law had been. In 1673, sheriffs were commanded to "take good care that the places under [their] charge shall be cleansed of all mobs, gamblers, whore-houses and such like impurities."[56]

During the last decades of the seventeenth century,

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[56] Ordinance of Oct. 1, 1673, art. 13, (1638-1674) Laws of New Netherland at 479. See also Ordinance of Nov. 8, 1673, art. 12, id. at 487; Ordinance of Jan. 15, 1674, art. 13, id. at 515.

the English governors experienced frustration in attempting to make New York a successful profit-making investment. Boundary debates with neighboring colonies, wars against the French and Indians, and the difficulty of controlling trade made New York an expensive and difficult colony to govern. The people demanded more self-government; for at the time, New York lacked a powerful popular legislature. The law was promulgated exclusively by the governors. The people were, however, finally granted limited self-rule through a legislative body known as the General Assembly.

(1) Criminal statutes

Although gambling was apparently widespread throughout the first part of the eighteenth century, it was not until 1741 that the General Assembly passed its first anti-gambling law. This law was apparently prompted by the realization that

> . . . gaming in the Colony of New York at Taverns & Other Publick Houses for Moneys or strong Liquor hath by Fatal Experience been found to be Attended with many evil Consequences, not only by Corrupting and Vitiating the Manners of many of the People of the said Colony Encouraging Them to Idleness, Deceit & many other Immoralities, but hath moreover a manifest Tendency to the Ruin of many. 57

Severe penalties were imposed on tavern keepers and inn-keepers who permitted billiard, truck, or shuffleboard equipment within their establishments. Anyone who sold liquor was forbidden to permit either youths under 21 or

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57 Act of Nov. 27, 1741, ch. 722, 3 Laws of the Colony of N.Y. (1739-1755) 194-95 [hereinafter cited as Gaming Act of 1741]. Re-enacted by Act of Nov. 20, 1745, ch. 796, 3 [1739-1755] Laws of the Colony of N.Y. 460-62.

apprentices to gamble with cards or dice under pain of a fine for any violation.[58] The youth or apprentice found mixing his drinking with gambling was also subject to a fine.[59] As with the anti-gambling laws of many other colonies, this law provided incentives to informants by giving them half of the fine collected. The other went to the local poor.[60]

On the eve of the American Revolution, the General Assembly also passed "An Act for the better preventing of excessive and deceitful Gaming."[61] This law contained both civil and criminal sanctions; the civil sanctions were based on the Statute of Anne.[62]

(2) Civil remedies

Under the civil sanctions, all conveyances and securities

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[58] Gaming Act of 1741 at 195. The significance of controlling gambling in taverns should not be underestimated. Social life centered around these institutions which provided newspapers, special rooms for negotiating business deals, and, of course, refreshments.

By 1772 there was an estimated ratio of one tavern for every fifty-five inhabitants of New York City. Moreover, these taverns catered to different classes of society, so that one could find special taverns for the wealthy and more modest ones, known as grog-houses, for the poor.

[59] Id.

[60] Id.

[61] Act of March 9, 1774, ch. 1651, 5 [1769-1775] Laws of the Colony of N.Y. (1769-1775) 621-24.

[62] 9 Anne c. 14 (1710). These same civil disincentives still exist today in N.Y. Gen. Oblig. Law §5-413 (Supp. 1975-1976).

made in consideration of winning from "Cards, Dice, Tables, Tennis, Bowls, or [any] other . . . Games" were void.[63] Further, reimbursement of money knowingly lent for such gambling was prohibited.[64] As a fruther disincentive, losers of more than £10 could recover their losses from the winner, provided the recovery suit was brought within three months of loss.[65] After that time, any person could sue the winner and recover three times the amount he had won. One half of this recovery went to support the poor and the other half was awarded to the suing party.[66] To ease the burden of prosecuting such cases, the law provided for special means of compelling testimony.[67]

The criminal aspects of the law were primarily aimed at discouraging cheating and professional gambling. Cheaters forfeited five times their winnings and were punished as perjureres. Those who won excessive amounts suffered the same penalty.[68] Professional gamblers were described as

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[63] Act of March 9, 1774, ch. 1651, 5 [1769-1775] Laws of the Colony of N.Y. 621-22. It is significant to note here that not all gambling, but merely casino-like gambling based on these specific games, was condemned. A few decades later a more generalized anti-betting law was to be passed.

[64] Id.

[65] Id. at 622.

[66] Id. at 623.

[67] Id. The law permitted the court to compel testimony under oath from persons liable under these provisions.

[68] Id. at 624.

"leud [sic] and dissolute Persons" who lived "at great Expences, having no visible Estate, Profession or Calling to maintain themselves, but support those Expences by gaming only,"[69] and were required to post bond for their good behavior or face an indefinite term in jail.[70]

d. Lotteries

New York's early attempts to control lotteries appear to have been economically and pragmatically motivated in the same way as the first anti-gambling laws.[71] Along with the other colonies, New York was plagued by a currency shortage throughout most of the early seventeenth century. Thus, it was extremely difficult to sell expensive property, since few buyers could afford high prices. The lottery allowed the seller to realize his price and appeared to satisfy the buyers who, in Thomas Jefferson's words, "[ran] small risks for the chance of obtaining a high prize."[72] This method proved valuable to John Blood, for example, who in 1746 was

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[69] Id.

[70] Id. Some accounts indicate that the law did not deter gambling, for New York City at the end of the 17th century was described as a place where:

> There were farces and pantomimes, revels, masked balls, bull baiting, horse races, cock fighting and other public diversions. Jessamines (dandies) and primped-up women followed sporting events and gambled freely.

See Chafetz at 17.

[71] Cf. Chafetz at 20-21.

[72] J. Ezell, Fortune's Merry Wheel 13 (1960) [hereinafter cited as Ezell].

able ". . . to dispose of a brick house, an annuity of five pounds, [and] numerous lots in New Jersey . . . " by selling 2,000 chances at thirty shillings each.[73]

For all their utility, lotteries also provided unique opportunities for cheating, and these possibilities motivated the Assembly in 1721 to pass New York's first lottery control law.[74] The Assembly was concerned with

> . . . the Vending and Disposing of Goods, Wares, and Merchandize by way of Lottery, Raffling, Ballating and Voluntary Subscribtion, or otherways, that Determines and alters the Property of Goods by Lot, as Shall fall by Chance, having been Used and Practised to the Manifest prejudice of Trade, and Obstructions of Commerce and Vendues, and proved of pernicious Consequence to Merchants, Shop-keepers and Traders, by which great Frauds have been and Dayly are Committed in the Goodness and Quality of Such Goods, wares and Merchandize, as well as the Value thereof, by which there has been Some times Double the Vallue advanced and put on the commodities, beyond their Intrinsick worth. 75

The Assembly imposed a fine equal to double the value of the property being offered as a prize on anyone who set up an unauthorized lottery.[76]

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[73] Id. at 14.

[74] Act of July 27, 1721, ch. 411, 2 [1720-1737] Laws of the Colony of N.Y. 61. This act was substantially re-enacted by the Act of Nov. 25, 1747, ch. 856, 3 [1739-1755] Laws of the Colony of New York 675-76. It is important to note that this law did not prohibit lotteries per se. Rather, it merely outlawed unauthorized lotteries. A private lottery then being conducted by a William Lake was, for example, explicitly exempted from the law's prohibitions.

[75] Act of July 27, 1721, ch. 411, 2 [1720-1737] Laws of the Colony of N.Y. 61.

[76] Id.

In spite of the 1721 statute, lotteries continued to flourish, often with official sanction. Between 1746 and 1774, the General Assembly passed more than a dozen acts authorizing public lotteries for such projects as the establishment of Kings College (Columbia University),[77] the fortification of New York City,[78] the construction of a lighthouse at Sandy Nook,[79] and the erection of a jail.[80]

The propularity of many of these public lotteries was not always great, in part because of competition from lotteries in neighboring states. To protect the success of its own enterprises, New York in 1759 imposed a fine of £1 on anyone who sold foreign lottery tickets within the state.[81] Half the penalty was awarded to the informant who brought such violations to the attention of the authorities, the other half went to the poor.[82]

Despite this added protection, New York continued to experience difficulty with its lotteries, several of which had

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[77] Act of Dec. 6, 1746, ch. 840, 3 [1739-1755] Laws of the Colony of N.Y. 607.

[78] Act of Feb. 27, 1746, ch. 817, id. at 528.

[79] Act of May 19, 1761, ch. 1147, 4 [1755-1769] Laws of the Colony of N.Y. 524.

[80] Act of Dec. 1, 1756, ch. 1032, id. at 126

[81] Act of Dec. 24, 1759, ch. 1100, id. at 377-78.

[82] Id.

to be postponed or cancelled.[83] Finally, in 1772, the Assembly enacted a comprehensive anti-lottery statute[84] which condemned the commercial harm caused by lotteries and cited their tendency to encourage idleness, fraud, and impoverishment as well as their ability to engender ". . . a dangerous spirit of Gaming."[85]

The 1772 law declared all unauthorized lotteries to be common nuisances, regardless of whether they were public or private, irrespective of ". . . whatever Name Denomination or Title [they] may be called known or distinguished. . . ."[86] Those found promoting prohibited lotteries, or buying or selling their tickets were subject to fines or imprisonment if the fines went unpaid.[87] The law also contained several incentives to encourage informants to report on illegal lottery activity. Informers could collect the winnings of those prosecuted. Moreover, immunity from prosecution was granted to lottery participants who cooperated with the authorities.[88]

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[83] Ezell at 34-38.

[84] Act of March 24, 1772, ch. 1542, 5 [1769-1775] Laws of the Colony of N.Y. 351-54 [hereinafter referred to as the Lottery Act of 1772].

[85] Id. at 352.

[86] Id.

[87] Id.

[88] Id. at 353. Buyers of lottery tickets who helped convict a lottery operator were not only immune from prosecution but were also entitled to sue the operators for double the price of the tickets as well as court costs.

The seriousness of the lottery problem can be seen in the severe manner in which the 1772 law allowed evidence to be obtained.[89] If any justice of the peace had reasonable cause to suspect illegal lottery activity, he could summon all parties believed to have knowledge of it. These parties, although granted immunity, were compelled to answer all questions, even incriminating ones. Refusal to answer resulted in imprisonment until the recalcitrant witness chose to cooperate. All public officials were commanded to oppose illegal lotteries with vigor.[90]

As with the 1774 gambling law,[91] the 1772 lottery statute included civil sanctions. All transfers of land or chattels resulting from an illegal lottery were declared void.[92] This law remained in effect until after the American Revolution.[93]

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[89] Id. at 354.

[90] Id.

[91] Act of March 9, 1774, ch. 1651, 5 [1769-1775] Laws of the Colony of N.Y. 621-24.

[92] Lottery Act of 1772 at 354.

[93] Id. The Lottery Act of 1772 was re-enacted in 1774 with a single addition, giving court justices the power and the duty to order grand jury investigations of violations of the act and to prosecute indictment. Act of March 9, 1774, ch. 1655, 5 [1769-1775] Laws of the Colony of N.Y. 639-42. During the Revolution patriotic groups resorted to clandestine lotteries to help finance the rebels' cause. The British, therefore, vigorously used the 1774 law as a means of frustrating the rebels. In 1783 when the Revolution was over, the New York state legislature pardoned all those who had been convicted under this law for activities occurring after July 4, 1776. See Act of Feb. 14, 1783, ch. 12, [1782-1784] Laws of N.Y. 269.

e. Horseracing

Prior to the Revolution, New York permitted horseracing within its bounds. New York's policy was more closely aligned with its Southern rather than its Northern neighbors'. The first English governor of New Netherlands, Colonel Richard Nicolls, established the state's first race track in 1664 at a place near Garden City, Long Island.[94] It was at Newmarket, as the track was called, that America's first horserace for a prize was run in 1666.[95] Throughout the seventeenth and eighteenth centuries horseracing on Long Island was a passion of New York's aristocratic upper class. Elsewhere, the poorer folk held races along highways, and betting usually accompanied them.[96]

In 1774, the Continental Congress attempted to divert the peoples' energies from frivolity to the more serious political problems of the day. In so doing, it called upon the colonies to

> . . . discountenance and discourage every Species of Extravagance and Dissipation, especially all Horse Racing, and all Kinds of gaming, Cock Fighting 97

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[94] Chafetz at 18.

[95] Id.

[96] Id.

[97] F. Dulles, A History of Recreation at 65 (2d ed. 1965) [hereinafter cited as Dulles].

Nevertheless, when a New York justice attempted to apply this request to horseracing he was unable to empanel a jury.[98]

A series of expensive wars during the late seventeenth and early eighteenth centuries plagued the English rule in both New York and other colonies.[99] Huge debts were created, which the British attempted to diminish by increasing colonial taxes. New York merchants were among the leaders of colonial resistance to the various tariffs and taxes imposed in the middle and late eighteenth century. When the infamous Stamp Act was passed,[1] New York City hosted the Stamp Act Congress which, in 1765, developed a plan to harass stamp officials and boycott British goods.[2]

Although there were more Loyalists in New York than in any other colony, power passed to the rebels after the battle

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[98] Chafetz at 28.

[99] Among the major wars was a series between England and France: King William's War, 1689-1697; Queen Anne's War, 1702-1713; King George's War, 1739-1748; and the French and Indian War, 1754-1763.

[1] The Stamp Act of 1765 was Parliament's first direct tax upon America. Its goal was to raise £60,000 annually through taxes on newspapers, almanacs, all types of legal papers, insurance policies, licenses, and dice and playing cards. Because it affected all the colonies and hit particularly hard at the professional and upper middle classes, the law evoked immediate and widespread opposition.

[2] The New York-led boycott was so successful that within a year Parliament, faced with a decline of over 20 percent in its colonial trade, repealed the act. It is true that the Act was repealed, but Parliament did not yield on the issue of principle. When the Stamp Act was repealed, another act was passed "asserting the right of the mother-country to tax the colonies, but at the time little notice was taken of it in the colonies in the general rejoicing at the repeal." R. Harris, A Short History of 18th Century England 1689-1793 at 147 (1963).

of Lexington on April 25, 1775. On May 27, 1776 a provincial congress asserted New York's right of self-government. Finally, after ratifying the Declaration of Independence on July 9, 1776, the fourth provincial Congress approved the first New York State Constitution on April 20, 1777.[3]

2. The formative era: 1776-1890

a. Historical background and reception

Because of its location in the middle of the colonies, New York was a key battleground during the Revolution. The British hoped to capture it, thus isolating New England from the Southern colonies. Although New York City was indeed captured by the English, their master plan failed and by 1783 the victorious colonies had expelled the last British soldiers from Manhattan.

After the war, New York City emerged as a major American metropolis. From 1785-1790, it served as both the national and state capital. By 1786 its population exceeded 24,000 and its economy thrived. Some of the nation's first banks and insurance companies were established there and over 19 different newspapers flourished.

The Revolution did not, however, lessen New Yorkers' love of drink and gambling.[4] Taverns continued to flourish, and betting was rampant. Among popular subjects for wagering

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[3] 28. B. N.Y. Const. (1777). (Constitution of the State of N.Y. Annotated 2d ed., ed. R. Cumming et al. 1899)

[4] Chafetz at 32.

were foot races and boat races,[5] and even the number of deaths resulting from the plague in New York City and Philadelphia.[6] During the post war years, faro also became extremely popular.[7] Introduced to America by British soldiers, the game was similar to roulette except that cards were used for placing bets. By stringing together a series of wins, huge sums could be accumulated in a short time. Gambling was so widespread that Columbia University would daily exhort its students to refrain from such activities.[8]

The New York State Constitution had provided for the reception of ". . . such parts of the common law of England, and of the statute law . . . , and of the acts . . . of the colony of New York, as together did form the law of the colony on . . . " April 19th, 1775 as were compatible with the laws passed by the new state.[9] The 1774 gambling law was included in this category and remained substantially in force during this period.[10]

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[5] Id. at 222-223.

[6] Id. at 37.

[7] H. Asbury, Sucker's Progress 6 (1969) [hereinafter cited as Asbury].

[8] Chafetz at 33.

[9] New York received the Common Law of England as its own common law in the Constitution of 1777, art. 35.

[10] The law was explicitly re-enacted with only minor alterations. See Act of Feb. 20, 1788, ch. 35, [1787-1788] Laws of N.Y. 56-58. Re-enacted by Act of March 21, 1801, ch. 46, 5 [1801] Laws of N.Y. 70-72, changing £ to $.

The first new legislation concerning gambling was passed in 1801 and was again addressed explicitly to inns and taverns.[11] All forms of gaming, including cock fighting,[12] were forbidden in these establishments.[13] The courts construed this statute broadly and found, for example, in Cuscudden's Case,[14] that a licensed grocery constituted an inn or tavern within the meaning of the statute. The presence of a shuffleboard, even though no one was playing at it for money, was held to be a violation of the law.

During the early decades of the nineteenth century, the courts, too, became active in this gambling field. The keeping of a common gaming-house was held to be indictable at common law in People v. Jackson[15] because:

> . . . it draws together evil disposed persons; encourages excessive gaming, idleness, cheating and other corrupt practices; and tends to public disorder. Nothing is more likely to happen at such places than breaches of the public peace. 16

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[11] Act of April 6, 1801, ch. 164, 5 [1801] Laws of N.Y. 439.

[12] Id. §8.

[13] Id.

[14] 2 N.Y. City H. Rec. 53(Ct. Gen. Sess. 1817)

[15] 3 Denio 101, 77 C.L.R. 101 (Sup. Ct. N.Y. 1846).

[16] Id.

In People v. Sergeant,[17] the court distinguished between what it felt to be the serious harm of public gambling and the innocence of recreational gaming for purposes of private entertainment. Here, the court held that the mere keeping of a billiard room without allowing bets did not constitute a common law nuisance.[18] Nor were games played solely for recreation illegal at common law. Instead, illegal gaming required some ". . . gain and loss between the parties by betting, such as would excite a spirit of cupidity."[19]

b. Civil law

Since the gaming law of the early 1800's only prohibited wagers on casino-type games, the courts were often called upon to decide whether a given scheme constituted an illegal and therefore unenforceable wager. Again, the distinction between serious and relatively harmless activities was important In Campbell v. Richardson,[20] a court found legal an arrangement in which a palyer paid 25 cents for each shot at a target, and would win $20 if he succeeded in hitting the target. The court ordered the prize to be paid. The court justified its decision by reasoning that:

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[17] 8 Cow. 138, 40 C.L.R. 138 (Sup. Ct. N.Y., 1828).

[18] Id. The court went on to modify this broad holding with the proviso that the establishment did not fit within the 1801 Innkeepers Law.

[19] Id. at 140.

[20] 10 Johns. 406, 20 C.L.R. 405 (Sup. Ct. N.Y. 1813).

> If a wager of any kind is to be recognised as valid in law, the one made in this case, is, perhaps, as harmless, and liable to as little objection, as any that could be made. . . . [T]he common law does recognise some wagers as valid 21

Wagers on elections, however, while not forbidden by the statutory law of that era, were found illegal as violating public policy.[22] To enforce this position, the courts refused to let either party to an illegal wager invoke their aid. Thus, when a loser refused to pay the winner the amount bet, the court in Bunn v. Riker[23] declined to enforce the debt. On the other hand, in McCullom v. Gourlay,[24] the court would not help a loser recover money which he had voluntarily paid to the winner.

With the introduction of stakeholders into the betting process the court had to decide whether a loser could recover his wager from the stakeholder before it was paid to the winner. The English rule on this subject, first laid down in Cotton v. Thurland,[25] was that the equities as between the

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[21] Id. at 407.

[22] See an excellent discussion of the development of New York's common law rules regarding wagers on elections in Ruckman v. Pitcher, 1 N.Y. (1 Const.) 392, 400-407 (1848).

[23] 4 Johns. 426, 14 C.L.R. 425 (Sup. Ct. N.Y. 1809).

[24] 8 Johns. 147, 18 C.L.R. 147 (Sup. Ct. N.Y. 1811).

[25] 101 Eng. Rep. 227, 5 Term. Rep. 405 (K.B. 1793).

stakeholder and the plaintiff should be examined carefully. Following that decision, New York's eminent Chancellor Kent[26] concluded, in Vischer v. Yates,[27] that unexecuted illegal contracts should be terminated if at all possible before the winner received his money. This rule was felt to have special merit in application to election bets.

> And if gambling on elections does really lead to corruption, passion and violence, we ought anxiously to adopt every just principle to put an end to the mischievous practice. No rule which falls within the cognizance of the courts appears to me to be more fit and effectual than that which suffers the deposit money to be arrested while it is in transitu. 28

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[26] James Kent was born in Philippi, New York in 1763. The grandson of a Presbyterian minister, and son of a lawyer, Kent was educated at Yale. He became a lawyer and a devout Federalist. He served three terms in the New York Legislature before being appointed to the state supreme court, and eventually to the chancellorship.

Kent's legal philosophy was best exemplified by his opposition to abolition of the property qualification for the suffrage and his belief in "the rights of the individual as distinguished from those of the people."

Kent became a professor of law at Columbia and authored Commentaries on American Law which served as a classic text of American jurisprudence for many decades. He has also been credited with getting the New York courts to hand down written opinions.

Chancellor Kent's attitude toward vice is best exemplified by the response which he gave when a temperance committee urged him to pledge himself to refrain from drink:

> Gentlemen, I refuse to sign any pledge. I have never been drunk, and, by the blessing of God, I never will get drunk, but I have a constitutional privilege to get drunk, and that privilege I will not sign away.

5 Dictionary of American Biography 347 (1963) [hereinafter cited as Dict. of Amer. Biog.]

[27] 11 Johns. 21, 21 C.L.R. 21, (Sup. Ct. N.Y. 1814).

[28] Id. at 31.

The Court of Errors, however, reversed Chancellor Kent's decision and held that money deposited with a stakeholder upon an illegal bet could not be recovered after the contingency on which the bet depended had occurred.[29] This unprecedented holding was dismissed by Tennessee court[30] as valueless.

> But there are few lawyers who would consider the decision of a court like that, consisting of politicians fresh from the people, a majority of whom most probably belonged to the political party of the winner, as of any authority when opposed to the unanimous opinion of the Supreme Court, composed of such men as Kent and Spencer. 31

The New York legislature was equally dismayed by the Yates decision and, in 1829, it moved to amend the liberal position which the courts had followed. The gaming law was extended to make illegal all wagers depending on any lot, chance, casualty or contingent event,[32] regardless of size or the public nature of the activity. The bettor was given the right to recover all money or property paid to either

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[29]Yates v. Foot, 12 Johns. 1, 22 C.L.R. 1 (Ct. of Err. N.Y. 1814).

[30]Perkins v. Hyde 14 Tenn. (6 Yerger) 195 (1834).

[31]Id. at 198-99.

[32]Civil Polity Act, ch.XX, tit. 8, art. 3, §8, 1 N.Y. Rev. Stat. 662 (1829) [hereinafter cited as Civil Polity Act].

a stakeholder or the winner,[33] and the three month statute of limitations on recovery suits by the loser was rescinded.[34]

c. Stock exchange speculation

Gambling in New York was not limited to wagering on entertainment and sporting events.[35] As the financial capital for the growing nation, New York City thrived on speculation.[36]

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[33] Id. §§8-10. This provision was interpreted in Lewis v. Miner, 3 Denio 103, 77 C.L.R. 103 (1846) to be an explicit rejection of the Yates decision. As the Lewis court reasoned:

> . . . It is a common thing that the money or property is not paid or delivered until after the game or bet has been decided; and to hold that the loser cannot recover in such a case, would go very far towards defeating the policy of the statute. It is true, that by the payment or delivery, the party consents to part with his property; and at the common law he would have no remedy to recover it. But the statute nullifies the consent, and gives him a remedy by action.

Id. at 105.

[34] Civil Polity Act §9.

[35] In addition to wagering on cockfights and horse races, New Yorkers also found foot races, and as the century wore on, boxing, to be favorite targets for betting. Later, baseball, football, and all sorts of other apectator sports also became betting subjects. See generally Chafetz.

[36] In 1790 thousands of merchants, farmers, and veterans held soldier certificates and government notes as payment for services and losses during the war. Many of those notes were sold for cash to speculators.

Alexander Hamilton organized the Bank of the United States in New York and for the first time made the notes interest-bearing. As a result, all sorts of government pledges began appearing and speculation increased tremendously.

Script changed hands regularly, sometimes on an hourly basis. The gambling mania became so bad that James Madison told Thomas Jefferson, in 1791, that "stock-jobbing drowns every other subject. The coffeehouse is in an eternal buzz with gamblers."

By 1829, the legislature felt compelled to control the more shadowy forms of financial speculation. In that year, it passed the Stock Jobbing Act[37] which declared that all stock sales were illegal wagers when the seller did not own or otherwise possess the authority to sell the shares at the time of the sale. The courts modified this law somewhat by upholding deals in which neither party ever intended to transfer stock, but rather only wanted to pay or receive the difference between the contract price and the market price. The only criterion which the courts appeared to require to determine whether a sale was legal was that the seller owned or was otherwise authorized to sell the shares at the time the contract was made.[38]

In Dykers v. Townsend,[39] the burden of proof for establishing violation of the Stock Jobbing Act was placed on the party alleging such violation. If the law were violated by a wagering contract, money paid or advanced by either the buyer or seller could be recovered.[40] Deposits placed with a

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Many companies were founded during this time. They raised capital by issuing stock which replaced lotteries as the favorite revenue producer. As one commentator has stated "many a onetime lottery-ticket salesman now made it his business to attend public sales and buy and sell shares and scrip on a liberal commission." See Chafetz at 39-40.

[37] Stock Jobbing Act, ch. XX, tit. 19, art. 2, §§6-8, 1 N.Y. Rev. Stat. at 710 (1829) [hereinafter cited as Stock Jobbing Act].

[38] Dykers v. Townsend, 24 N.Y. (10 Smith) 57, 62 (1861).

[39] Id.

[40] Stock Jobbing Act §8.

stockbroker, however, were not recoverable because the statute did not specifically authorize recovery in the latter case.[41]

The Stock Jobbing Act was repealed in 1858.[42] Since then the courts have upheld contracts for the sale of stock, including options to buy or sell stock in the future, even though chance was a key element in the transaction.[43] As reasoned by the court in Story v. Salomon,[44] such contracts were to be deemed legal unless there were clear indications that they constituted nothing more than mere speculation on fluctuations in price with no genuine intent to accept or deliver the stocks. Thus, from 1858 on, both the legislature and the courts encouraged the financial speculation which was to become essential to the economic development of both

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[41] Staples v. Gould, 9 N.Y. (5 Seld.) 520 (1854).

[42] Act of April 10, 1858, ch. 134, §§1 et seq., [1858] Laws of N.Y. 251.

[43] Story v. Saloman, 71 N.Y. (26 Sick.) 420 (1877).

[44] Id.

the state and the nation.[45]

d. Reform movement and Green Law

During the 1830's and 40's, New York was gripped by the evangelical Christian reform movement experienced in differing forms in many parts of the country.[46] The impact of this movement was felt most strongly in the northern and western portions of the state, most probably because of the large number of New England Protestants who had settled in those areas. After regeneration of the human soul and purification of the churches, the energetic missionaries turned their attention to reforming society. Liquor, slavery, the lack of institutions for the poor, and women's status as second-class citizens all came under attack.

Liquor evoked more concern than any of the other evils, because of its reputed popularity among the people, particularly

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[45]The extraordinary economic development of the 19th century naturally attracted many "gamblers" to the financial industry. One of the most infamous examples of 19th century speculation was Jay Gould's plot, in 1868, to corner the $25 million pool of circulating gold. He steadily bought up gold, convinced friends to do similarly, and prevailed upon President Grant not to release Federal gold reserves since that would deflate the currency.

When market pressures forced gold prices down in 1869 Gould bought between $50 and $100 million of gold credit. Sensing that the government was beginning to turn against him, Gould sold all his gold interests just before Friday, September 22, 1869. On that day, known as Black Friday, feverish gold trading led President Grant to release Federal gold reserves. Gould protected his friends throughout all this by helping them declare bankruptcy and then providing them with annuities. When ruined speculators tried to sue the brokers they were met with their bankruptcy, and when they tried to sue Gould, Boss Tweed's Tammany Hall interceded with the court. Gould cleared $11 million. Chafetz at 351-61.

[46]Ellis at 300.

the rapidly expanding class of urban poor.[47] Reformers such as Horace Greeley[48] led what began as a temperance movement in the 1830's, and reached a peak of total abstinence by the 1850's. Over 100,000 New Yorkers belonged to the New York State Temperance Society. In 1854, a coalition of "drys," upstate farmers, evangelical Protestants, and "native borns" succeeded in getting the Legislature to pass a prohibition law which Governor Horatio Seymour vetoed. The new governor, Myron Clark, approved a similar law the next year, but it

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[47]The temperance movement may well represent a subtle form of various kinds of prejudice. It was primarily an upstate, agrarian movement which had its greatest impact on urban areas. Moreover it was a Protestant cause while the mostly Catholic immigrants were usually opposed to prohibition.

[48]One of the most interesting and contradictory personalities in American history, this conservative crusader had a significant influence on American politics during the middle 1800's. He rose from humble beginnings in New Hampshire and Vermont to attain success as the founder and editor of the New York Tribune, traveler, lecturer, and author. Always active in politics he was one of the founders of the Republican party, after having been an active Whig for many years. An indefatiguable reformer, he championed at different times in his life numerous moral and social movements, including those calling for the training and education of the masses, justice for immigrants, an end to slavery, a homestead law, and a compassionate reconstruction. Following the death of his wife and a difficult campaign as the Liberal Republican and Democratic candidate for President, he died a broken man in Pleasantville, New York. IV Dict. of Amer. Biog. 528 (1963).

During the campaign to get the legislature to combat gambling Greeley wrote:

> . . . not less than five millions of dollars are annually won from fools and shallow knaves, by blacklegs, in this city alone; and not less than a thousand young men are annually ruined by them. . . . But our present laws are very defective and our police either bribed or powerless.

was soon declared invalid by the Court of Appeals.[49] Even if the court had not struck down the law, enforcement would probably not have been effective because city officials, bowed to the political pressure of saloon keepers and immigrants, had refused to respect the law.

Gambling underwent similar treatment during the reform era. In 1851, the New York Association for the Suppression of Gambling was established.[50] Founded by Horace Greeley and led by Jonathan Green,[51] this organization sought to

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[49] Ellis at 309-10.

[50] Chafetz at 92-95.

[51] Jonathan F. Green, was known throughout mid-19th century America as "the reformed gambler." After spending twelve years in the Ohio and Mississippi Valleys as a swindler, card shark, and dice genius, Green reformed. He published several books on the rules of gambling, including An Exposure of the Arts and Miseries of Gambling in 1843, in which he stated that:

> [F]irst, all gamblers were thieves; secondly, that they never played on the square; thirdly, that faro had less percentage than any other banking game, and that it was twenty per cent worse than stealing anyhow.

Green also worked the lecture circuit. One of his most effective presentations, which involved volunteers from the audience, demonstrated various ways in which the innocent player could be cheated.

Green finally arrived in New York in pursuit of hundreds of gamblers who had poured into New York when Louisiana and river valley authorities started to crack down on them. In 1851, Green chastised New York because it "encouraged, caressed and honored" these gamblers.

While Horace Greeley in the New York Tribune defended Green's position and urged support of the new anti-gambling bill before the legislature, gamblers and their supporters ran articles in another paper urging that every effort be made to "stifle this child of the Reformed Gambler." Silas W. Spaulding, a former

"expose" gambling establishments.[52] The Green Law of 1851[53] represented New York's toughest gambling law up to that time, with minimum fines mandated for anyone found guilty of keeping a gambling establishment,[54] exhibiting gambling devices,[55] or assisting in any banking game.[56] The law also called for the destruction of gambling devices.[57] A unique provision of

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agent for Green's books, was enlisted by these anti-Green forces to get him arrested for obtaining money and goods under false pretenses. Green was exonerated after spending some time in prison awaiting trial.

While imprisoned his wallet was taken and when Spaulding's people found two Treasury notes and some counterfeit bills in it. he was rearrested. After spending four days in jail Green got a hearing at which he revealed that for over a year he had been an undercover agent for the Secret Service, specializing in tracking down counterfeiters. The bills had been part of his arsenal of tricks for capturing crooks.

Green became ill after this ordeal and spent time recuperating at home. Horace Greeley wrote of him at that time:

> We greatly needed his service here to watch the operation, and defeat the snares, of the gamblers, who are more numerous, daring, and most pernicious. . . .

Green returned from his home to fight for passage of the 1851 anti-gambling statute known as the Green Law. In 1852 he retired from the anti-gambling crusade and spent the rest of his life in relative anonymity.

For further discussion, see Chafetz at 87-95.

[52] Id.

[53] Act of July 10, 1851, ch. 504, §§1 et seq., [1851] Laws of N.Y. 943-45.

[54] Id. §1.

[55] Id. §2

[56] Id.

[57] Id. §3.

the statute placed liability for gambling losses on any person who inveigled another into visiting a gambling place.[58] The enticer, himself, was subject to mandatory imprisonment at hard labor.[59] To counter the recalcitrance of police personnel to enforce the gambling legislation, the law imposed a misdemeanor sanction on public officials who refused to enforce its provisions.[60]

e. Political corruption

Despite its tough language, the Green Law failed to achieve its goal of eradicating gambling. The continued popularity of the activity under attack led both public officials and citizens to defy the law. Moreover, gambling was not just a favorite pastime in urban areas. An estimated 6 percent of all New York City dwellers looked to the gambling industry for their employment.[61]

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[58] Id. §5.

[59] Id.

[60] Id. §6.

[61] Chafetz at 228. Another estimate made by a German visitor to New York City during the mid-century was that

> [i]n New York City some 30,000 people earn a living from gambling and from similar branches of industry. It is clear, then, that no recent events have been able to stifle the love of gaming in the hearts of people . . .

O. Handlin, This Was America 326 (1949), [hereinafter cited as Handlin].

Between 1825 and 1855, New York State experienced a doubling of its population, primarily as a result of immigration. Many of these immigrants came from Eastern European or Catholic backgrounds, and brought with them none of the Protestant compunctions against gambling. Further, the bulk of this increase occurred in urban areas. By 1855, one fourth of the state's population, and nearly one half of Manhattan's inhabitants were foreign born, the majority of whom came from Ireland and Germany. Densely populated enclaves of immigrants developed in the cities. The crowded conditions in which they lived, their poverty, the difficulty of coping with a new language, and cultural barriers contributed to making these people prime supporters for the corrupt machine politics[62] which were to characterize many of the governments of New York City and state throughout the last half of the nineteenth century.

Machine politics, in turn, may well have contributed to the ineffectiveness of attempts to control gambling, liquor, and other forms of vice. During the time of the Green Law, New York City's mayor, district attorney, and police commissioner were controlled by Tammany Hall politicians who had strong political and economic reasons for protecting

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[62] "Machine Politics" is a generic term which refers to the type of political activity common to many state and local governments in which a dominant personality or faction has seized control. It is often characterized by its ruthless control over the decision-making elements of the governmental apparatus, its refusal to tolerate the actions of any rival faction, and its willingness to use the governmental apparatus against those who dare to challenge it.

the gambling industry.[63] The commissioner, who for a long time actually claimed to be ignorant of the law, finally declined to enforce it.[64] One local magistrate declared the law unconstitutional and refused to issue warrants under it.[65] The prosecution of one of the city's biggest policy-makers was dismissed when critical evidence was "lost."[66]

The most vivid example of the political atmosphere of the mid-century and how it affected gambling law was the life of John Morrissey.[67] Born in Ireland in 1834, Morrissey came to New York City as a child. In his youth he became known as an extraordinary street fighter, and by the time he was twenty he headed a gang of over 1,000 toughs. After a brief career as a prize fighter he opened a series of "class" gambling establishments which attracted politicians, gentlemen, and "the fancy" of New York. In order to make a profit, these places carefully stacked the odds in favor of the house.

Morrissey made several million dollars from these establishments and used this money to start big-time casino gambling at Saratoga Springs in 1861. By 1867 his influence there enabled him to found the Saratoga Racetrack and Club House, which became a favorite resort for the East Coast

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[63] Chafetz at 275-77.

[64] Id. at 227.

[65] Id.

[66] Id. at 275-77.

[67] For a more detailed account of Morrissey see Chafetz at 271-96.

elite.[68]

Using his money to support politicians, he succeeded in preventing strict enforcement of the Green Law vis-a-vis his businesses. With support from Tammany Hall's Boss Tweed, Morrissey became a Congressman from 1866 to 1870. Ironically, Morrissey lost his gambling fortune in another more legitimate segment of New York's "gambling life." At Saratoga, Morrissey had become a friend of Commodore Cornelius Vanderbilt, who enticed Morrissey into the stock market. Morrissey died in 1878, leaving only a small portion of his original wealth.

After the collapse of the reform movement of the 1850's, New York was wide open to gambling. Both the rich and the poor gambled, each in a different setting. The affluent frequented places such as those established by Morrissey and described by one European observer as "extravagantly decorated salons furnished with every luxury."[69] Buffets were laden with fine food. Brandy cost "as little as the food--at most, a tip to the Negro waiters on leaving."[70] The better places had secret devices for opening the door and many charged admission fees.[71] They were often

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[68] Id. at 282.

[69] Handlin at 327.

[70] Id.

[71] Id.

> . . . furnished with every comfort; thick carpets, marble tables, alabaster figurines, gilded mirrors, soft chairs, and velvet drapes. . . . 72

For the poorer gambler, poolrooms were available. They usually housed a telephone, a telegraph, a ticker tape machine, and a blackboard, thereby enabling those too poor to go to the track to bet on the horses.[73] To discourage these establishments, reformers put pressure on Western Union which finally agreed to stop servicing poolrooms.[74] Popular, too, during this time were bingo (then known as keno) establishments:

> In the busiest districts of New York, in the vicinity of the theaters and other pleasure spots, are scores of keno houses, open and accessible to all, often separated from a bar only by a swinging door. 75

f. 1871 Reform Movement

In 1871, an anti-corruption campaign, led to a large degree by George Jones, editor of The New York Times, succeeded in removing the Tweed Ring from Tammany Hall. Although this did not result in the abolition of corrupt politics in New York, its impact was lessened. From 1875 to 1895, a series of able governors including Samuel J. Tilden,

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[72] Id.

[73] Chafetz at 375-76.

[74] Id. at 380-81.

[75] Handlin at 328.

Grover Cleveland, and David B. Hill helped bring about a new spirit of reform.[76]

Under the new Penal Code of 1881,[77] being a common gambler was a misdemeanor. A common gambler was defined broadly as anyone who:

> . . . is the owner, agent, or superintendent of a place, or of any device, or apparatus, for gambling; or who hires, or allows to be used a room, table, establishment or apparatus for such purpose; or who engages as dealer, gamekeeper, or player in any gambling or banking game, where money or property is dependent upon the result; or who sells or offers to sell what are commonly called lottery policies, or any writing, paper, or document in the nature of a bet, wager, or insurance upon the drawing or drawn numbers of any public or private lottery; or who indorses or uses a book, or other document, for the purpose of enabling others to sell, or offer to sell, lottery policies, or other such writings, papers, or documents, is a common gambler. . . .[78]

Although the language of this provision appeared to make even the casual gambler subject to a fine or imprisonment, the courts again helped to tailor this legislation to political reality. They interpreted the statute and its subsequent re-enactments as aiming only at those involved in gambling

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[76] Ellis at 361-75.

[77] Act of July 26, 1881, ch. 676, tit.X, ch. IX, §§336-352 3 [1881] Laws of N.Y. [The Penal Code] 82-87 [hereinafter cited as Penal Code of 1881]. (Substantially re-enacted by the Act of March 12, 1909, ch. 88, 1 [1909] Laws of N.Y. 141).

[78] Id. §344 at 84-85.

as a "systematic, organized business,"[79] and not at those engaged in "ordinary betting."[80]

The 1881 Penal Code also contained the first statutory provision specifically directed at bookmaking. Registering bets or selling pools on any race or election, keeping a place for such activities, or knowingly allowing one's premises to be so used were activities punishable by imprisonment for one year or by a fine not exceeding $2000 or both.[81]

g. Lotteries and numbers

Just as gambling refused to die in the nineteenth century, so did lottery activities continue to flourish, despite attempts to control and abolish them. The first post-Revolution lottery law was enacted in 1783.[82] In addition to pardoning lottery offenders and preserving most of the pre-war lottery law, this statute expressed New York's position that only lotteries authorized by the state legislature would be tolerated.[83] Between 1783 and 1821, the legislature passed

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[79] Bamman v. Erikson, 288 N.Y. 133, 136, 41 N.E. 2d 920, 923 (1942).

[80] Watts v. Malatesta, 262 N.Y. 30, 186 N.E. 210 (1933).

[81] Penal Code of 1881 §351.

[82] Act of Feb. 14, 1783, ch.12, [1782-1784] Laws of N.Y. 269-70, as amended by Act of Feb. 25, 1813, ch. 10, §§1 et seq., 2 N.Y. Rev. Laws (1813) 187-91. The provision against promoting unauthorized lotteries. Id.

[83] For case law supporting this position see Hunt v. Knickerbacker, 5 Johns. 327, 15 C.L.R. (Sup. Ct. N.Y. 1810). See also People v. Sturdevant, 23 Wend. 418, 64 C.L.R. 418 (Sup. Ct. N.Y. 1840); People v. Charles, 3 Denio 212, 77 C.L.R. 212 (Sup. Ct. N.Y. 1846), aff. sub nom., Charles v. People, 1 N.Y.(1 Comst.) 180 (1848).

numerous acts providing for the establishment or operation of lotteries for such purposes as the promotion of literature,[84] the support of Union College,[85] and the improvement of navigation on the Hudson River.[86]

Authorized lotteries did not always succeed in raising their targeted revenue goals, often because of the corrupt practices of their managers. By 1805, managers were explicitly forbidden to purchase tickets in their own lotteries,[87] a common practice of that day. Competition from unauthorized lotteries and the game known as "insurance" or "policy" also cut down the revenue realized from authorized lotteries.

"Insurance" was based on legal lotteries, but was much more attractive to poor city dwellers. For a price far below that of a regular lottery ticket, a player could bet that a specific number would be drawn by a particular lottery on a certain day. Variations of the game permitted smaller sums to be wagered on whether a particular drawing would be an award or a blank.[88]

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[84] Act of April 3, 1801, ch. 126, 5 [1801] Laws of N.Y. 299-300.

[85] Ezell at 147.

[86] Act of March 14, 1800, ch. 25, 4 [1797-1800] Laws of N.Y. 469.

[87] Act of April 8, 1805, ch. 41, §IX, 4 [1804-1806] Laws of N.Y. 235. Also, in 1810 managers were penalized for receiving advances on the price of lottery tickets. Act of April 5, 1810, ch. 193, §20 6 [1810-1812] Laws of N.Y. 81. Further control of managers was mandated in 1813. See Act of April 13, 1813, ch. 198, §1 et seq., 2 [1813] Laws of N.Y. 270-72.

[88] Ezell at 95-96.

By 1817, a strong movement against lotteries had commenced with the founding of The Society for the Prevention of Pauperism.[89] The following year witnessed a major lottery scandal known as The Baldwin Libel Case. That case turned much public opinion against lotteries by revealing the extent to which the authorized ones had become corrupt. Charles Baldwin, editor of New York's Republican Chronicle, had charged in his paper that certain lottery managers had insured specific tickets for vast sums through agents and then had ordered the boy drawing winning tickets to palm their numbers. Using truth as a defense, Baldwin was acquitted of a libel charges.[90]

The Legislature established a committee to investigate corrupt lottery practices. That committee produced a report exceeding 100 pages in which it concluded that lotteries overburdened the poor and failed to produce expected revenues because of corrupt management.[91]

In response to these revelations, the Legislature, in 1819, passed the state's toughest lottery law to date.[92]

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[89] Id. at 186.

[90] Id. at 187-89.

[91] Id. at 189-90.

[92] Act of April 13, 1819, ch. 206, §§1 et seq., [1819] Laws of N.Y. 258-69, as amended by Act of April 13, 1820, ch. 197, §§1 et seq., [1820] Laws of N.Y. 180. This act was further amended by Act of April 16, 1827, ch. 300, §§1 et seq., [1827] Laws of N.Y. 327-31. The act provided for licensing of authorized tickets (§§1 - 3). Vendors of unauthorized tickets and unlicensed vendors were declared guilty of misdemeanors (§§1 and 6) as were persons offering goods for sale depending upon a lottery (§12). Any person who forged lottery tickets could be imprisoned for up to seven years (§13).

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Although the law contained severe regulatory provisions, it stopped short of outright prohibition of lotteries, the state still had not produced an alternate means of public financing. Once again, unauthorized lotteries were declared public and common nuisances. Moreover, their operators were made liable for penalties equal to the entire amount raised by the lottery or $2,500 if the former figure was unascertainable. Insurance and policy were totally prohibited.[93] All ticket vendors were required to be licensed by the appropriate authorities.[94]

Corruption was dealt with by provisions making managers personally liable in case of default. Managers were required to post a $30,000 good performance bond, take an oath,[96] give public notice of all ticket sales,[97] conduct speedy drawings,[98] and publish the names of winners.[99] Drawings had to be performed by a bare-armed person, under oath,

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[93] Act of April of April 13, 1819, ch. 206, §§1,2, 7[1819] Laws of N.Y. 258-60.

[94] Id. §9. Vendors could be licensed by mayors of New York City, Albany, Schenectady, Hudson, and Troy, or supervisors of other villages and towns. Id.§10, at 260-61.

[95] Id. §14.

[96] Id.

[97] Id. §16.

[98] Id. §29.

[99] Id. §32.

who used only the thumb and forefinger in picking out the billets.[1] To encourage the cooperation of players in exposing illegal lotteries or corrupt practices, the law exempted them from any liability.

During these years the courts attempted to discourage private lottery activity in various ways. In Hunt v. Knickerbocker,[2] the managers of a Connecticut lottery were denied recovery of the price of tickets sold in New York. All foreign lotteries were illegal in New York; thus, the sale contract was void. Recovery was also denied to a New Yorker who had bought insurance on the winning number in the Baltimore Lottery.[3] Although the court in Mount & Wardell v. Waite[4] found that the anti-insurance law applied only to domestic lotteries, it nevertheless held the contract to be void because insurance was considered to be against public policy. In Butler v. Kent,[5]

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[1] Id. §33.

[2] 5 Johns 327, 15 C.L.R. 230 (Sup. Ct. N.Y. 1810).

[3] Mount & Wardall v. Waite, 7 Johns. 434, 17 C.L.R. 320 (Sup. Ct. 1811). (plaintiff able to recover premium paid for policy only).

[4] Id.

[5] 19 Johns. 223, 29 C.L.R. 189 (Sup. Ct. N.Y. 1821). The court reasoned that:

> The injury, if any, is common to all those who held tickets in that particular lottery: and we see that in such a case it appertains to the public only to avenge

an authorized lottery's ticket seller was denied special damages against the lottery's manager whose well known incompetence was blamed for poor ticket sales.

By 1821, the anti-lottery movement had gained such momentum that the new state constitution provided:

> No lottery shall hereafter be authorized in this State; and the legislature shall pass laws to prevent the sale of all lottery tickets within this State, except in lotteries already provided by law. 6

Existing lotteries were still legal, and problems with lottery management continued throughout the early 1820's. By 1822, the legislature allowed the lottery beneficiaries to assume control of their lotteries and take on liability for their prizes.[7] This law enabled the giant lottery contracting firm of Yates & McIntyre to contract for the operation of nearly all of New York's legal lotteries.[8]

This firm was founded by Archibald McIntyre, a Scottish immigrant who served in the legislature and was State Comptroller from 1806-1821, and John Yates, a native born New Yorker who

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Fn. 5 cont.
> the injury. If there has been any unfaithfulness or dishonesty on the part of the managers of this lottery they are responsible, under the bonds which the statute . . . requires them to give; and possibly, also, by indictment.

Id. at 228, 193.

[6]N.Y. Const. art. VII, §11 (1821). Act of March 15, 1822, ch. 71, §§1 et seq., [1822] Laws of N.Y. 73-74, prohibited selling unauthorized lottery tickets and insuring tickets, whether authorized or not.

[7]Act. of April 5, 1822, ch. 163, §§1 et seq., [1822] Laws of N.Y. 157-59.

[8]Ezell at 86.

served in Congress and whose brother served as Governor from 1823 to 1825. Yates & McIntyre operated by purchasing all the tickets in a lottery and then having its dealers distribute them for a healthy profit. In 1825 ticket sales did not go well, with only 93 percent or slightly under $3 million being realized. The decline continued until 1829, when only 37 percent of the chances sold. It became apparent that the company would not be able to pay off its obligations, which included nearly $200,000 several years overdue to Union College. By concurrent resolution, the legislature in 1829 accepted a stipulation from the company to the effect that it would surrender all lottery rights by 1835. The financial problems of Yates & McIntyre apparently were not attributable to a loss of interest in lotteries, but rather to irregular books and accounting procedures as unearthed by a grand jury.

As one 1825 account described New York, "If the city did not appear like a huge lottery office, with innumerable departments, it was because the citizens were too excited by the rage for money making to see it as it really was."[9] In 1826, alone, it was estimated that 160 lottery offices prospered in the city.[10]

Just as lottery activity had continued to flourish during these years despite various legislative attempts to control or prohibit it, so did the policy and numbers business.

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[9] Id. at 190.

[10] Id.

By the early 1840's telegraphs enabled New York City and Philadelphia policy entrepreneurs to flourish. One historian described the New York numbers scene of that day as follows:

> Standing accounts were opened for servants, apprentices, young clerks, and others, and prizes were credited and purchases debited monthly. Handbills of the "most insidious and seductive character" were scattered broadcast; street placards and newspaper advertisements with huge figures promised wealth to the gullible; and numbers were peddled to passers-by on the public streets. 11

The continuing problem of numbers, the shocking revelations about Yates & McIntyre, the publication of a monthly magazine called The Lottery Exterminator (whose articles revealed that over $12 million a year was spent on lotteries in the United States and that New York had 300 ticket vendors selling chances on the Sabbath)[12] and the campaigning of reformers helped create a strong anti-lottery spirit which culminated in the total abolition of all lotteries and lottery ticket sales under the 1846 constitution.[13]

With that constitutional ban, the courts became involved in determining whether particular schemes constituted illegal lotteries. The court in People v. Payne[14] developed the position that a scheme was an illegal lottery only if its purpose was to dispose ". . . of any houses, lands,

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[11] Id. at 87.

[12] Id. at 223.

[13] N.Y. Const. art. I, §10 (1846).

[14] 3 Denio 88, 77 C.L.R. 88 (Sup. Ct. N.Y. 1846).

tenements, or real estate, or any money, goods or things. . . ."[15]

Again, the court took the position that lotteries held only for entertainment, even to determine which seat a legislator should hold, were not prohibited by law because

> [t]he object was, to prevent gambling, or gaming for some valuable thing; and not to punish a lottery made or drawn for mere amusement: or the determination by lot of some matter involving no right of property. 16

Indictments for selling lottery tickets, therefore, had to specify the purpose of the lottery for which the tickets were sold.[17]

A more general definition of a lottery, which included the concepts of consideration and chance, was stated in Hull v. Ruggles[18] and became the basis for the statutory definition adopted in the 1881 Code. In that version,

> [w]here a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it that is a lottery. 19

In business-oriented lotteries, the court adopted a strict stance. Accordingly, selling packages of candy at a higher

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[15] Id. at 89.

[16] Id.

[17] Id. at 90.

[18] 56 N.Y. (11 Sick.) 424 (1874).

[19] Id. at 427.

than normal price constituted a lottery[20] where some of the packages contained coupons entitling the holder to silverware. Where prizes had not fixed market value, their distribution by lottery-like schemes was nevertheless illegal. Thus, in Governors of the Alms House v. American Art Union,[21] the distribution of art works by lot to an art group's subscription members was held to violate the law.

Although contracts to sell foreign lottery tickets in New York were unenforceable,[22] lottery contracts executed outside the state could be enforced by the New York courts if they were legal in the state where they were made.[23] The

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[20] Id.

[21] 7 N.Y. (3 Seld.) 228 (1852). But, in Kohn v. Koehler, 96 N.Y. (51 Sick) 362, (1884) the court held that the sale of Austrian government bonds, which permitted the bond holder to have a chance at winning a cash prize in a drawing, did not constitute a lottery because the transaction was primarily a loan, the drawing being merely an incidental feature of the bond. Although chance was a factor in determining how much money the bond holder would be entitled to, the element of chance was not considered to be determinative.

In reaching this holding the court analogized from the securities industry, finding that in both the case at hand and the stock market

> . . . the purchaser ran the risk of a deterioration beyond the price named, and took the chance of a rise if by lot the bond which he held became entitled to it. In both cases the value is a matter of chance, and in neither can it be said, because it depends upon chance, that this chance constitutes a lottery.

Id. at 366

[22] Hunt v. Knickerbacker, 5 Johns, 327, 15 C.L.R. 230 (Sup. Ct. N.Y. 1810).

[23] Commonwealth of Kentucky v. Bassford, 6 Hill 526, 73 C.L.R. 526 (Sup. Ct. N.Y. 1844); Thatcher v. Morris, 11 N.Y. (1 Kern.) 437 (1854).

rationale behind this rule, first enunciated in Commonwealth of Kentucky v. Bassford,[24] clearly demonstrates that court opposition to lotteries was based more on pragmatic than moral considerations.

> Indeed, the policy of raising money by lottery for public purposes, such as for litarary and benevolent institutions, continued to prevail in this state unitl 1833, . . . It would be rather ungracious for our courts, under these circumstances, to refuse to uphold the contract in question, within the rule of comity,.on the ground that it was founded in moral turpitude. 25

Despite the new constitution ban on lotteries and the continued activity of the judiciary, numbers or policy still flourished. New York, with its growing population, central location, and established tradition of gambling became the numbers capital of the nation. By mid-century it had between 600 and 700 policy shops.[26] Earnings for policymen could exceed $5,000 a day after deducting the cost of bribing politicians and police.[27] Corruption of law enforcement personnel and the popularity

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[24] 6 Hill 526, 73 C.L.R. 526 (Sup. Ct., N.Y. 1844).

[25] Id. at 530.

[26] Asbury at 99.

[27] Id. at 97.

of the game rendered the anti-policy laws[28] ineffective throughout the nineteenth century.

The intimacy of corrupt politics and policy was best exemplified by the activities of Zachariah Simmons, who formed close ties with Tammany Hall. Under his prodding all the policy shops in New York City were raided in 1870.[29] Impressed with Simmons' power, most shops joined his syndicate which allocated specific monopolies in various areas of the city. Through this arrangement of local monopolies, each report vertically up an organization line, Simmons was able to expand his business to the West and South. To develop a new market of juvenile customers, he created the envelope game with bets as small as one penny. At its height, policy brought Simmons over $1 million a year and attracted almost one quarter of a million New York players.[30]

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[28] The lottery statutes prohibited all lotteries, and the courts found that this prohibition included numbers and policy. The court said, in Wilkinson v. Gill, 74 N.Y. (29 Sick.) 63 (1878), that numbers and policy were

> . . . a practice which is within the very mischief and evil intended to be remedied. It matters not by what name it is called, or what terms are used. It has all the essential features of a lottery, and should be so construed.

Id. at 67.

[29] Asbury at 99.

[30] Id. at 98-99.

h. Horseracing

Horseracing was a major pleasure of the wealthy and social elite of New York throughout the eithteenth and early nineteenth centuries. Long Island, with its flat open spaces, became the center for racing throughout the nation. As one London race book stated:

> These plains[Hempstead and Salisbury] were celebrated for their races throughout all the Colonies and even in England. . . . They [the races] were held twice a year for a silver cup, to which the gentry of New England and New York resorted. 31

Horseracing was originally viewed as an important means of improving the thorough-bred and other racehorse lines.[32]

New York first attempted to control betting on horseraces in 1802[33] by declaring any races for bets or stakes to be common or public nuisances.[34] The law further provided that

> . . . [T]he authors, betters, stakers, stakeholders, parties, contrivers and abettors thereof, shall be proceeded against, and punished by fine or imprisonment at the discretion of any court having cognizance thereof; and all public officers concerned in the administration

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[31] Dulles at 52.

[32] Id. at 139.

[33] Act of March 19, 1802, ch. 44, [1802] Laws of N.Y. 69-71 amended by Act of March 24, 1820, ch. 46, §§1 et seq., [1820] Laws of N.Y. 79-80. This provision is substantially in effect today as N.Y. Unconsol. Laws §7918 (1961, Supp. 1975-1976).

[34] Id. at 69.

> of justice, are hereby strictly enjoined to cause this Act to be faithfully executed. 35

Horse owners who permitted their animals to run in illegal races were required to forfeit the value of the animals and bettors forfeited the amount wagered.[36] All contracts based on racing bets were void.[37]

The 1802 law did not stop horseracing activities for several reasons. First, in this area of gambling litigation as well, the courts appeared conservative in their approach to the law. Thus, for example, in Van Valkenburgh v. Torrey,[38] the court relied on a literal reading of the word "racing" and declared that trotting was not affected by the law. Moreover, some counties were exampt from the law.[39]

Nor was the popularity of horseracing lessened by the law. Witness the ceremony attending the death of New York-owned Messenger, the finest horse in the nation during the 1809 racing season. His death was mourned as a national

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[35] Id.

[36] Id. at 69-70.

[37] Id. at 70-71. The Horse Racing Act also set fines for raffling merchandise and declared all parties connected with horseracing conducted within one-half mile of a court guilty of a misdemeanor. Id. at 71.

[38] 7 Cow. 252, 39 C.L.R. 252 (Sup. Ct. N.Y. 1827). This case held that penal statutes were to be construed strictly.

[39] See, e.g., Act of April 5, 1828, ch. 179, §§1 et seq., [1828] Laws of N.Y. 210-11. No action to recover bets or to hold the stakeholder liable for bets properly paid over authorized; as amended by Act of April 20, 1829, ch. 194, [1829] Laws of N.Y. 293.

tragedy and he was given a military funeral with musket volleys set off over his grave.[40]

In 1823, Long Island's Union Course hosted the major event of the generation: a race between Eclipse, representing the North, and Sir Henry, representing the South. The crowd was estimated at between fifty and one hundred thousand fans, including over twenty thousand out-of-staters. A $20,000 purse was to go to the winner of two out of three four-mile heats.[41] When Eclipse won, the air was

> rent with the shouts of extacy [sic] from the New Yorkers, and the press around the judges' stand for a short time was so great that nothing could overcome it. 42

During the next few decades racing began to attract a different class of spectator: the professional gambler who was far more concerned with making a profit than he was with horses.[43] In 1856, The Annals of American Sport reported that the Long Island racing season came out

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[40] G. Hunt, Life in America One Hundred Years Ago 177 (1914) [hereinafter cited as Hunt].

[41] Dulles at 140.

[42] Id.

[43] As Hunt lamented in his study of the 19th century:

> The sport which was under the control of horsemen who gambled has fallen into the hands of gamblers who race. They know nothing about horses and few of them can ride. . . . The elements of the crowd have changed. A few rich idlers, a large number of professional gamblers who systematically follow the races from place to place, men from the streets who like to gamble when they can . . . . Hunt at 179-80.

> . . . in its strength, this racing world--this huge agglomeration of gambling and fraud, of weakness and wickedness . . . men whose interest in [sporting events] is the interest of 'sharps' and 'gamblers'. 44

Public fear of these gamblers and their potential corrupt influence on racing led to a decline in track attendance for a while.[45] The Civil War with its demands for cavalry horses also slowed racing activities during the mid-century,[46] but they picked up shortly after the war. With the establishment of such deluxe racing tracks as the one at Saratoga Springs,[47] racing returned to its pre-war pace for the rest of the century.

Outside of the general anti-gambling laws passed throughout the century, horseracing was not explicitly dealt with until the 1881 Penal Code attacked bookmaking.[48] Despite that law, New York State bookmakers flourished, particularly after Tammany Hall barred the parimutuel system in 1888.[49] Richard Croker, the presiding boss and an avid horse bettor, played a major role in helping the bookies. Croker also

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[44] Chafetz at 262.

[45] Id. at 263.

[46] Id.

[47] Id. at 271-96.

[48] Penal Code of 1881 §351.

[49] Chafetz at 266-67.

encouraged the betting industry by granting a virtual monopoly on horserace wagering to a group of politically well-connected bookies who formed the Metropolitan Turf Association.[50]

Membership in the "Met", as this group was known, cost over $7,000, a price ironically equivalent to the price of a seat on the stock exchange.[51] Members were able to sit in the ring of the best tracks in the state. Located near the grandstand and furnished with a roof and blackboards on which odds could be figured, the ring location was essential to successful business. The greatest advantage of Met membership was the special privilege of immunity from the bookmaking law for 30 racing days a year.[52] That Tammany Hall favor epitomized the close ties between politics and gambling common in New York throughout the last part of the nineteenth century.

3. The modern era: 1890-1976

a. The political background

Rapid growth of both New York State and City continued throughout the first decades of the twentieth century. By 1900 the state's population exceeded 7,200,000, with New York City accounting for nearly half that number. Although the Irish and Germans had been the largest group of immigrants during the nineteenth century, Italians, Russians, Poles, and

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[50] Id. at 267.

[51] Id.

[52] Act of May 26, 1887, ch. 479, §§1 et seq., [1887] Laws of N.Y. 604-05 (repealed 1895).

Greeks made up the majority of twentieth century immigrants. As a result of this influx of Europeans, Catholicism became the single largest religious denomination in New York City and a major religion in the state.

By the end of the nineteenth century, political and social reform was again underway. Under the leadership of men like Charles Evans Hughes[53] and Theodore Roosevelt,[54] the Republican

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[53]Charles Evans Hughes was born in Glens Falls, New York on April 11, 1862, the son of a Welsh immigrant and preacher. As a young boy, Hughes was raised in a well-disciplined Christian household. After attending Colgate (then called Madison) and Brown he went on to Columbia Law School. Upon graduation he went to work in a New York City firm where his expertise in commercial law brought him a fine reputation.

In 1905 he was asked to investigate alleged misconduct in the city's utilities industry. Finding widespread corruption, Hughes convinced the legislature to use public regulation rather than enforced competition as the best means for correcting abuse. He was next asked to investigate the life insurance business, which was also shown to be thoroughly corrupted. In 1906 he became the Republican candidate for governor against Democrat, William Randolph Hearst, whom he soundly defeated. A progressive who viewed his role as "tribune of the citizenry," Hughes' tenure as governor was noted for superb administration. New York became a pioneer state in experimenting with government by commission.

Hughes avoided partisan politics and generated much ill feeling by fighting to maintain the state's constitutional ban on racetrack gambling. Nevertheless, he was re-elected governor, although by a much smaller margin. In 1910 he joined the Supreme Court of the United States. Later, in 1916, he was to leave the Court to run against Woodrow Wilson for the Presidency.

When he lost the election he returned to private practice in New York. After that, he was to serve as Secretary of State in the Harding Administration, and finally, in 1930, he was chosen to be Chief Justice of the Supreme Court where he remained until 1941. Throughout his tenure on the Court he was best known as a strong defender of the Bill of Rights and, in particular, free speech and press. C. Hughes, The Autobiographical Notes of Charles Evans Hughes (1973).

Party began to challenge Tammany Hall. During this time political reformers also began pressing for gambling reform, perhaps, in part, because of the close association between gambling interests and corrupt politicians. Organizations such as the City Vigilance Society, led by Thomas Platt, an anti-Tammany Republican boss, The Society for the Suppression of Vice and The Society for the Prevention of Crime helped stir up the public.[55]

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[54]Born into a well-to-do mercantile family in New York City, October 27, 1858, this inquisitive, somewhat delicate child, captured the hearts of his countrymen as the result of his battlefield exploits with the Rough Riders in Cuba, his tough-minded and determined assault on the forces of political corruption, and his sensitive response to the problems of the environment. As President of the Police Commission of the City of New York from 1895 until 1897 he vigorously attacked the vice and corruption, in addition to the laziness and inefficiency of the police force. His efforts brought him national publicity and set the stage for his role in national politics. Following his triumphs in the Spanish-American War he was swept into the statehouse in Albany where he continued his efforts to reform state politics. After one term, however, his involvement in New York state politics ended when he was nominated by the Republicans to run as Vice President.

[55]Chafetz at 344-49. Although all these groups sought to destroy Tammany Hall the motivating purpose of the City Vigilance Society was diametrically opposed to that of the other groups. Anthony Comstock and Dr. Charles Parkhurst, leaders of the Society for the Suppression of Vice and The Society for the Prevention of Crime, respectively, were dedicated to the eradictions of New York's flourishing vices. Thomas Platt, however, was only interested in getting his piece of the Democrat controlled "political pie".

The most significant factor in the reform movement, however, was the impact of the findings of the legislature's Lexow Committee in 1894.[56] In its report the committee greatly embarrassed Tammany Hall Democrats by exposing the New York City police practice of openly extorting $15 a month from policy shops and up to $300 a month from pool rooms in exchange for protection from the law.[57] Further testimony revealed that each "policy king" had a well-defined territory which the police protected by harrassing would-be competitors.[58] The police were so well informed about gambling in the city that it was suggested that they could have closed up all gambling in New York City if they so desired. In response to this report, Theodore Roosevelt was appointed president of the city's Police Board.

The state lawmakers responded to these findings in a spirit of reform when they enacted the Constitution of 1894.[59] That constitution explicitly prohibited all forms of gambling,

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[56] 1 Report and Proceedings of the Senate Committee Appointed to Investigate the Police Department of the City of New York, Jan. 18, 1895, at 36-37 [hereinafter cited as the Lexow Report.]

[57] Id. at 37.

[58] Id. at 36

[59] N.Y. Const. art. I, §9 (1894). This provision was substantially re-enacted in the 1939 constitution with the exception that parimutuel racing was not prohibited. N.Y. Const., art. I, §9 (1938 as amended in 1939).

including lotteries, pool-selling and bookmaking.[60] A year later the Penal Code was amended to provide felony penalties for bookmakers, poolsellers, and their assistants.[61]

b. William T. Jerome and Richard Canfield

In 1906, Charles Evans Hughes was elected governor on a reform platform. One of his major accomplishments was the eanctment of a comprehensive revision of New York gambling laws.[62] But personalities rather than laws appear to have been most effective against gambling. In 1900, William T. Jerome was elected District Attorney of New York City on "Clean Up Gambling" platform. During his tenure, he succeeded in closing down most of the city's gambling houses, including those of Richard Canfield.[63]

Just as Morrissey represented the manner in which gambling could flourish under the solicitous care of politicians and law enforcement personnel, the demise of Canfield's operations exemplified how gambling could be controlled if the laws were honestly enforced. Born in 1855, Canfield was known as an advocate of "the gentlemanly style." He was reputed to run a fair game and to prohibit his employees

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[60] Id.

[61] Act of May 9, 1895, ch. 572 [1895] Laws of N.Y. 379-80 (one to two years in jail and/or fine not to exceed $2,000). In 1895 the legislature also repealed the special immunity granted for on-track betting. Act of May 26, 1887 by passing the Act of May 9, 1895, ch. 570, §19, [1895] Laws of N.Y. 377.

[62] Act of March 12, 1909, ch. 88, [1909] Laws of N.Y. 141. Text of act at art. 88, §§970-97 4 [1909] Consolidated Laws of N.Y. 2657-65.

[63] See Asbury at 419-30.

from gambling. An art connoisseur who collected Whistler's works, Canfield's only involvement with politics was through bribery. His gambling houses were usually located in stately brownstones, with silver plaques on the doors, heavy velvet curtains on the windows, and a doorman to admit guests. Despite his bribes and profits exceeding $3 million, Canfield was not able to sustain his gambling empire in the face of Jerome's pressure.[64]

c. 1909 Penal Law

The reform movement became infectious. By 1907, even the gambling houses in Saratoga were closed. In 1909, a new Penal Law[65] imposed penalties ranging from a year in a municipal jail to a $1,000 fine and two years in state prison for such offenses as cheating at gambling,[66] enticing another to gamble,[67] bookmaking and poolselling,[68] being a common gambler,[69] keeping a gambling establishment,[70] and creating

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[64] Asbury at 419-30.

[65] See Act of March 12, 1909, ch. 88, [1909] Laws of N.Y. 141.

[66] Id. at §988.

[67] Id. at §980.

[68] Id. at §986.

[69] Id. at §970.

[70] Id. at §973.

a lottery or selling tickets therein.[71] Moreover, for the first time, the law defined slot machines and imposed penalties on anyone who kept, controlled, or possessed such devices.[72]

Even in the midst of William Jerome's administration police corruption was not wiped out altogether. The most infamous example was that of Charles Becker who, in 1911, became head of New York City's gambling squad. Using that position he developed graft relations with many gamblers, one of whom was Herman Rosenthal, a man who had been crying in vain to open new gaming-houses throughout 1909 and 1910. In spite of protection money paid to Becker, the relationship soured and Becker ordered a raid on Rosenthal. The latter retaliated by exposing Becker to the press. The night before he was to appear before a grand jury Rosenthal was shot. Becker was found guilty of ordering the murder. He went to the electric chair on July 30, 1915. His widow received an estate in excess of $100,000.[73]

In addition to containing criminal penalties, the 1909 Penal Law also included civil sanctions,[74] many of which

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[71]Art. 130, §§1370-86, 4 [1909] Consol. Laws of N.Y. 2708-11.

[72]Art. 88, §982, 4 [1909] Consol. Laws of N.Y. 2661.

[73]During the grand jury investigation into this case it was revealed that New York gamblers bribed police and political leaders in excess of $1,400,000 a year. For a more complete discussion of this subject see Chafetz at 397-408.

[74]See Act of Mar. 12, 1909, ch. 88, [1909] Laws of N.Y. 219.

dated back to the recovery provisions of the 1774 gambling law.[75] Although these civil remedies were described in broad terms, the courts, in such cases as People v. Solomon,[76] held that they protected only the casual bettor to whom the courts did not apply the law's criminal sanctions. Thus, in Watts v. Malatesta,[77] professional gamblers were not allowed to set off their losses against the recoveries of their victims.

d. The growth of organized crime

Despite the 1909 law and the brief success of the reform movement, enforcement of the gambling laws began to decline as the reform spirit waned and the nation entered World War I. During the second decade of the twentieth century, Arnold "The Brain" Rothstein began to dominate and change the New York gambling scene. He invented a national network of layoffs which enabled bookies to reinsure their bets; he also introduced "the fix" to sporting events,[78] and he attempted to organize crime on a nationwide scale.

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[75] See Act of Mar. 9, 1774, ch. 1651, 5 [1769-1775] Laws of the Colony of New York 621-24.

[76] 296 N.Y. 220, 72 N.E. 2d 163 (1947) where it was held that "casual betting"was not a crime.

[77] 262 N.Y. 80, 186 N.E. 210 (1933).

[78] One of Rothstein's reputed fixes was the infamous 1919 baseball World Series. These games came to be known as the Black Sox World Series when it was charged that the White Sox, one of the teams in the play-offs, had accepted a bribe to throw the game. L. Katcher, The Big Bankroll 138-48 (1958) [hereinafter cited as Katcher].

With a few exceptions, most illegal activity prior to Rothstein's organization had been the work of individual operators or syndicates. Although they sometimes worked on a large scale, these operators never integrated their various criminal activities into unified business operations nor did they impose a nationwide structure beyond their immediate businesses or their activities.[79]

Two factors other than Rothstein's own drive helped organized crime get started during this time. First was the advance of technology. Improvements in mass communication and transportation[80] enabled large-scale national organizations to function efficiently. More important, however, was passage of the Volstead Act in 1929,[81] and the age of Prohibition which it started.

Prohibition did not destroy the demand for liquor. Instead, it frustrated the normal, legal means of supplying it. Rothstein and others took over the supply job and

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[79] Id. at 9.

[80] By 1921, for example, there were nine million cars in the United States, and within the next five years that number doubled. The accessibility of this new form of transportation revolutionized life in America.

For further discussion see Dulles at 314-19.

[81] Act of Mar. 27, 1929, ch. 473, 45 Stat. 1446, amending National Prohibition Act, ch. 85, 41 Stat. 305 (1919), as by Act of November 23, 1921, ch. 134, 42 Stat. 222.

used their profits from gambling to buy the trucks, stills, and public officials necessary for the successful bootlegging industry. Bootlegging revenues, in turn, financed other major activities of organized crime, including prostitution, racketeering, bail bonding and, later narcotics.[82]

During this time the legislature made a few feeble attempts to cut down the abundant revenues from gambling. In 1917, for example, slot machines were attacked by a law which made the lease or sale of any coin-operated gambling device a misdemeanor.[83] Slot machines became so widespread that the corner druggist could be found taking children's money via candy slot machines.[84] During the Depression of the 1930's, slot machines became the most important form of betting for the poor.[85] One contemporary observer estimated that in 1939 alone, the national take of these devices exceeded $500 million, and a Gallup poll taken in the same year indicated that one out of three adults took an occasional chance at winning the jackpot.[86]

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[82] See Chafetz at 422-32. An example of the extent to which narcotics were already becoming a lucrative element of organized crime's business was the 1928 bust, in Buffalo and New York City of over $5 million worth of cocaine, heroin and morphine which had been smuggled in to the U.S. with Rothstein's financing.

[83] Act of May 16, 1917, ch. 516, 2 [1917] Laws of N.Y. 1543.

[84] See People v. Jennings, 257 N.Y. 196, 177 N.E. 419 (1931).

[85] Dulles at 378.

[86] Id.

With the Depression and the popularity of the slot machine, the 1930's brought organized crime to New York. Although various Sicilian crime groups had been in New York throughout the early years of the century, chaotic power struggles had kept them from developing unified structure and strength. In April of 1931, however, a new leader appeared. Salvatore Maranzano, whose dream was to become the "Boss of the Bosses," managed to consolidate these disparate groups into a new, nationwide organization. Marazano parcelled out "families" that had a boss at the top, and lower level of lieutenants and henchmen reporting to him. Maranzano and forty allies were, however, soon murdered by Bugsy Siegel and Meyer Lansky on the orders of a rival boss, Lucky Luciano.[87]

After Maranzano's death, Luciano quickly tightened his grip on New York, and parcelled out specific areas to various partners and allies. Vito Genovese was given control over rackets, loan-sharking, and the Italian Lottery which alone netted $1 million a year.[88] Frank Costello took care of political action.[89] Dutch Schultz took charge of the Harlem numbers business.[90] If trouble occurred, Genovese could call

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[87] D. Hanna, Vito Genovese 22-25(1974) [hereinafter cited as Hanna].

[88] Id. at 27.

[89] Id. at 35.

[90] Sann, Kill the Dutchman! The Story of Dutch Schultz (1971).

on an army of men to do his bidding. Lansky supplied diplomacy and financial advice,[91] while the layoff system first developed by Rothstein[92] was, under Costello, assigned to Frank Erickson.[93] Everyone appeared to share the bootlegging action.

Once again, politicians and criminals worked together. Arnold Rothstein financed Jimmy Hines, leader of New York City's 11th Assembly District in his efforts to help his unemployed constituents.[94] Frank Costello, along with Luciano and other "friends," attended the 1932 Democratic Convention where he played a role in securing Franklin D. Roosevelt's victory by pledging both the Italian-American and the Tammany Hall-controlled Irish-American vote.[95]

Although organized crime prospered during the 1930's and 40's, it was threatened more than once by vigorous attacks from such leaders as New York City Mayor Fiorello

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[91] H. Messick, Lansky 57-70 (1971) [hereinafter cited as Messick]

[92] See Katcher at 117-118.

[93] See Messick at 38-39.

[94] Chafetz at 431.

[95] Id. at 445.

La Guardia,[96] and New York State's special prosecutor Thomas E. Dewey.[97] Upon taking office in 1933, Mayor La Guardia attempted to rid the city of slot machines. His efforts led to the passage, in 1934,[98] of a tougher slot machine law which expanded the definition of the illegal device to encompass seemingly harmless gumball machines.[99] During this period, Dewey was appointed special prosecutor by Governor Lehman to investigate racketeering in New York City.

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[96]Fiorello H. LaGuardia was born in New York City in 1882, the son of an Italian immigrant. After traveling extensively and serving as a U.S. Consul at Fiume, he became an interpreter at Ellis Island for new immigrants.

After working his way through evening law school at New York University he entered politics as a progressive Republican whose special goal was to clean up Tammany Hall. After several terms in Congress he was elected Mayor of New York City and he served in that role from 1934-1945.

[97]Born in Owosso, Michigan in 1902, Thomas E. Dewey was educated at the University of Michigan and at Columbia University Law School, from which he graduated in 1925.

Although Dewey was a Republican, the Democratic governor of New York, Herbert H. Lehman, appointed him special prosecutor to root out racketeering in 1935. He was elected district attorney of New York County in 1937.

In 1942, he was elected governor, winning reelection in 1946 and 1950. In 1944 and 1948 he was an unsuccessful candidate for President.

[98]Act of May 7, 1934, ch. 317, [1934] Laws of N.Y. 847-48.

[99]People v. Seigel, 301 N.Y. 43, 92 N.E.2d 874 (1950).

One of Dewey's most famous cases involved the successful prosecution of Lucky Luciano. Luciano had taken over the prostitution business, and was running it like a chain of neighborhood stores. His heavy taxes on the brothels' profits led many disgruntled madames and whores to cooperate with the prosecution.[1] Luciano was convicted of sixty-seven counts of pandering and was sentenced to from thirty to fifty years in jail.[2] The public attitude toward this war on crime was revealed by one historian:

> [I]n the protracted trial it was impossible to tell whether newspaper readers were more interested in the exploits of the "King of Vice," the lurid and detailed testimony of a succession of prostitutes, or the triumphs of the relentless special prosecutor. 3

After his successful prosecution of Luciano, Dewey won a conviction against Hines.[4] He then turned his attention to Genovese, who fled the country. Despite these successes, these prosecutions were only symbolic acts. They failed to destroy organized crime because the daily operations could be handled by the remaining family members. The chiefs could still plan and direct strategy from their cells.[5] Moreover,

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[1] Hanna at 35-45.

[2] Id. at 43-44. Luciano was deported in 1946 by Governor Dewey, and his position as leader of the organization went to Vito Genovese who had returned to America.

[3] Ellis at 434.

[4] People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940).

[5] See Hanna at 45.

when local reformers like La Guardia drove gamblers out of the city they merely retreated to sanctuaries such as Bergen County, New Jersey, from which they continued their operations.[6]

In general, the efforts of individual reformers remained isolated from government as a whole. In 1935, while Dewey was fighting to put "capos" in jail, the New York legislature passed a law allowing wagering losses to be deducted from taxable income to the extent of wagering gains.[7] In effect, this law resulted in giving organized crime a lien on its customers' income prior to any government liens.

Efforts to stem organized crime reappeared in 1950 under the leadership of United States Senator Estes Kefauver. The Kefauver hearings on organized crime[8] revealed once again that the governments of both New York City and the state were subject to extensive criminal influence. In Saratoga, for example, casino gambling was openly tolerated by state authorities. The Superintendent of State Police admitted that he knew about the resort's widespread gambling but he added that

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[6]Fact Research Inc., Gambling in Perspective 49 (October, 1974). Prepared for the Commission on the Review of the National Policy Toward Gambling. [hereinafter cited as Gambling in Perspective].

[7]N.Y. Tax Law §360(5) (1975).

[8]Investigation of Organized Crime in Interstate Commerce, Hearings Before a Special Committee to Investigate Organized Crime in Interstate Commerce (1950-1951).

> . . . when one gets to be superintendent of the State police he is supposed to have enough savvy . . . to leave gambling in Saratoga alone. . . . 9

While the Kefauver Committee commended the efforts of Manhattan District Attorney Frank Hogan and the city police to frustrate organized crime, it also suggested that much of that effort had been undermined by the close relations between Frank Costello and Mayor William "Billy O" O'Dwyer's administration.[10] Gambling flourished in the city during O'Dwyer's term. One assistant district attorney estimated that $300 million was bet annually with illegal bookies in the city.[11] A Brooklyn district attorney claimed that $250,000 a year was spent paying off city police.[12]

In 1951, Governor Dewey followed up on the Kefauver findings by establishing the State Crime Commission to investigate the relationship between organized crime and government in New York State.[13] The recommendations of this

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[9] Sen. Special Comm. to Investigate Organized Crime in Interstate Commerce, 3rd Interim Report, S. Rep. No. 307, 82d Cong. 1st Sess. at 108 (1951). [hereinafter cited as Kefauver Report]. The committee further revealed that at least six separate casinos were known to the state police, including the luxurious Club Arrowhead whose casino contained five roulette wheels, five card tables, two crap tables, and other paraphernalia. Id. at 106-07.

[10] Id. at 121-124.

[11] Id. at 132.

[12] Id.

[13] E.O. of the Gov. [of N.Y.] dated March 29, 1951. Cf. First Report of the N.Y. State Crime Comm. Jan. 23, 1953.

commission led to a thorough study of gambling in a number of areas in the state, including Ithaca, a small upstate community and home of Cornell University.[14] They also prompted the creation, in 1958, of the New York Temporary Commission of Investigations.[15] Under this 1958 Commission, gambling throughout the state was studied exhaustively.

As a result of this study,[16] the Commission concluded that an effective assault on gambling would require several elements. First, the public had to realize the extent to which organized gambling had infected the entire society. Second, law enforcement agencies had to coordinate their efforts, initiate special "gambling" training, and raise departmental salaries, thereby making corruption less tempting. Last, the Commission recommended that penalties for gambling be increased in severity and enforced more vigorously.[17]

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[14] Gambling in Perspective at 56. Ithaca, a bucolic upstate New York town, located on Lake Cayuga, was found to be a wide open gambling town. The Sons of Italy Lodge hosted a regular high stakes crap game. One bookie was located within 75 yards of the police station, and mysteriously, the police files on gambling in Ithaca disappeared before the Commission could examine them.

[15] Act of April 25, 1958, ch. 989, 2 [1958] Laws of N.Y. 2367-72. A statewide police raid of over 100 bookie establishments studied by the Commission revealed a gambling network spread throughout Buffalo, Rochester, Syracuse, Utica, Albany, and smaller upstate cities, with contacts and counterparts throughout the United States, Canada and Cuba.

[16] New York State Commission of Investigation, Syndicated Gambling in New York State 100-10 (Feb. 1961).

[17] Id.

e. 1960 and 1965 gambling laws

In response to these recommendations, the legislature, in 1960, passed a series of tough new gambling laws whose purpose was to facilitate convictions and increase penalties. To encourage the cooperation of witnesses, policy players were exempted from criminal liability.[18] Knowing possession of bookmaking records was made a crime[19] and large-scale bookmaking and policy-making were declared to be felonies.[20] Moreover, mandatory minimum prison sentences were set for second and third gambling convictions.[21] Although these increased penalties were expected to decrease large-scale gambling, few convictions were obtained under the new law.[22] In 1962, criminal sanctions were also imposed on anyone who transported gambling equipment.[23]

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[18]Act of April 12, 1960, ch. 549, §3, 2 [1960] Laws of N.Y. 1713.

[19]Act of April 12, 1960, ch. 548, §1, 2 [1960] Laws of N.Y. 1710-11.

[20]Id. §2 at 1711.

[21]Act of April 12, 1960, ch. 549, §2, 2 [1960] Laws of N.Y. at 1712-1713. These are token efforts. For the second offense, the minimum sentence is 10 days; for the third, 30 days.

[22]1968 Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control and Effect on Society 64-65.

[23]Act of April 18, 1962, ch. 546, 2 [1962] Laws of N.Y. 2511-12.

In 1965, New York completely rewrote its gambling law as part of a major codification effort.[24] While the new law contained few substantive changes, it was greatly condensed and easier to work with. Under the 1909 Penal Law,[25] indictments had to be drawn very carefully, but the new law only required that two questions be answered: whether the alleged activity was gambling and whether the defendant had participated as other than a player.

The 1965 law replaced ambiguous court definitions with twelve clearer provisions. Thus, "gambling" was now statutorily defined: "stak[ing] . . . something of value upon . . . a future contingent event not under his [the player's] control. . . ."[26] At the core of the 1965 law was a sharp distinction between the social gambler, with whom the statute was not concerned, and the professional gambler, whom the law defined as one who either "advances" or "profits from" gambling other than his own personal betting.[27]

f. The Knapp Commission

Nevertheless, gambling and organized crime persisted in New York City and state throughout the 1960's. In 1970- after several articles on police corruption appeared in

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[24] N.Y. Penal Law §§225.00-225.40 (1967).

[25] See Act of March 12, 1909, ch. 88, [1909] Laws of N.Y. 141. For a helpful practice commentary which compares the 1909 Penal Law to the version under discussion, see N.Y. Penal Law §225.00 (1967).

[26] N.Y. Penal Law §225.00(2)(1967).

[27] Id. §225.00(3) to (5). This distinction was in line with case law. See Watts v. Malatesta, 262 N.Y. 80, 186 N.E. 210 (1933).

The New York Times, a Commission to Investigate Alleged Police Corruption was established under Whitman Knapp.[28] The Knapp Commission soon revealed that gamblers' protection money was the main source of widespread police corruption, and that a typical plainclothesman could expect to extort between $300 and $1,500 per month.[29] Further, supervisors, when involved, received about one half over the monthly take or "nut"[30] of the plainclothesman. A 1971 Joint Legislative Committee on Crime[31] also discovered that an arrested gambler, for example a bookie or policy maker, only faced a two percent chance of going to jail, and even then, his sentence would be light.[32] The promise of tougher sentences made in the early 1960's, therefore, was never fulfilled.

Soon after these two investigative bodies revealed their findings, New York City's Police Commissioner Murphy virtually halted enforcement of certain aspects of the gambling law. He defended this action by arguing that attempts to enforce

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[28]Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedures, Knapp Commission Report on Police Corruption (1972) [hereinafter cited as Knapp Commission].

[29]Id. at 1.

[30]Id.

[31]1971 Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control, and Effect on Society [hereinafter cited as 1971 Committee on Crime Report].

[32]Id. at 82-85.

the law in the past had not lessened gambling and had increased police corruption. In one heavy gambling district, for example, of 1,225 arrested bookies only ten were fined over $500, only nineteen were imprisoned and only three of these nineteen received sentences in excess of 90 days. It was also estimated that each arrest cost the public forty times the fine recovered.

Dismantling the gambling squads would not, in Murphy's opinion, bring about any great increase in gambling. Rather, this move would decrease the potential for corruption, enable the police to concentrate more forces on violent crime, lessen the load on clogged court calendars, and improve police morale.[33]

g. Lotteries and numbers

Lotteries were not a major source of concern during most of the twentieth century. Rather, it was policy, an offspring of the lottery, that attracted attention. The courts were liberal in their determinations of which of a wide variety

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[33] R. Daley, Target Blue 421-36 (1971, Dell ed. 1974). Commissioner Murphy's decision was also in line with the following recommendation of the Knapp Commission:

> The criminal laws against gambling should be repealed. To the extent that the legislature deems that some control over gambling is appropriate, such regulation should be by civil rather than criminal process. The police should in any event be relieved from any responsibility for the enforcement of gambling laws or regulations.

See Knapp Commission at 18.

of schemes constituted policy.[34] Policy, however, was not statutorily defined until the 1965 Penal Law declared "policy" or "the numbers game" a lottery in which the outcome is not determined by any act of the players or promoters.[35]

Despite the laws on the books, policy continued to flourish in New York, primarily because it was ingrained in the ghetto neighborhoods of the cities. In Brooklyn's Bedford-Stuyvesant, for example, the policy operations handled in 1970 alone exceeded $36 million.[36] Of that sum, organized crime withdrew an estimated $11 million from the community.[37] If the $51 million that was spent on heroin that year is added to that figure, the total organized crime take from Bedford-Stuyvesant in 1970 exceeded $62 million, $6 million more than the federal government received in taxes from that area.[38] On the other hand, organized crime was also a major ghetto employer. In 1970 policy alone provided some 15,000 jobs in Bedford-Stuyvesant.[39] Throughout the early 1970's policy business apparently increased at a pace above inflation.

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[34]People v. Kravitz, 287 N.Y. 475, 41 N.E.2d 61, cert. denied, 317 U.S. 667 (1942).

[35]See N.Y. Penal Law §225.00(11)(1967).

[36]1971 Committee on Crime Report at 86.

[37]Id.

[38]Id. at 88.

[39]Id. at 86.

h. Bookmaking

As in gambling and lotteries, organized crime increasingly penetrated horseracing throughout the twentieth century. Although an 1895 law imposed penalties on bookmakers, poolsellers, or their assistants[40] and repealed the special immunities given to on-track betting,[41] it nevertheless permitted authorized incorporated racing associations to hold races for prizes.[42]

Penalties for on-track betting were made exclusively monetary; the amount of money wagered was forfeited.[43] Pressure from reformers during this time led to the creation of a state racing commission with vaguely defined powers,[44] the taxation of race track receipts,[45] the prohibition of charges for the privilege of betting,[46] and the inclusion of broad anti-gambling powers and duties in the New York City charter.[47]

The drive to stop race betting was not appreciated by

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[40] Act of May 9, 1895, ch. 570, [1895] Laws of N.Y. 370-77, as amended by Act of April 23, 1896, ch. 380, §17, 1 [1896] Laws of N.Y. at 363-66.

[41] Id. at §19.

[42] Id. at §3.

[43] Id. at §17.

[44] Id. at §§5-7.

[45] Id. at §12.

[46] Id. at §18.

[47] Act of April 22, 1901, ch. 466, §§49(13), 315, 318 3 [1901] Laws of N.Y. 27, 136-37, 138 (Charter of N.Y.C.).

track owners who had come to rely on the large amounts of money which bookmakers paid to the owners.[48] To preserve this revenue, track managers developed a system of "oral betting" which was held to be exempt from the bookmaking law in People ex rel. Lichtenstein v. Langan.[49] Again, the court acted to protect betting as entertainment. In that decision the court reviewed the manner in which bookmakers operated:

> The making of the lists and the laying of the odds so as to make the percentages such as to give the bookmaker a profit has to be carefully figured, the maker taking into consideration the speed and endurance of the respective horses, and in order to make a practical use of the list and secure bets it of necessity has to be entered upon paper or some other material so that the odds upon each horse may be posted or shown to the patrons of the races when their bets are solicited. 50

The Court of Appeals then concluded that since ordinary betting was not attacked by the law and successful bookmaking required ". . . the writing out of the list of the odds laid on some paper or material so that they can be seen by those who are solicited to invest[,]"[51] oral betting did not constitute bookmaking.

Judge Vann, in his dissent, may have shown much more

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[48] Chafetz at 378-79.

[49] 196 N.Y. (3 Fiero) 260, 89 N.E. 921 (1909).

[50] Id. at 265, 89 N.E. at 922.

[51] Id. at 266, id.

wisdom than the majority when he argued that:

> . . . the statute prohibits engaging in bookmaking with or witout the aid of any writing, because writing is not of the substance and need not be resorted to, and, hence, if resorted to, is a mere incident. Engaging in the business of public gambling by quoting and laying insidious odds to a multitude of people was the evil aimed at, not the making of a record of the business which is comparatively innocent. I vote to reverse because, me judice, the information sets forth a criminal offense. 52

The public bettor suffered from the Langan decision. This decision, rather than frustrating the bookmakers, merely made it more difficult for the bettor to check and shop for odds because oral betting was conducted in the following manner:

> Blackboards disappeared from the bookmaker's stall and instead he wrote the odds on a daily program which he held in his hand. . . . The bettor came close enough to look over the card, called out, 'I have fifty dollars on Fleetwing to win.' The bookmaker answered, 'Taken' or 'You're on'. . . . 53

The Langan decision prompted an amendment of the law to omit any requirement of a writing for bookmaking convictions.[54] The courts continued to limit convictions under the bookmaking and poolselling laws to narrow areas of conduct and refused to apply these statutes to other types of gambling.[55]

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[52] Id. at 269, 89 N.E. at 923.

[53] Chafetz at 379.

[54] Act of June 15, 1910, ch. 488, 1 [1910] Laws of N.Y. 945-46.

[55] People v. Farone, 308 N.Y. 305, 125 N.E.2d 582, cert. denied, 350 U.S. 828 (1955).

Nevertheless, in one case tried under these provisions only one prohibited transaction was sufficient for conviction.[56]

"Bookmaking" was statutorily defined in the 1965 Penal Law as ". . . accepting bets from members of the public as a business, rather than in a casual or personal fashion. . . ."[57] The new law also differentiated between large and small scale operations.[58] Gambling in the first degree consisted of either accepting more than five bets totaling more than $5,000, laying off bets, or receiving more than $500 in any one day of business.[59] Possession of gambling records or large-scale bookmaking were also first degree offenses, except that the one day time period was not included. Anyone who knowingly possessed records of over 500 bets also committed a first degree offense.[60]

Possession of gambling records was made easier to prove by the removal of the requirement that such records be made by a person engaged in bookmaking. The new law substituted the requirement that the records be of a kind commonly used in bookmaking.[61] Also included as an offense was the possession of flash or water soluble paper. The only defense available to a possession charge was that the item was neither

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[56] People v. Pavia, 8 N.Y.2d 333, 170 N.E.2d 667 (1960).

[57] See N.Y. Penal Law §225.00(9)(1967).

[58] Id. §225.10.

[59] Id.

[60] Id. §225.20.

[61] N.Y. Penal Law §225.15 (Supp. 1975-76) amending N.Y. Penal Law §225.15 (1967). Original Act of May 26, 1969, ch. 974, 2 [1969] Laws of N.Y. 2416-17.

used nor intended to be used for bookmaking or policy.[62]

4. Decriminalization

a. On-track betting

Against this background of persistent illegal gambling and the increased profits which organized crime received from it, New York began to investigate the possibility of returning to the earlier pattern of legalizing certain forms of gambling which could be carefully monitored by public officials. The need for increased revenues which arose between the two World Wars, combined with the invention of the parimutuel totalizer, prompted New York to pass a constitutional amendment in 1939 by which the legislature was empowered to authorize parimutuel betting on horseraces.[63] Such betting was to yield "reasonable revenue" to the state.

In 1940, the legislature enacted the Parimutuel Revenue

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[62] N.Y. Penal Law §225.25 (1967).

[63] N.Y. Const. art. I, §9 (1938) as amended in 1939. In parimutuel betting, bettors wager against each other rather than against the bookmaker. The system was originated in 1856 by Pierre Oller who first called it the Paris mutuel system. Using a hand-run tallying machine Oller was able to calculate the changing odds by comparing the amount bet on each horse against the total pool of bets. By 1930 electronic devices known as totalizers had further removed parimutuel betting from tampering. This improved method for controlling wagering played a significant role in promoting limited legalization of gambling.

Law[64] which continued the state racing commission.[65] The commission was empowered to license parimutuel betting on horseraces and steeplechases conducted by incorporated racing associations,[66] to set the rules governing such betting,[67] and to investigate all cases related to race betting by subpoenaing books and records.[68] To insure the honesty of the betting system, the associations were required to be bonded,[69] and precise standards for bookkeeping, bet paying and information posting were imposed.[70] Betting was limited to on-track transactions.[71] This limitation proved to be a financial boon to track owners.

Revenues were raised by a tax of approximately 10 percent

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[64] N.Y. Unconsol. Laws §§7901-8052 (1961), as amended (Supp. 1975-76). For ease of administering the law the state was divided into two zones, one including New York City and a few surrounding counties, and the other including the rest of the state. A limit of six tracks was set for the first zone and three for the second, both as a way of improving the government's ability to oversee them and to prevent over-competition among them.

[65] Act of March 31, 1940, ch. 254, art. 1, §3, [1940] Laws of N.Y. 861-62.

[66] N.Y. Unconsol. Laws §7953 (1961).

[67] Id. §7957.

[68] Id. §7908 (Supp. 1975-1976).

[69] Id. §7955 (1961).

[70] Id. §§7956, 7957.

[71] Id. §7956. New York further benefited from track action by a provision, §7973, which mandated that 85 per cent of all employees at licensed tracks be New York residents for at least two years.

on the betting pools and 50 per cent on the "breaks," a rounded figure defined by the statute.[72] During the first 22 years of legalized on-track betting, over $1 billion was realized by the state.[73]

The ambivalent attitude toward the "morality" of betting was reflected by provisions prohibiting betting by minors.[74] Moveover, the racing season was limited to eight months of the year.[75]

The Parimutuel Racing Law also created a state harness racing commission[76] which administered rules similar to those imposed on horseracing, and in 1970 a state quarterhorse racing commission was established.[77] This deliberate division

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[72] Id. §7959(1). These rates have since been increased. For Zone 1 taxes are approximately 12-1/2 per cent on the total betting pool and 80 per cent on the "breaks"; zone 2 taxes are approximately equal to 11-1/2 per cent of the total pool, plus 65 per cent of the breaks. Id. §7959(1)(Supp. 1975-1976).

[73] J. Drzazga, Wheels of Fortune 125 (1963). Racing has continued to be an important New York State industry. In 1972, for example, New York racing attendance constituted 20 per cent of the total racing attendance in the United States and 32 per cent of the total government parimutuel revenue was collected by New York State.

[74] Act of March 31, 1940, ch. 254, art. 1, §8 [1940] Laws of N.Y. 863 as amended, N.Y. Unconsol. Laws, tit. 21, §8165 (Supp. 1975-1976). This ambivalence still exists, despite OTB's popularity. Patrons of OTB parlors, when questioned by New York Times reporters, either requested anonymity or denied their involvement altogether. "OTB 5, Hopes to Grow; Betting Stigma Persists," N.Y. Times, Apr. 5, 1976 at 1, col. 6.

[75] N.Y. Unconsol. Laws, tit. 21, §7972 (Supp. 1975-1976). An amendment extended the racing season to 9-1/2 months in 1971. Id.

[76] Act of March 31, 1940, ch. 254, §35, [1940] Laws of N.Y. 869; N.Y. Unconsol. Laws, §8001 (1961)(repealed July 1, 1973--subject matter now covered in §8164).

[77] N.Y. Unconsol. Laws §§8033-40x (1975-1976).

of authority worked against the goal of keeping criminals out of legalized betting. From 1946 to 1949, Frank Costello received $15,000 a year to keep bookies away from one New York track.[78] By 1951, organized crime figures had extensively infiltrated the parimutuel system.[79] In fact, there were unproven charges that New York legislators had been bribed into agreeing to authorize quarterhorse racing.[80]

In the early 1950's the legislature finally prohibited known criminals, violators of racing laws, and people known to consort with bookmakers from working at race tracks.[81] The racing commission was given the power to levy fines of up to $5,000 for racing law violations.[82] Public officials and employees were not permitted to have any interests other than ordinary bets in parimutuel activities. Lastly, labor racketeering at tracks was frustrated by a provision which forbade any requirement that track employees belong to unions.[84]

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[78]The race track was Roosevelt Raceway. Kefauver Report at 113.

[79]Id. at 151.

[80]12th Annual Report of the Temporary Commission of Investigation of the State of New York to the Governor and the Legislature at 287-89 (1970).

[81]N.Y Unconsol. Laws §7915 (1961).

[82]Id. §7975.

[83]Id. §8042 (Supp. 1975-1976).

[84]Id. §8028 (1961)(Harness Racing); §8040-s (Supp. 1975-1976) (Quarter Horse Racing).

Criminal activities continued to plague the tracks throughout the 1960's. The legislature attempted to combat such infiltration by passing new laws which included a provision making the entry of disguised or misidentified horses a misdemeanor.[85] In 1970, race tracks were required to carry the increasing costs of preventing the use of improper devices and the drugging of horses.[86] In another attempt to lessen criminal influence, the legislature combined all the racing commissions into a single New York State Racing and Wagering Board.[87]

b. OTB

During the Wagner Administration in New York City a series of fiscal crises inspired the city to lobby for legalized off-track betting (OTB) as a means of solving its financial problems.[88] Advocates claimed that at least $2 billion could be raised annually through OTB. While the city pushed for OTB, the legislature, reflecting race track interests, opposed it.[89] Public opinion in New York City ran three to one in favor of OTB[90] and one 1963 public opinion poll revealed that few New Yorkers worried about the

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[85] Id. §7918-a (Supp. 1975-1976).

[86] Id. at §7974.

[87] Id. at §7951-a.

[88] D. Weinstein and L. Deitch, The Impact of Legalized Gambling 17 (1974) [hereinafter cited as Weinstein and Deitch].

[89] Id.

[90] Id.

morality of race betting.[91] Of those interviewed, 70 percent believed that OTB would be a valuable means of raising revenue, while 25 percent saw the reduction of business for organized crime as a major advantage of OTB.

In 1970 the legislature finally sanctioned OTB by enacting the law whose purpose was to secure

> . . . a reasonable revenue for the support of government, and to prevent and curb unlawful bookmaking and illegal wagering on horse races. 92

New York City quickly exercised the local option provided in the law and established the New York City Off-Track Betting Corporation, a public benefit corporation "operated along the lines of a private enterprise business whose profits accrue to the taxpayers in the form of public revenue."[93] Employing an advanced on-line computer network, New York's OTB system is able to accept and transmit bets placed throughout the state into the parimutuel systems at the tracks. Thus, only a single parimutuel pool is required and the result is a single parimutuel pay-out price.[94] The OTB

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[91] Id.

[92] N.Y. Unconsol. Laws §8062 (Supp. 1975-1976).

[93] Testimony of Paul R. Screvane, President and Chairman of the Board of Directors of the New York City Off-Track Betting Corporation, before the Commission on the Review of the National Policy Toward Gambling 4 (Washington, D.C., May 6, 1975) [hereinafter cited as Testimony of Paul Screvane]. The corporation has a board of directors appointed by the Mayor. The board hires the corporate president and the corporation is able to operate with relative freedom from city bureaucratic procedures. See Weinstein and Deitch at 22.

[94] See Weinstein and Deitch at 98-100.

system accepts bets on New York thoroughbred and harness tracks, as well as on certain out-of-state tracks.[95]

One of the unique aspects of OTB is its use of mass marketing methods to attract business. As one commentator has written:

> OTB pays careful attention to the physical appearance of its offices. They are decorated with murals and racing posters, and are standardized as to signs and other decor. When a new branch office opens, it is accompanied by much fanfare to attract bettors in the neighborhood. Pre-opening advertising is placed in cooperative local stores and community newspapers, opening day "sweepstakes" are held . . . , and small items(such as OTB shopping bags, key rings and buttons) are distributed. One new branch even imported a horse from Yonkers Raceway for its opening and presented prizes in front of the office, leading a city councilman to accuse OTB of "medicine-show huckstering" contrary to its avowed purpose of providing facilities for gambling without excessively encouraging it. 96

In addition to widespread advertising[97] and live television coverage of some races,[98] OTB has also offered such exotic combination bets as the superfecta, which yields dramatic winnings to the bettor who picks the first four finishers in order.[99]

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[95] Id. Bets on Florida and Maryland races are taken only when there is no thoroughbred racing in New York. Special events such as the Kentucky Derby or the Preakness are also included.

[96] Id. at 103.

[97] Id. Advertisements usually emphasize the fun of betting by using slogans such as "the newest game in town" and "call us the N.Y. bets."

[98] Id.

[99] Id. at 102.

The extent to which OTB has accomplished its dual goals of raising revenues and combatting organized crime cannot yet be evaluated fully. A preliminary verdict would be that OTB has succeeded in increasing government revenues as well as redistributing them. By one account,[1] OTB in 1974 contributed $76.9 million to the $233.9 million total New York racing revenue. Since OTB may have been responsible for a $13.3 million decrease in on-track receipts[2] the actual net OTB income to government was probably closer to $63.6 million. Of this sum, only $4.9 million went to the state, while $54 million went to New York City.[3] Consideration must be given, however, to the possibility that OTB might also be diverting money from the purchase of taxable goods to betting.[4] To the extent that such diversions occur, OTB cannot be viewed as increasing state revenue since the state would be losing sales tax dollars.

Studies of OTB's impact on the ordinary citizen have

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[1] See Testimony of Paul Screvane at 7.

[2] Id. The conclusion of another study also points to the potential damage which OTB could cause to the tracks.

> . . . it appears that the institution of off-track betting can be expected to cause at least a short-term decrease in attendance and handle at local tracks, but the impact can be cushioned by payment of an adequate percentage of OTB revenue to the racing industry. OTB proponents feel that in the long run the effect on racing will be beneficial--if public interest in racing itself begins to increase.

See Weinstein and Deitch at 113.

[3] Schenectady, an upstate city near Albany, also has an OTB system which in the first seven calendar months of 1973 brought the city over $250,000. See Weinstein and Deitch at 111.

[4] See Weinstein and Deitch at 115.

revealed that most OTB players are not new to gambling. The average player

> . . . earns $12,300 a year. He is a high school graduate, forty-two years of age, male, white, often of Italian or Irish extraction, very often Catholic, and a blue collar worker. He is not poor. He is not a compulsive gambler. 90% of our customers also bet at the track. 25% have at some time bet horses with a bookmaker. 43% have had prior experience with some form of illegal gambling. [5]

It would appear, then, that OTB has succeeded in luring some of its customers away from organized crime. A recent study made for the National Gambling Commission concluded that the volume of legal betting was three times greater than that of illegal betting. It placed legal betting figures at $17.3 billion as opposed to $5 billion for illegal bets.[6]

When one considers the fact that "[i]llegal gambling within New York City is a multiple game activity that is conservatively estimated to gross four billion dollars . . .

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[5] See Testimony of Paul Screvane at 17-18.

[6] "Legal Bets in America Exceed Illegal Ones, 3-1, Study Shows," N.Y. Times, June 27, 1976, §5, at 9, col. 6. However, the Gambling Commission doubts the validity of this study. One Commission member, when speaking about the results reported by the Survey Research Center of the University of Michigan said, "It is so far off in the amount of money illegally bet in this country that I have to question the credibility of any of its figures." See generally, Second Interim Report: Commission on the Review of the National Policy Toward Gambling, 43, 68-71, (1976).

annually"[7] the effect of losses to OTB does not seem very serious. Moreover, the Justice Department has estimated that "no more than $10 of the total illegal handle" of organized crime comes from wagering on horseraces,[8] and the Department contends that

> [m]uch of the illegal wagers on horse races is of marginal value to the bookmaker whose main interest is in accepting wagers on team sport activities. At the present time, wagering on team sports is considered a sheltered market by the Organized Crime bookmaker since it provides him with his major portion of illegal gambling revenues yet remains free of any legal competition. 9

Thus, only the small bookmaker has been hurt by OTB.[10]

Many horsemen and track owners claim that OTB is slowly destroying racing. They claim that it has caused on-track attendance to sag,[11] and additionally, is responsible for the growing number of racing injuries.

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[7] Id. at 8, quoting statement of Commissioner Michael J. Codd of the New York City Police Department provided on April 25, 1975.

[8] Id. at 9.

[9] Id.

[10] Id.

[11] "Attendance Down, Betting Up in State," N.Y. Times, Feb. 4, 1976, at 26, col. 3; "Legal Bets in America Exceed Illegal Ones, 3-1, Study Shows," N.Y. Times, June 27, 1976, §5, at 9, col. 6.

> It all starts with the greed of the legislature. If the state wants to keep the racing season so long, then the tracks have to throw money around to keep the talent. So a horse goes all winter. [12]

Trying to keep up with the minimum figure of $5,600 for the yearly upkeep of each of their racehorses,[13] owners no longer give their good stock a rest. Tired horses and tired jockeys make mistakes.

Horsemen are not alone in their worries. In 1973, the legislature apparently attempted to help tracks offset losses from off-track betting.[14] Even though Paul Screvane, chairman of OTB, insists that OTB has been beneficial, not harmful, to the racing industry, the legislature recently passed a bill designed to save the New York State Racing Association from financial crisis.[15] This bill also created a temporary state commission to study thoroughbred racing and to suggest ". . . recommendations for changes in the existing structure designed to improve the quality of racing [and] measures necessary to insure maximum revenue to the state. . . ."[16]

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[12] "More Purses, More Races, More Injured Horses," N.Y. Times, July 4, 1976, §5, at 1, col. 5.

[13] "At Syracuse," N.Y. Times, Jan. 24, 1976, at 18, col. 3.

[14] "Albany Out to Rewrite '73 Trot Bill," N.Y. Times, Feb. 25, 1976, at 47, col. 5.

[15] "Bill Aiding Tracks Signed in Albany," N.Y. Times, July 29 1976, at 37, col. 1. Under this bill, the New York Racing Association is guaranteed $1.75 million for capital improvements each year, with the state paying all expenses except for charges for stakes, purses, interest, real estate taxes, promotion, advertising and depreciation.

[16] Id. The report is to be made on or before March 31, 1977.

Even Congress has responded to the racing industry's growing concern over interstate parimutuel betting. To forestall the grim future predicted by one horseman,[17] Congress is considering a bill to ban all interstate off-track betting.[18] If passed, this bill would prohibit interstate off-track betting in all cases except where a current contract existed between two states. New York and Connecticut are the only states with such a contract, and even that is due to expire in 1981.

Perhaps a more serious concern should be the effect of organized crime on OTB. The OTB system itself has "elaborate security procedures"[19] to prevent fraud and criminal

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[17] George Smathers, representative of the American Horse Council, stated early this year:

> In their drive to obtain every available betting dollar, the interstate wagering operations will seek the best races throughout the country. They will enter into contracts with one or two of the better known tracks in other states. The tracks within the state that offer interstate off-track wagering will be unable to to compete with the better quality racing programs.
>
> Attendance at these tracks will decline, purses will grown smaller, revenue will fall, and slowly but surely, the track will become unprofitable and close.
>
> Soon the industry will be left with a very small number of tracks and with no place to run the fair or mediocre grade horses. Without an opportunity to turn a profit on these horses, breeders will stop producing.
>
> . . . .
>
> Racing would deteriorate to little more than a lottery on horse races.

"Ban on Interstate OTB Urged," N.Y. Times, March 24, 1976, at 29, col. 6.

[18] "House Unit Backs Interstate Bet Ban," N.Y. Times, June 26, 1976, at 11, col. 1.

[19] See Weinstein and Deitch at 101.

influence. Guards protect the computer on a twenty-four-hour basis and careful security checks are made of all employees to determine whether they have organized crime connections.[20] In addition, there is a special investigatory unit which checks out allegations of misconduct. In 1972 this group conducted 288 investigations which resulted in six criminal prosecutions.[21] Yet the genius of professional criminals has already circumvented these precautions. In 1973, the FBI revealed that the superfecta was being abused by a betting syndicate which found that by arranging "to hold back two or three of the horses" it could "bet on all other possible combinations and be assured of winning more than [it had] expended."[22] The superfecta was banned as a result of this scheme.[23]

A recent state investigation of the State Racing and Wagering Board has given even more cause for concern.[24] It cited serious deficiencies in the Board's screening of "undesirables," inadequate financial audits, and the use of political influence in the appointment of officials at race tracks.

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[20] Id.

[21] Id.

[22] Id. at 102.

[23] Id.

[24] "State Report Hits Turf Body Again," N.Y. Times, July 11, 1976, §5, at 1, col. 3.

Nevertheless, OTB chairman Paul Screvane plans to increase the number of OTB parlors. He even envisions increasing OTB revenue by renting places like Manhattan Center or Radio City Music Hall, installing closed-circuit televisions for live coverage of horseraces, and granting concessions for food, soft drinks, and liquor.[25] The legislature also is considering bills which would authorize OTB to take bets on professional sports.[26]

c. Bingo

Bingo was always one of the forms of gambling prohibited by the gambling laws. During the Depression, however, it became extremely popular at amusement parks, fireman's carnivals, grange suppers and church socials.[27] Its popularity during this era was said to have been a result of the ". . . hope of being able to win something for nothing. . . ."[28] Churches, in particular, adopted bingo as a way of raising revenue and also as a means of providing social entertainment. As one churchman wrote:

> I cannot grow frenzied with the puritanic precisionists who rate the bourgeois pastime of bingo as a major sin. Church bingo parties are a healthy substitute for gossip teas, lovesick movies and liberal minded lectures. 29

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[25] "OTB 5, Hopes to Grow, Betting Stigma Persists," N.Y. Times, April 5, 1976, at 1, col. 6.

[26] Id.

[27] Dulles at 377.

[28] Id.

[29] Id.

Church and social group involvement in illegal bingo created serious problems: the police were torn between ignoring the law or enforcing it against churches and other highly respected organizations, while the bingo sponsors found their games becoming infiltrated by criminals who siphoned off much of the games' profits. In response to this predicament the people of New York, in 1957, approved a constitutional amendment which empowered the legislature, upon approval by the voters of the cities, towns, or villages to be affected, to authorize bingo when conducted by specific organizations for certain purposes.[30]

The legislature implemented this constitutional amendment by passing two laws: The Bingo Control Law[31] and The Bingo Licensing Law,[32] both of which had a common origin and purpose.

> The legislature hereby declares that the raising of funds for the promotion of bona fide charitable, educational, scientific, health, religious, civic and patriotic causes and undertakings, where the beneficiaries are indefinite, is in the public interest. It hereby finds that, as conducted prior to the enactment of this article, bingo was the subject of exploitation by professional gamblers, promoters, and commercial interests. It is hereby declared to be the policy of the legislature that all phases of the supervision, licensing and regulation of bingo and of the conduct of bingo games, should be closely controlled and that

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[30] N.Y. Const. art. I, §9 (1939)(as amended Nov. 5, 1957).

[31] N.Y. Exec. Law §§430-439-b (1972), as amended (Supp. 1975-1976).

[32] N.Y. Gen. Munic. Law §§475 et seq. (1974).

> the laws and regulations pertaining thereto should be strictly construed and rigidly enforced; that the conduct of the game and all attendant activities should be so regulated and adequate controls so instituted as to discourage commercialization in all its forms, including the rental of commercial premises for bingo games, and to insure a maximum availability of the net proceeds of bingo exclusively for application to the worthy causes and undertakings specified herein; that the only justification for this article is to foster and support such worthy causes and undertakings. . . . 33

The Bingo Control Commission[34] was established to ensure compliance with the law. It was explicitly charged with regulating the licensing process,[35] investigating any violations of the licensing law,[36] imposing penalties such as license revocation for violations of the law,[37] and recommending changes in the statute to the legislature.[38]

The Commission, however, was not successful in preventing illegal interference with authorized bingo games. Only four years after the bingo laws were passed, a New York State

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[33] See N.Y. Exec. Law §431 (1972).

[34] Id. §433, as amended (Supp. 1975-1976). The Commission, which is part of the state department, consists of a chairman and four members, not more than three of whom may be from the same political party. Such members cannot hold any other public office, have any pecuniary interest in companies involved with bingo, or be officers of any organization licensed to play bingo. Commission appointments last for five years and are made by the governor.

[35] Id. §435(1)(a).

[36] Id. §434 (1)(b).

[37] Id. §435(1)(c) and (f).

[38] Id. §435(1)(c), (g).

Commission of Investigation report on bingo indicated extensive misappropriation of bingo profits by notorious gamblers.[39] In fact, the same investigation revealed that the head of the New York Committee for the Legalization of Bingo, a group which led the campaign for the 1957 amendment, was a twice-convicted gambler with strong racketeer connections.[40] Widespread corruption was also uncovered in the investigative arm of the Bingo Commission.[41]

In 1961, a major reform was undertaken with the establishment of the Moreland Act Commission which recommended that the Bingo Commission be given expanded law enforcement powers.[42] In 1962, the Bingo Commission was given the power to grant immunity, after allowing the District Attorney and State Attorney General opportunity to be heard.[43] Sellers of bingo equipment were subject to the requirement that they be free from criminal ties.[44] In 1974, these sellers were required

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[39] 10 N.Y. Leglislative Documents, 185th Session, 1962, Doc. 103 at 41.

[40] Id. at 35 (specific facts cited are not actually there--only that he had a record and Las Vegas connections).

[41] Id. at 45.

[42] Id. at 51-52 (only describes appointment of the commission to review lottery laws).

[43] N.Y. Exec. Law §436 (1972).

[44] Id. §435(2)(c) as amended (Supp. 1975-1976). Besides an unpardoned conviction, other grounds for denial of a license include: being a known professional gambler or not of good moral character (id. §435(2)(c)(2)) or being a public employee (id. §435(2)(c)(3)).

to be licensed.[45]

In addition to containing elaborate provisions aimed at preventing criminal involvement in bingo, the laws also reflected strong reservations about legalized gambling. The statutes provided for local options so that communities which strongly opposed gambling could prevent bingo from going licensed within their borders.[46] Minors were prohibited from playing, unless accompanied by an adult,[47] and the frequency of the games,[48] the amount of the prizes offered,[49] and the hours during which bingo could be played were restricted.[50] No games were permitted in any indoor or outdoor area "where alcoholic beverages are sold, served or consumed during the progress of the game. . . ."[51] Most interesting of all, in light of the extensive advertising conducted by OTB and the State Lottery, was the prohibition on advertising.

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[45] Id. §435(2)(b).

[46] See N.Y. Gen. Munic. Law §§475 et seq. (1974).

[47] Id. §486.

[48] Id. §487(c). Games are limited to six days in one calendar month unless a special limited bingo period has been licensed, in which case a sixty-game limit is imposed.

[49] Id. §479(5), (6). No one prize may exceed $250 and the aggregate of prizes on any one bingo occasion may not go beyond $1,000. All net proceeds must go to the lawful purposes.

[50] Id. §485. The general rule is no bingo on Saturdays, although exceptions are permitted. Under §487 no bingo is permitted between midnight and noon.

[51] Id. §487.

> No game of bingo conducted or to be conducted in this state or outside of this state shall be advertised as to its location, the time when it is to be or has been played, or the prizes awarded or to be awarded, or transportation facilities to be provided to such game, by means of of newspapers, radio, television or sound trucks or by means of billboards, posters or handbills or any other means addressed to the general public, except that one sign not exceeding sixty square feet in area may be displayed on or adjacent to the premises owned or occupied by a licensed authorized organization. . . . 52

In 1967, further steps were taken in the direction of legalizing bingo with passage of a statute legalizing bingo-playing in private homes provided that the purpose be for amusement, that no one furnish anything of value for the opportunity to play, that no more than fifteen people participate, and that any prize awarded be nominal.[53] In 1970, bingo was authorized in senior citizens homes which have been granted an identification number by the Commission, offer only nominal prizes, permit only bona fide members of the home to participate, and do not require any consideration for participation.[54]

New York's recent fiscal crises may have a great impact on the ability of the state to control bingo and prevent criminal interference. In 1975, Governor Hugh Carey recommended, and the legislature agreed, to abolish the Bingo Commission as part of the governor's austerity budget.[55] Instead of

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[52] N.Y. Gen. Munic. Law §490 (1974).

[53] Id. §495-a(2)(b).

[54] Id. §495-a(2)(c).

[55] Ithaca Journal, Apr. 10, 1975, at 7, col. 2.

the 50 to 55 member staff of the commission, one director, seven accountants, two typists, and one stenographer will be charged with overseeing bingo in New York.[56] Ira M. Ball, an attorney who chaired the Bingo Commission from its founding in 1962 until its demise on April 1, 1975, has warned that the new arrangement will leave the state "wide open for all the crooks and gamblers we have kept out for the past 12 or 13 years."[57]

d. Lottery

New York's third venture into legalized gambling occurred in 1967 with the establishment of the New York State Lottery, the proceeds of which were to go solely to education.[58] In 1963, New Hampshire had been the first state in the twentieth century to reinstitute a state-run lottery.[59] Its success in preventing criminals from infiltrating the lottery and in raising large amounts of revenue inspired New York to establish its own.

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[56] Id. at col. 3.

[57] Id. at col. 2.

[58] N.Y. Unconsol. Laws §§9541 et seq. (1974), as amended (Supp. 1975-1976). The authority for the lottery law was §9 of article I of the state constitution, which permitted the establishment of a lottery provided "the net proceeds. . . be applied exclusively for the purpose of providing aid to primary, secondary, and higher education and for providing scholarships."

[59] State of Wisconsin Legislative Reference Bureau, State Lotteries Research Bulletin 73-1 at 6 (May 1973).

In its original form, the New York lottery was relatively modest, reflecting the bitter legislative debates which the subject of a legalized lottery had inspired.[60] Drawings were limited to not more than twelve a year,[61] tickets prices were relatively high (ranging between one and two dollars each),[62] and ticket sales were restricted to banking institutions, telegraph companies, hotels, and municipal outlets.[63] Moreover, tickets had to contain the name and address of the purchaser,[64] and could neither be negotiated[65] nor sold to minors under the age of eighteen.[66]

These rigid limitations prevented the lottery from realizing the revenue goals expected. When neighboring New Jersey opened its extremely successful weekly lottery featuring tickets priced at only fifty cents, it outgrossed

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[60] Id. at 8.

[61] N.Y. Session Laws, ch. 278, §1305(a)(1)(1967).

[62] Id. §1310.

[63] Id. §1306(a).

[64] Id. §1310.

[65] Id.

[66] Id. §1311(a).

New York's lottery three to one.[67] To compete with the New Jersey lottery, New York changed its lottery structure by expanding ticket outlets to any convenient business establishment.[68] Ticket prices were reduced to fifty cents[69] and tickets were made transferable.[70] The requirement that

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[67]Report of the Task Force on Legalized Gambling, Easy Money 50 (1974) [hereinafter cited as Easy Money]. The problem of over-competition among lotteries, a phenomenon experienced throughout the 17th and 18th centuries has again become a factor which states must consider when deciding on the revenue producing potential of legal lotteries. When New York began its lottery, for example, New Hampshire experienced a 50 per cent reduction in gross income from its lottery.

Another factor affecting the success of lotteries is novelty. Revenues during the first year of the currently authorized lotteries is high, but trails off in following years. Thus, to maintain their income production, lotteries must find new gimmicks. See id. at 50-51.

[68]See N.Y. Unconsol. Laws §9545 (1974), as amended (Supp. 1975-1976). The basic criterion for licensing ticket outlets is public convenience (§9545(a)), but there are certain limits. No one can be an agent whose business would be exclusively lottery ticket sales, an agent's financial reliability must be established, and the amount of patronage by minors and expected volume of sales will also be taken into consideration.

Until 1973, the law prohibited retail liquor establishments from selling tickets. That restriction no longer exists.

One study reveals that food stores (with 27.5 per cent) and restaurants (with 14.4 per cent of the total outlets) are the most popular sales agents. Stationary stores (8.2 per cent), drug stores (8.0 per cent), smoke shops (4.5 per cent), liquor stores (4.5 per cent) and newsstands (4.0 per cent) are the other major outlets.

[69]Another gimmick which has been used to increase sales has been to increase both the frequency of drawings and the prize amounts. See Easy Money at 50-51.

[70]N.Y. Session Law, ch. 165, §1310 (1970).

the purchaser's name and address appear on the ticket was also eliminated.[71]

The supervision of the lottery was entrusted to the New York State Racing and Wagering Board.[72] This Board had the power to set the rules governing lottery conduct, including the types of lottery to be conducted,[73] the price of tickets,[74] the number and size of prizes,[75] the manner of selecting winners,[76] and the method for selling tickets.[77] The Board also had the authority to grant and suspend ticket agents' licenses.[78]

An article by Lewis Freedman in the Syracuse-Herald Journal on October 3, 1975, alleging serious difficulties within the lottery prompted a change in the method of selecting winners. Other similar stories followed in the New York Daily News. Sales plummeted.[79] The director of the lottery soon announced

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[71] Id.

[72] N.Y. Unconsol. Laws §9544 (1974).

[73] Id. §9544(a)(1).

[74] Id. §9544(a)(2).

[75] Id. §9544(a)(3).

[76] Id. §9544(a)(4).

[77] Id. §9544(7).

[78] Id. §§9545, 9547.

[79] "Gyps Slashed Lottery Sales: Vendors," N.Y. Daily News, Oct. 17, 1975, at 1, col. 1.

chances while legislative leaders promised reports.[80] Nevertheless, Governor Carey suspended the lottery on October 22, 1975.

A number of reports were prepared in the next two weeks. The Haddad Report, prepared for Assembly Speaker Stanley Steingut, charged that the lottery profits were not used exclusively for education. Misleading advertising alleged weekly prizes in the "Colossus," although no such weekly events occurred. Not only were there significant management and organizational problems, lottery funds were placed in non-interest-bearing accounts for extended periods.[81]

The harshest criticism of New York lottery practices, however, was contained in the report of a private consulting firm commissioned by Governor Carey to give an independent assessment. The Little study found many potential areas for fraud in the New York lottery, although apparently no actual wrongdoing. Among the most serious problems were the security considerations, accompanied by the poor organizational and fiscal responsibility of the lottery agency. The Little

[80]"Lottery Drawing Changed to Use Only Sold Tickets," N.Y. Times, Oct. 22, 1975, at 49, col. 7.

[81]Report of William Haddad, Office of Legislative Oversight and Analysis, For Stanley Steingut, Assembly Speaker. See "Study Says Lottery Funds In Banks Earn No Interest," N.Y. Times, Nov. 4, 1975, at 37, col. 1. Another report making somewhat less harsh but similar conclusions was issued by the office of Senate Majority Leader Warren M. Anderson. See also Office of the Comptroller, State of New York, Special Audit Report on Financial and Operating Practices, Executive Department, Racing and Wagering Board, Division of the Lottery, Nov. 14, 1975, Rept. No. AL-St-35-76, which emphasizes the managerial problems.

study discovered that simple precautions, such as the use of special paper for the tickets and a special type font to print the numbers, had been abandoned. Access to the computers were not sufficiently restricted, nor was there an effective lock-out program to prevent the printing of additional tickets after the winning number had been announced. There were few checks on the computer programming: it did not follow written procedures and was apparently all in the head of a sole programmer. In addition, the programs for printing the numbers were rather facile, and thus decipherable. Other programs could have been used with little additional expense. Unsold tickets were not removed from the pool prior to the announcement of winning numbers, thus dealers had the opportunity to collect on winning numbers remaining among their unsold tickets.

The Little Report uncovered so many "needless opportunities for fraud" that Governor Carey ordered fundamental changes before the lottery would be allowed to resume.[82] Meanwhile, since it was earning no revenue, its staff was dismissed along with its director, Jerry Bruno. The lottery was not expected to become operational again until the spring of 1976.

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[82] "Carey to Overhaul Lottery and Dismiss Entire Staff," N.Y. Times, Nov. 29, 1975, at 1, col. 4.

Despite the new plans, the state supreme court issued an injunction on March 17, 1976 to insure that the State Lottery Commission, if and when it revived a weekly lottery, would not include unsold tickets in the pool from which winning tickets were to be drawn.[83] "The inclusion of unsold tickets seems plainly to constitute a fraud upon the public."[84]

The reasoning behind this injunction was not reflected in the new lottery bill passed by legislature on March 31st.[85] Although this act contained tight controls,[86] it did not require that all winning numbers be distributed among lottery patrons.

The court reiterated its earlier position and upheld its injunction limiting winning numbers to the numbers on sold tickets. The rescheduled drawings for the suspended October

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[83] "Metropolitan Briefs--Unsold Lottery Tickets Barred," N.Y. Times, Mar. 17, 1976, at 45, col. 1.

[84] Statement of Justice Abraham J. Gellinoff. Id.

[85] New York State Lottery for Education Law, ch. 92, ch. 93, McKinney's Session Laws (March 31, 1976). The Lottery for Education Law shifted the lottery from the control of the New York State Racing and Wagering Board to the Department of Taxation and Finance. The proceeds of the lottery are to be used exclusively for education, either for children with special educational needs, or as supplemental aid to all school children. The new act also called for the continuation of the five suspended October 1975 drawings.

[86] Id. Section 1604(10) requires the development of an internal security plan. Based on regular reports of lottery proceeds and dealings, it provides for the conscientious licensing of ticket agents. Sections 1611 through 1613 require a careful and deliberate series of authorizations for the control and dispersal of lottery funds.

games were thrown into confusion; the Colossus drawing was going to use seven random numbers to determine the winning tickets.[87] Nevertheless, a new lottery was scheduled for May 18, 1976 to award prizes to those finalists holding tickets from the grand tier drawings of the preceding October.[88]

Certain that this new lottery would suffer from the same faults which led to the suspension of the old lottery, the state supreme court issued an injunction barring the May 18th drawing. Not only was there the possibility that few people would have retained their October tickets for the seven-month interim.[89]

Working hard to combat these problems, the state filed new affidavits which prompted the court to drop the injunction. The state explained the theory behind the drawings and proposed a new procedure for carrying them out.[90] The first of these makeup drawings was held on July 16.

Too many problems confronted the State Lottery Commission to continue the makeup drawings for the last three outstanding games. Lacking sufficiently accurate information to conduct a drawing, the Commission announced in early August 1976 that it would make refunds on the approximately 1.8 million out-

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[87] "Metropolitan Briefs--Format of Colossus Lottery in Doubt," N.Y. Times, Apr. 21, 1976, at 41, col. 5.

[88] "New Lottery," N.Y. Times, May 5, 1976, at 42, col. 2.

[89] "Special New York Lottery Barred by Court Injunction," N.Y. Times, May 15, 1976, at 29, col. 1.

[90] "Court Approves Special Lottery for $1.7 Million Left in 1975," N.Y. Times, June 17, 1976, at 39, col. 3.

standing on $.50 tickets. The remaining $1.4 million in jackpot funds were to be awarded in a special game later in the year.[91] By the end of August, however, the last $125,000 prize had been awarded.[92]

Until recently, state lotteries were limited in their advertising campaigns by federal prohibitions on the broadcasting of lottery information.[93] New York and other lottery states found themselves restricted to using billboards, newspapers, and transit cards to advertise their games. Themes emphasized the good purpose of the lottery, chances at winning big prizes, and the fun of playing the lottery. Mechanical ticket vending machines also increased the ease of playing.

In December of 1974 Congress dropped its ban on broadcasting lottery information.[94] Since that time several states have instituted major television and radio coverage of their lotteries. In July of 1975 New York joined this trend, which, in effect, is a return to the early nineteenth century practices. Based on a popular television game show, New York's first lottery show was a half-hour prime-time affair featuring the finalists in the state's super $1 million lottery.[95]

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[91] "New York Lottery Will Give Refunds in Three Halted Games," N.Y. Times, Aug. 3, 1976, at 27, col. 1.

[92] "Bronx Mechanic Wins Final Lottery Drawing," N.Y. Times, Aug. 25, 1976, at 35, col. 8.

[93] 18 U.S.C. §1304 (1970).

[94] N.Y. Times, July 8, 1975 at 63, col. 4.

[95] Id. at 1, col. 4.

Billed as the "largest TV giveaway in history,"[96] and hosted by a popular television celebrity, the broadcast attempted to create a sense of drama and whet the playing instincts of the viewers. As described by one reporter, the show had the finalists

> . . . take part in an elimination game, which will reduce their number to three. At that point a wheel of fortune will spin for the third-prize winner, who will receive $250,000, and then for the second prize of $500,000. The remaining contestent will receive the grand prize of $1-million.[97]

e. Further legalization

Despite these ventures into legalized and state-controlled gambling, New York has not succeeded in putting organized crime or illegal gambling out of business. In 1973, one study recommended that New York also legalize casino gambling, slot machines, and parimutuel betting on jai alai and claimed that $1.15 billion per year could be raised from legalized gambling.[98] A study conducted by the Fund for the City of New York, however, found that the goals of trying both to raise substantial revenue and to compete with organized crime were contra-

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[96] Id.

[97] Id.

[98] New York State Commission on Gambling, "Report and Recommendations to Extend Legalized Gambling" iv (February 1973).

dictory.[99] While some forms of gambling were considered manageable by governments, others such as sports betting were not because the state could neither extend credit nor enforce loans the way organized crime could.[1] The study concluded that:

> Legalizing some forms of gambling as a contribution to the battle against official corruption and organized crime is worth a try.
>
> To achieve a measure of success, there will have to be sustained pressure on criminal gambling operations from two sides: the economic competition of a higher-payout legal game, and the unacceptable costs of stiff fines and jail terms for those convicted of illegal gambling operations.[2]

The study also went on to caution that "it would be a mistake to expect too much to result. Real solutions to such basic problems will require much more basic and far-reaching efforts."[3]

The legislature apparently feels that such efforts have been made. In early 1976, it held hearings for a bill to

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[99] Fund for the City of New York, Legal Gambling in New York: A Discussion of Numbers and Sports Betting 13-19 (1972) [hereinafter cited as Legal Gambling in New York]. The findings of this study were reflected in an equally valuable survey of gambling possibilities on a national level. See Easy Money at 43-61.

[1] Legal Gambling in New York at 13-19.

[2] Id. at 19.

[3] Id.

amend the state constitution to allow gambling in state-operated casinos. Most speakers favored legalization; the Speaker of the Assembly, echoing the usual reasons justifying almost all forms of legalized gambling, asserted that casino gambling would strengthen sagging city and state economies while it weakened the grip of organized crime.[4] New York, therefore, seems to be on the verge of returning to its earlier days when most forms of gambling were generally legal subject only to public order limitations.

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[4]"Bill for Legal Casinos Gets Conflicting Views," N.Y. Times, Jan. 30, 1976, at 33, col. 1.

CHAPTER III. THE SOUTH

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CHAPTER III. THE SOUTH

A. The Colonial Era: Background

Permanent English settlement of the area now comprising the Southern states[1] began in 1607 at the site of Jamestown, Virginia, making Virginia the first Southern colony in point of time and ultimately in preeminence. Two events in the settlement's early history bear emphasis because of their implications for the course of later Southern history.

In 1609, Governor Dale, after a series of failures with diversified agriculture organized in a quasi-feudal system of ownership, declared that henceforth land might be held by individuals in fee simple absolute. The result was an immediate "tobacco boom" and the commitment of most of the colony's arable and developed land to "cash crop" agriculture. In later years, Southern farmers would develop new cash crops --first indigo and rice, then cotton, peanuts, and soybeans-- but the basic commitment to one-crop, exploitative agriculture would remain. Periodically, especially when the rich soil showed signs of becoming depleted, reformers would plead for greater crop diversification, but their efforts were always frustrated when the opening of new lands or the discovery of new cash crops revived the flagging economy. After 1609, the South, therefore, became what it would remain: a land-based agricultural society whose economic health was tied to the

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[1] Maryland, Virginia, West Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Florida, and Arkansas.

world market for one or another "raw material." From its earliest history, then, the South was a "colonial" region.

The conversion from diversified farming to commercial agriculture also required a cheap labor force. Originally, that labor force was made up of white indentured servants. In 1619, however, the second significant development occurred: "twentie. . . negars" arrived at Jamestown, and over time, slavery as an institution developed in the South. Slavery became of utmost importance to the later South, both as a source of conflict with the industrial North and as a source of trouble to the Southern soul. By 1619, the seeds of the whirlwind that would destroy the old South had thus been planted.

Throughout the pre-Revolutionary period, Virginia also acted as the center of Southern culture. Other Southern colonies adopted Virginia's laws and customs. Virginia's leaders, too, men like George Washington, Thomas Jefferson and Patrick Henry, played prominent roles in the effort to end colonial status and establish a new republic. In many respects, the history of Virginia, its people and laws, is the early history of the South and the nation.

1. Gambling law during the colonial era

Early efforts to control gaming in the Southern colonies aimed at the "nuisances" arising from gambling rather than at the activity of gaming itself. Southern colonial legislatures, preoccupied as they were with the more pressing problems of frontier defense and settlement, dealt with gambling only when

activities associated with it threatened to disrupt the settled social order. Thus, the first statutes passed by the legislatures of the colonial South concerned cheating, fighting, or the disruption of the economy caused by large losses at gaming. These laws had, of course, the effect of promoting hard work and thrift among colonists who, in the early years, were more interested in gold (metallic or in the form of tobacco) than in producing sufficient food to support the colony. But, unlike Massachusetts, these laws did not embody a work ethic as such. Disorder, not idleness, was the foe.

The earliest enactments of these legislatures generally involved: (1) the explicit reception of the Statute of Anne,[2] which declared gambling transactions to be unenforceable and gave a loser of over £10 a right to recover his losses, and (2) the passage of local legislation criminalizing various disruptive activities associated with gambling. Thus, South Carolina made the Statute of Anne effective in the colony by passing it verbatim in 1712,[3] only two years after the statute had been passed by the House of Commons. Virginia herself passed the statute in 1727,[4] and Georgia passed a similar

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[2]9 Anne c. 14 (1710).

[3]Act of December 12, 1712, §11, 2 S.C. Stat. 565-68 (1837).

[4]Act of February 1, 1727, c. 8, 4 Va. Stat. 214 (Hening 1814).

statute in 1764.[5] Some states, like Maryland, never formally adopted the statute in the colonial period, although later commentators suggest that, at least in Maryland, it was apparently enforced. The American version of the statute was evidence of a neutral attitude toward gambling itself on the part of the state. As in England, it was the consequence to a land-based aristocratic society of the enforcement of gambling debts that was feared. While gambling contracts were not enforced, neither was gambling criminalized. Rather, the state relied, on the whole, on private adjustments made between the parties to a gambling transaction. Provisions for recovery of larger losses evidenced a desire to minimize economic disruption. Those losers who were in danger of forfeiting large amounts of money or land as a result of improvidence could seek the court's aid in the restoration of their fortunes. The prevailing social order would thus remain stable.

Legislation dealing with the supposed evils of gambling itself did not follow a uniform pattern in the South. Georgia criminalized any assault arising out of gaming.[6] Rather than having any relation to evils specifically associated with gambling, the sanction instead appears to have been directed at the general problem of maintaining public order. Virginia, however, in a pattern that later would be repeated in many states, threw the criminal net much wider. In 1744,[7] the

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[5]Act of February 29, 1764, and Act of March 25, 1765, in Prince's Digest of the Laws of Georgia 580-82 (1837).

[6]Id.

[7]Act of May 6, 1744, c. 5, 5 Va. Stat. 229 (Hening 1819).

state acted to prohibit gambling and betting in public places. By making public gambling illegal, Virginia eliminated most of the problems gambling might pose to the social fabric. In 1762, South Carolina also acted to penalize certain forms of gambling at taverns, but the list of prohibited games did not include the most common forms of casino gaming.[8] North Carolina was somewhat less strict in its battle against the nuisance arising from gaming; its laws were aimed only at cheating and fraud, and made no effort to penalize any particular class of gaming.

At the time of Revolution, Southern gambling laws thus remained, like England's patch-quilt affairs, with specific evils being subjected to prohibition as they arose. Only in Virginia did a pattern of control begin to develop. That pattern--blanket prohibition of public gaming as a method of eliminating all the evils that might arise from gaming--soon became widespread as Southern legislatures reacted to the twin challenges of corruption in state-run lotteries and the Great Revival of the early nineteenth century.

2. Early revenue needs and the lottery

The colonial South was a commercial agricultural region cut off from easy access to financial facilities. Although

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[8]Act of May 19, 1762, no. 911, 4 S.C. Stat. 158-62 (1838). It was declared illegal for tavern keepers to suffer apprentices, laborers, journeymen, overseers, or servants to play cards, draughts, shuffleboard, or ninepins. Apparently, the legislature felt a need to keep the work force at work.

there was a great desire to invest in land and to expand the economy, ready cash was seldom on hand to support the planters' dreams. This shortage of cash had important effects on public revenue collection. Periodic, ad hoc tax assessments might drain the cash supply, or might force farmers and planters to produce cash at the wrong time of year--before the crops were in and sold. As a result, some irregular form of taxation, payable when cash was available, became a necessity. In large part, the lottery, as it was first in England, became that revenue-raising device.

Legislators were aware that lotteries did not offer an unmixed blessing. One early Delaware law, attempting to regularize the chaotic lottery system that had sprung up in the state, declared:

> Whereas lotteries in general are pernicious and destructive to frugality, industry, trade, and commerce. . . : And whereas lotteries for . . . selfish and illaudable purposes, have lately been set up. . . .[9]

This act did not, however, ban all lotteries. It singled out for special treatment lotteries chartered by the Parliament in Great Britain or by the other colonies.[10] This system--banning all private lotteries while continuing to grant exceptions to state-run or chartered lotteries--became the standard for dealing with the lottery problem. South Carolina effectively banned private lotteries in 1762,[11] Virginia

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[9]Law of June 13, 1772, c. 207a, §§1,2, 1 Del. Laws 504 (1797).

[10]Id. §§3,5. (Parliamentary lotteries--no fine. Out-of-colony lotteries--£10 fine.)

[11]Act of September 13, 1762, no. 926, 4 S.C. Stat. 180-81 (1838).

followed in 1769,[12] and Georgia acted to the same end in 1764 and 1765.[13] These state efforts to control and regulate had certain virtues. They somewhat eased the abuses that had grown out of the unchecked proliferation of lotteries in the early period after settlement. In that period, lottery promoters, sensing a fast buck, had used appeals to patriotism and Christianity[14] in attempts to fuel the gambling fever but at the same time behaved in a most unchristian manner when when winners came to collect prizes. By limiting lottery franchises, legislatures could at least attach conditions to the terms of the grant in hopes of suppressing fraud.

3. Gambling law at the end of the colonial era

The predominant attitude of Southern legislators toward gambling itself on the eve of the Revolution was one of neutrality. State lotteries were chartered, but attempts were made to curb abuses. Only Virginia had enacted comprehensive criminal provisions, and even its law enforcement still depended upon the use of informants rather than the use of police and prosecutors.

The most important reason for such neutrality probably lay in the attitude of the people toward gambling. In contrast to

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[12]Act of November 7, 1769, c. 17, 8 Va. Stat. 353-54 (Hening 1821).

[13]Act of February 29, 1764 and Act of March 25, 1765, in Prince's Digest of the Laws of Georgia 580-82 (1837).

[14]See J. Ezell, Fortune's Merry Wheel 26 (1960) [hereinafter cited as Ezell] for a description of lottery promotions in colonial Virginia, including the active participation of George Washington, an indefatigable but gullible buyer of lottery tickets.

Northerners, Southerners, and especially those of the powerful planter aristocracy, openly celebrated the virtues of gambling. Unlike the Puritan image of the hardworking, stiff-collared yeoman farmer of New England, the Southern ideal emphasized the virtue of "carefreeness"; gentlemen were to devote their lives to the public and to frolic, hopefully in that order. The "Jockey Club" of Charleston, for example, organized in 1735, included some of the state's best and brightest citizens among its members.[15] At the Charleston club house, plantations were won or lost on the turn of a card.[16] One traveller in North Carolina noted that the gentry of that region were

> . . . much addicted to Gaming, especially at Cards and Dice, Hazard and All-fours . . . at which they play very high. . . .[17]

The gentry controlled politics during the colonial period, and they saw no reason to criminalize the very pleasures that represented an honored part of their style of living. More importantly, no countervailing public movement opposed gambling, and so no token gestures to anti-gambling feeling were made. Even Virginia, which prohibited public gambling, did not really strike a blow at the way of life of the tidewater aristocrats; if anything, prohibitions of public gambling struck at the pleasures of the poor, who, unlike the rich, did not have the space in their own houses for large-scale gambling. Thus, as the South entered the Revolution,

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[15] H. Chafetz, Play the Devil, 188 (1960) [hereinafter cited as Chafetz].

[16] Id. at 188.

[17] J. Brickell, The Natural History of North Carolina 39-40.

gambling was not condemned by the masses, but was instead celebrated by the few as part of the "good life." To the degree that the law concerned itself with gambling, as in England, issues of public order and the maintenance of economic stability were of paramount concern.

B. The Formative Era: 1776-1860

1. Historical background

The American Revolution welded together three quite different classes from three quite different areas of the new land: Lawyers and merchants from New England, great landowners from the South, particularly Virginia, and frontiersmen, present in most of the colonies, who saw the revolution, not only as an effort to break from Britain, but as a democratic upsurge against the social order of many of the colonies themselves.[18] It was these three classes who made the Revolution and then proceeded to create in a struggle among themselves a new nation.

It is sometimes tempting to look at Southern history in the period following the Revolution merely as a prelude to the

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[18]These materials treat the states of the North and the South together for the purpose of tracing common patterns of legal development. It would be a mistake, however, to read back into the history of the colonies and the early states a local unity that they did not have. Thomas Jefferson of Virginia, for example, in his papers compiled between 1770 and 1783 classified the statutes of Massachusetts, Connecticut and other states together with those of Barbados and Bermuda and called them "Foreign Law," because that is what "they in fact were to him." Goebel, "Law Enforcement in Colonial New York: An Introduction," in D. Flaherty, Essays in the History of Early American Law 387 (1969).

Civil War. Such a perspective is not only simplistic, but plainly wrong. In fact, until 1832, the South was perhaps the most nationalistic of all American regions. For 48 of the nation's first 60 years, a Southerner occupied the White House. It was in the South that the frontier and the frontiersmen, those legendary American figures, were first born. Daniel Boone, a Carolinian by birth, pioneered into Tennessee. The South was the home of the two great democratic champions of the "common man," Jefferson and Jackson, and the birthplace, ironically, of the third great hero of the nineteenth century, Abraham Lincoln. It was only in the period after 1832, and especially after 1850, when the slave system had taken firm root in the new frontiers of the South --Alabama, Mississippi, Tennessee, Kentucky, Florida, and Arkansas--that the region became conscious of its differences with the rest of the nation.

Even during the 1830's, the South shared common experiences with the rest of the nation. For instance, the Great Revival of the 1830's, which spurred efforts at moral reform, including reform of the corrupt lottery system, awakened religious feeling throughout the region. In the North, however, one of the outgrowths of the revival was the anti-slavery movement among churchmen. The South shared a lively two-party system with the North until 1852. Southern politicians and their Northern counterparts debated the same issues--the roles of banks and corporations in the economy, the desirability of state-financed public improvements, and

the extent to which the franchise was a right, rather than a privilege. It was only when those issues became settled and the issue of slavery replaced them that the South began to feel isolated from the rest of the nation.[19] In any case, by 1860 differences had become irreconcilable. The result was a war that destroyed a way of life for the South, shattering most of its institutions.

2. Gaming and horseracing in the settled states

In dealing with the development of gambling law, it is best to separate the South into two regions--the older seaboard South and the frontier regions. The two histories of gambling policy converged toward the end of the period, and, in large measure the newer states recapitulated the history of legislation in the older region. Louisiana, in so many ways sui generis, will be examined separately. Because lotteries are a distinct phenomenon, and one so important to later developments, they too, will be treated separately.

The story of the older seaboard states is a story of catching up with, and sometimes moving a bit beyond Virginia, which had effectively prohibited public gaming in 1744. North Carolina, for instance, after repealing its ineffective colonial gambling laws in 1785,[20] reinstated that part of the colonial legislation which made gaming debts unenforceable

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[19]For an interesting discussion of the role of the breakup of the Whig Party on the isolation of the South see R. Nichols, The Disruption of American Democracy (1948) and A. Craven, The Coming of the Civil War (1957).

[20]Act of November 19, 1785, c. 8, [1791] N.C. Laws at 396; Iredell's Laws of North Carolina 544 (1791).

in 1788.[21] Then, in 1791, the operation of gaming tables in taverns and other public places was outlawed.[22] Apparently, enforcement was lax, because a 1798 act required judges to read the gambling laws to each new grand jury, and held sheriffs liable for releasing gamblers who failed to post a double bond.[23] In 1799, public card games were banned.[24] The ban was made specifically applicable to tavern keepers and keepers of houses of entertainment in 1801,[25] although these persons could arguably have been prosecuted under the older statutes. The 1801 law went further than the 1799 statute, however, in one important respect--it declared that tavern players as well as keepers of such establishments were subject to criminal sanction. Finally, in 1835, the construction, erection, keeping, or use of a gaming table was outlawed.[26] This act was North Carolina's first attempt to control private social gambling; nevertheless, it was not aimed at the civilized poker games of gentlemen planters, but rather at the casino games enjoyed by the masses in taverns and public

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[21]Act of December 6, 1788, [1791] N.C. Laws at 448; Iredell's Laws of North Carolina 633 (1791).

[22]Act of December 5, 1791, c. 5, 2 [1790-1803] N.C. Pub. Acts at 9, Haywood's Manual 250 (1819), as amended N.C. Gen. Stat. §§14-295, 14-298 (1969).

[23]Act of November 19, 1798, c. 19, 2 [1790-1803] N.C. Pub. Acts at 123-24, Haywood's Manual 251-52 (1819).

[24]Act of November 18, 1799, c. 12, 2 [1790-1803] N.C. Pub. Acts at 138, 2 Potter's Laws of North Carolina 896 (1821).

[25]Act of November 16, 1801, c. 17, 2 [1790-1803] N.C. Pub. Acts at 178, 2 Potter's Laws of North Carolina 945 (1821).

[26]Act of November 16, 1835, c. 3, [1835] N.C. Laws 5-6.

places. While North Carolina gradually was expanding its gambling statutes, South Carolina adopted a blanket ban on casino-type gambling in 1802.[27] This act outlawed all gaming in taverns and other public places, and criminalized the use of gaming tables both in public and private, but did not threaten the pastimes of the gentlemen planters--poker and horseracing. Enforcement in South Carolina and throughout the old South of this period was the major problem. The legislature would respond from time to time, strengthening existing laws or adding provisions to encourage enforcement officials, but then the situation would return to normal, with gambling continuing as before. Thus, an 1816 South Carolina act retained the basic provisions of the 1802 act, increased the penalties, required sheriffs to take an oath to enforce the statute, made it unlawful for commissioners to grant a liquor license to anyone convicted of violations of the act, and contained a very strong search and seizure provision.[28]

Georgia, somewhat stricter than the other states, prohibited almost all forms of gaming except horseracing in 1816,[29] and included the more refined practices of betting and wagering in the list of prohibited games. The distinction between public and private gaming did not totally disappear, as fines for private gaming were considerably lower than those for public gaming.

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[27]Act of December 18, 1802, no. 1786, 5 S.C. Stat. 432-33 (1839).

[28]Act of December 19, 1816, no. 2096, 6 S.C. Stat. 26-28 (1839).

While the legislatures of other seaboard states were, in effect, busy copying Virginia's approach to the problem of gaming, Virginia's lawmakers were content to revise the old law and to adjust penalties. Meanwhile, the courts, faced with a legislatively drawn distinction between private and public gaming, took an active role in making the distinction meaningful.[30] In a decision that must have relieved respectable gentlemen, it was held that business buildings after hours were private places.[31] Thus, friends could be invited down to the store for a friendly game after hours.

Another gentlemanly sport was also widely tolerated in the old South. Some states, such as South Carolina and Virginia, left horseracing alone; the only provisions relating to the sport were those generally applicable to all gaming. As the Virginia General Court noted, the legislature had by implication excluded horserace gaming from the general ban on public gaming because

> No sport or pastime has . . . been more favourably and extensively indulged by all ranks of society in Virginia than horse racing.[32]

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[29]Act of December 19, 1816, division 10, §11, [1816] Ga. Acts 184. Note also that section 13 of the same act contained a strong search and seizure provision allowing law enforcement officers, on suspicion, to break and enter a house commonly reputed to be a gaming-house, and seize and destroy gaming tables and machines found there.

[30]See Walker v. Commonwealth, 4 Va. (2 Va. Cas.) 515 (1826) (old house--former jail--on public square a public place); Farmer v. Commonwealth, 35 Va. (8 Leigh) 741 (1837) (barn within 60 yards of place where liquor sold to public a public place).

[31]Windsor v. Commonwealth, 31 Va. (4 Leigh) 733 (1833).

[32]Commonwealth v. Shelton, 49 Va. (8 Gratt.) 592, 598 (1851).

In Georgia, horseracing was specifically exempted from the reach of the gambling laws.[33] North Carolina, for a while, even exempted "course-racing" contracts from the reach of the Statute of Anne.[34] In time, however, the state returned to a position of benign neutrality and once more brought horseracing within the terms of the statute.[35]

By the end of the formative era, most states in the seaboard South had thus made significant distinctions between various forms of gambling. Some were considered bad, and others were left untouched as important parts of Southern culture. The forms which were prohibited deserved sanction only because of the anti-social consequences they produced. It was not until the post-war period that gambling per se would be perceived as a threat to the social order.

3. Gaming on the frontier

Frontier laws tend to be borrowed from settled areas, especially those settled areas from which the frontiersmen come.[36] Thus, lawmaking on the Southern frontier did not

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[33]Act of December 19, 1816, division 10, §11, [1816] Ga. Acts 184.

[34]Act of November 17, 1800, c. 21, 2 [1790-1803] N.C. Pub. Acts at 156.

[35]Act of November 19, 1810, c. 14, [1810] N.C. Laws 14, as amended N.C. Gen. Stat. §16-1 (1975).

[36]The phenomenon is not unique to the American frontier. Witness the experience of "frontiersmen" who were also colonizers. The Indian Criminal Code, as Lord Thomas B. Macauley drafted it in the 1830's, did not adapt English law to conditions of the Indian subcontinent, but merely codified the existing criminal law of the British Isles. See J. Clive, Macauley (1975).

involve a unique process of creating new laws to fit new conditions. Instead, it generally involved the wholesale borrowing of laws from other, more settled states. Thus, in 1799,[37] Tennessee enacted substantially the Statute of Anne. The same act also punished those who encouraged gaming and provided for the forfeiture of liquor licenses of tavern owners who encouraged gaming. In 1811, the legislature moved to prohibit gaming devices,[38] and gave peace officers the power to seize such devices. In 1820 "turf racing" was exempted from the reach of the gambling laws.[39]

At least one prominent Tennessean welcomed the decriminalization of horseracing. Andrew Jackson, ironically the man whose name would one day be attached to a strong anti-gambling position, was a lover of horseracing as well as a frontier politician. In 1788, he participated in a horse race that almost led to his premature demise. Jackson matched a prize pony against a horse owned by Colonel Robert Love. The race drew spectators from miles around, and on race day

> Barbecue pits that had been fired throughout the night gave forth their tangy smell. . . [f]ull demijohns hung from saddles and shoulderstraps. Betting was fast and furious.

When Jackson's horse lost, the impetuous young lawyer challenged Love to a duel. Jackson's friends intervened and

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[37]Act of October 26, 1799, c. 8, §1, 1[1715-1820] Tenn. Laws at 638.

[38]Act of November 21, 1811, c. 112, 2 [1715-1820] Tenn. Laws at 69.

[39]Act of July 13, 1820, c. 5, 2 [1715-1820] Tenn. Laws at 619.

led the hot-tempered loser away from what might have been a fatal encounter.[40]

By 1860, Tennessee had repeated the pattern of older states: gambling which had the potential to cause a public nuisance had been prohibited, and the state otherwise remained neutral, while horseracing was given the legislature's blessing.

Mississippi, too, repeated the pattern. An 1801 statute made persons supporting themselves by gambling or other "undue means" liable to a ten-day stay in the local jail at their own expense, and fined innkeepers who harbored such suspicious characters for more than 24 hours.[41] An 1807 act made gambling debts void, and outlawed public gaming.[42] In 1810, private lotteries were banned, and a $1,000 fine was imposed on violators.[43] The state's gaming laws were consolidated into one law in 1822.[44] This law penalized cheating with a fine of five times the amount won, and made it an offense to win or lose more than $20 in 24 hours. Private gaming was still legal.

There was one unique feature here in the Mississippi

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[40]The anecdote is taken from P. Alderman, The Overmountain Men 229-30 (1970).

[41]Act of December 5, 1801, Stat. Miss. Terr. (crimes) 236, ¶88, §§1, 2 (1816).

[42]Act of February 4, 1807, Stat. Miss. Terr. (courts) 176, ¶107, §1 (1816); Act of February 4, 1807, Stat. Miss. Terr. (crimes) 235, ¶85, §2, ¶86, §3, ¶88, §4 (1816).

[43]Act of December 3, 1810, Stat. Miss. Terr. (crimes) 237, ¶90, §1 (1816).

[44]Act of June 18, 1822, §§5, 8, in Digest of the Laws of Mississippi (Alden ed. 1839) at 472.

experience. In most states the Revival of 1837, along with the political movement known as Jacksonian Democracy, produced a movement to ban state authorized lotteries. In Mississippi however, the movement also produced a ban on social gambling in 1857 that presaged the development of the law in other states.[45]

This unusual development, however, is illustrative of a more significant point: once again gambling itself, at least in the South, was perceived as an evil only when it intruded on public order. Since in most states the lottery was the most visible example of the threat gambling posed to an ordered society, the lottery was the first target of the reformer's zeal. In turn, the experience with lotteries led many people to examine the threat posed by all forms of gaming. In Mississippi, gaming was a much more visible evil than it was in other states. Natchez was a veritable Las Vegas on the Mississippi in the 1830's and 40's. Jackson and Vicksburg were also infested with gamblers during the same period.

In 1835, for example, Vicksburg citizens rose up in revolt and told the gamblers they had six hours to leave town. When the gamblers refused the "friendly invitation," four hundred men gathered to drive the gamblers from their lairs. Two gamblers objected to the seizure of their property and killed one of the leaders of the mob, a prominent physician. The mob was vindicated when the two gamblers were lynched

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[45]Revised Code of Miss. c. 64, §32, art. 134 at 596 (1857), banned in general terms all betting or promotion of betting and provided a $20 to $500 penalty for violations.

without benefit of clergy or counsel.[46]

When casino gambling became a threat to society in Mississippi, the state legislature moved to ban such activity. Again, horseracing, which did not appear to pose such a threat, remained legal.

Most states in the western South followed the Tennessee-Virginia pattern. By 1829, Florida had passed the Statute of Anne[47] and had prohibited the operation of gaming tables.[48] Kentucky repeated the general pattern in reverse order, enacting a gaming table prohibition in 1795[49] and the Statute of Anne in 1798.[50] Both these statutes were again virtual re-enactments of Virginia laws. While these laws were the subject of continuous revision in the ante-bellum period--penalties were lowered or raised, the power to issue search warrants was extended, and new games were criminalized by various acts--Kentucky's approach to gaming has remained essentially unchanged to date.

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[46]H. Carter, Lower Mississippi 248 (1942); R. Smith, The Majesty of Natchez 71 (1969).

[47]Act of November 6, 1829, [1829] Fla. Terr. Acts at 8 (received much of existing English common law and statute law, including typical laws on gambling as a public nuisance, cheating at cards, and "excessive" gambling). Cited in Day, "Extent to Which the English Common Law and Statutes are in Effect," 3 U. Fla. L. Rev. 303, 307 (1950).

[48]Act of February 10, 1832, §§45, 46, in Duval's Compilation of the Laws of Florida at 121 (1839); Act of February 27, 1839, §§1, 2, 5, in Duval's Compilation of the Laws of Florida at 126-27 (1839) (increased penalties and gave prosecutors power to immunize witnesses).

[49]Act of December 15, 1795, [1795] Ky. Laws 184, in Bradford's Laws of Kentucky at 184 (1799).

[50]Act of February 12, 1798, in 2 Littell's Laws of Kentucky at 103 (1810), Bradford's Laws of Kentucky at 96-97 (1799).

In Arkansas, similar ends were served by an 1829 statute,[51] although by 1855[52] Arkansas moved to criminalize all forms of betting. Penalties prescribed by the 1855 act, however, were extremely light, and gamblers like George DeVol, who reputedly could kill a man by butting him with his head, could still practice their trade.

One Kentucky judge aptly summed up the general legislative approach to gaming in the South in this era:

> . . . the object of the legislature was not to suppress gaming generally, but to proscribe a particular species of gambling, by punishing rigorously a notorious class of professional gamblers.[53]

Enforcement of the law reflected similar attitudes. Henry Clay, United States Senator from Kentucky, prominent Whig opponent of Andrew Jackson and supporter of national programs for internal improvement, tariff protection, and the rechartering of the Bank of the United States, probably violated the Kentucky gaming law every day of his life, but was never arrested because he did so in private quarters. The distinction between professional and gentlemanly gambling was legally recognized as a distinction between public and private

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[51]Act of November 10, 1829, §§1-13, [1829] Ark. Acts at 913.

[52]Act of January 22, 1855, §§1, 2 [1854] Ark. Acts 270; codified in Ark. Stat. Ann. §§41-3262, 41-3263 (1976).

[53]Commonwealth v. Burns, 27 Ky. (4 J.J. Marshall) 177 (1830). Judge Robertson, author of this opinion, was no friend of gambling; indeed, in this same opinion he expressed regret that the legislature had not banned gaming completely, although, as a good jurist, he interpreted the law ably when forced to apply it.

gambling.[54] Alabama actually left the question of what constituted "public gambling" to the jury, thereby allowing the community itself to distinguish between harmful and harmless gambling.

Occasionally, however, even in Alabama where juries were most sensible, the courts stepped in. In 1848, riverboats were declared to be public places within the meaning of the gaming statutes,[55] but nine years later this holding was questioned in Glass v. State.[56] Chief Judge Rice decided that a navigable river was not a highway within the meaning of the gaming laws, and that gambling on a river would not support a conviction for "gaming in a highway." The earlier case was not expressly overruled, thus the question of whether riverboat gambling was private or public was left unresolved.

This judicial conundrum was very much an academic question, however, because during the heydey of the riverboat culture, 1840 to 1860, gamblers worked those floating resorts with impunity. The type of law enforcement a gambler usually had to avoid was the rough-and-ready kind dispensed by an irate sucker or jilted gentleman. For a cut of the profits, the captain or mate of a river steamer would hide an unpopular three-card monte or poker artist until the next stop. Many experienced river gamblers timed their games to pay off only

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[54]Coleman v. State, 20 Ala. 51 (1852).

[55]Coleman v. State, 13 Ala. 602 (1848).

[56]30 Ala. 529 (1857).

moments before the vessel pulled up at one of the havens for criminals, prostitutes, and gamblers which lined the Mississippi at every port--neighborhoods like Natchez-under-the-Hill, Memphis's Pinch Gut, and Vicksburg's Landing. More so even than his land-locked counterpart, the riverboat gambler honored statutes against public gaming and cheating more in the breach than the observance.[57]

The distinction between private and public gambling, however, was complicated by the slavery issue. Although private gambling among whites was legal, private gambling among whites and Blacks received harsh punishment. Georgia penalized whites who gambled with free or slave Negroes with a one to five year jail term in 1837;[58] Alabama enacted a similar law in 1852,[59] although the penalties were lighter. These punishments were designed to discourage contacts with whites that might give Blacks troublesome ideas about equality. Whites who encouraged such attitudes were considered traitors to their race.

Slaves, however, could not be prosecuted for their violations of gambling law. The Florida Supreme Court held, for example, that as a matter of law, a slave was not a "person" and therefore could not be convicted under the state's

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[57] See Chafetz at 55-86.

[58] Act of December 25, 1837, [1837] Ga. Acts 120-21.

[59] Ala. Code §3256 (1852).

gambling laws. The court then reasoned that, since a slave did not own property, he could not gamble.

> [H]e has nothing to bet with; the money is not his, and if he should lose, his master could claim it; if he won, his winnings belong to his master.[60]

There were many in the frontier south, however, and perhaps more in the seaboard region, who felt that the traditionally mild Southern approach to gambling was inadequate. The agitation in Mississippi that led to an early criminalization of most forms of gambling was unique only in that it was successful. In Tennessee, for instance, the courts waged a running battle with the legislature by interpreting laws against gambling more broadly than the legislature intended. For instance, in 1829 the Tennessee Supreme Court, through Judge John Catron, held that lotteries fell within the prohibition of casino games and betting at cards or "any other game of hazard or address, for money or other valuable thing" enacted in 1799.[61] Thus, the defendants were to be barred from holding public office under an 1817 statute imposing that sanction on persons violating the "gaming" law but not expressly so on those violating the "lottery" law. Smith and Lane is interesting for more than the expansiveness of its holding. It is an excellent expression

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[60]Murray, A Slave, v. State, 9 Fla. 246, 253 (1839). The laws controlling interracial gambling were part of a general system of laws designed to prevent or control contact between Blacks and whites and to control slaves as a group. See also, the discussion of slavery and the law in E. Genovese, Roll, Jordan, Roll (1975) and in the more dated work of U. Phillips, American Negro Slavery (1918).

[61]State v. Smith & Lane, 10 Tenn. (2 Yerger) 272 (1829).

of judicial attitudes reflecting the developing principles of Jacksonian democracy.

John Catron grew up on the western side of the Appalachians, and he served with General Jackson in the War of 1812. After the war, he began a successful legal career in Tennessee. He was appointed to the state's highest court in 1824, and became its Chief Justice in 1831. An ardent and capable supporter of President Jackson, he played a large part in creating sentiment in support of Jackson's fight against the Bank of the United States, a fight, which, as has been previously noted, closely parallels in principle the fight against the corrupt state-chartered lottery system. Catron also managed Martin Van Buren's presidential campaign in Tennessee. One of Jackson's last acts as President was to appoint his self-educated friend and supporter to the United States Supreme Court in 1837.[62] There, Catron participated in the creation of much of the Taney Court's differing views on the constitutional status of the state-chartered lottery.

In Smith & Lane, Catron justified a strong judicial antipathy to gambling by an appeal to republican virtues; his opinion bears quoting at length as typifying the thinking of his generation:

> The presumption of law is that every man has acquired his property honestly; and it is the policy of every well regulated government, that he shall not be deprived of it without a fair

[62] Johnson & Malone, 2 Dictionary of American Biography 576-77 (1929).

> equivalent. This is particularly the case in Republics, where all should be independent in the means of subsistence. Reduce a man to want by gaming or otherwise, and he is no longer free to exercise the elective franchise, but dependent upon the hand that furnishes himself and family with bread. Not only ruin and beggary, but drunkenness, is almost uniformly the effect of gaming; the two vices combined, are more likely to sap the foundations of our institutions, than all others put together. Destroy freedom of thought, and independence of action, in voting at primary elections by the people, and the idea of governing by majorities is a farce, the popular will a delusion, bowing to the dictation of the wealthy minority. The patriot, anxious for the prosperity of his country and the durability of her institutions, repines at the thought of seeing the haggard, hungry, and naked gambler, or the besotted drunkard, dragged to the polls and forced to vote according to the beck of his, I might almost say, master; and he a champion of the loo table or faro bank. In pecuniary means and political power, knavery rises upon the ruins of honesty and independence Wheresoever, in these republics, gaming is in any shape tolerated, pauperism, supported by the government, is in nine instances in ten the consequence of it and its kindred vice, drunkenness.[63]

He went on to portray the gambling fever which could seize an impressionable soul:

> Like other passions, which agitate the great mass of the community, it lies dormant until once aroused, and then, with the contagion and fury of pestilence, it sweeps morals, motives to honest pursuits and industry into the vortex of vice; unhinges the principles of religion and common honesty; the mind becomes ungovernable, and is destroyed to all useful purposes; chances of successful gambling alone, are looked to for prosperity in life, even for the daily means of subsistence; trembling anxiety for success in lotteries, at the faro bank or loo table, exclude all other thoughts. Expectation is disappointed; more losses are sustained; the highly excited and

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[63]State v. Smith & Lane, 10 Tenn. (2 Yerger) 272, 274 (1829).

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> desperate feelings are kindled by drunkenness, from which arises a wretch, with a wrecklessness and desolation of feeling, that the genius of a Shakespeare or a Milton could not, nor can any man describe. Swindling, forgery, theft, every crime that extreme necessity and out cast desperation can suggest to a man lost to all the moral ties, though guarded against, are likely shortly to follow in the train.

The rising tide of public opinion against gambling further justified harsh penalties, especially disqualification from public office:

> All such cheats at cards, and other games, will, in a few years, be punished as men now are for theft. This no man will doubt who has watched the march of public opinion for the last ten or twelve years. Faro was then dealt in the bar-room of the tavern, openly by day and night, even by men who made high pretensions to honor and gentlemanship. The act of 1827, declares them infamous as felons. Why? Because they are presumed to cheat. The rule that punishes private theft, equally should punish open theft, by cheating at any game.[65]
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> The officer entrusted with public money who gambles, be his intentions ever so honest, is as dangerous as far as the public is concerned, as the knave who deals at faro, or cheats with balls and thimbles. Suppose state treasurers, cashiers and clerks of state banks, clerks of courts, sheriffs, lawyers, and constables, through whose hands most of the money of the country passes, and who hold it as public agents, go to the faro bank or loo table, the cold and calculating gambler arouses and excites to desperation the passion for play; public money is without a moment's thought staked and lost, the community grossly cheated without the possibility of redress, or of knowing an injury has been inflicted, until it is too late.[66]

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[64] Id. at 275.

[65] Id. at 277.

[66] Id. at 279.

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> If gamblers are to fill public trusts, and be keepers of the public money, the state would do well to appoint experienced sharpers, well supplied with marked packs and faro banks, who would be pretty certain not to lose it for want of skill, and not so likely to embezzle it, as the inexperienced novice would be to lose it. The absurdity of trusting the one or the other is equally manifest.[67]

Judge Catron's holding and the policies underlying it have been consistently followed by Tennessee courts.[68] In other states, it has been applied to the notorious nickel mint and pinball machine of the 1920's and 30's;[69] and in federal courts it has been cited with approval in a case involving the refusal of the Post Office to transmit letters to a lottery operator.[70]

Indeed, the expressions of hostility toward all forms of gambling that appear in the frontier South may be found predominantly in judicial opinions rather than in legislative enactments. Perhaps this phenomenon is due to the fact that many judges received their legal training "back East" where the rough-and-ready ways of frontier life were frowned upon.

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[67] Id. at 279-80.

[68] Howlett v. State, 13 Tenn. (5 Yerger) 144, 152 (1833); Bagley v. State, 20 Tenn. (1 Humphreys) 486, 489 (1840); Huckeby v. Spangler, ___Tenn.___, 521 S.W.2d 568 (1975).

[69] Nelson v. State, 370 Okl. Cr. 90, 256 P. 939 (1927); State v. Branney, 62 Wyo. 40, 160 P.2d 972 (1945).

[70] Commerford v. Thompson, 1 F. 417 (C.C.D.Ky. 1880).

Legislators, however, reflected the will of the average voter, who, at that time, was not unduly concerned with gambling.

4. Judicial protection of horseracing: game or sport?

The attitudes of the Northern and Southern judiciaries, however, parted company over the horseracing issue. Throughout America in the formative era, legislatures borrowed language from English anti-gaming statutes when constructing their own prohibitions. Most of these forbade specific forms of gaming as well as "any other game or games." The fate of horseracing under such a statute depended upon the view the courts took of the character of racing; i.e., was it a "game" or a "sport"?

In State v. Rorie,[71] the Supreme Court of Arkansas quashed an indictment for betting at a "certain game of hazard, commonly called a horse race," ruling that an 1855 statute[72] prohibiting the betting of money "on any game of hazard or skill" was not intended to embrace horseracing.[73] The court, attempting to discern the legislative intent of the prohibition, concluded:

> [W]e do not think that the Legislature intended to embrace horse-racing by the words "any game of hazard or skill," "played," etc., however vicious betting at such sports may be.[74]

A similar issue was before the Supreme Court of Texas in McElroy v. Carmichael,[75] where the plaintiff sought to

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[71]23 Ark. (10 Barber) 726 (1861).

[72]Act of January 22, 1855 §1, ¶1855] Ark. Laws 270, codified in Ark. Stat. Ann. §41-3262 (1976).

[73]23 Ark. 726 (1861).

[74]Id. 728 (emphasis in original).

[75]6 Tex. 454 (1851).

recover the value of a note "given for money won on the event of a horse race." The court below had instructed the jury that if they "believed the note to have been won on a horse race, they should find for the defendants,"[76] since betting on horseraces was an illegal act within the scope of an 1848 statute which prohibited betting at certain specified games or "at any other gambling device whatever."[77] Reversing the ruling of the lower court, Chief Justice Hemphill commented:

> The sport of horse racing has, for centuries, been known by its distinctive designation. It is not prohibited by the law of the land; and it is understood that all attempts in the legislature, for that purpose, have failed; and it cannot be presumed that a prohibition against this well known sport, would lurk under the disguise and cloak of the vague phrase, "gambling device," and this in a statute in which certain games were prohibited by name.[78]

The decisions were far from unanimous in their charactertization of horseracing. In fact, an apparent majority of the cases outside the South took the view that horseracing was indeed a "game" within the intent of anti-gaming legislation. In Cheesum v. State,[79] the Indiana Supreme Court, for example, held that a horserace was a game, and was therefore within the meaning of a gaming statute. Justice Perkins, speaking for the court, noted:

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[76] Id.

[77] Act of March 20, 1848, c. 152, §§69, 70, [1848] Tex. Laws 231, Hartley's Digest of the Laws of Texas 213 (1850).

[78] 6 Tex. at 456 (emphasis added).

[79] 8 Blackford 332 (Ind. 1846).

> The ground taken by the counsel for the plaintiffs in error is, that a horse race is not a game, and that therefore the case is not embraced by the statute. In this we think they are mistaken. In the statutes and judicial decisions of England, a horse race is uniformly classed as a game . . . and we think our Legislature used the term in the same signification.[80]

Cheesum was cited approvingly in Wade v. Denning,[81] an 1857 Indiana decision in which the supreme court reiterated that horseracing was a game within the purview of the gaming laws. Justice Stuart, in announcing the court's decision, adopted the broad view that the legislature meant to outlaw all gambling, not just certain forms of it:

> It seems obvious that the same vicious principle runs through all bets, whether they be upon a horse-race, or upon cards, or any other undetermined event. It is not the race or the play that the legislature is aiming at, but the betting for money or other valuables. . . . Aside from the awkward phraseology . . . it is not easy to distinguish a game of horse-race from a game of cards, or a bet on the one from a bet on the other.[82]

Such a position, however, was adopted by only one Southern court, Tennessee's. Thus, in 1820, the General Assembly of Tennessee sought to clarify the legal status of horseracing under the gaming laws by passage of an enactment which expressly exempted "turfracing" from the Tennessee gaming prohibition.[83] The term "turfracing," however, was strictly interpreted by Tennessee courts, and races covering only short distances were held not to be the

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[80] Id. at 333.

[81] 9 Ind. 35, 37 (1857).

[82] Id. at 36.

[83] Act of July 13, 1820, c. 5, [1820] Tenn. Laws 8.

sport exempted from the gaming laws by the 1820 statute.[84] The legislature responded, in 1833, with legislation designed to define in detail the turfracing exemption:

> [H]ereafter all horse racing, without regard to the distance which may be run, where the same is run upon a track or path made or kept for the purpose of horse racing, shall be deemed turf racing within the meaning of the acts of assembly of this State.[85]

The legislature specified the conditions under which horseracing was indictable by providing that the gaming laws of the state would apply to "all and every person betting or running, aiding and abetting in running any horse race in or along any public road. . . ."[86] Again, however, the courts stepped in to interpret strictly the intent of the legislature's effort to exempt all horseracing, except that conducted on public roads, from the reach of the gaming laws. In State v. Posey[87] the Supreme Court of Tennessee ruled that a horserace was indictable, although not conducted on a public road, because the indictment alleged that the race was not run on a "track made or kept for horse-racing."[88] Justice Green announced the court's decision, and, in so doing, questioned the wisdom of any legislative exemption of horseracing from the gaming laws:

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[84] See State v. Posey, 20 Tenn. (1 Humph.) 384, 385 (1839).

[85] Act of October 12, 1833, c. 10, §1, [1833] Tenn. Laws 6.

[86] Id. §2.

[87] 20 Tenn. (1 Humph.) 384 (1839).

[88] Id. at 385.

> The legislature never intended to tolerate horse-races gotten up and run at distilleries, grog shops and musters, where the crowds of excited intoxicated persons would render it alike dangerous and demoralizing. Indeed the policy of the exemption of horse-racing from the penalties of the statutes against gaming may in all cases be regarded as questionable; and it is the duty of the courts to construe these statutes so as to suppress the mischief of gaming, and consequently to exempt such only as fall within the express provisions of the law.[89]

It is clear from this opinion that the Tennessee courts did not intend to carry out the policies of the legislature on the subject of horseracing unless they coincided with the policy views of at least a majority of the court or were made so express and clear as to allow no other possible interpretation.

5. Excursus: Louisiana

Louisiana is an exception to all generalizations which may be made concerning the development of gambling law in the South. The South in this era was generally Protestant-dominated and rural; Louisiana, at least around New Orleans, was Catholic and urban. The common law formed the basis of the legal system in most of the South; in Louisiana the French civil law was the root of the legal system. These differences can be exaggerated though, for Louisiana was a typical slave state, agriculturally dependent on cash crops. Political development in Louisiana paralleled that in the rest of the South; Democrats and Whigs battled in the 1830's and 40's as

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[89] Id. at 386. In 1891, the legislature further refined its position on horseracing and gambling:

> [I]t shall be unlawful gaming to bet or wager in any way upon any horse race, unless the race track upon which the race is run, trotted, or paced, be inclosed by a substantial fence, and the bet or wager to be made within said inclosure.

Act of March 26, 1891, c. 115, §2 [1891] Tenn. Acts 253-54.

vigorously in Louisiana as in Alabama. Yet the differences between Louisiana and the rest of the South are significant, and nowhere is that difference highlighted more than in gambling policy.

In many respects, the law of Louisiana during this period paralleled that of other states. In 1806, the territorial legislature passed an act directed at professional gamblers.[90] This act, however, like those that followed, exempted New Orleans from its reach. Thus, gambling was indirectly legalized in New Orleans. The result was predictable. New Orleans became an open city and a gambler's paradise. The city soon taxed gaming-houses to produce revenue for the New Orleans Charity Hospital,[91] and gambling promoters consistently pointed to the aid given to the Charity Hospital as justification for the continuation of the New Orleans exemption.

The New Orleans exemption represented a typical compromise in Louisiana politics. Upcountry planters, often Protestants from other parts of the South, were allowed to pass laws for their region, while French Catholics in New Orleans gained an exception to the law.

The de jure exemption of New Orleans was struck down[92] after an alleged conspiracy to foment a slave revolt led by a professional gambler named Murrell was uncovered in 1835.[93]

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[90]Act of May 21, 1806, c. 10, §§7, 9, [1806-1807] Acts Terr. Orleans 42.

[91]Chafetz at 194.

[92]Act of March 19, 1835, [1835] La. Acts 134-36.

[93]Chafetz at 55-63, 195-200.

But in fact, the tacit exemption of New Orleans from the gambling laws survived into the 1860's. Public gaming was simply not seen as an evil by its citizens. In the 1840's, the city once again licensed and taxed casinos in direct violation of state law.[94] Nothing was done about the violation. Thus, an attitude of toleration came to be reinforced by lax enforcement.

This laissez-faire attitude toward gaming that developed in early Louisiana would have important consequences later. Although most states, after a bad experience with state lotteries, moved toward strict prohibition of gambling in the post-war period, Louisiana moved in the opposite direction. In the 1860's Louisiana actually relaxed its already liberal attitude toward gambling offenses and allowed the birth of the infamous Louisiana State Lottery, otherwise known as the "Serpent." The story of the rise and fall of the "Serpent" and its impact on the development of gambling law will be reserved until later.

6. Fight against lotteries

The national movement to abolish lotteries in the 1830's and 40's was, in large measure, part of the general movement against both "sin" and monopoly. In 1842, Democrats swept to power because of their opposition to lotteries. The lotteries in turn were portrayed merely as an adjunct to a corrupt monopolistic banking system dominated by the wealthy Whig power elite. The great moral fervor of the 1830's produced many

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[94] Id. at 197-200.

reform movements among the people in both the South and North. In Virginia, for instance, "General" Jay Cocke built a Temple of Prohibition to celebrate the virtues of abstinence. In the South, as in the North, a class element entered the picture. Lotteries, like corporations, made men wealthy without physical work. The poor, who worked hard for their fatback and beans, resented the state's approval of activities that made men wealthy without sweat. Thus, anti-lottery leaders were often enemies of all forms of speculation, except, of course, speculation in slaves.

By the time of Independence, the lottery system had taken hold throughout the old South. Typically, lottery charters furnished the only form of state control over the operations. This system of authorization subject to legislatively-imposed conditions furnished the pattern for the frontier states as well. Every frontier state authorized lotteries in one form or another, and each, in turn, eventually banned them.

Numerous methods of lottery regulation were attempted before the failure of efforts to control the lottery system became apparent. Maryland serves as a particularly good example of the variety of schemes devised by a legislature to deal with the problems raised by the lottery system. The state first prohibited all unauthorized lotteries.[95] Then in 1817, Maryland attempted to impose blanket conditions on the operation of all lotteries.[96] A Lottery Commission was

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[95]Act of December 22, 1792, c. 58, [1792] Md. Laws.

[96]Act of February 9, 1817, c. 154, [1817] Md. Laws 169.

established to assure that the conditions were observed. In 1818, the legislature attempted to strengthen state supervision of the system by making the payment of a state tax a precondition to the drawing of a lottery.[97] The same act increased the penalties for running an unauthorized lottery. In 1835, the legislature acted to consolidate all previously chartered lotteries into a single lottery to be supervised by the state.[98] After some maneuvering in the courts, and some feeble attempts by the legislature to control more effectively the consolidated lottery, the system was ended by constitutional amendment in 1851.[99] The lottery system did not officially die until 1859, when the last consolidated lottery was held.

Other states, while not as creative in their response to the abuses of lotteries, nevertheless attempted some form of control. Georgia banned unauthorized lotteries (a measure common to all states) in 1821[1] and taxed authorized lotteries nine years later.[2] South Carolina banned all unauthorized lotteries in 1762. In 1820,[3] the state attempted to tax out-of-state lotteries to death, but the effort proved futile as those schemes continued to flourish in the Palmetto State.

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[97]Act of February 15, 1819, c. 179, §2, [1818] Md. Laws.

[98]Act of March 24, 1836, c. 205, [1835] Md. Laws.

[99]Md. Const. art. III, §37 (1851).

[1]Act of May 16, 1821, [1821] Ga. Laws 13, Forster's Digest of the Laws of Georgia 332 (1831).

[2]Act of December 23, 1830, [1830] Ga. Laws 201.

[3]Act of December 20, 1820, [1820] S.C. Acts 15, 6 S.C. Stat. 152.

Florida authorized a lottery to raise funds for Union Academy in 1828, and lotteries authorized for civic and charitable purposes flourished during the Civil War. While there was no explicit legislation on the subject, unauthorized lotteries seem to have been generally recognized as illegal.[4] Other states enacted similar measures, but apparently to no avail.

The reasons for the failure of regulation are unclear. Certainly, by sanctioning certain lotteries, the states bestowed a respectability on the activity as a whole. Prohibiting abuses through criminal sanctions did not create a deterrent to the formation of illegal schemes because legal enforcement of such statutes was almost nonexistent. Government at this time simply did not possess the machinery to regulate effectively the droves of confidence men and unscrupulous lottery promoters who engaged in all forms of fraud and chicanery to maximize their profits.[5] In colonial times, the lottery system was abolished only when it became apparent that it constituted a public nuisance which threatened the general economic order. This realization came at different times in different places. In some Southern states, lotteries continued into the 1850's and 60's. Each of the Southern states, however, eventually banned all forms of lotteries, generally

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[4]See discussion in Lee v. City of Miami, 121 Fla. 93, 98-103, 163 S. 486, 489-90 (1935) holding that slot machines are not lotteries prohibited by Fla. Const. art. III, §23, and discussing the history of Florida gaming law as related to lotteries. Lotteries did not fall within the anti-casino gambling provisions of the Act of February 10, 1832, no. 55, §§45, 46, [1832] Fla. Laws; Duval's Compilation of the Laws of Florida 121 (1839).

[5]See generally Ezell for a discussion of state efforts to control related areas.

by constitutional amendment.[6] In Louisiana, though, federal intervention was necessary to kill the lottery system.

The movement against lotteries had two significant effects. For the first time, legislatures found that they could not effectively separate the nuisances produced by gambling from the activity of gambling itself. Efforts to criminalize only the nuisances had failed. This, in turn, led to a re-examination of the whole approach of segregating the "excesses" produced by gaming for criminal treatment. Second, since the reform movement produced in most states a constitutional amendment banning lotteries, an important new weapon was placed in the hands of prosecutors and courts in their efforts to prosecute gamblers. The courts, which at

[6]Common to all the states is the pattern of charter, regulation, and then prohibition. The pace of this process varied widely from state to state. In Tennessee (Tenn. Const. art. XI, §5 [1834]) and North Carolina) ch. 19 [1834-1835] N.C. Laws at 18 19), for example, lotteries were outlawed toward the end of the frontier period. Alabama (Ala. Const. art. IV, §26 [1875]), Arkansas (Ark. Const. art. V, §41 [1868]), and Florida (Fla. Const. art IV, §20 [1868]) prohibited them during the Reconstruction era. And Delaware (Del. Const. art. II, §17 [1897]) banned lotteries in the wake of the scandals surrounding the Louisiana State Lottery.

least in the frontier areas had always been more opposed to gambling than the legislatures, could use the ban on lotteries and the laws passed to effectuate the ban to criminalize activity not directly penalized by the state. Courts found that "lottery" was a word that could be stretched to cover slot machines, the "numbers," raffles, and gift promotions.

Moreover, such a lottery ban could be used to strike down legislative enactments decriminalizing certain forms of gambling. Inertia had thus been built into public policy toward gambling. Legislators, faced with a constitutional ban on lotteries, could act to decriminalize certain forms of gambling only after the passage of a constitutional amendment which was likely to occasion significant public debate, and draw out all the opponents of gambling in the area. Thus, the constitutional ban also discouraged legislative experiments with legalization.

C. The Modern Era: 1860 to 1976

1. Historical background

In the period after the Civil War, the South went through

a series of rapid changes. Reconstruction was a trying time as Southerners of more moderate temperament attempted to bring about racial accomodation and social change. The moderates were thwarted by the extremists who eventually brought about the end of Reconstruction by exploiting racism and regionalism in equal doses.

After Reconstruction, the South periodically attempted to become more "Northern" by industrializing and diversifying its agricultural system. These efforts were only moderately successful and today, despite constant talk of a "New South" the region remains what it has always been: unique.

General regional history, however, has only a tangential relationship to the history of gambling legislation in the South. In fact, the pattern of development of gambling law in this period was normal. Most states moved toward comprehensive prohibition of all gambling activity. The courts, by flexibly interpreting anti-lottery provisions of state constitutions and anti-lottery legislation, stepped in to ban gaming not specifically prohibited by the legislatures. In some states, however, various forms of legalization were attempted.

2. Prohibition and criminalization

The states that have developed a rigid anti-gambling policy--Mississippi, Alabama, Georgia, Tennessee, North and South Carolina, and until very recently, Virginia--have, on the whole, done so gradually. For most of these states, the inclusion of an anti-lottery clause in the state constitution

marked the beginning of the development of public policy opposed to gambling.

The development of the law in Georgia is typical of the pattern. Although Georgia had repealed all authorization for lotteries in 1858,[7] a constitutional ban on further legislative authorization was believed necessary by the Reconstruction Constitutional Convention of 1868.[8] In 1883, the state supreme court began a trend that led to a gradual widening of the scope of gambling laws by declaring contracts in agricultural futures to be void as gaming contracts:

> If this is not a speculation on chances, a wagering and betting between the parties, then we are unable to understand the transaction. A betting on a game of faro, brag, or poker, cannot be more hazardous, dangerous or uncertain. Indeed it may be said that these animals are tame, gentle and submissive, compared to this monster. The law has caged them, and driven them to their dens; they have been outlawed, while this ferocious beast has been allowed to stalk about in open mid-day, with gilded signs and flaming advertisements, to lure the unhappy victim to its embrace of death and destruction. What are some of the consequences of these speculations on "futures?" The faithful chroniclers of the day have informed us, as growing directly out of these nefarious practices, that there have been bankruptcies, defalcations of public officers, embezzlements, forgeries, larcenies, and death. Certainly no one will contend for one moment, that a transaction fraught with such evil consequences is not immoral, illegal, and contrary to public policy.[9]

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[7]Act of December 11, 1858, Cobb's Statutes and Forms of Georgia 780 (1859).

[8]Ga. Const. art. I, §23 (1868). The Reconstruction Era constitutional conventions were often the first to bar legislatures from authorizing lotteries, but there were many exceptions to this trend.

[9]Cunningham v. National Bank of Augusta, 71 Ga. 400, 401, 51 Am. R. 266, 267 (1883).

After attempts by the legislature to regulate futures, dealing in futures was prohibited in 1906.[10]

The courts took the initiative when confronted with pool-selling and bookmaking, reasoning that the operation of a "bookie" joint was the keeping of a gaming-house, and hence prohibited.[11] The legislature enacted a comprehensive ban on lottery activity in 1877.[12] When the courts of the South followed the general judicial trend and defined a lottery as an activity in which consideration was paid for a prize to be awarded as a result of chance,[13] a number of forms of gaming not usually thought of as lotteries were effectively criminalized. While the courts later stressed the necessary presence of chance in the determination of a winner,[14] the effect of the court-made definition of a lottery represented a significant expansion of the reach of criminal penalties.

Georgia gradually strengthened its anti-gambling stance, and by 1910 it was firmly established. Indeed, only insignificant legislation was enacted in the period between 1910 and 1970. For example, lest betting on athletic contests slip through the "skill" loophole in the court's interpretation

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[10]Act of August 20, 1906, tit. 7 [1906] Ga. Pub. Laws at 95.

[11]Thrower v. State, 117 Ga. 753, 45 S.E. 126 (1903).

[12]Act of February 24, 1877, [1877] Ga. Laws 112 made it a crime to employ or carry on any lottery or similar device for hazarding any money or thing of value, and a separate crime to spin a lottery wheel or draw out numbers.

[13]Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 44 S.E. 320 (1903).

[14]Russell v. Equitable Loan & Security Co. 129 Ga. 154, 162, 58 S.E. 881, 885 (1907). "[N]ot the mere contingency, but the method of settling the contingency, that introduced the objectionable element of chance."

of the lottery law, such betting was declared a criminal activity in 1947.[15] In 1970, when Georgia enacted a new criminal code with an anti-gambling bias, the legislature retained most of the old law on gaming and added only a few new provisions.

Tennessee, too, erratically developed its anti-gambling policy. One of the first enactments of the modern era only increased the penalties for keeping a gaming-house and attempted to define broadly "gaming house."[16] The legislature also acted to prohibit dealing in futures in 1883.[17] Here, as in Georgia, however, the courts took this simple body of law and used it to cover new gambling schemes.

Thus, "numbers" was brought under the ancient "gambling device" prohibition. In 1951, numbers slips were termed "an intricate [sic] part of the actual gambling where one would win or lose," and thus were gambling devices.[18] The court also took an active role in easing the prosecutor's job by allowing less than strong circumstantial evidence to support a gambling conviction. In Alley v. State,[19] police investigating a noise complaint saw the defendant's motions through the window of his house and concluded a craps game was in progress. They returned later, entered, and arrested

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[15] Act of March 27, 1947, [1947] Ga. Laws at 1139.

[16] Act of March 29, 1883, c. 230, §§1-3, [1883] Tenn. Acts at 308.

[17] Act of March 30, 1883, c. 251, §§1-5, [1883] Tenn. Acts at 331-32.

[18] Van Pelt v. State, 193 Tenn. 463, 469, 246 S.W.2d 87, 89 (1952).

[19] 218 Tenn. 497, 504, 404 S.W.2d 493, 496 (1966).

the defendants. The incident search revealed a plywood board with a blanket, apparently set up for craps. The men had varying amounts of money stuffed in their pockets. On this evidence, all were convicted of gaming and the homeowner was convicted of keeping a gaming-house, though his conviction for professional gambling was reversed on appeal.

In recent years, Tennessee revised its definition of gambling devices to exclude free play pinball machines, and in the same act fashioned stiffer penalties for professional gambling than amateur gambling. In modern times, however, the target of such sanctions against professionals is not the legendary riverboat gambler, but today's organized crime bookie.

States such as Georgia and Tennessee are not likely to legalize gambling in the near future even for a source of state revenue.

All the Northern states that have experimented with state lotteries are characterized by urban centers with low tax bases and high costs for social services. Most of them, too, are no longer dominated by Protestant persuasions. Even though some states in the South have costly urban centers, it is doubtful that they will decriminalize gambling to obtain another source of revenue. The basic cause of Southern resistance to state lotteries is, more likely than not, fundamentalist Protestantism, which remains a dominant cultural force in the deep South. Fundamentalists, in short, remain staunch opponents to all forms of gambling.

Nevertheless, fundamentalism remains a strong cultural force in Kentucky, which has legalized and promoted horseracing. In Arkansas, too, where the Methodist church still commands an impressive following, parimutuel betting has been legalized and Hot Springs was a major illegal gambling center in the 1950's. Thus, facile correlations between religion and anti-gambling legislation break down upon close examination. It is appropriate, therefore, to turn to a more particularized treatment of the development of modern gambling law.

3. Horseracing prohibitions

At the turn of the twentieth century, horseracing was under attack in the United States. The rise of the professional bookmaker and the frequent corrupt practices that accompanied him tarnished the image of the sport of kings. Public sentiment turned against racing. By the early 1900's, most of the states that had not previously banned wagering on horseraces had done so, and the sport remained alive only in the traditional thoroughbred breeding states of Maryland and Kentucky, where the use of parimutuel machines saved the sport from extinction.

In Alabama, for example, the end of gambling on horseraces began in 1889 with the passage of legislation making it illegal to sell pools, tickets, and chances, or to make or accept any wagers on horseraces, prize fights, baseball games, or any other contest held outside of the state. This statute was constitutionally challenged in State v. Stripling.[23] The

[20]Act of March 18, 1955, c. 234, §3(3), [1955] Tenn. Pub. Acts at 966.

[21]Id. §§1, 2 at 965.

[22]Act of February 26, 1889, §§1-3, [1888-1889] Ala. Acts 45-46.

[23]113 Ala. 120, 21 So. 409 (1897).

court held that the statute was proper under the police power and therefore was not an unconstitutional interference with interstate commerce, a subject matter for legislation reserved under the Constitution to federal government. Justice McClellan explained the reasoning of the court:

> We are unable to see how this is an interference, or has anything to do, with inter-state commerce. But if it touches such commerce at all it is in such a way as is within State competency. The State has a right to protect the lives and morals of its people against acts which threaten them even though such acts can only be accomplished through some instrumentality of inter-state commerce.[24]

Soon after this decision was reported, the legislature erased the distinction between in-state and out-of-state contests. The 1897 act prohibited the selling or buying of pools and the making or taking of books on horseraces "either within or without this state."[25] It also prohibited all wagering on the results of horseraces:

> . . . [I]f any person shall give or take or receive from another any money or other thing of value to be bet or hazarded, or to be used in buying any pool or any interest in any pool upon the event of any horse race, either within or without the State, he shall be deemed guilty of a misdemeanor and must on conviction be punished as provided in the preceding section.[26]

Likewise, bookmaking and poolselling were made felonies

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[24] Id. at 125, 21 So. at 411.

[25] Act of February 5, 1897 [1896-1897] Ala. Acts at 581-82. The act also prohibited, and punished more severely the maintenance of a bookmaking or pool-selling business.

[26] Id. §2 at 582.

in Missouri (1905),[27] Tennessee (1907)[28] and as noted above, in Georgia (1903).[29] The Tennessee act was particularly broad in scope:

> [I]t shall be unlawful for any person, persons, or corporation, whether as owner, lessee, or otherwise, to keep or have under his, their, or its control or management any room, hall, or house, or a track, path, road, or course, whether within or without an inclosure, for the purpose of encouraging, promoting, aiding, or assisting in any bet or wager upon any kind of a horse race or horse races, or where any bet or wager is permitted to be made upon any kind of a horse race or horse races, whether by bookmaking, auction pools, French mutuels, or in any other manner or by any other device whatsoever.[30]

Gambling at horseraces was thus dead in the overwhelming majority of Southern states by 1910, and, since big-time racing was fueled by gambling revenues, it, too, had apparently reached its end in the United States. Only a major economic Depression would revive the sport, which today represents one of the most popular pastimes in America.

4. Experiments with legalization

a. Louisiana

Louisiana's first major venture into state-promoted gambling, the Louisiana Lottery, was prompted by the state's fiscal crisis following the Civil War. Louisiana's 1864

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[27]Act of March 21, 1905 [1905] Mo. Laws at 131.

[28]Act of February 6, 1907, c. 89, [1907] Tenn. Acts at 250-51.

[29]See Thrower v. State, 117 Ga. 753, 45 S.E. 126 (1903), which brought bookmaking at racetracks within the definition of "gaming house" as used in Ga. Penal Code §398 (1895).

[30]Act of February 6, 1907, c. 89, §1, [1907] Tenn. Acts at 250.

Constitution empowered the legislature to tax lottery vendors and gambling house operators.[31] In 1866, the legislature acted to tax and license out-of-state lottery tickets.[32] In 1868, a new constitution was enacted that made no mention of lotteries.[33] In that same year, the legislature chartered the Louisiana State Lottery Company.[34]

The charter for the LSLC seemed, at first glance, to offer the state particularly good terms. The company was given a lottery monopoly for 25 years.[35] In return, the Lottery Company was to pay the state $40,000 a year in lieu of taxes.[36] Since there was no guarantee that the lottery would be profitable, the state seemed to have struck a good bargain for itself. The validity of the monopoly grant was eventually confirmed in the courts,[37] as was the exemption from taxation.[38] With its power confirmed by law, however, the lottery proceeded to corrupt the state in order to maintain its privileged status. Instead of losing money or breaking even, the lottery became the most profitable enterprise in

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[31]La. Const. art. CXVI (1864), in Digest of Louisiana Statutes at 89, 104.

[32]Act of February 17, 1866, [1866-67] La. Acts at 38-39.

[33]La. Const. (1868) in Digest of Louisiana Statutes at 113-140.

[34]Act of August 11, 1868, [1868] La. Acts at 24-27.

[35]Id., art. 8, §4 at 25.

[36]Id., art. 5, §1 at 25.

[37]Louisiana State Lottery Co. v. Richoux, 23 La. Ann. 743, 8 Am. R. 602 (1871).

[38]Louisiana State Lottery Co. v. City of New Orleans, 24 La. Ann. 86 (1872).

the state.

By 1877, the LSLC had begun selling tickets in every state in the nation. The house took a 20 to 40 percent cut of all revenues produced. Profits were spent to promote the lottery. Most newspapers in the state owed their financial health in major part to lottery advertising, which accounted for the newspapers' strong support of the LSLC. When the Reconstructionist Republicans began to lose power, the lottery managers shifted with the political winds and poured a quarter of a million dollars into the campaign of a Bourbon Democrat.[39]

In 1879, in response to cries for reform, the charter of the LSLC was withdrawn and the sale of all lottery tickets criminalized.[40] By skillful maneuvering, however, the Lottery Company induced the Constitutional Convention of 1879 to produce a document which included a provision expressly authorizing the legislature to charter lotteries and mentioning the Louisiana State Lottery Company by name.[41] The courts construed this constitutional provision to be a reinstatement of the lottery's charter.[42] The United States Supreme Court, considering the charter in another case, upheld the Lottery

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[39] Chafetz at 299-302.

[40] Act of March 27, 1879, [1880] La. Acts at 5-7.

[41] La. Const. art. CLXVII (1879) in B. Dart, Louisiana Constitutions at 591 (1932).

[42] State ex rel. Corcass v. Judge of First District Court, 32 La. Ann. 719 (1880).

Company's position, noting that a lottery was not malum in se but malum prohibita, giving legislatures the right to license or suppress them.[43] The Serpent was back, therefore, in business.

The lottery flourished after its rebirth. Thirteen million dollars a year in profit flowed into the company's coffers, and the company continued to expand its operations, especially its publicity campaigns. The expansion, however, provoked reaction. States that had long since banned their own lotteries enacted laws designed to curb the activities of the Louisiana Serpent. The LSLC fought back, but did so using methods which only exacerbated the national outcry against the game. The Philadelphia Times led an aggressive campaign against the Serpent in Pennsylvania. The LSLC tricked the Times publisher into a trip to Louisiana. Upon arrival, he was served with process in a libel suit instituted by the LSLC. Faced with the inevitability of a losing judgment in the Serpent's home jurisdiction, the publisher forced a settlement of the case by threatening to take it to the then hostile United States Supreme Court. The uproar resulting from this episode helped to bring about the enactment of congressional legislation banning the dissemination of lottery materials through the mails.[44] The lottery was never thereafter as profitable as it had been, and the Serpent breathed its last by operation of statute,

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[43] New Orleans v. Houston, 119 U.S. 265, 275 (1886).

[44] Chafetz at 303-05.

on January 1, 1894.[45]

For a while, the corruption surrounding the lottery's activities strengthened the Louisiana's anti-gambling forces. The legislature moved to stiffen existing gambling house prohibitions in 1870.[46] An 1892 law, for the first time, prohibited by name one form of gambling, craps, in toto.[47] Nevertheless, the courts refused to read the laws broadly. They held that if skill was involved, a game was not prohibited, and that the owner of a house where gaming took place could not be convicted of keeping a gaming-house if he had no interest in the outcome of the betting within the house.[48] Moreover, despite the penalties gambling flourished openly in New Orleans until the First World War. Indeed, the Kefauver Committee reported that New Orleans remained an "open city" until the 1950's.[49]

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[45]Act of June 28, 1892, [1892] La. Acts 35; Act of July 12, 1894, [1894] La. Acts 207-11. Together these acts comprehensively prohibited lottery activity of all kinds.

[46]Act of February 5, 1870, [1870] La. Acts at 38-39.

[47]Act of June 20, 1892, [1892] La. Acts at 7-8.

[48]State v. Quaid, 43 La. Ann. 1076, 10 So. 183 (1891).

[49]Chafetz at 191-203, 300; Kefauver Committee Report on Organized Crime 58 (1951). Huey Long's administration allowed gamblers and gangsters chased out of New York into Louisiana and New Orleans, thus continuing the tradition of that city as a refuge for the "river rats" of the steamboat era. There were 1,000 illegal gambling machines in the New Orleans area by the early 1950's, all supplied by the same Missouri enterprise, the Mills Novelty Co., which unsuccessfully sought to block a gambling prosecution in Rankin v. Mills Novelty Co., 182 Ark. 561, 32 S.W.2d 161 (1930).

Nor did the LSLC mark the end of the state's efforts to legalize and control betting. In 1926 the state moved to license the operation of horseracing tracks within the state.[50] This licensing was in line with a general history of toleration of horseracing in Louisiana. The Civil Code always provided that gambling debts on horseraces, foot races, and shooting matches were enforceable in court if not excessive. The code enforced such contracts on the ground that such sports ought to be encouraged because they honed martial skills. Apparently, it was hoped that betting would encourage men to participate in such sports.[51]

The horserace law aimed to raise revenue for the state through a licensing procedure. By 1940, though the legislature realized that larger amounts of money could be raised if the state were given a cut of the parimutuel take. Thus, the Louisiana State Racing Commission was formed.[52] The courts upheld the constitutionality of this enactment against a challenge based on a vague provision in the 1879 constitution condemning gaming. The court stated that the legislature retained plenary power to deal with gambling, and

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[50]Act of 1926, no. 352, [1926] La. Acts at 727-30.

[51]The horseracing provision of the Civil Code is at La. Civ. Code Ann. art. 2983 (1952). The early case of Henderson v. Stone, 6 Mart. 690, 1 N.S. 639 (La. 1823) upheld the validity of horserace debts in a forfeit race. Horserace contracts were held not assignable in Grayson v. Whatley, 15 La. Ann. 525 (1860). A slave was the stake in Vernot v. Yocum, 1 Mart. 580, 3 O.S. 406 (La. 1814).

[52]Act of July 18, 1940, [1940] La. Acts at 1156-64.

thus could authorize any gambling activity it wished, despite the expression of policy in the constitution.[53] Louisiana was once more in the gaming business, and once more the courts ratified the process.

The relaxed attitude of the state toward gambling was also reflected in the last major revision of the gambling law in 1942.[54] As the Reporter's notes in the Louisiana Code indicate, this legislation aimed squarely at professional gamblers, and not at bettors or social gamblers. The purpose of the 1942 statute can be seen most plainly in a provision declaring habitual gamblers to be vagrants.[55] The state continues to penalize the nuisances associated with gambling, but nowhere in the Code is gambling itself condemned.

Louisiana's relaxed policy is in large measure due to the continuing existence of a large constituency that looks with favor upon gambling. The state's involvement with horseracing in the 1920's did not produce pressure for more extensive promotion of gambling activity.[56] Nevertheless, given the state's long history of toleration of gambling, further legalization or decriminalization would not be unexpected.

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[53]Gandolfo v. Louisiana State Racing Commission, 227 La. 45, 78 So.2d 504 (1954) (except for lotteries, specifically prohibited by La. Const. art. XIX, §8 [1921].

[54]No. 43, art. 90 [1942] La. Acts at 137; La. Rev. Stat. Ann. §14:90 (1974).

[55]La. Rev. Stat. Ann. §14:107.4 (1974).

[56]La. Rev. Stat. Ann. §§33:4861.1-4861.16 (Supp. 1976).

b. Florida

Florida's experiments with legalization were a direct response to the decline of the tourist industry in the 1920's. Nothing in Florida's previous history would have led one to expect that the state would turn to gambling as a source of revenue in hard times. Once parimutuel gambling at racetracks was allowed, however, further state promotion of gambling followed.

Florida had experimented with licensed casino gambling in the years after 1879,[57] although a local option provision gave cities the authority to prohibit such activities if they wished.[58] The courts upheld this licensing system,[59] but the system never took hold in any significant way. By 1895, a reform legislature not only acted to prohibit the operation of gaming-houses, but also criminalized participation in all games of chance.[60] By 1895, Florida seemed to have moved into the camp of the strict prohibitionists.

The policy of Florida continued on this strict course for the next thirty years. In 1905, for instance, those who frequented gambling houses were declared vagrants.[61] In 1917, private citizens were given the right to seek an injunction

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[57]Act of March 7, 1879, c. 3099, §11.2, [1879] Fla. Laws at 19-20.

[58]Act of March 4, 1879, c. 3163, no. 65, §1, [1879] Fla. Laws at 105.

[59]Overby v. State, 18 Fla. 178 (1881).

[60]Act of 1895, §§3943, 3951, [1903] Fla. Rev. Stat. at 949-50.

[61][1906] Fla. Gen. Stat. §3570 at 1315.

to close down a gambling house.[62] The courts enforced the spirit of these laws vigorously. Betting on horseraces was declared to be gambling and hence illegal.[63] The legislature specifically included wagering on contests of skill within the general ban on all wagering activity.[64] As the state supreme court noted:

> The consensus of the better opinions is, that the wagering . . . upon the transpiring of any event whatsoever . . . is gaming or gambling within the meaning of these acts.[65]

The state might have maintained this rigid anti-gambling posture but for the hurricane season of 1928. In that year, the Miami-Fort Lauderdale area was hit by two of the worst hurricanes of modern times. The publicity the hurricanes received paralyzed the Florida tourist industry. Moreover, the state was faced with the task of raising large amounts of revenue to aid in rebuilding of the devastated cities. Since the state constitution forbade an income tax, alternative sources of revenue were necessary.[66]

Faced with these crises, Florida turned once more to licensed gambling, hoping to raise revenue and to attract

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[62]Act of May 24, 1919, c. 7367, §2 [1917] Fla. Laws at 216.

[63]Pompano Horse Club, Inc. v. State ex rel. Bryan, 93 Fla. 415, 448, 11 So. 801, 813 (1927).

[64]Ch. 5959, [1909] Fla. Laws at 157.

[65]McBride v. State, 39 Fla. 442, 448, 22 So. 711, 713 (1897).

[66]The constitutional revision of 1968 made provision for a very small income tax not to exceed the aggregate credits or deductions on a federal or other state income tax return. Fla. Const. art. VII, §5.

Northern tourists to the state. A regulated system of licensed parimutuel horseracing, dogracing and jai alai was first established.[67] Betting outside the parimutuel system was forbidden.[68] Racing days were controlled.[69] In short, the state set up a system to control horseracing which closely resembled the commissions established in earlier times to control the ill fated state-run lotteries. This revenue-raising device largely fulfilled its purpose. Today, the legalized gambling industry is Florida's sixth largest revenue source.[70]

Horseracing, however, was not the only form of gambling decriminalized by the Depression legislature. In 1935, the legislature also decriminalized the operation of slot machines, although counties had the local option of forbidding the operation of these machines.[71] Machines, however, could not be effectively regulated by the state. The cost of the type of inspection system needed to insure that all machines gave a fair return, were operated in areas where minors did not congregate, or were owned only by "reputable" people, would have been prohibitive. The state thus gave its imprimatur

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[67] Act of 1931, c. 14832, 1 [1931] Fla. Gen. Laws at 679-90 (horse and dogracing); Act of 1935, c. 17074, 1 [1935] Fla. Gen. Laws at 684-88 (jai alai).

[68] Act of 1931, c. 14832, §§15, 16, [1931] Fla. Gen. Laws at 688.

[69] Id. §§7, 8 at 685-86.

[70] M. Dauer, Should Florida Adopt the Proposed 1968 Constitution? at 26 (1968).

[71] Act of June 10, 1935, c. 17257, 1 [1935] Fla. Gen. Laws at 1085-91. State ex rel. Bennett v. Lee, 123 Fla. 252, 116 So. 565 (1936) upheld a provision of the 1935 act banning operation of any regulated machine within 300 feet of any public school or church.

to an activity over which it could, in fact, exercise little control. Like the early lottery managers, the slot machine owners wasted little time in abusing the privilege granted them by the state. The reaction of the public to the system was later described by a court as follows:

> Within two years the operation of slot machines in Florida had become so obnoxious to the citizens . . . that . . . a great majority of the counties . . . had voted overwhelmingly to prohibit the operation of all slot machine[s] . . . . The opposition to slot machines was the direct result of the baneful and destructive effect which the operation of those machines had had upon the morals of the people of Florida of all ages and classes. It is a matter of common knowledge, of which we must take judicial cognizance, that the lure to play the slot machine had become so great as to undermine the morals of many and lead to the commission of or the indulgence in vices and crime to procure the coins with which to play the machines.[72]

Anti-slot machine agitation thus led to a re-criminalization of the activity in 1937.[73]

Florida's experiments with legalized gambling came to a halt after 1937. The parimutuel system was a major exception to the rule, of course, but the official policy of the state seemed to swing back to a more anti-gambling stance. Part of the reason for this change lay in the public's awareness of the growth of organized crime in the state. As one commentator put it:

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[72]Eccles v. Stone, 134 Fla. 113, 120, 183 So. 628, 631 (1938).

[73]Act of May 29, 1937, c. 18143, 1 [1937] Fla. Gen. Laws at 909-12.

> To an unparalleled degree post-war America had seen the eye of public attention focused on the growth of organized crime. In the forefront of this discouraging picture stands the sinister ogre of illegal gambling, with particularly sharp adverse criticism directed toward activities within the State of Florida.[74]

As a result, the state passed several laws specifically aimed at organized crime. The use of wire systems to communicate gambling information was made a separate crime in 1949,[75] and laws against bookmaking were strengthened in 1951.[76] Hotels that permitted gambling on the premises could have their licenses revoked.[77] Even the ancient Statute of Anne itself was re-enacted.[78]

Recently, however, the tide seems to be turning once again toward a more relaxed gambling policy. The descendent of the Statute of Anne was recently repealed[79] in response to a series of cases that allowed Florida residents to escape foreign gambling debts by pleading the illegality of the original gambling contract.[80] More importantly, a ban on

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[74]MacDonald, "Recovery of Gambling Losses," 5 U. Fla. L. Rev. 185 (1952) (footnotes omitted).

[75]Act of May 4, 1949, c. 26722, §§2-3, [1949] Fla. Gen. Laws 33.

[76]Act of May 28, 1951, c. 26722, 1 [1951] Fla. Gen. Laws at 460-61.

[77]Act of June 11, 1951, c. 26939, 1 [1951] Fla. Gen. Laws at 1169-71.

[78]Act of May 7, 1951, c. 26543, §§1-3, 1 [1951] Fla. Gen. Laws at 118-19.

[79]Act of July 3, 1974, c. 74-382, §26, 1 [1974] Fla. Gen. Laws at 1219, repealing Fla. Stat. Ann. §849.27 (1965).

[80]Dorado Beach Hotel Corp. v. Jernigan, 202 So.2d 830 (Fla. 1967); Young v. Sands, Inc. 122 So.2d 618 (Fla. 1960) (where the debt was enforced only because the plaintiff money lender may not have known the funds were to be used for gambling).

political contributions by racetrack operators was recently lifted,[81] thus allowing the racing lobby to become a significant political force in the state. There are many reasons for this new shift. Florida's need for revenue has grown, at the same time the tourist trade seems to be decreasing. Hialeah Race Track has shown signs of financial ill-health, and the blame has been placed on "over-regulation" by the state. Perhaps most importantly, as other states and the Caribbean Islands legalize and promote various forms of gambling, the attraction of Florida as a vacation spot has decreased. Florida's tourist industry has thus begun lobbying for further legalization in the face of this economic threat. As the state's fiscal problems grow, the likelihood of legal casino gambling in Florida grows with them.

c. Maryland

Like Forida, Maryland took a strong anti-gambling stance in the early part of the modern era. In 1860, the Maryland legislature enacted a sweeping anti-lottery law.[82] This statute gave the purchaser of a lottery ticket the right to recover up to $50 from the vendor.[83] Penalties for other offenses were raised. In 1894, this anti-lottery law was strengthened to include possession of lottery tickets, slips, or records in the list of criminal activities.[84] In 1886, the

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[81] Act of May 8, 1974, c. 74-19, 1 [1974] Fla. Gen. Laws at 24-25.

[82] Act of March 9, 1860, c. 388 [1860] Md. Laws.

[83] Id. §2.

[84] Act of April 6, 1894, c. 310, [1894] Md. Laws at 435-36.

legislature included gift enterprises in the anti-lottery ban.[85]

When the courts failed to expand the scope of the gambling house or anti-lottery laws to cover bookmaking, the legislature responded by passing a law effecting the desired result. The court of appeals held in 1884 in James v. State[86] that bookmaking was not prohibited by the laws of the state. The legislature then moved within a few years to ban bookmaking,[87] with one important exception: bookmaking on county fairgrounds, or on any established race course[88] was excepted from the reach of the law. Thus, paradoxically, the seeds of state legalization and regulation of horseracing were first planted in a bill to criminalize bookmaking.

Once the state had approved bookmaking on certain tracks, pressure grew to regulate the approved racing. In 1892, the legislature moved to regulate racing days in two counties.[89] By 1912, the state had approved the formation of local racing commissions with the power to collect revenue and to promulgate regulations for racing.[90] Inevitably, demands for more comprehensive state-wide regulation grew. The possibility of conflicting regulations among local commissions and of

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[85]Act of April 7, 1886, c. 480, [1886] Md. Laws at 795.

[86]James & Gamble v. State, 63 Md. 242 (1884) construing Act of May 3, 1882, c. 271, [1882] Md. Laws at 408.

[87]Act of March 26, 1890, c. 206, [1890] Md. Laws at 234-35.

[88]Id. §1 at 234-35.

[89]Act of April 7, 1892, c. 386, [1892] Md. Laws at 534-35 applied to Prince George's and Montgomery counties.

[90]See, e.g., Act of March 28, 1912, c. 77, [1912] Md. Laws at 134-38.

competition among counties to give more favorable breaks to racetrack operators combined with a court decision holding the licensing system constitutionally defective in its administrative features[91] led to the establishment of a State Racing Commission in 1920.[92] The Racing Commission was given broad powers to regulate and to control horseracing, and was made responsible for the collection of taxes from racetrack operators. The form and duties of the Commission remain basically the same today.[93]

In 1943, parimutuel betting on harness and pace racing was approved by the legislature.[94] No other significant expansion of the racing law has since been approved. Substantial sums of money have been raised. In the 1972-1973 fiscal year, racing, for example, produced $12 million in revenue for the state.[95]

The reasons for legalization of parimutuel betting in Maryland are not simple. Legalization came at a time when

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[91]Close v. Southern Md. Agr. Ass'n., 134 Md. 629, 644, 108 A. 209, 215 (1919).

[92]Act of March 31, 1920, c. 273, [1920] Md. Laws at 479-88.

[93]Md. Ann. Code art. 78B, §§1-11, 13, 15-16, 21-22, 26 (1975).

[94]Act of May 6, 1943, c. 994, [1943] Md. Laws at 1778-81 authorized experimentation with betting on harness racing. The success of the experiment led to passage of permanent authorization four years later: Act of April 16, 1947, c. 502, §4, [1947] Md. Laws at 1029-30.

[95]"Statement of the Receipts and Expenditures of Public Money for the Year Ending June 30, 1973," in 2 [1974] Md. Laws at 3287.

demands on the state treasury were not heavy; no major economic crisis loomed in Maryland in 1920. Rather, two factors may account for this exception to the anti-gambling laws. First, Maryland's population was more urban, more Catholic, and thought of itself as more sophisticated than the population of most Southern states. Hence, the anti-gambling constituency was countered by a more relaxed, even pro-gambling population. Second, Maryland had a fairly large horse breeding industry and the thoroughbred breeders naturally favored any law that might aid their industry. Moreover, when the courts failed to expand the gambling house prohibitions to cover bookmaking, the legislature was forced to re-examine state policy toward horserace gambling.

In any case, the legalization of parimutuel betting led to an acceptance of the use of gambling as a revenue-raising device. Thus, it was natural for the legislature, faced with a real revenue crisis in the Eastern shore counties in the period during and immediately after World War II, to turn to the legalization and taxation of slot machines, in hope of easing the crisis. The result of their efforts was an orgy of corruption in the state, surpassed in the South only by the excesses of the Louisiana Lottery.

The first authorization for slot machines was given in 1943 to Anne Arundel County.[96] From 1947 to 1951, four more

[96]Act of May 6, 1943, c. 321, §§1, 2, [1943] Md. Laws at 348-49. See also R. King, Gambling and Organized Crime 131 (1969) [hereinafter cited as King].

counties--Prince George's, Calvert, Charles, and St. Marys--obtained authorization to legalize and tax the machines. At first the court seemed to oppose the legislative design. The court of appeals in Bell v. Board of Commissioners of Prince George's County found the enabling act for that county defective because it did not specify in enough detail the purposes of the bill.[98] The holding of this case was very narrow, however, and other authorizations survived the court's vagueness test.[99] In fact, the court later ratified the legislature's action by reading the anti-lottery section of the state constitution very narrowly, holding that

> [T]he words "lottery grant" as used in §36 were intended to mean traditional chartered ticket lotteries engaged in or sponsored by the state. So read, §36 does not inhibit the legislature from legalizing gaming. . . .[1]

Opponents of the slot machine laws, finding no support from the courts, carried their battle to the legislature. The opponents had much to complain about. Revenues from slot machines were not as large as the proponents of legalization had hoped. In 1961, for instance, Calvert County gained only $7,677 in revenue from the machines.[2] As one writer noted at the time, corruption and bribery by the slot machine promoters

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[97] King at 133.

[98] Bell v. Bd. of County Commrs. of Prince George's County, 195 Md. 21, 72 A.2d 746 (1950).

[99] Bender v. Arundel Arena, Inc., 248 Md. 181, 236 A.2d 7 (1967).

[1] Id. at 195, 236 A.2d at 15.

[2] King at 135.

had "always been rumored and has occasionally come dramatically to light in the state house."[3] The opponents, after a determined effort, were able to obtain a five year phase-out of the slot machines in 1963.[4] The passage of the 1963 act caused the slot machine operators to panic. Bribes were offered openly in hope of repealing the law. One state legislator was offered a $20,000 bribe within earshot of a state trooper. In the courts, the new anti-slot machine law was challenged on federal constitutional grounds, but to no avail.[5] On July 1, 1968, Maryland's modern experiment with legalized slot machines, therefore, ended.

The infatuation of state legislators with legalized gambling was not dealt a death blow, however, by the slot machine debacle. Soon after slot machines exited, agitation began for the passage of a constitutional amendment authorizing a state lottery, and the voters passed such an authorization in 1972.[6] In 1972, pending approval of the authorization by the voters, a Lottery Commission with exclusive powers to promote and regulate the state lottery was established.[7]

Nevertheless, the lottery has been a disappointing

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[3] Id.

[4] Act of April 30, 1963, c. 617, §1, 2 [1963] Md. Laws at 1346-47.

[5] Mills v. Agnew, 286 F. Supp. 107 (D.C. Md. 1968).

[6] Md. Const. art. III, §36 (ratified November 7, 1972).

[7] Act of May 26, 1972, c. 365, 1 [1972] Md. Laws at 1219-25, adding to the Md. Code the following: Md. Ann. Code art. 88D (Supp. 1975), and Md. Ann. Code art. 27, §371A (1976).

revenue source. Only $3 million dollars was cleared in the first year of operation.[8] Given increasing fiscal pressures, Maryland, the first state in the South to jump on the bandwagon of states authorizing lotteries, is not, however, likely to abandon the lottery in the near future.

d. Other states

Of all the Southern states, only Louisiana, Florida, and Maryland have experimented with legalized gambling on a large scale in the modern era. In other Southern states, the exceptions to general prohibitions of gambling have been very narrowly drawn. In general, only parimutuel betting on horseracing is exempt from the reach of the gambling laws.

West Virginia prohibits all betting, either public or private,[9] and the prohibition extends to all games whether or not skill is involved.[10] Nevertheless, in response to the severe financial problems the state faced during the Great Depression, the state permitted parimutuel betting at racetracks in 1933[11] and in 1935 established a Racing Commission to oversee the operation of the system.[12] The racing exception, however, was a temporary response to a crisis and was a radical departure from the state's

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[8]"Statement of the Receipts and Expenditures of Public Money for the Year Ending June 30, 1973," in 2 [1974] Md. Laws at 3269, 3301.

[9]Act of February 20, 1915, c. 41, [1915] W. Va. Acts at 318-19.

[10]W. Va. Code Ann. §61-10-4 at 1501 (1931).

[11]Ch. 47, [1933] W. Va. Acts (1st Exec. Session) at 341.

[12]Act of March 8, 1935, c. 71, [1935] W. Va. Acts at 303-09.

anti-gambling policy. The state has shown no signs of expanding the exception. In fact, a bill permitting charitable and fraternal bingo was vetoed by the governor in 1968.[13] Given the fundamentalist character of West Virginia's population and the fact that West Virginia does not have a significant tourist industry pressing for increased legalization little policy change can be expected.

Kentucky, too, has legalized parimutuel betting,[14] but here again, the exception is due to the size and power of the state's horseracing industry and is a clear exception to the anti-gambling policy of the state. While the state's Legislative Research Commission has recommended the adoption of off-track betting,[15] no action has been taken on the proposal. Even if OTB is established in Kentucky, no general trend to expand state involvement with gambling beyond the horseracing field is evident, as Kentucky's laws against gambling otherwise have remained strict. When a study on organized illegal gambling[16] in Kentucky proposed that the state exempt at least charitable and religious bingo from the state's constitutional ban on lotteries, the outcry was

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[13] See Rowe, "Bingo," 70 W. Va. La. Rev. 397 (1967-68) arguing that the governor's veto was justified by a constitutional ban on lotteries.

[14] Act of March 23, 1906, c. 137, [1906] Ky. Acts at 466-67 established the state Racing Commission, which promulgated regulations authorizing parimutuel betting. The regulations were upheld in State Racing Commission v. Latonia Agri. Ass'n, 136 Ky. 173, 123 S.W. 681 (1910). In 1950 the Kentucky Trotting Commission was established to regulate trotting races. Act of March 24, 1950, c. 173, [1950] Ky. Acts at 672-75.

[15] Ky. Leg. Research Commission, Research Rep. no. 109, Off-Track Betting: Kentucky (prepared by J. Kell) at 1-2.

[16] Id. "Organized Illegal Gambling" at G-52.

predictable. State Representative William Kenton likened gambling to "whoring and drinking, not something that the public can treat rationally."[17] Thus, Kentucky's anti-gambling constituency retains its power in the legislature, and this makes further legalization difficult. Since the horse breeders are interested only in their own sport and do not seem interested in expanding state involvement with gambling, the scales in Kentucky seem tipped against further legalization.

Delaware, too, has generally stringent laws against gambling.[18] In 1951, betting itself was criminalized.[19] Thus, the legalization of parimutuel betting in 1935 seemed, for a while, to represent a distinct exception to the general rule, and can be explained only by the Great Depression.[20]

Delaware has recently shown signs, however, of adopting a more explicitly pro-gambling stance. Charitable bingo was exempted from the anti-lottery laws in 1957,[21] and Delaware became the second Southern state to authorize a state-run

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[17] Id., "Initial Position Papers of LRC Off-Track Betting Advisory Committee" at A-33.

[18] See State v. Delaware Novelty House, Inc., 45 Del. 357, 74 A.2d 83 (1950) (state law prohibits operation of "any gambling device of any kind whatsoever"). See also Del. Rev. Code §4058 (1935).

[19] Act of June 5, 1951, c. 289, [1951] Del. Laws at 740-41.

[20] Act of 1935, c. 1, 40 [1935] Del. Laws at 3-4, amending Del. Const. art. II, §17.

[21] Act of April 23, 1957, c. 61, 51 [1957] Del. Laws at 88-89, added Del. Const. art. II, §17A.

lottery in 1973.[22] The lottery, however, was soon abandoned as the start-up costs exceeded the amount of the initial revenue produced.[23] The failure of the state lottery has probably decreased any pressure in the state for further decriminalization. Even before the lottery failed, however, opponents of legalized gambling defeated a proposal that a new Delaware state constitution omit all mention of gambling, thus giving the legislature a free hand in the area.

Arkansas legalized parimutuel betting in 1935 in response to the Depression[24] and a State Racing Commission was established in 1957.[25] In the same year, parimutuel betting on greyhound racing was expressly permitted by the state.[26] If racing were the only legalized gambling permitted by the state, the story of gambling in Arkansas would be much like that of West Virginia. While never legalizing casino gambling, however, Arkansas did tolerate the existence of large-scale casino gambling at Hot Springs for a significant period of time. It was only after the New York Times picked up on federal efforts to prosecute the Hot Springs operation and revealed the close working relationship

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[22]Act of June 25, 1973, c. 143, 59 [1973] Del. Laws, pt. 1 at 432-33.

[23]N.Y. Times, April 13, 1975 at 41, col. 1.

[24]Act of February 16, 1935, no. 46, §§1-26, [1935] Ark. Acts at 90-112.

[25]Act of February 15, 1957, [1957] Ark. Acts (extraordinary session) at 145-67.

[26]Act of March 8, 1957, id. at 594-615.

between Arkansas politicians and the casino operators,[27] that state officials were finally forced to reconcile their expressed public policy with their private actions and suppress the casinos.[28] The casino operators attempted to re-open by gaining passage of a statewide referendum legalizing their operation, but the anti-gambling sentiment in the predominantly Protestant and rural state was strong. The referendum failed in November of 1964.[29]

Given the anti-gambling feelings of the people and the state's apparently strict anti-gambling policy,[30] some explanation of why the state did allow gambling in Hot Springs needs to be made. Perhaps the answer lies in tourism. In the 1950's, Hot Springs was a decaying resort town. Large numbers of tourists had once come from Chicago and St. Louis, but by the 1950's the town had lost its appeal to the upper class Midwestern tourist. The disruptive effects of this shift on

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[27] N.Y. Times, March 8, 1964 at 1, col. 3.

[28] N.Y. Times, March 28, 1964 at 1, col. 7.

[29] N.Y. Times, November 4, 1964 at 6, col. 1.

[30] The courts of Arkansas showed a strong anti-gambling policy by broadening the definitions of lottery and gambling devices. In 1930, the court found that a combination mint vending-pinball machine, which gave a mint for every nickel but might also give free games, to be a gambling device. Rankin v. Mills Novelty Co., 182 Ark. 561, 562, 32 S.W.2d 161, 162 (1930). The court said:

> The machine under consideration is attractive to children, and the fact that they may sometimes secure the right to play an attractive game--the opportunity varying with the number of slugs first received and upon "base hits" made--induces them to spend their nickels, not for the mints, but for the possibility of the game, and is gambling within the meaning of our statute.

the economy of the area, and by implication on the state as a whole, could have been severe. State officials apparently tolerated gambling as a last resort effort to save the town. In any case, it is doubtful that anything short of legalization could have kept Hot Springs competitive with Las Vegas, and the failure of the 1964 referendum, even without state action to close the casinos, marked the end of efforts to save the town's economy through gambling. Since the closing of Hot Springs as a gambling resort, no further moves have been made in Arkansas to decriminalize gambling. Moreover, the economic "boom" that has taken place in the state since the early 1960's has decreased demands for revenue. The prospect for further legalization, therefore, seems remote, especially since the population remains rural and Protestant.

CHAPTER IV. THE MIDWEST

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1. East of the Mississippi

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Chapter IV.

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CHAPTER IV. THE MIDWEST

A. Early History

1. East of the Mississippi[1]

The area now recognized as the northeastern portion of the Midwest was first inhabited by French Catholics who followed routes marked by the explorers Pierre Marquette and Louis Joliet. These French adventurers were the first Europeans to cross the plains of Illinois and to encounter the upper reaches of the Mississippi River. In the seventeenth century, La Salle, another French explorer, traversed the wilderness that later became Indiana and Ohio.

The first white inhabitants were mostly fur trappers and traders, and thus the area was left as a wilderness for many decades. The constant threat of Indian attack discouraged permanent settlements; it was not until the early nineteenth century that certain areas were cleared and secured by force for white settlement. A large section near Lafayette, Indiana, for example, was not deemed safe for white settlement until after the Battle of Tippecanoe in 1811.

By the time of the outbreak of the French and Indian War, the French maintained only minimal control over the area. In 1763, the provisions of the Treaty of Paris ceded the French holdings to Great Britain. British control of the area continued until the Revolution, and, to some extent, beyond it.

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[1]Ohio, Michigan, Illinois, Wisconsin and Indiana.

Some of the original thirteen states claimed land between the mountains and the Mississippi. North of the Ohio River, claims were made by Virginia, Massachusetts, and New York.[2] These claims were in conflict with British claims to the area, which were voiced well after the Revolutionary War. Indeed, the strategic British garrison at Detroit was not abandoned until 1796, and the last British forces were not evacuated until 1797. Between 1781 and 1786, all of the state claims to western land were ceded to the United States, and in 1800 the "Territory Northwest of the River Ohio" or Northwest Territory, was created by act of Congress.

The Land Law of 1796 opened the area for settlement, and by 1800, 45,000 settlers reached Ohio.[3] As population increased, the area was redivided into the Indiana, Michigan, and Illinois Territories. The boundaries of these jurisdictions continually varied as new states were admitted to the Union.

Most of the settlers of the Midwest in the early 1800's came from New York and other Eastern states. Some settlers ventured as far west as Indiana, although most were reluctant to leave the more eastern woodlands for the prairies beyond. Settlement was concentrated along the river banks since river travel was the major form of transportation. In 1820, there was still no significant migration as far west as Illinois or as far north as Michigan. These outer regions were inhabited only by French trappers who remained after France relinquished its claim to the area.

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[2]D. Clark, The Middle West in American History 76 (1937) [hereinafter cited as Clark].

[3]Id. at 2.

a. Early gambling prohibitions

Early gambling statutes in the Northwest Territory closely paralleled those of the East. The preamble of the 1790 Northwest Territory Act, the first anti-gambling statute affecting the Territory, reflecting a philosophy characteristic of much of Puritan derived legislation, articulated the danger seen in continued gambling activity:

> Whereas the population, happiness, and prosperity of all countries, especially infant communities, necessarily depend upon the sobriety and industry of the people, and their attention to the moral and political duties of life. . . . [a]nd whereas many pernicious games have been publickly practised in this territory, tending to the corruption of morals and the increase of vice and idleness, and by which honest and unsuspecting citizens may be defrauded, and deserving families be reduced to beggary and want.[4]

The 1790 Act declared gaming contracts to be void, and any person who established or permitted the establishment of "any species of gaming" where money might be wagered could draw a $200 fine.[5] In the absence of organized law enforcement on the frontier, the statute encouraged the prosecution of violations by private individuals through a provision that reserved one-half of all the resultant fines for the private prosecutor.[6] The act also prohibited tavern keepers from keeping billiard or other tables. Those who violated the ordinance risked the loss of their licenses.[7]

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[4]Act of Aug. 4, 1790, ch. 13, [1790] N.W. Terr. Laws at 30 (Ill. Bar Ass'n Reprint ed. 1925).

[5]Id. §1.

[6] Id. §2.

[7]Id.

The policy of the 1790 Act was retained in the Maxwell Code of 1795.[8] This codification clarified the earlier statute by limiting penalties for keeping gaming tables to innkeepers and by including cockfighting and horseracing as games within the reach of the statute.[9]

Apparently, the law-makers of the infant communities of the Northwest Territory viewed these early forms of gambling--tavern gambling and betting on animal fights or races--as aspects of frontier life best curtailed. The provisions, however, were in most cases ignored by both law enforcement officials and the populace at large.

b. Lotteries

Lotteries never enjoyed the popularity in the early Midwest that they enjoyed in the East and South, perhaps because lotteries were a financial necessity in the early days of development in these areas; they acted as a substitute for systems of banking and taxation to raise revenue. By the time Midwestern towns needed capital for major improvements, the newly-chartered banks of New York and other Eastern cities could provide the necessary capital. Lotteries, therefore, had lost their most viable rationale by the end of the eighteenth century; only their gambling aspects remained.

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[8]Act of July 16, 1795, [1790] N.W. Terr. Laws at 276 (Ill. Bar Ass'n Reprint ed. 1925).

[9]Id. §1.

Nevertheless, there was some lottery activity in the Northwest in the early nineteenth century. Illinois, Michigan and Indiana each authorized lotteries. The Illinois legislature authorized a lottery to raise funds for public works projects in 1819.[10] The state forbade unauthorized lotteries in both 1810 and 1819.[11] In 1805, the legislature of Michigan authorized a lottery "for the encouragement of literature and the improvement of the city of Detroit." Adapted from New York law, the plan was to raise $20,000 through four successive lotteries.[12] Private lotteries were again forbidden, and violators (sellers, buyers, and aiders and abettors in private lotteries) were subject to a $30 fine.[13] Michigan authorized other public lotteries while still a territory. In 1808, a lottery was established to raise $6000 to build a road between Detroit and Monroe.[14] In 1817, the territory authorized a lottery to benefit the founding of the University of Michigan.[15]

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[10]A $10,000 lottery was authorized for improving navigation on the Big Wabash River. Act of March 25, 1819, [1819] Ill. Laws at 257. A $50,000 lottery was authorized for draining the Mississippi Bottom for health reasons. Act of March 27, 1819, [1819] Ill. Laws at 310.

[11] Act of March 9, 1810, §11 [1809-1811] Ill. Terr. Laws 1819, §12, at 21 (Ill. State Hist. ed. 1906); Act of March 5, 1819, [1819] Ill. Laws at 127.

[12]Act of Sept. 9, 1805, 1 Mich. Terr. Laws at 67.

[13]Act of Dec. 19, 1808, §31, 4 Mich. Terr. Laws at 21, 29.

[14]Id. at 35.

[15]Act of Aug. 26, 1817, 2 Mich. Terr. Laws at 105.

Finally, in 1829, the legislature authorized a lottery to improve the same Detroit-Monroe road.[16] In 1828, Michigan increased the penalty for holding a private lottery to $2000, a huge penalty by nineteenth century standards.[17] In 1832, the sale or advertising of private lottery tickets was prohibited.[18] Indiana authorized two lotteries while still a territory, one for the benefit of Vincennes University,[19] and one for the benefit of Vincennes Library.[20]

The other states and territories of the eastern Midwest never approved lotteries. In Ohio, a proposal for an early lottery to raise funds for public use was rejected:

> Thus early was the policy adopted of interdicting this demoralizing and ruinous mode of gambling and taxation; a policy which, with but a temporary deviation, has ever since honorably characterized the legislation of Ohio.[21]

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[16] Act of Oct. 29, 1829, 2 Mich. Terr. Laws at 731-34.

[17] Act of June 30, 1828, 2 Mich. Terr. Laws at 687.

[18] Act of June 14, 1832, 3 Mich. Terr. Laws at 921.

[19] Act of Nov. 29, 1806, ch. 5, §15, [1806] Ind. Laws in [1801-1809] Ind. Terr. Laws at 183 (Ill. State Hist. ed. 1930).

[20] Act of Nov. 23, 1810, ch. 3, §1, [1810] Ind. Laws, in Ind. Terr. Laws at 105 (Ill. State Hist. ed. 1930).

[21] "Preliminary Sketch of the History of Ohio," in 1 Stat. of Ohio and N.W. Terr. at 29 (Chase ed. 1833).

In fact, most of the states and territories east of the Mississippi specifically banned lotteries between 1795 and 1820,[22] beginning with the Northwest Territory enactment of 1795.[23]

c. River travel and gambling

Before 1800, the only route west from Ohio was the Ohio River. After 1800, overland roads were built, but they were at best "rock-strewn, precipitous roadway[s] over the mountains" or "rutted or muddy course[s] through the lowlands."[24] Thus, most settlers continued to rely on river travel for at least the first twenty years of the nineteenth century.

River travel increased remarkably with the development of the steamboat. The first steamboat on the great central rivers, "The New Orleans," was launched by Nicholas J. Roosevelt in 1811 at Pittsburgh.[25] By 1815, another steamboat, the "Enterprise," made the long upriver journey on the Mississippi between New Orleans and Louisville in only 25 days.

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[22]Act of July 16, 1795, §6, [1795] N.W. Terr. Laws at 276-77 (Ill. Bar Ass'n Reprint ed. 1925); Act of Sept. 17, 1807, ch. 37, §16, [1807] Ind. Laws in [1801-1809] Ind. Terr. Laws at 375 (Ill. State. Hist. ed. 1930); Act of March 25, 1819, [1819] Ill. Laws at 257.

[23]Act of July 16, 1795, §6, [1795] N.W. Terr. Laws at 276-77 (Ill. Bar. Ass'n Reprint ed. 1925). This act also prohibited raffles.

[24]Clark at 33.

[25]Id. at 105-06.

Only ten years later, there were 75 steamboats making regular journeys on the Mississippi[26] and Ohio Rivers.

Improved river transportation gave rise to the massive westward migration of the 1820's and 30's.[27] In a typical item of the era, the Buffalo Republican reported;

> Our steam boats, and other vessels, have for several days been literally crammed with passengers, and a great part of them emigrants from the East, intending to settle in the fertile parts of Michigan and Ohio. It is said that within the past week, as many as one thousand souls passed through this place for such destination.[28]

The steamboat brought not only population and prosperity to Midwestern river cities, but gambling as well. Professional gamblers regularly worked the steamboats of the Mississippi and Ohio;[29] the boats were an ideal setting for the victimization of unsuspecting travelers. On land, the town tavern of more rural days was replaced by the "wolf trap," a primitive form of a casino. Cincinnati, an early population center and the chief port on the Ohio River, was particularly infested with these river-borne hustlers.

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[26] Id. at 107.

[27] Id. at 18.

[28] As quoted in Clark at 18-19.

[29] H. Asbury, Sucker's Progress 204 (1969) [hereinafter cited as Asbury].

The citizens of Ohio, however, were not pleased with the influx of gamblers. Anti-gambling fervor increased throughout the 1820's and 30's. In the wake of anti-gambling riots and lynchings, Ohio river towns expelled gambling hustlers.[30] In Cincinnati, an angry mob threatened to burn down all the gambling houses and to hang their occupants. Only the intervention of Mayor Sam Davis saved the lives of the gamblers and, perhaps by design, the gambling industry itself.[31]

Cincinnati wolf traps of the 1830's, however, were replaced by more sophisticated gambling houses in the 1840's. Proprietors of the wealthier houses paid large sums to the police for protection,[32] but the keepers of the lowlier wolf traps could not afford the high prices of local law enforcement.

> [T]he police and politicians absorbed more and more of the meager earnings of the Traps, and when the graft was not forthcoming subjected the keepers, dealers, and customers to the danger and annoyance of frequent raids, on the ground that the dives were the rendezvous of criminals and the breeding places of crime and disorder, which, as a matter of fact, they were. Unable to withstand such persecution, the Wolf-Traps gradually decreased in numbers . . . .[33]

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[30] Id. at 220-29.

[31] Id. at 227.

[32] Id. at 271-79; M. Chafetz, Play the Devil 209 (1960).

[33] Asbury at 275.

2. West of the Mississippi

Settlement of the western side of the Mississippi[34] generally lagged behind settlement of the Ohio valley by about thirty years. In the mid-nineteenth century, many of Iowa's settlers came west from Ohio, apparently wishing to escape the rapid population growth. Indeed, many of the Iowa pioneer families of the 1840's had been Ohio pioneer families between 1790 and 1820.

Missouri, however, was settled much earlier than the rest of the land west of the Mississippi because of its location on the lower Mississippi and its proximity to the Gulf of Mexico. In fact, Missouri's settlement coincided closely with that of the Northwest Territory. During the eighteenth century, French Canadian trappers and traders roamed the region, but after 1815, pioneers poured in, especially along the Missouri and Mississippi Rivers. Thus, gambling and anti-gambling activity west of the Mississippi originated in the territorial days of Missouri.

a. Early gambling prohibitions

In 1814, the Missouri Territorial Legislature[35] passed its first law prohibiting gambling. Section 3 of the act prohibited the keeping of any gaming tables and subjected violators to a fine not exceeding $500.[36] This 1814 provision

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[34]Minnesota, Iowa and Missouri.

[35]Missouri became a territory in its own right in 1814.

[36]Act of Jan. 8, 1814, [1813-14] Mo. Terr. Acts at 30-33. This section has been referred to as "the original tree which grew against gambling. . . . " Williamson, "Gambling Laws of Missouri," 7 J. Mo. B. 85 (1951).

is identical to the current provision except that two additional forms of gambling have been brought within its prohibition: keno in 1881[37] and slot machines in 1901.[38] Sections 5 and 7 of the 1814 law have also been retained with little modification. Reflecting the Statute of Anne, section 5 declared that debts and other commercial transactions that were based on gambling were null and void.[39] Section 7 of the act fined the owner of any building who was convicted of permitting gambling on his premises.[40]

Iowa's first gambling statute was not enacted until 1838--24 years after Missouri's--and reflects the later period of settlement of the Iowa Territory. In general, migration upriver from St. Louis was slow because the United States continued to recognize Indian title to the region, even after the Louisiana Purchase. No Iowa land was legally ceded to the whites by the Indians until after the bloody Black Hawk War of 1832. As late as 1839, the United States Congress "guaranteed" the existing property rights of Iowa Indians.[41] Even so, the first Indian lands were opened to white settlement in 1833, and by the late 1840's, most of Iowa was claimed by whites. In 1838, the Iowa Territory was created by Congress.

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[37]Act of March 9, 1881, §1, [1881] Mo. Laws at 112.

[38]Act of March 19, 1901, §2194, [1901] Mo. Laws at 130.

[39]The current provision is found in Mo. Ann. Stat. §434.010 (Supp. 1976).

[40]The current provision is found in Mo. Ann. Stat. §563.420 (1953).

[41]Act of March 3, 1839, [1843] Iowa Rev. Stat. at 30.

Before establishment of its own territorial government, Iowa functioned under the laws of several other territories.[42] Once Iowa was declared an independent political entity, the settlers[43] were quick to enact their own laws, including a statute on gambling.[44] An 1838 act declared gambling illegal. At the same time, in sharp contrast to the laws of other areas, it made gambling debts collectible. Gambling debts were defined as "any valuable thing won by gambling or playing at cards, dice, or other games of hazard whatsoever. . . ."[45]

Despite the collection provision, the law was designed to discourage gambling. The statute also provided a procedure by which gambling losses could be recovered for the use of the county by any person.[46] The 1838 law made it a misdemeanor to keep gaming tables and to "induce, entice or permit any person to bet or play"[47] on the device. The players at the

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[42]The present state of Iowa formed part of the Indiana Territory (1804), the Louisiana Territory (1805), and the Missouri Territory (1812). After Missouri was admitted to the Union in 1812, the Iowa region remained unorganized and ungoverned for more than two decades, until it was incorporated into the Michigan Territory (1834) and then into the Wisconsin Territory (1836).

[43]The first permanent white settlers came from Eastern and Southern states, but as early as the 1840's, they were joined by Scots, Scandinavians, Dutch, Czechs, and Germans.

[44]Act of Dec. 25, 1838, [1838-39] Iowa Terr. Stat. Laws at 221.

[45]Id. §1.

[46]Id. §2.

[47]Id. §3.

tables, as well as the keepers, were punished,[48] as were those who permitted the devices to be set up or used on property they owned, occupied, or controlled.[49] The act also outlawed gaming-houses,[50] provided for witness immunity,[51] required the seizure (forcible if necessary) and destruction of gambling devices,[52] and mandated the forfeiture of office by public officials who failed to turn in gambling law violators.[53]

These provisions were passed during a period of Iowa's development that was similar to the development of the Northwest Territory in the 1790's: the first towns were springing up along the rivers, farmers were breaking ground, and communities were forming out of the sparse population. The experience of the territories to the east is obviously reflected in the work of these new frontiersmen, for they enacted more sophisticated anti-gambling provisions than those of the Northwest, Ohio, and Indiana Territories. Instead of simply prohibiting the possession or use of gambling devices,

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[48] Id. §4. The punishment was a fine of $10 to $500.

[49] Id. §5. The punishment was a $100 to $500 fine and/or 10 days to 3 months in prison.

[50] Id. §§6, 7, 9.

[51] Id. §10.

[52] Id. §§11, 12, 13.

[53] Id. §15. A maximum fine of $100 was also imposed.

for instance, Iowa introduced a nuisance law and provided for the seizure and destruction of gambling devices. Similarly, witness immunity was made available to law enforcement officials in Iowa, but not to those who were trying to suppress gambling in the Ohio River valley.

By permitting the collection of gambling debts, while outlawing the use of gambling tables, the 1838 legislature was more concerned with the evils of professional gambling and the spread of casinos than with the prospect of social gambling among the pioneers. Even though social gambling was seen as a destructive force in Cincinnati, Louisville, and other river towns, the big-time hustlers who rode the great steamboats undoubtedly made a poker game between friends seem relatively benign.

Iowa was also the first Midwestern jurisdiction to declare that any person who "does or is suspected to get his livelihood by gaming"[54] was a vagrant,[55] and subject to imprisonment. Any such "dissolute person" would be set free,

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[54]Act of Jan. 24, 1839, ch. 154, §1, [1843] Iowa Rev. Stat. at 626. The statute required that the accused have the "Wherewital to maintain himself, by some visible property, . . . labor, or some honest calling." Once again, the Puritan notion of calling found itself reflected in positive law.

[55]Id. §1.

however, if he had a wife or family in the Territory, could post a bond, and would "return to his wife and family and follow some useful employment for their maintenance and support.[56] This provision clearly reflects Iowa's dependence on the family farm for its economic survival.

In 1843, the Iowa legislature expanded the Territory's gambling laws to include more of the traditional provisions. Lotteries, never popular in Iowa, were outlawed.[57] All gambling debts were declared void,[58] thus repealing the contradictory provision in the 1838 law. Losers could sue for recovery of losses within six months; if a loser failed to sue, any other person could sue to recover the loss.[59] An element of private enforcement was thus introduced. Keepers of public gaming-houses were also subjected to fine and imprisonment.[60]

Minnesota was the next territory to be carved out of the Louisiana Purchase. It was established in 1849, and the Organic Act of Minnesota immediately became law.[61] This act

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[56] Id. §2.

[57] Act of Feb. 16, 1843, ch. 49, §36, [1843] Iowa Rev. Stat. at 191.

[58] Act of Feb. 13, 1843, ch. 76, §1, [1843] Iowa Rev. Stat. at 273.

[59] Id. §2.

[60] Id. §8.

[61] Act of March 3, 1849, [1851] Minn. Stat. at 26.

provided that the laws in force in the Territory of Wisconsin at the date of Wisconsin's admission as a state were to be "valid and operative in Minnesota until altered, modified, or repealed by the Minnesota legislature."[62] Minnesota did not pass its own gambling provisions until 1851,[63] and even then the statute borrowed heavily from the 1849 Wisconsin Revised Statutes.[64] Minnesota's anti-gambling statute forbade keeping, using, or betting on gaming tables[65] and rendered all gambling

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[62] Id. §12.

[63] Minn. Terr. Rev. Stat., ch. 106 (1851).

[64] Cf. Wis. Rev. Stat. ch. 138, §§8, 9, 10, 11 (1849) and Minn. Terr. Rev. Stat. ch. 106, §§2, 3, 4, 5 (1851).

[65] Minn. Terr. Rev. Stat. ch. 106, §1 (1851). Specifically enjoined were "E.O. or rolette [sic] tables, faro or pharo banks . . . . " Id. Dealing cards at faro or forty-eight was punishable by a fine of $50 to $100. Id. §2. Any person who allowed gaming devices to be set up on his property was subject to a fine of $75 to $100. Id. §4.

A witness's testimony could not be used against him. Id. §5. This early immunity provision was only recently replaced by a transactional immunity statute. Minn. Stat. Ann. §609.09, as amended (Supp. 1976).

Losses incurred in card and dice games could be recovered in a civil action (id. §8), and a judgment could be entered upon oath of the parties (id. §9). Section 8 remains in force in substantially identical form as Minn. Stat. Ann. §541.20 (Supp. 1975-76). Section 9 was dropped in 1866. Minn. Gen. Stat. ch. 99, at 618-20 (1866).

For an example of recovery of losses from playing cards, see Parsons v. Wilson, 94 Minn. 416, 103 N.W. 163 (1905).

contracts void.[66] Minnesota also introduced nuisance concepts into its gambling law, but, unlike Iowa, required search warrants to be issued before an alleged gambling device could be seized.[67] In the same year, the state granted municipalities the independent power to suppress gambling.[68]

After the territories enacted these first provisions, the legislatures remained silent on the subject of gambling for twenty years. The courts also refrained from active involvement in the development of the law of gambling at this time. The only noteworthy decision was an Iowa case which held that horseracing was not a game of chance as defined by the statutory prohibitions on gambling, and thus not forbidden by law.[69]

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[66]Minn. Terr. Rev. Stat., ch. 106, §10 (1851). Most of this section is in force today as Minn. Stat. Ann. §541.21 (Supp. 1975-16).

[67]Minn. Terr. Rev. Stat. ch. 110 (1851). Gaming apparatus and implements were subject to search and seizure. Id. §2(3). Repealed in 1963, this provision was replaced by Minn. Stat. Ann. §626.04, (as amended Supp. 1975-76).

[68]Minn. Terr. Rev. Stat. ch. 41 (1851). The board of trustees was given the power to suppress gaming-houses, id. §23 (9), and horseracing, id. §23(22). See Minn. Stat. Ann. §412.221(25)(1958).

[69] Harless v. United States, 1 Morris 169 (Iowa 1843).

b. Lotteries

The only significant lottery activity west of the Mississippi was in Missouri. Missouri, in fact, was an important exception to the Midwest's relative lack of lottery activity. Missouri may have been influenced somewhat by the constant lottery activity of its downriver neighbor, Louisiana. In the first decades of the nineteenth century, the Missouri legislature periodically authorized lotteries.[70] In 1835, however, the legislature began to show its disapproval of lotteries by prohibiting all those not authorized by the state.[71] Then in 1842, the legislature attempted to eliminate all lottery activity in Missouri by repealing lottery authorization enactments.[72]

The Missouri court, however, reluctantly found the 1842 statute unconstitutional. In State v. Hawthorn,[73] the court affirmed the lower court holding that the statute violated the federal constitutional ban on laws impairing the obligation

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[70] See, e.g., Act of Feb. 9, 1833, ch. 61, [1832] Mo. Laws. at 82-83.

[71] Act of Jan. 24, 1835, [1834-35] Mo. Rev. Stat. at 398.

[72] Act of Dec. 19, 1842, [1842] Mo. Laws at 85. Violators were "punished by a fine not less than one, nor more than five thousand dollars. . . " or subject to imprisonment for six to twelve months.

[73] 9 Mo. 389 (1845).

of contracts. The court declared that it felt "every disposition to sustain the act whose obvious tendency is to suppress an evil and promote public and private morals."[74] Ironically, Chief Justice Taney had written the landmark Charles River Bridge[75] opinion eight years earlier where he declared that a charter should not be construed against the community. Thus, the Missouri court undoubtedly would have been upheld by the Supreme Court of the United States, if it had found the 1842 statute constitutional. Apparently, the full meaning of the shift in personnel and doctrine reflected in the Charles River Bridge decision had not yet reached the Missouri frontier.

Lotteries that were previously authorized, therefore, continued to flourish in Missouri. The most notable of these was the New Franklin lottery. This lottery was franchised in 1833[76] to raise $15,000 to build a road from New Franklin to the Missouri River. The lottery continued to flourish into the 1870's, long after New Franklin had been abandoned and the road had collapsed into the river.[77] In an 1880

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[74] Id. at 396.

[75] Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1838).

[76] J. Ezell, Fortune's Merry Wheel: The Lottery in America at 134 (1960) [hereinafter cited as Ezell].

[77] Id.

quo warranto proceeding,[78] however, the Missouri court declared that the franchise of the New Franklin Lottery had finally expired. The state could then constitutionally enforce its lottery ban.

Recounting his impressions of St. Louis in the middle 1880's, an English traveler, Edward Dicey, noted:

> The town . . . is crowded, like a Bavarian or Papal one, with the offices of the State Lottery. It shows the practical working of the American Constitution, when you consider that the United States Government has no more power to hinder every State in the Union from establishing lotteries than we have to require Belgium to suppress the gaming tables at Spa; and it shows, too, the wise actions of the State Governments, that in only three out of the thirty-six States, and these all Border Slave States--Kentucky, Delaware, and Missouri --are lotteries permitted by local laws.[79]

From the number of lottery offices, Dicey concluded that the lottery was a thriving business, and undoubtedly accounted for both the light taxes and the poverty in Missouri.[80]

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[78]State v. France, 72 Mo. 41 (1880). A quo warranto proceeding was defined in Johnson v. Manhatten Ry. Co., 289 U.S. 479, 502 (1933) as "an extraordinary proceeding, prerogative in nature, addressed to representing a continued exercise of authority unlawfully asserted."

[79]Ezell at 230.

[80]Id. at 231.

The official policy of Minnesota toward lotteries was more typical of the Midwest. Included in its first gambling enactment was a ban on the establishment or promotion of lotteries and the sale of lottery tickets.[81] The statute provided especially stiff penalties for second offenders,[82] and for first offenders involved in fraudulent lottery schemes.[83] Lottery advertising was proscribed,[84] and all prizes or sums of money connected with the lottery were forfeitable to the territory.[85]

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[81]Minn. Terr. Rev. Stat. ch. 105, §§1-2 (1851). The statute covered all involvement with lotteries, including aiding and abetting or allowing one's property to be used for a lottery. Punishment for the promotion or establsihment of a lottery was imprisonment for one to six months. Punishment for selling tickets was a fine of $100 to $500.

[82]Id. §3. The penalty was six months to two years in jail.

[83]Id. §5. The burden of proving the genuineness of the lottery ticket was on the defendant. Id. §6.

[84]Id. §4.

[85]Id. §7.

B. Expanded Development

1. Economic and cultural development

In 1840, St. Louis and Cincinnati were the only cities west of the Appalachians with populations larger than 100,000. By 1860, however, the waterfronts of the Great Lakes and the great central rivers were attracting settlers in great numbers: Detroit, Chicago, and Milwaukee all reached the 100,000 mark. Illinois, centrally located in the Midwest, gained more immigrants than any other state during the 1850's.[86]

The primary economic activity of the settled Midwest was agriculture. The first economically important products were corn in Ohio, Indiana, Illinois, and Iowa; wheat in Minnesota; and dairy products in Wisconsin and Michigan.[87]

Industrial development in the Midwest also began along the river fronts and lake fronts, where raw materials and finished products could be transported easily. Industrialization was periodically hindered by economic depressions, or "panics," which gripped the Midwest along with the rest of the nation.

Industrial development did not start until after the Panic of 1819, and further expansion was inhibited for almost a decade by the Panic of 1837.[88] The Panic of 1857, however,

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[86] Clark at 22-26.

[87] R. Nye, Midwestern Progressive Politics 3-5 (1959) [hereinafter cited as Nye].

[88] Clark at 161-64.

did not have such a debilitating effect because it was followed by the Homestead Act of 1862. The Homestead Act, along with the increasing pace of industrial development, brought many settlers to the Midwest, especially to the northern areas. At first, most immigrants were Americans from the eastern states of the South. Right behind them came immigrants from Germany and Scandanavia. Somewhat later in the 1800's, expanding industry drew Poles, Italians, and Czechs to Midwestern cities.[89]

2. Legal developments

a. Judicial interpretations

The mid-nineteenth century was a period of increased judicial definition of gambling law which broadened the reach of existing statutes. Although the enforcement of gambling law in the Midwest was never efficient, prosecutions were numerous enough to allow courts to clarify the often inartfully worded early statutes.

In the eastern Midwest, this period of judicial strengthening and definition began soon after the passage of early statutes. In 1824, Indiana re-enacted its 1807 provisions with some additions. One important innovation was to permit gambling winners to discharge themselves from further penalties and prosecution by repaying the losers.[90]

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[89] Nye at 8-9.

[90] Ind. Rev. Laws, ch. 48, §3 (1824).

Third parties were empowered to recover losses if the loser failed to sue within six months.[91] This statute remained in force until 1894, and resulted in much litigation.

In 1835, the Indiana Supreme Court interpreted the act strictly. It ruled that money lost to the winner of a bet concerning an election was not recoverable. The statute stated that those who lost money at games could recover, but nothing was provided for those who lost money on non-gaming wagers.[92] In a series of later cases, the court held that a loser could recover his losses from a stakeholder only if he explicitly told the stakeholder not to deliver the money to the winner before it was in fact delivered.[93] In 1887, the court ruled that the state, acting for a wife whose husband had lost money gambling, could sue and recover the money from a gambling house keeper, even though the money was won by the keeper's servant in his absence.[94]

This strengthening of the law continued in the important case of Sondheim v. Gilbert.[95] Here, the court held that a bona fide holder of commercial paper, who gave value for the

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[91] Id. §2. If no relatives existed, the proceeds went for the benefit of the county.

[92] M'Hatton v. Bates, 4 Blackford. 63 (Ind. 1835).

[93] Frybarger v. Simpson, 11 Ind. 59 (1858); Morris v. Philpot, 11 Ind. 447 (1858); Bourroughs v. Hunt, 13 Ind. 178 (1859).

[94] Conden v. State, 113 Ind. 73, 14 N.E. 705 (1887).

[95] 117 Ind. 71, 18 N.E. 687 (1888).

note without notice of its gambling origins, could enforce payment of the note, unless a statute specifically held otherwise. The noteholder was allowed to recover because the note was given in payment of a wager on the price of commodities, an activity which was not specifically prohibited by an anti-gaming statute.[96]

The Indiana courts also ruled that the lender's mere knowledge that the borrower intended to gamble with the funds would not defeat the lender's action to recover the loan. If the lender actively urged or aided the borrower to use the money for gambling, however, he became particeps criminis. Courts would then not allow the lender's action to recover the loan.[97]

b. Legislative broadening

Ohio and Indiana were the first states to broaden their gambling laws to include peripheral activities, thereby further discouraging gambling.

In 1814, as the Ohio canal system brought population to former wildernesses, the state re-enacted its early prohibitions[98] with important additions. The act added an anti-cheating provision,[99] recognizing that big-city hustlers

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[96] Id. at 75, 18 N.E. at 691.

[97] Jackson v. City Nat'l Bank, 125 Ind. 347, 25 N.E. 430 (1890).

[98] Act of Jan. 4, 1814, ch. 310, 2 Stat. of Ohio and N.W. Terr. at 823 (Chase ed. 1833).

[99] Id. §7.

were becoming the chief gambling problem, and broadened gaming provisions to forbid even the possession or importation of playing cards.[1] Seemingly innocent activities were also prohibited because they were commonly associated with gambling. A later act forbade nine pin alleys, sleight of hand tricks, wire dancing, and, curiously, puppet shows where admission was charged.[2] In 1825, bull- and bear-baiting, cockfighting and horseracing were banned.[3] Ohio codified these prohibitions in 1831.[4]

Indiana adopted provisions parallel to those of Ohio in the same period.[5] Additionally, an 1838 Indiana statute denied witnesses an excuse from testifying,[6] and an 1855 provision forbade gambling by minors.[7]

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[1] Id. §4.

[2] Act of Jan. 19, 1824, ch. 600, §§7-8, 2 Stat. of Ohio and N.W. Terr. at 1350 (Chase ed. 1833).

[3] Act of Jan. 22, 1825, ch. 643, 2 Stat. of Ohio and N.W. Terr. at 1460 (Chase ed. 1833).

[4] Act of Feb. 17, 1831, [1831] Ohio Stat. at 163.

[5] Ind. Rev. Laws ch. 29, §§45-49, 56, 61 (1824).

[6] Ind. Rev. Stat. ch. 47, §5 (1838).

[7] Act of March 1, 1855, ch. 55, §1, [1855] Ind. Laws at 121.

States and territories to the north and west of Indiana and Ohio also began to grow and feel the attendant need to revise and strengthen their gambling laws. Illinois passed rigorous gambling contract provisions in 1827.[8] All contracts upon gaming consideration were declared void[9] and losers were allowed to recover all losses over $10.[10] Should a loser fail to sue within six months, a third party could sue the winner for treble the amount. Half the recovery would then go to the plaintiff and the other half to the state.[11]

In Michigan, an 1819 act[12] based on New York law banned horseracing and declared it a public nuisance.[13] The state's early gaming prohibitions remained intact from territorial days until the 1860's, and were frequently re-enacted.[14] It was not until 1882, however, that Michigan courts were forced to define gaming.[15] The definition imposed by Judge Cooley

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[8]Ill. Rev. Code, Crim. Code, §2 (1827).

[9]Id. §1.

[10]Id. §2.

[11]Id.

[12]Act of Oct. 12, 1819, 1 Mich. Terr. Laws at 417-19.

[13] Participants were subject to $100 fine and six months in prison

[14]See, e.g., Mich. Rev. Stat. tit. IX, ch. 41, §§9-10; ch. 43, §§9-18 (1846).

[15]People v. Weithoff, 51 Mich. 203, 16 N.W. 442 (1883).

was simply: "Let a stake be laid upon the chances of a game, and we have gaming."[16]

After 1860, Michigan entered a stage of development experienced by Ohio 30 to 40 years earlier. Betting on elections[17] and betting by minors[18] were both outlawed. In 1877, Michigan specifically banned gaming on railroad cars[19] and increased various gaming penalties.[20]

Anti-gambling sentiment in two of the last Midwestern states to be populated--Wisconsin and Minnesota--reached a peak in the 1870's and 80's. Wisconsin banned gambling on railroads in 1875[21] and forbade policy in 1883.[22] An 1888 Wisconsin court decision upheld the legality of horseracing for prizes, but declared that the prize offering could not be mere subterfuge for betting or gaming.[23]

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[16] Id. at 214, 16 N.W. at 448.

[17] Act of March 15, 1861, [1861] Mich. Laws at 277.

[18] Act of March 25, 1867, 1 [1867] Mich. Laws at 128.

[19] Act of May 22, 1877, §10, [1877] Mich. Pub. Acts at 186-89.

[20] Id. at 167.

[21] Act of March 2, 1875, ch. 119, [1875] Wis. Laws at 219.

[22] Act of April 2, 1883, ch. 286, §1, [1883] Wis. Laws at 230.

[23] Porter v. Day, 71 Wis. 296, 300, 37 N.W. 259, 261 (1888).

Minnesota in 1870 augmented earlier territorial gambling prohibitions by introducing nuisance law and municipal enforcement.[24] The State banned railroad and steamboat gambling in 1874,[25] and sought to curtail swindling in an 1877 enactment.[26] In 1878, it added special provisions to protect minors from gambling[27] and finally banned gambling from taverns altogether.[28]

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[24]Significant Minnesota enactments were: Act of July 27, 1858, ch. 96, §27, [1849-1858] Minn. Pub. Stat. at 731; Act of Aug. 12, 1858, ch. 18, §16, [1849-1858] Minn. Pub. Stat. at 340; Act of March 5, 1870, ch. 31(4), [1870] Minn. Gen. Laws at 56, 78.

[25] Act of March 9, 1874, ch. 48, [1874] Minn. Gen. Laws at 184-85.

[26] Act of March 2, 1877, ch. 130, [1877] Minn. Gen. Laws at 226-27.

[27] Act of March 7, 1878, ch. 75, §1, [1878] Minn. Gen. Laws at 122. A fine of $10 to $50 was stipulated. Id. §2. In 1889, this law was amended to include billiards and pool. Act of April 6, 1889, ch. 87, [1889] Minn. Gen. Laws at 197.

[28] Act of March 3, 1887, ch. 81, §4, [1887] Minn. Gen. Laws at 131-32. Bagatelle, card tables and dice were prohibited, but billiard and pool tables were exempted. Violators were subject to a fine of $10 to $50.

c. Anti-lottery amendments

By the mid-nineteenth century, lotteries had been prohibited in the Midwest for years. Gambling opponents, however, were not content until anti-lottery amendments were added to all the state constitutions. Between 1835 and 1865, such clauses became part of the constitutions of most Midwestern states.[29] In many states these amendments were ratified with little or no debate.[30] Enforcement of these provisions, however, was poor throughout the nineteenth century, and the full effect of these amendments was not felt until the early years of the twentieth century.

The opposition to lotteries in the Midwest can be understood by examining the then prevailing Jacksonian ideology. Authorized lotteries were a form of legislatively-bestowed privilege and monopoly which the Jacksonians fiercely attacked. Because the people saw the state charter lottery system as a conspiracy between legislative representatives and private interests, statutory prohibitions against lotteries would not suffice. Constitutional provision, however, could forever prevent a legislature from suddenly repealing an anti-lottery statute and enacting a lottery authorization. The passage of the anti-lottery provisions, therefore, was a matter of the people checking the legislatures rather than the legislatures curtailing the activities of the people.

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[29] Iowa Const. art. III, §28 (1857); Mich. Const. art. XII, §6 (1837); Ind. Const. art. XV, §8 (1851); Ill. Const. art. III, §35 (1848); Wis. Const. art. IV, §24.

[30] See, e.g., II Debates in Indiana Convention 1850 at 1294.

Jacksonian opposition to state-authorized lotteries was but a part of their opposition to the Second Bank of the United States. To the Jacksonians, the Bank was a monstrous symbol of privilege and speculation which threatened political equality by promoting the creation of a special class--a moneyed aristocracy. Although there was never any real threat that the United States would develop a society as class-locked as that of Europe, the Jacksonians were nonetheless vigilant to prevent privileged groups from getting rich by any means other than their own labor. A recent historian has examined the distinction made by John Sedgwick, a Jacksonian economist, between the consumer-idler and the industrious producer:

> The consumer-idler is one of the very few Americans who consume without working, or whose productive efforts yield nothing useful--lackeys, gamblers, men of fashion, and the like.[31]

Although Sedgwick thought there would always be some consumer-idlers in America, they presented no problem to the society and economy unless

> . . . public institutions and measures intrude upon the natural state of affairs, imposing false distinctions and special privileges. . . .[32]

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[31] A. Meyers, The Jacksonian Persuasion at 132 (1957) [hereinafter cited as Meyers].

[32] Id. at 133.

Jacksonian resistance to the Bank was also based on their "hard-money" policy, which was an alternative to the Hamiltonian system.[33] Conceived largely by William Gouge, the hard-money policy was opposed to the banks' exclusive control over currency. Banks were to be repositories of money only; they were not to have the privilege of issuing notes. By curtailing the power of all banks, the Jacksonians hoped to restrict the transfer of wealth from the farmers and laborers--the industrious producers--to the business community. Andrew Jackson himself summed up the aims of the hard-money doctrine:

> 'The planter, the farmer, the mechanic and the laborer all know that their success depends upon their own industry and economy, and that they must not expect to become suddenly rich by the fruits of their toil. . . .' Yet 'they are in constant danger of losing their fair influence in the Government. . . . The mischief springs from the power which the moneyed interest derives from a paper currency, which they are able to control, from the multitude of corporations with the exclusive privileges which they have succeeded in obtaining in the different States.'[34]

Jackson's statement could sum up equally well his followers' opposition to lotteries. Anti-lottery sentiment was motivated by a strong "money-for-labor" philosophy. The ticket purchasers should not expect to get rich by a lucky draw, and the lottery operators should not reap a fortune by collecting the nickels and dimes of farmers and washerwomen.

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[33] A. Schlesinger, The Age of Jackson at 119 (1945) [hereinafter cited as Schlesinger].

[34] Id. at 126.

Using Sedgwick's distinction, lottery operators were consumer-idlers who merely transferred wealth from the industrious producers. The authorized lottery was particularly reprehensible because it gave both a privilege and an official blessing to non-producers. Just as the Jacksonians were against the federal government granting privileges to one bank, so were they against the states granting privileges to lottery companies.[35]

The Midwest was particularly receptive to Jacksonian ideas. In the early nineteenth century, the Midwest and parts of the South were America's frontier lands. Although one historian points out that Jacksonianism actually developed in the East,[36] it nonetheless had massive support on the frontier. Westerners favored Jacksonian economics: the Bank's sudden reversal of its inflationary policy had left many of them debtors. Westerners also responded to the moral orientation of Jacksonianism.[37] The belief firmly held on the frontier

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[35]Although the Jacksonians were ideologically opposed to lotteries, one of Jackson's acts actually encouraged their proliferation. In 1830, Jackson wrote his famous Maysville Road veto which squelched federal financing of internal improvements. Federal participation in the development of inland waterways and the construction of overland roads had been a pet project of John Qunicy Adams, Jackson's predecessor. Jackson's veto was based on his states-rights belief that such projects were the responsibility of local political units. Local and state governments had inadequate systems of taxation, however, and were often forced to rely on state-authorized lotteries to raise the necessary revenue.

[36]Schlesinger at 307.

[37]Meyers at 21-23.

that all property should be earned through work echoes the earlier Puritan edict against idleness. To some extent, this was a morality of necessity. The harsh conditions in both seventeenth-century Massachusetts and early nineteenth-century Illinois would not tolerate shirkers. As Sedgwick suggested, the only way for a frontiersman to pull himself out of poverty was through hard work, close discipline, and temperate habits.[38]

d. Futures

In the late nineteenth century, a new gambling evil was feared in the Midwest: commodities speculation. Trading in futures was seen as extremely dangerous to the economic health of the region and the entire nation. While the Panics of 1837 and 1857 were caused in part by wild land speculation,[39] the Panic of 1873 was commonly blamed on commodities speculation. In response, dissatisfied Midwestern farmers forced the passage of anti-speculation legislation, and abandoned their traditional Republican Party to form small third parties. These parties eventually coalesced into the Populist movement, led by Wisconsin Governor LaFollette.

A problem confronting the agricultural states during this unstable period was the apparent contradiction between, on the one hand, the need for a market in future commodities to provide capital and, on the other hand, the tendency of speculators to use that market for gambling.

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[38] Meyers at 139.

[39] Clark at 169-71.

Indiana was the first Midwestern state to tackle the futures problem. In 1865, the Indiana Supreme Court held that dealing in futures was not illegal gambling.[40] That court held later, however, that commodities speculation was illegal gambling, if, at the time of making the contract, neither party intended the actual delivery of the goods.[41] The court was attempting to ban bucket shops and speculation but to permit legitimate futures contracts. A similar distinction was drawn in Missouri in an 1887 statute.[42] Michigan, on the other hand, banned all futures contracts in a statute of the same year.[43]

As the national center of agricultural trading, Illinois's experience with the futures problem is particularly important. By 1860, Illinois had a population of one million. Chicago had surpassed St. Louis as the Midwest's largest city and Cincinnati as the nation's leading center of meat packing. Northern Illinois industries, many of them serving agriculture's need for manufactured products, made Illinois third in the nation in manufacturing.

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[40]Shipp v. Bowen, 25 Ind. 44 (1865).

[41]Sondheim v. Gilbert, 117 Ind. 71, 78, 18 N.E. 687, 690 (1889).

[42]Act of March 19, 1887, [1887] Mo. Laws at 171. A bucket shop was defined as a place where prices of various items were posted and fictional purchases made. Act of May 9, 1889, [1889] Mo. Laws at 98. See Connor v. Black, 119 Mo. 126, 24 S.W. 184 (1893).

[43]Act of June 18, 1887 [1887] Mich. Pub. Acts at 215-16; see also Act of June 28, 1907, [1907] Mich. Pub. Acts at 487-89.

Against this background, the Illinois legislature banned all futures contracts in 1874.[44] One year later, however, the Illinois courts modified this prohibition to allow futures contracts where at least one party intended delivery.[45] The court declared:

> The intention of the parties gives character to the transaction and if either party contracted in good faith, he is entitled to the benefit of the contract no matter what may have been the secret purpose or intention of the other party.[46]

Nevertheless, this view was later discarded in favor of a more stringent interpretation of the statute. An 1889 case, Schneider v. Turner,[47] held that all option contracts were unlawful. The court noted the purpose of the statute:

> It manifestly is to break down the pernicious practice of gambling on the market prices of grain and other commodities.[48]

Whatever the purpose of the statute, it was apparently not effective. In an 1890 case, Soby v. People,[49] the court

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[44] Ill Rev. Stat. ch. 38, §130 (1874). Offenders were fined from $10 to $1,000 or confined in the county jail for one year, or both.

[45] Pixley v. Boynton, 79 Ill. 351 (1875).

[46] Id. at 354. See also Colderwood v. McCrea, 11 Ill. App. 543 (1882); and Semler Milling v. Fyffe, 127 Ill. App. 514 (1906).

[47] 130 Ill. 28, 22 N.E. 497 (1889). This case was cited approvingly in Clews v. Jamieson, 182 U.S. 461, 494 (1901).

[48] Id. at 41, 22 N.E. at 499.

[49] 134 Ill. 66, 25 N.E. 109 (1890).

observed: "[T]he evil it was aimed at continued to increase with wonderful rapidity throughout the state. . . ."[50] To remedy the statute's ineffectiveness, another act was passed in 1887 to suppress bucket shops.[51]

In 1900, the judicial course was again reversed, when the court in Booth v. People[52] held that the suppression of market gambling was within the police power of the state, but that

> . . . [t]he prohibition need not embrace all contracts for options to buy or sell, but only all of such contracts as be at the root of the evil which threatens the public safety and welfare.[53]

This decision opened the way for a legitimate commodities market with state regulation.

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[50] Id. at 72, 25 N.E. at 111.

[51] Act of June 6, 1887, [1887] Ill. Laws at 96.

[52] 186 Ill. 43, 57 N.E. 798 (1900).

[53] Id. at 53, 57 N.E. at 800-01.

C. The Modern Midwest

1. Social and economic development

Politically, the Midwest was a Republican stronghold from the Civil War to World War II. Party loyalty waned somewhat at the turn of the century when the Populists attracted great numbers of Midwestern voters. It was not until F.D.R. and the New Deal, however, that the G.O.P. lost its political monopoly and the Democrats made major inroads.

The changing political allegiance in the Midwest was due in part to a changing population. Between the two World Wars immigrants came from Europe, Canada, and the Southern United States. Southern Blacks arrived in the Northern industrial cities in great numbers. Those cities today have significant Black populations, but the Midwestern states without major metropolitan areas remain essentially white. In 1970, for example, Minnesota's population was .5% Black and Iowa was 99% white.

Religion, too, changed in the Midwest. While Protestants continued to be the majority, the number of Catholics and Jews increased significantly since 1900, particularly in the cities.

Finally, the Midwest's economy changed from one that was largely agricultural in the nineteenth century to one that is highly industrial in the twentieth. The Midwest still produces much of the nation's food, but more Midwestern workers are now engaged in manufacturing than in farming. The industrial cities that burgeoned around the Great Lakes and along the Mississippi in the mid-eighteenth century grew even more dramatically in the 1920's and 30's.

These social and economic changes may account for a softening of the Midwest's traditional attitude against gambling. In contrast to the blanket prohibitions of the nineteenth century, various states now allow parimutuel betting, state-authorized lotteries, and bingo for charity. The urban states (Illinois, Ohio, and Michigan) with their more diverse economies and populations generally have the more liberal gambling laws. In contrast, Indiana, which is still largely rural, retains its earlier, more conservative prohibitions.

Nevertheless, the Midwest remains more opposed to gambling and the liberalization of gambling laws than the Northeast. Although the twentieth century has brought cultural and economic diversification to the Midwest, the old religious and rural influences are still strong enough to form significant resistance to gambling liberalization.

2. Gambling and organized crime in Chicago

a. Early Chicago: 1833-1920

Chicago was incorporated in 1833, and already "the mud hole of the prarie" had its share of gamblers. By the 1840's, there were by far more gambling joints in Chicago than either St. Louis or Cincinnati, even though the city on the lake was only half the size of either river city.[54]

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[54] Asbury at 286.

Committees of town fathers were formed to rid Chicago of this growing vice, but were unsuccessful until "Long John" Wentworth became mayor in 1857. At that time, there was a notorious vice section north of the Chicago River known as the Sands. Newspaper articles reported that untold numbers of strangers were lured to the gambling dens there, and were robbed and murdered.[55] Despite repeated efforts to clean up the area, it continued as a haven for hustlers, thieves and other undesirables. Then, on one afternoon in 1857, an advertisement of a dogfight in another part of the city lured all the male inhabitants away from the Sands. While they were gone, Wentworth sent in a sheriff and thirty policemen to demolish and burn down fifteen tumble-down buildings. By destroying their nest, the mayor's men effectively scattered the gamblers all over town. Not content to stop there, Wentworth raided a gambling house on more respectable Randolph Street. Policemen entered the building through the roof and chased the gamblers and employees out to the street where they were captured and arrested. The entire contents of the building were then confiscated--gambling equipment and furnishing alike.

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[55] Id. at 238.

Wentworth and other Chicagoans continued to fight gambling, but during the Civil War their energies were necessarily directed elsewhere. Once again, gamblers flocked in and set up shop. After the war, Chicago's sporting circle was dominated by Mike McDonald, the purported originator of the phrase "There's a sucker born every minute."[56] As a young man in New Orleans in the 1850's, McDonald had become enamored with the glamor of gambling and resolved to take part.

By the 1880's, McDonald had also achieved considerable political influence: he engineered the campaign of Mayor Carter Harrison (a mayor who did not have Wentworth's reformist tastes) and became the leader of the Cook County Democratic machine. Despite his part in the graft of city building contracts and scandals involving his two wives, McDonald successfully combined the two roles of gambling czar and political broker until his death in 1907.

b. The Prohibition Era

In McDonald's time, vice and urban politics were dominated by the Irish, but by the early twentieth century, crime had become more ethnically diverse. Figures on Chicago's underworld in the 1930's show that 30 per cent of the bosses were Italian, 29 per cent were Irish, 20 per cent were Jewish,

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[56] Id. at 295.

and 12 per cent were Black. Not one leader was listed as a white American of native-born stock.[57] This is undoubtedly because organized crime--defined here merely as the distribution and sale of illegal goods and services--has traditionally served as an avenue of upward social mobility for new groups in America. After an ethnic group has spent several generations dealing in gambling, prostitution, drugs, and (during Prohibition) booze, it moves on to legitimate businesses and professions.

Contrary to common belief, organized crime did not originate with bootlegging during Prohibition. Rather, it began with gambling syndicates in American cities after the Civil War.[58] As illustrated by the career of Mike McDonald, gambling had close links with urban politics. One reason for this connection was the common Irish background of the gamblers, police, and politicians of the late nineteenth century. A more important reason, however, was that the gambling syndicate and the political machine were often part of the same neighborhood organizations. Gambling operations, such as numbers, depended on a large number of runners who cultivated friendships with the local citizens in much the same way as precinct captains:

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[57] Haller, "Urban Crime and Criminal Justice: The Chicago Case," 57 J. Am. Hist. 620 (1970).

[58] Haller, "Bootleggers and American Gambling 1920-1945: An Overview," (unpublished paper) at 1.

> The syndicates, then, were organized like political machines, and it was natural that in many cases they became the local political organization in some wards of the city. Thus, it was not simply that the gambling syndicates influenced political organizations, but that gambling syndicates were the local political organization. Local bookmakers or policy writers served as precinct captains, while the leaders of syndicates became ward leaders and often won election as aldermen or state representatives.[59]

Thus, organized crime was entrenched in Chicago and other American cities, long before the passage of the national dry law in 1920.

Prohibition, however, did usher the Italians into organized crime, and probably accounted for the myth that all organized crime began with bootlegging. By the time Italians began immigrating to the United States in large numbers, most areas of illicit activity had already been monopolized by other groups. The Irish, for example, dominated gambling and racketeering and the Blacks controlled policy.

Bootlegging gave Italians their opportunity, but not all bootleggers were Italian. In fact, there were twice as many Jews involved in the distribution of illegal spirits as Italians.[60] Whatever their ethnic background, however, bootleggers were almost all newcomers to the underworld: young men in their twenties who had grown up in urban slums.

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[59] Id. at 9.

[60] Only 25% of the leading bootleggers were Italian, while 50% were Jewish. Id. at 14.

Once Italians and other bootleggers made their entry into organized crime, they branched into other areas, particularly gambling. Almost from the beginning, bootleggers invested in gambling operations and continued to expand long after repeal. Since Prohibition lasted only thirteen years, most bootleggers were still only in their thirties and had amassed extensive capital when alcohol again became legal.

In most cases, the bootlegging entrepreneurs invested in the existing gambling structure, but seldom replaced the gamblers already there. The system could absorb these newcomers, although not always without muscle and violence, because gambling opportunities expanded during the 1920's and 30's. Increased use of the telephone altered bookmakers' methods of operations, and the legalization of parimutuel horseracing gradually eliminated the bookmaker's role at the track.[61] Many bootleggers also found it convenient to go into slot machines as a sideline. Since the machines were often placed in speakeasies, it was easy to service them as trucks went from place to place delivering liquor. In the years after the repeal of Prohibition, ex-bootleggers also played a significant part in the creation of regional gambling centers: Miami, Florida; Hot Springs, Arkansas; and most notably, Las Vegas, Nevada.

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[61] Id. at 48.

c. Al Capone

Although his infamy was greater than others of his generation, Alphonse Capone's career nonetheless typified the role of Italians and bootleggers in the organized crime network of the 1920's and 30's. Born in Naples in 1899, Capone immigrated to the United States with his parents as a small boy. The family lived in the Williamsburg section of Brooklyn where young Alphonse advanced from window smashing and petty thievery to membership in a street gang. He earned his nickname, "Scarface," in an adolescent fight with a knife-wielding Sicilian who slashed his left cheeck from the top of his ear to the corner of his mouth.

Capone got his start in big-time Chicago crime through two former residents of the old Brooklyn neighborhood. "Diamond Jim" Colosimo, already well-established in prostitution, imported Johnny Torrio in 1919 to help him run the business. Torrio, in turn, brought Capone to Chicago to operate one of the brothels at $75 per week. With the onset of Prohibition in 1920, Colosimo began dealing heavily in bootlegged alcohol, but within a year was mysteriously shot to death. Although there were rumors that Colosimo had angered rival hoodlums and even some of his own men by grabbing too much of the alcohol trade, no one was ever arrested. Capone and Torrio immediately took over Colosimo's bootlegging and prostitution enterprises, and by 1924, had expanded into

gambling parlors in the Chicago suburbs. For that year, their organization was estimated as employing 700 assistants and bodyguards and grossing $2 to $5 million.[62] Scarface had risen to the top.

Rising to the top and staying there, however, often involved murdering competitors. As the undisputed controllers of the South Side, Capone's and Torrio's chief rivalry was with Danny O'Banion's North Side organization. One morning in 1924, while O'Banion clipped chrysanthemums in his flower shop, three well-dressed Italians walked in and shot him. This act fomented a war of retribution between the two gangs that lasted for years. In one battle, Torrio came so close to getting killed that he was scared into an early retirement in Italy. The bloody feud finally culminated in the 1929 St. Valentine's Day Massacre when Capone's men, disguised as police, gunned down seven North Siders in a garage on Clark Street.

Despite the numerous violent crimes that were attributed to Capone, he was finally put behind bars for income tax evasion. Since Capone kept no personal records (he did not even have his own checking account), it was difficult for federal investigators to gather evidence. Eventually, however, one of Capone's henchmen talked and became the prosecution's

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[62]F. Busch, "The Al Capone Case," in Enemies of the State 178 (1954).

main witness. At the trial in 1930, the prosecution estimated that Capone's total net income for the years 1925 to 1929 was over one million dollars, for which he paid no tax. Earlier, a magazine writer had given an unverified breakdown of Capone's 1928 earnings: $60,000 from beer and liquor, $25,000 from gambling and dogtracks, $10,000 from brothels, and $10,000 from miscellaneous sources.[63] Capone was convicted, and sentenced to a total of eleven years in prison, and ordered to pay $50,000 in fines. Suffering from a deterioration of mind and body due to untreated syphilis, Capone was released after serving seven years. In 1947, unlike many of his rivals, Al Capone died peacefully in bed.

d. Blacks and organized crime

In the last two decades, Italian dominance of organized crime has declined. As Italians enter legitimate businesses and professions and become assimilated into the mainstream of American culture, Blacks, and in some cases Puerto Ricans, are assuming control of the nation's gambling, prostitution, and narcotics. In a recent study of the "Black Mafia" in New York,[64] the nascent Black crime structure was described as much looser and less formal than that of their Italian predecessors. Lacking the Italians' traditional close family

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[63] Id. at 184.

[64] F. Ianni, Black Mafia: Ethnic Succession in Organized Crime (1974).

ties, Blacks are depending on other relationships to build their organization: chiefly friendships developed in childhood gangs and in prison.[65]

Although Black participation in the entire spectrum of organized crime is a recent phenomenon, Black control of policy is not. Originating in Black neighborhoods in the nineteenth century, policy was contemptuously labeled by white racketeers as the "nickels and dimes game of the poor." Even so, policy in New York was eventually taken over by whites in the 1930's. Policy in Chicago, however, remained in Black hands until 1952 when it was wrested from them by Sam Giancana, the current Mafia chieftain.

One reason given for Chicago's long period of Black control was the close political connection with Mayor "Big Bill" Thompson from 1915 to 1931. In the same kind of symbiotic relationship that existed between gamblers and politicians in the nineteenth century, Thompson and the Black organization were mutually helpful. While Blacks paid $500,000 per year to his machine, Thompson gave protection to the Blacks' operation. In addition, Black underworld employees registered Black voters, got them to the polls, and served as election judges.[66]

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[65] Id. at 107.

[66] Id. at 109-16.

It has been asserted that Blacks must establish the same political connections before their organization can succeed that of the Italians. In addition to gaining greater control of crime outside the ghetto and achieving an organizing principle to substitute for the family, Blacks must develop better access to political power and the ability to corrupt it.[67]

3. Organized crime in other Midwestern cities

The Kefauver Committee, studying organized crime operations in 1950,[68] cited five cities in Midwestern states as having extensive crime organizations. Because the Committee named only nine other cities throughout the country, the Midwest was undoubtedly a major center of organized crime. Chicago, in fact, was specifically named as the focal point of American organized crime. Gambling in Chicago included bookmaking with illegal wires, and policy, a game where poor Blacks commonly bet 25 cents at 100 to 1 odds. On Chicago's South Side, "policy stations [were] almost as numerous as churches, and more evenly distributed."[69] These

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[67] Id. at 316.

[68] Senate Special Committee to Investigate Organized Crime in Interstate Commerce, Third Interim Report, S. Rep. No. 307, 82d Cong., 1st Sess. (1950) [hereinafter cited as Kefauver Committee Report].

[69] H. Marx, Gambling in America 74 (1952).

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stations operated openly, and the Kefauver Committee found enforcement of gambling laws by certain Chicago police officers to be "deplorable."[70]

The Kefauver Committee cited other Midwestern cities. In Kansas City, gambling houses reputedly grossed $34 million annually, although law enforcement was recently improved. In St. Louis, racing information was passed illegally but easily between Missouri and Illinois. In Detroit, policy, the major form of gambling, was rife among automobile workers. The Committee also named Cleveland in its report.

4. Bank nights at the movies: other forms of gambling

Another twentieth century gambling phenomenon was the movie house "bank night." Motion pictures became commercially significant around the turn of the century. The Depression, however, was hard on the movie industry. Along with other struggling businesses, it was forced to create new marketing devices to survive. One of these was the bank night, where a ticket bought admission and a chance to win a prize.

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[70] Kefauver Committee Report at 50.

> Motion picture theaters entered [the lottery] field very widely with "bank nights" and other similar programs; many organizations and private businesses devised schemes whereby they "gave away" automobiles, refrigerators, stoves, and innumerable other items of great and little value. Some chambers of commerce, representing a majority of the merchants in the towns, engaged in these enterprises, as well as churches and other non-profit organizations. Newspapers and periodicals likewise participated, all of which represented, despite the legal prohibition from 1842 onward, a rather amazing circle back, in lottery activity, almost to the point of the beginning in 1833 when the town of New Franklin was granted the power to engage in the practice.[71]

Clearly, the bank night looked like a lottery, and most Midwestern states had constitutional prohibitions against lotteries. Even so, the legal status of bank nights was not always clear. In State v. Emerson,[72] for example, the Missouri court adopted a definition of "lottery" that seemed purposely designed to bring bank nights and similar schemes within the constitutional ban. A lottery was defined as "every scheme or device whereby anything of value is for a consideration allotted by chance."[73]

Clever promoters found ways to get around this definition, however, and eleven years later, the court was forced to define the lottery anew. In State v. McEwan,[74] the court

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[71]Williamson, "Gambling Laws of Missouri," 7 J. Mo. B. 85-86 (1951).

[72]318 Mo. 633, 1 S.W.2d 109 (1927).

[73] Id. at 639, 1 S.W.2d at 111.

[74]343 Mo. 213, 120 S.W.2d 1098 (1938).

considered a bank night operation that attempted to evade the lottery laws by eliminating the necessary element of consideration. A theater gave a cash prize to a person whose name was drawn from a list of everyone who had previously registered. Thus, to win, a person did not have to pay admission to the theater on the night of the drawing. Nevertheless, the court held that the scheme was a lottery, saying that to abide by previous decisions to the contrary would be to join hands with those

> . . . who designedly devise ways and means to evade our lottery laws and thereby defeat the very purpose of our constitution and the law enacted in obedience thereto. Such a policy can only tend to force legislators to constantly enact new laws to meet the ever increasing cunning devices to evade the existing laws.[75]

Opinions such as these stunted the further growth of bank nights. Since the 1930's, lotteries of this sort have been more or less eliminated.

5. Gambling devices

What was meant by the term "gambling device" was not always clear. Slot machines were generally found to be gambling devices.[76] A 1937 Missouri court easily reached this conclusion by applying the traditional test of whether skill or chance was the dominant element.[77]

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[75] Id. at 222, 120 S.W.2d at 1102.

[76] See, e.g., Act of March 14, 1935, ch. 321, §§103, [1935] Ind. Acts at 1539.

[77] State ex rel. Igoe v. Joynt, 341 Mo. 788, 110 S.W.2d 737 (1937). The test was based on People ex rel. Ellison v. Lavin, 179 N.Y. 164, 71 N.E. 753 (1904).

The status of pinball machines that offered free replays, however, was more problematic. In State v. One "Jack and Jill" Pinball Machine,[78] the court noted that gambling had three necessary elements: (1) consideration or risk; (2) chance; and (3) reward or prize.[79] Without considering the first two elements, the court decided that a free game was not "property or money," the reward or prize required by the legislature. The court's reluctance in reaching this decision, however, was evident in its conclusion:

> The vacuous mind that may momentarily be brightened by finding entertainment and amusement in watching a metal ball meander aimlessly over the surface of an inclined table and finally score by dropping from sight into an aperture, therein, would be equally entertained by watching a certain species of scarabaeoid beetle aimlessly roll his putrid ball across the ground and into a hole where eventually it becomes sustenance for itself and young. Would not the entertainment and amusement in each instance be the same though five cents paid to pull the plunger in the one and in the latter the propulsion is by the beetle and its accomplishments are not emblazoned upon an electronically lighted scoreboard . . . . How could watching a rolling ball bounce from peg to pin and then disappear enrich the mind or broaden one's intellect? After its propulsion by the plunger, gravity moves the balls, but that law of physics was discovered by Sir Isaac Newton and became common knowledge more than two centuries ago. Such information is not acquired by inserting a nickel in a pinball machine. From the beetle, one might learn some new fact relating to entomology but nothing from "Jack and Jill." If there is educational value in either, it preponderates in favor of the beetle.[80]

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[78] 224 S.W.2d 854 (Mo. App. 1949).

[79] Id. at 860.

[80] Id. at 860-61.

In conservative Indiana, however, the law on this issue took a strangely different course. In 1955, the legislature excluded pinball machines that gave only the right to an immediate replay from the list of prohibited gambling devices.[81] Two years later, the Indiana court held that this distinction between free replay machines and other types of machines had a rational basis.[82] While some machines provided unearned monetary gain, free replay pinball machines provided only free entertainment. The distinction was therefore not unconstitutional.

By 1960, however, the Indiana court held in Peachey v. Boswell[83] that pinball machines that recorded the number of replays won were gambling devices. Two years later, the court went even further and held that the replay feature made a pinball machine a gambling device because further amusement was a thing of value.[84] Except for the specific type of machine excluded by the legislature, therefore, all pinball machines which gave free replays were gambling devices subject to suppression.

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[81] Act of March 11, 1955, ch. 265, §2(3)(4), [1955] Ind. Acts at 714.

[82] Tinder v. Music Operating, Inc., 237 Ind. 33, 142 N.E.2d 610 (1957).

[83] 240 Ind. 604, 167 N.E.2d 48 (1960).

[84] Worl v. State, 243 Ind. 116, 183 N.E.2d 594 (1962). The legislature amended the 1955 act to exempt pinball machines that yield an immediate unrecorded replay from classification as gambling devices. Act of March 12, 1957, ch. 205, §1(4), [1957] Ind. Acts at 425.

6. Legalization of gambling

The twentieth century has produced two major periods of financial need for some Midwestern states: the Great Depression and the present urban fiscal crisis. In response to the Depression, Ohio and Michigan introduced legalized on-track parimutuel betting in 1933.[85] Illinois legalized parimutuel betting earlier in 1927.[86] In each state, the legislature created a regulatory agency and specified guidelines for the system's operation.

This legislation followed a thirty year period when horse breeding and racing were becoming popular, especially in nearby Kentucky. It also followed the development of the technical necessities for the parimutuel system. This system was devised in France in 1865, but the totalizer--the machine that calculated and displayed the odds--was not invented until 1913.

Recently, organized criminal influence in horseracing has been a major problem. A report by the Select Committee on Crime of the House of Representatives[87] found race-fixing to be widespread[88] and to extend to every major track as far

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[85]Act of June 28, 1933, 115 Ohio Laws at 367, amending Act of April 6, 1933, 115 Ohio Laws at 171; Act of June 28, 1933, [1933] Mich. Pub. Acts at 295.

[86]Act of June 13, 1927, [1927] Ill. Laws at 28.

[87]House Select Committee on Crime, Organized Criminal Influence in Horseracing, H. R. Rep No. 93-326, 93d Cong., 1st Sess. (1973).

[88]Id. at 11.

west as Illinois.[89] Nevertheless, in 1971, Illinois was fourth in state revenues from horseracing, behind New York, California, and Florida.[90]

Despite the recent institution of income taxes in some states,[91] Ohio, Illinois, and Michigan again find themselves in stiffening financial straits. Wisconsin and Missouri also expressed doubt about the ability of current revenues to meet increasing needs for social services in their larger cities. One typical response to these revenue demands was to follow the lead of New Hampshire, New Jersey, and New York by establishing a state lottery. This course was followed in Michigan,[92] Ohio,[93] and Illinois.[94] Attempts to establish state lotteries in Wisconsin and Iowa, however, have failed thus far.

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[89] Id. at 12.

[90] Id. at 104.

[91] All of the Midwestern states currently levy income taxes.

[92] Mich. Const. art. IV, §41 (1963, as amended 1972); Act of Aug. 1, 1972, no. 239, [1972] Mich. Laws at 467; Mich. Stat. Ann. §18.969 (Supp. 1976).

[93] Ohio Const. art. XV, §6 (1851, as amended 1973); Ohio Rev. Code Ann. §§3770 et seq. (Supp. 1976).

[94] Ill. Ann. Stat. ch. 120, §§1151 et seq. (Supp. 1976).

Gambling prohibitions have been relaxed in other areas. Among these are the recent exemptions of charitable, religious, and fraternal organizations from the ban on bingo and similar games. States have drafted guidelines for the games which specify maximum prizes and the frequency of game nights. Church bingo and similar games have generally been well received in the Midwest.

Indiana's charitable exemption, however, was found unconstitutional.[95] In Fairchild v. Schanke,[96] the Indiana court asked:

> Is there any substantial distinction between a bona fide religious, patriotic, charitable or fraternal club seeking and receiving profit from the conduct of a lottery, the operation of slot machine, or any other gambling device, and an individual, a social club, or a professional gambler who operates a similar lottery enterprise, slot machine or other gambling devices? We can see none.[97]

7. Legislative efforts to curb illegal gambling

Many changes in gambling laws during the twentieth century are attempts to suppress the involvement of organized crime. A 1953 revision of Indiana gambling law, for example, begins with a recognition of organized crime's link with illegal gambling:

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[95] Indiana's exemption was the only such provision found unconstitutional.

[96] 232 Ind. 480, 113 N.E.2d 159 (1953).

[97] Id. at 489, 113 N.E.2d at 163.

> It is hereby declared to be the policy of the general assembly recognizing the close relationship between professional gambling and other organized crime, to restrain all persons from patronizing such activities in this state; to restrain all persons from patronizing such activities when conducted for the profit of any person; to safeguard the public against the evils induced by common gamblers and common gambling houses; and at the same time to preserve the freedom of the press and to avoid restricting participation by individuals in sports and social pastimes which are not for profit, do not affect the public, and do not breach the peace.[98]

In response, the statute added professional gambling to an already comprehensive set of prohibitions.[99]

Other states employed more subtle devices. In Wisconsin and Missouri, for example, the reputation of a place and of the people who frequent it is admissible evidence to show that a private house is actually a gambling establishment.[1] Wisconsin also allows law enforcement agencies that are investigating commercial gambling to use wiretaps.[2]

States also single out organized illegal gambling by distinguishing between, on the one hand, social and private gambling, and on the other, commercial or professional gambling. Commercial and professional gambling generally carry a much stiffer penalty.[3] In Ohio, however, the gambling

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[98]Act of March 11, 1953, ch. 147, §1, [1953] Ind. Acts at 492. This statute was later declared unconstitutional. Fairchild v. Schanke, 232 Ind. 480, 113 N.E.2d 159 (1953).

[99]Act of March 11, 1953, ch. 147, §3(2), [1953] Ind. Acts at 492.

[1]Wis. Stat. Ann. §945.01(4)(b)(1958); State v. Froemsdorf, 218 Mo. App. 481, 488, 279 S.W. 181, 183 (1926).

[2]186 Wis. Stat. Ann. §968.28 (Supp. 1975).

[3]See, e.g., Wis. Stat. Ann. §945.03 (1958, as amended, Supp. 1975); Ill. Ann. Stat. ch. 38, §28-1.1 (Supp. 1976).

laws "prohibit the business of gambling without forbidding gambling carried out for pleasure rather than profit."[4] Private social gambling is, therefore, currently legal in Ohio.[5]

8. Iowa: A Case study of legalization

The recent story of the gambling law of Iowa is curious. It illustrates, too, the pitfalls of hasty reform. During the summer of 1971, a reporter from the Des Moines Register notified Iowa Attorney General Richard Turner that illegal gambling was being conducted at a fund-raising picnic for a Roman Catholic church. While local police directed traffic, 3,000 people attended a church picnic which offered as entertainment illegal bingo, crap games, and roulette as well as illegal Sunday beer. Turner had the parish priest arrested. The priest was fined $100 for keeping an illegal gambling house and Turner, whose office is elective, was criticized by Iowa Catholics (who comprise approximately 25 per cent of the state's church members). "They wanted to know why I was picking on them when everybody else was breaking the law, too."[6] In response to this public pressure, Turner closed carnival games at the Iowa State Fair that summer.

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[4]Committee Comment, Ohio Rev. Code Ann. §295.01 (1975)(emphasis added).

[5]Ohio Rev. Code Ann. §§2915.01, 2915.02, 2915.04, 2915.05 (1975, as amended Supp. 1976).

[6]N.Y. Times, June 24, 1975, at 15, col. 1.

The "bingo busts" were widely reported, as were Turner's statements that Iowans should change their laws if they did not want them enforced. Iowans agreed. In 1972 the voters amended the state constitution, a typical product of Jacksonian democracy, to permit social gambling.[7] In 1973, the legislature enacted drastic changes in Iowa's century-old gambling laws. In 1972, the New York Times had reported: "Cub Scouts will be in violation of Iowa's gambling laws if they charge for bean bag or ring tosses at their carnival this year. . . ."[8] In striking contrast, a 1975 Newsweek report said that Iowa was so "wide open for gambling" that it was attracting professional gamblers from the West Coast, Reno, Las Vegas, and Chicago.[9]

Most sections of Iowa's gambling law were left unchanged by the 1973 statute. It was still illegal to keep a gambling house, to gamble, to possess gambling devices, to sell pools, to promote animal fights, to promote lotteries, or to permit minors in a billiard hall where beer was sold. Gambling stakes were still subject to seizure and forfeiture by the state.[10]

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[7]Iowa Const. art. III, §28 was repealed by the General Election, Nov. 7, 1972.

[8]N.Y. Times, June 21, 1972, at 86, col. 1.

[9]"Fat City Iowa," Newsweek, Apr. 28, 1975, at 10.

[10]Iowa Code Ann. §726.12 (Supp. 1975), now repealed by Act of July 17, 1975, Senate File 496, [1975] Iowa Legis. Service at 447.

Some sections, however, were changed radically. The major change of the 1973 statute provided that:

> Natural persons may participate in games of skill, games of chance, card games played for money with ordinary playing cards, wagers, bets, pools, or raffles provided:
>
> (1) The game or activity . . . is incidental to a bona fide social relationship . . .
>
> (2) The game or activity is conducted in a fair and honest manner.
>
> (3) No participant wins or loses more than . . . five hundred dollars . . . during any period of twenty-four consecutive hours.[11]

Because of the ambiguity of the phrase "a bona fide social relationship" and the impossibility of enforcing the limit on stakes, Iowa quickly became a haven for gamblers.[12] By 1974, Iowa's infant gambling industry handled $37 million.[13]

The new law contained other loopholes. The surviving prohibitions on gambling houses,[14] pools,[15] lotteries,[16] and gambling devices[17] did "not apply to games of skill, games of

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[11] Id.

[12] N.Y. Times, June 24, 1975, at 15, col. 1.

[13] Id.

[14] Iowa Code Ann. §726.1 (Supp. 1976). Now amended by Act of July 17, 1975, Senate File 496, [1975] Iowa Legis. Service at 447.

[15] Id. §726.6 (1946).

[16] Id. §726.8 (Supp. 1976). Now amended by Act of July 17, 1975; Senate File 496, [1975] Iowa Legis. Service at 447.

[17] See id. §99A1 (Supp. 1976). Now amended by Act of July 17, 1975, Senate File 496, [1975] Iowa Legis. Service at 447.

chance and raffles . . . [nor] to mechanical or electronic amusement devices" that complied with the new statutory exceptions.[18]

Some unambiguous prohibitions remained in Iowa. For example, the new law clearly prohibited casino and house profits,[19] and regulated games and raffles operated by fairs.[20] Gambling contracts were still void.[21]

Nevertheless, the new law's overwhelming effect was to encourage gambling. A report to the State Senate Judiciary Committee claimed that bookie operations and punchcard games could be found in most areas of the state.[22] The report acknowledged, however, that both games were legal under the 1973 social gambling law.[23]

Although there was no evidence of loan-sharking or Mafia involvement,[24] the report expressed concern that Iowa's

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[18] Id. §726.11. Now amended by Act of July 17, 1975, Senate File 496, [1975] Iowa Legis. Service at 447.

[19] Id. §726.12(4), repealed by Act of Aug. 15, 1975, ch. 99, §25 [1975] Iowa Acts.

[20] Id. §§99B.3-99B.7. Cash prizes were permitted only in bingo games and could not exceed $100. Now amended by Act of July 17, 1975. Senate File 496, [1975] Iowa Legis. Service at 447.

[21] Id. §537A.4 (Supp. 1976).

[22] Division of Vice Enforcement, Iowa Dept. of Public Safety, Gambling in Iowa: Social Gambling Law Violations (1975) at 1. This unpublished report covers the period from January 1, 1972 to March 31, 1975.

[23] Id. at 2-3.

[24] Id. at 6.

gambling would become criminally organized. It also noted that

> . . . [m]any county attorneys have declined to prosecute violations of the 'social gambling' law, citing the ambiguity [and] vagueness [of the law], and [their] inability to interpret the law.[25]

The problems with the 1973 gambling law prompted the legislature to pass a comprehensive revision in 1975.[26] The new statute is not intended to resurrect Iowa's former prohibition against all gambling. Rather, it permits the social and charitable gambling which is popular in the state, yet curtails commercial gambling and the involvement of organized crime. Gambling is regulated through extensive licensing.

Iowa, therefore, aptly illustrates the course of reform being pursued in a number of states as they begin to reconsider old legislative traditions.

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[25] Id. at 7.

[26] Act of July 17, 1975, Senate File 496, [1975] Iowa Legis. Service at 447.

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CHAPTER V. THE WEST

A. The Frontier Era

1. Population and settlement

Before 1850, the West[1] was generally inhabited by strays --cowboys, prospectors, miners, and fur traders. It was a crude region, populated almost exclusively by men. There were no laws, and no formal government to restrain anti-social behavior. In fact, the early West was more a collection of individuals than any sort of coherent society. When these loners did gather together, it was often to conduct such riotous rituals as the "rendezvous" of the fur trappers.

> For several days, while a whole year's business was transacted, celebrations and merriment were also in order. Horse races, gambling, drinking, dancing, story-telling, and swapping Indian wives were as much a part of the rendezvous as was the barter of beaver. Often the mountain men, who were an improvident carefree lot, would lose the result of a whole year's grueling work in the few days of a riotous rendezvous.[2]

Such periodic debauchery also appealed to the miners and the cowboys who followed the trappers as the West's chief inhabitants. A combined casino, bordello, and saloon, a "C.B.S.," was a fixture wherever there was extra money to be spent. Gambling, whoring, and drinking took place openly, and was welcomed in the early boom towns for the fat profit it yielded. As one author crudely put it:

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[1]Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

[2]C. Bancroft, Colorful Colorado: Its Dramatic History 22 (1959) [hereinafter cited as Bancroft].

> Four things indicate prosperity in a mining town--Hebrews, gamblers, common women, and fleas. Hebrews, gamblers, and common women are accurate thermometers of ready money and prosperity. When Jews and gamblers pull stakes for another town, it is a safe guess that prosperity is also going.[3]

Gambling was not, therefore, considered socially degrading in these impromptu communities.

> Gambling was done openly and under license in Boise. In the early seventies we classed gamblers as gentlemen or loafers. The cheap sports, the "tin-horn" gamblers, were driven out by vigilantes prior to 1868. Our regular faro or poker player was considered as respectable as a reputable merchant, for they were honest in all things but their occupation; and the majority of them pursued straighter courses in gambling than our businessmen did in their lines under the guise of respectability. Many of our licensed gamblers moved in polite society and were very popular. Eastern people find it difficult to reconcile gambling with respectability, but when custom permits a thing--when, in fact, gambling takes the rank of an industry--the social crime disappears.[4]

Moreover, until these areas garnered enough residents to win formal territorial recognition,

> . . . problems of law and order had been settled by the local miners' courts, peoples' courts, and claim clubs, informal organizations set up by miners, townspeople, and farmers to record claims and boundaries and to perform rudimentary functions of policing.[5]

But cheating, and the violence it spawned, had to be controlled in the early West. Too often, this meant a vigilante hanging or two. Vigilante justice quickly became as loathsome

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[3]T. Donaldson, Idaho of Yesterday 41 (1941).

[4]Id. at 41-42.

[5]Bancroft at 46.

and unruly as the evils it sought to correct. Slowly, even the cowboy and the miner came to see the need for law. Yet it was neither the cowboy nor the miner who brought the restraints of civilization to the old West.

After the Civil War, settlement of the West by everyday people--farmers and their families--was actively promoted. The war had resolved the conflict over whether future Western states would be slave or free. Sizable areas of the Kansas and Nebraska Territories were already well-populated by the 1850's, but other more distant regions awaited the coming of the railroads for large-scale immigration.

During this period, most of the Southwest also came under American control. The population was sparse and predominantly Spanish and Indian. At the time of the first territorial census in 1860, for example, Arizona contained a mere 6,482 inhabitants. The Southwest remained desolate and dangerous until the last decades of the nineteenth century. Despite military efforts to quash them, Apache Indian uprisings also continued unabated into the 1870's.

Nevertheless, Eastern journalists, such as Horace Greeley of the New York Tribune, A.D. Richardson of the Boston Journal, and Henry Villard of the Cincinnati Commercial, exhorted their readers to go West, settle, and grow prosperous. The West was advertised as a golden opportunity waiting to be seized by clever Easterners. The hard facts were more disconcerting. Denver, for example, retained the lawlessness of the frontier for more than half a century. Except for a few brief periods

of suppression, it was, for instance, a wide-open gambling town until the early 1920's. In 1879, Carlyle Channing Davis, a Colorado newspaperman, described a typical Western mining town:

> The scene unfolded was unlike anything I ever before had seen or conjured in my imagination. . . . Every other door seemed to open upon a saloon, dancehall or gambling den.
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> * * * *
>
> Taking in the spectacle, I joined the throng, passing from door to door and witnessing scenes that almost beggar description. Chief among the places I visited was Pap Wyman's combination concert and dance hall, with every game of chance known to the fraternity in full blast--faro, keno, roulette, stud poker, pinochle and what not. On the face of a monster clock, behind a bar scintillating with a wealth of crystal, was painted the significant invitation to guests 'Please Do Not Swear.'
>
> Here, perhaps, were a score of girls and women of the underworld, of varying ages and types of attractiveness. They were attired in more or less picturesque and fantastic garb, some wearing little surplus apparel of any description, and were dancing with bearded bull-whackers, uncouth delvers in the mines (with soil besmeared attire to mark their vocation) . . . .[6]

Until the end of nineteenth century, the journey west was extremely dangerous. Most settlers had to cross the continent in wagons and on foot since the railroads were not completed until the 1870's and 80's. The tragic story of the Donner party illustrates the harsh life of these early travelers. In 1846, a group of pioneers led by George Donner left Illinois bound for California. Their misfortune was the most catastrophic of the overland crossing. On July 20, Donner took twenty wagons into the untried Hastings Cutoff around the

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[6] Id. quoted at 80-82.

south side of the Great Salt Lake. They encountered difficulties that delayed their desert crossing and arrived at Truckee Lake in the eastern Sierras on October 31. Snow blocked the pass, and they were forced to encamp. Faced with starvation, seventeen members attempted to cross the Sierras on snowshoes in December. Seven survived. From January to April, four relief parties brought out the remaining survivors. Death by starvation had been averted by cannibalism.

The constant threat of violence was another hazard of the Western wilderness. Indians, led into battle by Cochise, Victorio, and Geronimo, often attacked settlers. The settlers were also violent toward each other. The frontier was settled in stages, and in some areas, law and order had to be privately managed until quite late. In 1873, an Arizona vigilante group called the Law and Order Society lynched four alleged murderers on one of Tucson's busiest thoroughfares. Even later, in 1881, the Earp Brothers and Doc Holliday settled their dispute with the Clantons in the gunfight at the O.K. Corral.

Ultimately, private law enforcement was replaced by a formal government only when there were enough immigrants to warrant territorial recognition by the federal government. The territory's residents would elect a legislature, and the federal government would appoint a governor and judges.

2. Gambling laws on the Great Plains

Characteristically, one of the first acts of the newly-elected territorial legislatures was to pass anti-gambling

statutes. This was particularly true on the Great Plains where the legislatures were dominated from the beginning by farmers. Kansas and Nebraska, for example, both gained territorial status in 1854, and by 1855, the sodbusters had triumphed over the veteran frontiersmen by passing a comprehensive gambling law.[7]

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[7]Unlike other Western states, Utah never experienced conflict between new settlers and old. No pioneers reached Utah ahead of the Mormons, and the first territorial law was enacted without significant opposition.

The permanent settlement of Utah began in July, 1847, when 145 Mormons reached the Great Salt Lake Valley. By the end of 1848, 5,200 more Mormons had migrated to Utah in hope of escaping religious persecution. Their tormentors were not likely to follow them to such an isolated, uninviting place. Within a year, the United States gained control of Utah through the Treaty of Guadalupe Hidalgo, which formally ended the Mexican-American War.

The United States did not take any immediate steps to govern the territory. Thus, in 1849, the Mormons established their own government, naming their settlement the State of Deseret. Under this banner, they adopted a constitution, enacted laws, and established a capital at Salt Lake City.

The State of Deseret, though short-lived, promulgated Utah's first gambling statutes. This legislation was reminiscent of the laws passed in the Puritan colonies in the seventeenth century. For example, the mere playing of games was forbidden, regardless of whether the players placed wagers. Since Mormon society was governed both politically and religiously by Brigham Young's elders, Mormon gambling law was theologically derived. Indeed, Utah later faced a long struggle for statehood precisely because of its reluctance to separate church and state.

Enforcement of gambling laws, however, was suspect in areas of Utah that were not brought under Mormon control. The hinterlands were settled by non-Mormon miners who appreciated casinos. See, e.g., Terry v. Peterson, 37 Utah 401, 108 P. 1106 (1910) for evidence that casinos thrived in parts of Utah that the Mormons could not subdue.

Alaska is another Western state that experienced little conflict over gambling in its early years. The Yukon gold rush of 1896 led to an increase in gambling and lawlessness, but the gold rush eventually ended and the hordes stopped coming. Throughout most of its history, Alaska was largely regarded as a government outpost, and federally-appointed officials simply decided which laws should be adopted. The gambling laws that were selected were those most appropriate to federal purposes. See, e.g., Alas. Terr. Code Ann. ch. 8, §152 (Carter 1900).

Typically, early territorial statutes were modeled on the existing laws of more eastern states. For example, the Kansas Act of 1855, which was identical to a Missouri statute[8] passed in the same year, outlawed all games of chance. Specifically prohibited were setting up or keeping games of ABC, faro bank, E.O., roulette, or equality.[9] Conviction under the statute was limited to cases where the accused both kept a prohibited device and permitted someone to play it, and resulted in a maximum one year's imprisonment and a $1,000 fine.[10]

Gambling laws in the West were not, however, passed in the spirit of Puritan attacks on idleness, as they often were

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[8]Act of 1855, ch. 53, §§15-26, [1855] Kan. Terr. Stat. at 285-87; Act of Dec. 8, 1855, ch. 50, art. 8, §§16-27, 1 [1855] Mo. Rev. Stat. at 626-29.

[9]Similar gambling laws were enacted in other agricultural territories. See Act of April 28, 1862, ch. 9, §§128-30, [1862] Dak. Terr. Gen. Laws at 189, where gaming for money and the keeping of common gaming-houses were made illegal; Act of March 14, 1855, [1855] Neb. Terr. Laws at 201, which penalized persons keeping a house for gambling purposes or allowing certain games to be played on their premises; Okla. Terr. Stat., §§2238-39 (1890).

[10]The Kansas penalties were more severe than most. In Nebraska, the largest fine was only $300. Act of March 14, 1855, [1855] Neb. Terr. Laws at 201. In South Dakota, the fine did not exceed $100 and the maximum imprisonment was only six months. Act of April 28, 1862, ch. 9, §§128-30, [1862] Dak. Terr. Gen. Laws at 189.

The first sanctions against gambling generally were not very severe. Thus, states that later became serious about closing casinos had to strengthen their laws to increase the deterrent effect. The relative leniency of the early gambling laws may have been due to the prohibitionists' inability to overpower the pro-gambling forces. When the Western territories became heavily populated by homesteaders, however, enough political leverage was provided to impose stiff penalties.

in the East. Even in those legislatures dominated by Methodist farmers, zealous anti-gambling campaigns were thus not crusades against greed and sloth. Rather, they were, as in the South, intended as methods for controlling the abuses of public gambling only. The majority of Western states, like Virginia, tolerated private, social gambling; they attempted to outlaw only public, commercialized gambling. Even when individuals were caught in public gaming-houses, they were only lightly fined,[11] or were not held liable at all.[12]

Texas law illustrates the general Western distinction between private and public gambling. The Penal Code of 1856 acknowledged that a private room in an inn or tavern did not come within the intended ban on gambling in public places.[13] Further, the Code did not prevent individuals from indulging in games of chance for their own private amusement.

The Texas courts restated this distinction between private and public gaming. In Sheppard v. State,[14] the court implied that certain private gaming was permitted:

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[11]Although an operator of an illegal gambling house in Kansas could be fined up to $1,000, a patron was fined only $25. Act of 1855, ch. 53, §16, [1855] Kan. Terr. Stat. at 285-86.

[12]In Oklahoma, for example, merely betting at prohibited games was not a punishable offense. If a player won, however, he was liable for five times the value of the consideration received. Okla. Terr. Stat. §2241 (1890).

[13]See the Texas Penal Code of 1856, tit. 13, ch. 4, in Oldham & White's Digest of the Laws of Texas at 506 (1859).

Texas was more concerned with preserving purely social gaming than most American states. This was due in large part to the substantial Mexican community which had a tradition of casual social gaming.

[14]1 Tex. App. 304 (1876).

> The prohibited games are divided into two classes, to wit: "1st, playing cards in particular places; 2d, gaming tables or banks everywhere."[15]

An earlier court explained that the blanket prohibition on gaming tables and banks was due to their purely commercial nature.

> The characteristic principle or element of the gaming tables or banks specified in the code . . . is that they have a keeper, dealer or exhibiter and operator on the basis of one against the many . . . . The keeper charges and takes a per centage upon all the bets that are made, and is therefore interested in stimulating and protracting the betting. The more is bet, the more he makes. And if the game continues long enough, he will have all the money and the betters have none; then it is that the true principle of the game is unveiled--one against the many.[16]

An effort to curtail commercial gambling was also evident in the distinction between games of skill and games of chance. Games of chance, from which professional gamblers reaped large profits, were generally prohibited. Games of skill, on the other hand, usually fell outside the statutory prohibition.[17] Not surprisingly, Western courts generally declared that private horseracing was a game of skill and therefore legal. Horseracing was too deeply ingrained in the culture of the West to be outlawed.[18] Indeed, the only bets that would be

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[15] Id. at 305.

[16] Stearnes v. State, 21 Tex. 692, 697 (1858).

[17] See, e.g., D'Orio v. Startup Candy Co., 71 Utah 410, 266 P. 1037 (1928).

[18] See, e.g., McCall v. State, 18 Ariz. 408, 161 P. 893 (1916).

enforced in most Western courts were horseracing bets.[19]

Winners of other games or wagers, however, went unaided by the courts. Obviously, this rule allowed gamblers to incur large debts without legal sanction. In many jurisdictions, losers could even recover losses already paid to the winner of a wager.[20] Here, the courts would actively intervene to save a person from his own imprudence, apparently regarding the gambler as a victim, rather than an accomplice in an immoral undertaking.

On the whole, however, Western gambling laws were meant neither to save gamblers from their own folly nor to condemn wicked and wasteful behavior.[21] More like their counterparts in the South rather than the Northeast, they were enacted in an effort to curtail the worst abuses of public and commercial gambling.

As legends of the Wild West have it, gambling often resulted in disorderly conduct and even violence. These abuses had to be controlled before farmers would move their families into the towns. Since lawless behavior was directly associated with gambling, gambling was declared illegal as

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[19]See Act of 1855, ch. 76, §4, [1855] Kan. Terr. Stat. at 389; Act of March 2, 1864, §3, [1864] Colo. Laws at 97; Act of Dec. 1, 1862, ch. 9, §10, [1862-1863] Dak. Gen. Laws at 75-76; Misner v. Knapp, 13 Ore. 135, 9 P. 65 (1885).

[20]See Act of 1855, ch. 76, §1, [1855] Kan. Terr. Stat. at 388; Act of April 5, 1887, ch. 108, §1, [1887] Neb. Laws at 664-66; Act of 1850, §2, [1849-1850] Ore. Terr. Laws at 114.

[21]Utah laws were an exception to this rule because of the state's domination by the Mormons. Utah's gambling law was indeed regarded (by the Mormons) as a moral manifesto:

part of a concerted effor to eliminate the prevailing unruliness.

Recently, however, some historians have questioned whether gambling's excesses really posed a serious enough threat to warrant a blanket prohibition of gambling. One writer asserts that only fifteen homicides occurred in notorious Dodge City between 1870 and 1885, and few of these were related to gambling.[22] Bat Masterson, the redoubtable lawman, hired to tame the unruly in Dodge City, in fact killed no one in his several years as sheriff.[23] Although gambling was almost exclusively town-centered, contemporary newspaper reports indicate that violent crimes in Western towns such as Dodge City were relatively infrequent. Thus, while myth implies that the frontier townsfolk were beseiged by armed desperadoes who flocked to the casinos, brothels, and saloons, the record suggests that this was simply not the case.

Fn. 21
cont. Gambling is in opposition to the divine will; it is wicked, evil practice, destructive of the finer sensitivities of the soul. No matter how cloaked or disguised, and no matter how professedly worthy an accompanying money raising scheme may be, gambling is morally wrong and will be avoided by all who are saints in deed.
B. McConkie, Mormon Doctrine 277 (1958).

Ironically, however, even Utah courts ultimately made the distinction between betting at games of chance and betting in a contest of skill. See D'Orio v. Startup Candy Co., 71 Utah 410, 266 P. 1037 (1928).

[22]R. Dykstra, The Cattle Towns 144 (1968) [hereinafter cited as Dykstra].

[23]Id. at 143.

Indeed, the frontier towns, even with their gambling, were comparatively safe.[24] Town entrepreneurs, interested in the steady growth of these communities, had to be assured of an orderly, stable place to conduct business.[25] Even the proprietors of gambling establishments--often the owners of more legitimate businesses as well--were in favor of curbing gambling abuses, although they clearly did not want to prohibit gambling altogether. Finally, when the town did become unruly from time to time, it was still easier to control the crime and violence there than out on the open plains.

Nevertheless, many Western states and territories passed stern measures against gambling. It is difficult to explain why Nebraska, which had a fairly negligible problem with gambling abuses, would adopt such radical prohibitions. It would seem that the state never considered a more discriminating approach, such as a licensing system to regulate and restrain gaming.

Apparently, Nebraska's agrarian interests, reflecting their Eastern origins, dictated an absolute ban on gambling as soon as they gained control of the legislature. Their opposition to gambling, however, was more than a pragmatic objection to the growth of crime. Rather, it was a

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[24] Id. at 116. For a thorough discussion of reform politics in frontier towns, see Dykstra at 239-93. Another historian has published statistics showing that most prosecutions on the Oklahoma frontier were for rapes and murders committed far from the nearest town. G. Shirley, Law West of Fort Smith 209-31 (1957).

[25] Dykstra at 114-15.

demonstration of political anger: gambling was a speculative enterprise designed to take advantage of the hardworking but unwary farmer. Once again the Jacksonian influence can be seen in operation. William Cobbett, a transplanted English journalist of the late eighteenth century, recognized the blatant exploitation of gambling schemes:

> Have you an itching propensity to use your wits to advantage? Make a lottery. A splendid scheme is a bait that cannot fail to catch the gulls. Be sure to spangle it with rich prizes: the fewer blanks--on paper--the better; for on winding up the business, you know, it is easy to make as many blanks as you please. Witness a late lottery on the Potowmack. The Winding up, however, is not absolutely necessary . . . The better way is to delay the drawing; or should it ever begin, there is no hurry about the end, or rather, let it have no end at all. If . . . discontented adventurers should happen to say hard things of you, show them that you despise their unmannerly insinuations, by humming the tune of Yankee Doodle. This may dumbfound them; but should they persist, there is a mode left that cannot fail to stop their mouths. The scheme of the lottery is your contract . . . : Produce this, and defy them to point out any breach of it on your part. Entre nous; I am supposing you discreet enough to avoid in your scheme anything that might look like a promise to commence the drawing on this or that particular day; or to finish at any given period.[26]

3. The Jacksonian ideal in the West

In the years before the Civil War, the East had already been altered by the growth of industrialism. The opening of the West, however, provided an escape from the threat of an increasingly stratified economic and social order. Those who left their Eastern homes to create new farms on the frontier

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[26]W. Cobbett, the transplanted English journalist, quoted in J. Ezell, Fortune's Merry Wheel: The Lottery in America at 105 (1960).

were part of a movement to reaffirm Jackson's vision of the small man's democracy. The West was to be a sanctuary, almost a Jeffersonian preserve for the small farmer. Populists, committed to the Jacksonian idea, were convinced that they could rescue themselves from political domination by the business and industrial interests if they could create a viable political opposition.

Inherent in the teachings of the Jacksonian democrats was the idea that political democracy was impossible without economic democracy. Recall Justice Catron's opinion in Smith and Lane.[27] Once wealth became concentrated, the individual was inevitably stripped of his political importance. Individual sovereignty in any community depended upon a broad diffusion of economic power. If the individual were not preserved as the integral unit of the nation's economy, he could not retain any power in the decision-making process. The Jacksonian vision, recalling the earlier vision of Jefferson himself, demanded an essentially rural society where persons were their own masters, were vigilant of their rights, and were prepared to express their own wills.

Ironically, in light of the life style of Jackson himself and many of his Frontier Friends, gamblers had no place in the developed Jacksonian ideal. While the yeoman's honest labor added to the wealth of the community, the gambler produced nothing. Like other forms of speculation, gambling merely

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[27]State v. Smith & Lane, 10 Tenn. (2 Yeager) 272 (1829).

transferred wealth from those who legitimately amassed it. Extensive gambling would ultimately create a hierarchy based solely on wealth. And Americans--particularly the small farmers, shop keepers, the little people--were traditionally opposed to the development of any class system.

Commercial gambling, therefore, had to be checked, as did overly-powerful banks, railroads, corporations, and commodity speculators. Farmers feared that gamblers would dominate the new territorial governments unless they were summarily evicted. Further,--and this time echoing their Puritan forefathers--they were opposed to the idleness and waste that gambling promoted. Those habits could quickly destroy a fledgling agricultural community.

4. The response to gambling in the Far West

The response to gambling in the Far West--the Rocky Mountain states and the Southwest--was quite different from that on the Great Plains. In Wyoming, Montana, and Arizona, there was no incipient clash between old-timers and newcomers. Farmers never came to these states in great numbers, so there was never great opposition to the gambling establishment. Unlike the farm states, the Far West did not prohibit gambling altogether, but many legislatures did pass licensing and regulation measures.

The licensing scheme passed by the Montana territorial legislature, for instance, was typical of those enacted by most Far West states. The owner of each house where gambling tables were kept or games of chance were played was to pay a

fee of $50 per month. This fee schedule was adjusted in both 1873[28] and 1887[29]. From the increasing size of this license fee, it may be inferred that profits to gambling house operators were substantial. The 1887 law required each operator to pay a $100 general fee every three months plus $40 per month for every faro table and $250 per month for every poker or roulette table.[30]

Despite regulation, many Far West gambling operations bordered on fraud. The governor of New Mexico described the problem in the gambling resorts in his state as follows:

> [S]ome of the games as played here afford the player 250 per cent less chance of winning than similar games afford in the larger gaming establishments of Europe, which pay enormous dividends to stockholders.[31]

In Montana, where certain types of casino games were welcomed, three-card monte, strap games, thimble-rig, black and red, the ten dice game, faro, and "any other game where fraud or cheating [was] practiced,"[32] were nonetheless banished. The penalty for violators was severe: up to five years in the county jail, a maximum $1000 fine, or both. Gambling fraud was considered a serious offense not only because innocent

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[28]Act of May 8, 1873, [1873] Mont. Terr. Laws at 73.

[29]Act of March 10, 1887, §12, [1887] Mont. Terr. Laws at 75-76.

[30]Id.

[31]Statement of H. J. Hagerman, Governor of New Mexico 1906-1907, quoted in H. Asbury, Sucker's Progress 346 (1969).

[32]Act of Jan. 11, 1865, §§1, 2 [1864] Mont. Terr. Laws at 354.

players were fleeced, but also because suspected cheaters--along with a few bystanders--were often shot.

In sum, there were numerous statutes regulating gambling in the Far West and totally prohibiting it on the Great Plains during the frontier era. Most went unenforced, however, until the territories gained statehood. Gamblers continued to operate unchecked, despite the hostility of the farmers and those who yearned for a more "respectable" community. There was little enforcement even in Kansas, Nebraska, and the Dakotas, all territories which unequivocably refused to legalize gambling. Even when the laws were enforced, the fines were light and were dismissed by gamblers as simply the cost of doing business.

B. The Statehood Era

1. The Far West

The desire to achieve statehood eventually moved even reluctant states to adopt a ban on commercial gambling. In a 1907 conversation with New Mexico's newly-appointed territorial governor, President Theodore Roosevelt personally outlined the terms of statehood:

> Captain, I know your ambition is to have New Mexico made a state, but before you can get statehood you must clean house in New Mexico and show to Congress that the people of New Mexico are capable of governing themselves. [33]

The implication was that the territory would have to dispel,

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[33] G. Curry, George Curry, 1861-1947: An Autobiography 208 (1958).

among other things, its general reputation for lawlessness by prohibiting gambling.

In most Far Western states, the years just before statehood were marked by conflict between the federally-appointed governor and the popularly-elected legislatures. The governors, who were often outsiders, tried endlessly to direct the legislatures toward banning gambling. The legislatures' reaction was to balk at being told what to do. In 1907, Arizona's Governor Kibbey[34] placed this issue squarely before the legislature.

> The time has come, it must appear to us all, when more care should be taken in our deportment than has been the rule in our earlier and ruder days. Cities, towns and villages are growing up all over the Territory. Every year finds a larger number of children, whose education not alone in the schools, but in the formation of habits by association, example and observation, demands a more careful consideration than was accorded to it when our towns and villages were the abodes of men chiefly, or of but few women and children.
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> The rule that prevails among men in new communities, that each must stand or fall upon his own merits--that only the strong deserve to stand, and that to fall is the natural and deserved fate of the weak--might have much to commend it if the rule concerned men alone. But as we have progressed in population, as the Territory has become more and more the home of families, the fate of women and children has become involved, and men themselves have assumed new social responsibilities, so that the old rule, if ever the right one, is not now applicable.

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[34]Kibbey, a native of Indiana, served as supreme judge and governor of the Territory by an appointment made in Washington. Legislative History of Arizona 1864-1912, at 371-72 (George Kelly comp. 1926).

> I therefore recommend to you that you enact a law repealing the provisions for licensing gambling, and making it unlawful for any person to maintain, conduct or permit gambling in any public place, . . . or in any other place to maintain conduct or permit such gambling for the purpose of gain or hire and for any person to gamble in any of said places.[35]

Just days later, the Arizona legislature complied with Kibbey's request and repealed the provisions that permitted licensed gambling in Arizona.[36] In 1909, the repealing statute was augmented by another act which prohibited specific games and established the punishment for offenders.[37] All violations were misdemeanors and carried a maximum $300 fine and six months imprisonment. The 1909 Act forms the core of Arizona's current anti-gambling law.[38]

Even though some Far Western states did enact blanket prohibitions against gambling, their citizens never displayed the profound distaste for gambling that existed in the farm

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[35] Id. at 248-49.

[36] Act of Jan. 31, 1907, ch. 1, [1907] Ariz. Terr. Laws at 1. The disputes between territorial governors and legislators were not usually centered around the legislators' refusal to place any controls on gambling. Arizona, like most other territories, already favored some form of casino licensing. Rather, the dispute concerned whether total prohibition of all gaming was necessary for practical enforcement reasons.

[37] Act of March 18, 1909, ch. 92, [1909] Ariz. Terr. Laws at 231-33. The 1909 act was a fairly representative Far West anti-gambling statute. Virtually all of the territories enacted similar laws in order to win statehood from a skeptical Congress. These territories, however, were not necessarily coerced into abolishing gambling by Easterners. Many territorial residents themselves supported prohibition because it gave the West a more positive image as a stable community and thus made it easier to attract Eastern investors.

[38] Ariz. Rev. Stat. Ann. §§13-431, 13-432, 13-433, 13-435, 13-437 (1956).

states. In the late nineteenth century, New Mexico enacted a total prohibition on gambling, but

> . . . public sentiment was such that at every term of court the district attorney would file informations against all the professional gamblers and with very few exceptions pleas of guilty were always arraigned and fines imposed by the district judge in an amount totalling with costs much less than was required under the old license system.[39]

The criminal penalties for gambling often amounted to little more than a de facto licensing program. Sometimes there were no penalties at all because the courts interpreted the new gambling laws narrowly. In McCall v. State, for example, the Arizona court declared:

> A pari mutuel machine is as innocuous in and of itself as a faro-table without cards, a roulette-table without the ivory balls, a stein without beer, a goblet without wine. These are alike harmless without the complement of cards, balls, beer and wine. So likewise, is the pari mutuel machine without the horse-race or other contest of chance.[40]

The court concluded that the state could not confiscate and destroy articles that allegedly constituted gambling apparatus unless the objects could be used exclusively for gambling.

2. The Farm States

By the time Kansas and Nebraska were granted statehood, the small farming community had become the dominant political unit on the prairies. While the cowboys farther west continued to tread lightly on gamblers, the farmers redoubled their efforts to banish gambling completely. One special form of gambling singled out for attack was the lottery. The original

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[39] R. Twitchell, Old Santa Fe 337 (1963).

[40] 18 Ariz. 408, 416, 116 P. 893, 896 (1916).

constitutions of many of the farm states included express provisions against legislatively-authorized lotteries.[41] Since lotteries were never prevalent in the West, it is difficult to explain these measures as responses to particular abuses, as in the East. Instead, these constitutional provisions are best seen as symbolic gestures against legislatively-enfranchised privilege and legislative corruption. Thus, they are really Eastern law carried Western. Western Populists, therefore, remembering lotteries chiefly for the corruption and privilege that they represented in the East prohibited them wherever they went. It must be conceded, too, that these provisions may in fact reflect little more than the lawyers' habit of beginning a new draft of a legal document by copying the standard clauses of an old one. Since these provisions were in the constitutions of the Midwest and the East, they may well have been unthinkingly carried into the constitutions of the West.

Soon after statehood, the Western farm states also enacted a series of statutes intended to add enforcement techniques to their initial gambling statutes. Public officials who for no reason failed to pursue and prosecute gambling offenders were subject to punishment.[42] In several states, municipalities were given independent power to enact and enforce harsher

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[41]Neb. Const. art. III, §24; Kan. Const. art. XV, §3; N. Dak. Const. art. I; S. Dak. Const. art. III, §25.

[42]See, e.g., Act of Jan. 11, 1865, ch. 9, §398, [1864-1865] Dak. Terr. Laws at 114. Officials were fined a sobering $500. This fine remains the same today.

gambling laws than those adopted by the state.[43] These additions were attempts to eliminate the possibility that a corrupt legislature or a corrupt state court could be bribed, and thereby undermine the anti-gambling sentiment of the people.

Nuisance laws were another device used to combat gambling. "Common gambling houses" were declared public nuisances, and any person was given standing to bring an action of abatement against them.[44] Thus, the decision to prosecute was not left solely to a few public officials who could be corrupted: citizens could enforce their gambling laws directly. By making injunctions available, nuisance actions also provided a more effective remedy than a mere fine or jail term. Effective procedures for confiscating and disposing of illicit gambling devices were also established.[45] Like injunctions, confiscation of their equipment effectively put gambling house proprietors out of business, at least for a while. Finally, gambling laws were revised to bring more people within the ambit of illegality. For example, landlords who knowingly rented their premises for gambling purposes were penalized.[46]

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[43] See, e.g., Act of Feb. 28, 1868, ch. 19, art. 3, §29, [1868] Kan. Gen. Stat. at 159.

[44] See, e.g., Act of Feb. 6, 1895, ch. 151, §4, [1895] Kan. Laws at 288.

[45] Id.

[46] Id. §§2-3 at 287-88.

Despite the added enforcement measures, evidentiary problems often prevented the conviction of gamblers. In response, several states adopted witness immunity statutes. To compel witnesses to disclose information which was potentially self-incriminatory, the states granted either use immunity or transactional immunity.[47]

Vagrancy laws were expanded to include the "common gambler."[48] Although the penalty for vagrancy was not very stiff, it was easier to obtain a conviction for vagrancy than for a gambling felony.[49] If nothing else, the vagrancy law could be used to harass suspected gamblers.

Finally, the Western farm states revised their laws to prohibit a new gambling phenomenon, commodities speculation. In states with strict gambling laws, commodity futures provided a legitimate front for gamblers. Shops were opened

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[47] See, e.g., Act of Feb. 13, 1925, c. 100, §1, [1925] Neb. Laws at 290.

[48] See, e.g., Act of Feb. 25, 1875, §30, [1875] Neb. Laws at 13-14.

[49] The definition of a common gambler was usually quite broad:

> If any person shall keep or exhibit any gaming table, establishment, device, or apparatus, to win or gain money, or other property of value, or shall aid, or assist, or permit others to do the same, or if any person shall engage in gambling for a livelihood or shall be without any fixed residence, and in the habit or practice of gambling, he shall be deemed and taken to be a common gambler. . . .

Id. The punishment was a fine of $100 or a jail term of one to three months.

to conduct what appeared to be bona fide futures transactions but what were in reality wagering contracts. Most states soon enacted bucket shop provisions to distinguish between authentic future delivery contracts and illegal stock gambling:

> Our statute was not intended to prevent contracts for future delivery of commodities when entered into in good faith and with an actual intention of fulfillment; its purpose was to suppress mere speculation where the commodity dealt in exists only in imagination, where no delivery is contemplated, but where on the contrary it is expected that the parties will settle upon the difference in the speculative market.[50]

3. Lotteries

Those states that totally outlawed gambling generally included all forms of lotteries in their prohibition. The universally accepted definition in the West of a lottery was any scheme for the

> . . . distribution of money or property, among persons who have given or agreed to give, a valuable consideration for the chance, whether called a lottery, . . . or by some other name.[51]

In every state, a lottery consisted of three key elements: there had to be consideration paid for the chance to win a prize. As such, no new legal ground was broken.

In the early twentieth century, courts were forced to decide whether certain business promotions, such as "bank nights" and "gift enterprises," were illegal under the definition of a lottery. In a typical bank night scheme, all

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[50]Orthwein-Matchette Inv. Co. v. McFarlin, 93 Kan. 526, 527, 144 P. 842, 843 (1914).

[51]Act of Feb. 6, 1895, ch. 152, §6, [1895] Kan. Laws at 290.

purchasers of tickets were given a chance to win in the raffle held during intermission. Ticket purchasers literally paid to see the movie, not to buy a chance in the raffle. Nevertheless, many state courts in the West, as in the Midwest, ruled that the consideration was paid at least in part for a chance to win the prize, and therefore bank nights were illegal as lotteries.

Gift enterprises, where a customer was given a bonus gift for buying the vendor's product, were also declared illegal. Several Western states prohibited this widely-used marketing device, claiming that it was an illegal lottery and was injurious to the public welfare.

Lottery laws were applied to pinball machines, and in many states they were banned as illegal games of chance.[52] The courts had to determine whether people played pinball for sheer entertainment or for the free games--"prizes"--that were awarded to high scorers. Pinball distributors naturally argued that they should not be prevented from pursuing a legitimate entertainment business.

The fate of bank nights and pinball machines is an example of the application of a law without its reason. In both the West and Midwest, state constitutions prohibited state-authorized lotteries more out of the fear of privilege and legislative corruption than out of a moral repugnance to

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[52] See, e.g., Pin-Ball Machine v. State, 371 P.2d 805 (Alas. 1962). The court declared that the six pinball machines in question were gambling devices. They were then confiscated by the police and destroyed as contraband.

lotteries per se. The Western Jacksonians originally wanted to prevent lottery operators, like bankers and other speculators, from amassing great power and wealth, thereby robbing small farmers and laborers of their political importance.

By the twentieth century, however, any game that even resembled a lottery was flatly prohibited, no matter how innocent. Pinball was arguably not a game of chance and clearly not a form of speculation. It was literally only a nickel and dime business. Nor were bank nights and gift enterprises forms of speculation. Rather, they were marketing techniques that were devised during the Depression to keep businessmen from going under. In fact, many of these businessmen were the same small-scale entrepreneurs that the Jacksonians were in favor of protecting.

C. The Modern Era: A Trend Toward Legalization

1. The general trend

The Western states historically imposed comparatively low taxes on their citizens.[53] Indeed, low taxes became a staunch political tradition in the West. In times of fiscal crisis, such as the Great Depression and the recent recession of the 70's, many Western states looked to legalized gambling as an alternative source of revenue. The Depression forced the

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[53] In Wyoming, for example, public revenues are currently limited to a state sales tax and local property taxes. There is no individual or corporate income tax.

establishment of parimutuel horseracing in six Western states: California, Oregon, South Dakota, Nebraska, Texas, and Washington. In those states that traditionally took a firm position against gambling, the populace often chose to pay higher taxes than to legalize gambling.[54]

Even when state residents favored legalization of certain forms of gambling, implementation was often hampered by the old Jacksonian constitutional prohibitions that had been aimed at the state chartered lottery systems. In Kansas, for example, the court declared that a 1971 statute allowing charitable bingo was unconstitutional.[55] Over the years, the Kansas court similarly struck down the distribution of door prizes,[56] the sale of lottery tickets,[57] bank nights,[58] punchboards,[59] and parimutuel betting on animal races.[60] In each case, the court ruled that the legislature was constitutionally barred from licensing any form of lottery.

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[54]Washington held a referendum in 1963 on a plan to license bingo and public card rooms. The proposed bill was summarily defeated. Act of March 7, 1963, 37, §§1-9, [1963] Wash. Laws at 350-55.

[55]State v. Nelson, 210 Kan. 439, 502 P.2d 841 (1972).

[56]State ex rel. Kellogg v. Kansas Mercantile Ass'n, 45 Kan. 351, 25 P. 984 (1891).

[57]In re Smith, 54 Kan. 702, 39 P. 707 (1895).

[58]State ex rel. Beck v. Fox Kansas Theatre Co., 144 Kan. 687, 62 P.2d 929 (1936).

[59]City of Wichita v. Stevens, 167 Kan. 408, 207 P.2d 386 (1949).

[60]State ex rel. Moore v. Bissing, 178 Kan. 111, 283 P.2d 418 (1955).

Recently, however, the Kansas constitution was amended to allow charitable bingo.[61]

The charitable bingo exception is common in the West and throughout the United States. Many states which otherwise refuse to license gambling allow churches to hold weekly bingo.[62] The legislatures apparently believe that no private profit is made, as in commercial bingo, and the public is indirectly benefited by the increase in charity treasuries.

There is also a movement toward a general decriminalization of gambling in a few prohibitionist states. In 1971, the Washington legislature voted to authorize and license a number of gambling activities. Upon receipt of the bill, however, Governor Evans promptly vetoed it. In his view, the legislature had "opened the door to professional gambling in Washington."[63] He was further not convinced that legalization was truly supported by the people. After three years of extensive caucussing, the legislature was able partially to override the governor's veto and legalize licensed public card parlors. By 1974, the politics of gambling had changed in Washington. Once fairly homogeneous, the population had become more diverse. The earlier consensus on the total prohibition of gambling was diluted by the arrival of immigrants whose ancestry was neither Jacksonian nor pioneer.

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[61] Kan. Const. art. XV, §3a (as amended, 1974).

[62] See, e.g., Neb. Rev. Stat. §§9-101 to 9-122 Repl. Vol. 1974).

[63] Governor's Veto Message, [1971] Wash. Laws (1st Extra Session), c. 280 at 1434-35.

California, on the other hand, shows no sign of legalizing gambling. Although California suffers some of the same fiscal problems as the large Eastern states, it has not turned to legalized gambling as a new source of revenue. Further, unlike some Eastern states, California has not had to legalize gambling to combat the involvement of organized crime. The 1950 Kefauver Committee Report noted that although Los Angeles and San Francisco have extensive illegal gambling, California's gambling is not heavily infiltrated by organized crime of the Mafia type. According to U.S. Department of Justice estimates, less than a third of all Far West gambling is controlled by Mafia racketeers.[64]

Other Western states have been less hesitant to legalize gambling to raise revenue. Many of these states, such as Montana, Idaho, and Wyoming, were never resolutely in favor of banning gambling. In 1965, Montana legalized parimutuel betting and created the Montana Horse Racing Commission.[65] All participants in racing must be licensed by this commission. The state nets one per cent of the gross receipts, while the track keeps twenty per cent.[66]

As early as 1937, Montana attempted to license certain games and "trade stimulators." For a $10 license fee, charitable organizations or business places could provide cards and tables for playing rummy, whist, bridge, blackjack,

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[64]Task Force on Legalized Gambling, Easy Money 9 (1974).

[65]This is now the Board of Horseracing. See Mont. Rev. Codes Ann. §82A-1602.13 (Supp. 1975).

[66]Mont. Rev. Codes Ann. §§62-512, 62-514 (Supp. 1975).

hearts, dominoes, and checkers. Also for a $10 license fee, businesses were authorized to exhibit trade stimulators, such as pull and ticket boards, for the use of adult customers.[67] As in Kansas, however, the courts later found this statute unconstitutional[68] under the states' anti-lottery provision.

In 1972, Montana rewrote its constitution and omitted the anti-lottery clause.[69] The new constitution specifically allows lotteries to be authorized by legislation, referendum, or initiative. The state has also decriminalized several forms of gaming. The Card and Games Act of 1974 provides that cities, towns, and counties may, for a fee, issue card game licenses to authorized vendors of liquor, beer, food, or other consumables.[70] A 1974 Act authorizes localities to issue licenses for bingo and raffles.[71]

2. Nevada: A case study

a. The territorial experience: 1827 to 1864

The story of Nevada's territorial history begins with a few exploratory treks by pioneer trappers and religious groups in the third decade of the nineteenth century. The word "Nevada" itself is derived from Spanish. It means "snow

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[67]Act of March 16, 1937, ch. 153, §§1-5, [1937] Mont. Laws at 492-94.

[68]State ex rel. Harrison v. Deniff, 126 Mont. 109, 245 P.2d 140 (1952); Mont. Const. art. XIX, §2 (1889).

[69]Mont. Const. art. III, §9 (1972).

[70]Mont. Rev. Codes Ann. §62-707 (Supp. 1976).

[71]Mont. Rev. Codes Ann. §62-719 (Supp. 1976).

capped," and it was first applied to the mountains on its western border. The story of the Nevada territory ends with fifteen years of gold fever, as town after town sprang up, bustled with life, and died, according to the whim and luck of the prospectors. Politically and economically, this was a confusing era, full of both the divisiveness that sprang from conflicts between conservative Mormons and carefree gold diggers, and the odd sense of community abandon that characterized the prospector, who willingly cast his lot with Lady Luck.

Jedidiah Smith, a St. Louis fur trader and explorer, was the first man of European descent to traverse the land which now constitutes the state of Nevada. In 1827, he crossed the territory on his way to and from California, and brought back the first reliable reports of a hitherto unexplored region.[72] In the 1830s and 1840s, several other explorers passed through the region, including John C. Fremont. The trappers, however, came in small numbers and rarely settled or remained in any one place for any length of time.[73]

The first substantial settlements in Nevada occurred shortly after the signing of the Treaty of Guadalupe Hidalgo in February of 1848 by which Mexico ceded the territory that

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[72] See E. Mack, Nevada: A History of the State from the Earliest Times through the Civil War 62-74 (1935) [hereinafter cited as Mack].

[73] Id. at 41-42.

included Nevada to the United States.[74] Brigham Young and his faithful band of Mormons, who had established Salt Lake City only two years before, continued to expand westward and organized a government which they called the "State of Deseret" in the Nevada territory.[75] Although the federal government did not recognize the new state, the Mormons, unabashed, continued to settle the area.[76]

It was not until two years later, however, that the event which was to shape Nevada's early history came to pass. Gold had been discovered in California in 1849, and as hundreds of wagon trains began to pour through Nevada on their way to California, eager prospectors got out their pans to test the soil on their way to the coast. In 1850, a lone prospector climbed into a ravine near the California border and sifted a few specks of glittering gold. Although it would be several years before the gold rush enveloped Nevada and her neighboring state, the discovery reverberated in Sacramento and other Pacific settlements, and set the stage for the first important

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[74]Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, February 2, 1848, 9 Stat. 922. The treaty was concluded at the end of the Mexican-American War. Mexico had captured the territory from Spain during its war of revolution in 1821.

[75]D. Driggs, The Constitution of the State of Nevada 7 (1961) [hereinafter cited as Driggs]. Deseret, a word from the Mormon scriptures, meant "honeybee", and it symbolized the Mormon community's emphasis on work.

[76]The Nevada territory remained without an organized government until Congress passed the Compromise of 1850, ch. 51, 9 Stat. 453, which admitted California as a state and created the Territory of Utah, which included most of what is now Nevada.

scenes in Nevada's social history.[77]

(1) The permissive period

Throughout the early 1850's, prospectors searched intensely for a big find in the Nevada territory. By the spring of 1859, four of them near the California border had uncovered one of the biggest discoveries of the gold rush years: the Comstock Lode. The news ran through the California papers in the summer of 1859, and within weeks, the trails to Nevada swelled with prospectors, bringing with them a lifestyle that was to affect the state for generations.

> They came from every walk of life and by any mode available: by wagon, by mule, by horse, on foot, and sometimes pushing wheelbarrows before them. Along with the miners came people with supplies of all kinds, including herds of sheep, hogs, and cattle, who had learned from other mining rushes that a wealth often came more easily from above ground than below it.[78]

Mining communities formed and grew to thousands within weeks: Gold Hill, Virginia City, Silver City and others. Hotels, general stores, and dozens of inevitable casino-bordello-saloons soon lined the streets, and even though gambling had not been prevalent in the straight-laced Mormon communities, it was now widespread. The prospectors of Nevada were veterans of the California gold rush, and the colossal uncertainties of their way of life made the hazard and the bet an integral part of the gold-mining lifestyle.

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[77]R. Elliott, History of Nevada 50-51 (1973) [hereinafter cited as Elliott].

[78]Id. at 64-65.

> Because the region's sustaining industry, like mining operations everywhere, was itself a prodigious gamble, residents of all degrees were conditioned to the habit of risking all they possessed in the expectation of high rewards, either by taking flyers on the local mining exchanges or at the gambling tables to be found in every bar.[79]

Impromptu government districts were established to guarantee land titles, and, although the deeds were usually kept in a book of records behind the bar in the local saloon, they were generally accepted as legal by the California courts.[80] Nonetheless, lawlessness and disorder reigned in the Nevada territory until 1861, when Congress, frightened by the secession of the Southern states and desperate for support for the Northern states, established the Territory of Nevada.[81]

James Warren Nye, a native New York Republican and a political ally of President Abraham Lincoln, was appointed territorial governor. Nye had been Commissioner of Police in New York City, and was a firm advocate of law and order. The wild lifestyle of the Nevada miners shocked him. He agreed with the Mormon conservatives from the very first. His opening speech in Carson City proclaimed:

> As we progress in the labors before us, I shall at all times expect good order and observance not only of the laws of the federal government, but of the laws which shall be enacted by your legislature, that we may realize a certain protection to our property and our persons . . . .[82]

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[79] O. Lewis, Sagebrush Casinos 53 (1953).

[80] Elliott at 65.

[81] Act of March 2, 1861, ch. 83, 12 Stat. 209.

[82] Mack at 223.

In August 1861, the first territorial elections were held, and in his first speech to the representatives two months later, Nye left no doubt as to where he stood on the gambling issue. "Of all the seductive devices extant," he said, "I regard that of gambling as the worst." He continued:

> It holds out allurements hard to be resisted. It captivates and ensnares the young, blunts all the moral sensibilities and ends in utter ruin. The thousand monuments that are reared along this pathway of ruin, demand at your hands all the protection the law can give.[83]

(2) First sanctions against gambling

Following this lead, the legislature passed a broad statute banning all forms of gambling a month later. Violators were guilty of a felony and could be imprisoned for two years and fined $5,000. Even those betting on other people's innocent games were subject to six months in prison and a $500 fine, and witnesses who would provide information to a grand or petit jury were immunized from prosecution. As a final incentive, District Attorneys received one hundred dollars for each conviction they could obtain.[84]

Despite such attractions for enforcement, convictions under the act were virtually nonexistent. Gambling was as much a part of the Nevada lifestyle as were the mines, and no group of representatives in Carson City managed to change this phenomenon solely by the passage of legislation. In fact,

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[83] Elliott at 72.

[84] Act of Nov. 25, 1861, ch. 25, [1861] Nev. Laws 53.

the gambling law was only one of a number of territorial statutes that were passed at the behest of Governor Nye and then cheerfully ignored by Nevada's citizens, who simply went about their business as usual. The territorial legislature, for example, also passed a strict blue law, prohibiting persons from ". . . keep[ing] open any playhouse or theater, race ground, cockpit, or play at any game of chance for gain, or engag[ing] in any noisy amusement, on the first day of the week, commonly called the Lord's Day."[85] While Sunday was observed by the Mormons in the mining towns, it was a day off from work and was traditionally spent in raucous pursuit of "noisy amusement." The blue law, of course, was widely ignored.

Outraged at the citizens' casual indifference to his laws, Nye continually demanded that the national government give more attention to chaotic conditions in the territory.[86] Congress, however, was in the midst of a war, and so long as Nevada remained loyal to the Union, Congress had no time for Nye's complaints.

It was the Civil War, in fact, which set the stage for Nevada's entrance into the Union. By 1864, it had become obvious to President Lincoln and the Republican leaders in Congress that two more votes would be needed in the Senate to muster the two-thirds majority necessary to pass the Thirteenth

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[85]Act of Nov. 21, 1861, ch. 18, [1861] Nev. Laws 39.

[86]Mack at 247. See, e.g., H. R. Jour., 37th Cong., 2d Sess. 486 (1861-62); S. Doc. No. 36, 37th Cong., 2d Sess. 28 (1861-62).

Amendment. Further, it appeared to Republican politicians that the election of 1864 might be very close, and they were eager to have another Republican state in their column, particularly if the election were thrown into the House of Representatives. Reversing its stand of less than a year before,[87] Congress took only six weeks to pass the statehood bill and have it signed by the President.[88] In July of 1864, the Nevada Constitution, its first and only basic charter, was written. The voters approved it in September, and in October, President Lincoln declared Nevada a state,[89] just in time for the November election.

b. The formative era: 1864 to 1910

Although Carson City was humming with political activity as Nevada entered its first decades of statehood, the real pulse of the new state's life was a few miles to the northeast on the slopes of Sun Mountain. There, the state's gold miners were busy devising methods to extract and refine the silver and gold of Comstock. Their success meant that Comstock, gold mining, and the lifestyle that went with it all were to dominate the history of Nevada for years to come.

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[87] In 1863, Nye had attempted to get Congress to pass a bill authorizing Nevada's statehood, but the attempt failed. Elliott at 78; Driggs at 14.

[88] Act of March 21, 1864, ch. 36, 13 Stat. 30. See generally J. Taylor, Nevada: The Gamble Lincoln Won (1964).

[89] This was a departure from the usual procedure, under which Congress would have had to ratify the new state constitution. Because of the time element in the Nevada case, Congress provided in the enabling act that the President would have the power of ratification.

(1) More realistic sanctions

At its first session, the new Nevada legislature, more cognizant of the realities of Nevada life than its territorial predecessor, repealed the strict 1861 anti-gambling statute and substituted a new law that was far milder. Operators of gambling places were made guilty only of misdemeanors, could be fined not more than five hundred dollars, and could be jailed only on default of payment, and, in any case, for not more than six months.[90] In essence, local gambling establishments were free to pursue their business as they pleased, subject only to an occasional minimal fine from the local district attorney, who was to keep one fourth for himself and give the rest to the state treasury and the county's hospital fund.[91]

(2) Legalization

Five years later, the Nevada legislature legalized gambling altogether. Governor Blasdel, a former mining businessman, a Republican, and a political ally of (now Senator) Nye,[92] vigorously denounced the move, but the legislature passed it over his veto.[93] The new law provided

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[90]Act of Feb. 23, 1865, ch. 53, [1864-65] Nev. Laws 169.

[91]Id. §2.

[92]1 Dictionary of American Biography 358-59 (1964).

[93]See [1869] Nev. Laws 120-21. See also Elliott at 248. The proponents of the 1869 act, oddly enough, argued that to legalize gambling would be to kill it. A portion of the Assembly committee report on the bill indicated that:

that gambling establishments would be required to purchase a license every three months, at a fee ranging from $250 to $500, depending on the size of the county. Such licenses protected the licensee ". . . against any criminal prosecution for dealing or carrying on the game . . . during said three months," so long as the license did not authorize gambling ". . . in the front room of the first or ground floor of any building." Other provisions barred the participation of persons under 17 years of age and prohibited individual communities from banning gambling as long as it was licensed

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Fn. 93 cont.

> Experience has fully demonstrated that prohibitory laws . . . are but a dead letter and defied with impunity by the votaries of this vice, and your committee believes that no act prohibiting this vice can in any manner be made effectual; . . . If, therefore, the votaries of this vice will, in defiance of all laws, openly and persistently practice the same . . . they, for the carrying on of such business, should be compelled to pay a license which would aid materially in the support of the government which protects them as other citizens in all their legal rights.
>
> . . . The passage of this bill will, in our judgment, operate beneficially to our state, both morally and financially.
>
> But very few, if any will be able or willing to pay the heavy license required, and the practicable result will be: to close once and forever hundreds of low dens and "dead falls" which now disgrace our principal towns; . . . we trust that . . . a fear that it may legalize and make respectable the profession of gambling, will not be held sufficient to justify the defeat of the only measure which can possibly reach this vice.

See Gaming Control Board, Legalized Gambling in Nevada: Its History, Economics and Control 7 (2d rev. ed. 1970) [hereinafter cited as Legalized Gambling in Nevada].

under the act.[94]

Gambling proponents at the time believed that legalization would strangle gambling. As an Assembly Committee Report stated:

> But very few, if any, will be able or willing to pay the heavy license required, and the practicable result will be: to close once and forever hundreds of low dens and deadfalls which now disgrace our principal towns.[95]

As the law went into effect, however, gamblers happily moved to the back rooms. Leaving their children behind, Nevada's familiar gamblers pursued their avocation with vigor. Although there are no accurate records to indicate the total daily or annual take of the mining town gambling houses, it is unlikely that many of the barroom casinos were put out of business by the licensing fees.[96] Payment became even easier two years later, when the fee was reduced to $75 or $100, with an even cheaper rate for quarterly licensees.[97]

Gambling in Nevada in the late decades of the nineteenth century should be distinguished from the quite different types of gambling which took place in New York, Washington, Denver, Kansas City, and San Francisco. In those cities, gambling was truly big-time: the upper classes, rather than the everyday workers, were known for gambling. Lush carpeting and

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[94]Act of March 4, 1869, ch. 71, [1869] Nev. Laws 119.

[95]Testimony by Philip P. Hanifin, Chairman of the Gaming Control Board, State of Nevada, Before the National Commission on the Review of the National Policy Toward Gambling, Mon. Aug. 18, 1975.

[96]H. Asbury, Sucker's Progress 351 (1969) [hereinafter cited as Asbury].

[97]Act of March 2, 1871, ch. 47, [1871] Nev. Laws 107.

glittering chandeliers decorated the fancier gambling houses, while the bets ranged into the thousands of dollars and fortunes were shoved back and forth across the green felt tables every night. Gambling in Nevada, on the other hand, was a quite different story. In the mining towns such as Silver City and Virginia City, gambling took place in the back rooms of the local saloons. In very few establishments was gambling the sole or even principal business; the typical gambling room was adjunct to a saloon, dance hall, or bordello. The floors above often constituted a hotel or rooming house. More often than not, there was a one- or two-dollar limit on the poker games; most bets were twenty-five cents to one dollar. Seldom did the room contain more than a single faro layout, a roulette wheel, a three-card monte pitch, and a few poker tables. A bet of $100 in faro was enough to attract the entire crowd's attention, and when someone risked $1000 on a single turn, it was talked about throughout the area.[98]

It was precisely this small-time nature of Nevada gambling which made stories of big winnings seem so glamorous. There were occasional episodes which were told up and down the streets in a hundred towns, and true gambling fanatics savored them like vintage wine. An historian of small-time Goldfield gambling, for example, reported the following:

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[98]Asbury at 351.

> I think it was at the Mohawk where a roughly dressed bozo swaggered up to the faro bank layout, which showed a $10-$20 or maybe $25-$50 limit. In faro bank a deck of cards is placed in a case from which the cards are pushed one at a time through a horizontal slot, exposing two new cards with each play. One card wins and one loses. You can play a card to win or you can place a thing called a "copper" on your bet and play the card to lose.
>
> . . .
>
> Anyhow, this trampy looking character ambles up to the faro bank with an insolent, "What's your limit?" when the limit was clearly shown by the sign on the wall.
>
> If the dealer had looked above the baggy pants, held by a belt that left an insecure sag below the paunch, he'd have seen a blue flannel shirt with a hole over the navel. But the dealer looked down his nose at the character and answered sarcastically, "I'll turn for anything you've got on you."
>
> The man tossed a crumpled bill on the high card. The dealer turned two cards and the high card won. When he unfolded the bill, he screamed foul. It was a thousand-dollar bill. After a hassle the house paid off. The dealer had said, "I'll turn for anything you've got on you."[99]

The "tramp" turned out to be Walter Scott, a famous Nevada gambler known as "Death Valley Scott," in one of his many grandstand plays.

Another story concerned a rare no-limit game in the small town of Ely, northeast of Goldfield, where a stranger laid a thousand dollar bill on number seventeen in roulette. Seventeen won and the dealer piled the winnings on the table. The gambler took a long look at his $36,000 and said, "Let

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[99]E. Arnold, Gold-Camp Drifter 56 (1973) [hereinafter cited as Arnold].

her ride." The house, however, refused to roll for it. It could stand to lose $35,000, but not 35 times $36,000, which would be $1,200,000.[1]

The popularity of such tales, however, demonstrates something about Nevada gambling in reverse: the working people, betting their few nickels and dollars, were the vast majority of Nevada's gamblers. What was unique about Nevada's gambling was not the size of the bets, but the sheer number of people playing.

> Next to mining, gambling was the biggest business and wenching was the favorite pastime. People gambled on where the next fly would light, whether the next female passerby would be blonde or brunette, who could spit a stream of tobacco juice farthest and straightest--Arkansawyers barred--and a jillion other screwball bets.[2]

With the exception of the Gentry and Crittenden house in Virginia City, which ranked with the fancy establishments of the East, gambling in Nevada was small-time but pervasive.

(3) Regulatory statutes

The closing decades of the nineteenth century saw a fair amount of legislative action in the gambling field. Statutes were enacted to deal with the punishment for failing to procure a license,[3] the amount of the license fee,[4] the duty

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[1] Id. at 73.

[2] Id. at 55.

[3] Act of March 4, 1875, ch. 68, §1, [1875] Nev. Laws 128 (fine raised to between $1,000 and $3,000; imprisonment from three months to one year).

[4] Id. §2 ($400 per quarter); Act of Feb. 28, 1877, ch. 57, §1, [1877] Nev. Laws 94-95 ($250 or $400 per quarter, depending on the size of the county); Act of March 8, 1879, ch. 110, §4, [1879] Nev. Laws 114-15 ($100 for the first month, $75 for each month thereafter).

of sheriffs to enforce the licensing law,[5] the prohibition of minors from gambling,[6] places in which gambling business could be conducted,[7] the rights of debtors to gamble,[8] and the times for opening and closing of gambling houses.[9] In general, however, the statutory scheme remained largely unchanged in its major focus, and compliance was a simple matter. Enforcement problems and related cases were rare.

In 1873, a case did come up under the 1861 territorial statute banning gambling on Sunday. The convicted defendant brought a habeas corpus action challenging the validity of the blue law in light of the 1869 legalization of gambling. His petition, however, was dismissed by the Nevada Supreme

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[5]Act of March 4, 1875, ch. 68, §4, [1875] Nev. Laws 128-29.

[6]Id. §3, at 128 (persons under 21 not allowed to gamble); Act of March 19, 1897, ch. 95, §1 [1897] Nev. Laws 111 (giving parent or guardian of minor a civil action for damages against the proprietor of a saloon or gambling house).

[7]Act of Feb. 28, 1877, ch. 57, §2, [1877] Nev. Laws 95, and Act of March 8, 1879, ch. 110, §7, [1879] Nev. Laws 116 (gambling prohibited on the first floor unless the city is in a small county, in which case gambling can be conducted in the back room on the first floor); Act of Feb. 23, 1893, ch. 42, §1, [1893] Nev. Laws 36 (prohibiting gambling on the first floor of any building).

[8]Act of March 5, 1877, ch. 103, [1877] Nev. Laws 173 (denying debtors and persons with wives and dependent minor children the right to gamble. Family members given the right to notify local gambling proprietors of the fact, and gamblers who win money from such persons deemed guilty of a misdemeanor).

[9]Act of March 6, 1889, ch. 72, [1889] Nev. Laws 71 (establishing that gambling places shall not open for business before 6:00 a.m. and shall not close later than midnight).

Court, since habeas corpus is not a writ of error thus the decision of the lower court concerning the validity of the statute could not be examined at the appellate level.[10]

(4) Constitutional prohibition of lotteries

Two cases were decided in the 1870's and 1880's regarding Nevada's constitutional prohibition against lotteries, which was typical of these Western provisions taken from Eastern documents. Ever since the constitutional conventions of 1863 and 1864,[11] the state's constitution had contained the following section:

> No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed.[12]

Several years later, Nevada's legislature passed "An act to prohibit lotteries" in furtherance of the section,[13] but this was apparently forgotten, for in 1871 and 1881 the Nevada Benevolent Association was authorized to conduct raffles and

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[10] Ex Parte Winston, 9 Nev. 71 (1873).

[11] A constitutional convention was held in Nevada in 1863 and drafted a state constitution which was rejected by both the state's voters and the federal government. Elliott at 77-84. When the Nevada statehood movement succeeded a year later, however, the 1863 constitution provided the foundation for the 1864 constitution. See A. Marsh, Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada (1866) [hereinafter cited as Marsh].

[12] The provision, which is contained in Art. IV, was adopted from the 1863 constitution without debate. Marsh at 152. The lack of debate is some evidence that the provision did not reflect local sentiment but represented one lawyer copying the work of another.

[13] Act of March 7, 1873, ch. 110, [1873] Nev. Laws 186.

gift concerts. In Ex Parte Blanchard[14] and Nevada v. Overton,[15] the Supreme Court of Nevada declared the raffle laws unconstitutional. There is some evidence, however, that these decisions had little effect on the general attitude regarding lotteries, for they generally sold "like hot cakes," and prospectuses were commonly posted in the windows of jewelry stores, restaurants, and saloons.[16]

(5) Constitutional challenge of licensing scheme

Nevada's general gambling scheme did face one constitutional challenge during these first decades. In State v. Donovan,[17] the operators of a back room faro layout in a Virginia City hotel brought a writ of mandamus to compel the local sheriff to issue them a license. He refused to do so, for the layout was on the hotel's first floor, and the license was therefore prohibited by Section 7 of the 1879 gambling act, which restricted gambling to the upper floors of buildings in counties which polled more than 1,500 votes in the last election.[18] Noting that only one county qualified under this test for the prohibition, the operators charged that the law was in violation of a constitutional provision barring the legislators from passing special or local laws.[19] The

[14]Ex Parte Blanchard, 9 Nev. 101 (1874).

[15]Nevada v. Overton, 16 Nev. 136 (1881).

[16]Weisenburger, "God and Man in Secular City," 14 Nev. Hist. Soc. Q. 3, 6 (summer 1971).

[17]State v. Donovan, 20 Nev. 75, 15 P. 783 (1887).

[18]Act of March 8, 1879, ch. 110, §7, [1879] Nev. Laws 116.

[19]Nev. Const. art. IV, §20. See also id. §21.

court, however, rejected this contention, noting that section 7

> . . . is not limited to such counties only as may have been within the classification at the date of the enactment.
> . . . It is general in its terms and applies uniformly to all counties in the state, and its operation and effect is to be determined by the increase or decrease of the voting population in the respective counties.[20]

The gambling law was never again subjected to a constitutional challenge.

(6) Gambling debts

The question of the contract recovery of an unpaid gambling debt sparked the most gambling-related litigation in Nevada during the nineteenth century. The court, relying on general principles of common law and the Statute of Anne, uniformly held that such debts were not recoverable. In the early case of Scott v. Courtney,[21] a faro player brought an action for unpaid gambling debts of two thousand one hundred dollars. In refusing recovery, the court examined common law cases in which gambling debts were held unrecoverable because of the illegal nature of the transaction, and then faced the question as to whether Nevada's legalization changed the law in this respect. It concluded that it did not:

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[20]20 Nev. at 79, 15 P. at 784.

[21]Scott v. Courtney, 7 Nev. 419 (1872).

> The statute does not pretend to do more than to protect the keepers of public gaming houses from criminal prosecution when a proper license is procured. . . . If the law of this state did not, in express terms, limit the effect of the license, we would not be inclined to place this construction upon it; but its language, it seems to us, is too plain to admit of any other interpretation.[22]

Seizing on this construction, a debtor in the subsequent case of Evans v. Cook[23] used the fact that his debt rose from gambling as an affirmative defense to an action for its recovery. The court upheld the validity of such a defense, noting that English statutes in force at the date of American independence were part of the common law adopted by Nevada, and that the Statute of Anne made promissory notes based on gambling debts ". . . utterly void, frustrate, and of none effect . . . ."[24]

These cases were followed by two others in the early twentieth century, both of which held that certificates of deposit or stocks given as security for a gambling debt were not given subject to a bona fide assignment, since there was no legal consideration for the transfer.[25] In both cases, actions by the assignee to recover on the securities were defeated.

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[22] Id. at 421-22.

[23] Evans v. Cook, 11 Nev. 69 (1876).

[24] 9 Anne c. 14, §1; 4 Bac. Ab. 456; quoted in 11 Nev. at 75.

[25] Burke v. Buck, 31 Nev. 74, 99 P. 1078, (1909); Menardi v. Wacker, 32 Nev. 169, 105 P. 287 (1909).

(7) Boom era

For those with cash, however, gambling flourished until 1910. Despite a serious depression that began in 1880 with the decline of the Comstock Lode,[26] Nevada's gamblers still collected their chips in the back rooms of hundreds of small saloons throughout the state. Then, in 1900, Jim Butler, an occasional miner, discovered new traces of gold and silver in Nevada's southwestern hills. Within months, the hundreds of prospectors who poured into the area matched Butler's discovery with others of their own, and Nevada was once again the object of a great gold rush.[27] Tonopah and Goldfield became the new centers of mining activity, and along with the miners came a revival of the rough-and-tumble lifestyle Nevada had known so well. As one historian reported of Tonopah:

> Cash income in the summer and autumn of 1901 was far greater than a desert town of a few hundred population really needed to maintain itself. Local business boomed. Stores, saloons, blacksmith shops, restaurants, gambling layouts, and other appurtenances of a mining camp sprang up and thrived.
>
> The Brougher brothers started a saloon; Ole Elliott started a saloon; Harry Ramsey started a saloon; Jim Butler started a saloon; Tom Kendall and Jack Carey started a saloon--the Tonopah Club --soon to be most famous of them all. It was to thrive through the prosperous years as the scene of many of the most colorful events incident to the life of a richly producing mining town, and to be the setting of anecdotes that have attained the dignity of legends.[28]

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[26] See Elliott at 170-209.

[27] Id. at 211-12.

[28] C. Glasscock, Gold in Them Hills 39-40 (1932) [hereinafter cited as Glasscock].

One such legend involved a Tonopah gambler by the name of Charley Taylor, who had cleaned up in a big mining deal. He appeared at the Club one day, anxious to test a system he had devised for winning at roulette. The roulette operators, willing to oblige, set up an extra wheel in a private room and a crowd squeezed in to watch. At two o'clock in the afternoon, Taylor bought $5,000 worth of chips and proceeded to systematize. By two o'clock the next morning, he had lost thirty-four thousand dollars. He bought a round of champagne for the crowd and called it a day. "He was the coldest gambler I ever saw," the owner said later. "He never batted an eye or fluttered a hair on a five-thousand-dollar bet, win or lose." Nobody ever figured out his system, but in view of its performance that day, no one ever wanted to.[29]

(8) Cheating and fraud

As the stakes got bigger and the gambling more serious, the larger gambling houses always had to be alert against trickery. A regular morning chore was to examine and weigh the dice, check the edges of the playing cards carefully, and inspect the roulette wheels for tampering or wiring. The paraphernalia had to be kept above suspicion, since any evidence of crooked play would kill the game. In Goldfield, for instance, the word got out that a semi-private club had purchased a fancy ten-thousand-dollar wired roulette wheel. Whether the report was true was inconsequential: the wheel

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[29] Id. at 40-41.

was never set up. No one would have played it.[30]

The Nevada legislature, aware that illegal play was a major threat to one of the state's important pastimes, passed a law in 1879 which made it clear that any gambling licensee

> . . . who shall knowingly or otherwise deal or allow to be dealt any cheating or thieving game, or games known as "hogging games," shall be deemed guilty of a misdemeanor. . . .[31]

To the truly dedicated gambler, however, cheating was as important a part of the game as luck, and to do it with style and sophistication was considered an art. Bert Marland, for example, was one of the most clever dice players in the West. He studied the dice used at famous crap tables and took pains to duplicate them for his own.

> Bert's duplicates would be made and/or loaded to order--busters, six-eight, natural dice, or whatever. The appearance, measurements, and weight would have to be exactly the same as the dice in the game into which the switchmen would introduce them. To make six-eight, natural dice, or busters, he would take unspotted dice and then grind and color only the spots he wanted. To load dice he drilled opposite corners, left one corner empty, and poured in the other corner the quantity of mercury he wanted. Then he sealed them up and colored the proper spots. He could give them everything except proper balance.[32]

He was fond of relating his many high wins in dice, including one in which he won over $10,000 in a bout that started as a casual roll in the men's room at some Midwestern hotel.

Another favorite, of course, was the marked deck of cards.

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[30] Arnold at 79.

[31] Act of March 8, 1879, ch. 110, §11, [1879] Nev. Laws 116.

[32] Arnold at 78.

The aces, kings, queens, jacks and tens could be lightly sandpapered on the edges so as to show different length of markings, even in a dim light, from the right angle. Or a series of small pinholes, to the sharp eye, could show the same thing. The dangerous thing about marked cards, however, was that some cardsharp who was not as drunk as he pretended to be could play along for a while until the perpetrator did not have the cards, and then nail him to the wall.[33]

(9) Speculators and promoters

With the coming of the railroad to Goldfield and Tonopah in 1904,[34] the towns grew considerably in population and their fame spread eastward. One characteristic of Nevada booms was the speculation which accompanied them. Stock promoters and speculators swarmed into town like carpetbaggers and soon attracted hundreds of suckers to their widely publicized, and often fraudulent, schemes.

> Promoters were aided by the almost complete lack of legal regulations to protect investors and by what one writer called "the veritable craze" of the public to invest in mining stock. No news seemed too absurd to be believed in the atmosphere of the time, and the most extravagant claims in mining advertisements and the prospectuses were accepted at face value. Thousands of people throughout the United State pledged their modest means to back various promotional schemes without giving a thought to the most cursory investigation.[35]

The most notorious of these "wildcat" promoters was George

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[33] Id. at 85.

[34] Glasscock at 128; Elliott at 216.

[35] Elliott at 220.

Graham Rice, a New Yorker who came to Nevada in 1904 and made hundreds of thousands of dollars on a variety of schemes.[36]

Publicity was the byword, and promoters such as Rice would do virtually anything to fill the papers with print. On one occasion they lured a well-known author into town and carefully recorded in print her every move. On another they played up the death of a well-known gambler as a major social occasion, and numerous times they descended into the fancier gambling dens themselves to toss as much as $37,000 on a single roll of the dice, according to one report.[37] The most spectacular of the big promotional schemes, however, was the sponsorship of the Gans-Nelson lightweight championship fight in 1906.

A 1903 Nevada statute had been passed to regulate bookmaking on horseraces and prize fights conducted outside the state,[38] but Rice and a promoter named Tex Rickard recognized that they could have a free hand at gambling on prize fights conducted within Nevada. Eyeing the prospective gambling returns, the favorable publicity for Nevada mining towns, and the returns from the fight promotion itself, they chose Goldfield as the most likely spot for the championship bout between Joe Gans and Oscar ("Battling") Nelson. Rice

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[36] Id. at 220-21.

[37] Id. at 221; Glasscock at 224-25.

[38] Act of March 13, 1903, ch. 65, §1, [1903] Nev. Laws 90. Some of the more restrictive provisions of the law were amended by the Act of March 29, 1907, ch. 170, §1, [1907] Nev. Laws 368.

and Rickard put together a $30,000 purse, squelched the chances of other towns with a burst of publicity, and watched with glee as sportswriters and fight fans from throughout the nation flocked to Goldfield with their nickels and dollars. As the date drew near, the streets of Goldfield were jammed ". . . with a holiday crowd of persons from all parts of the country and all walks of life."[39] The fight itself lasted an incredible 42 rounds under the desert sun. Although Nelson, the hero, ended up a loser, Nevada was placed on the sports map of the world, and its bookmaking became an important adjunct to national sports contests of all kinds.

(10) A new liberalization

During the first decade of the nineteenth century, the Nevada legislature appeared to adopt a more liberal attitude toward the gambling which permeated its boom towns. Although it began regulating the slot machine industry for the first time,[40] by 1905, the legislature had repealed all restrictions concerning the operation of gambling rooms on the first floor of buildings[41] and had rescinded statutes regulating the opening and closing hours of saloons and gambling establishments

[39] Glasscock at 227-32.

[40] See Act of Feb. 23, 1901, ch. 13, [1901] Nev. Laws 23 (making it a misdemeanor to own, operate, or play a slot machine); and Act of March 15, 1905, ch. 52, [1905] Nev. Laws 77 (permitting licensing of slot machines, but prohibiting their use in areas where they could be seen from the street and prohibiting minors from playing them).

[41] Act of March 13, 1905, ch. 50, [1905] Nev. Laws 72. A predecessor of this act was the Act of March 13, 1903, c. 70, [1903] Nev. Laws 97.

as well.[42] An additional enactment redirected the funds from gambling licenses to the county or city treasuries.[43] This trend, however, was merely a calm before the storm that was to come. In 1909, reformers swept into the Nevada legislature, and passed a strict act to outlaw gambling of all kinds. The story of that effort, its failure, and the re-establishment of Nevada as the nation's lone outpost of legalized gambling is the story of Nevada's modern era.

c. The Modern era: 1910 to 1975

(1) Turn about: total prohibition

In 1909, Nevada's hundred-year-old attitude about gambling took a turn. Reform spirit was alive in the state, and the legislature, ". . . in the exercise of its powers over the policy and morals of the people,"[44] enacted a comprehensive law prohibiting all forms of gambling.[45]

The 1909 act passed by the Nevada legislature prohibited persons from: (1) conducting "in any capacity whatever" a long list of gambling games (which showed an impressive and detailed knowledge on the part of the Nevada legislature about such vices) for "any representative of value"; (2) conducting games for which the manager received money; (3) playing slot machines; and (4) betting on horseraces. A violator could

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[42]Act of March 7, 1905, ch. 69, [1905] Nev. Laws 97.

[43]Act of March 14, 1907, ch. 80, [1907] Nev. Laws 183.

[44]Ex Parte Pierotti, 43 Nev. 243, 246, 184 P. 209 (1919).

[45]Act of March 24, 1909, ch. 210, [1908-09] Nev. Laws 307.

be imprisoned for up to five years.[46] Persons who knowingly permitted such activities received the same punishment and each day's violation was deemed a separate offense.[47] The gambling devices themselves were subject to two further provisions: one subjected persons having such devices in their possession to as much as a $500 fine and six months in jail, and the other required police and sheriffs to seize and destroy all equipment of which they had knowledge, even if that required them ". . . to break open doors for the purpose of obtaining possession of any such gambling devices. . . ."[48] A final section immunized witnesses testifying about gambling matters.[49]

(2) Enforcement problems

Gambling in Nevada was a criminal offense for two decades, but the spirit of reform faded fast in light of the practicalities. As one author noted:

> The public revenue from licensing was lost, of course, and a sturdy chain of surreptitious joints began to build up that conducted every known skin game, including Chinese lotteries. Eventually there was "protection" and other corruption of political and social life.[50]

In short, criminalization drove Nevada's gamblers underground.

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[46] Act of March 24, 1909, ch. 210, §1, [1908-09] Nev. Laws 307-08.

[47] Id. §2, at 308.

[48] Id. §§3, 4, at 308-09.

[49] Id. §5, at 309.

[50] R. Lillard, Desert Challenge: An Interpretation of Nevada 325 (1942) [hereinafter cited as Lillard].

It was a repeat of the experience of the 1860s, during which gambling had for four years been officially illegal, but, in fact, widespread. Gamblers were still around; they were just more discreet.

Few criminal prosecutions actually arose under the act, and only one reached the Supreme Court of Nevada. In State v. Williams,[51] a Winnemucca gambling house operator challenged his conviction for knowingly permitting gambling on the premises. His appeal was based on various procedural grounds, including the prejudicial predispositions of a grand juror and the fact that in his jury summation, the district attorney had referred to the defendant's failure to take the stand. The Nevada court threw out all of his objections, and upheld the conviction.

One of the reasons that Nevada's citizens tolerated the new gambling law so well was that virtually everyone assumed that it would soon be repealed. In 1911, the legislature did take a step in that direction by legalizing poker, stud-poker, five hundred, solo, and whist (where the deal alternated and no percentage was taken). The ban was also lifted on social games played for drinks, cigars and prizes under two dollars.[52] But, in 1913, gambling with the

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[51]State v. Williams, 35 Nev. 276, 129 P. 317 (1912).

[52]Act of March 17, 1911 concerning crimes and punishments (not printed). See generally Lillard at 325-26.

exception of social games was again outlawed.[53]

(3) Legalization of social gambling

Social gaming was no longer included among prohibited activities under the law passed in 1913. The laws of 1915 carried similar provisions,[54] and the anti-gambling law was expressly made inapplicable to ". . . nickel-in-the-slot machines for the sale of cigars and drinks and no playbacks allowed."[55]

This provision was the subject of a 1919 case. A Reno store manager, convicted under the Nevada anti-lottery statute for having slot machines in his place of business, brought a habeas corpus action to challenge the prosecution's definition of "lottery," since the legislature had explicitly exempted slot machines from Nevada's gambling statutes. In Ex Parte Pierotti[56] the Supreme Court of Nevada granted habeas corpus, noting that

> . . . the legislature of this state, since the date of its organization as a state, has plainly drawn a distinction between lotteries and unlawful gaming.
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> . . .
>
> It is for the legislature, and not the courts, to draw the line of demarcation between the varied kinds. It is not the province of courts to confound by construction what the legislature has made clear.[57]

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[53]Act of March 21, 1913, ch. 149, [1913] Nev. Laws 235.

[54]Act of Feb. 26, 1915, ch. 30, [1915] Nev. Laws 31; Act of March 29, 1915, c. 284, [1915] Nev. Laws 462.

[55]Act of March 29, 1915, ch. 284, [1915] Nev. Laws 462.

[56]Ex Parte Pierotti, 43 Nev. 243, 184 P. 209 (1919).

[57]Id. at 248, 250; 184 P. at 210, 211.

The legislature's slow movements toward legalized gambling were merely the overt signs of what was continually bubbling underneath. Bribes to allow unmolested games, for example, were so widespread that they were considered little more than a form of license.[58] A district attorney in the small town of Ely surprised both the citizenry and the town's other officials when he took the gambling laws seriously and shut down the town's gambling houses. City officials reportedly lost $5,000 a year in potential bribes.[59] Virtually everyone continued to expect that gambling would someday be legalized. In 1922, the Supreme Court of Nevada, for example, decided a case in which the court was asked to interpret a lease which provided that the lessor, a Reno organization, could repossess the premises "if gambling should be legally authorized in this state. . . ."[60] As these and other instances indicated, gambling was "an open secret" throughout the period of illegality.[61]

On January 16, 1920, the Eighteenth Amendment and the

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[58] Lillard at 326.

[59] W. Turner, Gamblers' Money 33-34 (1965) [hereinafter cited as Turner].

[60] Christensen v. Valdemar No. 12, 46 Nev. 150, 152, 208 P. 426 (1922). The lessee argued in the case that the 1915 law permitting some forms of gambling was not the kind of legalization which brought into operation the lease's clause and the court, applying principles of contract construction, agreed.

[61] Lillard at 326. One historian, referring to the decreasing effectiveness of anti-gambling enforcement after 1915, noted that:

Volstead Act took effect, and Nevada, as well as the rest of the nation, was thrown into Prohibition. Nowhere did Prohibition engender respect for law enforcement, but in Nevada, where the laws against the consumption of liquor and gambling existed side-by-side, the effect was even more pronounced.

> The fact that the Nevada gambling prohibition had to be enforced along with the national liquor prohibition did not do much good in Nevada for either law enforcement program. The speakeasies had gambling tables and slot machines. The people who wanted only to gamble or only to drink felt a brotherhood. Both groups, of course, were outnumbered by that mass who wanted to both drink and gamble. One of the byproducts of all this was the creation of a lawlessness in attitude for a whole generation of Americans; and a class of dishonest law enforcement officers and public officeholders such as the nation had never known before.[62]

Knowledge of the speakeasy password entitled a person to enjoy both vices, and disrespect for the law was rampant.

(4) Total legalization

By 1930, the anti-gambling fervor in Nevada was

Fn. 61 cont.

> This patchwork law remained in force for 16 years, during which time it was by all accounts either ignored completely or so feebly enforced as to be worse than useless. Its fatal defect lay in the fact that the games allowed in the licensed houses had little appeal to the gambling public, which accordingly shunned them and patronized instead the numerous undercover resorts that promptly sprang up.
>
> As a result, state and local revenues from license fees declined year by year while the illegal houses multiplied. . .

Legalized Gambling in Nevada at 9-10.

[62] Turner at 31-32.

substantially exhausted. The only residents who strongly opposed gambling were apparently the same upper and middle class women who supported Prohibition, and their support among the citizenry was fading after two decades of experimentation. Talk of gambling legalization became widespread. Even in Carson Valley, a center of the Mormon faith from 1849 to 1957, the traditional anti-gambling position of the Mormons never gained either legislative or enforcement support. Before the January, 1931, legislative session, Democratic and Republican committeewomen of the state called a meeting in Reno to help build legislative support for their position. "We do not legalize murder, highway robbery, or other unlawful practices," one delegate declared, "and we should not legalize gambling." These arguments did not convince the legislature.[63] Nevada's returning frontier spirit, and the legislators' appreciation of the potential economic effects upon a Depression-ridden state, deafened their ears to such pleas.

In early February of 1931, assemblyman Phil Tobin introduced the gambling legalization bill, and it passed through both houses, winning the governor's approval in little over a month.[64] An expectant population whooped with joy, and even before the license forms had been printed, the houses were "thronged with players."[65] Work crews had already been

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[63] Id. at 32-33

[64] Id. at 35-39; Elliott at 278-79. Act of March 19, 1931, ch. 99, [1931] Nev. Laws 165.

[65] Lillard at 326.

employed to renovate the Reno casinos,[66] and retired roulette wheels and crap tables were hastily moved into rented ground-floor rooms. The governor had signed the bill on Thursday, February 19, and, as one historian reports:

> Saturday night, the twenty-first, was a gala society night. Repressed Californians poured into Las Vegas and Reno and Cal-Neva resort, astraddle the state line on Lake Tahoe. In the swanky night clubs and hotels people appeared in fashionable formal dress to celebrate the occasion. In one Reno resort an entertainer imitated a movie premiere by announcing the guests as they arrived. Elsewhere a man gambled for more than thirty-three hours without once leaving his seat. He always had about $3,000 in front of him.[67]

The 1931 Nevada gambler was not, however, of the same breed as the frontier gambler of Nevada's gold mining days. Many persons now interested in gambling might never have participated were it illegal; often they were wealthy visitors from nearby cities in California, to whom Nevada was attractive, not only because of the glamours and excitement of gambling, but also because of the easy marriage and divorce laws.[68] It was not only the rough working-class miners who gambled in Nevada now; it was also the socialite Californians and naive tourists, who came to Nevada seeking extraordinary excitement and unusual experiences.

The gambling scheme established by the Nevada Legislature in 1931 was strikingly similar to that which prevailed in the

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[66] Elliott at 279.

[67] Lillard at 326.

[68] Elliott at 279.

state prior to 1910, though it has changed considerably in recent years. Business gambling was subject to licensing as before, with licenses issued by the county sheriff.[69] For a fee of $10 for slot machines, $25 for poker and card games, and $50 for other games, a gambling house operator was protected from prosecution for three months.[70] The fees collected were split between the city, county, and state treasuries.[71] As further measures, the act resurrected the previous ban on gambling by persons under 21 and provided that licenses must be posted in plain view.[72] Violators of the essential sections were guilty of a misdemeanor and subject to six months in prison and up to a $1,000 fine.[73] Only one case arose under the act during the first few years of decriminalization, and that case merely established that a city could properly exercise licensing discretion by refusing to issue a gambling license for moral and civic reasons to an applicant who was otherwise qualified.[74]

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[69]Act of March 19, 1931, ch.99, §§1, 2, [1931] Nev. Laws 165-66. The act also provided that no alien could procure a license, and required that the license contain descriptions of the premises and the games played.

[70]Id. §2.

[71]Id. §5, at 167.

[72]Id. §§12, 13a, at 168-69.

[73]Id. §11, at 168.

[74]State ex rel. Grimes v. Board of Comm'rs, 53 Nev. 364, 1 P.2d 570 (1931).

(5) Regulatory statutes

In the decades following decriminalization, the Nevada legislature frequently passed laws concerning such matters as the license fee for slot machines,[75] the punishment for non-licensed gambling,[76] the dissemination of horseracing information,[77] the preparation of gambling licenses,[78] and the outlawing of dogracing.[79] Among its more important acts were the establishment of a State Racing Commission in 1943[80] and in 1945, for the first time, the imposition of a tax on gambling.[81] Despite the flurry of legislative activity, however, legalized gambling in the 1930's and 1940's did not have the social and political fame which was to come later.

Until the post-World War II years, gambling was viewed by

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[75]Act of March 20, 1939, ch. 93, [1939] Nev. Laws 95.

[76]Act of March 17, 1941, ch. 57, [1941] Nev. Laws 64 (passed over veto of governor).

[77]Act of March 28, 1941, ch. 134, [1941] Nev. Laws 313.

[78]Act of March 31, 1947, ch. 196, [1947] Nev. Laws 665.

[79]Act of March 22, 1949, ch. 108, [1949] Nev. Laws 143.

[80]Act of March 13, 1943, ch. 80, [1943] Nev. Laws 105.

[81]Act of March 28, 1945, ch. 248, [1945] Nev. Laws 492. The taxation bill became law without the signature of Governor Carville, who relayed to the Nevada legislature his opinion that the act ". . . [imposed] on the gambling business a type of tax which the State of Nevada has avoided in the past as a matter of policy." See [1945] Nev. Laws 495-96.

The original Nevada Gambling tax was one percent of the operation's total revenue; in 1947, the rate was increased to two percent (Act of March 31, 1947, ch. 223, [1947] Nev. Laws 734) and has been changed several times since. Taxation of Nevada casinos is now based on a sliding scale formula whereby casinos with higher gross revenues pay a higher tax rate. Legalized Gambling in Nevada at 19.

Nevada's citizens as simply another business. Reno and Las Vegas were already established as the principal gambling centers, since each could draw on major California population districts for a steady tourist trade,[82] but even in those cities there was none of the sensational atmosphere which danced in the imaginations of citizens throughout the rest of the country. As one author noted in 1942:

> Men and women gamble in the "clubs" at any time of the night or day . . . Nearly all the clubs are on the street level. From the sidewalks you looks [sic] through large uncovered windows to the brighly lighted interiors. The general atmosphere is that of any legitimate business patronized by the general public . . . .
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> There are not steerers or criers. Visitors are never urged to play, and are at liberty to look on or linger. Women receive normal courtesies. No drinking is allowed except at the bar. The crowds are quieter than shoppers in a department store. They are as quiet as church congregations. They are serious, concentrating. Only some stray extrovert pretends to be having a hilarious time.[83]

(6) Nevada gambling as a national attraction: The invasion of organized crime

The first stirrings of what was to be Nevada's big entertainment industry occurred in 1941. An enterprising casino owner in Elko, Nevada surprised the gambling industry by paying $12,000 to Ted Lewis and his orchestra for an eight-day engagement at the Commercial Hotel. The crowds gathered each night of their performance proved the soundness of the

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[82] Elliott at 314.

[83] Lillard at 321-22.

plan. Soon casino owners in Reno and Las Vegas were imitating the innovation, and as new casinos opened throughout the 1940s, it became common for a big-name entertainer to be on hand to preside over the festivities.[84] Major hotel developers from throughout the country soon began to build entertainment complexes on the outskirts of Las Vegas in an area which has become known as the "Strip." Thomas E. Hull from California built the Hotel El Rancho Vegas and R. E. Griffith, a Texas theater owner, constructed the Hotel Last Frontier.[85] It was not until 1946, however, that Benjamin ("Bugsy") Siegel built the fabulous Flamingo Hotel and changed Nevada gambling history.

"Bugsy" Siegel was born in 1906 in a dilapidated, crime-infested tenement in Brooklyn. From his early teenage days on, he was a New York hoodlum of the first order.[86] By the time of Prohibition, New York City crime was dominated by two large gangs and Siegel, along with Meyer Lansky, was at the head of one of them. He was perhaps best known for his operation of Murder, Inc. By 1937, however, Siegel was tired of the New York gangland lifestyle. He had always admired the glamours of high society, and he wished to move from New York

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[84] Elliott at 314-15.

[85] Id. at 315.

[86] Of the several sensationalist accounts of the life of "Bugsy" Siegel, the best is D. Jennings, We Only Kill Each Other (1967) [hereinafter cited as Jennings]. Jennings discusses Siegel's early career at 24-39. See also E. Reid and O. Demaris, The Green Felt Jungle 15-29 (1963) [hereinafter cited as Reid and Demaris].

and better himself. About this same time, the New York City mob decided that it should expand its operations in California. Siegel leaped at the chance to fulfill both expectations, and eagerly made the move to Beverly Hills and Los Angeles Hollywood society.[87] For the next eight years, he enjoyed both a racketeering income and respectable movie-star friends as he solidified the connections of organized crime in Los Angeles. During this same period, he also became an inveterate gambler.

"The Bug," a New York gambler once said, "was always a sucker for an exciting long-shot bet." He frequently bet on horseraces, invested in gambling rooms at Rodondo Beach, and at least claimed that a large portion of his income came from bets on horseraces, professional sporting events, and an occasional election. His meticulous record of daily bets revealed a winning percentage so high that the conclusion that most of the contests were fixed is almost unavoidable.[88] When Siegel suffered an embarrassing indictment for bookmaking in 1945,[89] he began to feel that he should move away from the Los Angeles police department. The attractions of Nevada's

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[87] Jennings at 39-40; Reid and Demaris at 17-18.

[88] Jennings at 51, 106.

[89] Id. at 142-43. Siegel pleaded guilty to the bookmaking charge in a plea bargain in which a felony count of conspiracy was dropped. Earlier, in 1940, Siegel had been indicted for murder but the charge was dismissed when key witnesses were unable to travel to California for the trial. Id. at 120-21.

legalized gambling were too strong to resist. Bugsy intended to become legitimate, he said, so legitimate that ". . . no FBI man can ever as much as lay a finger on my shoulder."[90]

Siegel's dream was to build the largest and most luxurious gambling casino in the world, and he invested his entire fortune and millions of dollars in loans to build what he called the "fabulous" Flamingo. Although the hotel's opening was a dismal failure and it suffered losses in its initial months of existence, by mid-1947 it was operating in the black. Siegel had at last brought really big-time gambling to Nevada, and he was perhaps at the height of his career when he was shot to death while reading the evening paper in the living room of his mistress' Beverly Hills mansion. The killing was widely attributed to members of the new Las Vegas mob who wanted control of the successful Flamingo.[91]

The death of "Bugsy" Siegel did not mean the end of organized criminal involvement in Las Vegas; on the contrary, it was more of a beginning. In the late 1940's, a group of notorious Cleveland criminals joined with Wilbur Clark, a Las Vegas impresario, to build the Desert Inn, which has become as much a haven for Mafia members as the Flamingo.[92] In the 1950's, several multi-millionaire gangsters with

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[90] Reid and Demaris at 20.

[91] Jennings at 205; Reid and Demaris at 28-29. See also E. Kefauver, Crime in America 235 (1951) [hereinafter cited as Kefauver].

[92] Reid and Demaris at 53-61.

Capone-gang connections put up the money for construction of the Stardust, still the world's largest resort hotel.[93] Even the notorious Frank Costello was discovered to have had considerable interest in the Tropicana hotel in the years following World War II.[94]

During this period, Mafia activities took the old-fashioned gangland style developed in the East. As Hank Greenspan, editor and publisher of the Las Vegas Sun, recently recollected--

> We have seen these things happen in Las Vegas--men have suddenly disappeared--they are shot in parking lots--lives have been threatened. Some of our biggest hotels have been "taken off" through this method, and those pit bosses who refuse to go along get visits in the middle of the night from men with shotguns.[95]

(7) The Kefauver Committee

All of this did not go unnoticed, either in Nevada or in the country at large. In May of 1950, the United States Senate authorized the creation of the Special Senate Committee to Investigate Organized Crime in Interstate Commerce, and the Committee with Senator Estes Kefauver as its chairman, took testimony in various cities throughout the United States. At Las Vegas, delving into the history of "Bugsy" Siegel and other gambling impresarios with criminal records, the Committee

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[93] Id. at 61-69.

[94] Id. at 69-70.

[95] Remarks of H. M. Greenspun before The Commission on the Review of the National Policy Toward Gambling, Aug. 4, 1975.

found an alarming "alliance of gamblers, gangsters, and government. . . ."[96] Racketeers from New York, Cleveland, California, Michigan, Dallas and other crime centers were found to have controlling interests in many of Nevada's largest casinos. The state's lieutenant governor was a partner in the Pioneer Club, the Golden Nugget, and other gambling operations. Even members of the Nevada Tax Commission were partial owners of some of the casinos owned by racketeers. The Committee's report observed:

> The profits which have been taken from gambling operations are far greater than those which can be earned quickly in any other business. The availability of huge sums of cash and the incentive to control political action result in gamblers and racketeers too often taking part in government.
>
> [W]here gambling receives a cloak of respectability through legalization, there is no weapon which can be used to keep the gamblers and their money out of politics.[97]

"As a case history of legalized gambling," the Committee concluded, "Nevada speaks eloquently in the negative."[98]

(8) Attempts to control organized crime

Nevada did take some early measures to eliminate criminal influences from the gambling and entertainment industry, but none proved very effective. In 1949, the legislature authorized the Nevada State Tax Commission, which issued gambling licenses for taxation purposes, to obtain ". . .

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[96]Senate Special Committee to Investigate Organized Crime in Interstate Commerce, Interim Report, S. Rep. No. 2370, 81st Cong., 2d Sess. 93 (1950) [hereinafter cited as The Kefauver Committee Report].

[97]Id. at 93.

[98]Id. at 94.

information concerning applicants' antecedents, habits and character. . ." and to deny licenses to applicants if it found, on the basis of such information, that the issuance of a license would not be "in the public interest."[99] The law was thought to grant power to the Tax Commission to deny licenses to those with underworld connections, but in fact, the power was ineffective. Although the commission did deny licenses to a few known racketeers,[1] it made no attempt to eliminate undesirable persons who had been operating in the state before 1949.[2] Further, some gangsters simply evaded the problem by leasing their casinos to holding companies, which then applied for the license.[3]

Other laws passed by the Nevada legislature declared dograces to be public nuisances,[4] licensed bookmaking on horseraces,[5] established a state racing commission to oversee

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[99]Act of March 19, 1949, ch. 93, §4, [1949] Nev. Laws 116-17. The measure was passed in response to fears by the state's attorney general that involvement of racketeers in the state's wire service operations, which dated from the "Bugsy" Siegel days, would lead to gangland warfare in Nevada. The Kefauver Committee Report at 92.

[1]Reid and Demaris at 65, 67.

[2]The Kefauver Committee Report at 91. See also Kefauver at 233-34.

[3]Reid and Demaris at 67. Senator Kefauver also criticized the Nevada Tax Commission for having members with blatant conflicts of interest. One William J. Moore, for example, had substantial interests in the Last Frontier Hotel and once granted himself a favorable wire service rate while a member of the Commission. Kefauver at 232.

[4]Act of March 22, 1949, ch. 108, [1949] Nev. Laws 143.

[5]Act of March 26, 1949, ch. 152, [1949] Nev. Laws 326

regulation of horseracing,[6] licensed parimutuel betting in the state,[7] and provided stiff penalties for the use of loaded dice or marked cards.[8] The law authorizing Tax Commission investigations into the histories of prospective licensees was amended and stiffened twice.[9] The overall attitude toward gambling, however, was unchanged. In 1951, when the United States Congress banned the transportation of gambling devices in interstate commerce,[10] Nevada promptly passed a law exempting itself from the act.[11]

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[6]Act of March 28, 1949, ch. 195, [1949] Nev. Laws 416. See also Act of March 23, 1951, ch. 321, [1951] Nev. Laws 532.

[7]Act of March 29, 1949, ch. 231, [1949] Nev. Laws 507, as amended, Act of March 23, 1951, ch. 322, [1951] Nev. Laws 538.

[8]Act of March 21, 1951, ch. 239, [1951] Nev. Laws 358, as amended Act of Feb. 23, 1955, 10, [1954-55] Nev. Laws 13.

[9]Act of March 20, 1951, ch. 208, [1951] Nev. Laws 315 (providing a special fund out of which investigation expenses could be paid), and Act of March 27, 1953, ch. 284, §3, [1953] Nev. Laws 440-41 (barring persons convicted of any of a long list of crimes from receiving a gambling license).

[10]Act of Jan. 2, 1951, ch. 1194, §2, 64 Stat. 1134 (now codified as 15 U.S.C. §1172).

[11]Act of March 15, 1951, ch. 97, [1951] Nev. Laws 113. The Federal act had provided that any state could exempt itself from the law. A recent Federal case, incidentally, held that where a licensed Nevada bookmaker violated non-penal regulations of the Nevada Gaming Commission the transgression was not "a violation of the law of a state" which could give rise to a Federal prosecution under 18 U.S.C. §1955, which makes state gambling violations Federal crimes as well. United States v. Gordon, 464 F.2d. 357 (9th Cir. 1972). It seems, therefore, that the Ninth Circuit, which entertains claims from Nevada in the Federal courts, is not apt to read Federal anti-gambling statutes strictly when faced with duly licensed gambling activity in Nevada.

In 1955, the State Gaming Control Board was created to act as the enforcement and investigative unit of the Tax Commission.[12] Declaring it the policy of the state that ". . . all establishments where gambling games are conducted. . . shall be licensed and controlled so as to better protect the public health, safety, morals, good order and general welfare," the legislature empowered the board to investigate license applicants and to recommend action to the Tax Commission.[13] A detailed statute governed its organization and procedures. Four years later, the legislature, recognizing that the work of supervising gambling licenses was still overburdening the Tax Commission, created the separate Nevada Gaming Commission to assume the licensing and taxation function.[14] The new commission was given powers virtually identical to those already possessed by the Tax Commission and its adjunct, the Gaming Control Board.

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[12]Act of March 29, 1955, ch. 429, [1954-55] Nev. Laws 883. This action followed a series of revelations in the Las Vegas Sun spotlighting the involvement of Las Vegas gamblers in Nevada politics, and the subsequent hard stance toward strict gambling regulation taken by then Governor Russell. See Elliott at 329.

[13]Act of March 29, 1955, ch. 429, §§13-21 at 887-91. The act specified that gambling licenses were a "revocable privilege" and that "no holder thereof shall be deemed to have acquired any vested rights therein or thereunder," §13, and attempted to close a licensing loophole by providing that no corporation or "assocation of a quasi-corporate character" should be granted a license, §17(2). This provision, however was changed in 1967. Act of April 26, 1967, ch. 534, §§1, 3, [1967] Nev. Laws 1585-86.

[14]Act of March 30, 1959, ch. 318, [1958-59] Nev. Laws 427.

(9) Judicial action vs. organized crime

In the decade following 1949, the Supreme Court of Nevada considered nearly one gambling-related case a year, but only three concerned the licensing of gambling operators. In 1953, a Reno restaurant owner brought a case before the court, challenging the city's refusal to license his proposed gambling establishment.[15] The area of Reno in which his casino would have operated was already dominated by a number of gambling businesses. The city council had denied his application because of its belief that "it would not be in the best interests of the community" to permit gambling to saturate the area. The court held that this was a reasonable exercise of authority:

> [I]t is within the discretionary powers of the governing municipal board to balance these public and private interests against each other in determining the proper course and method of regulation. We may not, then, question a determination in favor of what is deemed to be the paramount public interest so long as the action taken be not arbitrary or discriminatory.[16]

Since the action at hand was neither arbitrary nor discriminatory, having a basis in fact, the court affirmed the denial.

Not until 1957 did Nevada's Supreme Court deal with the question of criminal involvement in the state's gambling

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[15]Primm v. City of Reno, 70 Nev. 7, 252 P.2d 835 (1953). The charter of the city of Reno includes authorization for the city council, as well as the appropriate state agency, to license liquor and gambling establishments.

[16]Id. at 14, 252 P.2d at 838.

business. When it did, however, it dealt with it in depth.[17] The case involved the suspension of gambling licenses held by persons whom the Tax Commission thought to be "unsuitable" because of their suspected association with several known figures in organized crime, including Meyer Lansky. The suspended licensees attacked the order on the administrative law ground that the Commission's finding was not supported by substantial evidence. Taking judicial notice of the interplay between crime and the business of gambling, the court in Nevada Tax Commission v. Hicks seized the opportunity to discuss in detail the Nevada licensing scheme. Unlawful gambling in other states, the court noted,

> . . . tends . . . to create as well as to attract a criminal element . . . [which] . . . tend[s] to organize and thus obtain widespread power and control over corruptive criminal enterprises throughout this country; . . . .
>
> . . .
>
> For gambling to take its place as a lawful enterprise in Nevada it is not enough that this state has named it lawful. We have but offered it the opportunity for lawful existence. The offer is a risky one, not only for the people of this state, but for the entire nation. Organized crime must not be given refuge here through the legitimatizing of one of its principal sources of income. Nevada gambling, if it is to succeed as a lawful enterprise, must be free from the criminal and corruptive taint acquired by gambling beyond our borders. If this is to be accomplished not only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutinized.[18]

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[17]Nevada Tax Commission v. Hicks, 73 Nev. 115, 310 P.2d 852 (1957).

[18]Id. at 119, 310 P.2d at 854.

The duty of the Nevada Tax Commission, therefore, was to bear that responsibility. The court noted that when the Commission determined "suitability" to engage in Nevada gambling, it acted administratively and thus its determination was not judicially reviewable unless arbitrary, discriminatory, capricious, or beyond the sphere of its authority. Where it applied an arbitrary standard to a particular case, however, its action was quasi-judicial and thus could be reviewed by a court to determine whether the decision was supported by "substantial evidence."[19] The Commission's position was that the licensees' failure to report a number of underworld-connected loans which had been made to an associated corporation running the Bonanza Hotel was a violation of Commission rules. This conduct made the licensees "unsuitable" for involvement in the gambling business. The court, however, noted that the partnership engaged in gambling was distinct from the Bonanza Hotel corporation, and that the failure to report was therefore no violation of the rules. Since this was the apparent basis of the "unsuitability" determination, and since other charges had insufficient evidentiary support, the court reversed the commission's decision and affirmed an

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[19] Id. at 121, 310 P.2d at 855. The "substantial evidence" test for the validity of administrative actions is broadly applied to a number of agencies in a number of different situations. The test was clarified and defined in the late 1930's by Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938) and NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292 (1939). It was continued and codified in the Administrative Procedure Act, ch. 324, §10(e)(5), 60 Stat. 237, approved in 1946. See generally 4 K. Davis, Administrative Law Treatise §§29-01 to 03 (1958).

earlier judgment setting aside the suspension order.

While the Hicks case was decided against the licensing agency on technical grounds, the court specifically left open the question as to whether a licensee's "[association] with a man who ha[s] undesirable social or business connections" was sufficient ground for a finding of "unsuitability."[20] No decision on the point has yet been rendered, but subsequent events seemed to indicate that such ground would be sufficient: later that year, the Gaming Control Board successfully removed one racketeer from the industry who was found to have connections with New York's Frank Costello.[21] A later case, moreover, firmly established that involvement in cheating was a sufficient ground for removal from the industry. In Nevada Tax Commission v. Mackie,[22] the court held that substantial evidence supported the Commission's determination that the licensee had cheated in certain card games at his establishment. The Commission's revocation of the license was sustained.[23]

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[20] 73 Nev. at 133, 310 P.2d at 861.

[21] Reid and Demaris at 73.

[22] 75 Nev. 6, 333 P.2d 985 (1959).

[23] The court also decided in the Mackie case that a court could not modify a license revocation order issued by the Commission. Id. at 10, 333 P.2d at 987. The only case decided since Mackie under the gambling licensing scheme was the recent case of O'Callaghan v. District Court, 89 Nev. 33, 505 P.2d 1215 (1973), which held that an employee who had been denied a work permit by the Gaming Control Board could ask the court for equitable relief when his administrative remedy was exhausted.

(10) Gambling Debts

Most of the other gambling-related cases decided by the Nevada Supreme Court involved suits by one party or another to collect debts arising from gambling. Throughout a long course of decisions, the court held firmly to the position it took in 1872: a debt incurred from gambling was not recoverable.[24]

[24]In Craig v. Harrah, 66 Nev. 1, 201 P.2d 1081 (1949) the plaintiff, the owner and proprietor of Harrah's Club in Reno, sued for recovery of a debt. The defendant asserted that the loan was made for gambling purposes, but the court held that the assertion was not backed by sufficient evidence and found for the plaintiff. Had the defendant's allegation been true, however, it is clear that the case would have come out the other way. An older Nevada case, in accord, is Esden v. May, 36 Nev. 611, 135 P. 1185 (1913), 37 Nev. 305, 142 P. 530 (1914). A year after the Craig case the Nevada court held in West Indies, Inc. v. First Nat'l Bank of Nevada, 67 Nev. 13, 214 P.2d 144 (1950) that debts arising from gambling are clearly not recoverable. The plaintiff, a gambling establishment, sued the estate of a former patron for payment on checks delivered by the deceased, but dishonored, which were executed for consideration of money won at gambling. The court affirmed a dismissal of the complaint on the grounds that gambling debts, even if arising in duly licensed gambling establishments, are not recoverable. The same rule was followed in a per curiam decision in Weisbrod v. Fremont Hotel, 74 Nev. 227, 326 P.2d 1104 (1958), although a decision later in the same year dismissed such a defense because of a lack of sufficient evidence, Wolpert v. Knight, 74 Nev. 322, 330 P. 2d 1023 (1958). In 1961, a golfer on a Las Vegas golf course scored a hole-in-one and sued the corporate owner of the course for $5,000, the amount the owner had promised to pay any golfer achieving such a feat. Counsel for the golf course proprietor argued that a promise to pay such a prize was really a gambling contract and that the owner was therefore not liable. Nevertheless, the Nevada court in Las Vegas Hacienda v. Gibson, 77 Nev. 25, 359 P.2d 85, 87 A.L.R.2d 645 (1961), held for the plaintiff. The performance of the act was consideration for the promise to pay, it said, and there was not a sufficient element of chance or risk of loss present to make the transaction a gambling one. The rule that there can be no contract recovery for a debt arising from gambling was most recently reaffirmed in Corbin v. O'Keefe, 87 Nev. 189, 484 P.2d 565 (1971), in which the plaintiff was not allowed to recover money owed him by a gambling club when the Boston Red Sox, upon which he had bet $100, won the American League pennant in 1967 against odds of 100 to 1.

(11) The Gaming Commission vs. organized crime

Another tactic used by the Gaming Commission and the Gaming Control Board in the late 1950's and early 1960's was to keep persons who had connections with organized crime from even entering the premises of Nevada gambling businesses. To effectuate this policy, it compiled and published a "black book" containing the names and pictures of persons it deemed "undesirable." The book was sent to hotel and casino operators across the state with the following admonition:

> In order to avoid the possibility of license revocation for 'unsuitable manner of operation' your immediate cooperation is requested in preventing the presence in any licensed establishment of all 'persons of notorious or unsavory reputation' including the above individuals as well as those who subsequently may be added to this list.[25]

If the hotels and casinos continued to entertain these guests, the Commission would apply pressure by verbal suggestion or by sending in teams of agents to carefully examine the operation's cards and dice.

Fn. 24 The only gambling case decided in the decade after 1949 which involved neither the state licensing scheme nor a claim for contract recovery was Dunn v. Nevada Tax Commission, 67 Nev. 173, 216 P.2d 985 (1950). There, a newspaper publisher challenged the validity of the Nevada statute banning the unlicensed dissemination of horseracing information from sources outside the state. The court found the statute to be a proper exercise of the police power.

In 1963, the Ninth Circuit Court of Appeals held that where a gambler sued the proprietor of a gambling establishment to recover money lost because of allegedly loaded dice, the suit did not fall within the old gambling contracts rule and stated an actionable claim. Berman v. Riverside Casino Corporation, 323 F.2d 977 (9th Cir. 1963) on remand, 247 F.Supp. 243 (1964), aff'd. 354 F.2d 43 (9th Cir. 1965).

[25]Marshall v. Sawyer, 301 F.2d 639, 641 (9th Cir. 1962), 365 F.2d 105 (9th Cir. 1966), cert. denied, 385 U.S. 1006 (1967).

This scheme was the subject of a constitutional attack in a case brought by one John Marshall in 1960. Marshall v. Sawyer went to the Ninth Circuit Court of Appeals twice and eventually ended in court approval of the procedure.[26] Marshall, who admittedly had been engaged in illegal gambling operations in other states and who had been convicted of six crimes since 1929, had been placed in the Commission's black book in March of 1960. In October of that year he visited Las Vegas and was refused service at the Desert Inn hotel complex, at the urging of the Commission. About the same time, the Commission raided the Desert Inn and other hotels that had previously served Marshall and confiscated cards and dice. Governor Grant Sawyer, in support of this action, stated publicly,

> I agree with any measures necessary to keep hoodlums out of Nevada . . . . We might as well serve notice on underworld characters right now that they are not welcome in Nevada and we aren't going to have them here.[27]

Incensed at this treatment, Marshall brought suit against the Commission and others under several civil rights acts, claiming both statutory and constitutional violations. The Ninth Circuit first held that the federal courts should entertain the claim,[28] reversing a District Court decision that the

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[26] Id.

[27] 301 F.2d 639, 642.

[28] Id. at 643-46.

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action should be dismissed on the doctrine of abstention, and later found on the merits for the defendants.[29] Since there is no "broad and unrestricted right" to "enjoy . . . public accommodations,"[30] the court held, the actions of the Commission violated neither the Equal Protection nor Due Process clauses.

In 1967, the Nevada legislature, recognizing the importance of the "black book" as a tool for keeping Nevada gambling businesses free from undesirable influences, formalized the authority of the Control Board to maintain the list and to enforce its ban.[31] By that time, the legislature had created a third gambling-related agency as well: the Gaming Policy Board, chaired by the governor and organized to supervise general matters of state gambling policy.[32]

(12) "Skimmed" profits: The survival of criminal elements

The most frequent gambling-related crime committed in Las Vegas in recent years has not been connected with the rough tactics of "Bugsy" Siegel and his kind, but consists

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[29] 365 F.2d 105 (9th Cir. 1966).

[30] Id. at 110. Along the same lines, Judge Pope, in an earlier concurring opinion in the case, said that "gambling or being in or about a gambling establishment is a mere matter of governmental favor; it has none of the aspect of property or other private right." 301 F.2d at 653.

[31] Act of April 15, 1967, ch. 376, §§38-42, [1967] Nev. Laws 1041-42. The sections provided for notice to persons whose names were placed by the Commission on the "black book" and also allowed for a hearing should the person being listed demand one. Id. §§39, 40. The importance of the "black book," however, should not be overemphasized. As late as 1969, it contained only eleven names. Elliott at 334.

[32] See Act of March 29, 1961, ch. 214, §4, [1961] Nev. Laws 360.

rather of "skimming" illicit profits off the top of casino revenues and evading various income taxes. Agents of the Federal Bureau of Investigation discovered evidence of this widespread practice in 1967, when they bugged conversations of Las Vegas gambling figures. This surveillance came to light in connection with the prosecution of Robert Baker, a former U.S. Senate official, for tax evasion, grand larceny and fraud.[33] As much as $6 million a year, they discovered, was being siphoned from major Las Vegas casinos, including the Desert Inn, the Stardust, the Flamingo, and the Sands. Vast sums were paid to state and local officials, including a governor and a former governor. Such diverse underworld figures as Tony Accardo and Sam Giancana from Chicago, John Scalish from Cleveland, and Meyer Lansky from New York were involved.[34] Seven licensed gambling operators were subsequently indicted for skimming casino profits to evade federal income taxes, and three were indicted for sending in false income tax returns.[35] All but two of those indicted later had their charges dismissed in return for dropping a

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[33]"Ex-U.S. Aide Calls Bugging Valuable," N.Y. Times, June 26, 1967, at 15, col. 1. William O. Bittman, a former member of the Justice Department who prosecuted Baker, was quoted as saying that ". . . the Government learned from bugging the amount of money that was being skimmed, who was doing the skimming, how the skimming was done, who the couriers were that were delivering the money around the country, when they were leaving, and who was going to receive the money." Id. at 990.

[34]The findings of the FBI in Las Vegas were summarized in a series of articles in the Chicago Sun-Times, July, 1966.

[35]"7 Nevada Gaming Figures Indicted on Tax Charges," N.Y. Times, May 12, 1967, at 1, col. 2.

$4.5 million suit against the FBI for invasion of privacy during the period of wiretapping.[36]

In late 1967, the Nevada Gaming Commission adopted a series of rules to try to prevent such skimming,[37] but the measure has apparently met with less than perfect success. As recently as 1971, officials of the Dunes hotel were indicted for skimming and income tax evasion.[38]

Other criminal involvement has likewise surfaced in recent years. In 1969, for example, it was discovered that a number of Mafia racketeers from Kansas City had considerable interests in Caesar's Palace.[39] Two years later, Meyer Lansky, an old partner of "Bugsy" Siegel and the man reputed to be one of the chief financial brains of the organized underworld, was indicted in Florida both for contempt of court in refusing to testify about his involvement with the Flamingo Hotel and

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[36] "U.S. and Casinos End Nevada Dispute," N.Y. Times, March 29, 1968, at 22, col. 4.

[37] "Nevada Invokes New Gaming Rule," N.Y. Times, Nov. 19, 1967, at 61, col. 3.

[38] "U.S. Jury Indicts 6 at Nevada Hotel," N.Y. Times, Dec. 15, 1971, at 40, col. 3. Although the indictments have not ceased, tax revenues from gambling did jump 18 percent following the Commission's action to prevent skimming. At least part of that increase must be attributed to the successful taxation of income formerly "skimmed." Elliott at 327.

[39] "Casino in Las Vegas Cited in Complaint," N.Y. Times, June 15, 1969, at 42, col. 2.

also for gambling charges.[40] More recently, public attention has been focused on the saga of Howard Hughes' financial investments in a Nevada gambling empire.[41]

Presently, most Nevada businessmen and politicians claim that the state's gambling industry has been thoroughly cleansed of mob influence. Bill Harrah, the owner of one of Reno's most famous casinos, stated in a recent speech:

> . . . in the early days of Las Vegas and a few places in the North, we heard about such things as gangsters and hoodlums and a few Damon Runyon type characters. It didn't seem anything to worry about. Then there were some incidents--like Bugsy Siegal--and an image began to form which prevails in the minds of many people today --mainly Easterners.
>
> Then there were stories about Mafia infiltration and skimming the late 50's and early 60's. I have to tell you frankly that I have never been at all able to discuss this situation, and the closest I have ever come to the Mafia was in the audience of the God Father.

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[40]"Lansky Is Indicted on Gambling Count," N.Y. Times, March 26, 1971, at 44, col. 3. Lansky was sentenced to a year in prison on the contempt conviction, "Lansky Given A Year and a Day," N.Y. Times, June 15, 1973, at 33, col. 3, but was too ill to stand trial on the gambling charge. Indeed, it seems that the skimming case itself will never be tried. "The Lansky Luck," N.Y. Times, April 20, 1975, at 31, col. 1. Recent Federal criminal litigation, too, revealed that in 1966 and 1967, organized crime connected elements from Detroit successfully acquired hidden interests in Vegas Frontier, Inc., the corporation which operated the Frontier Hotel in Las Vegas. United States v. Polizzi, 500 F.2d 856, 868, (9th Cir. 1974). Subsequently, these interests were sold to Howard Hughes. Id.

[41]Hughes moved to Las Vegas in 1967 and obtained a license in November of that year which enabled him to enter the gambling business. "4th Casino Bought By Howard Hughes," N.Y. Times, Nov. 29, 1967, at 28, col. 1. By 1971, he had purchased seven casinos and four major Las Vegas hotels, giving him a substantial share of the gambling business there. Hughes himself, however, moved from Las Vegas in 1971.

> I have no doubt that Nevada had some bad apples in those days, but I believe they are gone for the most part--or are no more present or involved in this industry than in any other.[42]

Peter Echeverria, Chairman of the Nevada Gaming Commission concurs:

> I will concede that 25 years ago, gambling in Nevada was conducted in certain areas by persons who today could not get a license, but the sales of certain business interests, administrative procedures, and even a few funerals have helped clean up our gambling industry in our ever-active policing and licensing activity.[43]

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[42]Speech by Bill Harrah, Before the Commission on the Review of the National Policy Toward Gambling, August 1975, at 4.

[43]Statement of Peter Echeverria, Chairman of the Nevada Gaming Commission, Before the Commission on the Review of the National Policy Toward Gambling, in Carson City, August 18, 1975. Warren Nelson of Reno, Nevada, made similar remarks to the Commission, on August 6, 1975, at 7:

> In my opinion, there is no such thing as skim, Mafia, cheating or any other wild, bad things you hear about the business. They were always exaggerated but now, through state regulation, these things are impossible. We have our own control agencies in the state, consisting of the Gaming Commission and Gaming Control Board. They are very knowledgeable and know exactly what is going on. Their knowledge of percentages and the gaming business is as knowledgeable as anybody in the business.

Senator Howard W. Cannon gave similar testimony before the Committee in Carson City, Nevada, August 17, 1975, at 2:

> We have come a long way since the days of the Kefauver investigation and the justifiable preoccupation with the sinister, illegal, and destructive aspects of gambling that were endlessly publicized and romanticized in the thirties, the forties, and the fifties.

Frank Johnson, former Chairman of the State Gambling Commission, responded to a statement in the Commission's Preliminary Report as follows in a letter to Executive Director Richie dated August 22, 1975:

Yet, some law enforcement officials are still concerned about the possibility of organized criminal influence in the state's casinos. For example, Ralph Lamb, the Sheriff of the Las Vegas Metropolitan Police Department, after noticing that Nevada's regulatory scheme minimizes the possibility of mob control, admitted that:

> The problem of the involvement of organized criminal groups in licensed gambling is an ever present problem. For example, it is becoming increasingly difficult to identify the presence of organized criminal groups in the gaming industry. This is due to the fact that large amounts of illegitimate money from these groups are invested in legitimate businesses. This money from these businesses can then be used to finance a large legal gaming operation. The effect is one of hidden control through financing of casino operations.[44]

Fn. 43 cont.

> On page 31, fourth paragraph, there is a statement reading . . . The Committee for Economic Development reports that public officials are accused of issuing licenses to persons and organizations of low repute and failing to prevent skimming or fraudulent tax reports. . . . To my recollection, which is pretty good in these matters, the few such allegations of this kind have been politically motivated, and where never proved or really taken seriously. . . all of this is pretty much in the deep, dark past. No real recognition has been given to the great strides forward made in the last 8 to 10 years.

[44]Remarks of Ralph Lamb, Sheriff, Las Vegas Metropolitan Police Department, before the Commission on the Review of the National Policy Toward Gambling, on August 8, 1975, at 5.

Shannon L. Bybee, Jr., a Las Vegas Legal expert in the area, agrees with Sheriff Lamb:

> Absence of any widely accepted criteria for identifying members of organized crime makes it virtually impossible to identify a specific individual as part of an organized criminal element. The best you can do is state that the person has been identified in the press or by some law enforcement agency as part of organized crime. And you can seldom find anyone willing to publicly make that identification and offer any facts to support his opinion.[44A]

Whatever Nevada's success against organized crime, the state has clearly made significant efforts to deal with the problem. If, in the future, Nevada fails, it will not be because Nevada's citizens did not take the problem seriously.

(13) Gambling and Nevada's economy

Publicity to one side, the real importance of gambling to Nevadans has not been its connections with organized crime. While that has certainly been a prominent aspect of Nevada gambling, far more significant has been the effect which gambling and the related entertainment industry have upon the state's economy.[45]

The economic effect of Nevada's legalized gambling is

[44A] Shannon L. Bybee, Jr. "Some Observations on Control of Legalized Gambling," addressed to the Commission on the Review of the National Policy Toward Gambling, Las Vegas, Nevada, at 10.

[45] The other major legal attractions which Nevada offers the temporary visitor are the famous six-week divorce and the local county option of legalized prostitution. Nev. Rev. Stat. §§125.020(e), 269.175 (1973).

immense. As the fourth smallest state in the nation,[46] with few natural industries other than what currently remains of its mining capabilities,[47] Nevada has come to rely heavily on the flow of tourists to draw income into the state. The Las Vegas and Reno metropolitan areas, which attract large numbers of visitors from Los Angeles and San Francisco, supply the bulk of an estimated yearly revenue of over $750 million.[48] More than ten percent of the state's citizens are directly employed in the gambling industry. It has been estimated that the indirect employment may amount to more than half the state's working population.[49] The growth of gambling businesses has been phenomenal in the last fifteen years:[50] between 1960 and 1970 alone gambling revenues increased 287 percent.[51] Over 60,000 tourists now flock into the state each day, a total of nearly 22 million a year.[52] These figures indicate that Nevada is more than just casually

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[46] U.S. Dept. of Commerce, Statistical Abstract of the United States at 12 (1974). Nevada's population density is about five persons per square mile.

[47] N.Y. Times Encyclopedic Almanac at 180 (1972).

[48] Legalized Gambling in Nevada at 5.

[49] Id.

[50] Elliott at 327. See also W. Eadington, The Economics of Gambling Behavior: An Economic Analysis of Nevada's Tourist Industry (unpublished Ph. D. dissertation, Claremont Graduate School, 1972) at 63-75 [hereinafter cited as Eadington].

[51] Eadington at 75.

[52] Legalized Gambling in Nevada at 5. For a study of the movement of tourists into Nevada, see Eadington at 63-75.

involved in the gambling and entertainment businesses. On the contrary, it is not only Nevada's most important industry; it is the economic lifeblood of the state. In 1962, Judge Pope, concurring in Marshall v. Sawyer, observed that

> . . . in a very real sense, and in essence, the State of Nevada itself is in the gambling business, and its continued maintenance of that institution is vital to the State's life and its economy.[53]

In this situation, what was true in 1962 can only be more true in 1976.

To various levels of government, the most important aspect of Nevada's gambling industry is the opportunity it affords for taxation. Several major taxes are imposed on Nevada gambling casinos: the federal slot machine tax,[54] the state gross receipts tax,[55] the annual state license fee on games,[56] the quarterly game and device license fee,[57] the casino entertainment tax,[58] the county table tax,[59] and the city gambling licenses.[60] Although Nevada has not developed

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[53]Marshall v. Sawyer, 301 F.2d at 648.

[54]Int. Rev. Code of 1954, §§4461-62.

[55]Nev. Rev. Stat. §463.370 (1973).

[56]Id. §463.380.

[57]Id. §463.383.

[58]Id. §§463.401-406.

[59]Id. §§463.390, 463.250.

[60]Id. §§266.355, 463.250.

into the one-tax state that some predicted it would become,[61] there can be no doubt that the various taxes and licensing fees imposed in the state do constitute a significant source of governmental revenue. In 1969, for example, the taxes on Nevada's gambling industry amounted to more than $33 million.[62] A vast majority of the state's gambling tax revenues comes from the relatively few large-scale casinos which attract a large portion of the state's gambling business.[63] The gambling tax is a relatively secure source of governmental revenue; because of the attraction of gambling to the tourist and because of the typically irrational gambling compulsion which seizes the habitual casino customer, the demand curves of Nevada gamblers are apparently highly inelastic.[64] This circumstance, coupled with the ability of the larger casinos to handle increasing numbers of players at a decreasing average cost[65] and the

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[61] See Zubrow and Decker, "The Taxation of Legalized Gambling in Nevada," 15 Nat'l Tax J. 71 (1962) [hereinafter cited as Zubrow and Decker].

[62] Legalized Gambling in Nevada at 19. Surprisingly, this total put Nevada in sixth place among all states in terms of total revenues received from gambling taxes. Id. at 20. On a per capita basis, however, Nevada's collections were by far the highest in the nation.

[63] Zubrow and Decker at 73.

[64] R. Decker, The Economics of the Legalized Gambling Industry in Nevada (unpublished Ph.D. dissertation, University of Colorado, 1961) at 215.

[65] Id. at 215-16.

relatively low costs of administering Nevada's gambling tax,[66] make it clear that even in times of economic hardship the state is assured of an income flow steadier than that enjoyed by any of its neighbors.

(14) Nevada: conclusions

The present legal structure surrounding Nevada gambling is geared toward maximizing its beneficial economic effects, while minimizing its potentially harmful social aspects. Although the state oddly defeated a move in 1969 to remove the constitutional prohibition of lotteries,[67] other gambling in the state is open, even though heavily regulated by the Nevada Gaming Commission,[68] the State Gaming Control Board,[69] and the Gaming Policy Committee.[70] The policy of the state toward gambling has remained constant since 1955: gambling establishments must be "licensed and controlled so as to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada. . . ."[71] Nevertheless, criminal involvement in various Las Vegas

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[66] Zubrow and Decker at 81.

[67] The 1967 legislature passed a resolution calling for the authorization of state lotteries in Nevada's constitution, [1967] Nev. Laws 1824. The constitutional amendment procedure in Nevada, however, requires that the amendment be passed by two successive legislatures before it is sent to the people, and the measure was defeated in the 1969 session.

[68] Nev. Rev. Stat. §§463.022-029 (1973).

[69] Id. §§463.030-120.

[70] Id. §463.021.

[71] Id. §463.130.

casinos has not entirely ended. It is apparent, too, that "clean" gambling operators are interested in preserving the city's reputation to avoid frightening the tourists,[72] and this force must be recognized in assessing law and practice in Nevada.

Nevada in the 1970's seems to have achieved a kind of stability vis-a-vis gambling, for it is willing to suffer the disadvantages that attend legalized gambling in exchange for the economic benefits which accrue. The rest of the country, in turn, tolerates Nevada. Whether other states will follow Nevada's lead and legalize gambling is an open question, but whatever their decision, they cannot afford to treat Nevada's experience as fast evidence of how legalization might affect the gambling story in their particular states. Whether labelled a success or a failure, Nevada's experiment must be viewed in light of its unique history.

Nevada's gambling history began like those of the other Western states, but soon important developments disrupted its "natural" course. Nevada's Comstock gold rush brought a rough-and-tumble mining community to the state as late as the 1850's. Unlike most Western states, however, Nevada was not forced to rid itself of the gambling practiced by the miners in order to win statehood from the Congress. Rather, Congress needed another free state to back its Civil War effort. Thus, an internal movement to assure statehood through respectability never occurred in Nevada.

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[72] Elliott at 335. See also Reid and Demaris at 179.

Nevada's gambling developed as a benign form of entertainment in the early days, as opposed to the big time gaming of the East. Normally, bets were small and no one lost his or her fortune at the wheel or gaming table. Reformers could not point to the desperation and ruin that was elsewhere associated with gambling.

Nevada might have taken a sterner view of gambling had it, like most other Western states, developed industries which attracted a less bawdy population. Family life and the requirements of steady, constant labor might have made Nevada's attitude toward gambling more conservative. Nevertheless, Nevada's second gold rush in 1900, with the simultaneous completion of the national railroad system which brought Eastern speculators and promoters to Nevada in droves precluded the development of more "respectable" industries.

Nevada did prohibit gambling in 1910. Its legislature was strongly affected by the Populist reform movement. But gambling was so deeply ingrained in the life of Nevada's citizens that such laws were almost totally ignored. Consequently, in 1930, Nevada relegalized gambling. The hotel-casino tourist trade began to boom, and also to attract organized crime. Yet it was the particular historical situation of Nevada in the 1940's which fostered such infiltration. Legalized casino gambling need not have bred criminal infestation.

In the 1940's and 50's organized crime had a monopoly on the expertise needed to operate gambling establishments. It

had also developed a method of violent enforcement of its self-proclaimed "rights." These techniques overwhelmed federal and state law enforcement strike forces which lacked the sophistication, manpower, and funding to battle such criminal elements. Indeed, it was not until the early 1950's, when the Kefauver Committee held its hearings, that the nation became aware of the threat that organized crime presented to Nevada and to the nation at large. Finally, the early corporate structure of the hotel-casino industry in Nevada was characterized by independent entrepreneurs who did not have large reserves of economic strength to fall back on. Still, these individual entrepreneurs developed organizational and legal expertise to combat the mob's infiltration into their enterprises. Today's gambling industry in Nevada, which features massive corporate structures whose ventures have been marked by scrupulous honesty, may in fact offer more significant evidence of the prospects of legalized casino gambling than the experience of the 1940's and '50's.

The financial success of today's gambling industry in Nevada may well encourage other states' elusive hopes of lucrative sources of revenue. These states must recognize the uniqueness of Nevada's history. In the 1950's, Nevada had a monopoly on state-protected casino gambling. The Kefauver Committee hearings had shut down major competitors in Hot Springs, Arkansas and Bergen County, New Jersey. Furthermore, Nevada's monopoly coincided with a favorable geographic

location and the popularization of nationwide air travel. The ease of access and travel created by the airline industry expanded Nevada's tourist market long before the gambling industries of the Bahamas, Puerto Rico and Aruba could similarly benefit.

In addition, by the 1960's gambling was Nevada's largest industry, a booming tourist attraction. With the majority of its population employed by gambling-related industries, Nevada depended heavily on outsiders to bring their tax dollars into the state. Las Vegas, Reno, and Lake Tahoe simply cannot offer conclusive evidence as to the experiences an established city might have with legalized gambling industries and competitive forms of entertainment. The tourist center aspect of gambling in these cities is an integral part of the Nevada gambling experience. No firm predictions about the success or failure of casino gambling in cities like New York or Chicago can be made where the tourist factor is or may not be apparent. The Nevada experience may offer some clues as to which problems must be overcome if legalized gambling elsewhere is to remain free of organized criminal infiltration. Care, however, must be taken not to generalize from this highly unique experience.

Chapter VI. FEDERAL LAW

A. The Constitution as Bulwark or Barrier

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A. The Constitution as Bulwark or Barrier

1. Introduction

The development of the law of gambling has primarily been told in these materials as a story of the growth of the law among the several states. It would be a mistake, however, to assume that the national government has played no role or even a small part in that development. Indeed, all of the issues so far discussed primarily at the state level were at one time or another the subject of vigorous debate in the hall of Congress or carefully phrased arguments before the Supreme Court. Nevertheless, the story of the development of federal law is not one, but several: the role of the Supreme Court in the early efforts to bring the state-chartered lottery system under control, the roles of both the Supreme Court and the Congress in the final stages of the efforts to end the last vestiges of the state chartered lottery system, and the modern role of the federal government in fighting syndicated gambling and in acting as a federal arbiter of conflicting state policies in the context of decriminalization. Involved, too, is the impact on state practices of federal tax policy and the separate, but interesting and enlightening story of the development of the law of the District of Columbia by the Congress. In turn, each of the dimensions of federal law must be considered.

2. The Dartmouth College case

A new era in the history of the Supreme Court began with the first year of the Monroe Administration. As this was known in politics as the "Era of Good Feeling," it might also be termed the "Era of Calm" in reference to the Court, but it was the calm before the storm.[1] The 1817 Term was devoted chiefly to the argument of cases growing out of the War of 1812. The 1818 Term, however, had as its centerpiece the argument before the Court in one of its most famous cases, Dartmouth College v. Woodward.[2]

The Dartmouth College case involved more than a question of law; it also involved an emerging issue of national politics, on which there had already begun to be divisions along party lines throughout the country. Dartmouth College had first received its charter in 1769 from the British Crown. The old College Trustees were largely Federalists in politics and were supported by similar interests in New Hampshire. The new charter, rewritten by the New Hampshire legislature, was the work of a college faction composed largely of staunch Republicans.[3] In general, the Federalists laid great stress on property rights, particularly

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[1] See generally I.C. Warren, The Supreme Court in United States History 474-510 (1922) [hereinafter cited Warren].

[2] 17 U.S. (4 Wheat) 518 (1819).

[3] Thomas Jefferson himself wrote to Governor William Plumer of New Hampshire in reference to the plan to rewrite the charter:

those stemming from legislation, and sought to protect them against the fluctuating public sentiment. The Republicans, on the other hand, like the Jacksonian Democrats who followed them and were their political heirs, looked with suspicion on all forms of privilege, particularly those created artificially by the power of government.

The adherents of the old charter retained Daniel Webster, then 36 and a member of Congress, to defend them before the Court. The other side was represented by the then Attorney General of the United States, William Wirt, who was also a lawyer of immense practice. The argument lasted three days. Webster's position, if not his arguments, prevailed[4] when the case was decided in the following Term.

Chief Justice John Marshall delivered the opinion of the Court. The Dartmouth College charter was, he said, the outcome and partial record of a contract between

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> The idea that institutions established for the use of the Nation cannot be touched nor modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may, perhaps, be a salutary provision against the abuses of a monarch, but it is not absurd against the Nation itself. Yet our lawyers and priests generally inculcate this doctrine.

Quoted in Warren at 484.

[4]Webster argued that the charter itself was a property interest in the hands of the holders and could not be forfeited except according to its own terms or for abuse. See 17 U.S. (4 Wheat) 577-595. See also Mr. Justice Story's opinon for the Court in Terrett v. Taylor 13 U.S. (9 Cr.) 43 (1815).

the donors of the college and the British Crown. The current trustees were the successors to the donors; the State of New Hampshire was, of course, the successor to the Crown. This contract could not under Article I, Section 10, clause 1 of the United States Constitution, prohibiting States' impairment of the obligations of contracts, be set aside.

At the time of the decision, its import was not widely perceived.[5] Unquestionably, however, the decision came at a peculiarly opportune time for business interests,[6] for corporations were for the first time becoming a factor in the commerce of the country.[7] They now had a formidable

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[5] Warren at 490.

[6] The first corporation chartered in the United States after the Revolution was the Bank of North America; it was chartered in 1780 in Pennsylvania. Prior to 1800, only eight manufacturers' corporations had been chartered in the whole country. It was only after the end of the War of 1812 that corporate business began to grow. Id. at 491 n. 2.

[7] While the Dartmouth College case is, of course, the decision usually looked to by historians as establishing the sanctity of the legislatively granted charters, see, e.g., A.Schlesinger, Jr., The Age of Jackson at 321 (1945) [hereinafter cited as Schlesinger], the careful legal historian must comment on Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810), which was in fact the first Supreme Court case to hold a state legislative enactment violative of the Contract Clause. The so called Yazoo Land Fraud scandals and involved sales of public lands made by a corrupt Georgia Legislature. Upon discovery of the corruption, the succeeding legislatures attempted to rescind the sale, even though the land had since passed on to other purchasers. The purchasers retained Alexander Hamilton, who advised them that the revocation controvened the Contract Clause of the Constitution.

bulwark behind which they could do business free of the interference of politics.[8]

But if business had its bulwark, public policy now faced its barrier. For in the years after the Dartmouth College case, whenever efforts were made to bring an end to the state chartered lottery system, care had to be exercised that there would be no interference with existing lotteries. The anti-lottery movement, for example, had in 1821 secured A constitutional amendment banning lotteries in New York.[9] Legislation, too, had been enacted to enforce the ban.[10] Yet existing lotteries continued, and it was necessary in 1833 for the legislature to buy the outstanding interests

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See B. Wright, The Contract Clause of the Constitution 22 (1938). When the case reached the Supreme Court, Chief Justice Marshall wrote an opinion for the Court in which he agreed with Hamilton. 10 U.S. (6 Cr.) at 139. The land grants were, to be sure, executed and the obligations not to be impaired had to be executory, but the land grant was attended, in Marshall's opinion, by an "implied contract" on the part of the grantor not to claim again the thing granted. Consequently, the legislature could not act to set aside the sale.

[8]In light of the subsequent fight between the Jacksonian Democrats and the Bank of the United States, it is not without irony that the history of the Contract Clause is reviewed. Proposals were made in Pennsylvania to revoke the charter of the Bank of North America, the first corporation chartered in the United States after the Revolution. There is good reason to believe that it was the experience of James Wilson with these proposals that led to the inclusion of the Contract Clause in the new constitution. See II The Works of James Wilson at 834 (R. McCloskey ed. 1967). Wilson saw a need to secure "sure anchors of privilege and of property" to protect against "the irregular and impetuous tides of party and faction." Ibid.

[9]N.Y. Const., art. 7, §11 (1821).

[10]Act of Mar. 15, 1822, ch. 71 §1, Law of New York 73-74 (1822).

in previously authorized lotteries.[11] Other reform efforts, during this period, and even beyond, also ran up against the Contract Clause.[12]

3. The Charles River Bridge case

Ultimately defeated at the polls, the Federalists were left entrenched in the courts, and under the resourceful hands of Marshall or influenced by his powerful personality, the Supreme Court became the fortress of conservatism. Many of the state courts, too, "agreed in repeating his prejudices, though rarely with his profundity, and all, operating as a kind of high priesthood of the law, agreed in detesting Jacksonian democracy."[13] But Marshall's tenure on the Supreme Court came to an end with his death in the summer of 1835. With his next appointment, Jackson, who was now

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[11]Act of April 30, 1833, ch. 306, Laws of New York 484 (1833). It was the firm of Yates & McIntyre that reaped the major benefit of this legislation. McIntyre was not only a member of the Legislature, he was also State Comptroller from 1806-1821. Yates, in turn, was a member of Congress; his brother was also Governor of New York from 1823 to 1825. J. Ezell, Fortunes Merry Wheel: The Lottery in America at 86 (1960) [hereinafter cited as Ezell]. There was a basis in fact, therefore, for the Jacksonian concern with legislatively-created privilege and profit in the operation of the state-chartered lottery system.

[12]The Surpeme Court of Missouri, for example, reversed convictions for the sale of lottery tickets in violation of Missouri law in State v. Hawthorne 9 Mo. 389 (1845) on the grounds that the Missouri legislature was prevented under the Contract Clause from repealing prior grants and criminalizing sales under them.

[13]Schlesinger at 322.

President, would have not only the Chief Justice, but a majority of the Court. Jackson appointed Roger Brooke Taney, who had been Jackson's Attorney General (1831-33), Secretary of Treasury (1833-34), and good right arm in the fight against the Bank of the United States.

The symbolism of change was all too real. The new Chief Justice wore trousers instead of the traditional knee breeches, and he got in his first term the opportunity to mark out a new course for the court in the Charles River Bridge case.[14]

Within ten days after the opening of the Term, the Supreme Court heard final arguments in the Charles River Bridge case. The issue presented was whether the charter of the complaining company, which authorized it to operate a toll bridge, stood in the way of the State's authorizing another company to build another bridge in the immediate vicinity. Once again, Daniel Webster argued in behalf of the complaining party, seeking support in his own precedent, the Dartmough College case. Yet this time Webster did not prevail.

Chief Justice Taney wrote the opinion for the Court. The result itself was narrow enough. The corporate charter was to be strictly construed. Since no monopoly was expressly granted, none would be implied. But the rationale of the

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[14]Charles River Bridge v. Warren Bridge, 39 U.S. (11 Pet) 420 (1837).

new Court was expansive. "The object and end of all government", Taney declared, "is to promote the happiness and prosperity of the community. . . ."[15] But what of the rights of private property? "While the rights of private property are sacredly guarded," rejoined Taney, "we must not forget that the community also has rights and that the happiness and well-being of every citizen depends on their faithful preservation."[16] The way was, therefore, now constitutionally cleared for public policy to prevail against the state-chartered lottery system, although the final triumph did not come for forty-three more years during the Post-Civil War period.[17]

4. Phalen v. Virginia

The new Court's attitude toward the state-chartered lottery system was itself most clearly expressed in Phalen v. Virginia.[18] In the Charles River Bridge decision, the Court announced a rule of narrow construction of state charters. In Phalen, the Court went further and held that even those rights which were expressly granted could subsequently be limited in time.

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[15] Id. at 547.

[16] Id. at 548.

[17] The general opinion among Whigs came close to despair. Chancellor Kent commented that the decision "undermines the foundations of morality, confidence and truth." Schlesinger at 327. The North America Review, a Whig organ of opinion, lamented: "We have fallen under a new dispensation in respect to the judiciary." Id. at 328.

[18] 49 U.S. (8 How.) 163 (1850). By now, the Supreme Court included Jackson's old friend and colleague from Tennessee, John Catron.

In 1829, Virginia authorized a lottery to repair the Faquier and Alexandria Turnpike Road. In 1834, however, it banned all lotteries, except those already in existence, which were allowed to continue until 1840. Nevertheless, Phalen did not attempt to sell tickets until 1841. When he was convicted for an unauthorized sale, he appealed his conviction to the Supreme Court, arguing that the 1834 law impaired his contract rights.

Mr. Justice Greer answered for a unanimous Supreme Court that it was even doubtful that the license to sell the tickets was a contract, but that even if it were, "it could not be considered illimitable as to time."[19] Comparing the legislation to unquestioned land title recording acts, the Court sustained it:

> If reasons of sound policy justify legislative interference with contracts [dealing with land] of individuals, how much more will it justify the limitation of licenses so injurious to public morals.
>
> The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and the simple. 20

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[19] 49 U.S. (8 Haw.) at 167.

[20] Id. at 168.

5. Stone v. Mississippi

After the Charles River Bridge decision, the progression of cases continued. Phalen held that state charters could be limited in time. Stone v. Mississippi[21] delivered the coup de grace to the status of the Dartmouth College case as a barrier to the end of the state-chartered lottery system.

Lotteries had been illegal in Mississippi prior to 1867. But in that year, "carpet-bag" government, imposed on Mississippi in the Post-Civil War era, chartered a lottery corporation. When the people of Mississippi adopted their constitution in 1868, however, they banned all lotteries, and adopted legislation to enforce the ban.[22] The Attorney General of Mississippi then instituted an action against the lottery corporation to determine by what right it continued to sell lottery tickets; the company set up the Contracts Clause as a defense, and the stage was thus set for the last act of the constitutional play.

Chief Justice Morrison R. Waite, a Grant appointee, wrote for a unanimous Court. The new course charted by Taney in Charles River Bridge reached its final destination.

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[21]101 U.S. 814 (1880).

[22]In Moore v. State, 48 Miss. 147,174 (1873) the provision was sustained:

> It is eminently expedient and wise to uphold the inviolability of contracts. It is also essential to the safety of the public that the law making department should have full authority to regulate and abate all evil practices and vices that are hurtful to society.

The Chief Justice began by recognizing that the Dartmouth College case was "so imbedded in the jurisprudence of the United States as to make . . . [it] a part of the Constitution itself."[23] The question, therefore, was whether the charter contained a contract, for only the contract, and not the charter, was protected. The Chief Justice then began his analysis of the question by recognizing that the Legislature could not "bargain away the police power of [the] . . . state."[24] He then noted that lotteries were a proper subject of this power:

> We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes.
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> Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that, with the same opportunities of indulgence, the same results would be manifested.
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> If lotteries are to be tolerated at all, it is, no doubt, better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. 25

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[23] 101 U.S. at 816.

[24] 101 U.S. at 817.

[25] 101 U.S. at 819.

The answer seemed to follow without doubt:

> The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, mala in se, but as we have just seen, may properly be made mala prohibita. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance or otherwise,' might be 'awarded' to them from the accumulations of others. Certainly the right to stop them is governmental, to be exercised at all times by those in power, at their discretion. Anyone, therefore, who accepts a lottery charter, does so with the implied understanding that the People, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, and this whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has, in legal effect, nothing more than a license to continue on the terms named by the specified time, unless sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal. 26

A Supreme Court that began under Marshall by finding implied contracts to protect legislative charters ended under Waite by finding implied understandings to overturn them. The play was at an end.

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[26] 101 U.S. at 820-21.

B. The District of Columbia--A Case Study

1. Introduction

Ever since its establishment,[27] the District of Columbia has been a federal enclave, having Congress as its "city council" and the United States Supreme Court as its "appellate tribunal." Congressional jurisdiction over the District was provided for in the Constitution.[28] Congressional control over local District of Columbia affairs persists to this day, although it has been exercised in various forms.[29] The "home rule" that residents demanded was

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[27]One of the first acts of the new nation was to set aside land for a new capitol. Act of July 16, 1790, ch. 28, 1 Stat. 130. A series of early enactments refined the form of government for the District of Columbia. See, e.g., Act of May 3, 1802, ch. 53, 2 Stat. 195; Act of May 4, 1812, ch. 75, 2 Stat. 721; Act of May 15, 1820, ch. 104, 3 Stat. 583.

[28]U.S. Const. art. I, §8, ch. 17.

[29]From 1841 to 1874, a brief and ill-fated experiment in self-government was attempted, when the District had its own "governor." Act of Feb. 21, 1871, ch. 62, 16 Stat. 419; Act of June 220, 1874, ch. 337, 18 Stat. 116. Even during this period, however, Congress retained ultimate control. The District's government was restored completely to the prior form in 1878, Act of June 11, 1878, ch. 180, 20 Stat. 102. Few modifications were made over most of the next century. For a period of years Washington, D.C., was governed by a triumvirate of commissioners, who had to seek appropriations from House and Senate District Committees. These Committees often were composed of Maryland and Virginia Congressmen whose constituencies did not necessarily have the same interests as District residents. In the late sixties, a mayor, appointed by the President, replaced the commissioners. In addition, a non-voting delegate to the House of Representatives was chosen, and a city council formed.

achieved, however, in part by a constitutional amendment allowing them to vote for President for the first time in 1964[30] and in legislation increasing the role of self-government in late 1973.[31] Nevertheless, Congress still retains ultimate fiscal control and the District elects no voting representatives to Congress.[32] Until 1970, the United States Court of Appeals was the normal court of last resort in the District of Columbia,[33] and it was not unusual for a local criminal prosecution to reach the Supreme Court of the United States in the nineteenth century.[34]

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[30] U.S. Const. amend. XXIII.

[31] Act of Dec. 24, 1973, Pub. L. No. 93-198, 87 Stat. 774.

[32] Consistent with the constitutional requirement of exclusivity, Congress retained essential fiscal powers. Although Washington, D.C. residents now elect their own school board, city council, mayor, and non-voting delegate to the House of Representatives, they continue to have less than complete power to govern themselves.

[33] The court system was reorganized in that year to ease the United States District Court and Court of Appeals calendars by removing many matters of local concern from their jurisdiction. District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, July 29, 1970, 84 Stat. 473. The United States Court of Appeals was replaced by District of Columbia Court of Appeals (formerly the Municipal Court of Appeals) as the court of last resort for District of Columbia law. Review to the United States Supreme Court remains. See, e.g., M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. App. 1971).

[34] Largely through military governors, Congress also exerts such direct control over U.S. possessions including American Samoa, the Canal Zone, Guam, and the Virgin Islands.

The development of the law of gambling in the District of Columbia is relevant to the study of the growth of Federal gambling policy for reasons related to the unique political status of the District. In the sense that Congress legislated in the District without impinging upon local sovereignty, congressional enactments relating to gambling in the District of Columbia were a more accurate reflection of a national attitude toward gambling than general congressional legislation involving gambling. Consequently, the law in the District of Columbia must be considered in forming an accurate impression of the national policy toward gambling.

2. Common law background

The District of Columbia was born with gambling limitations on its books. Carved from ten square miles of Maryland and Virginia on the banks of the Potomac, much of it swampland, the District had an organic law providing that the prior laws of Virginia and Maryland should apply to the extent that they were not inconsistent with new legislation for the District.[35] The "compendium of a variety

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[35]Act of Feb. 27, 1801, ch. 15, 2 Stat. 103. The District of Columbia was composed of two counties, one from Maryland and one from Virginia. In Alexandria County, Virginia law was to govern, while in Washington County, Maryland law controlled. Believing that the Virginia portion would never be needed for the national capitol, Congress retroceded Alexandria to Virginia in 1846. Act of July 9, 1846, ch. 35, 9 Stat. 35.

of laws drawn from various sources."[36] thus included gambling prohibitions from Maryland[37] and similar ordinances from Georgetown[38] and the City of Washington.[39] Common law nuïsance was also used with some success to restrict gambling in the early nineteenth century.[40]

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[36]Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n., 393 U.S. 186, 196 (1968) (Douglas, J. in dissent). To this date the unusual origin or District of Columbia law requires that the pronouncements of Maryland courts be given greater weight than those of other jurisdictions where no domestic law is applicable to a given point. Blair v. Prudential Insurance Co., 153 U.S. App. D.C. 281, 286 n. 6, 472 F. 1356, 1361 n. 6 (1972).

[37]A 1792 statute, for example, prohibited the sale of lottery tickets not approved by the Maryland legislature. Md. Acts 1792, ch. 58, 1 Dorsey's Laws 288, cited in Hawkins v. Cox, 11 F. Cas. 872 (No. 6,243) (C.C.D.C 1819). A 1797 provision also prohibited the keeping of gaming tables in taverns. Md. Acts 1797, ch. 110, §2, cited in United States v. Dixon, 25 F. Cas. 872 (No. 14,970) (C.C.D.C. 1830).

[38]An 1806 bylaw proscribed public gaming tables. Georgetown Bylaw of March 7, 1806, cited in United States v. Wells, 28 F. Cas. 521 (No. 16,662) (C.C.D.C. 1812).

[39]Pursuant to congressional authorization, Act of May 3, 1802, ch. 53, §7, 2 Stat. 195, the Washington city council could restrain or prohibit gambling if it so chose. In 1809, it restrained faro tables. Bylaw of Aug. 16, 1809, cited in Washington v. Strother, 29 F. Cas. 356 (No. 17,233) (C.C.D.C. 1824). The bylaw was expanded by the city council to include other forms of gaming devices such as "rolly-bolly, shuffleboard, and equality table" in a Bylaw of Jan. 12, 1830, §1, as cited in Hall v. Washington, 11 F. Cas. 278 (No. 5,953) (C.C.D.C. 1836); Dixon v. Washington, 7 F. Cas. 766 (No. 3,935) (C.C.D.C. 1830).

[40]United States v. Ismenard, 26 F. Cas. 554 (No. 15,450) (C.C.D.C. 1803); United States v. Dixon, 25 F. Cas. 872 (No. 14,970) (C.C.D.C. 1830).

3. Early lotteries and gambling

The Washington that Andrew Jackson knew, when the Mall was a bog, and cattle and sheep grazed behind the White House, "had a special experience with lotteries."[41] Lotteries were a popular means of financing public improvements at the turn of the nineteenth century, and Washington, as a planned city, needed many new buildings.[42] A number of lotteries were conducted, with scandal associated from the first.[43] Congress authorized lotteries for the District, in 1812, provided that the amount to be raised on an individual project did not exceed $10,000 and the President approved.[44] Problems associated with such lottery ventures led to

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[41] Washington Lawyers' Committee for Civil Rights Under Law, Legalized Numbers in Washington at 11 (1973).

[42] See Ezell at 102-08.

[43] The most notorious seems to have been a lottery operated by Samuel Blodget in the 1790's, which ended with Blodget sacrificing his personal property to cover prizes he had been unable to deliver as promised. Ezell, at 104.

[44] Act of May 4, 1812, ch. 75, §6 2 Stat. 726. Congress also authorized specific lotteries directly taking, inter alia, the following actions: 1) assigning for committee study the holding of a lottery to benefit an Alexandria Episcopal church, Annals of Cong., 10th Cong., 2d Sess. 501 (1808); 2) considering imposing an excise tax on lottery earnings in conjunction with a new tax on plate and jewelry, Annals of Cong., 13th Cong., 3d Sess. 224, 1122 (1815); and 3) discussing a potential lottery to benefit Georgetown University, Annals of Cong., 14th Cong., 1st Sess. 90 (1816).

litigation reaching the Supreme Court in a number of instances.[45]

Corruption associated with gambling ventures in the District of Columbia, moreover, soon involved Congress. The first congressional effort to establish comprehensive penal laws for the District, enacted in 1831, contained a section limiting the operation of gaming tables.[46] In 1842, Congress also outlawed the sale of lottery tickets in the District of Columbia, providing that a place of business for the sale of such tickets would be unlawful, that contracts for the sale of lottery tickets would be void, and that money paid for such contracts could be recovered.[47]

Despite the new legislation, gambling persisted and in some cases became legend.[48] Various enterprises rose

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[45] See, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 82 (1821); Brent v. Davis, 23 U.S. (10 Wheat.) 449 (1825) (irregularities in lottery offering challenged); Corporation of Washington v. Young, 23 U.S. (10 Wheat.) 455 (1825); Clark v. Corporation of Washington, 25 U.S. (12 Wheat.) 19 (1827); Shankland v. Corporation of Washington, 30 U.S. (5 Pet.) 391 (1831). The last three cases involved the same lottery, each concerning the attempts of ticket purchasers to collect from the judgment-proof manager.

[46] Act of March 2, 1831, ch. 37, §12, 4 Stat. 449.

[47] Act of Aug. 31, 1842, ch. 282, 5 Stat. 578. Half the penalty upon conviction was to be given to the informer.

[48] The Palace of Fortune, operated by Edward Pendleton, was alleged to be the favorite of lobbyists and legislators alike in the decades before the Civil War. When Pendleton died, President Buchanan attended the funeral. Prominent Democrats were the pallbearers. H. Chafetz, Play the Devil at 182 (1960) [hereinafter cited as Chafetz].

and fell as Washington's population shifted and burgeoned through the Civil War period.[49] Meanwhile, feelings toward gambling, and particularly toward lotteries, shifted among the general populace and led to a more critical attitude in Congress toward such ventures. Congress added "gift enterprises" to the list of prohibited activities in 1873,[50] strengthened the prohibition regarding lottery tickets in 1878,[51] and in 1883 adopted an "act more effectually to suppress gaming in the District of Columbia."[52] Betting on horse or boat races was added to the list of prohibitions five years later,[53] leading to a whole group of sections in the 1901 codification of law in the District of Columbia entitled "Offenses Against Public Policy."[54]

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[49] Id. at 179-82.

[50] Act of Feb. 17, 1873, ch. 148, 17 Stat. 464.

[51] Act of April 29, 1878, ch. 68, 20 Stat. 39. The statute stated that one who should "within the District of Columbia, keep, set up, or promote, or be concerned as owner, agent, clerk, or in any other manner, in managing any policy-lottery or policy-shop" would be fined or jailed. It also provided that the sale of any related tickets or devices or the permission of any such conduct in one's house similarly would be punished.

[52] Act of Jan. 31, 1883, ch. 40, 22 Stat. 411. The statute also defined "gaming table", and prohibited participation in "three-card monte", and repealed any inconsistent provisions.

[53] Act of April 26, 1888, ch. 204, 25 Stat. 94.

[54] Act of March 3, 1901, ch. 854, §§8863-69, 31 Stat. 1330-31. Largely codifying existing law, the provisions prohibited lotteries, gaming tables, "three-card monte," and making book.

The attitude of Congress toward gambling in Washington was fully developed by the time of the Civil War. A Washington court summarized the law and public opinion concerning lotteries as follows:

> Although formerly permitted by law, and even encouraged, public opinion for nearly half a century almost everywhere in this and all civilized countries has recognized lotteries as fruitful sources of unmitigated mischief; as a cunning scheme by which crafty knaves plunder the silly and credulous; destructive of thrift and honest industry and pandering to idleness and vice. . . . The keeping of a shop within this District for the sale of lottery or policy tickets is something affecting the entire country. 55

Other forms of gambling also fared badely in the courts, amid similar language of debilitating influences and vice attached to gambling.[56]

4. Modern law

Although the more infamous, public forms seemed to disappear at the close of the nineteenth century, gambling

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[55] United States v. Green, 19 D.C. (8 Mackey) 230, 241 (1890).

[56] See, e.g., Miller v. United States, 6 U.S. App. D.C. 6 (1895) (booth for taking bets on horseraces held within definition of "gaming table" as device in which money was wagered); Lansburgh v. District of Columbia, 11 U.S. App. D.C. 512 (1897) (prohibiting trading stamp venture under "gift enterprise" statute as intervening in legitimate business); Sheedy v. District of Columbia, 19 U.S. App. D.C. 280 (1902) (promotion involving cereal box coupons held unlawful); District of Columbia v. Kraft, 35 U.S. App. D.C. 253, cert. denied, 218 U.S. 673 (1910) (trading stamp venture held unlawful); Corporate Organization and Audit Co. v. Hodges, 47 U.S. App. D.C. 460 (1918) (newspaper contest involving awarding of gift points to advertisers and customers held unlawful). Trading stamp promotions were also construed to be unlawful "gift enterprises" under the statute of another jurisdiction in In re Gregory, 219 U.S. 210 (1911).

remained. The numbers game became popular, particularly among the urban poor.[57] The simplicity and unobtrusiveness of the game and the narrow construction of existing statutes[58] made the limitation of numbers a particularly difficult task for law enforcement officials. Congress debated such difficulties,[59] and in 1938 and again in 1953 further amended existing law in an attempt to reach the numbers.[60]

A chapter of the D.C. Code today continues to prohibit many forms of gambling.[61] Lotteries remain prohibited in

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[57] Washington Lawyer's Committee for Civil Rights Under Law, Legalized Numbers in Washington 35 (1973).

[58] In Ferguson v. United States, 123 A.2d 615 (D.C. Mun. App. 1956), aff'd, 99 U.S. App. D.C. 331, 239 F. 2d 952, pet. for rehearing enbanc denied, cert. denied, 353 U.S. 985 (1957), the defendant appealed from a conviction under the current D.C. Code §22-1502 for the possession of a numbers book. The court in Ferguson affirmed the conviction, however, construing the D.C. Code section as amended in 1953 to encompass the defendant's conduct.

[59] S. 711, 76th Cong., 1st Sess. (1938) was proposed to strengthen anti-numbers legialation in the District. It was argued that approximately $3000 per day was realized in the D.C. numbers operations in 1938, where the maximum bet was 50¢. 85 Cong. Rec. 4237-40 (1938). The discussion cited Justice Holmes' opinion in Francis v. United States, 188 U.S. 375 (1903), which had distinguished an original ticket from a duplicate to avoid an anti-lottery statute conviction as support for the argument and that duplicate numbers slips would similarly be outside the D.C. provision as it existed in 1938.

[60] The 1938 act prohibited the mere possession of a lottery ticket. It also strengthened the definitions of previously prohibited conduct. Act of April 5, 1938, ch. 72, 52 Stat. 198. The 1953 legislation added language specifying that the possession of such tickets was prohibited whether or not the tickets pertained to a current venture. Act of June 29, 1953, ch. 159 §206(a), 67 Stat. 95.

[61] D.C. Code §§22-1501 to 22-1515 (1973).

all forms,[62] as are "gambling premises"[63] and "gaming tables."[64] "Three-card monte"[65] and sports betting[66] are illegal, and a comprehensive scheme prohibits dealing in futures.[67] Finally, it is illegal to be present in an "illegal establishment", defined as including a "gambling establishment" or place where "intoxicating liquor" or "narcotic drugs" are sold without the proper licenses.[68] This particular prohibition has been construed to be unconstitutional by the D.C. Circuit.[69]

5. Decriminalization

There is no significant movement toward decriminalization of gambling in the District of Columbia today. Although local authorities will probably play a larger role in the

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[62] Id. §22-1501. The stringent possession statute is particularly significant, since it punishes the player as well as the entrepreneur.

[63] Id. §22-1503 prohibits knowing permission of the sale of lottery tickets on one's premises, while id. §22-1505 prohibits the maintenance of gambling premises generally.

[64] Id. §22-1504.

[65] Id. §22-1506.

[66] Id. §22-1508. "Corrupt influence" in connection with athletics is separately proscribed by id. §22-1513.

[67] Id. §§22-1509 to 12 prohibit "bucketing and bucket-shopping."

[68] See D.C. Code §22-1515(a) (1973).

[69] The provision was held unconstitutional on its face in an appeal involving the sale of narcotics. Holly v. United States, 150 U.S. App. D.C. 287, 464 F.2d 796 (1972).

future than they have in the past,[70] the system of statutes enacted by Congress apparently remains firmly entrenched. Gambling, of course, persists, and it is unlikely to be halted entirely by any scheme of laws. Nevertheless, the congressional policy toward gambling in the District of Columbia is and has been one of prohibition for more than a century.[71]

C. Federal Regulation of Lotteries

1. Present statutes

The existing scheme of federal anti-lottery statutes consists principally of six statutes,[72] five of which comprise chapter 61 of the United States Codes, title 18.[73] Section

[70] Home rule will probably leave Congress out of future decisions involving local District of Columbia penal laws.

[71] D.C. Code §§22-1502 and 22-1515 (1973) are significant, too, because they represent a congressional attempt to limit gambling by reaching the participant. Federal statutes not concerning gambling specifically related to the District of Columbia have not generally done so. Although other statutes may affect the individual gambler, and, occasionally, applications of Federal statutes to individuals may seem harsh, see, e.g., United States v. Fabrizio, 385 U.S. 263 (1966), the general policy of Federal anti-gambling statutes has been to limit the business enterprise of gambling, not the individual gambler. See 18 U.S.C. §1955.

[72] 18 U.S.C. §§1301-04 (1970), 1307 (Supp. IV, 1974), 39 U.S.C. §3005 (Supp. IV, 1974).

[73] Chapter 61 also includes §1305, which exempts fishing contests from the anti-lottery statutes, and §1306, which prohibits the participation of federally insured or chartered banks in certain lottery-related activities.

1301 prohibits the importation and passing through interestate commerce of lottery tickets and related materials.[74] Section 1302 limits the mailing of lottery tickets, advertisements, or related materials.[75] Section 1303 forbids postal authorities

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[74] 18 U.S.C. §1301 provides:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or any list of prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

[75] 18 U.S.C. §1302 provides:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
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> Any letter, package, postal card, or circular containing any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;
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> Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;
>
> Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

from acting as agents for a lottery.[76] Radio communications are added to the list of prohibited channels for lottery-related information by section 1304, which was added by

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> Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;
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> Any article described in section 1953 of this title--
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> Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

[76] 18 U.S.C. §1303 provides:

> Whoever, being [an officer or employee of Postal Service] acts as agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than $100 or imprisoned not more than one year, or both. (as amended by Act of August 12, 1970, Pub. L. 91-375, §6[j][10]).

the Communications Act of 1934.[77] Section 1307, enacted in 1975, in certain circumstances exempts lotteries conducted by state acting under authority of state law from the federal anti-lottery statutes just discussed.[78] Finally, 39 U.S.C. §3005

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[77]18 U.S.C. §1304 provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

[78]18 U.S.C. §1307 provides:

> (a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law--
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> (1) contained in a newspaper published in that State, or
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> (2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.
>
> (b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law.
>
> (c) For the purposes of this section 'State' means a State of the United States, the Dirstict of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

provides postal officials with the authority to implement section 1302.[79]

While the federal anti-lottery statutes appear comparatively straightforward, their present form is the product of an

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(d) For the purposes of this section 'lottery' means the pooling of proceeds derived from the sale of tickets or chance and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. 'Lottery' does not include the placing or accepting of bets or wagers on sporting events or contests.

[79] 39 U.S.C. §3005 provides in pertinent part:

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a post master to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

(c) . . .

intricate policy struggle spanning many years of American history. During the nineteenth century, as state governments shifted from encouragement to prohibition of lotteries, Congress followed suit. Congress took an active part in what would generally be thought to be a state matter because lotteries had spread beyond the control of the states. Had it not acted, Congress in effect would have been condoning lotteries almost universally condemned. Nevertheless, this period of increasing national involvement in the regulation of lotteries saw the basic policy questions of federalism argued as the national government determined the role it would play.

2. Constitutional limitations

Throughout the development of the federal lottery statutes, a number of constitutional provisions played a prominent role in both litigation and congressional deliberations. Controversy surrounded the following:

(1) the extent of congressional power to regulate interstate commerce under Article 1, §8 of the Constitution;[80]

(2) the power of Congress under its postal authority in Article 1, §8 as it affects the internal affairs of the States;[81]

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[80] "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" U.S. Const. art. I, §8, cl. 3.

[81] "The Congress shall have Power . . . to establish Post Offices and Post Roads;" U.S. Const. art. I, §8, cl. 7.

(3) the reach of federal police power under the Necessary and Proper Clause as it extends to the proscription of new crimes inconsistent with state policies;[82]

(4) the obligation placed on both state and national governments by the Contracts Clause in Article 1, §10;[83]

(5) the extent of protection afforded the states under the Tenth Amendment[84] to distinguish crimes mala prohibita and mala in se[85] without federal involvement; and

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[82] "The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, §8, cl. 18.

[83] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, §10, cl. 1.

[84] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[85] The distinction is that an act malum in se is "an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law," while an act malum prohibitum is "a thing which is wrong because prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law;" Black's Law Dictionary 1112 (rev'd 4th ed. 1968; italics in text).

The distinction was important to the argument of the petitioners for writs of habeas corpus in In Re Rapier, 143 U.S. 110 (1892). Counsel's argument hinged the reservation of powers under the Tenth Amendment on the malum prohibitum/malum in se distinction, 143 U.S. at 119:

(6) the scope of First[86] and Fourth[87] Amendment protections of individuals from the reach of state or federal legislation.

> Turning to the division of powers made by our Constitution between the States and the general government, we find, as its most distinctive feature, that certain enumerated powers were awarded to the latter, and all others reserved to the former. And among the powers so reserved most certainly that of determining what new things should be declared and treated as criminal offenses against the good order of society was embraced, except so far as distinct powers of legislation upon particular subjects were conferred upon general government.
>
> There is therefore, a well-defined line which limits the extent to which the general government can act as a moral person, and regulate its own powers so as to favor or disfavor particular acts of individuals in the States. That line is, in general, coincident with the boundary everywhere recognized as separating mala prohibita from mala in se.

Although this categorization was rejected by the Court, 143 U.S. at 134, the argument is useful because it unveils the reason for the historical controversy about gambling prohibition. The distinction had been raised by the Supreme Court previously: "[lotteries] are not, in the legal acceptation of the term, mala in se, but, as we have just seen, may properly be made mala prohibita," Stone v. Mississippi, 101 U.S. 814, 821 (1879).

State and federal policies conflict at different stages of political history in their drawing of the malum prohibitum/ malum in se line where the constitutional delegation of powers arguments become crucial. The recent friction between federal statutes and state-operated lotteries resulted from a change in the state definition of mala prohibita that was not yet reflected by Congress. The process is cyclical, and underlies many 19th century Congressional arguments concerning the limitation of gambling enterprises, extending to the present.

[86] "Congress shall make no law . . . abridging the freedom of speech, or of the press;" U.S. Const. amend. I.

[87] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," U.S. Const. amend. IV.

3. Historical development

a. Original detachment

Lotteries flourished in the United States from the colonial period through the 1830's. Usually condoned by law, they were respectable as well as popular:

> For many years after this practice [lotteries] began to prevail it was not regarded at all as a kind of gambling; the most reputable citizens were engaged in these lotteries, either as selected managers or as liberal subscribers. It was looked upon as a kind of voluntary tax for paving streets, erecting wharves, buildings, etc., with a contingent profitable return for such subscribers as held the lucky numbers. 88

During this period, most states had similar experiences with lotteries.[89] Private lotteries were banned in many areas because of the competition they gave state lotteries and the fraud and corruption they engendered. To stifle competition further, states would ban the sale of tickets of neighboring state lotteries. One by one, the states began to prohibit lotteries altogether, usually by constitutional amendment.[90] Congressional regulation of lotteries in the District of Columbia was also consistent with this pattern.

After the Civil War, congressional attention to lotteries shifted from the District of Columbia to the

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[88] A. Spofford, Lotteries in American History, S. Misc. Doc. No. 57, 52d. Cong., 2d Sess. 174-175 (1893) [hereinafter cited as Spofford].

[89] See Ezell, at 102-05; Spofford, at 193.

[90] Spofford, at 193.

Post Office. Postal officials discovered that the mails were being used for fraudulent lottery schemes.[91] The states lacked power to control lottery enterprises dependent on mail channels. Consequently, the Post Office sought to obtain legislation to increase its powers at this point,[92] since the prohibition of the actions of postal authorities as agents for lotteries was at that period the only federal legislation regarding lotteries.[93]

The first congressional limitation affecting state lotteries was, however, not enacted until 1868. Hidden

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[91]The Department uncovered many different kinds of schemes. For example, a firm in New York would obtain the names of persons living in rural districts throughout the country and send circulars through the mail concerning a "gift enterprise" scheme which was notoriously fraudulent. This firm would then receive in response a large amount of money daily. Whenever a complaint was made that the "gift" was not received, the firm would reply either that it had never received the money from the purchasers or that it had already mailed the package, thus placing the blame on the Post Office, which could not conclusively check the allegations. S. Misc. Doc. No. 57, 39th Cong., 1st Sess. 2 (1866). (Letter from Solicitor of Post Office Department to Postmaster General concerning use of mails for fraudulent purposes).

[92]S. 148, 39th Cong., 1st Sess. (1866).

[93]In 1827, Congress enacted the antecedent of 18 U.S.C. §1303 limiting the participation of postal officials in lotteries, Act of March 2, 1827, ch. 61, 4 Stat. 238.
In 1821, however, Congress had passed a resolution calling for a report by the Committee on the District of Columbia on the number and profits of lotteries. Annals of Cong., 16th Cong., 2d Sess. 757 (1821).

within an "Act to further amend the postal Laws,"[94] the statute provided that:

> it shall not be lawful to deposit in a post-office to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever. 95

Another provision which allowed the postmaster to open letters suspected of containing lottery materials prohibited by the statute was eliminated in conference.[96] There was seemingly little dispute and no open debate over this limitation on the mailing of lottery tickets.

Nevertheless, the new statute was difficult to enforce. A provision imposing penalties on postal employees for the unlawful detention or delay of mail remained unaffected by the 1868 Act,[97] and Postal authorities had no way to ascertain

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[94] Act of July 27, 1868, ch. 246, 15 Stat. 194. The act concerned, inter alia, the free return of nondeliverable mail (§1), the establishment of postal money orders (§2), and a discount for sales of postage stamps to vendors (§12).

[95] Id. at §13. The anti-lottery provision had been added to the House bill by the Senate. Cong. Globe, 40th Cong., 2d Sess. 4175 (1868).

[96] Cong. Globe, 40th Cong. 2d Sess. 4412 (1868). Chairman Farnsworth reported for the House Committee on the Post-Office and Post-Roads that this would be a "dangerous power to confer upon postmasters."

[97] U.S. Rev. Stat. §§3890, 3891 (1875 ed.). The Attorney General opined:

> While it may be lawful . . . to detain . . . a letter . . . within the prohibition of the statute, it is unlawful for him to detain any letter which is not. . . . The

the contents of suspected letters, since letters are protected by the Fourth Amendment.[98]

When the postal laws were codified in 1872,[99] the 1868 limitation on the mailing of lottery tickets was reworded,[1] leaving only illegal lotteries subject to the statutory exclusion. There was no open debate or report concerning the change. Consequently, it is not clear whether a change in policy was intended.[2] The prohibition of postal officials

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> officer may have acted in perfect good faith . . . he may have had reasonable ground to believe . . . that the letter detained was within the prohibition of the statute; and yet I cannot say . . . that such a plea would be a good defence either to a public prosecution, or to a private suit, by the person aggrieved.

12 Op. Att'y. Gen. 538, 539 (1868).

[98] The expectation of privacy derived from the Fourth Amendment as applied to sealed letters was not long debatable. Ex Parte Jackson, 96 U.S. 727 (1877).

[99] Act of June 8, 1872, ch. 335, 17 Stat. 283.

[1] Id. §149. The section provided:

> That it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, and a penalty of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution, is hereby imposed upon conviction, in any Federal court, of the violation of this section.

[2] Chairman Farnsworth of the House Committee on the Post-Office and Post-Roads introduced the bill, H.R. 1, 42d Cong., 2d Sess. (1872), and said that there were no major changes. Cong. Globe, 42d Cong., 2d Sess., pt. 1, 15 (1871).

acting as lottery agents was brought forward unchanged,[3] and both provisions were contained in the Revised Statutes.[4]

In the next few years, while the nation was fighting a depression, criticism of remaining state-operated lotteries intensified. Between 1872 and 1876, seven additional states enacted constitutional amendments forbidding their legislatures from authorizing lotteries for any purpose.[5] Yet the populace apparently bought more tickets than ever. The Attorney General of New York, for example, reported that there were 33 lottery agencies in New York City alone receiving an average of more than 9500 letters each week.[6]

b. The 1876 "illegal" debate

Congress amended the restriction on the mailing of lottery tickets in 1876 by striking the word "illegal."[7] The change reflected a congressional determination that the exclusion of lottery-related materials from the mails was to

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[3] Act of June 8, 1872, ch. 335, §79, 17 Stat. 294.

[4] The statute prohibiting postal officials from acting as lottery agents, became U.S. Rev. Stat. §3851 (1875 ed.), and the provision prohibiting the mailing of lottery materials became Rev. Stat. §3894 (1875 ed.).

[5] Spofford at 193.

[6] Ezell at 238. The report cited 7661 ordinary and 1993 registered letters as the weekly average.

[7] Act of July 12, 1876, ch. 186, §2, 19 Stat. 90.

extend to all lotteries, whether or not authorized by state governments.[8] Despite the assertion of the chairman of the House Committee on the Post-Office and Post-Roads that the bill contained no material changes,[9] and subsequent passage in the lower body with no debate,[10] Senate agreement was not so easily obtained. Many of the major and recurring issues of constitutional dimension were raised in the Senate, fervently argued on the floor, and decisively answered with a vote favoring the proposed amendment.[11]

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[8] The object of the amendment to [Rev. Stat. §3894] is to secure uniformity and prohibit lottery circulars of any kind from passing through the mails.

4 Cong. Rec. 3656 (1876) (remarks of Mr. Cannon, of the House Committee on the Post-Office and Post-Roads on reporting H.R. 1239, 44th Cong., 1st Sess. (1876). The bill, as H.R. 2575, was fully debated in the Senate, id. at 4261-64.

[9] Speaking about a modification of U.S. Rev. Stat. §3894 (1875 ed.) (relating to obscene publications), as well as a modification of the anti-lottery measure, Mr. Cannon was responding to the challenge that "The proposed bill in no wise changes the law as it now is except to provide a penalty for the circulation of obscene literature." Id. See also Horner v. United States, 146 U.S. 449, 456 (1893) citing the change; 15 Op. Att'y Gen. 203, 204 (1877):

> I cannot see how Congress could have more explicitly declared a purpose to deprive of mail privileges all lottery letters and circulars, without regard to the charter or charters of the lotteries, than it did by striking out the limitation previously found in the word 'illegal'.

[10] 4 Cong. Rec. 3656 (1876).

[11] Certainly the Senate does not mean to decide that the citizens of a State where lotteries are legal have no right to send a lottery scheme from one portion of the State to another. That seems to me to be interfering with the rights of the people of the States where they choose to think that the sale of lottery tickets is not criminal or improper.

The constitutionality of the 1876 restriction on the mailing of lottery materials was considered by the Supreme Court the following year in Ex Parte Jackson.[12] The Court held that "[t]he power possessed by Congress embraces the

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4 Cong. Rec. 4262 (1876) (remarks of Sen. Whyte). Further excerpts from the debate in the Senate highlight the clarity with which the continuing arguments with respect to the prohibition of gambling enterprises by the federal government were seen in 1876:

> The difficulty which the Department [Post Office] labors under is in determining what are and what are not legal lotteries. A great many schemes are gotten up, some in the Territories, some of them in operation to-day apparently with the forms of law, but yet of doubtful legal force, and they are transmitting their matter through the mails, and the whole thing proves to be a fraud upon the community; and the question arises whether it is not wiser and better to treat all lotteries, whether legal or illegal, as precisely the same, or as a system of gambling which a wise course in legislation will not only justify but demand at our hands shall be stopped.

Id. at 4262 (remarks of Sen. Hamlin).

Debate in the Senate also reflected the propriety of congressional action with respect to local gambling activity:

> . . . if a State chooses to authorize and legalize a lottery, call it gambling, if you please, and gambling it is, that is a matter entirely for the consideration of that State . . .

Id. (remarks of Sen. West). This argument raises the mala in se versus mala prohibita problem. There is little doubt that Congress was reflecting the change in the perspective of the populace at large towards lotteries as well as specific aims to eradicate corruption. Nor is there doubt that the national mood had been correctly perceived by Congress as having shifted away from approval of lotteries. See Ezell at 242-70; see also Phalen v. Virginia, 49 U.S. (8 How.) 163, 168 (1850).

[12] 96 U.S. 727 (1877).

regulation of the entire postal system of the country."[13] Construing the lottery exclusion from the mails as it would any other postal regulation, the Court avoided the question of possible interference with state prerogatives under the reservation provision of the Tenth Amendment. Instead, the Court turned to a warning against the infringement of individual rights:

> The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with the rights reserved to the people, of far greater importance than the transportation of the mail. 14

The court then discussed potential First[15] and Fourth[16]

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[13] Id. at 732.

[14] 96 U.S., at 732

[15] Id. at 733-34.

[16] The Court in Jackson set Fourth Amendment guidelines as to permissible interference with the mails restrictively, cautioning the Congress not to attempt to violate the guarantee no matter what the purpose, at 96 U.S. 733:

> Letters and sealed packages of this kind are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly

Amendment difficulties under the statute. Jackson did not affirm on the merits the congressional decision to regulate lotteries, but rather sustained the right of Congress "to refuse its facilities for the distribution of matter deemed injurious to the public morals."[17]

The 1876 change did not have the desired result of extinguishing the state-chartered lottery system. The Postmaster General instructed postmasters to refuse to deliver or receive letters addressed to lottery companies or their

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describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

[17] 96 U.S. at 738. The holding of Jackson was the subject of much dispute in ensuing years. In 1884, the Senate Committee on Post-Offices and Post-Roads reported S. 1017, 48th Cong. 1st Sess. The purpose of S. 1017 was to prohibit the mailing of newspapers containing lottery advertisements. Jackson was cited as authorizing the enactment of such legislation, 15 Cong. Rec. 4380 (1884). The minority report characterized the Jackson language differently, finding that the case could only be construed as having upheld the Act of July 12, 1876, Id. 4383, and otherwise as spelling out restrictions upon the power of Congress to interfere with freedom of the press: "Nor can any regulations be enforced against the transportation of printed mattter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value," (96 U.S. at 733). Because Jackson affirmed the lottery restrictions of 1876 but also cautioned against over-extensions of congressional power in violation of constitutional guarantees, the case was cited in an exaggerated fashion to support both sides repeatedly in the volatile decades to follow during the congressional battle with the Louisiana Lottery.

agents on the assumption that such mail concerned lotteries.[18] The Attorney General, however, advised the Post Office that it did not have such authority. He concluded that the statute did not confer powers of seizure or detention; the only means of prevention contemplated by the statute was a fine.[19] The Attorney General also determined that newspapers, which are open to inspection, were not "circulars" and thus not within the statutory prohibition.[20] The postal

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[18] Ezell, at 240. In 1895, Congress gave the Postmaster General the explicit authority to refuse to deliver ordinary letters which violated the statute. Act of March 2, 1895, ch. 191, §4, 28 Stat. 963.

[19] 16 Op. Att'y Gen. 5,6 (1878). See also 17 Op. Att'y Gen. 77,78 (1881); 18 Op. Att'y Gen. 306,308-11 (1885). Ezell, reports the following background at 247-48.

> The management decided to test the legality of the Federal law of 1876. Ben Butler, stormy petrel of the Civil War, postwar political king-pin and the brother-in-law of the Secretary of the Treasury, headed a corps of nine lawyers to press the fight. Howard reportedly hurried to Washington for personal interviews with President Rutherford B. Hayes and Secretary of the Treasury John Sherman, a move interpreted by northern newspapers as an attempt to inject the lottery into national politics. Despite numerous indications that the lottery was unpopular, the Attorney General handed down a decision which was berated by lottery foes as sustaining the law of 1876 but at the same time preventing its enforcement.

[20] 18 Op. Att'y Gen. 306, 309 (1885):

> I do not think that a newspaper or periodical is rendered non-mailable by containing a lottery advertisement. This does not transform the newspaper into a 'circular' within the purview of section 3894.

authorities, therefore, were unable to enforce the statute effectively.

Meanwhile, the Louisiana Lottery, which had been an important factor in the 1876 congressional action, continued its operations in flagrant violation of the statute. In 1868, a New York gambling syndicate had secured an exclusive lottery franchise from a bribed Louisiana legislature.[21] Declaring that the franchise would increase state revenue and stop the flow of Louisiana gambling dollars out of the state, the legislature gave the syndicate a lucrative monopoly by prohibiting the sale of other lottery tickets in the state. In exchange for a payment of $40,000 per year, the company was exempted from all state taxes.[22] In an elaboration of its operations on the floor of Congress, the Louisiana Lottery was alleged to have had as much as $30,000,000 in annual income.[23] The lottery was not without foes in the

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[21] Ezell, at 243:

> But as later revealed in testimony by the officers and incorporators in a fight over the profits, the issue was not left to stand or fall on its own merits, for the syndicate had liberally bribed carpetbagger and Negro legislators.

[22] Id. at 244.

[23] The Louisana Lottery Company was chartered by the Legislature of Louisiana in 1868, for twenty-five years from January 1, 1869.

> This is a private corporation and its affairs are veiled in the greatest secrecy. The number of its stockholders is not known, but they are believed to be less than twenty in number. Some five or six control the great majority of the stock.

state, but its supporters were able to prevent attempts to revoke the franchise or authorize a second lottery in

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> All the proceedings and workings of the company are carefully concealed from the public. Four national banks in New Orleans . . . guaranty the prizes drawn.
>
> The stock of the company embraces 12,000 shares at a par value of $1,200,000. Owing to the large dividends paid by the company the shares are quoted at $1,200, or an aggregate of $12,000,000.
>
> The dividends are believed to exceed, on the average, 100 per cent., and [in 1889] . . . were 170 per cent.
>
> This dividend large as it is, represents only half of the profits of the company for a single year. The other profits go to certain preferred stockholders, very few in number.
>
> . . . . [T]he daily drawings . . . exceed $2,000,000 annually [in addition to $28,000,000 from monthly and special drawings] making the enormous annual income of $30,000,000, or twice the sum that was paid Napoleon by Jefferson in 1801 for the entire Louisiana Purchase.
>
> The remarkable thing about this lottery is the fact that 93 per cent of income is derived outside the State of Louisiana, from other States of the Union and the Territories. There is not a city or considerable village in the country which does not contribute to the enormous revenues of this gigantic gambling concern. It was the boast of the champions of the company in the recent struggle before the Louisiana Legislature that it was 'enriching the State by millions.'
>
> . . . . After one of the most furious and humiliating struggles that have ever occurred before a legislative body, both branches of the Louisiana Legislature, by a two-thirds vote of each house, decided to submit a constitutional amendment to the people, at an election in 1892, which proposes to 'carry the charter of the Louisiana Lottery Company up to the year 1919.'

21 Cong. Rec. 8705-06 (1890) (from remarks of Mr. Moore.)

Louisiana.[24] The lottery embarked on its most profitable decade after the passage of the 1876 statute, obtaining 93 percent of its revenue outside of Louisiana.[25] Many smaller schemes were also in operation, at the same time, although after 1868 none were legal.[26] In reply to a resolution of the House of Representatives calling for information regarding the use of the mails for lottery purposes, the Postmaster General reported numerous such schemes.[27]

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[24] The ease with which these measures were passed seem [sic] to justify the repeated claim that the company controlled every Louisiana legislature from 1868 to 1892. See Ezell, at 245.

[25] Ezell, at 249, 251; 21 Cong. Rec. 8705-06 (1890).

[26] Ezell, at 241. Two other states, Delaware and Vermont, permitted lotteries authorized by their own legislatures, but no lotteries in fact were authorized during this period. H.R. Rep. No. 787, pt. 2, 50th Cong., 1st Sess. 2 (1888). In 1884, the Senate Committee on Post-Offices and Post-Roads surveyed the extant state lottery statutes and constitutional provisions while considering S. 1017, 48th Cong., 1st Sess. (1884), which prohibited mailing lottery advertisements. 15 Cong. Rec. 4380-82 (1884). Of 38 states, only Delaware, Vermont, and Louisiana did not completely prohibit lotteries. The report concluded at 4382:

> From the foregoing it clearly appears that the bill reported by the committee is not only within the power and duty of Congress, but is also in harmony with and in support of the policy of nearly every State in the Union.

[27] H.R. Exec. Doc. No. 22, 46th Cong., 2d Sess. 16-17 (1880). The report, entitled "Letter from the Postmaster General in reply to a resolution of the House calling for information regarding the use of the mails for lottery purposes," listed over 100 suspected violators. Congress had used the report technique previously, as authorized by an 1821 resolution but at that time did not follow with any legislation.

Pressure upon Congress to take further action against lotteries mounted over the next decade. Scores of petitions begged for congressional eradication of the Louisiana Lottery, by then dubbed the "Serpent."[28] Countless bills were introduced to accomplish this and related purposes, but most were never reported out of committee.[29] In a special

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[28] Ezell, at 268. A large number of such petitions were referred to in the Congressional Record from 1880 to 1895.

[29] There was much lottery-related congressional activity during the years 1876 to 1890. In 1878, the 45th Congress eliminated the sale of lottery tickets in the District of Columbia by the Act of April 29, 1878 ch. 68, 20 Stat. 39. Approximately ten bills a year concerning lotteries were read and sent to committee from the 48th to 51st Congresses. One such bill was H.R. 5933, 50th Cong. 1st Sess. (1888), which concerned the prohibition of the advertisement of lottery tickets in the District of Columbia. Debate concerning H.R. 5933 typifies the arguments and divisions of Congress at the period, 19 Cong. Rec. 1153-1161 (1888). Ex Parte Jackson was extensively relied upon at 19 Cong. Rec. 1155 to show the restrictions imposed upon Congress with regard to regulating lotteries by the First and Fourth Amendments. Proponents of the bill to eliminate lottery advertisements often argued emotionally, denying that they could be circumventing constitutional guarantees:

> I know it will be insisted that the provisions of the bill will be an abridgment of the . . . 'freedom of the press' . . . but, Mr. Speaker, it will not abridge any . . . 'freedom of the press' . . . to do right or to publish whatever may promote the good of mankind. It is not designed to take away any proper or legitimate right of the press, but only to restrain and prohibit all license to perpetrate a wrong by enticing the young and unsuspecting into habits that will lead them into ruin, as heretofore been done in many instances. Some of the blackest deeds in the catalogue of crimes have been committed under the plea of liberty. On the way to the guillotine Madame Roland, [sic] exclaimed, . . . 'O, Liberty! Liberty! what crimes are committed in thy name'. . . .

message to Congress concerning lotteries, President Benjamin Harrison himself urged that without federal aid the states were powerless to control the lotteries.

> If the baneful effects of the lotteries were confined to the States that give the companies corporate powers and a license to conduct the business, the citizens of other States, being powerless to apply legal remedies, might clear themselves of responsibility by the use of such moral agencies as were within their reach. But the case is not so. The people of all the States are debauched and defrauded. The vast sums of money offered to the States for charters are drawn from the people of the United States, and the General Government through its mail system is made the effective and profitable medium of intercourse between the lotteries company and its victims. . . . The use of the mails by these

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(Remarks of Mr. Glass). Id. 1156.

Those opposed to further congressional action argued as follows:

> What is the Louisiana lottery? It is an institution authorized, organized, and created by the organic law of a sovereign State of this Union. It is a legal institution in so far as the State of Louisiana can make it so, as completely as any institution chartered by any State in this broad land. Now, my friend from Illinois [Mr. Cannon] knows that in so far as we can exercise this power in reference to the Louisiana lottery we can equally exercise it with reference to any banking institution chartered in the State of Louisiana or elsewhere. Now, I wish to ask my friend this question: If we can say to to this lottery company, a chartered institution, bearing the stamp and impress of the authority of a State law--nay, of the constitution of one of the States of this Union--'Your advertisement shall not be published in any newspaper issued in the District of Columbia,' why can we not say to some banking corporation authorized in the State of Louisiana, or, if you chosse, in the District of Columbia, 'You shall not receive the moneys of this lottery company as deposits in your vaults?'

(Remarks of Mr. Compton, id. at 1157).

H.R. 1159 was defeated 119-113, with 91 not voting, id., at 1161. The excerpts given are representative of the nature of the arguments on the floor and the extent to which pertinent issues were raised and overcome.

> companies is a prostitution of an agency only intended to serve the purpose of a legitimate trade and a decent social intercourse. 30

c. The amendments of 1890

The President's urgent request before Congress for new

30"A Compilation of the Messages and Papers of the Presidents 1789-1897, H.R. Misc. Doc. No. 210, pt. 9, 53rd Cong., Sess. 80-81 (1894) (J. Richardson ed.) [hereinafter cited as Richardson]. The same message was reprinted at 21 Cong. Rec. 7916 (1890). Harrison's message was based upon the increasing concern reported by the Postmaster General, John Wanamaker. In his 1889 annual report, Wanamaker had decried the ineffectiveness of existing federal law dealing with the Louisiana Lottery, Report of the Post master General 1889, 10 Exec. Doc. 39-41, 51st Cong., 1st Sess. (1889-90). This prompted Harrison to ask for new anti-lottery legislation in his first message to Congress, Richardson, at 44:

> The unsatisfactory condition of the law relating to the transmission through the mails of lottery advertisements and remittances is clearly stated by the Postmaster-General, and his suggestion as to amendments should have your favorable consideration.

The President also complained of conditions in the District of Columbia in his message, Richardson, at 81:

> The national capital has become a sub-headquarters of the Louisiana Lottery Company, and its numerous agents and attorneys are conducting here a business involving probably a larger use of the mails than that of any legitimate business enterprise in the District of Columbia. There seems to be good reason to believe that the corrupting touch of these agents has been felt by the clerks in the postal service and by some of the police officers of the District.

Harrison was again speaking on the recommendation of his Postmaster-General, John Wanamaker, who had written in a special report that the "entire Post-Office Department is in point of fact the principal agent of the Louisiana State Lottery Company." 11 S. Exec. Docs., 51st Cong., 1st Sess. 3-4 (1889-90), Exec. Doc. No. 196. There is more than a little irony in Harrison's role. The anti-lottery movement had begun as a Democratic attack against state created privilege; it was now ending as a Republican attack against corruption that would be accomplished over state rights objections.

legislation to eliminate the Louisiana Lottery provided the necessary impetus. Although each of the several previous Congresses had grappled with the question of banning newspapers containing lottery advertisements[31] from the mails, such a ban was not enacted until 1890.[32] The new legislation broadened the definition of prohibited matter and specifically authorized postal authorities to refuse to deliver mail suspected of being lottery-related.[33]

The 1890 Act represented the resolution of fifteen years of congressional debate over essentially the same issues. These issues were cogently framed by the opponents of an earlier version of the 1890 amendment.[34]

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[31] See S. Rep. No. 233, 48th Cong., 1st Sess. (1884); H.R. Rep. No. 826, 48th Cong., 1st Sess. (1884); S. Rep. No. 11, 49th Cong., 1st Sess. (1886); H.R. Rep. No. 2678, 49th Cong., 1st Sess. (1886); H.R. Rep. No. 787, 50th Cong., 1st Sess. (1888); S. Rep. No. 1579, 51st Cong., 1st Sess. (1890).

[32] Act of Sept. 19, 1890, ch. 908, 26 Stat. 465. The Act provided in pertinent part:

> . . . nor shall any newspaper, circular, pamphlet, or publication of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier.

This provision was similar to that discussed for the District of Columbia in 1888.

[33] Act of September 19, 1890, ch. 908, §2, 26 Stat. 466.

[34] The minority report in connection with S. 1017, 48th Cong., 1st Sess. (1884), an analogous bill to that enacted in 1890, construed the principal question as one of states' rights. 15 Cong. Rec. 4383 (1884).

> Assuming that the States are competent to protect the morals of their people against the corrupting and injurious effects of lotteries and lottery advertisements, and that the duty to furnish such protections rests with them, this bill presents the grave question as to how far Congress may legitimately go in exercising unquestionable powers for the accomplishment of objects and purposes that do not come lawfully within its jurisdiction. In other words, can Congress properly regulate the mail service of this country, under its authority "to establish post-offices and post-roads" for the purpose of preventing the circulation of newspapers containing lottery advertisements and the suppression of lotteries? 35

After references to Jackson,[36] the framers of the Constitution, Calhoun, Webster, and other luminaries, the opposing report concluded that

> The present bill is a long departure from the conservative opinions entertained and acted upon by the great statesmen of 1836. If not unconstitutional it embodies a principle and policy of most dangerous character and tendency, . . . 37

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[35] S. Rep. No. 233, 48th Cong., 1st Sess. 13-14 (1884) (minority report).

[36] Ex Parte Jackson, 96 U.S. 727 (1887).

[37] S. Rep. No. 233, 48th Cong., 1st Sess. 16 (1884) (minority report). See also 15 Cong. Rec. 4383 (1884).

As to the freedom of the press issue, the same minority report cited Jackson:

> Liberty of circulating is as essential to that freedom [the freedom of the press] as liberty of publishing; indeed, without the circulation the publication would be of little value. The freedom of circulation by the ordinary channels of communication is the very essence of the press's freedom. . . . Deny to the press the right to circulate through the mails and over post-routes, which now include all public highways, railroads, and navigable streams (unless sent as merchandise), and the guarantee thrown around its freedom by the Constitution is worthless.

15 Cong. Rec. 4383.

The bill's advocates contended that not only were Louisiana's rights at issue, but more significantly, the rights of the other states were involved. Federal control of the mails precluded the other states from effectively countering the Louisiana Lottery.[38] Congress had before it the responsibility to "crush this hydra-headed monster which is demoralizing the young, the poor, and the needy throughout the country, as no other institution in America has ever done, . . ."[39]

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[38] House debates over the 1890 legislation reiterated prior arguments. See 21 Cong. Rec. 8698-8721 (1890) concerning H.R. 11569, 51st Cong., 1st Sess., at 8706 (1890):

> The States are powerless to extirpate the Louisiana lottery. They are powerless even to protect themselves from its insidious brigandage. They have exhausted their resources. The mails, the national banks, and the channels of interstate commerce are controlled by the national authority and by national authority alone. The national Congress and the national Executive are alone equal to the overthrow of this pestilent corporation, which has become the richest, the most audacious, and the most powerful gambling institution that the world has ever known.

[39] Id. at 8705. Congress thus chose not to follow the states' rights arguments reiterated id. at 8703:

> . . . if Congress, in its supremacy, can indirectly undermine, discriminate against, and in effect destroy the legislation of the States in matters exclusively reserved to the States, our system is destroyed, the rights of the States under their reserved powers practically ended, and the Government is centralized, with the States mere figure-heads. To apply it: If a State, for purposes of revenue or from policy, desires to establish, tolerate, or legalize lotteries, which it has an undenied and undoubted authority to do, and which is a matter over which Congress has no earthly concern, and then Congress can, by indirection, through the exercise of another power, practically nullify and invalidate this action and make criminals of those within that State that do the customary and essential acts to its existence and prosperity according to its design and the law of the State, than the State might as well go out of business and cease to exist.

The 1890 Act broke the back of the Louisiana Lottery. "A fearless man was appointed postmaster in New Orleans and thousands of pieces of mail were seized and immense masses of evidence collected."[40] Business at the New Orleans post office was soon reduced by one-third.[41] The constitutionality of the Act was upheld by the Supreme Court in In Re Rapier[42] in 1892:

> We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. 43

d. Champion v. Ames: Regulation beyond the mails

Congress acted against lotteries once again in 1895 in a provision that was to become 18 U.S.C. §1301.[44] Going

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[40] Ezell at 263-64.

[41] The following year, the Postmaster General reported increased convictions under the lottery statutes and that the new statutes had received accolades from the press. Of 2,259 newspaper editorials in 850 papers, 2,172 opposed the use of mails by lottery companies and 87 favored such use. Report of the Postmaster General, 1891, 13 H.R. Exec. Doc., 17-22, 52d Cong., 1st Sess. (1891-92).

[42] 143 U.S. 110 (1892).

[43] Id. at 134.

[44] Act of March 2, 1895, ch. 191, 28 Stat. 963. Sections 2 and 3 of the 1895 legislation integrated the new changes into prior federal anti-lottery statutes, e.g. U.S. Rev. Stat. §§3894, 3929, 4041, last revised at 26 Stat. 465. Section 4 extended the power of postal officials to refuse to deliver

beyond its postal authority, Congress prohibited the importation and interstate carriage of lottery-related materials. The immediate reason for the new legislation was again the Louisiana Lottery. After having been curtailed by the 1890 Act and finally losing its Louisiana charter,[45] the Lottery had reestablished itself in Honduras and attempted to operate without using the United States mails.[46] To regulate the interstate transportation of lottery materials without regard to the postal service, Congress was forced to rely on its powers under the Commerce Clause.[47]

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mail relating to lotteries by including ordinary letters. The most significant extension of the 1895 act, unrelated to congressional authority to operate the postal service, was contained in §1, which affected interstate carriage.

[45] Ezell at 267.

[46] 26 Cong. Rec. 2356 (1894); 27 Cong. Rec. 3013 (1895) (remarks of Mr. Broderick).

[47] In attempting to eradicate the Louisiana lottery, Congress also affected charitable lotteries, despite its intention to avoid doing so:

> I have not the slightest objection to confining it to the lottery business, but to provide that the offering of prizes shall be a penal offense at innocent church fairs and other little enterprises of that sort, it seems to me, is going beyond what we ought to attempt.

26 Cong. Rec. 4313 (1894) (remarks of Mr. Gorman). The problem was inherent in the unsophisticated nature of the statute that was passed. For an alternative, see, e.g., 18 U.S.C. §1955.

The need for additional legislation in 1895 was explained as follows:

The Supreme Court sustained the 1895 lottery enactment against constitutional challenge in Champion v. Ames,[48] which was thrice argued before the Court before finally being decided in favor of the legislation by a 5-4 majority.[49] Although the reservation of powers to the states under the Tenth

> Mr. Speaker, in 1890 Congress forebade the use of the United States mails to companies and individuals for the purpose of advertising lottery schemes. That law has been evaded by using for such purposes the express, and it has been deemed necessary to amend the law so as to prohibit carrying in any way matter intended to advertise lotteries . . . . This bill has been commended by the Post Office Department. The law as it exists has given the Department much trouble . . . [An excerpt from the Postmaster General's most recent report was read, urging that a bill such as the one under consideration would 'strike at the root of this great evil and eradicate it.'] A few years ago we had but one lottery in the United States. Public sentiment was aroused against it. When the institution was driven out by the legislation of the Congress and by the States it was reorganized in the territory of Honduras, and has been operating from that territory throughout the States of the Union, so that today, instead of having one lottery, as we had a few years ago, we have a number. This lottery business has grown to such an extent that it has shocked the moral sense of the people of the entire country, and it ought to be suppressed.

27 Cong. Rec. 3013 (1895) (remarks of Mr. Broderick).

[48] 188 U.S. 321 (1903).

[49] Champion was heard together with Francis v. United States, 188 U.S. 375 (1903), in which Mr. Justice Holmes restricted the application of the 1895 statutes by finding that the slips for lottery tickets held by customers were not covered by the statutory definition prohibiting the interstate carriage of lottery materials. Champion was first argued in 1900 and then was joined with Francis to be argued in October, 1901 and again in December, 1902. 188 U.S. at 325. The final opinion, decided 5-4, coupled with the constricting of the congressional purpose in Francis through the reversal of a conviction, demonstrates the closeness of the issue in the mind of the Court.

Amendment was briefed and argued by Champion,[50] the case was decided through reliance on Chief Justice Marshall's opinion in Gibbons v. Ogden[51] as a Commerce Clause matter.[52] Since the Court held that Congress was authorized to pass the anti-lottery statutes,[53] the Tenth Amendment issue was dismissed because "the power to regulate commerce among the States has been expressly delegated to Congress."[54] Although the propriety of congressional action was not for the courts to determine, constitutionality was clear:

> If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through

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[50] 188 U.S. at 330-32. Champion sought relief from a conviction under the 1895 statute by a writ of habeas corpus. Id. at 325.

[51] 22 U.S. (9 Wheat.) 1 (1824).

[52] The Champion court (Harlan, J.) quoted extensively from Chief Justice Marshall's opinion in Gibbons v. Ogden at 188 U.S. 347 (italics added by the Champion opinion):

> [The commerce power] is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.

[53] After tracing the development of the Commerce Clause powers subsequent to Gibbons at 188 U.S. 348-52, the Court affirmed the constitutionality of the 1895 Act. Id. at 357.

[54] Id. at 357.

> such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right. 55

Irony seems to run throughout the history of the development of the law of gambling. Originally, it was an expansive opinion by Chief Justice Marshall in the Dartmouth College case that stood in the way of reform. It then required a revolution in constitutional thinking begun by Chief Justice Taney in the Charles River Bridge case to restore state power to its rightful place. Now, the final end of the state-chartered lottery system seemingly required a new and expansive reading of the Constitution, creating a federal police power where none had existed before. First, federal power grew, and stood in the way; then federal power shrank, and stood aside; finally, federal power grew, and fought the last battle itself.[56]

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[55] Id., at 358. The dissenters argued that the Tenth Amendment precluded further congressional action and that the "scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest." Id. at 372.

[56] Many of those same interests in the nation who first expressed support for Dartmouth College then voiced alarm at Charles River Bridge, now expressed concern with Champion. Warren at, 457-60. A report to the American Bar Association in 1917 characterized Champion:

e. Statutory construction

The anti-lottery statutes of 1895 were incorporated in the federal criminal code of 1909[57] and have remained substantially unchanged until recent years.[58] The provisions authorizing specific actions by postal authorities where violation of the anti-lottery measures was suspected were segregated and became what is currently 39 U.S.C. §3005.[59]

> This case was undoubtedly the Pandora's box from which burst forth with amazing speed and ever-increading velocity the tendency to federalize and centralize, beyond the dreams of Alexander Hamilton, a government whose centripetal forces had already been too greatly strengthened as a result of the Civil War. It was the beginning of that steady, unending, unceasing movement in Congress to stretch far beyond its real meaning and far beyond what any fair construction, however liberal, warranted the Commerce Clause of the Constitution. This movement has progressed so steadily, has been pressed so persistently, and has gone so far that it threatens to utterly annihilate our dual system of government, to utterly destroy the police powers of the several States, and finally to be about to deprive our people of the inestimable blessings of local self-government, unless it be checked speedily and sharply.

Quoted in Warren, at 460. The nation had thus come, it would seem, full circle.

[57] Act of March 4, 1909, ch. 321, 35 Stat. 1088.

[58] U.S. Rev. Stat. §3894 as amended by 26 Stat. 465 became §213 at 35 Stat. 1129; Rev. Stat. §3851, having to do with postal authorities as lottery agents became §214 at 35 Stat. 1130; the 1895 amendments at 28 Stat. 963 relating to the importation and interstate transportation of lottery materials were codified as §237 at 35 Stat. 1136.

[59] 39 U.S.C. §3005 was virtually identical to the pre-1970 39 U.S.C. §4005, the change being made pursuant to the reorganization of the Post Office according to the Act of Aug. 12, 1970, Pub. L. No. 91-375, 84 Stat. 746. The statute had devolved from U.S. Rev. Stat. §§3929, 4041 through 39 U.S.C. §§ 259, 732 (1952 ed.) In 1975, however, 39 U.S.C. §3005 was amended to exempt materials relating to state operated lotteries.

The lottery statutes were subsequently renumbered in the 1948 criminal code revision. The 1890 Act excluding lottery-related materials from the mails in current form is 18 U.S.C. §1302, while the 1895 Act forbidding the importation and transportation of lottery materials is now 18 U.S.C. §1301.

The definition of prohibited matter in section 1302 is much broader than that in section 1301, because at the time of original enactment there existed greater congressional confidence in its jurisdictional power to regulate what could be sent through the mails as opposed to what could pass through interstate commerce.[60] In any case, both sections 1301 and 1302 have been construed narrowly by the courts.

France v. United States,[61] decided in 1897, was one of a succession of cases involving a lottery operation headquartered in Covington, Kentucky. Lottery agents in Cincinnati, just across the Ohio River, solicited bets and choices of numbers in Ohio, and then carried individual slips of paper, blank save for the selected numbers, over the

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Act of June 25, 1948, ch. 645, 62 Stat. 683. Section 213 of the 1909 Code became 18 U.S.C. §1302; §214 became 18 U.S.C. §1303; and §237 became 18 U.S.C. §1301.

[60] This explanation was advanced by the dissenting judge in United States v. McGuire, 64 F. 2d 485 (2d Cir.), cert. denied, 290 U.S. 645 (1933). But see Champion v. Ames, 188 U.S. 321 (1903) (constitutional affirmance of predecessor of 18 U.S.C. §1301 on Commerce Clause grounds).

[61] 164 U.S. 676 (1897).

bridge to Kentucky each day. There, the numbers were drawn, using an elaborate glass wheel containing 78 numbered discs, from which twelve were drawn successively to give the order of digits. After the drawing, messengers brought pay-offs and sheets listing only the successful combinations back to their Ohio customers. Federal agents arrested some of the messengers on their way back to Ohio with the pay-offs, indicting them under the predecessor of section 1301 for interstate transportation of "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery. . . . " The Court overturned the conviction, holding that the language of the statute concerned the future only and thus did not prohibit the interstate carriage of materials relating to a lottery that had already been drawn.[62]

The Supreme Court next had occasion to construe the wording of the same statute in 1903, when it decided Francis v. United States,[63] at the same time as Champion v. Ames.[64]

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[62] 164 U.S. at 682-83:

> Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly.

[63] 188 U.S. 375 (1903).

[64] 188 U.S. 321 (1903).

Francis arose from a factual situation almost identical to that involved in France. The operator of a lottery business in Covington, Kentucky was convicted in the trial court for having his agents take slips and pay-offs over the river to Ohio. Justice Holmes wrote the opinion of the Court. He distinguished the carriage of lottery materials between states on the person of an individual, here, an agent of the company, from the sending of such materials across state lines through a commercial carrier.[65] When carried by agents, the tickets circulated internally and remained within the lottery company's possession. With no change of possession, such carriage did not constitute commerce, even though it aided some business or traffic. The conviction, however, was reversed on a separate ground. The Court narrowly construed the word "represent" in the statute,[66] holding that slips of paper having nothing but a number written upon them were not meant to be encompassed by the statute: "They as little represented the purchasers' chances, as the stubs in a check book represent the sums coming to the payees of the checks."[67]

The Supreme Court did not construe either statute again in the subsequent fifty years, leaving the combination

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[65] 188 U.S. at 377.

[66] Id.

[67] 188 U.S. at 378.

of France and Francis to guide the lower courts.[68] Those cases below that considered sections 1301 and 1302 in the ensuing period did not diverge from the pattern that had been set.[69] Again, in 1952, the Supreme Court relied heavily

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[68] Among the cases holding that the anti-lottery statutes were to be construed narrowly, and so relying on France and Francis to overturn convictions, were: United States v. McGuire, 64 F. 2d 485 (2d Cir.) cert. denied, 290 U.S. 645 (1933); United States v. Wade, 59 F. 2d 831 (S.D. Tex. 1932); United States v. Sanderlin, 199 F. Supp. 116 (E.D. Va. 1961); United States v. Dauphin, 20 Fed. 625 (E.D. La. 1884) (the "Louisiana Lottery Case");United States v. Whelpley, 125 Fed. 616 (W.D. Va. 1903); United States v. Bergland, 209 F. Supp. 547 (E.D. Wisc. 1962), rev'd on other grounds, 318 F. 2d 159 (7th Cir.) cert. denied, 375 U.S. 861 (1963) (holding on appeal that reliance on France was misplaced with respect to the construction of 18 U.S.C. §§1084 and 1952, anti-gambling statutes enacted in 1961). Even where a conviction was obtained under §1301, France and Francis remained serious obstacles that had to be distinguished at length. See United States v. Bianco, 94 Supp. 239 (W.D. Pa. 1950), rev'g., 189 F. 2d 716 (3d Cir. 1951), same case at 103 F. Supp. 867 (W.D. Pa. 1952). The narrow construction standard of France and Francis, however, has been questioned in United States v. Fabrizio, 385 U.S. 263, 269 (1966).

[69] See, e.g., United States v. Dauphin, 20 Fed. 625 (E.D. La. 1884), "The Louisiana Lottery Case". The defendants had been convicted under the antecedent of 18 U.S.C. §1302 for sending circulars through the mails advertising the Louisiana Lottery. Challenging the trial court's interpretation of the statute's conduct requirement on appeal, the defendants argued that they had only sent the circulars to the post office to be mailed but did not mail the circulars themselves. Further, their mere expectation that the circulars would be mailed was not within the statutory language "it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail." The court sustained this reasoning, noting that the defendants had sent the circulars to the post office but:

> . . . the meaning of this enactment is that the sending should follow the deposit, and should be 'through' or 'in' the mail. . . . Circulars concerning lotteries, so far as the federal law is concerned, may be lawfully sent anywhere, from any point to any point, with any intent, provided that it be not in violation of this section. 'In violation of this section' means in violation of the general and sole prohibition upon which it all rests, and in aid of which its penalties were established. That general prohibition is, 'shall not be carried in the mail.'

on France and Francis in dismissing an indictment brought under section 1302 against one who had mailed materials pertaining to a proposed lottery venture.[70] The Court there held that section 1302 only applied to existing, rather than hypothetical, lottery enterprises.[71]

f. Extension to broadcast media

The federal prohibition against the broadcasting of lottery-related information, 18 U.S.C. §1304, was enacted as part of the Communications Act of 1934,[72] although it had first been proposed two years earlier.[73] There were two major justifications for the statute: (1) to preserve consistency with the anti-lottery postal statutes, and (2) to remove any competitive advantage radio stations might

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20 Fed. at 627 (emphasis in the original). The case does not state current law, since it was decided before the amendments of 1890. The reasoning of the court has not been utilized in similar cases involving mail fraud. See Creech v. Hudspeth, 112 F. 2d 603, 606 (10th Cir. 1940); Horwitz v. United States, 63 F. 2d 706, 708 (5th Cir.), cert. denied, 289 U.S. 760 (1933). The Louisiana Lottery Cases, however, are illustrative of the niggardly leeway given the prosecution under the anti-lottery statutes.

[70] United States v. Halseth, 342 U.S. 277 (1952).

[71] Id. at 280.

[72] Act of June 19, 1934, ch. 652, 48 Stat. 1064.

[73] H.R. 7716, 72d Cong., 1st Sess. (1932). The provision was part of a bill designed to amend the Radio Act of 1927, then the principal federal statute regulating broadcasting. See 75 Cong. Rec. 1983 (1932).

have over newspapers as a result of the postal and interstate commerce prohibitions with respect to lottery-related materials.[74] Thus, the provision's sponsor declared:

> . . . this section simply provides that the Federal Government, which has assumed the responsibility and obligation to regulate radio, shall not permit these stations, licensed by the Federal Government, to violate the laws of the United States and of every State in the Union. I have heard of no opposition to this from any source, ... 75

The assertion as to the lack of controversy over the measure at the time seems to have been well-founded, since it soon became law.[76] The text has remained substantially the

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74 The committee does not think that the United States should permit any radio station, licensed and regulated by the Government, to engage in such unlawful practices.

Furthermore, the broadcast of such information is unfair to the newspapers, which are forbidden the use of the mails, if they contain such information.

H.R. Rep. No. 221, 72d Cong., 1st Sess. 8 (1932). For a comparison of the postal and broadcasting anti-lottery statutes, see Haley, "The Broadcasting and Postal Lottery Statutes," 4 Geo. Wash. L. Rev. 475 (1936).

75 75 Cong. Rec. 3683 (1932) (remarks of Mr. Davis).

76 The 1932 bill is discussed in the conference report at H.R. Rep. No. 2106, 72d Cong., 2d Sess. (1933), reprinted at 76 Cong. Rec.5036-37 and 5203-04 (1933). A useful summary of the report is found at 76 Cong. Rec. 5204 (1933) (remarks of Sen. Dill). The bill was passed by both houses of Congress and sent to the President in 1933, 76 Cong. Rec.5397 (1933), but was pocket vetoed. The bill was incorporated in the Communications Act of 1934 as §316, S. Rep. No. 781, 73d Cong., 1st Sess. 8 (1934); 78 Cong. Rec. 10988 (1934). Approved by the Senate, 78 Cong. Rec. 10912 (1934) and the House, 78 Cong. Rec. 10995 (1934), the legislation was signed by the President on June 19, 1934, ch. 652, §316, 48 Stat. 1088.

same since the time it was first proposed.[77]

Although no prosecution has been brought under section 1304, there has been considerable administrative interpretation and consequent judicial review because the statute has come under the aegis of the Federal Communications Commission (FCC) and its licensing procedures. The FCC has issued administrative decisions under section 1304, for example, in situations where radio and television stations have sponsored or advertised "give-away" programs.[78] In addition to having

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[77] No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person, firm, or corporation operating any such station shall knowingly permit the broadcasting of, any advertisement of, or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person, firm, or corporation violating any provision of this section shall upon conviction therefor, be fined not more than $1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs.

H.R. 7716, §13 72d Cong., 1st. Sess. (1932) (H.R. Rep. No. 221, 72d Cong., 1st Sess. 7 [1932]. The only differences were the addition of the word "any" between "of" and "such lottery" in the latter part of the first sentence, and the deletion of "firm, or corporation" from two places.

[78] The first case decided by the FCC under §1304 was In re WRBL Radio Station, Inc., 2 F.C.C. 687 (1936), where the FCC challenged a station seeking license renewal which had broadcast lottery advertisements. The FCC found that the scheme was a lottery, having the essential elements of chance, a prize, and consideration, but renewed the license nonetheless because of a station management change. 2 F.C.C., at 693. See In re City of Jacksonville, 21 F.C.C. 334, 410 (1956); In re Noble Broadcasting Corp., 1 F.C.C. 2d 154, 157 (1965); In re Keith L. Resing, 3 F.C.C. 2d 904 (1966). For an attempt to expand the scope of the prohibition, see also In re Greater Indianapolis Broadcasting Co., 44 F.C.C 2d 37 (1973).

the power to refuse to renew operating licenses where the facilities are not operated in the "public interest,"[79] the FCC may revoke licenses or construction permits,[80] issue cease and desist orders, and impose forfeitures of up to $1,000 for each day on which an infraction occurs.[81] The FCC may also promulgate declaratory orders[82] and regulations[83] it feels necessary to enforce the law, and has done so.[84]

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[79] See, e.g., In re KXL Broadcasters, 4 F.C.C. 186 (1937), in which the contested license was renewed because "this station for many years has supplied a public need, and for the most part its programs have met with general approval." Id. at 190.

[80] 47 U.S.C. §312(a)(6) (Supp. III, 1973).

[81] 47 U.S.C. §503(b)(1)(E)(1970). See, e.g., imposing such fines, In re KTOK Radio, Inc., 3 F.C.C. 2d 653 (1966) ($500); In re Ohio Quests, Inc., 8 F.C.C. 2d 859 (1967) ($500); In re Call of Houston, Inc., 12 F.C.C. 2d 733 (1968) ($2,000); In re Lawrence Broadcasters , Inc., 14 F.C.C. 2d 384 (1968) ($10,000); In re Taft Broadcasting Co., 18 F.C.C. 2d 186 (1969) ($2,000).

[82] 5 U.S.C. § 554(e) (1970).

[83] 47 U.S.C. §303(f) and (r) (1970).

[84] The regulation now in force reads as follows:

Broadcast of Lottery Information

a) No licensee of an AM, FM, or television broadcast station, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes.

(18 U.S.C. 1304, 62 Stat.763).

In Federal Communications Commission v. American Broadcasting Co.[85] the Supreme Court upheld a lower court determination that the FCC's regulations were overbroad. The action had been brought by the three major television networks, which at that time were broadcasting "give-away" programs extensively. Chief Justice Warren, in the opinion for the Court, held that "the Commission's power in this respect is limited by the scope of the statute,"[86] and that to find a prohibited lottery there must be "chance", "a prize", and "consideration;" the Court found that there

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> b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for prize, such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast or the station in question.

47 C.F.R. §73.1211 (1975) which applies to all broadcast stations.

Furthermore, a similar provision extends the regulation to originating stations of cable television. 47 C.F.R. §76.213 (1975).

85 347 U.S. 284 (1954).

86 Id. at 290. The regulations in question, reprinted at 347 U.S. 288-89, were much broader than those now in force.

was no such consideration for the "give-aways,"[87] The FCC has, however, continued to interpret section 1304 broadly,[88] and it has developed a full body of law on consideration[89] and on the state of mind required under the

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87 To be eligible for a prize on the "give-away" programs involved here, not a single home contestant is required to purchase anything or pay an admission price or leave his home to visit the promoter's place of business; the only effort required for participation is listening.

> We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime.

347 U.S. at 294 (footnotes omitted).

88 An FCC holding was again restricted in Caples Co. v. United States, 243 F 2d 232 (D.C. Cir. 1957). The FCC found that a television program based on bingo was a lottery, distinguishing the bingo game from American Broadcasting because the home participant had to obtain cards from local stores handling the sponsor's products in order to play rather than merely watch. The court, however, held:

> The undesirablility of this type of programming is not enough to brand those responsible for it as criminal. Protection of the public interest will have to be sought by means not pegged so tightly to the criminal statute or in additional legislative authority.

243 F. 2d at 234.

89 In re Bob Jones University, 18 F.C.C.2d 8 (1969); In re Public Notice Concerning Applicability of Lottery Statute to Contests and Sales Promotions, 18 F.C.C.2d 52 (1959); In re WBRE-TV, Inc., 18 F.C.C.2d 96 (1969); In re Taft Broadcasting Co., 18 F.C.C.2d 186 (1969). The most fascinating in this group of 1969 cases may be In re United Television Co., 20 F.C.C.2d 278 (1969), in which a station carrying spurious religious programs was in reality tipping off local residents to winning numbers by means of carefully selected citations to the Scriptures.

statute.[90]

The most significant cases under section 1304 have arisen recently involving the state-operated lotteries. Soon after the New York State Lottery became operative in 1967, the FCC issued a declaratory judgment, in which it ruled that section 1304 applies to state-operated lotteries.[91] Consequently, it barred all announcements other than ordinary news reports and station editorials concerning lotteries.[92] The broadcasters involved appealed the ruling[93] and challenged the interpretation on First Amendment grounds, but the Second Circuit rejected their constitutional attack in New York State Broadcasters Ass'n v. United States.[94] The court construed the statute narrowly, holding that it bars only the broadcasting of information that "directly promotes"

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90 The FCC has not been sympathetic to arguments on the part of station managers alleging lack of knowledge. See In re Meredith Colon Johnston, 1 F.C.C.2d 720, 724 (1965); In re Ohio Quests, Inc., 8 F.C.C.2d 859, 860 (1967); In re City of Jacksonville, 21 F.C.C. 334, 410 (1956).

91 This was before enactment of 18 U.S.C. §1307.

92 In re Broadcasting of Information Concerning Lotteries, 14 F.C.C. 2d 707 (1968). "In the category of news, any material broadcast in normal good faith coverage which is reasonably related to the audience's right and desire to know and be informed of the day-to-day happenings within the community is permissible." Id. at 710.

93 Pursuant to 47 U.S.C. §402(a) (1970).

94 414 F.2d at 990 (2d Cir.1969), cert. denied, 396 U.S. 1061 (1970).

a given lottery.[95] The court then proceeded to consider in detail what could and could not be broadcast.[96] The court set aside the FCC ruling for lack of specificity. After this ruling, the FCC issued a second declaratory ruling in 1970.[97]

Meanwhile, in 1972, the Jersey Cape Broadcasting Corporation requested a declaratory ruling from the FCC concerning whether a one-sentence announcement during the Thursday evening news broadcasts advising New Jersey residents of the winning number in the weekly drawing of the state's

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[95] "[W]e think that the section must be directly construed to go no further." 414 F.2d at 997. Although "the first amendment does not protect freedom to swindle even though words may be used to accomplish that result," id. at 996, the court noted that

> The real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct.

Id. at 997.

[96] A news item which has the "incidental effect of promoting a lottery" is not banned, but if a lottery announcement contains incidental "news", such as the amount to be realized for education, it is nevertheless prohibited. 414 F 2d at 998. "We are aware that at times the line drawn may be thin . . ." the court conceded. An interview by a television reporter of an excited winner would be a legitimate feature, "legitimate news and an indirect promotion at best." Editorial comment also was protected. Id. at 999. The court also took note of the rule of New York Times v. Sullivan, 376 U.S. 254 (1964), but held that the constitutional problem would not be easily reached in §1304 cases. 414 F.2d at 999.

[97] In re Broadcasting of Information Concerning Lotteries, Supplemental Declaratory Ruling, 21 F.C.C.2d 846 (1970).

lottery would violate section 1304. The FCC held that such a broadcast would be a violation.[98] Upon its failure to reconsider,[99] the Third Circuit, sitting en banc, held that such a broadcast was indeed protected by the First Amendment in New Jersey State Lottery Comm'n v. United States.[1] It is doubtful whether the guidelines established for permissible broadcasts in New York State Broadcasters Ass'n could have survived the Third Circuit's expansive interpretation, and it was for this reason the Supreme Court granted certiorari in the New Jersey State Lottery case.[2] After the case was briefed and argued in the Supreme Court, however, Pub. L. No. 93-583 was enacted, making significant changes in the federal treatment of state-operated lotteries.[3]

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[98] In re Jersey Cape Broadcasting Corp., 30 F.C.C.2d 794 (1971).

[99] In re Jersey Cape Broadcasting Corp., 36 F.C.C.2d 93 (1972).

[1] 491 F.2d 219 (3d Cir. 1974), vacated and remanded, 420 U.S. 371 (1975). The Court held that FCC regulations following §1304 that acted to infringe upon the editorial discretion of a broadcaster in the selection of news items were in the nature of a prior restraint and impermissible. 491 F.2d at 222. "The contention that on Thursday afternoon the winning number in the New Jersey lottery is not 'news', in a broadcast context, is simply frivolous." 491 F.2d at 222. Although it did not have to do so for the case before it, the Court concluded that the best construction of §1304 would be to restrict its application to "promotion of lotteries for which the licensee receives compensation." Id. at 224.

[2] 420 U.S. at 373.

[3] Most important was the enactment of 18 U.S.C. §1307, which exempted lotteries authorized and conducted by the states from §1304 entirely.

The Supreme Court then vacated the judgment in New Jersey State Lottery and remanded the case to the Third Circuit to allow the court to consider whether the new legislation had made the First Amendment claims moot.[4] Justice Douglas dissented from the suggestion that the case had become moot; he felt significant issues remained to be considered with respect to the application of the new legislation to non-lottery states.[5]

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[4] 420 U.S. at 373.

[5] The State of New Hampshire had been given permission to intervene on the question of mootness. It argued that significant issues remained unresolved. The Court refused to consider the issues presented by New Hampshire, however, because they were not properly before the Court in the context of the New Jersey litigation. It remanded the case to the Third Circuit for determination of remaining questions. 420 U.S. at 374.

Justice Douglas wrote that Congress could not have intended to resolve the serious First Amendment issues raised by the appeal in the new legislation. Id. at 374. In a footnote he presented the only judicial analysis to date which examines why problems remained:

> As the State of New Hampshire points out, the new §1307 even on its face does not resolve the claims of all parties to this action. New Hampshire, which was granted leave to intervene in the Court of Appeals, conducts a lottery; neighboring Vermont does not. Title 18 U.S.C.A. §1307(a)(2) (Supp. Feb. 1975), upon which the Court relies, applies only to broadcasts by a station in the State which conducts the lottery, or in an adjacent State which also conducts a lottery; presumably, then, §1304 remains applicable to a Vermont radio station which desires to broadcast information concerning the New Hampshire lottery. The restraint imposed by §1304 will thus continue to inhibit the New Hampshire lottery with respect to certain groups of prospective participants, including New Hampshire residents who listen to Vermont radio stations and Vermont residents who might wish to cross the state line and participate.

Id.

4. Accomodation with state decriminaliztion

a. Pressure for change

The national policy toward lotteries changed little for eighty years. The 1895 legislation against passage of lottery materials in interstate commerce seemed to be the last step necessary to reconcile the policies of state and national governments in the nineteenth century as all joined to purge the nation of the last vestiges of the corrupt Louisiana Lottery. Before 1975, Congress only acted twice with respect to lotteries in the twentieth century: once to enact 18 U.S.C. §1304, concerning the new technology of broadcast media, and once, under its authority to regulate the national banks, to reconcile bank policies with the congressional perception of the lottery statutes.

By the 1960's, however, many had forgotten the Louisiana Lottery. The nation's feelings toward lotteries began to come full circle toward decriminalization. Lotteries once again came to be perceived as relatively harmless and as painless means of augmenting state incomes. By 1974, thirteen states had authorized lotteries. Lottery income in some states was significant, although always proportionately small in terms of the entire budget.[6] The new lotteries conducted by the state governments were thought to be

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[6] See, e.g., "Lottery Termed Bad Bet and Poor State Business," N.Y. Times, Feb. 9, 1974, at 33, col. 7. The Task Force on Legalized Gambling concluded after careful study of state decriminalization efforts as follows:

corruption-proof and highly efficient because of the computer. These lotteries were far different from the images of the nineteenth century enterprises that present-day opponents attempted to resurrect in the minds of the electorate.

Decriminalization of lotteries in more than one-fourth of the states posed difficulties both for those states and for Congress. Federal laws restricted many aspects of the state lottery operations through statutes which Congress had previously enacted to help the states effectuate prior policies. State-operated lotteries were severely limited in their advertising,[7] and also in the purchase and distribution of lottery-related materials[8] and funds.[9] Even while

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> . . . the Task Force found no justification for the highly publicized assertions of a number of state government officials that legalized gambling will be an important new source of substantial revenue for state treasuries. We have determined that neither the early financial returns from the lotteries and from off-track betting nor the economics of the illegal gambling industry support the optimistic assumptions that are now so widespread. Even allowing for a wide margin of error and for differences in the volume of activity from one state to another, the Task Force is convinced that total revenues from comprehensive legalization of gambling would make only a relatively small contribution to state treasuries.

Report of Task Force on Legalized Gambling, Easy Money at 6 (1974) (emphasis deleted) [hereinafter cited as Easy Money].

[7] Advertisements pertaining to lotteries could not be mailed (18 U.S.C. §1302); broadcast (18 U.S.C. §1304); or lawfully imported or transported in interstate commerce (18 U.S.C. §1301).

[8] Interstate transportation of lottery-related materials was prohibited by 18 U.S.C. §§1301-02, 1304, and 1953. Use of wire communications (18 U.S.C. §1084) and travel in interstate commerce involving lotteries (18 U.S.C. §1952) were also prohibited.

[9] The federal banking laws were amended in 1967 to restrict the role of federally-charted or -insured banks with respect

trying to comply with the matrix of federal anti-lottery statutes, state lotteries frequently appeared to operate in violation of federal law. Open conflict seemed inevitable in late 1974 as the Department of Justice threatened to prosecute certain states for apparent violations.[10]

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[10] On August 30, 1974, Attorney General Saxbe sent the governors of each state conducting a lottery a telegram warning them that "[s]erious questions have arisen concerning the lottery that is being conducted in your state," and that "[T]here is a distinct possibility that there are violations of the criminal provisions of the Federal code.", "Saxbe Threatens Suit to Shut Down State Lotteries", N.Y. Times, Aug. 31, 1974, at 1, col. 1. In September of 1974, however, Saxbe announced a ninety-day moratorium on federal prosecution under the anti-lottery statutes in order to allow Congress the opportunity to amend these statutes. "Lotteries Get 90-Day Reprieve," Wash. Post, Sept. 7, 1974, at 1, col. 8. But cf."A Fair Bet: Official Gambling Will Grow, " N.Y. Times, Oct. 13, 1974, §4 (The Week in Review), at 10, col. 3.

The concern of the Department of Justice was demonstrated in the following excerpts from official correspondence:

> U.S. Department of Justice
> New Haven, Conn., October 25, 1974
>
> Commission on Special Revenue
> State of Connecticut
> Wethersfield, Conn.
>
> Gentlemen: The apparent and potential conflicts between Federal statutes and State Special Revenue Projects flags to this office the obligation to enforce the federal law . . .
>
> . . . .
>
> . . .Congress will presumably avail itself of the opportunity to determine whether the Federal laws should be enforced against the State. Unfortunately inaction on the part of Congress when the issue has clearly been presented to it in the form of proposed remedial legislation suggests that the laws as they are or may be applicable in their present form do in fact state the will of Congress. This inference becomes stronger with the passage of time, particularly when threats of prosecution have been made publicly. . . .

b. Enactment of section 1307

The impending prosecution of states operating lotteries forced decisive congressional action. After having considered similar proposals for several years,[11] Congress passed legislation seeking to exempt state-operated lotteries from

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120 Cong. Rec. at H-2601 (daily ed. Dec. 20, 1974). The Attorney General also wrote the Chairman of the House Judiciary Committee, emphasizing the importance of exculpatory legislation:

> Office of the Attorney General
> Washington, D.C., September 6, 1974
>
> Hon. Peter W. Rodino, Jr.
> Chairman, Committee on the Judiciary,
> House of Representatives
> Washington, D.C.
>
> Dear Mr. Chairman: The Department of Justice had conducted an active review of the application of federal law to the activities of state-operated lotteries, and that review concludes that there are a number of apparent violations of federal law with respect to the manner in which state lotteries are now being conducted. Officials of the Department over the past several months have been in consultation with state officials on this subject. I feel the situation so urgent and important that I have invited the Governors of the affected states to meet with me on September 6 . . . .

H.R. Rep. No. 93-1517, 93d Cong., 2d Sess. 12-13 (1974), 1974 U.S. Code Cong. & Ad. News 7007, 7014-15.

[11] H.R. 6668, 93d Cong., 1st Sess. (1973) was a bill designed to exempt state-operated lotteries from Federal statutes similar to the bill finally enacted in 1975. H.R. 6668 was introduced by Congressman Rodino, Chairman of the House Judiciary Committee, who had introduced a similar bill in the 92d Congress, H.R. 2374, 92d Cong., 1st Sess. (1971), and had held hearings on that bill on October 13, 1971. Neither those hearings, nor the hearings held April 24, 1974 on H.R. 6668 produced immediate action on the floor. A parallel bill, S. 544, 93d Cong., 1st Sess. (1973), was introduced in the Senate by Mr. Hart.

the reach of federal laws under certain conditions.[12] The legislative history of the new act shows the limited nature of the changes that were enacted.[13] The general rule

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[12] Act of Jan. 2, 1975, Pub. L. No. 93-583, 88 Stat. 1906. The enactment made three significant changes in prior law. First, it added 18 U.S.C. §1307, which exempted lotteries "conducted by a State acting under authority if State law" from the provisions of 18 U.S.C. §§1301-04. Second, the law amended 39 U.S.C. §3005 to allow the mailing of newspapers containing advertisements concerning state-operated lotteries and to allow letters containing lottery materials to be mailed within the borders of states that permit such lotteries as follows:

> (d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation published in a State containing advertisements, lists of prizes, or information concerning a lottery conducted by that State acting under authority of State law, or (2) tickets or other materials concerning such a lottery within that State to addresses within that State. For the purposes of this subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Finally, Pub. L. No. 93-583 amended 18 U.S.C. §1953 to exempt "Equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law" from the prohibition of that section.

[13]

> The purpose of S. 544, as amended, is to amend present Federal provisions relating to lotteries (18 U.S.C. 1301-1304, 1953; 39 U.S.C. 3005) to accomodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States. The bill accomplishes this purpose by exempting such State-run lotteries from existing prohibitions to the extent of permitting use of radio and television stations licensed to a location within that State; use of newspapers published within that State without imposition of mailing restriction on such papers; transportation and use of the mails to distribute materials to addresses within that State; and use of interstate facilities and channels to obtain equipment, tickets, etc., designed for use in the operation of such lottery within that State (e.g., purchased from an out-of-State business).

S. Rep. No. 93-1404, 93d Cong., 2d Sess. 2 (1974). See also H.R. Rep. No. 93-1517, 93d Cong., 2d Sess. (1974), 1974 U.S. Code Cong. & Ad. News 7007; 120 Cong. Rec. S22542-43; H12599-609 (daily ed. Dec. 20, 1974).

of the federal statutes relating to lotteries was to remain the same: prohibition to the extent that lotteries affected interstate commerce or matters within federal control. A specific exception to this rule legitimated lotteries "conducted by a State acting under authority of State law" in certain situations.

In the context of the prohibitions that had evolved in the nineteenth century, the exception for state lotteries was to be precisely confined to the following:

> 1. Permitting transportation and mailing to addresses within the particular State conducting the lottery;
> 2. Permitting the mailing of newspapers published within the State, notwithstanding lottery promotional or other information contained therein concerning a State-run lottery in that State;
> 3. Permitting the broadcasting of promotional or other information concerning a lottery within that State from stations licensed to a location within that State; and
> 4. Permitting a State-run lottery to obtain material necessary to conduct its operation from out-of-State sources. 14

Thus, the legislation was urged on Congress by its sponsors[15] as a narrowly-drawn exception to the general rule.[16] The argument succeeded in rallying the votes that had not been obtainable for the previous two years, and the President signed the legislation on January 2, 1975, after the session

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[14] S. Rep. No. 93-1404, 93d Cong., 2d Sess. 3 (1974).

[15] Congressman Rodino, Chairman of the House Judiciary Committee and Democrat from New Jersey, one of the lottery states, introduced the legislation, held hearings on it, recommended it to Congress, and was floor leader.

[16] See 120 Cong. Rec. H12599-609 (daily ed. Dec. 20, 1974).

had ended.[17]

c. The state-conducted lottery exemption

The federal gambling laws specifically applicable to state-conducted lotteries are: (1) the lottery chapter 61 of title 18;[18] (2) the criminal statute pertaining to the interstate transportation of wagering paraphernalia, 18 U.S.C. §1953; and (3) the section of the postal title that regulates mail containing lottery information, 39 U.S.C. §3005. As has been discussed above, legislation in early 1975 sought to exempt lotteries "conducted by a State acting under the authority of State law"[19] from the purview of the lottery-related statutes. The 1975 legislation added a new section, 18 U.S.C. §1307 to the lottery chapter, and made amendments to 18 U.S.C. §1953 and 39 U.S.C. §3005.[20]

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[17] Act of Jan. 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916.

[18] 18 U.S.C. §§1301-04 (1970); 18 U.S.C. §1307 (Supp. IV, 1974).

[19] 18 U.S.C. §1307(a).

[20] To 39 U.S.C. §3005, the Act of January 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916 added the following new subsection:

> (d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation published in a State containing advertisements, lists of prizes, or information concerning a lottery conducted by that State acting under authority of State law, or (2) tickets or other materials concerning such a lottery within that State to addresses within that State. For the purpose of this subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

5. Some applications

The new legislation leads to curious applications of federal law to the state-conducted lotteries. Because of the recent vintage of the legislation and the absence of case law,[21] it is useful to illustrate the operation of the new provisions through a series of hypothetical applications. Each numbered paragraph will attempt to consider a different aspect.

(1) The Boston Globe, published in Massachusetts but also serving much of northern New England, may legally advertise and fully discuss the Massachusetts state lottery, but may not cover the lotteries of any other state.[22] Readers of the Globe in New York, Connecticut, Rhode Island,

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[21] In United States v. New Jersey State Lottery Comm'n., 420 U.S. 371 (1975), the Supreme Court vacated and remanded a Third Circuit case arising under Section 1304 which involved news broadcasts of winning state lottery numbers because of the Government's contention that the newly-enacted §1307 mooted the question. Justice Douglas filed a dissenting opinion, arguing that important issues were left unresolved by the new legislation.

[22] Section 1307(a)(1) provides that Sections 1301-04 do not apply "to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under authority of State law. . . contained in a newspaper published in that State." "Published in that State" means that a newspaper containing an advertisement or list of prizes concerning a state-conducted lottery other than the same state in which the newspaper is published is not exempt from the anti-lottery statutes. Thus, a newspaper may only advertise the lottery of the state in which it was published.

39 U.S.C. §3005 is also relevant here. Without Section 3005(d), Section 3005 would provide postal officials with the authority to refuse to deliver a newspaper concerning gambling, particularly if the newspaper were in reality a scratch sheet for a gambling operation. Current law, however, would exempt any newspaper within the definition of Section 1307(a)(1) from the prohibition of Section 3005.

Maine, or New Hampshire, all of which conduct lotteries, as well as Globe readers in Vermont, which has no lottery, will all be confronted with advertisements about only the Massachusetts lottery in their newspapers.

(2) WBZ Radio, licensed to a location in Massachusetts, may broadcast advertisements, commentary, and news about the lotteries of Massachusetts, Rhode Island, Connecticut, New York, and New Hampshire, but may not do so with respect to the lotteries of Maine, New Jersey, or Pennsylvania.[23] This is because 18 U.S.C. §1307 allows broadcast facilities licensed to a location in a lottery state to broadcast with respect to the lottery of that state or the lotteries of any adjacent states, but not with respect to any other state.[24] The many regular WBZ listeners in

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[23] Although each of the listed states operates a lottery, Maine, New Jersey, and Pennsylvania do not border Massachusetts, and therefore would fail the test of Section 1307 (a)(2).

[24] Section 1307(a)(2) provides that Sections 1301-04 do not apply:

> to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under authority of State law. . . broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

Thus, a broadcast facility licensed to a location in a state which conducts a lottery may broadcast advertisements concerning that lottery and also the lotteries conducted by any adjacent states. Note that the example given in the text makes the provision seem less rational than if an example involving New York City and suburban New Jersey were chosen. In this case, only two states, both of which conduct lotteries, form a combined broadcast marketing area in which roughly the same audience is served by both stations.

Portland, Maine will be bombarded with advertisements concerning the lotteries of five states, but as a matter of federal law[25] may not hear a word, beyond legitimate news, about their own state lottery. Similarly, listeners in Rutland, Vermont who tune to WBZ will have to listen to advertisements about the five lotteries, even though they cannot legally participate in any.

(3) A Portsmouth, New Hampshire television facility, licensed to feed cable television originating from Boston and New York City, may have to filter out lottery advertisements and commentary that could legally be broadcast from the place of programming but could not legally be broadcast

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[25]The federal policy expressed in Section 1307 may be characterized in alternative ways. If the rule is to exempt state lotteries from the reach of federal anti-lottery statutes to the broadest extent possible consistent with the rights of non-lottery states, then the different treatment of newspapers and broadcast media in Section 1307 (a)(1) and (a)(2) would represent a workable compromise. The technological differences between newspapers and broadcast media, making the policing of newspapers with respect to geographic boundaries a relatively simple task, support an argument that an adjacent-state rule for broadcast media and a lottery-state-only rule for newspapers is reasonable. If the federal policy were characterized more narrowly, as creating the most limited exemption possible for communications facilities in the same state as state-conducted lotteries, the adjacent state rule seems unnecessarily broad. Lobbying pressure from the broadcast industry interested in increased advertising revenues may be the most realistic explanation for the inconsistencies in treatment. Finally, any such line-drawing can be made to seem particularly foolish when presented in the New England setting used here, where lottery and non-lottery states are in close proximity.

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from New Hampshire.[26] Such a cable facility in New Hampshire would be limited to broadcasting New Hampshire and Massachusetts lottery information despite having its programming source in other states. It could not broadcast about the neighboring Maine lottery, only a mile or two across the harbor, because its sources in Boston and New York City could not have done so. Perhaps the New Hampshire facility could interject advertisements about the Maine lottery at each point that it would have to expunge material about the New York lottery. Further, if the same station were established in Gloucester, Massachusetts, serving essentially the same audience, it could broadcast information concerning the Rhode Island, Connecticut, and New York lotteries in addition to those of New Hampshire and Massachusetts. These cable television examples seem to raise paradoxes not foreseen by Congress.[27]

(4) A Rutland, Vermont radio or television station, or the Rutland Herald, could not advertise any lotteries at all,[28] even though the area Vermonters would have numerous

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[26] This is another application of Section 1307(a)(2), discussed in the previous note. Since both Pennsylvania and New Jersey border New York and both conduct lotteries, their lotteries may be advertised by New York stations under the adjacent-state rule. Neither lottery could be advertised by a New Hampshire facility for New Hampshire does not border either Pennsylvania or New Jersey.

[27] From the legislative history accompanying the statute, it appears that cable television was not considered. The thrust of the discussion in the text turns on the rapidly changing law surrounding the characterization and regulation of cable television.

[28] The rule of Section 1307(a) is explicit with respect to the media of non-lottery states.

alternative media sources from which to obtain the same information and their readers and listeners from Massachusetts, New York, and New Hampshire would have legal opportunities to participate in these lotteries. At a minimum, this application of federal law deprives the Vermont media of considerable revenue available to similarly situated competitors in neighboring states.

(5) Without reference to constitutional issues,[29] one living in Vermont could not mail a letter containing anything related to any lottery to any address anywhere without violating federal law.[30]

(6) One living in Massachusetts could mail a letter from his home to any other address within the state concerning any aspect of the Massachusetts lottery, but he could not send any materials by mail to an address within the state concerning any other lottery.[31] The sender of a

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[29] The relationship between the Fourth Amendment and congressional power over postal affairs is considered generally in Ex Parte Jackson, 96 U.S. 727, 733 (1877).

[30] Section 1302 prohibits mailing such information, and it is not saved by anything in section 1307. 39 U.S.C. §3005(d) is likewise inapplicable.

[31] This is made possible by two provisions. Section 1307 provides that "the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law" is exempt from Sections 1301-02. To come within the Section 1307(b) exemption, the materials must be mailed or sent to a state that conducts a lottery and the materials so sent must relate to that lottery. 39 U.S.C. §3005(d) provides that mail relating to lotteries is exempt from Section 3005(a) only if such mail remains at all times within the state conducting the lottery to which the materials pertain.

letter containing materials pertaining to a lottery could also mail his letter to an address within the state conducting the lottery to which the materials in the letter pertain,[32] but he might risk having these materials returned to him, stamped "Fraudulent," under the more narrowly-constructed exemption to 39 U.S.C. §3005.[33]

(7) A printer in Rutland, Vermont could prepare tickets and advertising circulars for the New Jersey lottery and mail them to New Jersey without violating federal law.[34] The printer would have to take care not to interrupt the trip to New Jersey by having the materials stored at another location, and he would also have to guard against confusing

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[32]This is clear under Section 1307(b).

[33]The exemption in Section 3005(d) arises only where the material is mailed within the same state which conducts the lottery. This narrow exemption reflects a congressional determination to frame the exemption for Section 3005 more narrowly than that for Section 1302. The prohibition of Section 3005 would not arise unless evidence existed that the sender was engaged in an illicit scheme. Again Congress seems to have chosen a policy of providing the narrowest workable exemption possible, regardless of the resulting imperfect symmetry.

[34]Section 1307(b) applies to shipping (Section 1301) or mailing (Section 1302), exempting materials relating to state-conducted lotteries from both. If the tickets were shipped, 39 U.S.C. §3005 would be inapplicable; if they were mailed, the finding of illicit conduct as a condition precedent to operation of Section 3005 would also exculpate any legitimate supplier.

the New Jersey materials with those of another state.[35] The purpose of this exemption is to allow states which conduct lotteries to obtain the necessary materials outside their own borders without violating federal law. Otherwise, in order to operate a lottery, a state would first have to enter the lottery material manufacturing business.

6. A proposed amendment

The above examples illustrate the confused results which can stem from the "balance" sought by the enactment of the exemption for state-conducted lotteries. Many of the above applications of the statute were seen by the drafters of the amendment and were recognized in Congress at the time of passage. One problem, however, does not seem to have been recognized by Congress.

Despite the many restrictions imposed by the new legislation, a complete exemption has been created for the transportation of materials pertaining to state-conducted lotteries. Because of an unfortunate choice of words in the

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[35]There is no state of mind requirement as to result in Section 1301-04. One who knowingly sends lottery-related materials in interstate commerce (having an active appreciation of his actions and the surrounding circumstances) may thus violate Section 1301, even though he has no particular end in mind. One acting outside the Section 1307 exemptions could violate Section 1301 with no unlawful state of mind. Previously, this had not been a problem because there were no legal circumstances under which one could be sending lottery-related materials in interstate commerce.

drafting of the amendment to 18 U.S.C. §1953,[36] that section is effectively irrelevant to materials related to state-conducted lotteries. The exemption to the anti-lottery statutes contained,however, in 18 U.S.C. §1307(b) apparently works as it was intended.[37] The result is to place state-conducted lottery materials in the same position as that of all lottery materials prior to the enactment of 18 U.S.C. §1953. The practical import of this distinction is to allow lawful schemes to distribute tickets and advertise Eastern state lotteries in states which prohibit lotteries.[38] This

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[36]Act of January 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916 added the following provision to §1953(b):

> or (4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law.

[37]The pertinent language of 18 U.S.C. §1307 is:

> the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law.

Instead of creating a exemption for the lottery-related materials themselves, this provision only exempts their transportation under certain circumstances.

[38]As long as the materials "relate to a state-conducted lottery," they are completely exempt from Section 1953, leaving only Sections 1301-02 to restrict the interstate transportation of such materials. Section 1307(b) does not exempt these materials in this situation, thus Sections 1301-02 would apply, but they have been construed extremely narrowly in the past. This would allow the development of a variety of schemes to distribute lottery tickets throughout the country, potentially interfering with the policies of a number of states reminiscent of the Louisiana Lottery.

is precisely what Congress sought to avoid. Congress should immediately enact a technical amendment to section 1953 to correct this problem, restore section 1953, and reconcile the policies of the recent legislation.

7. The individual bettor

The current state of the law, however, is not without its advantages. The individual purchaser or transporter of a state lottery ticket does not now violate 18 U.S.C. §1953 by carrying such a ticket across state lines. As discussed in United States v. Fabrizio,[39] decided before the recent amendments, such an individual bettor would have committed a felony under federal law as it was previously drafted.[40]

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[39]385 U.S. 263 (1966).

[40]Justice Stewart argued in his dissent to Fabrizio that the majority was construing Section 1953 too broadly:

> The Government does not contend that federal law makes it a crime for a person from another State to visit New Hampshire, purchase a sweepstakes ticket there, and return to his home. But it has been argued that if a visitor to New Hampshire returns home with a receipt that merely acknowledges his personal purchase and in no way affects his eligibility to receive a prize, he has committed a crime punishable by imprisonment of up to five years. Thus the Government requires us to assume that Congress has branded as felons many or most of the thousands of visitors to New Hampshire who have purchased sweepstakes tickets there. I do not believe that Congress intended such an unexpected result, which only the most abjectly literal approach to statutory interpretation could tolerate. No plausible legislative purpose would be served by the Government's construction,

Nevertheless, there seems to be scant policy justification for this harsh result.

Federal policy toward gambling, in short, does not require the individual ticket purchaser in a state-conducted lottery to be included in the sweep of an amended 18 U.S.C. §1953. The national policy toward gambling is largely passive; in most instances it has been a policy supportive of the substantive choices of the several states. At each stage in the evolution of the national government's participation in the regulation of lotteries, the policies of the states have been the moving force. As the views of the populace regarding lotteries have changed from acquiescence to prohibition, and now to scattered decriminalization, the federal government has followed behind in an effort to enforce such views. In making each step along this path, Congress has had to balance the interests of states in the vanguard against those states not yet seeking change.

Allowing individual purchasers of tickets in state-conducted lotteries to carry tickets or acknowledgments across state borders, therefore, is not inconsistent with the national policy toward lotteries as it stands today. Where some states have established and encouraged lotteries, but other states still oppose them, the most important

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> for when an individual takes an acknowledgment of purchase home from New Hampshire, merely retaining it as a personal record of his purchase, the anti-gambling policies of other States are in no way undermined, and no opening is provided for the growth of organized racketeering.

385 U.S. at 272-73.

aspect of federal policy should be to exclude lottery-related materials and activity from institutions under federal aegis. This exclusion should depend on the extent to which it infringes upon the policies of the non-lottery states. Individual state laws could place whatever limitations necessary upon the importation of all lottery tickets, leaving to federal law the primary role of combating institutional exploitation of the individual state policies toward gambling. Despite the confused legislative history of federal lottery regulation over the last century, this has been the basic conclusion of Congress as well.[41]

Should the current loophole in section 1953 be closed, therefore, as suggested above, a simple amendment should also be made to exempt individual bettors in state-conducted lotteries from the sweep of the statute. This provision should allow an individual to transport personally lottery tickets from legal state-conducted lotteries across state lines, provided that the individual does not resell the tickets to others.[42] Together with the amendment to

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[41]The legislative history of other federal anti-gambling statutes is replete with references excluding the individual bettor from the impact of the law under consideration. See, e.g., 18 U.S.C. §§1081-83, 18 U.S.C. §1084, 18 U.S.C. §1952 and 18 U.S.C. §§1511, 1955.

[42]A provision such as the following could be appended to §1953(b)(4):

section 1953 already proposed, this change would make federal law consistent with a federal policy.

D. Modern Criminal Statutes

With the exception of the extension of the anti-lottery statutes to radio broadcasting in 1934, between 1895 and 1948, no federal statutes were enacted that directly affected gambling. Congress did act with respect to the District of Columbia and also enacted legislation attempting to treat certain futures contracts,[43] but the general rule for

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> . . . acting under authority of State law; nor shall this section apply to tickets or other materials concerning a lottery conducted by a State acting under authority of State law when transported personally by an individual not for subsequent resale.

This language would exempt an individual from the rule of Section 1953, as it will have been amended by the language suggested above, and yet avoid problems relating to interstate transportation of lottery tickets for profit. Tickets would have to be transported by the individual purchaser, with no intention to resell them. This exemption could also be drawn as a defense, one that the defendant could present in the event that the government could make out a case under the existing statute. In either case, the exemption for the individual bettor would not weaken §1953--its potence with respect to interstate schemes to distribute lottery tickets for profit against the policies of other states would not be affected.

[43] In the late 19th century, many states attempted to limit "bucketing" transactions involving futures speculation, which was analogized to gambling. See, e.g., the District of Columbia futures prohibitions in D.C. Code §§22-1509 to 12 (1973). The theory seems to have been that contracts for margin buying involve wagering over the price of commodities at some future

the first half of the twentieth century was federal abstention from gambling-related legislation. The pressure on the national government created by the Louisiana Lottery and

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time. Where such contracts are made without a bona fide intention to invest in such commodities, there is a high potential for the traditional "anti-social consequences" associated with gambling. The distinction between such forms of prohibited conduct and related forms of investment, such as the securities and commodities markets, is neither easily drawn nor necessarily rational. An over-generalized distinction between what has been prohibited and what has been encouraged by the state legislatures in the area of futures transactions may be made by measuring the perceived social utility of the given type of transaction. Thus investment in the stock market is encouraged; "bucketing" is not. Each may be characterized as gambling. Passing of the risk of market fluctuations in agricultural products, generally lawful, is also a form of gambling, as is insurance. Neither transaction is generically distinguishable from many types of proscribed futures dealing.

In any event, the Federal government did not proscribe futures trading by statute for many years, except in the District of Columbia. The only Federal involvement in such transactions in the 19th century was in the Supreme Court's responses to adjudications concerning state statutes which proscribed futures. Examples of such pre-Erie Supreme Court cases are Booth v. Illinois, 184 U.S. 425 (1902); Clews v. Jamieson, 182 U.S. 461 (1901); Bibb v. Allen, 149 U.S. 481 (1893); Embrey v. Jemison, 131 U.S. 336 (1889); White v. Barber, 123 U.S. 392 (1887); Irwin v. Williar, 110 U.S. 499 (1884); Roundtree v. Smith, 108 U.S. 269 (1883); and Higgins v. McCrea, 116 U.S. 671 (1886).

Congress finally acted with respect to futures. The first effort was the Future Trading Act, Aug. 24, 1921, ch. 86, 42 Stat. 187, which was promptly declared unconstitutional for imposing a penalty in the guise of a tax. Hill v. Wallace, 259 U.S. 44 (1922). Congress then enacted the Commodity Exchange Act of 1922, Sept. 21, 1922, ch. 369, 42 Stat. 988, as amended by Act of June 15, 1936, ch. 545, §1, 495, at 149 (which substituted the name Commodity Exchange Act for Grain Futures Act), 7 U.S.C. §§1-17a (1970) and (Supp. IV, 1974). Congress has also established the Commodity Futures Trading Commission, 7 U.S.C. §§2-4 (1970). Parallel congressional involvement in the regulation of the securities industry since the Depression via the Securities Act of 1933, 15 U.S.C. §§77l-77aa (1970), the Securities Exchange Act of 1934, 15 U.S.C. §§78a-78ii (1970), and the establishment of the Securities Exchange Commission, is beyond the scope of these materials.

similar enterprises had subsided. Gambling regulation was returned to the state governments, where it had rested exclusively before the nineteenth century lottery scandals.

Since 1948, however, the federal role in the regulation of gambling has expanded significantly. Federal statutes have been enacted with respect to gambling ships,[44] interstate and foreign transportation of gambling devices,[45] transmission of wagering information involving wire facilities,[46] interstate travel in furtherance of racketeering enterprises,[47] the business enterprise of gambling,[48] state-conducted lotteries,[49] and wagering taxes.[50] Taken together, these and other provisions form a complex scheme of federal involvement in the regulation of gambling in recent years.

The principal legislation concerning gambling was enacted in three cycles, corresponding roughly with the Kefauver investigations of 1950-51,[51] Attorney General

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[44] 18 U.S.C. §§1081-83 (1970); 15 U.S.C. §§1171-78 (1970).

[45] 18 U.S.C. §§1953 (Supp. IV, 1974).

[46] 18 U.S.C. §1084 (1970).

[47] 18 U.S.C. §1952 (1970).

[48] 18 U.S.C. §§1511, 1955 (1970).

[49] 18 U.S.C. §1307 (Supp. IV, 1974).

[50] Int. Rev. Code of 1954, §§4401-23; 4461-63.

[51] 15 U.S.C. §§1171-77 (1970).

Robert F. Kennedy's program against organized crime in 1961-62,[52] and the new administration's anti-crime efforts of 1969-70.[53] Familiarity with these provisions is essential to a full understanding of the national policy toward gambling.

The first of the modern enactments concerning gambling was of minor scope. In 1948, 18 U.S.C. §§1081-83 were enacted to prevent the commercial operation of gambling ships floating off the coast in defiance of state anti-gambling laws.[54] The operative provision outlawed the owning or operation of a vessel used for gambling within federal jurisdiction but outside the jurisdiction of a state.[55]

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[52] 18 U.S.C. §§1084, 1952-53; 15 U.S.C. §1178 (1970).

[53] 18 U.S.C. §§1511, 1955, 1961-68 (1970).

[54] Gambling ships off of the California coast were attracting thousands of customers in the 1940's. Although prosecution was possible under a Treasury Department licensing provision, the procedure was difficult. The ships moved beyond the three mile limit to avoid California jurisdiction, and used small "water taxis" to service the floating casinos. Comment, "Federal Regulation of Gambling," 60 Yale L.J. 1396, 1406 n. 62 (1951).

[55] 18 U.S.C. §1082(a) provides as follows:

> (a) It shall be unlawful for any citizen or resident of the United States, or any other person who is on an American vessel or is otherwise under or within the jurisdiction of the United States, directly or indirectly--
>
> (1) to set up, operate, or own or hold any interest in any gambling ship of any gambling establishment on any gambling ship; or

The statute was aimed at large-scale commercial gambling; it was not intended to be used to harass private yachtsmen.[56] Only one reported case has arisen under the gambling ship statutes.[57] Sections 1081-83 were enacted to alleviate a specific problem that was beyond the power of state legislatures to control; of themselves, though, they do not reflect a general congressional policy concerning gambling.

> (2) in pursuance of the operation of any gambling establishment on any gambling ship, to conduct or deal any gambling game, or to conduct or operate any gambling device, or to induce, entice, solicit, or permit any person to bet or play at any such establishment, if such gambling ship is on the high seas, or is an American vessel or otherwise under or within the jurisdiction of the United States, and is not within the jurisdiction of any State.

Subsection (b) provides for a fine up to $10,000 or two years' imprisonment; subsection (c) is a forfeiture provision. Section 1081 defines "gambling ship," "gambling establishment," "vessel," and "American vessel." Section 1083 prohibits "water taxis" from providing transportation to and from illegal gambling ships on the high seas.

18 U.S.C. §§1081-83 were added by the Act of April 27, 1948, ch. 235, 62 Stat. 200; codified at Act of May 24, 1949, ch. 139, §323, 63 Stat. 92.

[56] The House Committee on the Judiciary reported the bill without amendment, emphasizing that only commercial enterprises were to be within the proscribed conduct:

> However, the committee wants it clearly understood that it is not its intention to provide any agency of the Government with an opportunity to harass the vast number of private yachtsmen, and that the Secretary of the Treasury shall carefully draft any regulations he may issue so as to be sure that the application thereof will be to large-scale commercial gambling alone.

H.R. Rep. No. 1700, 80th Cong., 2d Sess. 1 (1948), 1948 U.S. Code Cong. & Ad. News 1487-88 (1948).

[57] United States v. Black, 291 F. Supp. 262 (S.D.N.Y. 1968) (motion to dismiss Section 1082 indictment denied because premature).

1. The Kefauver Committee

In 1950, two events signalled the beginning of a more active federal role in combatting organized crime generally, and gambling specifically. In February, the Attorney General's Conference on Organized Crime[58] convened to discuss the need for new, concerted action in addition to the various state laws dealing with gambling.[59] Three months later, the Special Senate Committee to Investigate Organized Crime in Interstate Commerce--the Kefauver Committee--was established.[60] Together, the two events evoked a flurry of

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[58] The Attorney General had received resolutions from local officials and organizations seeking a conference to discuss law enforcement problems. The proposed conference met during the annual Conference of United States Attorneys and focused principally on large-scale organizations that depended upon syndicated gambling. Statement of H. Plaine, Department of Justice, Hearings Before the House Comm. on Interstate and Foreign Commerce on S. 3357 and H.R. 6736, 81st Cong., 2d Sess. 35 (1950) (Gambling devices) [hereinafter cited as House Commerce Hearings].

[59]
> . . . while practically all of the States have laws prohibiting gambling and gaming, and the use of gambling machines, such as the notorious slot machine, is prohibited, the efforts of the local enforcement officials are usually and often frustrated not only by the hostility and opposition of those who stand to benefit by these operations, but also by the ease with which the paraphernalia, which is essential to gambling operations, can be distributed in interstate commerce.

Id.

[60] The Committee originated with S. Res. 202, 81st Cong., 2d Sess. (1950), submitted by Senator Estes Kefauver of Tennessee. The introduction of the Committee's final report stated its purposes:

publicity[61] and congressional hearings,[62] and produced

> The function of the committee was to make a full and complete study and investigation to determine whether organized crime utilizes the facilities of interstate commerce or whether it operates otherwise through the avenues of interstate commerce to promote any transactions which violate Federal law or the law of the State in which such transactions might occur.

Kefauver Committee, Organized Crime 9 (Didier ed. n.d.).

[61] In 1949, President Truman focused national attention on the problems of organized crime in a series of public statements. Shortly thereafter, Attorney General Tom C. Clark ordered J. Edgar Hoover to have the Federal Bureau of Investigation compile a report on crime conditions in the country. This report, and the publicity surrounding its release, led to an effort by the Administration to seize the anti-crime initiative through the February conference to gain the support of Federal, state, and local officials for tough new Federal legislation. This, in turn, encouraged Congress to establish the Kefauver Committee. The Committee, which thrust its chairman into presidential politics held numerous public hearings throughout the country, many of which were televised. Over 800 witnesses were heard and millions of words of testimony collected in Miami, Tampa, New Orleans, Kansas City, Cleveland, St. Louis, Detroit, Los Angeles, San Francisco, Las Vegas, Philadelphia, Chicago, New York, and Washington, D.C. Hearings Before a Special Committee to Investigate Organized Crime in Interstate Commerce Pursuant to S. Res. 202 (81st. Cong., 2d Sess.) and S. Res. 60 and 129 (82d Cong., 1st Sess.), pts. 1-19 (1950-51) [hereinafter cited as Investigation of Organized Crime in Interstate Commerce]. The public outcry against the perceived horrors of organized crime was overwhelming. Fifty of the nation's leading newspapers organized clearinghouse to analyze and report as much news as possible about the national crime syndicates and their leaders. Numerous local crime commissions also were established. E. Kefauver, Crime in America 13-22 (1951).

[62] Hearings Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce on S. 3358, 81st Cong., 2d Sess. (1950) (Transmission of Gambling information); Hearings Before the Senate Comm. on Interstate and Foreign Commerce on S. 1563, S. 1564, S. 1624, and S. 2116, 82d Cong., 1st Sess. (1951) (bills relating to the interstate transmission of gambling information and materials) (Anti-crime Legislation).

some legislation.[63] Although only one significant set of provisions relating to gambling was enacted at that time, proposals stemming from the Kefauver hearings were at the core of measures enacted decades later.[64]

Chapter 24 of 15 U.S.C. §§1171-77, known as the Johnson Act, was enacted in 1951[65] to limit the interstate transportation of gambling devices. The House Report accompanying the bill stated that

> [t]he primary purpose of this legislation is to support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting the use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such States. 66

The bill was aimed primarily at "nation-wide crime syndicates" thought to be immune from local law enforcement,[67] and was not designed to supplant local gambling policies.[68] An

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63 15 U.S.C. §§1171-77 (1970) were a direct outgrowth of the Kefauver investigations. The wagering excise taxes were also enacted at this time.

64 Attorney General Kennedy's program to curb organized crime and racketeering was in large measure a direct product of legislation proposed subsequent to the Kefauver investigations but not enacted at that time.

65 Act of Jan. 2, 1951, ch. 1194, 64 Stat. 1134.

66 H.R. Rep. No. 2769, 81st Cong., 2d Sess. 2 (1950), 1950 U.S. Code Cong. & Ad. News 4240.

67 H. R. Rep. No. 2769, 81st Cong., 2d Sess. 4-5 (1950), 1950 U.S. Code Cong. & Ad. News at 4243.

68 Justice Department testimony before the House committee emphasized the limited Federal role contemplated under the statute:

unsuccessful fight against the bill led by Nevada Congressman Walter S. Baring argued that the law would adversely affect the legal gambling industry and infringe upon states' rights.[69]

> Mr. Plaine. I did want to make one factual premise clear, Mr. Chairman. Aside from the Federal antilottery laws which were enacted in 1890, 1895, and 1934, and some very recent legislation dealing with gambling ships, the Federal Government has no present enforcement function in the field of gambling. The laws and the policy which by their accumulative effect we might say establish a Nationwide policy against gambling, particularly commercialized gambling, are to be found in the laws and the constitutions of the several States. In that sense, this committee and the whole Congress will be approaching the present-day problem just as Congress approached the lottery problem in 1890, and again in 1895, when the so-called national policy against lotteries had been formed by the States by their laws and constitutions, and Congress was asked to enact a Federal law to close the loopholes in interstate and foreign commerce in aid of that policy.
>
> . . .
>
> Proceeding, then, Mr. Chairman, on the assumption that there is a substantive evil to be corrected, let me say categorically that the purpose of the bill is to support the basic policy of the States which outlaws slot machines and similar gambling devices by prohibiting the interstate shipment of such machines, except into States where their use is legal.

House Commerce Hearings 37.

[69] The issues were reminiscent of those surrounding the 19th century lottery debates. Representative Baring argued that the power to regulate gambling came from the states' police powers, and that it would be unreasonable to extend national Commerce Clause powers into that area. The business interests of the Nevada congressman's constituency probably played as large a part in his arguments for constitutional limits on deferal power. See 96 Cong. Rec. 13642-44; 13651-53 (1950). Proponents of the bill pointed to the requests of many states for Federal legislation, qucting from the language of the Attorney General concerning the bill:

Such objections were overcome by the repeated assertions that the bill was narrow in scope. A provision allowing states the opportunity to exempt themselves from the direct impact of the proposed statute by subsequent state legislation also defeated such objections.[70]

> The only thing that the Federal Government is being asked to do under this bill is to stop in channels of commerce the shipment of these machines which the States are powerless to keep out of the channels of interstate commerce. Actual enforcement against those people who gamble or use these machines wrongfully in the States is left to the States. . . .

Id. at 13643 (1950). Congressman Tacket of Arkansas added pragmatically that voting for the proposed bill resembled voting "against sin" because slot machines were likely to be found only where people did not object to them strongly in the first place. Id. at 13655 (1950).

[70] 15 U.S.C. §1172, prohibiting the interstate transportation of gambling devices, contained the following proviso:

> Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: Provided, further, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

The basic provisions of the Johnson Act defined the subject gambling devices,[71] prohibited the interstate transportation of such devices under certain conditions,[72] and required elaborate reporting and registration by manufacturers of such devices.[73] The provisions have

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To a state in which certain gambling devices are lawful, such a proviso is not the same in practice. In the absence of a federal statute, certain activities not expressly proscribed, could be conducted within the state, such as gambling activities acquiesced to by the legislature and populace. After the Federal statute and proviso were enacted, state legislatures had to approve expressly the conduct in question, and make public vote "in favor of sin" rather than tacitly allowing such activities. The difference to an elected representative might be substantial.

[71] 15 U.S.C. §1171 defined "gambling device" as a "slot machine" or similar coin-operated device dependent upon an element of chance to give a valuable prize, as well as defining "gambling device" to be even a sub-assembly or essential part of such a device. The original definition of "gambling device" had been much broader in S.3357, 81st Cong. 2d Sess. (1950), but was narrowed by the House in committee. H.R. Rep. No. 2769, 81st Cong., 2d Sess., 6-7 (1950).

[72] 15 U.S.C. §1172 (1970) provides, as a general rule:

> It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession. . . .

[73] 15 U.S.C. §1173, as enacted, Act of June 2, 1951, ch. 1194, 64 Stat. 1134. The provision required manufacturers and dealers in gambling devices to register with the Attorney General, to file monthly records of sales of gambling devices, and to mark individually the components of such devices. It was unlawful to repair or sell such a device without complying with the section.

been applied to a variety of devices.[74] Although the constitutionality of the Johnson Act was decisively established,[75]

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[74] Some courts have read the statute to cover almost any type of gambling device activated by a coin or token, or which had been designed or manufactured as a gambling device. United States v. 19 Automatic Pay-Off Pinball Machines, 113 F. Supp. 230 (W.D. La. 1953); United States v. Brown, 156 F. Supp. 121 (N.D. Iowa 1957); United States v. 24 Digger Merchandising Machines, 202 F.2d 647 (8th Cir.), cert. denied,345 U.S. 998 (1953). Other courts, relying on the penal character of the statute, construed the language strictly, requiring a traditional slot machine. United States v. Three Gambling Devices, Known as Jokers, 161 F. Supp. 5 (W.D. Pa. 1957), aff'd., 254 F.2d 395 (3d Cir. 1958); United States v. One Electric Point-maker, 149 F. Supp. 427 (N.D. Ind. 1957); United States v. Ansani, 240 F.2d 216 (7th Cir.), cert. denied,353 U.S. 935 (1957); United States v. McManus, 138 F. Supp. 164 (D. Wyo. 1952). Thus there was some confusion, since a machine might be proscribed in one circuit and allowed in another. For example, pinball machines were generally construed to be excluded from the statutory proscription, United States v. Five Gambling Devices, 252 F.2d 210 (7th Cir. 1958), but United States v. 19 Automatic Pay-Off Pinball Machines, 113 F. Supp. 230 (W.D. La. 1953) applied the proscription to a pinball machine which had previously been used for gambling. "Digger machines," often found at carnivals, have also been included since they are coin-operated. United States v. 24 Digger Merchandising Machines, 202 F.2d 647 (8th Cir.) cert. denied, 345 U.S. 998 (1953).

[75] United States v. 65 Slot Machines, 102 F. Supp. 922 (W.D. La. 1952)(statute did not involve a taking in violation of due process because it does not apply to property remaining within a state); No. Beach Amusement Co. v. United States, 240 F.2d 729 (4th Cir. 1957); United States v. 46 Gambling Devices, 138 F. Supp. 896 (D. Md. 1956)(statute not unconstitutionally vague); United States v. Ansani, 138 F. Supp. 451 (N.D. Ill. 1955), aff'd., 240 F.2d 216 (7th Cir.), cert. denied, 353 U.S. 936 (1957)(statute requiring registration as a dealer does not violate self-incrimination clause of Fifth Amendment because it applied only to future acts; the provision requiring monthly reports of unlawful acts was held unconstitutional).

the Supreme Court did uphold narrow constructions of the permissible scope of such legislation.[76] The filing requirements were interpreted to violate the Fifth Amendment protection against self-incrimination in that they required documentation of potentially illegal transactions.[77] Together, the narrow construction of the Johnson Act and unconstitutionality of the filing provisions seriously eroded its effectiveness and led to requests for congressional amendments.

2. Robert F. Kennedy's Program for Organized Crime

Robert F. Kennedy's vigorous efforts against organized crime and syndicated gambling brought about a dramatic change at the Justice Department. Kennedy repeatedly testified before congressional committees[78] and sponsored

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[76] The statute has been held not applicable to purely intrastate activities. United States v. Denmark, 119 F. Supp. 647 (S.D. Ga. 1953); United States v. Braun, 119 F. Supp. 646 (S.D. Ga. 1953); United States v. Five Gambling Devices, 119 F. Supp. 641 (N.D. Ga. 1952), aff'd., 346 U.S. 441 (1953); United States v. 15 Mills Blue Bell Gambling Machines, 119 F. Supp. 74 (N.D. Ga. 1953); United States v. 178 Gambling Devices, 107 F. Supp. 394 (S.D. Ill. 1952).

[77] United States v. Ansani, 138 F. Supp. 451 (N.D. Ill. 1955), aff'd., 240 F.2d 216 (7th Cir.), cert. denied, 353 U.S. 936 (1957).

[78] Legislation Relating to Organized Crime: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, and H.R. 7039, 87th Cong., 1st Sess. 18-47 (1961) [hereinafter cited as House Judiciary Hearings]; The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before the Senate Comm. on the Judiciary on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, and S. 1665, 87th Cong., 1st Sess. 1-18 (1961) [hereinafter cited as Senate Judiciary Hearings]; Gambling Devices: Hearing Before the House Comm. on Interstate and Foreign Commerce on H.R. 3024, H.R. 8410, and S. 1658, 87th Cong. 2d Sess. 9-34 [hereinafter cited as 1962 Commerce Hearings].

articles urging the enactment of new anti-gambling legislation.[79] The fruits of his endeavors were three new substantive provisions as well as amendments to the Johnson Act.

a. Wire communications--18 U.S.C. §1084

The first accomplishment of the Kennedy program was an addition to the gambling chapter of 18 United States Code, which previously had been concerned exclusively with gambling ships.[80] Section 1084 was added to prohibit the interstate transportation of wagering information.[81] The legislative history declared that the purpose of the new measure was

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[79] Kennedy, "The Program of the Department of Justice on Organized Crime," 38 Notre Dame Lawyer 637 (1962); Kennedy, "Three Weapons Against Organized Crime," 8 Crime & Deling. 321 (1962); Pollner, "Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering," 28 Brooklyn L. Rev. 37 (1962).

[80] 18 U.S.C. §§1081-83 (1970), ch. 50.

[81] Act of Sept. 13, 1961, Pub. L. No. 87-216, 75 Stat. 491. The first subsection read:

> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

> . . . to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce. 82

Such a statute was perceived to have a potential impact on organized crime by cutting off a major source of revenue through the restriction of gambling activities.[83]

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[82] H.R. Rep. No. 967, 87th Cong., 1st Sess. 1 (1961), 1961 U.S. Code Cong. & Ad. News 2631.

[83] Attorney General Kennedy testified:

> Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. . . because profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime. . . .
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> . . .
>
> It is quite evident that modern organized, commercial gambling operations are so completely intertwined with the Nation's communication systems that denial of their use to the gambling fraternity would be a mortal blow to their operations.
>
> This is the precise purpose of the proposed legislation.

Senate Judiciary Hearings 6, 11.

Section 1084 was framed to reach only those "engaged in the business of betting or wagering,"[84] thus exempting the individual bettor. The statute proscribed the use of a "wire communication facility" by the business gambler to communicate information relevant to gambling. The section also contained a provision directing that common carriers aid the government in forcing the compliance of business gamblers.[85] A key exception to the general policy of the prohibition provided:

> (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sports events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal. 86

The enforcement history of section 1084 in the courts has reflected the legislative purpose. Constitutionality

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[84] The Justice Department bill had originally extended to the social bettor, but the statute was narrowed in committee. Senator Kefauver testifed that the focus of the provision ought to be on the professional, not the social gambler. Senate Judiciary Hearings 278-79.

[85] See 18 U.S.C. §1084(a)(1970). The wording of the statute logically requires both a professional gambler and the knowing use of communication facilities in furtherance of gambling activities.

[86] Id. Section 1084(b).

has been upheld.[87] The section has been construed to reflect the congressional balance of interests among states prohibiting and allowing gambling, but at the same time has been construed to reflect a congressional policy against the use of interstate facilities for gambling.[88] Section 1084 has been interpreted broadly,[89] but the statutory requirement that the defendant must be in the

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[87] "Congress has undoubted authority respecting interstate commerce. . . . " See, e.g., United States v. Borgese, 235 F. Supp. 286, 296 (S.D.N.Y. 1964); United States v. Kelley, 254 F. Supp. 9, (S.D.N.Y. 1966).

[88] Martin v. United States, 389 F.2d 895 (5th Cir.), cert. denied, 391 U.S. 919 (1968). In Martin, it was argued that Section 1084 did not prohibit the transmission of wagers into Nevada, because the prohibition of wagers would "defeat the policies of Nevada while not aiding in the enforcement of the laws of any other State." 389 F.2d at 897. The court was unsympathetic, responding that "if the policy of Nevada is not 'defeated' in some way, then the policy of every other State that prohibits what Nevada allows could be defeated." 389 F.2d at 898. The court also argued that Section 1084 was not enacted solely to assist the states in their substantive gambling policies:

> Furthermore, assistance to the States directly was not only part of the reason for enactment of section 1084. This section was part of an omnibus crime bill that recognized the need for independent federal action to combat interstate gambling operations. . . . Moreover, this series of legislation does not stand alone, but appears as part of an independent federal policy aimed at those who would, in furtherance of any gambling activity, employ any means within direct federal control.

Id.

[89] United States v. Yaquinto, 204 F. Supp. 276 (N.D.W.Va. 1962); United States v. Bergland, 318 F.2d 159 (7th Cir. 1963), cert. denied sub nom., Cantrell v. United States, 375 U.S. 861 (1963).

business enterprise of gambling has been preserved.[90] The news reporting exemption in section 1084(b) has also been relied upon to limit prosecutions.[91] Although a steady number of convictions has been obtained under section 1084,[92] the greatest impact of the section may have been its deterrent effect on certain forms of gambling.[93]

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[90] Cohen v. United States, 378 F.2d 751 (9th Cir.), cert. denied, 389 U.S. 897 (1967).

[91] Thus, even "scratch sheets," as long as they are sold to the public, are outside the scope of the prohibition. Kelley v. Illinois Bell Telephone Co., 325 F.2d 148 (7th Cir. 1963); United States v. Kelley, 328 F.2d 227 (6th Cir. 1964).

[92] See, e.g., Administrative Office of the United States Courts, Statistical Report for the Commission on the Review of the National Policy Toward Gambling 36 (July 1974). The conviction rate for a composite of gambling cases brought under 18 U.S.C. Sections 1084, 1952, and 1953 is lower than the conviction rate for all Federal prosecutions.

Year	No. Prosecuted (§§1084, 1952-53)	No. Convicted	% Convicted	(All Federal Crimes) % Convicted
1967	152	98	65	83
1968	108	86	80	80
1969	122	73	60	81
1970	166	81	49	77
1971	380	163	43	72
1972	360	213	59	75
1973	319	179	56	75

The figures are, however, too small for further generalizations.

[93] Attorney General Kennedy testified in 1963 that there had been a sharp decline in gambling in the previous year. Hearings Before a Subcomm. of the Comm. on Appropriations of the House of Representatives, Departments of State and Justice, the Judiciary, and Related Agencies, Appropriations for 1964, 88th Cong., 1st Sess., pt. 2, at 8-9 (1963). Two years later, Congress was told:

b. The Travel Act--18 U.S.C. §1952

In April, 1961, Attorney General Kennedy submitted a proposed draft of a bill to prohibit travel in aid of racketeering enterprises to Congress. In the cover letter, Kennedy stated:

> Over the years an ever-increasing portion of our national resources has been diverted into illicit channels. Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity. . . .
>
> The effect of this legislation would be to impede the clandestine flow of profits from criminal ventures and to bring about a serious disruption in the far-flung organization and management of coordinated criminal enterprises. It would thus be of material assistance to the States in combatting pernicious undertakings which cross State lines. 94

The statute was designed to proscribe only interstate travel with intent to engage in certain unlawful activities. The Attorney General testified that the social gambler

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> The utility of the 1961 antigambling laws is being demonstrated not only by increased prosecutive action, but also by numerous intelligence reports showing that large interstate gambling operations are either shutting down or becoming intrastate and relatively minor in scope and profit.

Hearings Before a Subcomm. of the Comm. on Appropriations of the House of Representatives, Departments of State and Justice, the Judiciary, and Related Agencies, Appropriations for 1966, 89th Cong., 1st Sess., pts. 3-4, at 88 (1965).

94 Letter from Robert F. Kennedy, Attorney General, to the Vice President, S. Rep. No. 644, 87th Cong., 1st Sess. 3 (1961); Letter from Robert F. Kennedy, Attorney General to the Speaker of the House, H.R. Rep. No. 966, 87th Cong., 1st Sess. 4 (1961) (reproduced in 1961 U.S. Code Cong. & Ad. News 2664, 2666).

would have little to fear under the proposed law, because only the business enterprise of gambling was within its scope.[95]

In its path through Congress, however, the proposed bill was amended so that the gravamen of the the offense was travel in interstate commerce with the intent to commit certain unlawful activity together with the subsequent attempt to perform such activity.[96] With this restriction, the bill

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[95] House Judiciary Hearings at 24. See also dialogue between Senator Ervin and Herbert J. Miller, testifying for the Justice Department, Senate Judiciary Hearings at 255. Travel of innocent persons would be unaffected: ". . . we have carefully delineated an area of law enforcement which will disrupt the organized criminal syndicates without interfering with general travel." Statement of Attorney General Kennedy, id. at 16. Kennedy further testified:

> The main target of our bill is interstate travel to promote gambling. It is also aimed at the huge profits in the traffic in liquor, narcotics, prostitution, as well as the use of these funds for corrupting local officials and for their use in racketeering in labor and management.

Id. at 20. Justifying the role of the national government, the Attorney General also stated that ". . . only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials." Id. at 16.

[96] In the Senate, the bill (S. 1653), 87th Cong., 1st Sess. (1961) was first broadened to include the use of any interstate facilities in aid of organized crime activities, S. Rep. No. 644, 85th Cong., 1st Sess. 5, 6 (1961); 107 Cong. Rec. 13943 (1961) (remarks of Mr. Eastland), despite the caution from the Justice Department that such a broad bill would not be politically viable. Senate Judiciary Hearings at 107 (testimony of Mr. Miller). The Senate also narrowed the definition of "unlawful activity" and added the requirement that action in furtherance of the illicit activity must be attempted. S. Rep. No. 644, 87th Cong., 1st Sess. 2 (1961); Senate Judiciary Hearings 251-54, 257-58. After further changes in the House, a conference was held to reconcile differences. H.R. Rep. No. 1161, 87th Cong., 1st

was enacted.[97]

Sess. 1 (1961), reproduced at 107 Cong. Rec. 18814-15 (1961). The bill as enacted retained the Senate's requirement of an attempt to further the proscribed activity. In addition, it defined travel as an interstate facility along with other interstate facilities to prohibit the use of either any of these to further racketeering activity, but retained the more restrictive House title definition of interstate facilities. For criticism and analysis of the impact of this legislative process on the interests of federalism, see the opinion of Judge Friendly in United States v. Archer, 406 F. 670, 678-81 (2nd Cir. 1973).

[97] Act of Sept. 13, 1961, Pub. L. No. 87-228, 75 Stat. 498. The statute as enacted read as follows:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--
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> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, and carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section, 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.
>
> (c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Section 1952 has been amended twice since enacted. Arson has been included in the definition of unlawful activity in subsection (b)(2) and the definition of narcotics has been modified. See 18 U.S.C. §1952(1970).

Constitutional challenges to the Travel Act have been interposed under a number of theories, but none has been successful.[98] The Supreme Court has not entertained constitutional questions arising under the Act, although it has taken appeals in matters of construction.[99]

The Travel Act has been construed consistently and

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[98] The Act is a valid exercise of power under the Commerce Clause. United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967); Gilstrap v. United States, 389 F.2d 6 (5th Cir. 1968), cert. denied, 391 U.S. 913 (1968); United States v. Zizzo, 338 F.2c 577 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965); United States v. Nichols, 421 F.2d 570 (8th Cir. 1970); Marshall v. United States, 355 F.2d 999 (9th Cir. 1966), cert. denied, 385 U.S. 815 (1966). See also United States v. Corallo, 281 F. Supp. 24 (S.D.N.Y. 1968); United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962); United States v. Ryan, 213 F. Supp. 763 (D. Colo. 1963). Criminal conduct as defined in Section 1952 is not protected by the First Amendment. United States v. Cerone, 452 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972); Spinelli v. United States, 382 F.2d 871, 890 (8th Cir. 1967), rev'd on other grounds, 393 U.S. 410 (1969); United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964); United States v. Corallo, 281 F. Supp. 24 (S.D.N.Y. 1968); United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962). The Tenth Amendment argument has been dispensed with as a corollary to affirmance under the Commerce Clause in the cases cited supra. Fifth Amendment due process challenges based on vagueness have also been unsuccessful. United States v. Zizzo, supra, Gilstrap v. United States, supra. Bass v. United States, 324 F.2d 168 (8th Cir. 1963); Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir. 1963).

[99] The Court has denied certiorari in numerous cases challenging constitutionality. Three cases reached the Supreme Court on matters of construction. Erlengaugh v. United States, 409 U.S. 239, 243 n. 9 (1972); Rewis v. United States, 401 U.S. 808, 811 n. 5 (1971); United States v. Nardello, 393 U.S. 296 (1969). Two additional cases involved the suppression of evidence obtained by wiretap. United States v. Kahn, 415 U.S. 143 (1974); Spinelli v. United States, 393 U.S. 411 (1969).

straightforwardly. It is not a per se violation of section 1952 for one who operated a gambling business to travel interstate.[1] The interstate travel must be related to the gambling enterprise itself, such as travel to and from work by employees of the establishment.[2] Customers have been distinguished, confining the reach of the statute to those engaged in gambling as a business.[3] The use of an interstate "facility" pursuant to a gambling enterprise, also proscribed by section 1952,[4] has been construed to include telephone,

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[1] United States v. Hawthorne, 356 F.2d 740 (4th Cir.), cert. denied, 384 U.S. 908 (1966)(defendant operator of supper club with gambling facilities held not culpable under Section 1952 for trip interstate related to the removal of his family); but cf. United States v. Carpenter, 392 F.2d 205 (6th Cir. 1968)(defendant liable after interstate trip to visit son, the "dominant motive" of which was furtherance of gambling activity).

[2] United States v. Barrow, 363 F.2d 62, 65 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

[3] Rewis v. United States, 401 U.S. 808 (1971); United States v. Lee, 448 F.2d 604, cert. denied, 404 U.S. 858 (1971). The operator of the illicit establishment may be liable for the foreseeable interstate travel of an employee, United States v. Lee, 448 F.2d 604 (7th Cir. 1971); United States v. Chambers, 382 F.2d 910, 913-14 (6th Cir. 1967); United States v. Barrow, 363 F.2d 62, 64-65 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967); United States v. Zizzo, 338 F.2d 557-80 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965), but not that of patrons. Rewis v. United States, 401 U.S. 808, 814 (1971)(dictum). It is clear that the interstate traveler who is merely a patron of the gambling club is not himself liable: ". . . the traveler's purpose must involve more than the desire to patronize the illegal activity." Rewis v. United States, 401 U.S. 808, 811 (1971).

[4] Menendex v. United States, 394 F.2d 312, 314 n.2 (5th Cir.), cert. denied, 394 U.S. 1029 (1969); United States v. Winston, 267 F. Supp. 555, 561 n. 8 (S.D.N.Y. 1967);

telegraph,[5] and newspapers,[6] but not necessarily the depositing of an out-of-state check.[7] Any such contact must be more than incidental.[8] The Travel Act has been

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United States v. Borgese, 235 F. Supp. 266, 297 (S.D.N.Y. 1964). But see United States v. DeSapio, 299 F. Supp. 436, 448 (S.D.N.Y. 1969) (count of Section 1952 indictment alleging use of telephone in intrastate commerce dismissed). Cf. United States v. Gebhart, 441 F.2d 1261 (6th Cir.), cert. denied, 404 U.S. 855 (1971) (Section 1952 not violated unless mailing is interstate).

[5] United States v. McMenama, 403 F.2d 969 (6th Cir.), cert. denied, 394 U.S. 974 (1968); United States v. Hawthorne, 356 F.2d 740 (4th Cir.), cert. denied, 384 U.S. 908 (1966).

[6] Erlenbaugh v. United States, 409 U.S. 239 (1972)(causing a publication to be carried in interstate commerce with an intent to facilitate the operation of an illegal gambling business held proscribed). A Fourth Circuit holding that reversed a conviction under Sections 1952 and 1084 for ordering a publication for gambling purposes by telephone, United States v. Arnold, 380 F.2d 366 (1967) seems unlikely to be followed.

[7] In United States v. Altobella, 442 F.2d 310 (7th Cir. 1971), the Seventh Circuit reversed a Section 1952 conviction involving an extortion transaction in which a check had been cleared interstate. However, convictions were sustained in United States v. Salsbury, 430 F.2d 1045 (4th Cir. 1970) which involved a bookmaking operation using out-of-state checks. The Fourth Circuit also upheld a conviction involving a bribe paid with a check used in interstate commerce in United States v. Wechsler, 392 F.2d 344 (4th Cir.), cert. denied, 392 U.S. 932 (1968). The cases perhaps may be reconciled by looking to whether the defendant himself had initiated a proscribed transaction involving an out-of-state check or whether such a check was merely incidental to the transaction.

[8] Rewis v. United States, 401 U.S. 808 (1971); United States v. Altobella, 442 F.2d 310 (7th Cir. 1971); United States v. McCormick, 442 F.2d 316 (7th Cir. 1971); United States v. Judkin, 428 F.2d 333 (6th Cir. 1970). See also United States v. Hawthorne, 356 F.2d 740 (4th Cir.), cert. denied, 384 U.S. 908 (1966).

construed as possibly overlapping with other provisions.[9] Finally, the effectiveness of the Travel Act has been attested to by successive Attorneys General in appropriations hearings for the Department of Justice.[10]

c. Transportation of wagering paraphernalia--18 U.S.C. §1953

In 1961 Congress enacted section 1953 as "An Act to provide means for the Federal Government to combat interstate crime

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[9]The use of an interstate facility prosecribed under Section 1952 includes the use of interstate wire communication facilities directly proscribed by Section 1084. Nevertheless, arguments setting forth the danger of double prosecution have been dismissed because the elements of proof differ under the two statutes. United States v. McLeod, 493 F.2d 1186 (7th Cir. 1974); United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962). In Nolan v. Unived States, 395 F.2d 283 (5th Cir. 1968), the defendant was convicted under Section 1084 but acquitted under Section 1952. See also United States v. Ruthstein, 414 F.2d 1079 (7th Cir. 1969); United States v. Winston, 267 F. Supp. 555 (S.D.N.Y. 1967). In Erlenbaugh v. United States, 409 U.S. 239 (1972), the Supreme Court rejected the defendant's argument that the exemption in Section 1953 for "any newspaper or similar publication" applied to Section 1952 as well. Also, Section 1952 seems to overlap with Section 1082, the gambling ship provision, but conduct potentially proscribed by both of these statutes was prosecuted under Section 1952 in United States v. Brennan, 394 F.2d 151, cert. denied, 393 U.S. 839 (1968)(floating craps game aboard ship going from New Jersey to New York).

[10]The Criminal Division of the Department of Justice requested thirty additional attorneys and support staff in the fiscal year 1962 to meet the increased workload expected under the new statutes. Hearings Before a Subcomm. of the House of Representatives, Departments of State and Justice, the Judiciary, and Related Agencies, Appropriations for 1963, 87th Cong., 1st Sess., pt. 2, 6 (1962). 2,100 investigations were instigated in the first four months after 18 U.S.C. Sections 1804, 1952, and 1953 were enacted. Id., 87th Cong., 2d Sess., pt. 2, 122 (1962). In the fiscal year 1963, the Criminal Division requested funds to expand further the Organized Crime and Racketeering Section: "This is where all the emphasis is going in the Attorney General's drive on organized crime," testified a Justice Department official. Id. at 146. Racketeering convictions, numbering 45 in 1960, had risen to 546 in the 1964 calendar year. Id. 89th Cong., 1st Sess., pt. 3, 7 (1965).

and to assist the States in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia."[11] As the third weapon in Attorney General Kennedy's arsenal against organized crime, the bill was sought because the states did not have jurisdiction to control the widespread use of interstate facilities by bookmakers and lottery operators.[12] Another major reason for the enactment of the new statute was to revive the prohibitions against the interstate distribution of lottery materials that had been imposed by 18 U.S.C. §§1301-02. The legislative history of section 1953[13] emphasized that

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[11] Act of Sept. 13, 1961, Pub. L. No. 87-218, 75 Stat. 492.

[12] Letter from Attorney General Kennedy to the Speaker of the House, April 6, 1961, as reproduced in H.R. Rep. No. 968, 87th Cong., 1st Sess. 3-4 (1961), 1961 U.S. Code Cong. & Ad. News 2634, 2637.

[13]

> This bill is designed to prevent the easy interstate transportation of wagering paraphernalia. Federal laws which are designed to suppress traffic in lottery tickets in interstate or foreign commerce have been on the statute books since 1895 (18 U.S.C., secs. 1301, 1305). [sic--should read §§1301 and 1302]. These statutes make illegal the transportation in interstate or foreign commerce of 'any paper, certificate or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery . . . .' However, over the years the courts have limited narrowly the scope of these statutes. Moreover, under the classic definition of a lottery, the court's interpretation excludes sports' betting slips from existing statutory prohibition against interstate transportation. Thus, it is that the bill is designed to close the most important loopholes resulting from these court decisions.

those statutes had been emasculated by narrow judicial construction. Highlighting the weaknesses of existing legislation, Senator Eastland remarked on introducing section 1953:

> . . . the lottery statutes in their present form [do not] cover the many thousands of sports betting pool slips which are transported daily across State lines, for they do not meet the traditional definition of a lottery--the payment of a consideration must be for a prize to be awarded by chance. Even out-and-out lottery tickets may be shipped across State lines with impunity if they are printed in blank, shipped, and then locally overprinted with the paying numbers.[14]

The general rule of section 1953 is to penalize anyone[15] who knowingly carries in interstate commerce materials relating to bookmaking, sports betting pools, or numbers.[16] The statute is broadly drawn, but contains

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> . . . The language of the proposal make clear [sic] that it will include slips, papers, or paraphernalia which may be used in a lottery scheme not yet in existence or already completed. It also bans the interstate transportation of slips recording the accounts and numbers bet in a numbers lottery and betting slips and other material utilized in a bookmaking operation. . . .

H.R. Rep. No. 968, 87th Cong., 1st Sess. 2 (1961), 1961 U.S. Code Cong. & Ad. News 2634, 2635. See also Senate Judiciary Hearings at 14.

[14] 107 Cong. Rec. 13902 (1961).

[15] Anyone "except a common carrier in the usual course of its business" is implicated by the statute. 18 U.S.C. §1953(a) (1970). See Senate Judiciary Hearings at 297, 303.

[16]

> Whoever, except a common carrier in the usual course of its business, knowingly carries or send in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

several explicit exemptions. Materials pertaining to legalized parimutuel betting are exempt, as are materials relating to sports betting that are imported into a state which allows such betting.[17] The interstate transportation of newspapers or similar periodicals is also exempt.[18]

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18 U.S.C. §1953(a)(1970). This prohibition was also added by reference to the language of 18 U.S.C. §1302 (1970) (prohibiting the mailing of certain lottery-related materials) which now contains anything proscribed by Section 1953 in its enumeration of materials excluded from the mails. The Post Office Department recommended this further strengthening of Section 1302 to eliminate the intrastate mailing of any materials included in the definition of Section 1953 that were not included previously in Section 1302. Such materials otherwise would be prohibited only when they travelled interstate. Letter from Postmaster General Brawley to Rep. Celler, May 16, 1961, as reproduced in H.R. Rep. No. 968, 87th Cong., 1st Sess. 45 (1961), 1961 U.S. Code Cong. & Ad. News 2634, 2637.

[17] It was urged that companies should be able to ship equipment to be used in parimutuel racing to states in which such racing was legal. Senate Judiciary Hearings at 293-95. An individual could redeem a legally-acquired out-of-state parimutuel ticket as well. The sports betting provision was similar. The exemptions were framed as follows:

> This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel material used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

18 U.S.C. §1953(b)(1970).

[18] During the hearings on Section 1953, the American Civil Liberties Union warned that without such an exemption one could be prosecuted for carrying a newspaper across state lines because of the information within it. Senate Judiciary Hearings at 48; House Judiciary Hearings at 383.

In 1975, as noted above, a fourth exemption pertaining to state-conducted lotteries was added to the exemptions for parimutuel, legalized sports betting, and periodicals. When 18 U.S.C. §1307 was added to exempt state lotteries from the anti-lottery statutes, a parallel exemption had to be made in section 1953, too, because of the overlap among the statutes concerning lottery materials.[19] The exemption enacted in 1975, however, completely excludes materials relating to state-conducted lotteries from section 1953, rather than merely exempting the importation of such materials.[20] This exemption was probably drawn more broadly than Congress

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[19] To the extent that lottery-related materials were knowingly carried interstate, 18 U.S.C §1953 overlaps with the provisions which prohibit the mailing (18 U.S.C. §1302) and interstate transportation (18 U.S.C. §1301) of lottery-related materials. Exemption from the anti-lottery statutes without an equivalent exemption from Section 1953 would prohibit states from obtaining tickets and advertising materials for state-conducted lotteries from out-of-state sources, forcing lottery states to produce all such materials within state bounds. This would be foolish as a matter of policy, particularly for a state not having the requisite materials.

[20] The following language was added after the exemption for newspapers in 18 U.S.C. §1953(b):

> , or (4) equipment, tickets or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law.

Act of Jan. 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916. Unlike §1953(b)(2), relating to wagers on sporting events, the exemption for materials relating to state-conducted lotteries in §1953(b)(4) is not confined to the importation of the exempted materials into a state in which such materials are legal.

intended.[21]

Five years after section 1953 was enacted, the Supreme Court fully analyzed the construction and policy of the statute in United States v. Fabrizio.[22] Fabrizio had been indicted for knowingly carrying 75 acknowledgments of purchase for the New Hampshire Sweepstakes from Keene, New Hampshire to Elmira, New York. The United States appealed the dismissal of the indictment directly to the Supreme Court, which reversed the dismissal.[23] It noted that in section 1953, "Congress painted with a broad brush,"[24] and that to construe the section narrowly would "defeat one of the purposes of the section [which was] to thwart the interstate movement of such paraphernalia"[25] no matter who was carrying it, in order "to assist local enforcement of laws pertaining to gambling

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[21] The report accompanying Pub. L. No. 93-583, adding §1953 (b)(4), stated that if the law were enacted:

> the transportation of equipment, tickets, or materials used or designed for use within a State conducting such a lottery under the authority of its State law to addresses within that State would be permitted.

H.R. Rep. No. 93-1517, 93rd Cong., 2d Sess. 4 (1974), 1974 U.S. Code Cong. & Ad. News 7007, 7010. The exemption clearly permits more.

[22] 385 U.S. 263 (1966).

[23] Id. at 266. The appeal was from the Western District of New York.

[24] Id. at 266.

[25] Id. at 267.

and like offenses."[26] The Court also noted that the statute was not to be confined to the prohibition of the transportation of materials related to unlawful activities.[27]

There has also been a series of cases interpreting the periodical exemption in section 1953. It has been held that a "tout sheet" may be transported interstate under the exemption no matter how blatant its real purpose,[28] but such distribution may nevertheless violate the Travel Act.[29]

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[26] Id. at 267 n. 4.

[27] The court emphasized that "Congress did not limit the coverage of the statute to 'unlawful' or 'illegal' activities," id. at 268, and that Congress had decided not to exempt state-run wagering from the reach of §1953:

> Exemption would also defeat one of the principal purposes of §1953, aiding the States in the suppression of gambling where such gambling is contrary to state policy. For example, New York prohibits the sale of lottery tickets and the transfer of any paper purporting to represent an interest in the lottery "to be drawn within or without" that State regardless of the legality of the lottery in the place of drawing. N.Y. Const., art. I, §9, N.Y. Penal Law §§1373, 1382. To allow the paraphernalia of a lottery, state-operated or not, to flow freely into New York might singificantly endanger that policy. It is clear that the lottery statutes apply to state-operated as well as illegal lotteries, and that §1953 was introduced to strengthen those statutes by closing the loopholes placed in them by the narrow interpretation of included materials by this Court in France v. United States, 164 U.S. 676, and Francies v. United States, 188 U.S. 375.

385 U.S. at 269 [emphasis added]. At the time Fabrizio was decided, lotteries were unlawful in New York and the exemption to Section 1953 for state-conducted lotteries had not been enacted.

[28] United States v. Kelly, 328 F.2d 227 (6th Cir. 1964); Kelly v. Illinois Bell Telephone Co., 325 F.2d 148 (7th Cir. 1963).

[29] United States v. Azar, 243 F. Supp. 345 (E.D. Mich. 1964).

The construction of the newspaper exemption as being confined to section 1953 and not affecting prosecutions brought under 18 U.S.C. §§1084 or 1952 has been affirmed by the Supreme Court.[30] Testimony in appropriation hearings has stated that the federal government's use of the three sections has been effective in limiting gambling activity affecting more than a single state.[31]

d. Strengthening the Johnson Act

The shortcomings of the Johnson Act were recognized soon after its passage, and steps were quickly initiated to clarify its terms and toughen its sanctions. Before its dissolution the Kefauver Committee recommended expanding the coverage of the Johnson Act.[32] Although many bills

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[30] In Erlenbaugh v. United States, 409 U.S. 239 (1972), the Court confined the newspaper exemption in Section 1953(b)(3) to that section, and rejected theories that the amendment should be contrued to limit prosecutions under other sections.

[31] For instance, the number of cases investigated by the F.B.I. under 18 U.S.C. §§1084 and 1952-53 rose from 5361 in 1962 to 15,600 in 1964. Hearings Before the Subcomm. of the Comm. on Appropriations of the House of Representatives, Departments of State and Justice, the Judiciary, and Related Agencies, Appropriations for 1964, 88th Cong., 1st Sess., pt. 2, 8 (1963); id. Appropriations for 1966, 89th Cong., 1st Sess. pts. 3-4 88 (1965).

[32] The Kefauver Committee issued several reports summarizing its findings and making recommendations before ending its investigation on September 1, 1951. S. Rep. No. 2370, 81st Cong., 2d Sess. (1950); S. Rep. No. 141, 82d Cong., 1st Sess. (1951); S. Rep. No. 307, 82nd Cong., 1st Sess. (1951); S. Rep. No. 725, 82d Cong., 1st Sess. (1951). One recommendation urged an expansion of the terms of the Johnson Act to reach all types of gambling machines, not just slot machines. E. Kefauver, Crime in America 325 (1951).

were introduced to accomplish this, none were enacted until the Gambling Devices Act of 1962.[33] The amendments were passed after hearings were held[34] and a report considered the impact

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[33] Act of October 18, 1962, Pub. L. No. 87-840, 76 Stat. 1075. The impetus again came from Attorney General Kennedy, who testified as follows:

> Ten years of experience in enforcement of this act show that there are serious flaws and loopholes, and that a major revision is necessary.
>
> The Johnson Act now covers a machine which has a drum or wheel with symbols thereon, oranges, cherries, plums and here and there a jackpot. This is the 'one-armed bandit.' The Johnson Act describes the operation of this machine as having some element of chance which may deliver or entitle the player to receive money or property. It further describes a machine which is coin operated and, of course, the machine covered by the act. It also covers the so-called 'digger' or 'crane' merchandise machine and some variations thereof. However, it does not cover roulette machines or many other devices common to gambling casinos.
>
> Frankly, Mr. Chairman, there is no logical reason why these devices should not be banned from interstate commerce. In addition, the existing definition will not extend to a machine in current use which is in every practical respect a 'one-armed bandit,' even to the extent of its physical appearance. The machine I refer to is called a 'point maker.' On its face is a glass on which are painted the traditional slot machine symbols which I mentioned. Behind the glass are a series of lights which flash on and off until one remains in each column. The machine registers free games which can be played or paid off. This machine has been contrived by the gamblers to evade provisions of the Johnson Act. Because it has no drum or wheel, is not coin operated, and does not deliver any money directly to the player, it is not covered by the act.

S. Rep. No. 645, 87th Cong., 1st Sess. 2 (1961).

[34] See 1962 Commerce Hearings.

of syndicated gambling enterprises on the slot machine industry.[35] The Johnson Act as amended contained:

(1) an expanded definition of "gambling devices ";[36]

(2) substantially modified registration and filing requirements;

(3) a complete prohibition against the manufacture or possession of such devices in the District of Columbia and other federal jurisdictions;

(4) a forfeiture provision;[37] and

(5) a narrow exemption for devices clearly not associated with gambling.[38]

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[35] H.R. Rep. No. 1828, 87th Cong., 2d Sess. 1 (1962), 1962 U.S. Code Cong. & Ad. News 3809, 3816-18.

[36] As used in this chapter--
(a) The term 'gambling device' means--
(1) any so-called 'slot machine'. . . or
(2) any other machine is mechanical device including, but not limited to, roulette wheels and similar devices designed and manufactured primarily for use in connection with gambling, and, (A) which when operated may deliver, as the result of the application of any element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as a result of the application of an element of chance, any money or property. . .

15 U.S.C. §1171(a)(2)(1970).

[37] 15 U.S.C. §1177 (1970).

[38] 15 U.S.C. §1178 (1970). Three categories of devices are exempted: (1) machines designed to be used at a racetrack in connection with parimutuel betting; (2) machines such as coin-operated bowling alleys and pinball machines that do not give prizes in money or property; and (3) "claw" and "digger" machines not operated by coin and "manufactured primarily for use at carnivals or country or State fairs." The last definition is particularly interesting in terms of the nature and specificity of the legislative process.

The Johnson Act was used far more effectively after the 1962 amendments. The courts accepted a broad definition of "gambling devices" in applying the act to numerous types of machines,[39] and have consistently rejected constitutional attacks on the validity of the act.[40] The courts also enforced the act against intrastate activities, as long as an interstate effect was shown. This judicial action reflected expanding interpretations of the scope of federal power under the Commerce Clause.[41]

3. The Organized Crime Control Act of 1970

After the enactment of the Kennedy anti-gambling statutes, Congress acted twice more with respect to gambling in the 1960's. In 1964, after having considered such a provision for several years, Congress enacted a statute designed to penalize bribery in sporting events.[42] Major

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[39] United States v. Various Gambling Devices, 368 F. Supp. 661 (N.D. Miss. 1973)(pinball); United States v. Five Gambling Devices, 346 F. Supp. 999 (W.D. La. 1972)(pinball); United States v. Two Coin-Operated Pinball Machines, 241 F. Supp. 57 (W.D. Ky. 1965)(pinball); United States v. 11 Star-Pack Cigarette Merchandising Machines, 248 F. Supp. 933 (E.D. Pa. 1966)(trade boosters); United States v. Wilson, 475 F.2d 108 (9th Cir. 1973)(bonanza).

[40] See, e.g., United States v. Five Gambling Devices, 346 F. Supp. 999 (W.D. La. 1972)(§1177 forfeiture proceeding held not to violate due process); but cf. United States v. U.S. Coin and Currency, 401 U.S. 715 (1971).

[41] United States v. Five Gambling Devices, 346 F. Supp. 999 (W.D. La. 1972), citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[42] Act of June 6, 1964, Pub. L. No. 88-316, 78 Stat. 203, codified as 18 U.S.C. §224 (1970). The operative provision provided:

scandals involving the "fixing" of college basketball games[43] and the fear that state governments and athletic associations were powerless to act against organized crime believed to be involved in such bribery led the national government to

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> Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

18 U.S.C. §224(a)(1970).

[43] On December 7, 1950, Bradley University, which at that time had the top-ranked basketball team in the nation, defeated Oregon State by a score of 77-74 in an important game. The captain of the Bradley team, Gene Melchiorre, and the leading scorer, Fred Schlicter, each scored 21 points. Nothing seemed unusual, since Bradley had been favored by nine points and it appeared that Oregon was highly determined to win. Several months later, however, an investigation of organized crime in New York revealed that Bradley had shaved points in order to win by fewer than nine. Melchiorre had been the contact man with an organization headed by Salvatore Tarto Sollazzo, and had distributed $4,000 among his teammates on this occasion. 108 Cong. Rec. 19174 (1962). Two more scandals hit college basketball in 1960 and 1961. In the first, a New York City lawyer attempted to fix 25 games in ten states. 110 Cong. Rec. 921 (1964). The other involved fifty games in 23 cities and 17 states. 107 Cong. Rec. 11705 (1961). In total, 26 men from 15 schools accepted $44,000 in bribes. 108 Cong. Rec. 19175 (1962). The gamblers had become more sophisticated in their methods. Instead of bribing the favored team, they would bribe the underdog to lose by a few extra points. Players confessed that it was normal to go full-speed on offense so the score would look good but to loaf on defense to allow the other team to score more than it otherwise would. This method of point shaving was difficult to detect and nearly impossible to prove. Id.

action.[44] The second congressional action involving gambling concerned amendments to the banking laws restricting bank participation in the finances of state-conducted lotteries.[45] In addition, in 1967 Congress added a section to the criminal code making knowing violation of the new provisions culpable.[46]

The third comprehensive effort to constrict organized crime was initiated upon the arrival of the Nixon Administration in Washington. The Orgainzed Crime Control Act of 1970[47] contained among its provisions designed to inhibit organized crime one title specifically relating to gambling.[48] This

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[44] Letter from Byron R. White, Deputy Attorney General, to Senator James O. Eastland, Chariman, Committee on the Judiciary, March 23, 1962; 110 Cong. Rec. 920-22 (1964). Subsection(b) of Section 224 states that the federal sports bribery provision should not be construed as a federal effort to preempt local authorities in any way, thus reinforcing the notion that the national government was only acting where states had jurisdictional problems in reaching sports bribery.

[45] Act of December 15, 1967, Pub. L. No. 90-203, 81 Stat. 608, codified at 12 U.S.C. §§25a, 339, 1829a, 1730c, and 18 U.S.C. §1306(1970).

[46] 18 U.S.C. §1306(1970).

[47] Act of October 15, 1970, Pub. L. No. 91-452, 84 Stat. 922. The 1970 Act did not primarily originate in recommendation of the new Administration. Its intellectual origins lay in the work of the President's Crime Commission in 1967. Task Force Report: Organized Crime, President's Commission on Law Enforcement and Administration of Justice (1967) [hereinafter cited Task Force Report].

[48] Title VIII of the act was originally considered as a separate bill. S. 2022, 91st Cong., 1st Sess. (1969). Other provisions of the act sought, inter alia, to establish

title reflected the prevalent feeling that gambling was a steady and lucrative source of revenue for the underworld.[49] The act also incorporated other provisions affecting gambling, including a comprehensive new title pertaining to racketeering activity[50] and the inclusion of the act's prohibitions in the list of potential crimes for which wiretap investigations

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special grand juries, to provide immunity for prosecution witnesses and informants, and to extend sentencing for recidivists. Discussion of Title VIII was free from the controversy that had surrounded many of the other provisions. See generally Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary on S.30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292, 91st Cong., 1st Sess. (1969) [hereinafter cited as Senate S.30 Hearings]; Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on S.30 and related proposals, 91st Cong., 2d Sess. (1970) [hereinafter cited as House S.30 Hearings]; S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 1 (1970); McClellan, "The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?" 46 Notre Dame Lawyer 55 (1970) [hereinafter cited as McClellan].

[49] See, e.g., Task Force Report (1967); Gambling and Organized Crime: Report by Senate Committee on Government Operations, made by its Permanent Subcomm. on Investigations, S. Rep. No. 1310, 87th Cong., 2d Sess. (1962). Senator McClellan remarked upon introducing S. 3564, 90th Cong., 2d Sess. (1968), the precursor of the gambling title, that:

> Gambling is the principal source of income for key elements of organized crime and it is the purpose of this bill to seek to shut off this flow of revenue by making it a crime to engage in a substantial business enterprise of gambling.

[50] Title IX, 18 U.S.C. §§1961-69 (1970).

would be authorized under appropriate circumstances.[51]

The gambling title of the act contained two substantive provisions which may be considered together.[52] Section 1955 is a direct prohibition of illegal gambling businesses of a prescribed volume.[53] Section 1511 makes unlawful the

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[51] Title VIII added §§1511 (obstruction of state and local law enforcement) and 1955 (prohibition of business enterprise of gambling) to the list of designated offenses for which authorization for wiretapping might be obtained. See 18 U.S.C. §§2510-20 (1970). Wiretapping has been used extensively in the enforcement of gambling offenses. Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communication, table 7, at 23 (1973)(446 of 864 requests pertaining to gambling).

[52] The two statutes use identical terminology in key provisions, such as the jurisdictional basis and the definition of "illegal gambling business." They have been construed together by the courts to the extent relevant. See, e.g., United States v. Becker, 461 F.2d 230 (2d Cir. 1972).

[53]

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section--
>
> (1) 'illegal gambling business' means a gambling business which--
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

obstruction of state law enforcement with the intent to facilitate an illegal gambling business.[54] Together, the two provisions encompass gambling activities not previously

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(2) 'gambling' includes, but is not limited to, pool selling, book making, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business, and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, or other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. . . .

18 U.S.C §1955 (1970).

54 (a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if--

(1) one or more of such persons does any act to effect the object of such a conspiracy;
(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and
(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

18 U.S.C. §1511(a)(1970). Subsection (b) contains the same definitions as §1955(b), subsection (c) exempts activities conducted by tax-exempt organizations from §1511(a), and subsection (d) provides penalties.

reached by federal law.

Sections 1511 and 1955 are more sophisticated than any prior federal criminal statutes designed to curb gambling. The impetus for their enactment was a federal effort to reach conduct previously thought to be outside federal criminal jurisdiction.[55] Relying on expanded notions of federal power under the Commerce Clause,[56] sections 1511 and 1955 do not depend on a specific showing of a relationship of the proscribed activity with interstate commerce. Instead, federal jurisdiction rests upon a congressional finding that gambling businesses of a given size have an effect upon interstate commerce.[57] This novel approach

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[55] Before 1970, the federal government could reach local gambling only if the jurisdictional requirements of 18 U.S.C. §§224, 1081-84, 1301-04 or 1952-53 were met, i.e., an interstate facility must have been affected. The wagering excise taxes served at least a potential law enforcement purpose on the local level, however, in that local gambling winnings were subject to taxation. In 1968, the Supreme Court curtailed whatever effectiveness the wagering taxes may have had by ruling that the taxes subjected gamblers to Fifth Amendment self-incrimination dangers and thus could not be enforced. Marchetti v. United States, 390 U.S 39 (1968); United States v. Grosso, 390 U.S. 62 (1968). At the time Sections 1511 and 1955 were being considered, however, the unavailability of the tax approach against syndicated gambling increased the pressure for enactment of federal statutes that could reach gambling without regard to specific showings of jurisdictional impact.

[56] See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); see also Wickard v. Filburn, 317 U.S. 111 (1942); Maryland v. Wirtz, 392 U.S. 183 (1968).

[57]
> The Congress finds that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof.

Act of Oct. 15, 1970, Pub. L. No. 91-452, Title VIII, pt. A, §801, 84 Stat. 922, 936.

has been found constitutional by numerous federal courts of appeal[58] despite early questions.[59]

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[58] United States v. Becker, 461 F.2d 230 (2d Cir. 1972); United States v. Hiehl, 460 F.2d 454 (3d Cir. 1972)(construing §1511); United States v. Harris, 460 F.2d 1041 (5th Cir. 1972), cert. denied, 409 U.S. 877 (1972); United States v. Thaggard, 477 F.2d 626 (5th Cir. 1973), cert. denied, 414 U.S. 1064 (1973); United States v. Hunter, 478 F.2d 1019 (7th Cir. 1973), cert. denied, 414 U.S. 857 (1973); Schneider v. United States, 459 F.2d 540 (8th Cir. 1972), cert. denied, 409 U.S. 877 (1972); United States v. Sacco, 491 F.2d 995 (9th Cir. 1974); United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974). Although the jurisdictional element has been held constitutional, at least one court in reversing a Section 1955 conviction cautioned against exploitation of the technique. The Fifth Circuit, in United States v. Bridges, 493 F.2d 918 (5th Cir. 1974), held that the government had not proved the necessary jurisdictional element in convicting a four-man poker and craps ring that had recently added a fifth participant. The court warned:

> To construe these provisions as urged by the government would not further the congressional purpose, for such a broad construction could subject almost any small gambling operation to federal regulation. This is clearly not the function of §1955.

493 F.2d at 922. See also Ianelli v. United States, 420 U.S. 770 (1975).

[59] A colloquy between Senator McClellan and Assistant Attorney General Wilson during Senate hearings on the bill is illustrative:

> Senator McClellan. . . I am concerned that the effect of this bill would be to extend Federal jurisdiction so far that it would be virtually the same as local criminal jurisdiction in this area. Now, you have mentioned this problem in your remarks already.
>
> Mister Wilson. We have tried to head that off, and if we haven't done it, it needs to be done, because it is not our purpose to move all this into Federal courts.
>
> Senator McClellan. Our experience in the past has been that in such situations the expansion of Federal power has tended to supplant, not merely supplement, State criminal jurisdiction. Again I take it that is what you want to avoid.

Practical and theoretical advantages accompany the new provisions. Because jurisdictional elements are separated from the substantive offense, analysis of the elements of the crime is simplified.[60] Once facts are shown providing the requisite jurisdictional volume and duration,[61] the effect of the activity on interstate commerce becomes irrelevant for purposes of conviction. A disadvantage of this approach, however, is that prosecutorial authorities may have to determine the appropriateness of federal involvement in a given situation at some point short of that limit on federal action set by Congress.[62] A countervailing advantage

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Mr. Wilson. Yes, sir.

Senate S.30 Hearings at 396. See also id. at 381 (prepared statement of Assistant Attorney General Wilson); id. at 394-402 (committee questioning of Mr. Wilson); and S. Rep. No. 91-617, 91st Cong., 1st Sess. 70-75 (1969). Senator McClellan testified in the House to the same effect. House S.30 Hearings at 105.

60 See, e.g., 18 U.S.C. §1084 (1970); 18 U.S.C. §1952 (1970); 18 U.S.C. §1953 (1970).

61 The authorities must prove: (1) that five or more persons are involved in the manner required by the statute; (2) that the operation is in violation of local law; and (3) that it has been operating for more than a month or does more than $2,000 business per day.

62 See United States v. Bridges, 493 F.2d 918 (5th Cir. 1974). It is possible that factors which met the minimum criteria to constitute a violation of Section 1955 could exist in many small-scale gambling operations of local character. While the statute would permit federal involvement, reasonable allocation of prosecutorial and judicial resources should militate against federal action in such circumstances. Section 1955 is drawn to provide federal authorities considerable latitude in determining whether to prosecute seeming violators. If the present discretion is found to be too broad, the problem could be remedied simply by raising the requirements. For instance, $2,000 per day could be changed to $10,000 per day.

of the new statutes is that they have been drawn so that only conduct which "is a violation of the law of a State or political subdivision in which it is conducted" may be prosecuted.[63] Both sections are contingent upon the illegality of the given gambling enterprise in the jurisdiction in which it is being conducted. Conflict between federal and local policies toward gambling is thus theoretically impossible.[64]

The premise upon which sections 1511 and 1955 are based is the ineffectiveness of local law enforcement efforts in dealing with gambling. Section 1511 directly seeks to combat police corruption in furtherance of gambling activity:

> No drive against illegal gambling can even begin to succeed in those instances where it is to be undermined and betrayed by venal law-enforcement officers--police, prosecutors, or even judges.
>
> It is not pleasant to contemplate, but we cannot blind ourselves to the distasteful fact that some bribery and bribery attempts of law-enforcement officials at all levels have been characteristic of the presence of organized crime.

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[63] 18 U.S.C. §1955(b)(1)(i)(1970).

[64] Since the requisite conduct must be a violation of state law in order also to violate Section 1955, it would appear that conflict would be impossible. In some practical situations, however, conflict might occur. Local officials could be bribed not to enforce the local provisions. They might not have any desire to have the provisions enforced. Where local statutes are old, a tacit understanding not to enforce thr provisions against non-illicit purposes might exist. This is particularly likely where the populace acquiesces to certain conduct that a majority of the legislature could not approve because of the opposition of a vocal minority.

> Hence, the necessity to the Congress to enact a law which makes obstruction of State and local law enforcement in such areas a Federal offense. The citizens of every State are entitled to have their laws enforced in an equal-handed manner, and that right is one protected by the 14th amendment to the U.S. Constitution. 65

The legislative history emphasizes that although section 1511 was to be used only in relation to the obstruction of justice in furtherance of gambling activities, the conduct proscribed need not meet the traditional requirements of a conspiracy.[66] Neither section 1511 nor section 1955 purports to reach the individual gambler. He who "conducts, finances, manages, supervises, directs, or owns" an illegal gambling business is culpable; he who merely bets is not.[67]

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[65] 115 Cong. Rec. 10736 (1969)(remarks of Senator Hruska).

[66] Senate S.30 Hearings at 397 (testimony of Assistant Attorney General Wilson). For this reason, "scheme" was used instead of "conspiracy" in earlier drafts of Section 1511. The Association of the Bar of the City of New York's Committee on Federal Legislation criticized the word "scheme" as overly vague. House S.30 Hearings at 324. Senator McClellan attempted to argue that "scheme" for the purposes of §1511 actually required a greater degree of proof than "conspiracy" would, in that it required participation in the illicit activity, while "conspiracy" only required an overt act. This reasoning ignores many situations, such as the one-time bribe in furtherance of gambling activity, which would not be encompassed by a traditional conspiracy theory but would be proscribed by Section 1511. McClellan, "The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?," 46 Notre Dame Lawyer 55, 137 (1970). The point was mooted when the House changed "scheme" to "conspiracy" in its version of the bill.

[67]

> The term 'conducts' refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet.

Most of the litigation arising under the new statutes has stemmed from prosecutions of illegal gambling businesses rather than bribery. Most questions have been resolved in the application of section 1955, but section 1511 may be considered in pari materia to the extent relevant. Numerous constitutional issues were raised involving Commerce Clause powers, equal protection, [69] the right to travel, [70] and

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H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., 53 (1970) (referring to §1511). Earlier drafts had used "participates" instead of the series of verbs contained in the statute as enacted. See, e.g., S. 2022, 91st Cong., 1st Sess. (1969). In United States v. Becker, 461 F.2d 230 (2d Cir. 1972), the court held:

> Thus Congress' intent was to include all those who participate in the operation of a gambling business, regardless how minor their roles and whether or not they be labelled agents, runners, independent contractors, or the like, and to exclude only customers of the business.

461 F.2d at 232 [emphasis in original].

[69] Schneider v. United States, 459 F.2d 540 (8th Cir. 1972), cert. denied, 409 U.S. 877 (1972); United States v. Bally Mfg. Corp., 345 F. Supp. 410, 427 (E.D. La. 1972): "The rule is simply that a variation in state laws does not in any way nullify or render unreasonable a federal antigambling statute which incorporates state law." Thus, no denial of equal protection was found in the application of Section 1955 to each state according to the laws of that state. Section 1955 does not have to be uniformly applied to all states. See also United States v. Thaggard, 477 F.2d 626, 630-31 (5th Cir. 1973), cert. denied, 414 U.S. 1064 (1973) (exemption for tax-exempt organizations in §§1511(c) and 1955(e) held not to violate equal protection).

[70] United States v. Smaldone, 485 F.2d 1333, 1343 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974), citing Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311, 327 (1917) and Kentucky Whip and Collar co. v. Illinois Central R. Ro., 299 U.S. 334 (1937).

vagueness.[71] There has been little disagreement among the circuits over statutory construction,[72] with one notable exception. One argument postulated that under Wharton's Rule, a defendant could not be convicted for both substantive offense under section 1955 and for conspiracy to commit it, since a minimum number of participants was required in either case.[73] The courts did not resolve the argument without confusion.[74] The Supreme Court, however, determined that

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[71] United States v. Garrison, 348 F. Supp. 1112, 1119-20 (E.D. La. 1972); United States v. Bally Mfg. Corp., 345 F. Supp. 410, 427 (E.D. La. 1972): "Section 1955 does not forbig 'the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ,'" citing Connally v. General Construction Co., 269 U.S. 385, 391 (1926); see also United State v. Riehl, 460 F.2d 454 (3d Cir. 1972).

[72] See, e.g., United States v. Palmer, 465 F.2d 697 (6th Cir. 1972)(presumption in §1955(c) construed); United States v. Schullo, 363 F. Supp. 246, 248-49 (D. Minn. 1973), cert. denied, 421 U.S. 947 (1975)("gross revenue" of $2,000" in §1955(b)(1)(iii) does not mean net income after expenses); United States v. Gordon, 464 F.2d 357 (9th Cir. 1972)(§1955 applies only where state criminal law is violated, not where violations are of state tax measures).

[73] Wharton's Rule was designed to apply to crimes, such as adultery and bribery, in which a minimum of two participants was logically required to constitute the substantive offense. In such cases, a third party would be required for conspiracy to be a logically separable offense. Arguably, this requirement has nothing to do with Section 1955.

[74] The better rule is that of United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975).

> In asking us to apply Wharton's rule to the section 1955 situation, appellants misconceive the import of that section's jurisdictional requirement that five or more persons be involved in the illegal gambling business. Such jurisdictional requirements are unrelated to the criminal character of the conduct and should be separately treated.

the difficulty was illusory.[75] Once initial problems had been resolved, the bulk of litigation under the gambling provisions concerned the propriety of law enforcement conduct under the wiretapping provisions.[76]

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489 F.2d at 558. Other courts have held that Wharton's Rule presents no problem because more than five defendants were indicted. United States v. Becker, 461 F.2d 230, 234 (2d Cir. 1972); United States v. Iannelli, 477 F.2d 999, 1002 (3d Cir. 1973), aff'd., 420 U.S. 770 (1975); United States v. Mainello, 345 F. Supp. 863, 882-83 (E.D.N.Y. 1972). For a falacious argument that Wharton's Rule prohibits a double-count indictment charging conspiracy under 18 U.S.C. §371 (1970) and violation of 18 U.S.C. §1955, see United States v. Greenberg, 334 F. Supp. 1092 (N.D. Ohio 1971):

> . . . Congress has established several jurisdictional elements for this offense. One, which makes appropriate the application of 'Wharton's Rule,' is subsection (ii) of the Act. Thought this unique section, Congress has made the offense federally cognizable only when there are five or more participants. One of the bases of federal intervention is a concert of action between the parties. In other words, the offense is one involving the element of concursus necessarius. That is, it is absolutely necessary that there be a plurality of parties and it is necessary that there be concerted action among them. It therefore appears that a charge of conspiring to commit the offense should not be maintainable.

334 F. Supp. at 1095.

Law review commentators have also dealt with the question with varying degrees of clarity. See Note, "Wharton's Rule and Conspiracy to Operate an Illegal Gambling Business," 30 Wash. Lee L. Rev. 613 (1973); Comment, "Gambling Under the Organized Crime Control Act: Wharton's Rule and the Odds on Conspiracy," 59 Iowa L. Rev. 452 (1973).

[75] Iannelli v. United States, 420 U.S. 770 (1975).

[76] See, e.g., United States v. Roberts, 477 F.2d 57 (7th Cir. 1973), cert. denied, 417 U.S. 908 (1974); United States v. Kleve, 465 F.2d 187 (8th Cir. 1972); United States v. Curreri, 363 F. Supp. 430 (D. Md. 1973); United States v. Bleau, 363 F. Supp. 438 (D. Md. 1973); United States v. Falcone, 364 F. Supp. 877 (D.N.J. 1973); Quintina v. United States, 359 F. Supp. 769 (D. Mass. 1973).

In its title on "racketeer influenced and corrupt organizations," codified at 18 U.S.C §§1961-1968,[77] the Organized Crime Control Act employed techniques even more sophisticated than those utilized in sections 1511 and 1955. Section 1962 prohibits a series of enumerated relationships between enterprises engaged in interstate commerce and participants in or money derived from a "pattern of racketeering activity."[78] "Racketeering activity" is defined to include gambling as prohibited by 18 U.S.C. §§1084, 1511, 1952, 1953, and 1955, as well as numerous other forms of criminal activity.[79] A "pattern" is two acts of "racketeering" occurring within ten years of each other.[80] The availability of civil remedies

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[77] Act of Oct. 15, 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941.

[78] Subsection (a) prohibits the investment of income derived from a "pattern of racketeering activity" in any enterprise engaged in or affecting interstate commerce. Subsection (b) prohibits the acquisition of an interest in such an enterprise through a "pattern of racketeering activity." The remaining two subsections proscribe the conduct of affairs of enterprise engaged in or affecting interstate commerce through a "pattern of racketeering activity" and prohibit conspiracy to violate any of the other subsections of Section 1962.

[79] Section 1961 is the definitions section. Subsection (1) defines "racketeering activity" as any threat or act involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in dangerous drugs punishable under state law by imprisonment for more than one year. The section also includes a lengthy list of felonies indictable under Title 18.

[80] Section 1961(5). At least one of these acts must have occurred after the effective date of enactment of Sections 1961-68, and the ten year period excludes any period of imprisonment.

and stringent criminal sanctions are the most significant aspect of sections 1961-1968.[81] The major rationale behind the enactment of sections 1961-68 was the curtailment of the infiltration of organized crime into legitimate business. Senator McClellan testified:

> Threats, arson, and assault are used to force competitors out of business and obtain larger shares of the market. Building contractors pay tribute for the privilege of using non-union labor, while labor unions infiltrated by organized crime raise no objection. A corporation is bled of its assets, goods obtained by the corporation on credit are sold for a quick profit, and then the corporation is forced into bankruptcy while the criminals who infiltrated it disappear. Large sums in stocks and bonds are stolen from brokerage houses and banks, and then used as collateral to obtain loans. Income routinely is understated for tax purposes, so that mob businesses have competitive advantages over businesses which report all their income. These methods and others give such a competitive advantage to the mob enterprise that monopoly power is approached or gained, and prices are raised. 82

In addition, much of the original financing for such ventures was thought to come from syndicated gambling.

> We must recognize, too, that La Cosa Nostra's control of gambling ravishes the entire society, not merely the gamblers, since the $6 or $7 billion profit organized gambling operators earn each year bankrolls not only the Mafia drug trade, but organized crime's infiltration of legitimate business and other activities, and this is one of the Nation's most serious criminal justice and economic problems. 83

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[81] Sections 1964-68.

[82] House S. 30 Hearings at 106. The legislation as adopted, of course, extended beyond the infiltration of legitimate business; it also extended to the operation of illegitimate businesses and other "entities" effecting commerce.

[83] Id. at 87.

Despite the important purposes for which sections 1961-68 were enacted, its provisions were not adopted without significant controversy. It was argued that the list of crimes that could become "racketeering activity" for purposes of sections 1961-68 was overinclusive,[84] that the statutory requirements were too harsh,[85] that the statute was ill-designed to suit a goal practically impossible to achieve,[86] and that the civil remedies were subject to abuse.[87]

The civil remedies, similar to those available under the antitrust laws, are potentially the most important aspect of sections 1961-68. The district courts are empowered under section 1964 to prevent violations of section 1962

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84 The Committee on Federal Legislation of the Association of the Bar of the City of New York urged that many of the criminal provisions included in the definition of "racketeering activity" were relatively minor violations that could receive far harsher penalties if prosecuted under Sections 1962. House S.30 Hearings at 327-29. Senator McClellan defended the list, arguing that "[t]he listed offenses lend themselves to organized commercial exploitation, unlike some other offenses such as rape, and experience has shown they are commonly committed by participants in organized crime." McClellan at 142-43.

85 The requirement that two acts must have occurred within ten years of each other was added to §1961(5) in response to A.C.L.U. complaints that an earlier version created a "pattern" from one recent occurrence linked without limit to any prior activity enumerated in Section 1961 (1). House S. 30 Hearings at 499.

86 Id. 328-29; 499. See also, H.R. Rep. No. 1549, 91st Cong., 2d Sess., 186-87 (1970) (dissenting views).

87 H.R. Rep. No. 1549, 91st Cong., 2d Sess., 187-88 (1970) (dissenting views); House S.30 Hearings at 499.

by means of orders of divestiture, dissolution, and reorganization.[88] A treble-damage action also may be brought.[89] Further, section 1965 allows liberal venue and service of process provisions for civil remedies sought under section 1964.[90] The most serious potential issue under the civil provisions of sections 1961-68 is the extent to which they may be used to circumvent constitutional guarantees afforded defendants in the criminal justice system.[91]

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[88] Section 1964(a). Subsection (b) provides that the Attorney General may institute such proceedings and have accelerated disposition of them in court. Section 1964(d) also purports to estop a defendant from denying in a civil proceeding matters finally determined against him in a criminal proceeding under Sections 1961-68.

[89]
> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. §1964(c)(1970).

[90] If "the ends of justice require. . . ," this may include nationwise service of process. 18 U.S.C. §1965(b)(1970).

[91] The impact of the civil techniques available to prosecutorial officers under Sections 1964-68 arguably equals that of many criminal proceedings. While the penalties do not extend beyond those available in other circumstances to other plaintiffs, the methods denominated "civil" in Sections 1964-68 give the government a unique powerful system that would not be available to a plaintiff in a civil antitrust action. The corollary to the provision of this new weapon against racketeering to the United States in this instance is that it endangers potential defendants who will be given none of the rights constitutionally guaranteed to criminal defendants. The very advantages seen by the Justice Department in the civil provisions of Sections 1964-68 are, of course, the disadvantages to potential defendants:

Sections 1961-1968 have had only a short enforcement history. Challenges to (1) the validity of an order obtained by the United States for civil injunctive relief[92] and (2) the application of the criminal provisions in section 1962 to the acquisition of a foreign corporation[93] have been

> These time-tested remedies. . . should enable the Government to intervene in many situations which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure . . . with its lesser standard of proof, non-jury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in a similar activity. Finally, these remedies are flexible, allowing of several alternative courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the court to insure that its decrees are not violated.

S. Rep. No. 91-617, 91st Cong., 1st Sess., 82-83 (1969) (letter of Deputy Attorney General at Senate Hearings).

Whether the United States will choose to use these measures in marginal situations and, if so, whether such use will be held constitutional remains to be seen. There is little question, however, that constitutional infirmity does not attach automatically to the application of either the civil or criminal provisions of Sections 1961-68. For a sympathic analysis of the civil provisions, see"Comment, Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for 'Criminal Activity'", 124 U. Pa. Law Rev. 124 (1975).

[92]United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975)(citing In re Debs, 158 U.S. 564 [1895] for the proposition that Congress has broad powers to regulate activities affecting interstate powers, in dismissing defendant's claim that Section 1964 was being used to circumvent a failure of proof under criminal standards). See also United States v. Altese, 19 Crim. L. Reptr. 2319 (2d Cir. 7-21-76)(Section 1961 applies to illegal gambling business).

[93]United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

resolved in favor of the constitutionality of these provisions. Private treble damage actions under section 1964 have also been litigated.[94] Testimony of Department of Justice officials at appropriations hearings indicated that a major effort is underway to use the new techniques available under sections 1961-68.[95]

A consistent theme running throughout the federal criminal statutes discussed in this section is the supportive role that federal policy has played in the development of the law. Although different techniques have been used and the overall federal involvement in the regulation of gambling has increased steadily, the basic trend of this federal involvement has been to support state policies. These federal statutes define the parameters of permissible activity but leave the states with sufficient flexibility to experiment with various forms of gambling.

E. Non-Criminal Federal Gambling Provisions

1. Banking laws

In 1967, shortly after New York began to operate its

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94 King v. Vesco, 342 F. Supp. 120 (N.D. Cal. 1972).

95 Assistant Attorney General Henry Peterson testified that Sections 1961-68 would become a major weapon in the hands of the Department's regional Strike Forces. Hearings Before a Subcomm. of the Comm. on Appropriations of the House of Representatives, Departments of State, Justice and Commerce, the Judiciary and Related Agencies, Appropriations for 1972, 92nd Cong., 1st Sess., pt. 1, at 523-24 (1971).

state lottery, Congress amended the federal banking laws[96] to prohibit banks insured by the federal government from distributing or advertising lottery tickets.[97] The legislation was enacted at the insistence of the Chairman of the House Committee on Banking and Currency[98] to exclude gambling activities from institutions within the federal domain.[99]

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[96] Act of December 15, 1967, Pub. L. No. 90-203, 81 Stat. 608 added five sections. To the National Banking Act was added Rev. Stat. §5136A, 12 U.S.C. §25A; to the Federal Reserve Act a new §9A, 12 U.S.C. §339; to the Federal Deposit Insurance Act a new §20, 12 U.S.C. §1829A; and to the National Housing Act a new §410, 12 U.S.C. §1730C. 18 U.S.C. §1306 was also added, making violation of any of the other provisions criminally liable.

[97] Except for the type of institution affected, each new statute is the same. The sections provide in pertinent part as follows:

> Sec. 5136A. (a) A national bank may not--
> (1) deal in lottery tickets;
> (2) deal in bets used as a means or substitute for participation in a lottery;
> (3) announce, advertise, or publicize the existence of any lottery;
> (4) announce, advertise, or publicize the existence or identity of any participant or winner, as such, in a lottery.
>
> (b) A national bank may not permit--
> (1) the use of any part of any of its banking offices by any person for any purpose forbidden to the bank under subsection (a). . . .

[98] Congressman Wright Patman of Texas was the sponsor of H.R. 9892, 90th Cong., 1st Sess. (1967).

[99] See generally, H.R. Rep. No. 382, 90th Cong., 1st Sess. (1967); S. Rep. No. 727, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S. Code Cong. & Ad. News 2228; Prohibition on Use of Financial Institutions as Lottery Agents: Hearings on H.R. 10595 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st

The legislative history indicates that Congress suspected that banking functions did not mix well with gambling.[1] Another theory was that legislation was necessary to avoid a competitive disadvantage between savings and commercial

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Sess. (1967)[hereinafter cited as Senate Banking Hearings]; To Prohibit Certain Financial Institutions from Participating in Gambling Activities: Hearings on H.R. 9892 Before the Comm. on Banking and Currency of the House of Representatives, 90th Cong., 1st Sess. (1967)[hereinafter cited as House Banking Hearings]. The reports of both Houses concluded that to prohibit banks from active participation in lottery activities would be perfectly consistent with prior federal policy. H.R. Rep. No. 382, 90th Cong., 1st Sess., 2 (1967); S. Rep. No. 727, 90th Cong., 1st Sess., 2 (1967); 1967 U.S. Code Cong. & Ad. News 2228, 2229.

[1] "[T]he Federal Government should not be a participant in pandering to and promoting the passions." 113 Cong. Rec. 32197 (1967)(remarks of Senator Lausche). "I do not feel this is an appropriate function for financial institutions, the traditional bastions of thrift and frugality." 113 Cong. Rec. 18669 (1967)(remarks of Rep. Horton).

> . . . there is a certain element of dignity and trust about a bank and action on the part of the Federal Government, the State and so forth, which would allow banks to sell lottery tickets is not proper. . . .

House Banking Hearings at 19 (remarks of Rep. Wylie).

Among the bill's opponents was Senator Javits of New York. He argued that "Congress has refrained from exerting its authority where a State has instituted a lottery," Senate Banking Hearings at 26, 31, and that "[a]nything one wishes could be legislated under the guise of regulating banks on grounds of respectability or morality or ethics." 113 Cong. Rec. 18669 (1967). The minority views appended to the Senate Report were framed in terms reminiscent of the states' rights controversy of the nineteenth century anti-lottery legislation. S. Rep. No. 727, 90th Cong., 1st Sess. 15-16 (1967); 1967 U.S. Code Cong. & Ad. News 2238, 2240.

banks.[2] A third reason for the enactment of the prohibition was based on moral grounds, but this reason was relied upon only by the bill's sponsor.[3]

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[2] The General Counsel of the Federal Home Loan Bank Board had ruled that the sale of lottery tickets by federal savings and loan institutions would be "inconsistent with their objectives as thrift institutions." H.R. Rep. No. 382, 90th Cong., 1st Sess., 13-18 (1967). For this reason, it was argued that all banks should be precluded from distributing lottery tickets. S. Rep. No. 727, 90th Cong., 1st Sess., 4 (1967), 1967 U.S. Code Cong. & Ad. News 2231.

[3] In introducing the bill, Congressman Patman had called gambling an "unmitigated evil," and argued that bank participation in such enterprises would be "a great boost to the gambling interests," and that "eventual domination or outright takeover of these banks by the gambling syndicates" was sure to follow. 113 Cong. Rec. 12346 (1967). Patman elaborated:

> . . . the purpose of the bill is to reaffirm the traditional policy of Congress and of all branches of the Federal Government to shun gimmickry, deception, gambling huckstering, and all fast-buck activities; and instead to meet Federal obligations on a high plane of ethics. Between the lines of the legalisms written into this bill, you may read--and I hope Members of Congress and all other citizens will read---this statement: "The Federal Government of the United States is too proud to work as a shill for gamblers."

113 Cong. Rec. 18582 (1967). Patman alluded to a consistent federal policy opposed to lotteries since President Benjamin Harrison's plea to Congress in 1890. Id.

Patman then specifically addressed the New York lottery.

> It is not the purpose of this legialtion to impede the New York State Lottery in any manner, or to question the morality of such a lottery. But, rather, the legislation seeks to keep banks' activities limited to normal banking operations, which certainly do not include selling lottery tickets.

113 Cong. Rec. 15171 (1967). Turning to Governor Rockefeller personally, Patman remarked:

Despite the vehemence of some of the attacks on gambling, the result of the legislation was to prohibit only the visible aspects of involvement in gambling. No provision forbids banks from accepting deposits or performing other traditional banking activities. Although the amendments have been referred to in the courts,[4] cases have not been

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> If Mr. Rockefeller wishes to support his State government by trickery, slickery, shell games, gambling, and fast buckism, that is a matter that rests between him and the voters of New York. But when he attempts to slip these ingredients into the Federal banking system, then it is time for Members of Congress to teach him a basic lesson in the proper and time-honored separation of State and Federal Governments.

113 Cong. Rec. 18582 (1967). Calling the New York lottery "simply another Rockefeller scheme to dodge a fair and equitable tax program," id., Patman claimed that the governor's family had "always operated on the assumption that the rich should get richer and that the poor should be fleeced." Id. at 18583. Noting that "it is easier for a camel to pass through the eye of a needle than for Rockefeller to consider taxing himself and his financial peers," id. at 18584, Patman concluded that:

> He is asking the people of New York, and the supporters of his position in Washington are asking Congress, to go along with the rotten philosphy, 'if you can't lick the crooks, join 'em.'

113 Cong. Rec. 18586 (1967).

Various members of Congress quickly disassociated themselves from Patman's harangue, pointing out that while Governor, Rockefeller had opposed the lottery until it had been overwhelmingly approved by the electorate. 113 Cong. Rec. 18590 (1967).

[4] In Martin v. United States, 389 F.2d 895 (5th Cir. 1968), cert. denied, 391 U.S. 919 (1968), the court's decision in an appeal under 18 U.S.C. §1084(1970) referred to the statutes in question as examples of a policy against those who would use facilities within federal control for gambling purposes. The statute was similarly referred to in New York State Broadcasters Ass'n v. United States, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970), involving 18 U.S.C. §1304.

reported under these provisions and regulations have not been promulgated.[5]

2. Miscellany

A number of other federal statutes not yet mentioned relate to gambling in some respect. Although they have neither independent policy significance nor have they generated great controversy, these provisions should be mentioned in the interest of completeness.

The Farm Labor Contractor Registration Act of 1963[6] excludes prospective agricultural labor foremen from federal recognition in certain circumstances. One of these is a prior conviction for gambling.[7] Having heard testimony that the situation was ripe for the exploitation of migrant

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[5] Subsection (e) of each section enacted to prohibit banks from dealing in lottery tickets enabled the supervisory authorities of such banks to issue "such regulations as may be necessary."

[6] Act of September 7, 1964, Pub. L. No. 88-582, 78 Stat. 920.

[7]
. . .

> (b) Upon notice and hearing in accordance with regulations prescribed by him, the Secretary may refuse to issue, and may suspend, revoke, or refuse to renew a certificate of registration to any farm labor contractor if he finds that such contractor--
>
> . . .
>
> (7) has been convicted of any crime under State or Federal law relating to gambling. . . .

7 U.S.C. §2044 (1970)(since amended in other respects).

farm workers through gambling,[8] Congress passed this legislation in concern for the impact of crew leaders on migrant farm workers.[9]

Immigration and Nationality provisions also restrict the opportunities of those not of "good moral character."[10] In certain circumstances, gambling activity is outside "good moral character."[11] This provision has been used several

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8 A crew leader frequently organizes groups of workers in areas in which they live, usually provides means of transportation for members of his crew, and often lends them money if necessary, during the season; enters contracts with the growers; supervises workers on the job; helps to provide continuity of employment and unless there is a written agreement with the farmer, is responsible for social security taxes. He is the individual who has the most continuous relationship with these migrant workers.

H.R. Rep. No. 358, 88th Cong., 1st Sess., 2 (1963).

9 S. Rep. No. 202, 88th Cong., 1st Sess., 2 (1963); S. Rep. No. 167, 88th Cong., 1st Sess., 12 (1963)("the crew leader. . . is the source of weekend entertainment often consisting of whiskey, women, and 'Georgia Skin,' a gambling game").

10 8 U.S.C. §1101(f)(1970). The section was promulgated as part of the Act of June 27, 1952, Pub. L. No. 414, ch. 477, 66 Stat. 163 (since amended in other respects).

11 For the purposes of this chapter--
No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was--

. . .

(4) one whose income is derived principally from illegal gambling activities;
(5) one who has been convicted of two or more gambling offenses committed during such period;

. . .

8 U.S.C. §1101(f)(4), (5)(1970).

times in deportation proceedings.[12] An analogous section of the Tarriff Act of 1922[13] prohibits the importation of lottery tickets among other "immoral articles."[14] The statutory framework establishing the Law Enforcement Assistance Administration also includes "gambling" in its definitions of activities in which organized criminal elements might be engaged.[15] Finally, subject to the state-conducted lottery exception, the Federal Communications Commission has authority to revoke

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[12] The provision in U.S.C. §1101(f)(5) survived a constitutional attack in Petition of Lee Wee, 143 F. Supp. 736 (S.D. Cal. 1956), in which it was asserted that the provision made "moral character" turn on the jurisdiction in which the alien happened to live because of the status of gambling in that area. See also Matter of A--, 6 I. & N. Dec. 242 (July 26, 1954)(Italian alien convicted for "bookmaking and pool selling" and arrested for lottery violations held deportable); Matter of S--K--C--, 8 I. & N. Dec. 185 (Nov. 14, 1958)(Chinese national whose only employment was as a dealer in Chinese dominoes and fan-tan at Seattle club, in violation of Washington law held deporatable under 8 U.S.C. §1101(f)(4)).

[13] Act of September 11, 1922, ch. 356, §305, 42 Stat. 937, as amended by the Tariff Act of 1930, June 17, 1930, ch. 497, §305, 46 Stat. 688.

[14]

> (a) All persons are prohibited from importing into the United States from any foreign country any. . . lottery ticket, or any printed matter that may be used as a lottery ticket, or any advertisement of any lottery.

19 U.S.C. §1305 (1970). The predecessor of §1305 had been enacted in 1894, when feelings against lotteries were strong. Tariff Act of 1894, ch. 349, §10, 28 Stat. 549.

[15] Act of June 19, 1968, Pub. L. No. 90-351, §601, 82 Stat. 209; 42 U.S.C. §3781(b)(1970).

licenses for violations of the anti-lottery statute.[16]

F. Wagering Taxes

The Internal Revenue Code of 1954 includes a number of express provisions with respect to gambling. Section 4401 imposes a 2% excise tax on all wagers placed with a gambling business.[17] The Code also imposes an occupational tax on the

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[16] Communications Act of 1934, June 19, 1934, ch. 652, §312, 48 Stat. 1086; 47 U.S.C. §312 (1970).

> (b) When any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this act, or section 1304, 1343, or 1464 of Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission. . . the Commission may order such person to cease and desist from such action. . . .

47 U.S.C. §312(b)(1970).

[17] Int. Rev. Code of 1954, §4401, as amended by Act of October 29, 1974, Pub. L. No. 93-499, 88 Stat. 1551. Section 4402, however, exempts: (1) wagers placed with parimutuels licensed by a state; (2) wagers placed on coin-operated devices taxed under §§4461-63; and (3) wagers placed in certain sweepstakes. The latter provisions reads as follows:

> No tax shall be imposed by this subchapter--
>
> . . . .
>
> (3) State-conducted sweepstakes. On any wager placed in a sweepstakes, wagering pool, or lottery--
>
> (A) which is conducted by an agency of a State acting under authority of State law, and
>
> (B) the ultimate winners in which are determined by the results of a horse race, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

operators of gambling businesses,[18] and a tax on coin-operated gambling devices.[19] Another group of sections provides

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This was added to the statute after the establishment of the New Hampshire sweepstakes, apparently to avoid having federal tax laws inhibit a lawful state enterprise. Other state-operated lotteries also may have results determined in some respect by a horserace, thus they may come within the exemption afforded by §4402(3).

The absence of policy significance of the parimutuel basis for this exemption has been persuasively explained as follows:

> The excise tax on wagers is a deterrent measure, requiring the potential gambling manager either to pay a prohibitive additional cost or to risk federal prosecution. The games that are exempt from its provisions are simply those that were legal when it was enacted. In exempting pari-mutuel pools, for example, Congress was not expressing an ethical preference for pari-mutuel as opposed to fixed-odds or some other betting system; it was distinguishing publicly licensed legal games from the unlawful and undesirable variety. The appearance of state lotteries and OTB systems, and the possible emergence of other legal games, has made the exemption only of pari-mutuel games obsolete. It has led to a lot of silly technical maneuvering by the lottery states, and it is bound to produce more legal contortions as other legal games are introduced.

Easy Money at 83.

[18] Int. Rev. Code of 1954, §4411, as amended by Act of October 29, 1974, Pub. L. No. 93-499, 88 Stat. 1551, placing a tax of $500 per year on persons liable to pay taxes under §4401 or their agents. Before the 1974 amendment, the tax had been $50 per year.

[19] Int. Rev. Code of 1954, §§4461-63, imposing a tax of $250 per machine per year. Section 4462 defines machines to which the tax is applicable as those of the slot machine genus, excepting "bona fide vending or amusement" machines and those that dispense a prize of merchandise valued at under a nickel.

definitions,[20] requires registration and recordkeeping,[21] imposes penalties,[22] and requires confidentiality of information relating to the imposition of the wagering excise taxes.[23] In addition, gambling winnings,[24] as well as any illegal income whether or not derived from gambling,[25] are included within the statutory definition of gross income.[26] A specific section[27] allows gambling losses to be used to

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[20] Int. Rev. Code of 1954, §4421.

[21] Id. §4403 (requiring the maintenance by persons liable for tax of daily records of the gross amount of all wagers on which they are liable), 4412 (requiring detailed registration by persons liable for the tax to show locations of businesses giving rise to such tax and addresses of agents engaged in receiving wagers, as well as other information), and 4423 (requiring access for the IRS to books of account of persons subject to tax).

[22] The general penalty sections of the Code apply, including Section 7201, relating to tax evasion, and Section 7203, relating to failure to file or provide information. Further, Section 4422 provides that the wagering taxes imposed by Sections 4401-24 not be construed as exclusively federal, but instead as also allowing parallel state taxation.

[23] Int. Rev. Code of 1954, §4424, added by Act of October 29, 1974, Pub. L. No. 93-499, 88 Stat. 1551.

[24] See Winkler v. United States, 230 F.2d 766 (1st Cir. 1956).

[25] See United States v. Sullivan, 274 U.S. 259 (1927)(taxation of liquor held not unlawful), James v. United States, 366 U.S. 213 (1961)(embezzled funds held taxable).

[26] Int. Rev. Code of 1954, §61. See, e.g., Weiner v. Comm'r., 10 B.T.A. 905 (1928)(card playing); Droge v. Comm'r., 35 B.T.A. 829 (1937)(lottery). The tax is based on the return on the wager--the gambler's taxable income thus does not include the return of his initial wager, his capital investment. Silver v. Comm'r., 42 B.T.A. 461 (1940).

[27] Int. Rev. Code of 1954, §165(d). See Skeeles v. United States, 95 F. Supp. 242 (Ct. Clms. 1951).

offset only gambling winnings and prohibits such losses from being treated as ordinary losses offsetting all other types of income. Otherwise, gambling income is treated no differently than other forms of income.[28]

1. Special wagering taxes

a. Legislative history

The current wagering excise and occupational taxes evolved from tax legislation first enacted in 1951.[29] This law imposed a 10% tax on wagers placed on sporting events, betting pools, and lotteries conducted for profit.[30]

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[28] Before 1970, income derived from gambling was not eligible for income averaging under Sections 1301-05 of the Code, but this exclusion has been eliminated.

[29] Revenue Act of 1951, October 20, 1951, Pub. L. No. 183, §§463, 471-72, 65 Stat. 528. Only that part of the tax relating to coin-operated gambling devices, now Sections 4461-64 of the Code, had existed prior to 1951. See Revenue Act of 1941, September 20, 1941, ch. 412, §555, 55 Stat. 722. The tax was intially $50 per machine per year.

[30] For the purposes of this chapter--

> (1) Wager. The term 'wager' means--
> (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers;
> (B) any wager placed in a wagering pool with respect to a sports event or contest, if such pool is conducted for profit; and
> (C) any wager placed in a lottery conducted for profit.

Int. Rev. Code of 1954, §4421(1). Card games, roulette, dice games, and social and friendly wagers all were excluded. This was not done, however,

> because of any belief that they were not suitable subjects for taxation. However, the method of taxation which the bill proposes, while particularly appropriate to bookmaking and to policy operation, does not appear readily adaptable to these other forms of gambling. . . . In any event your committee believes that the tax. . . will cover at least 90 percent of total commercial wagering.

Those who conducted gambling enterprises within the statutory definition were required to pay the 10% tax; the tax was then expected to be reflected in the odds these entrepreneurs made available to their customers.[31] Elaborate disclosure provisions for operators were also required, including lists of employees, gross amounts of wagers,[32] and the purchase of occupational tax stamps to be prominently displayed.[33]

Congress' goals for the wagering excise taxes were inconsistent. It sought to find additional sources of

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H.R. Rep. No. 586, 82d Cong., 1st Sess. (1951), 1951 U.S. Code Cong. & Ad. News 1781, 1840-41. No evidence was cited for the 90% estimate.

[31] The tax was placed on the wagering enterprise: "Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him." Int. Rev. Code of 1954, §4401(c). It could be assumed that one in the business enterprise of gambling would simply add the tax on to the price of the bet, decreasing the odds for the customer. In fact, this would occur only where the gambling business actually had to pay such tax. No illegal gambling enterprise under local law would face this possibility.

[32] Int. Rev. Code of 1954, §§4403, 4412, and 6107. Section 6107 of the Code, which placed an affirmative duty on the IRS to make lists of taxpayers under the wagering taxes available to local prosecutors, was repealed by the Act of October 22, 1968, Pub. L. No. 90-618, 82 Stat. 1235.

[33] Before 1968, section 6806 of the Int. Rev. Code of 1954 required those liable for tax under §§4411 and 4461 to "place and keep conspicuously" occupational tax stamps in their business establishments.

revenue during a period of extreme budgetary pressures[34] and to compete with organized crime for gambling profits.[35] This second purpose was largely a direct result of the Kefauver Committee recommendations.[36] The Committee had

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[34] President Truman, in his message to Congress on February 2, 1951 concerning taxation, argued that the nation must "pay as it goes" and asked for increases in personal and corporate income taxes and new excise taxes to cover increased government spending. The House report accompanying the Revenue Act of 1951 stated:

> Commercialized gambling holds the unique position of being a multibillion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation. Your committee is convinced that the continuation of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens.

H.R. Rep. No. 586, 82d Cong., 1st Sess. 55 (1951), 1951 U.S. Code Cong. & Ad. News 1781, 1838. See also S. Rep. No. 781, 82d Cong., 1st Sess. (1951), 1951 U.S. Code Cong. & Ad News 1969, 2090. The reports also contained estimates of $407 million per year in expected revenue from the new taxes, which would ease the pressures of the Korean War on the federal budget.

[35] The House and Senate reports on the bill frame the bill as a revenue measure only, but floor debates reveal that many Congressmen regarded the bill as a weapon to be used against organized crime. See, e.g., 97 Cong. Rec. 6892 (1951) (remarks of Rep. Cooper).

[36] The Kefauver Committee felt that gambling was the mainstay of organized crime:

concluded that organized crime depended upon gambling profits

> Gambling profits are the principal support of big-time racketeering and gangsterism. These profits provide the financial resources whereby ordinary criminals are converted into big-time racketeers, political bosses, pseudo-businessmen, and philanthropists.

Special Committee to Investigate Organized Crime in Interstate Commerce, Third Interim Report, S. Rep. No. 307, 82d Cong., 1st Sess., 2 (1951). Although Senator Kefauver was himself concerned about converting the IRS into a criminal agency, 97 Cong. Rec. 12478 (1950), the Kefauver Committee recommendations urged a large role for the IRS in the battle against organized crime:

> IV. . . . The Bureau of Internal Revenue should maintain on a current and continuing basis a list of known gangsters, racketeers, gamblers, and criminals whose income-tax returns should receive special attention by a squad of trained experts.
>
> . . .
>
> V. The Bureau of Internal Revenue should enforce the regulations which require taxpayers to keep adequate books and records of income and expenses, against the gamblers, gangsters, and racketeers who are continually flouting them. Violation should be made a felony.
>
> VI. Gambling casinos should be required to maintain daily records of money won and lost to be filed with the Bureau of Internal Revenue. . . . Where the casino is operating illegally, in addition to the aforementioned obligations, the operators of the casino should be required to keep records of all bets and wagers.
>
> VII. The law and regulations of the Bureau of Internal Revenue should be amended so that no wagering losses, expenses, or disbursements of any kind. . . incurred in or as a result of illegal gambling shall be deductible for income tax purposes.
>
> . . .
>
> IX. The internal revenue laws and regulations should be amended so as the require any person who has been engaged in an illegitimate business netting in excess of $2,500 a year for any of 5 years previously, to file a net-worth statement of all his assets, along with his income-tax returns.

and that taxation could be used to fight gambling effectively.[37] Those illegal operators liable to pay the tax would either have their profits reduced and then be subject to prosecutions for gambling under local law or would be subject to federal prosecution for tax evasion.[38]

b. Enforcement experience

Failures in enforcement quickly manifested the theoretical difficulties underlying the enactment of the 1951 wagering excise tax legislation. The Internal Revenue Service opposed the legislation from the beginning, believing that the new

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Kefauver Committee, Organized Crime 182-86 (Didier ed.). See also, Comment, "The Use of Taxation to Control Organized Crime," 39 Cal. L. Rev. 226 (1951); Note, "Federal Regulation of Gambling: Betting on a Long Shot," 57 Geo. L. J. 573 (1969).

[37] But cf. Internal Revenue Service Intelligence Division, Legislative History of Tax Statutes Relating to Gambling and Internal Revenue Enforcement Activities 1953-1973 3 (March 1974)(unpublished report submitted to the Commission on the Review of the National Policy Toward Gambling)[hereinafter cited as IRS Legislative History].

The Committee's conclusions have continued to be repeated at the highest levels of government. See, e.g., President Nixon's Message to Congress on organized crime, H.R. Doc. No. 91-105, 91st Cong., 1st Sess., 1 (1969), quoted in S. Rep. No. 92-764, 92d Cong., 2d Sess., 6 (1972). "[Organized Crime's] economic base is principally derived from its virtual monopoly of illegal gambling, the numbers racket, and the importation of narcotics."

[38] This tactic was held to be constitutionally defective in Marchetti v. United States, 390 U.S. 39 (1968) and United States v. Grosso, 390 U.S. 62 (1968).

tax would be unproductive and unenforceable.[39] IRS Commissioner Dunlop, testifying before the House Appropriations Committee, also felt that such a tax would breed contempt for other tax provisions if it were not properly enforced.[40] Another IRS Commissioner requested that Congress provide over 4000 additional agents for the IRS in order to enforce the new tax properly, but this request was never granted.[41]

Subsequent history of the enforcement of the 1951 act fully confirmed the doubts expressed by the IRS. A $407 million annual yield predicted in 1951 became less than $10 million per year actual yield over the next decade.[42]

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[39] IRS Legislative History at 3. Current officials of the IRS so testified before the Commission on the Review of the National Policy Toward Gambling. Summary of Testimony of Donald Alexander, Commissioner of the Internal Revenue Service; John Olszewski, Director, Intelligence Division, Internal Revenue Service; and Mervin D. Boyd, Program Analyst, Intelligence Division, Internal Revenue Service, May 15, 1974 [hereinafter cited as IRS Testimony].

[40] IRS Legislative History at 4, IRS Testimony.

[41] In 1952, IRS Commissioner Mortimer M. Caplin requested 4,333 additional revenue agents, the number he thought necessary properly to enforce the new taxes. Caplin, "The Gambling Business and Federal Taxes," 8 Crime & Deling. 371, 373 (1952). The Senate committee which recommended the wagering taxes had also foreseen the need for additional IRS manpower, but little change resulted. S. Rep. No. 781, 82d Cong., 1st Sess. 1, 113-19 (1951), 1951 U.S. Code Cong. & Ad. News 1969, 2096.

[42] IRS Legislative History at 19. Recent statistics to 1968 were even lower:

	1964	1965	1966	1967	1968
Stamps sold	7,465	7,284	6,155	5,917	5,089
Collections	6,156,000	6,674,000	6,394,000	6,196,000	5,111,000
Seized revenue	1,021,128	1,187,282	739,142	746,426	385,943

S. Rep. No. 92-764, 92d Cong., 2d Sess., 12 (1972).

Further, the enforcement cost to the IRS has been extremely high especially in light of the limited fruits of such efforts.[43]

As a weapon against organized crime, the 1951 act was also less than a success. Various estimates of the national illegal gambling handle have been dramatically higher than the reported income upon which the tax has been collected.[44] The lack of incentive to reveal potentially unlawful conduct and the lack of personnel made enforcement of the statute against gambling operated by organized crime appear unreal.

Although the wagering excise taxes had problems from a practical standpoint and posed theoretical difficulties, the taxes were upheld. The Supreme Court held that the wagering excise taxes were not unlawful as a penalty,[45] and also held at that time, that there were no Fifth Amendment

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[43] The IRS estimated that the cost to collect the wagering taxes between 1952 and 1966 was $18.6 million. This task consumed between 2.9 and 11.4 percent of Intelligence Division time, while producing only a minute fraction of total IRS receipts. IRS Legislative History at 19.

[44] Gross handle of illegal gambling is not easily estimated, but all seem to agree that it is high, ranging from $20 billion annually to $500 billion. Easy Money at 53-54. Handle, however, corresponds only to the volume of business--the gross amount bet. The net profit derived from illegal gambling is much lower, perhaps appoximating $2 billion annually. Id. at 55. See also President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 188 (1967); Second Interim Report, Commission on the Review of the National Policy Toward Gambling 46 (1976).

[45] United States v. Kahriger, 345 U.S. 22 (1953).

problems of self-incrimination.[46] The possible problems would involve the cooperation of federal tax officials with local criminal authorities in the enforcement of both tax and criminal laws. Litigation also arose concerning the extent to which the tax reached runners for a larger enterprise.[47]

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[46] The Court considered the registration requirements as well as the $50 occupational tax in United States v. Kahriger, 345 U.S. 22 (1953) and held that the data required was "obviously supportable as in aid of a revenue purpose." 345 U.S. at 32. As to an asserted infringement on the Fifth Amendment protection against self-incrimination, the Court stated:

> Since appellee failed to register for the wagering tax it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for. . . . Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed [citations omitted]. If respondent wishes to take wagers subject to excise taxes . . . he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future, he must fulfill certain conditions.

345 U.S. at 32-33. See also Lewis v. United States, 348 U.S. 419 (1955). As to the probity of federal tax stamps in state wagering prosecutions, see, e.g., Jefferson v. Sweat, 76 So.2d 494 (Fla. 1954)(gambling stamp held not prima facie evidence of state gambling violation).

[47] United States v. Calamaro, 354 U.S. 351 (1957) held that runner were outside the purview of the statutory definition of those receiving wagers on behalf of another and thus not subject to the occupational tax. See also United States v. Cooperstein, 221 F. Supp. 522 (D. Mass. 1963). Congressional efforts to change the definition to reach runners have been unsuccessful. See S. Rep. No. 91-840, 91st Cong., 2d Sess. (1970); S. Rep. No. 92-764, 92d Cong., 2d Sess. (1972).

c. Constitutional attack

The 1968 Supreme Court decisions of Marchetti v. United States[48] and United States v. Grosso[49] ,however, curtailed the effect of the wagering tax statutes on illegal gambling operations by limiting the application of tax enforcement provisions on Fifth Amendment grounds. Marchetti involved a conviction for conspiring to evade payment of the $50 occupational tax on a person in the business of accepting wagers and for failure to comply with registration requirements. Noting that all states except Nevada had broad penal provisions against gambling and that registration information under the federal excise taxes was readily available to local authorities, the Court held that

> . . . these provisions may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination.[50]

The Court insisted that the right to tax illegal enterprises was not limited by its holding,[51] which was confined strictly to the scope of the Fifth Amendment privilege:

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[48] 390 U.S. 39 (1968).

[49] 390 U.S. 62 (1968).

[50] 390 U.S. at 42. In so holding, the Court reversed the authority of recent vintage: United States v. Kahriger, 345 U.S. 22 (1953), and Lewis v. United States, 348 U.S. 419 (1955). For a student note that anticipated this shift, see Comment, "Self-Incrimination and the Federal Excise Tax on Wagering," 76 Yale L. J. 839 (1967).

[51] 390 U.S. at 44.

> . . . The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted. . . .[52]

Grosso extended the significance of the Marchetti holding by applying it to a conviction for failure to pay the 10% excise tax. The Court noted that the general practice of the IRS to make information obtained in the enforcement of the excise tax available to local authorities raised equally serious self-incrimination problems.[53] The Court left it to Congress to decide how to isolate the wagering information from potential state gambling prosecutions and consequent Fifth Amendment problems.[54] The next year

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[52] 390 U.S. at 51.

[53] > . . . those liable for payment of the excise tax reasonably may expect that information obtainable from its payment. . . will ultimately be proffered to state and federal prosecuting officers.

390 U.S. at 66. Thus Grosso extended Marchetti to a situation where self-incrimination problems were raised even though the statute did not require reporting. Even though the reporting of any tax information was not required, the question of its confidentiality and use in subsequent prosecution still remained.

[54] The Court refused to imply judicial restrictions on the use of tax information which had been requested by the Government by enforcement authorities, stating that such restrictions might be difficult to design and were in any event up to Congress. 390 U.S. at 66. In Marchetti, the Court noted that the complexity of the problem involved in showing that evidence in subsequent prosecutions was not obtained by the exploitation of wagering tax information:

Congress attempted to do so.[55] Congress hoped to alleviate the Fifth Amendment problems[56] by removing certain mandatory

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> Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling. We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values. We therefore must decide that it would be improper for the Court to impose restrictions of the kind urged by the United States.

390 U.S. at 59-60.

[55] Act of October 22, 1968, Pub. L. No. 90-618, 82 Stat. 1235.

[56] The Senate report accompanying the legislation was direct in explaining the reason for the repeal:

> This section provides for the repeal of section 6107 of the Internal Revenue Code of 1954 relating to disclosure of the identity of persons paying special (occupational) tax which was subjected to criticism in the three cases handed down by the Supreme Court on Janaury 29, 1968. The repeal of this section should make it completely clear that it is not the desire or intent of the Congress that the entire system of Federal taxation be rendered impotent or ineffectual because a State or local jurisdiction has a law rendering aspects of the activity illegal. The Federal taxing power is of such fundamental importance that it is difficult to conceive that it was the intent of the framers of the Constitution that the act of a State or local government could thwart the effective operation of the internal revenue laws of the United States. Since the section no longer serves any useful purpose, and since it now jeopardizes the effective operation of the internal revenue laws, it should be repealed.

S. Rep. No. 1501, 90th Cong., 2d Sess. 52 (1968). In addition to Marchetti and Grosso, the third case referred to was Haynes v. United States, 390 U.S. 85 (1968), which involved

disclosure requirements[57] and the provision requiring posting of occupational tax stamps.[58] These changes did not resolve the matter, however, because they still allowed information used in tax prosecutions to be made available to state and local officials, although they no longer required this information to be submitted.[59] Further, after some dispute within the courts of appeals,[60] the Supreme Court extended

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the self-incrimination protest of an individual charged with violation of Int. Rev. Code of 1954, §5851, a tax provision relating to the regulation of firearms.

[57] Code §6107, repealed by the 1968 legislation, had provided:

> In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes. . . . Such list. . . shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof. . . .

[58] Section 6806, relating to occupational tax stamps, was substantially altered by the 1968 legislation. This alteration removed all references to wagering taxes and coin-operated gaming devices. The section had previously required tax stamps to be posted so that they were conspicuous and visible to persons operating gambling devices.

[59] In light of the reasoning in Grosso, that prosecutors in subsequent criminal cases might have access to information involved in tax cases, the IRS halted its criminal investigations under the wagering laws. IRS Testimony at 2.

[60] Compare United States v. United States Coin and Currency in the Amount of $8,674.00, 393 F.2d 499 (7th Cir. 1968) (holding Marchetti reasoning extends to civil forfeiture) with United States v. One 1965 Buick, 392 F.2d 672 (6th Cir. 1968), vacated and remanded, 402 U.S. 937 (1970).

the Marchetti-Grosso rationale to civil forfeiture proceedings used to enforce the wagering taxes in United States v. United States Coin and Currency.[61]

Despite the emasculation of the 1951 gambling tax legislation by the Supreme Court under the Self-Incrimination Clause, there was no immediate congressional activity to amend the tax laws concerning gambling. One reason for this delay was the IRS' continued lack of enthusiasm for the gambling tax provisions.[62] A more important reason was the enactment of the Organized Crime Control Act of 1970.[63] As noted above, Title VIII of the 1970 Act included provisions which specifically related to local level gambling businesses with national repercussions. Thus, the enactment of direct criminal provisions involving gambling in this act alleviated the pressure for anti-gambling provisions in other areas of the Code.

d. 1974 amendments

In late 1974, however, Congress did overhaul the wagering tax laws.[64] The new legislation lowered the excise tax from 10% to 2%,[65] increased the occupational tax from $50 to $500,[66]

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61 401 U.S. 715 (1971). The case is noted in 33 Albany L. Rev. 158 (1968).

62 IRS Legislative History at 4-5.

63 Act of October 15, 1970, Pub. L. No. 91-452, 84 Stat. 922.

64 Act of October 29, 1974, Pub. L. No. 93-499, 88 Stat. 1551.

65 Int. Rev. Code of 1954, §4401.

66 Id. §4411.

prohibited the disclosure of wagering tax information except for the enforcement of federal tax laws through civil or criminal measures,[67] and prohibited the use of tax documents, such as returns or registration forms, against the taxpayer in criminal proceedings unrelated to the collection of taxes.[68]

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67 Id. §4424. The newly enacted section provides as follows:

> (a) General Rule. Except as otherwise provided in this section, neither the Secretary or his delegate nor any other officer or employee of the Treasury Department may divulge or make known in any manner whatever to any person --
>
> (1) any original, copy, or abstract of any return, payment, or registration made pursuant to this chapter, (2) any record required for making such return, payment, or registration, which the Secretary or his delegate is permitted by the taxpayer to examine or which is produced pursuant to section 7602, or (3) any information come at by the exploitation of any such return, payment, registration, or record.
>
> (b) Permissible Disclosure. A disclosure otherwise prohibited by subsection (a) may be made in connection with the administration of civil or criminal enforcement of any tax imposed by this title. However, any document or information so disclosed may not be --
>
> (1) divulged or made known in any manner whatever by any officer or employee of the United States to any person except in connection with the administration of civil or criminal enforcement of this title, nor (2) used, directly or indirectly, in any criminal prosecution for any offense occurring before the date of enactment of this section.

68 Int. Rev. Code of 1954, §4424(c)(Supp. IV, 1974). The subsection provides:

Congress assumed that the new prohibitions on disclosure of tax-related information would end the self-incrimination problems raised by Marchetti and Grosso.[69] In so doing, Congress relied on parallel issues which had arisen in cases such as United States v. Freed,[70] involving federal requirements for the registration of firearms. There, the Supreme Court held that legislation restricting the use of information obtained under the National Firearms Act in unrelated criminal prosecutions[71] avoided the

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(c) Use of Documents Possessed by Taxpayer. Except in connection with the administration of civil or criminal enforcement of any tax imposed by this title--
(1) any stamp denoting payment of the special tax under this chapter,
(2) any original, copy, or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and
(3) any information come at by the exploitation of such document,
shall not be used against such taxpayer in any criminal proceeding.

[69] See H.R. Conf. Rep. No. 93-1401, 93d Cong., 2d Sess., 2 (1974), 1974 U.S. Code Cong. & Ad. News 6228, 6233.

[70] 401 U.S. 601 (1971).

[71] Int. Rev. Code of 1954, §5848 provides in pertinent part that:

(a) General rule.
No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly, or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

self-incrimination problems previously held to exist under the statute in Haynes v. United States.[72]

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[72] 390 U.S. 85 (1968)(holding that self-incrimination problems were raised by registration requirement applicable to persons inherently suspect of criminal activities). The Court in Freed held after citing the amendment noted above that:

> the claimant is not confronted by 'substantial and "real"' but merely 'trifling or imaginary hazards of incrimination' --first by reason for the statutory barrier against use in a prosecution for prior or concurrent offenses, and second, by reason of the unavailability of the registration data, as a matter of administration, to local, state, and other federal agencies.

401 U.S. at 606. Thus the conference committee observed with respect to the proposed §4424:

> The amendment also provides specific restrictions as to the disclosure and use of information pertaining to taxpayer compliance with Federal wagering taxes. Although existing law (sec. 6103) provides broad limitations on the publicity of income tax returns, no such restrictions exist for returns and other documents related to the wagering taxes. In 1968, Congress repealed section 6107 of the Internal Revenue Code which provided for public inspection of the names of all persons paying occupational taxes, including the wagering occupational tax. Despite this repeal, current law remains ambiguous in that no specific provision exists barring disclosure of wagering tax information.
>
> Consequently, to resolve any remaining doubts which may exist under the rationale of the Marchetti v. United States [390 U.S. 39 (1968)] and Grosso v. United States [390 U.S. 62 (1968)] cases, the amendment provides that no Treasury Department official or employee may disclose, except in connection with the administraton or enforcement of internal revenue taxes, any document or record supplied by a taxpayer in connection with such taxes, or any information obtained through any such documents or records. Additionally, the amendment provides that certain documents related to the wagering taxes, and information obtained through such documents, may not be used against the taxpayer in any criminal proceeding, except in connection with the administration or enforcement of internal revenue taxes.

The new legislation, therefore, cured the self-incrimination problems facing the wagering taxes. In addition, enforcement responsibility for the provisions was transferred from the Intelligence Division of the IRS to the Bureau of Alcohol, Tobacco, and Firearms. This transfer indicates a renewed interest in enforcing the law and a recognition that the wagering taxes are more important in fighting crime than in raising revenue.[73] An enforcement problem that remains, however, is one concerning local criminal enforcement efforts in matters involving individuals who have paid federal wagering taxes. In such cases, the local authorities will have to show that their proof is "untainted by any connection with information obtained as a consequence of wagering taxes."[74] If such lack of taint becomes difficult to prove, illegal gamblers may begin to pay federal gambling taxes for their immunizing effect in subsequent state

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It is expected that these changes in the law will remove any constitutional problems regarding enforcement of the wagering taxes.

H.R. Conf. Rep. No. 93-1401, 93d Cong., 2d Sess. 2 (1974), 1974 U.S. Code Cong. & Ad. News 6228, 6233.

[73] U.S. Dep't of Treasury, Dep't Order 221-3, Dec. 24, 1974, 40 Fed. Reg. 1084 (1975). See also Scott, "Enforcing Gambling Tax Pushed," Wash. Post, Jan. 10, 1975, at 24, col. 1.

[74] Marchetti v. United States, 390 U.S. 39, 59 (1968).

prosecutions.[75]

2. Income taxation of gambling

The general rule with respect to the taxation of gambling winnings is that income derived from gambling is to be treated no differently than any other form of income. Section 165(d), of the Code, however, allows gambling losses to be deducted only from gambling winnings.[76] This provision reflects the attitude that to allow the deduction of wagering losses from any type of income would encourage reckless gambling to reduce one's tax bill. Still, the limitation allows the offsetting of winnings from one form of gambling by the losses from another form

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75 Absent a clear showing that the subsequent criminal prosecution rests entirely on independent evidence the defendant may assert that Section 4424 has been violated, that proof related to the federal tax registration or payment is inadmissible, and that the subsequent criminal prosecution must be dismissed. Cf. United States v. Schipani, 289 F. Supp. 43, 54 (E.D.N.Y. 1968), aff'd., 435 F.2d 26 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971): "Once it becomes apparent that the issue [tainted evidence] is in the case. . . the government bears the burden of convincing the Court that evidence it seeks to introduce at a criminal trial was not obtained by it in violation of a defendant's constitutional rights." 289 F. Supp. at 54.

76 Int. Rev. Code of 1954, §165(d) provides:

> (a) General Rule. There shall be allowed as a deduction any loss sustained during the taxable year and not compensated by insurance or otherwise.
>
> . . .
>
> (d) Wagering Losses. Losses for wagering transactions shall be allowed only to the extent of the gains from such transactions.

of gambling.[77] It also allows an enterprise which has a gambling business as its overall purpose to deduct expenses not directly related to gambling, such as lease or payroll expenses.[78]

To facilitate the difficult task of ensuring the reporting of income, including gambling winnings the IRS requires submission of an information form for all payments of over $600 in the taxable year--Form 1099.[79]

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[77] Drews v. Comm'r., 25 T.C. 1354 (1956). Although the burden or proof that a loss is properly deductible rests on the taxpayer, Donovan v. Comm'r., 359 F.2d 64 (1st Cir. 1966); Mack v. Comm'r., 429 F.2d 182 (6th Cir. 1970), the requisite standard is unclear. See, e.g., Carol Manzo, T.C. Memo 1972-142 (losing parimutuel tickets not conclusive of gambling losses); Aaron Greenfeld, T.C. Memo 1966-83 (more than taxpayer's own records required); Anthony F. & Barbara B. Gallagher, T. C. Memo 1968-27 (partial losses allowed on hypothesis that most gamblers incur some losses). Nevertheless, possession of losing parimutuel tickets is still frequently adequate proof to establish losses sufficient to offset any gambling income for the taxable year. See IRS Legislative History, supra, note 485.

[78] Comm'r. v. Sullivan, 356 U.S. 27 (1958). See also Comm'r. v. Heininger, 320 U.S. 467 (1943).

[79] Int. Rev. Code of 1954, §6041(a) requires in pertinent part as follows:

> (a) Payments of $600 or More. All persons engaged in a trade or business and making payment in the course of such trade or business to another person. . . of $600 or more in any taxable year. . . shall render a true and accurate return to the Secretary or his delegate, under such regulations and in such form and manner as to such extent as may be prescribed by the Secretary. . .

Thus Form 1099, which must be filed pursuant to Section 6041(a) is not necessarily related exclusively to gambling. Section 6041(a) has a general revenue function of ensuring withholdings and thus tax collection in situations in which tax might otherwise go unreported, such as one-time wages or annuities.

In practice, however, such information returns in the gambling area have only been filed by racetracks on payoffs over $600 at high odds. The IRS conceded that strict enforcement of the information return requirement would "create recordkeeping burdens of staggering proportions."[80] The current compromise, however, results in many inequities. Form 1099 is easily subverted and is not filed in many of the most egregious cases.[81]

Until 1970, gambling income was also specifically excluded from the income averaging provisions of the Code.[82] These sections allow the taxpayer to reduce the effective rate at which a surge of income is taxed where such income is significantly larger than the average income for the previous four years. The exclusion of gambling income from income averaging heightens the impact of the tax burden on a "good" year where gambling income causes a significant increase in taxable income for the tax year. Since gambling winnings may be regarded as no less cyclical or sporadic than other forms of income for which income averaging was designed, such as royalties or breach of contract damages, the exclusion

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80 IRS Legislative History at 25; Easy Money at 83.

81 A common abuse is one involving "ten percenters"--those who cash winning parimutuel tickets for a ten percent fee, then provide false information for Form 1099. See IRS Legislative History at 27-28. Further legal gambling enterprises in Nevada have not been required to file information returns. Easy Money at 83.

82 Int. Rev. Code of 1954, §§1301-05.

seems to be invidious and policy based against gambling winnings.[83] In any event, the provision was removed along with a comprehensive redrafting of the income averaging sections in 1969.[84]

3. Gambling tax policy

Both the 1951 wagering tax legislation and the income tax treatment of gambling have been targets for criticism in recent years.[85] Particularly in light of the growth of state-operated lotteries, off-track betting, and the

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[83] Prior to 1964, the income averaging provisions were denominated expressly according to source of income, with no references to gambling. Section 1302 concerned "income from an invention or artistic work," §1303 concerned "income from back pay," §1304 concerned "compensatory damages for patent infringement," §1305 concerned "breach of contract damages," and §1306 concerned "damages for injuries under the antitrust laws." This approach was discarded in favor of general provisions by the Act of Feb. 26, 1964, Pub. L. No. 88-272, 78 Stat. 106. The new scheme in §1302 relied on a definition of "averagable income" as income from any source which exceeded 133-1/3% of "average base period income," (defined as the average income over the previous four years, with some qualifications) with certain specified exclusions. One exclusion was that for wagering income:

> §1302(b). Adjusted Taxable Income. For purposes of this part, the term "adjusted taxable income" means the taxable income for the computation year, decreased by the sum of the following amounts:
>
> . . .
>
> (3) Wagering Income. The amount (if any) by which the gains from wagering transactions for the computation year exceed the losses from such transactions.

[84] Tax Reform Act of 1969, Dec. 30, 1969, Pub. L. No. 91-172, 83 Stat. 586. The result is that wagering income is treated no differently than any other averagable income for tax years after 1969.

[85] See generally, Easy Money; Fund for the City of New York, Legal Gambling in New York (1972). See also First Interim Report 7 (1975).

increased discussion of other forms of decriminalization of gambling, existing tax law has been criticized as inhibiting state policy choices with respect to gambling and, in effect, as furthering the hold of organized crime over gambling. These assertions should be considered in light of the practical legislative and policy alternatives available within the federal tax power.

Before the 1974 legislation which repaired the Marchetti-Grosso damages, the federal taxes could, as a practical matter, be enforced only to legal gambling ventures. Consequently, they provided a tax advantage to illegal gambling. The law with minor exceptions then required legal gambling ventures[86] to pay a ten percent tax on the amount wagered in their establishments. This margin was enough to crush any possibility of competition with illegal games.[87] Current law has lowered this tax to two percent and seems to have alleviated the self-incrimination problem, but substantial difficultics remain. Despite the reduction of the tax and some glowing predictions about how much

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86 Int. Rev. Code of 1954, §4402(3).

87 Few lawful or unlawful enterprises could compete if stymied with a unique exaction amounting to ten per cent of their gross. As to the profit margin in various forms of illegal gambling, see Easy Money at 53-60.

revenue is likely to be forthcoming,[88] there is no apparent reason why illegal gambling enterprises would be any more likely to pay the two percent tax than their pre-1968 tax bills.

There is little indication, moreover, that the new tax will be enforced any more vigorously today than it has been since 1951. In addition, the original rationale behind the tax legislation, to obtain a basis for federal jurisdiction, has little continuing validity in light of the enactment of the Organized Crime Control Act of 1970.[89]

The reduction of the tax rate to two percent seems to have vitiated arguments that federal wagering excise taxes preclude effective competition by legal ventures with illegal gambling enterprises. Although the occupational tax has been raised to $500, that sum would be insignificant to any large venture. The two percent excise tax by itself

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88 Statistics based on Treasury Department estimates given in conjunction with a 1972 effort to enact a provision similar to Int. Rev. Code of 1954, §4424, S. 431, 92d Cong., 2d Sess. (1972), were as follows:

	Revenue (per annum)	
	Pre-1968 (actual)	S. 1624 (estimate)
Occupational tax	$ 360,000	6,757,500
Voluntary (%)	60	53
Occupational tax	240,000	6,15-,000
Enforced (%)	40	47
Excise	3,300,000	6,969,000
Voluntary (%)	59	65
Excise	2,300,000	3,562,500
Enforced (%)	41	35

S. Rep. No. 92-764, 92d Cong., 2d Sess., 12 (1972).

89 Act of Oct. 15, 1970, Pub. L. No. 91-452, 84 Stat. 922.

simply is not large enough to have a clear anti-competitive effect, especially in light of the other tangible and intangible variables.[90]

Nevertheless, it may be persuasively argued that the federal wagering taxes should be repealed entirely. The only function they serve, absent a dramatically increased enforcement effort by the IRS, is to place a special "sin tax" on legal gambling condoned and often furthered by state policy. This function is inconsistent with any statutory purpose originally advanced in favor of the legislation and is generally fruitless. Further, the federal wagering taxes are an encroachment on state policy choices with respect to gambling. The general federal policy has been to avoid interference with state gambling options where no federal interest is involved. Given the absence of a significant federal interest in the current wagering tax statutes, they

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90 In reducing the excise tax from ten percent to two percent, the government has increased the potential ability of legalized gambling enterprises to compete with organized crime by eight percent. There is a number of variable not suitable for direct conversion into meaningful quantitative measures, such as community confidence in the local numbers runner, availability of credit, and convenience. Examining only economic factors, however, the legal game would have to offer odds at least equal to the illegal game. The typical numbers game, with its rather large profit margin, provides a good example: Odds are 999:1; pay-off averages 58% on a 600:1 game because of cutting odds on favored numbers. Runners take 25%, with an additional five percent each for controllers and police protection in a typical case. This leaves approximately seven percent from which miscellaneous bookkeeping costs are yet to be deducted. The goal of the legal competitor would be to keep total operating costs, including advertising, under thrity percent. The two percent tax is insignificant in costing out the expense of a legal entity operating this type of numbers game, as the advertising expenses for the state lotteries have shown. Easy Money at 56. The $500 occupational tax averaged out over the year would not measurably alter this calculus. See generally Fund for the City of New York, Legal Gambling in New York (1972).

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should be repealed.[91]

The policy considerations underlying the application of federal income taxes to gambling are significantly different than those affecting the excise and occupational taxes. Unlike special forms of taxation, the income tax is general. Wagering excise taxes represent a specific policy choice to apply a special tax on wagering. The theoretical basis of income taxation is to tax all income, "from whatever source derived."[92] The suggestion of repeal of the special taxes, therefore, does not carry with it the repeal of the general tax.

Gambling is treated specially under the federal income taxes in only one respect--the limitation on the deductibility of gambling losses in section 165(d). The policy behind this section, to avoid the encouragement of heavy or reckless gambling,[93] seems relatively uncontroversial. The income

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[91] Together, the existence of alternative means of obtaining federal jurisdiction over moderate scale local gambling operations, the lack of sufficient manpower to enforce the wagering taxes, and the shifting policies of the states with respect to gambling manifest the absence of a real federal interest. As to the ostensible revenue function, the tax reduction from ten percent to two percent indicates that a significant income from this provision was not contemplated by Congress.

[92] Int. Rev. Code of 1954, §61.

[93] If gambling losses were duductible without restriction, a taxpayer could blithely incur them to lower his tax bill to the extent that he still had money to feed himself. The losses provision of the Code probably contemplated unintentional, uncompensated losses. Although it may be argued that a gambler seeks to win when he bets, his investment resembles a capital investment in securities or real estate more than the business, theft, and disaster losses enumerated in Section 165. See, e.g., §165(g)(treating worthless securities as capital assets).

taxes otherwise do not favor or discriminate against gambling.

It has been argued however, that gambling winnings should not be taxed at all.[94] The premise of this theory is that few gamblers win over time. This week's gain is next week's loss, and only a rare gambler derives real income from gambling. Taxation of gambling income is essentially confiscatory, because the occasional winnings are fully taxed but losses are not fully deductible. Further, taxation of gambling winnings encourages illegal gambling, since winnings from illegal enterprises would remain undisclosed, with no information or withholdings being sent to the IRS.[95]

Despite the initial appeal of this analysis, it is logically (and probably politically) untenable. In terms of general considerations of tax equity, exempting gambling winnings from taxation would discriminate invidiously in favor of gambling as a form of income-producing activity. Gambling is not the only form of investment that is cyclical and uncertain. To the extent that actual winnings went untaxed, gambling would be treated more favorably than almost all other forms of income.[96] Second, it would be

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94 See, e.g., Easy Money at 84-85.

95 This assumes that Form 1099 would be required to be filed by the legal gambling business. Now, however, legal gambling casinos in Nevada are not required to file this form.

96 While the Code purports to tax all income, there are statutory exceptions. For example, recipients of gifts are not taxed, nor are donors up to $3,000 as a general rule. See Int. Rev. Code of 1954, §2503(b).

difficult to argue that a viable gambling business made no profit. A general income tax exemption for gambling income, therefore, would first have to distinguish individual gambling profits from business gambling profits; it would then also have to distinguish gambling businesses from all other forms of business, making gambling the favored form of investment.[97] The major reason to exclude gambling income from taxation is the professed competitive disadvantage that the gambling tax places on legal gambling enterprises in reference to their income and their pay out to winners. In light of the speculative nature of this argument and the many as yet undetermined variables, it is probably unwise (as well as impolitic) to exempt gambling income from taxation.

A far more equitable scheme might be to allow more generous gambling loss carry-overs. Rather than allowing wagering losses to be deducted only against winnings for the current tax year and income averaged over a short period of time, wagering losses might be preserved to offset winnings for prior and future years. A provision similar to those for carryback and carryforward of capital losses under the

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[97] An unsubsidized venture could not operate at a loss for very long. Assuming that a gambling business operated for profit, at least in the immediate sense, a tax exemption for gambling would favor that business, as form of investment, over all other businesses. If the line were to be drawn between the individual gambler and one gambling as a business, criteria would be difficult to develop. Would two professional gamblers be classified as a partnership not subject to exemption?

current Code[98] this would allow the taxpayer to neutralize any net wagering income in a given year with wagering losses from a prior or subsequent year. Only actual gambling winnings, therefore, would be taxed. The rare individual bettor who managed to preserve a winning streak would still be liable to pay income taxes on his winnings, but those who had actual losses over time would not. Thus, only minor changes would be required to achieve a workable solution.

G. Comprehensive Reform--S.1

The Criminal Justice Reform Act of 1975, better known as S.1,[99] is now under consideration in Congress. The bill represents a comprehensive effort to codify, revise, and reform the federal criminal law. It is in the true sense a code rather than a group of statutes,[1] and as such is a unique contribution to federal jurisprudence. While the

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[98] Int. Rev. Code of 1954, §1212. This section allows the "net capital loss" of a corporation to be treated as a "short-term capital loss" in each of three preceding years and five subsequent years, as a general rule. Individuals may also carry captial losses forward under Section 1212(b).

[99] S.1, 94th Cong., 1st Sess. (1975).

[1] For a brief history of significant codification efforts leading up to S.1, see "The Challenge of a Modern Federal Criminal Code," 117 Cong. Rec. 6120-6171 (1971).

proposed changes that S.1 would make in many areas of federal law are beyond the scope of these materials, the treatment of gambling under the proposed code must be considered briefly.

An intellectual descendent of the Model Penal Code,[2] S.1 is based upon the draft code of the National Commission on Reform of Federal Criminal Laws, and was produced pursuant to statutory mandate[3] in 1971.[4] The greatest strength of the new code is its effort to be at once simple and

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[2] See the epochal article by Professor Herbert Wechsler, "The Challenge of a Model Penal Code," 65 Harv. L. Rev. 1097 (1952). See also Senate Committee on the Judiciary Committee Print of the Criminal Justice Codification, Revision and Reform Act of 1974, 93rd Cong., 2d Sess., vol. 2, 1-13 (1974).

[3] Act of November 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516. The act provided at §3:

> The Commission shall make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice. It shall be the further duty of the Commission to make recommendations for revision and recodification of the criminal laws of the United States, including the repeal of unnecessary or undesirable statutes and such changes in the penalty structure as the Commission may feel will better serve the ends of justice.

[4] The Commission's final report, containing its proposed Federal Criminal Code, is contained in Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess., pt. 1, 129-514 (1971), and is also available as a separate volume. Previously, the Commission had produced a draft of its proposed code and extensive working papers. See National Commission on Reform of Federal Criminal Laws, Study Draft and Working Papers (1970).

comprehensive. S.1 uses straightforward drafting, with uniform vocabulary and definitions throughout. It articualtes state of mind requirements,[5] defenses,[6] jurisdictional bases,[7] and sentencing[8] expressly and uniformly for each substantive provision.

With respect to gambling, S.1 largely succeeds in its effort to restate current law in simplified form. Almost all of current federal gambling law is brought forward in the bill, with notable improvements in organization and clarity. Further, the federal law of gambling as brought forward in S.1 can be said to conform clearly to two basic congressional tenets explored in detail in these materials: (1) S.1 maintains a clear federalist policy with respect to gambling, in large measure leaving substantive choices on the local level to the several states;[9] and (2) S.1 carries

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[5] S.1, 94th Cong., 1st Sess., §§301-03 (1975).

[6] S.1, 94th Cong., 1st Sess., §§501, 511-12, 521-23, 541-44, and 551-52 (1975).

[7] S.1, 94th Cong., 1st Sess., §§201-05 (1975).

[8] S.1, 94th Cong., 1st Sess., §§2001-06, 2101-06, 2201-04, 2301-06, and 2401-03 (1975).

[9] The following federal anti-gambling statutes, inter alia, were drafted with specific exemptions for differing state law: 15 U.S.C. §1172, 18 U.S.C. §1084, 18 U.S.C. §1952, 18 U.S.C. §1953, 18 U.S.C. §§1511, 1955, 18 U.S.C. §1307 and Int. Rev. Code of 1954, §4402(3).
However, the federal government has acted directly contrary to the professed interests of some states on occasion. See, e.g., 12 U.S.C. §§25A, 339, 1730C, 1829 and 18 U.S.C. §1306, relating to federally-insured banks.

forward and expands the notion that the federal law of gambling ought to focus primarily on institutional forms of gambling, leaving the individual bettor alone as much as possible, and instead tightly controls aspects of gambling susceptible to exploitation by elements of organized crime.[10]

Rather than the multiplicity of provisions concerning gambling contained in current law,[11] S.1 contains only one basic section concerning gambling.[12] This provision integrates the essential aspects of many existing statutes, allowing some to be eliminated completely. Relying to a significant degree on the intellectual framework of the Organized Crime Control Act of 1970,[13] the section prohibits the business enterprise

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[10] See, e.g., 18 U.S.C. §§1961-68.

[11] Title 18 alone includes the following sections directly pertaining to gambling: 18 U.S.C. §§224, 1081-83, 1084, 1301-04, 1306, 1307, 1511, 1952, 1953, 1955, 1961-68, and 2516.

[12] S.1, 94th Cong., 1st Sess. §1841 (1975). 18 U.S.C. §§1084, 1301-02; 1307, 1952, 1953, and 1955 are effectively replaced by Section 1841 of S.1.

[13] Act of October 22, 1970, Pub. L. No. 91-452, 84 Stat. 922. For example, §1841 defines "gambling business" as:

> . . . a business involving gambling of any kind that, in fact:
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> (A) has five or more persons engaged in the business; and
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> (B) has been in substantially continuous operation for a period of thirty days or more, or has taken in $2,000 or more in any single day.

"Gambling" itself is intentionally undefined. The drafters apparently were unwilling to risk the possibility of excluding ingenious possiblities. See Senate Comm. on the Judiciary, Committee Print of the Criminal Justice Codification, Revision and Reform Act of 1974, 93rd Cong., 2d Sess., vol. 3, 829-39, 35 (1974).

of gambling, the transportation of gambling paraphernalia, and the receipt of lay-offs.[14] This section also incorporates several absolute defenses, which include: (1) conduct legal in all relevant jurisdictions;[15] (2) information transmitted

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[14] Section 1841(a) provides as follows:

> (a) Offense. A person is guilty of an offense if he:
> (1) owns, controls, manages, supervises, directs, conducts, finances, or otherwise engages in a gambling business;
> (2) receives lay-off wagers or otherwise provides reinsurance in relation to persons engaged in gambling;
> (3) carries or sends:
> (A) a gambling device;
> (B) gambling information; or
> (C) gambling proceeds
> from within a state to any place outside the state; or
> (4) otherwise establishes, promotes, manages, or carries on an enterprise involving gambling.

[15] Section 1841(c) provides in pertinent part:

> (c) Defense. It is a defense to prosecution:
> (1) under subsection (a)(1), (a)(2), or (a)(4) that the kind of gambling business or enterprise, the manner in which the business or enterprise was operated, and the defendant's participation therein, were legal in all states and localities in which it was carried on, including any state and locality from which a customer placed a wager with, or otherwise patronized, the gambling business or enterprise, and any state and locality in which the wager was received or to which it was transmitted.
> (2) under subsection (a)(3) that:
> (A) the gambling device was carried or sent into, or was en route to, solely a state and locality in which the use of such device was legal;
> (B) the defendant was a common or public contract carrier, or an employee thereof, and was carrying the gambling device in the usual course of business;
>
> . . .

"solely in connection with news reporting,"[16] and (3) paraphernalia transported by an individual bettor.[17]

In addition to the principal gambling section, S.1 brings forward other gambling-related provisions from existing law. Those sections dealing with sports bribery[18] and racketeering activities[19] are carried forward entirely. Several other provisions are transferred to other titles of the U.S. Code, including those dealing with gambling ships,[20]

> (E) the transmission of the gambling information was solely from a state and locality in which such gambling was legal into a state and locality in which such gambling was legal; or
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> (F) the gambling proceeds were obtained by the defendant as a result of his lawful participation in gambling which was legal in all states and localities in which it was carried on, including any state and locality from which the defendants placed a wager or otherwise participated in gambling activity, and any state and locality in which his wager was received or to which it was transmitted.

[16] Section 1841(c)(2)(D) exempts the transmission of gambling information "made solely in connection with news reporting." This definition differs from prior law, and would perhaps cure the First Amendment problems inherent in previous definitions.

[17] Section 1841(c)(2)(C) provides that it is a defense to §1841(a)(3) that "the defendant was a player or bettor and the gambling device he was carrying or sending was solely a ticket or other embodiment of his claim."

[18] 18 U.S.C. §224 is carried forward as §1753 of S.1.

[19] 18 U.S.C. §§1961-68 are carried forward as separated into criminal and civil components. Thus, 18 U.S.C. §§1961-64 is represented in S.1 by Sections 1901-06, although those sections also include new anti-racketeering weapons, and 18 U.S.C. §§1964-68 are contained in S.1 Sections 4011-13, categorized as "ancillary private civil remedies."

[20] 18 U.S.C. §1081-83 are placed in 46 U.S.C. by §§971 and 973 of S.1.

the mailing of lottery information, the action of postal authorities as lottery agents,[21] and broadcasting of lottery information.[22] Gambling-related bribery is treated in a general section concerning bribery.[23] Finally, several provisions relating to gambling not contained in the current title 18 have also been affected by S.1.[24]

The provisions of S.1 that relate to gambling, therefore, largely suceed in simplifying and harmonizing existing law, carrying it forward without major substantive changes in scope or policy.

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[21] Thus 18 U.S.C. §§1302 and 1303 are replaced by Section 869(a) of S.1 into a new part of Title 39, codified at 39 U.S.C. §6003, pertaining to lotteries. This provision also purports to carry over the provisions of 18 U.S.C. §1307 relating to state-conducted lotteries, but does not amend 39 U.S.C. §3005.

[22] 18 U.S.C. §1304 would be replaced by 47 U.S.C. §§511-12 and by Section 1087(s) of S.1. Section 511 would give the FCC authority to discontinue licenses where a broadcast facility is broadcasting gambling inforamtion. Section 512 prohibits the broadcasting of lottery information, and carries forward an exemption similar to that now contained in 18 U.S.C. §1307 for state-operated lotteries.

[23] 18 U.S.C. §1511 is thus represented by Section 1351 of S.1, which generally deals with bribery.

[24] Section 279(a) of S.1 amends 7 U.S.C. §2044(b)(7), with respect to the gambling records of farm labor contractors. See notes 452-55 and accompanying text supra. Sections 331, 339(c), 349(f), and 351(d) of S.1 amend the pertinent sections of Title 12 relating to banking that had been added by the 1967 anti-lottery act. These amendments provide for punishment, thus making the current 18 U.S.C. §1306 unnecessary. The interstate commerce provisions added by the Johnson Act, 15 U.S.C. §§1171-78, are amended in technical respects by §421 of S.1.

Chapter VII. LOTTERIES

A. The Lottery: An Introduction

1. The Roots of the Colonial Lottery
2. The Growth of the Colonial Lottery
3. American Lotteries after the Revolution
4. The Rise of the Louisiana Lottery
5. The Fall of the Louisiana Lottery
6. The History of Lotteries in the Twentieth Century

B. Lotteries: Problems and Promise

1. The Lottery as a Painless Tax
   a. The Promise
   b. The Problems
2. The Lottery as a State-run Business
   a. The States Create a Market for the Lottery
   b. State and Federal Lottery Controls
3. The Effect of Lotteries on Organized Crime
4. Conclusions about Modern Lotteries

Lotteries have played a crucial role in the development of gambling law both in its origins and today as part of the decriminalization movement. In many ways, it appears as if the law has developed in a circular fashion and that in its maturity the law is returning to its origins. Consequently, there is more than a little justification for now turning in these materials to a detail d analysis of the history of and present development of this particular form of gambling.

A. The Lottery: An Introduction

The ancients drew straws to settle disputes between persons of equal reason or authority. The element of chance represented God's will made known to man. The first King of Israel was chosen by lot.[1] The Bible reports that the Holy Spirit directed the Apostles while they used lots to replace Judas with Matthias.[2] Early America, sorely needing public works but lacking adequate banks and taxes, relied on the lottery as a financing measure.

More recently, the United States government employed a lottery to select soldiers for the Viet Nam war. Merchandizers have commonly used lotteries to sell their products: in pursuit of profits millions of consumers have scurried

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[1]G. Sullivan, By Chance A Winner at 4 (1972) [hereinafter cited as Sullivan].

[2]Acts 1:24.

after wrappers, boxtops, and labels.[3] Television game shows have similarly exhibited the elements of a lottery.[4] Courts have dealt with overreaching referral-sales contracts as unlawful lotteries.[5]

The foregoing schemes, however, are peripheral to a discussion of the most significant form of lotteries. This chapter will focus on these games of chance--lotteries--that states conduct to raise revenue and curb illegal gambling.[6] Specifically, it will examine in historical context whether lotteries produce these benefits and whether the benefits outweigh the attendant costs. Modern lotteries, however, cannot by fully understood outside the context of their historical development.

1. The Roots of the Colonial Lottery

The first lotteries to raise revenue appeared in feudal Europe. Throughout the sixteenth century, Italian merchants sold lottery tickets to attract customers and to dispose of unsold goods. Francis I of France, unable to finance his

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[3]The Postal Service traditionally banned only those lottery materials for which consideration had been paid. Thus, commercial lottery schemes could use the mails, but the states could not. See N.Y. Times, Nov. 24, 1970, at 32, col. 3.

[4]See generally F. E. Williams, Lotteries, Laws, and Morals (1958) [hereinafter cited as Williams].

[5]Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wash.2d 630, 409 P.2d 160, 14 A.L.R.3d. 1411 (1965).

[6]Task Force on Legalized Gambling, Easy Money at 17 (1974) [hereinafter cited as Easy Money].

profligate court through taxes, established a government lottery in 1539.[7]

Queen Elizabeth I introduced the first English public lottery in 1566, primarily to pay for harbor repair. In her version of the game, all participants won a prize of some sort. Most received less than the cost of the ticket, but a few won "plate and certaine sorts of merchaundizes."[8]

Shortly after Elizabeth's death, colonists brought the first lottery to America.[9] In 1612, the Crown authorized the Virginia Company of London to conduct lotteries for one year. Prizes ranged up to £5,000. Promotional jingles encouraged bettors "to plant a Kingdome sure, where a savadge people dwell; God will favor Christians still, and like the purpose well."[10]

The Company requested a second lottery in 1620. Permission was granted, and sales began. Tradesmen soon complained, however, that the lottery siphoned money from honest industry, and the lottery was quickly shut down.[11] Charges of mismanagement, added to the businessmen's

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[7] Sullivan at 5.

[8] Id.

[9] J. Ezell, Fortune's Merry Wheel: The Lottery in America 5-9 (1960) [hereinafter cited as Ezell].

[10] Sullivan at 13; Ezell at 5.

[11] H.B. and G. M. Weiss, The Early Lotteries of New Jersey 2-5 (1968) [hereinafter cited as Weiss].

complaint, prompted the House of Commons to strip the Virginia Company of all its authority to conduct lotteries.[12]

English lottery history broadly parallels the American experience. The government sponsored several lotteries to fund public works projects. Games managed by the Lord Chancellor and the Archbishop of Canterbury financed the British Museum and the Westminster Bridge.[13] These noble civic actions, however, were afloat on a broader tide of public greed; local merchants sought new customers through the sale or gift of tickets.[14] The English lotteries enjoyed respectable leadership and objectives but were occasionally tainted by questionable sales techniques.

The earliest American lotteries mirrored the Virginia experiment and the English games. Despondent, deprived colonists, seeking to improve their unglamorous lives, eagerly bought English tickets shipped to the New World.[15]

Quakers, however, America's first organized opponents of the lotteries, won the passage of a Pennsylvania ban on the games. William and Mary, fearing a reduction in ticket sales, repeatedly vetoed such statutes.[16] The sale

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[12] Sullivan at 13.

[13] A. F. Ross, "The History of Lotteries in New York," The Magazine of History 8-9 (1907) [hereinafter cited as Ross].

[14] Id.

[15] Weiss at 10; Ezell at 15.

[16] Sullivan at 18-19.

of English tickets continued.

Puritan theologians also joined the initial fight against lotteries, but the games became such a valuable tool of public finance that even many Puritans acquiesced to them. Cotton Mather remained critical of the games, but only managed to generate opposition to them by directing public attention to their niggardly prize payout.[17] Despite this initial criticism, however, lotteries were accepted because of their worthy public purposes and the lack of alternative financing.

2. The Growth of the Colonial Lottery.

Political and economic necessities were the mother of the colonial lottery. The mercantilistic monarch in England kept the colonies economically dependent and politically weak. Only three incorporated banks existed in America before 1790.[18] The business corporation and securities markets were in their infancy. Yet the colonies desperately needed roads, defenses, bridges, schools, and churches. The lottery, therefore, flourished as a substitute for conventional methods of public and private finance.

Connecticut authorized its first lottery in 1747 to raise money for student housing at Yale.[19] Lotteries

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[17] Id.

[18] L. V. Chandler, The Economics of Money and Banking 88-89 (6th ed. 1973).

[19] Sullivan at 25.

held in Pennsylvania, Connecticut, and Delaware provided the capital to institute Princeton.[20] Still other lotteries funded King's College (now Columbia) and Rutgers.[21]

Gambling even financed the nation's defenses. One lottery was intended to raise money for coastal fortifications during King George's War.[22] Nevertheless, even the pressing circumstances of the day failed to ensure that game's success. The provincial assembly paid £3,000 into the prize fund but still had to delay the drawing dates. The assembly finally authorized the treasury to buy unsold tickets.[23] The game was, on the whole, a failure.

Braving such risks, Boston held a lottery to relieve Annapolis. In 1748, Benjamin Franklin helped sponsor a lottery so Philadelphia could afford cannons for its defense.[24] Both lotteries met with moderate success.

By the time of the French and Indian War, however, the military and economic position of the colonies had eroded considerably. They suffered from an unfavorable balance of trade and an acute shortage of currency. Immediate relief and long-term stability were both urgently

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[20] Weiss at 29.

[21] Ross at 15.

[22] Ezell at 32-33.

[23] Ross at 15.

[24] Williams at 28.

needed.[25] Thus, when William Pitt sought funds to invade Canada in 1758, Massachusetts did not raise taxes or sell bonds. It arranged a £30,000 lottery for the venture. This lottery, however, ended in failure.

So important were lotteries for national defense and other public programs that colonies increasingly disapproved of lotteries for solely private gain. Many early legislatures prohibited strictly private lotteries as common nuisances. The colonies gravitated toward a policy of licensing and regulating private lotteries in the public interest.[26]

In general, a group seeking a specific public improvement would petition the colonial government for a lottery. The legislature, unable or unwilling to raise taxes for the project, would usually authorize the venture. Legislators, bettors, and taxpayers enjoyed a community of interests.

The Rhode Island General Assembly, for example, permitted lotteries only with specific legislative consent. The games proved so successful that the legislature "began an almost unbroken chain of grants."[27] Thus, from 1744 to 1774 the colonies sanctioned approximately 158 lotteries.

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[25] Ezell at 29.

[26] E. Devereux, Jr., Gambling and the Social Structure: A Sociological Study of Lotteries and Horse Racing in Contemporary America 119 and n. 119 (unpublished Ph.D. dissertation, Harvard University 1949) [hereinafter cited as Devereux].

[27] Ezell at 34.

They benefited public projects according to the following distribution:

58 for internal improvements (wharves, canals, roads, etc.);

39 for cities and counties;

27 for churches;

19 for individual relief;

13 for educational institutions;

10 for colonial government; and

5 new industries.

Unlicensed lotteries also abounded,[28] often serving similar public purposes.[29]

The growing number and importance of lotteries failed to improve their administration. Drawings were usually prolonged affairs, sometimes lasting years. Each ticket corresponded to one duplicate in a revolving drum, and to a second duplicate in the broker's records. A second revolving drum was filled with winning and blank tickets, totalling the number sold. Tickets from the two drums were simultaneously drawn and matched. All tickets had to be matched and accounted for. For this reason, even the most efficient games often dragged on for months.[30]

A further inconvenience to bettors was the cost of tickets, which was occasionally as high as $10 each.

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[28] Ezell at 53-59.

[29] Weiss at 34-35.

[30] Ezell at 30-32.

Enterprising middlemen "insured" tickets, accepting less than the ticket price to bet on a certain number, and returning to the bettor less than his full prize. Everyone could then afford to play, so some critics characterized the scheme as a burden on the poor.[31] This wrinkle in the state-run game was a precursor to the modern numbers racket and is currently banned in most lottery states.[32]

Despite their administrative shortcomings, however, the games were promoted in all the original colonies except Pennsylvania. Not even in Pennsylvania, though, were the games eliminated. England reversed the state's anti-lottery statute, and state officials treated gamblers leniently. Pennsylvania law provided that whenever an informant turned over a lottery agent, the governor and the informant would share the fine as a bounty. The governor typically remitted his half to the offender. Thus, associates of lottery agents would turn them over to the authorities, receive a share of the bounty, and return it to the offender. The fine was more like a "licensing fee" than a strict criminal penalty.[33]

Although only tolerated in Pennsylvania, the lottery was

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[31] See H. Asbury, Sucker's Progress (1961).

[32] See, e.g., Conn. Gen. Stat. Ann. §12-569(a)(Supp. 1975); Del. Code Ann. tit. 29, §§4808 and 4809 (Supp. 1975); Me. Rev. Stat. Ann. tit. 8, §§357 and 358 (Supp. 1975); and N.J. Stat. Ann. §§5:9-13 and 5:9-14 (1973).

[33] Ezell at 21.

respected in other colonies.[34] Civic-minded persons had no Community Chest or United Way to join; they instead promoted the local lottery.[35] George Washington bought tickets to promote westward expansion. Indeed, he sent tickets to friends in need of good luck.[36] Benjamin Franklin promoted a lottery to erect a steeple at Christ Church in Philadelphia.[37] John Hancock helped manage a lottery in 1762 to rebuild Faneuil Hall, the scene of several Revolutionary events. Even such antagonists as Alexander Hamilton[38] and Thomas Jefferson[39] shared an appreciation of the lottery's potential.

The very success and respectability of the colonial games invited English interference. The Lords of Trade in England had long opposed lotteries on the ground that they dissipated wealth.[40] Shortly after the French and Indian War, the Lords recommended that no more lotteries be authorized. The King, anxious to stabilize the economy of

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[34] Weiss at 11.

[35] Ezell at 26.

[36] Sullivan at 7.

[37] Ross at 20.

[38] Sullivan at 7.

[39] Sullivan at 35. Jefferson's defense of lotteries stemmed, at least in part, from his request for permission to use a lottery in the sale of his land. No individual could have offered him a fair price, but a lottery could have amassed sufficient capital. See Ezell at 168-70.

[40] Sullivan at 26-27.

the colonies, ordered them not to license games without his approval.

By 1772, the colonies had either ignored the directive or secured Royal acquiescence. With few other sources of revenue, the legislatures could ill afford to forego future lotteries. The colonies thus charted an increasingly independent economic course.[41]

The desire for political independence, of course, culminated in the Revolution of 1776. During the war, the colonists still held lotteries to finance internal improvements, but they also sought funds to further the war effort.[42] Massachusetts raised nearly $750,000 to reward enlistees. Vermont applied lottery revenue to military defenses, and Massachusetts applied some income to clothing Continental soldiers.

Tories, as well as Revolutionaries, sought lottery aid. The British tried to establish a lottery in Newport, Rhode Island, to relieve Loyalist refugees.[43] The effort failed, but more successful drawings did take place in New York.[44]

The federal lottery, however, was the greatest failure of the war years. The colonies were reluctant to tax

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[41] Ezell at 51-52.

[42] Ezell at 64.

[43] Ezell at 66.

[44] Ezell at 67.

to support the central government, and their currency was not well-respected. National leaders therefore turned to the lottery to net more than $1 million to maintain troops in the field. Sales were brisk at first, but slowed as war conditions deteriorated. The Continental Congress asked the states to buy the remaining tickets. Not all the tickets were sold, and the drawings were never completed. The first national lottery, therefore, had collapsed.[45]

3. American Lotteries after the Revolution.

Independence enabled state legislatures to determine the form and scope of their taxes. Foreign trade was not yet strong, but was at least free form the yoke of English mercantilism. Corporations, banks and securities markets took time to develop, and the new nation desperately needed roads, bridges, wharves, and other public projects. Hence, the states still depended on lotteries for revenue.

During the period of confederation more than 80 lotteries were licenses for new industries and internal improvements.[46] Nevertheless, more reliable methods of finance emerged. Nearly 90 incorporated banks existed by 1810. Conventional and lottery financing, however, were not always separate operations. After the Revolution, John Adams negotiated Dutch loans for the new, revenue-hungry republic. American credit was so bad that the

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[45] Ezell at 62-63.

[46] Ezell at 71-72.

United States even had to pay a bonus on its interest charges. Adams thus arranged a lottery to distribute the bonus to the Dutch creditors.[47]

The federal government later conducted two other unsuccessful lotteries. The first was held from 1793 to 1799 to fund the building of Washington, D.C. Sales were sluggish and accusations of mismanagement were levelled, so the lottery director abandoned the project. Disgruntled bettors sued him for the advertised prizes.[48]

The second federal lottery was held in 1812 to finance a canal between Maryland and the District of Columbia. Federal promoters sold tickets in Virginia, even though lotteries were prohibited in that state. The Supreme Court ruled that Congress could not authorize ticket sales where banned by state statute. The canal lottery thus suffered from a narrowed ticket market.[49]

The states remained as desperate for funds as the federal government. The population of New York nearly tripled from 1790 to 1810; Pennsylvania's doubled to almost one million.[50] The frontier states also grew

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[47] Sullivan at 32.

[48] Sullivan at 36-37.

[49] Williams at 31.

[50] Sullivan at 32.

rapidly, but on an even smaller financial base.[51] The need for public services grew with the population. Until more dependable revenue sources developed, lotteries normally filled the gap. The territorial governments of St. Louis and Detroit financed their firefighting companies through lotteries. Lotteries provided a hospital for Nashville, Tennessee, in 1823 and a water supply for Frankfort, Kentucky, in 1838.

By 1832, eight states in the East were raising a total of $66.4 million per year by lottery. The entire federal government spent only a quarter of that amount. New York licensed more than 30 public lotteries between 1776 and 1883.[52] Most of the income was allocated to westward expansion, transportation, and internal improvements.[53]

Lotteries produced private gain as well as public benefit. By 1790, those who petitioned for lottery authority no longer handled the mechanics of the project. Brokers, not unlike modern securities underwriters, bought all the tickets at a discount and marketed them at face value throughout the country. Brokers often received a

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[51] In the same two decades Kentucky's population soared from 73,677 to 406,510. Id.

[52] Council of State Governments, Gambling: A Source of State Revenue 6 (1973) [hereinafter cited as State Revenue].

[53] Sullivan at 33.

commission to manage all aspects of a lottery. Such promotion was big business. John B. Yates and Archibald McIntyre ran nearly all New York-authorized lotteries by 1823.[54] Brokers became so adept at public finance that they approximated the role of bankers. Indeed, the Chase National Bank and the First National Bank of New York City were founded by lottery brokers.[55]

Brokers often ran lottery shops. There, bettors could find tickets for lotteries from all parts of the nation, ranging from inexpensive "long-shots" to costly "investment" tickets.[56] Earning a good living from the games, brokers diligently promoted the tickets.

As conventional financing matured and as lottery promotion became big business, lotteries fed more on greed than need. Bettors and promoters alike sought riches from the games, but the nation's appetite and enthusiasm for lotteries was not unbounded.

The early nineteenth century---the period of Jacksonian Democracy---was the heyday of the fight against privilege. The small farmer or artisan felt threatened by the "privileged" in government and business,[57] and by the

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[54] Weiss at 20-23, 40, 59, 64.

[55] Sullivan at 40.

[56] Sullivan at 43.

[57] See Herman Melville, The Confidence Man.

frequent panics and depressions. At first, they sought escape and easy money from the lottery. All too often, they were victimized by lottery fraud and default.[58] They finally struck back at institutions profiting from their misfortune, lotteries included.[59]

The argument that lotteries diverted money from productive business reappeared. The Supreme Court itself had to face litigation over the operation of various lotteries.[60] In 1827, Congress prohibited postmasters from acting as lottery agents.[61] The government was taking its first steps in a long fight against the lottery.

Politicians also reacted to the public's objections to lotteries. In 1828 Connecticut refused to permit the Middleton Military Academy to conduct a lottery. Legislators in the Nutmeg State also twice stiffened the penalty for conducting an unauthorized lottery.[62]

Episcopal and Presbyterian churches, too, escalated their opposition to the games.[63] Methodism, condemning all forms of gambling, gained adherents throughout the

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[58] Ezell at 200-01.

[59] Ezell at 195-203.

[60] See, e.g., Clarke v. City of Washington, 25 U.S. 19 (1827).

[61] Act of March 2, 1827, ch. 61, §6, 4 Stat. 238.

[62] Ezell at 197.

[63] Weiss at 17-19.

1830's and 40's.[64]

Pennsylvania, inspired by these reform movements and its Quaker traditions, banned all lotteries in 1833, even those which might otherwise be specially chartered by the state.[65] The governor of Pennsylvania, viewing lotteries as an interstate threat, urged other chief executives to ban their games, too.

By 1834 New York, New Jersey, Massachusetts, Connecticut, New Hampshire, Maine, Vermont, Ohio, and Illinois had all joined in prohibiting lotteries.[66] In 1842, Congress enacted a ban on federal lotteries. Texas and California banned the games in their first state constitutions. By 1862 few states lacked an anti-lottery law.[67]

The rapid-fire attack on lotteries resulted from a coalition of forces. Jacksonian attacks on privilege joined with religious and moral reformers in attack on gambling. At the 1844 New Jersey constitutional convention, political reformers, abolitionists, temperence advocates, and church leaders united to win a constitutional bar to future lotteries.[68] By mid-century, even the Supreme Court

[64] Weiss at 27.

[65] Ross at 38-39.

[66] Devereux at 118-19.

[67] Sullivan at 50-51.

[68] Weiss at 26-27.

embodied in its jurisprudence ideas reflecting the swirling anti-lottery tide:

> Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places but the latter infests the whole community: it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor, and it plunders the ignorant and simple.[69]

4. The Rise of the Louisiana Lottery.

Surging lottery activity did not follow the Civil War as it had the Revolution. Conventional forms of finance were developing. The federal government began to pose a threat to dishonest schemes. Only a handful of states still permitted the games.

The climate for lotteries was unfavorable---but hardly fatal. In 1868, two men began a lottery in Louisiana that was destined to shape lottery history for decades. John A. Morris, a wealthy ex-Northerner from a horseracing background, devised the plan. Charles T. Howard contributed his considerable knowledge of the lottery business. Together, they secured a lottery monopoly. The Louisiana legislature incorporated the Louisiana Lottery Company, exempted it from all taxes, and banned the sale of foreign lottery tickets. In return, the state received $1 million over 25 years.

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[69]Phalen v. Virginia, 49 U.S. (8 How.) 163, 168 (1850).

The enterprise got off to a slow start, however, until Dr. Maximilian Dauphin joined the scheme. He hired G.T. Beauregard and Jubal A. Early, formal Confederate generals, to conduct drawings. They lent "an air of respectability and honesty" which contributed greatly to the expansion of the enterprise.[70]

As the Louisiana Lottery began to thrive, others began to fail. The Kentucky Supreme Court found the Kentucky Lottery illegal. The state legislature revoked its license in 1878. Georgia and Alabama also banned the games. Thus, the Louisiana Lottery, enjoying an even stronger monopoly, became a spectacular success.[71]

Ticket booths appeared in front of churches and taverns. Young and old alike sold tickets. Some agents employed side shows and magic tricks to attract customers. One agent exhibited a parrot trained to pluck lucky tickets from a hat with his beak.[72]

Daily drawings took place in Boston, Cincinnati, Denver, and San Francisco. The New Orleans ticket selections, held in the Opera House, featured a free concert after each day's drawings.[73]

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[70] Sullivan at 52-54.

[71] Sullivan at 54.

[72] Sullivan at 44.

[73] Sullivan at 54.

Sales and profits soared. The Louisiana Lottery Company paid dividends of 110% in 1887, 120% in 1888, and 170% in 1889. At its peak, the company probably netted almost $5 million in profit every year.[74]

The scheme hardly went unchallenged. Louisiana politicians condemned the game by voice but supported it by vote, for they were the best public servants money could buy. One long-time foe of the game mysteriously voted to renew it. When he died soon after the vote, $18,000 was found on his body. A minister in the legislature sold his vote for a new church steeple. Another legislator found $20,000 one morning under his breakfast plate. The Louisiana Lottery, in effect, bribed the public as well. It built waterworks, cotton mills, sugar refineries, and even contributed to flood relief in the 1890's.[75] It flourished, therefore, in an atmosphere of bribery, corruption, and dishonesty.

5. The Fall of the Louisiana Lottery.

The Louisiana Lottery could buy off the state, but not the nation, and 93% of the company's revenues came from operations outside the state.[76] Interstate commerce and mail carried the scheme to all corners of the country. President Benjamin Harrison, therefore, sought legislation

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[74] Sullivan at 55-56.

[75] Sullivan at 56-57.

[76] D. Weinstein and L. Deitch, The Impact of Legalized Gambling 11 (1974) [hereinafter cited as Weinstein and Deitch].

to curb the game which "debauched and defrauded" the public.[77] Congressmen introduced several anti-lottery measures, initially more noteworthy for their quantity than quality.

In 1827 Congress prohibited postmasters from acting as lottery agents.[78] An 1868 act banned lottery materials from the mails but provided no effective enforcement or sanctioning powers.[79] The 1872 codification of postal laws applied the earlier prohibitions only to illegal lotteries.[80] The Louisiana Lottery, of course, was not illegal, so it remained largely unrestrained by federal regulation.

Finally, in 1890, legislation banned from the mails all advertisements, solicitations, notices, payments, tickets, and prizes for schemes in which prizes were awarded by lot or chance.[81] Two years later, the Supreme Court invoked the Postal Powers clause of the Constitution to uphold this statute.[82]

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[77] Sullivan at 57.

[78] Act of March 2, 1827, ch. 61, §6, 4 Stat. 238. See 18 U.S.C. §1303 (1970) and 18 U.S.C. §1307 (Supp. 1975).

[79] Act of July 27, 1868, ch. 246, §13, 15 Stat. 194-96.

[80] Act of June 8, 1872, ch. 335, §149, 17 Stat. 283, 302.

[81] Act of Sept. 19, 1890, ch. 908, §1, 26 Stat. 465.

[82] Ex Parte Rapier, 143 U.S. 110 (1892).

Relying on the Commerce Clause, Congress next prohibited the interstate transportation of lottery materials.[83] The Supreme Court upheld this law, too, in a case argued three times and decided by a 5-4 vote.[84]

By 1895, the Louisiana Lottery, therefore, was dying. Nearly half the mail handled at the New Orleans Post Office had been lottery-related. The District of Columbia lottery office had sent out 50,000 pieces of mail in a typical month and had received tons of mail in return.[85] Barring lotteries from the mails and from interstate commerce was thus a sentence of death for the Louisiana Lottery.

6. The History of Lotteries in the 20th Century.

The federal lottery laws which squeezed life from the Louisiana Lottery in the 1800's remain largely in effect today. To be sure, a ban on broadcasting lottery information now exists.[86] State-run games, however, have been recently excepted from many federal anti-lottery statutes.[87] Federal law still remains a bar to a resurgence of the notorious, nation-wide private lotteries.

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[83] See 18 U.S.C. §1301 (1970) and 18 U.S.C. §1307 (Supp. 1975).

[84] Champion v. Ames, 188 U.S. 321 (1903).

[85] Sullivan at 58.

[86] 18 U.S.C. §1304 (1970).

[87] 18 U.S.C. §1307 (Supp. 1975).

By 1930, the 45 states had also banned lotteries. Indeed, 35 state constitutions outlawed the games.[88] The overlay of federal and state law posed a formidable deterrent to would-be lottery promoters.

Although crises such as the Depression and the Second World War generated proposals for national and state-run games, such plans received little support until the 1960's and 70's.[89]

B. Lotteries: Problems and Promise

In 1963, the New Hampshire legislature authorized a sweepstakes to benefit local education programs.[90] Because New Hampshire was traditionally conservative---both fiscally and morally---the plan produced conflicting responses. On the one hand, the lottery presented a way to finance education without raising taxes.[91] It promised something for nothing. On the other hand, it was state-sanctioned gambling. Many New Englanders felt the government should not promote such idle

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[88] Sullivan at 98.

[89] Sullivan at 14-15.

[90] State Revenue at 2. See also N.H. Rev. Stat. Ann.§§284:1 et seq., especially §284:21-j (Supp. 1975).

[91] N.H. Const. pt. 2, art. V provides that all taxes must be "proportional and reasonable." N.H. Rev. Stat. Ann. §77:4 (Repl. Vol. 1970) taxes interest and dividends, but not wages. In fiscal 1975, New Hampshire received lottery income of $4.2 million. N.Y. Times, July 23, 1975, at 18, col. 5.

amusements. A stormy controversy ensued.

Since that date, a dozen states have followed New Hampshire's lead.[92] State legislators have always wanted to raise money without raising taxes. They have also been anxious to curb the growth of organized crime. The lottery promised to do both, by diverting money from the syndicates to the states.

Where the lottery went, however, criticism followed. Some foes have argued that crime should be fought by prosecution, not competition. Others have charged that the lottery is an inefficient and regressive mode of taxation. In 1976, lotteries are still going into and out of business. But no one has fully examined their costs and benefits.

The purpose of this section, therefore, is to sort out the economic, social, and political effects of state-run lotteries. Specifically, the issues will be treated as follows:

(1) the lottery as a "painless tax";

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[92]Connecticut, Conn. Gen. Stat. Ann. §§12-568 et seq. (Supp. 1975); Delaware, Del. Code Ann. tit. 29, §§4801 et seq. (Supp. 1975); Illinois, Ill. Rev. Stat. ch. 120, §§1151 et seq. (Supp. 1975); Maine, Me. Rev. Stat. Ann. tit. 8, §§351 et seq. (Supp. 1975); Maryland, Md. Ann. Code art. 88D, §§1 et seq. (Supp. 1975); Massachusetts, Mass. Gen. Laws Ann. ch. 10, §§22 et seq. (1973 and Supp. 1975); Michigan, Mich. Stat. Ann. §18.969(1) et seq. (Supp. 1975); New Hampshire, N.H. Rev. Stat. Ann. §§284:21-a et seq. (Supp. 1975); New Jersey, N.J. Stat. Ann. §§5:9-1 et seq. (1973); New York (1976 lottery), N.Y. Tax Law §§1600 et seq.; N.Y. State Fin. Law §92-c (Supp. 1976); Ohio, Ohio Rev. Code Ann. §§3770.01 et seq. (Supp. 1975); Pennsylvania, Pa. Stat. Ann. tit. 72, §§3761-1 et seq. (Supp. 1975); and Rhode Island, R.I. Gen. Laws Ann. §§42-61-1 et seq. (Supp. 1975).

(2) the lottery as a state-run business;

(3) the lottery as a competitor to organized crime; and

(4) conclusions about modern lotteries.

1. The Lottery as a Painless Tax.

a. The Promise

The states need money. In 1971, for example, state revenues rose 9.3% while state expenditures rose 16.2%, leaving an aggregate state deficit of $1.6 billion. Between 1959 and 1968, the 50 states enacted 309 separate revenue measures, each placing a new or increased burden on taxpayers. Federal revenue-sharing has failed to close state budget gaps, and municipalities have been draining state funds at an ever-growing rate.[93]

Despite their lack of income, many states have been unwilling or unable to increase their taxes. New York and Massachusetts, for example, tax income and sales heavily. They can ill afford to squeeze more revenue from these sources. Connecticut, on the other hand, does not tax personal income directly. Personal income taxes are so unpopular in the Nutmeg State that politicians have tried desperately to get along without them. States have been seeking other, less painful ways to raise

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[93] State Revenue at 1.

money.[94]

For politicians, the money that Americans spend on illegal gambling has proved a tempting untapped source of cash.[95] Betting totalled an estimated $20 billion in 1967 and $23 billion in 1973. Some estimates range even higher.[96] Most forms of wealth, income, or amusement are already taxed. Illegal wagers, therefore, are generally taxable, but problems arise in collecting the levy.[97] Hence, many politicians view the state lottery as a novel way to tap the billions of dollars spent on illegal gambling.

Legislators expect the lottery to succeed where taxes fail because gambling funds are voluntarily spent. Taxpayers normally contribute to the government because they are forced to do so. Legislators are reluctant to raise taxes further. Bettors gamble, however, because of the lures of excitement and easy profits. Many politicians welcome gambling as a source of income that

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[94] See id. at 7 and N.Y. Times, July 4, 1976, §4, at 4, col. 3. See also N.Y. Times, Jan. 25, 1976, §E, at 7, col. 1, which criticizes New Jersey and Connecticut for failing to introduce broadly-based personal income taxes and for relying instead upon lotteries. New Jersey, of course, has since adopted an income tax.

[95] See Easy Money at 43.

[96] Id. at 6, 53-54. See also Second Interim Report: Commission on the Review of the National Policy Toward Gambling 46 (1976) (1974: 22.5 billion) [hereinafter cited as Second Interim Report.]

[97] See, e.g., the Federal excise tax on wagers, 26 U.S.C. §§4401 et seq. (Supp. 1975). But note that persons already violating the anti-gambling laws will find little incentive to obey the Federal tax laws.

does not depend upon the coercive power of the state for its success. In short, lottery profits promise to finance popular state programs through the willing participation of the bettor rather than through the coerced compliance of the taxpayer.

Although politicians deem the lottery a "voluntary tax", they realize that it is a burden that someone will have to shoulder. In general, they believe that the burden should fall primarily on organized criminals. Indeed, mobsters are presumably earning billions of dollars each year from illegal gambling.[98] If the public could be wooed from the illegal to the state-run games, lottery profits would come at the expense of organized criminals. By diverting funds from the syndicates to the states, the lottery would kill two birds with one stone. It would fight crime while it raised money.

Politicians also tried to put the lottery tax burden on out-of-staters. With only 600,000 inhabitants, New Hampshire plainly had to expand beyond the home market. Indeed, during 1964 "80 percent of the tickets were sold to residents of Massachusetts, New York, and Connecticut, even though out-of-state residents had to travel to New Hampshire to purchase tickets."[99] In short, legislators

[98] See Easy Money at 6, 53-54. But see Second Interim Report at 46.

[99] State Revenue at 11.

often rationalize the lottery as a tax on criminals and non-residents rather than on home-state voters.

Politicians rationalize the lottery in terms of its benefit as well as of its burden. New Hampshire, as was mentioned, earmarks lottery profits for local education programs.[1] Connecticut, New York, and New Jersey follow suit.[2] Massachusetts maintains a Local Aid Fund to benefit cities and towns.[3] Pennsylvania supports a fund to provide property tax relief and local transportation for the elderly.[4] The remaining states appropriate lottery profits for their general funds.[5]

America's libertarian traditions also help politicians accept the lottery as a revenue-raising device. Instead of making up the public's mind, they have used the free market to test the economic and moral worth of the lottery. In this way, the collective "economic vote" of consumers determines the financial success or failure of the lottery.

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[1] N.H. Rev. Stat. Ann. §284:21-j (Supp. 1975).

[2] See Conn. Gen. Stat. Ann. §12-568(c)(Supp. 1975); N.Y. State Fin. Law §92-c (Supp. 1976); N.J. Stat. Ann. §5:9-22(c)(1973).

[3] Mass. Gen. Laws Ann. ch. 10, §35(c)(Supp. 1975).

[4] Pa. Stat. Ann. tit. 72, §3761-2 (Supp. 1975).

[5] See Del. Code Ann. tit. 29, §4815 (Supp. 1975); Ill. Rev. Stat. ch. 120, §1172 (Supp. 1975); Me. Rev. Stat. Ann. tit. 8, §366.1.C (Supp. 1975); Md. Ann. Code art. 88D, §20(c)(Supp. 1975); Mich. Stat. Ann. §18.969(11)(2)(k)(Supp. 1975); Ohio Rev. Code Ann. §3770.06(D)(Supp. 1975); R.I. Gen. Laws Ann. §42-61-15(4)(Supp. 1975).

Public participation reflects the collective conscience with respect to gambling. No element of coercion is involved. Indeed, the more the lottery satisfies consumers, the more profit the state earns. Hoping to capitalize on this community of interests and to maximize free will, many legislators have thus allowed aggregate consumer behavior to determine the viability of the lottery.

In sum, several factors argue in favor of the lottery as a way for states to earn money. Voters resist higher taxes, and the lottery can generate income without compulsion. Lottery profits can be set aside for worthwhile state projects and may come at the expense of organized criminals. Moreover, a state-run lottery can offer relatively harmless amusement---and instant wealth, on occasion---to those who choose to participate. Hence, more than a dozen states now conduct lotteries.[6]

b. The Problems

As a revenue-producer for the states, however, the lottery has presented problems as well as promise. In a nutshell, the lottery's revenues have often been

(1) drawn from the wrong sources;

(2) in an uneconomical fashion; and

(3) spent for improper purposes.

Politicians apparently overestimate the amount of profit that criminals earn through illegal gambling.

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[6] Weinstein and Deitch at 35-70.

The Task Force on Legalized Gambling concluded that "illegal [gambling] operators retain $3 to $4 billion before expenses---a gross profit well below that commonly supposed...." The Task Force also calculated that in all,

> operators of the major illegal games clear slightly more than $2 billion a year in net profits---about double the amount the states receive each year from legal gambling. If the states captured every cent of these profits, they would be enriched by 1.3 percent of their current (1974) revenue level.[7]

Of course, the Task Force was referring to all forms of illegal gambling, but the point remains that politicians probably misjudge the size of the lottery pie. Lottery profits may therefore not come from the pockets of criminals to the extent envisioned.

Politicians are also unable to put the "lottery tax" burden on out-of-staters to the degree intended. New Hampshire could succeed with a beggar-thy-neighbor policy when it offered the only legalized lottery in the nation. Once a dozen other states---mostly in the North and East---introduced lotteries, the competition for sales became fierce.[8] Hence, when nearby states also go into the lottery business, politicians must take a second look at their home markets.

When the lottery thus failed to draw revenue from

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[7] Easy Money at 7 and 57. See also Second Interim Report at 46.

[8] See Easy Money at 50-51.

mobsters and out-of-staters as anticipated, it became a tax on the general public in the lottery states. As such, it has been a failure. On balance, it has operated as a regressive, counterproductive, unpredictable, and inefficient tax.

In general, persons in lower income groups have the most incentive to purchase lottery tickets. Leading routine lives for lack of money, they derive comparatively more benefit from the lottery's excitement and potential profits than do the affluent. Indeed, a "Massachusetts study showed that four out of five who could least afford to gamble purchased lottery tickets."[9] Recent newspaper reports suggest that most lottery players are poor and middle-income persons.[10] The Task Force on Legalized Gambling concluded that "legalization of gambling will produce relatively small amounts of revenue and will raise it from the wrong people in the wrong way."[11] Although contrary evidence exists, it appears that many of those who play the lottery are those who can least afford it.

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[9] State Revenue at 32. But see Second Interim Report at 44. (Whites and suburbanites most frequent players: average $25 per year).

[10] See Ithaca Journal, Dec. 9, 1975, at 15 and N.Y. Times, July 4, 1976, §4, at 4, col. 3. On the other hand, a "survey made for the New Jersey State Lottery Commission indicates that the lottery may not be a regressive revenue source. More than 70 percent of lottery sales in that State go to individuals earning $7,500 or more a year; 72 percent of the customers have at least completed high school." State Revenue at 17.

[11] Easy Money at 7 (emphasis added).

As a tax, the lottery would be "regressive" if rich and poor individuals all spent the same absolute amount on bets. As the evidence indicates, however, the poor probably spend more on lottery tickets than do the rich. Hence, the lottery may be, in effect, doubly regressive.

The nature of a state's tax structure, however, is not revealed by examining one constituent part. A state with a regressive lottery and a thoroughly progressive income tax may, on balance, exhibit a fair, broad-based tax structure. Connecticut, however, provides a striking contrast. It has a lottery and high sales and property taxes---but no direct personal income tax. The overall system for raising revenue is highly regressive. The effect of the lottery in Connecticut, therefore, is to worsen an already dismal tax structure.[12]

As a tax, the lottery is inefficient as well as regressive. Many economists believe the cost of raising one dollar by lottery is far higher than raising a dollar by almost any other form of tax.[13] Indeed, the New York Times reported that "it costs states anywhere from 15 cents to 40 cents to collect one dollar in lottery revenue;

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[12] For a thorough discussion of this problem, see N.Y. Times, Jan. 25, 1976, §4, at 7, col. 1. When that article appeared, New Jersey also had a highly regressive property tax structure in addition to a lottery. New Jersey has since enacted a personal income tax, but only because of judicial pressure. See N.Y. Times, July 11, 1976, §4, at 4, col. 1.

[13] See Robert K. Kinsey, "The Role of Lotteries in Public Finance," National Tax J. at 18 (March 1963) [hereinafter cited as Kinsey].

the cost of producing a dollar in revenue through conventional means of taxation is less than a nickel."[14] The Task Force on Legalized Gambling agreed that the

> costs of operating and promoting gambling absorb a large percentage of the income that a given game may raise; hence gambling is an inefficient way to raise public funds compared to the low cost of collecting income, real estate, and other taxes.[15]

The lottery may also be an uneconomical way to raise revenue because its profits are so unpredictable. Sales and income taxes, to be sure, fluctuate with consumer spending habits and the gyrations of the national economy. Lottery profits do reflect these factors, but are also sensitive to interstate lottery competition[16] and to

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[14] N.Y. Times, July 4, 1976, §4, at 4, col. 3.

[15] Easy Money at 7. These comparisons are apparently made on the basis of average cost of collection. Since most states do have tax collection systems--but no lottery--it might be more advisable to make the comparisons in terms of marginal cost. Thus, until lotteries reached some optimal level of participation, their marginal costs would be exorbitant relative to the marginal costs of the existing tax systems. Indeed, the marginal cost of the Lottery "tax" might never fall to the marginal cost level of other taxes. Hence, the lottery may be even more inefficient than the figures in the text indicate.

See also Sam Rosen, "Lottery as a Source of Public Revenue," Taxes at 619 (Sept. 1966).

It has also been estimated that funds comparable to lottery profits--but earned on a steady basis--could be achieved through increases in income tax rates of 0.2% and in sales tax rates of 0.4%. Weinstein and Deitch at 73.

[16] See Easy Money at 50-51.

changes in marketing tactics.[17] It is quite difficult to foresee lottery revenue with precision. Budget-planners thus cannot make accurate financing recommendations to the legislature. The legislature correspondingly loses some of its prerogative to determine spending and taxing priorities.

New York City, for example, ran into budget trouble in 1970 in part because it overestimated its share of the state's lottery revenues.[18] The governor of Connecticut similarly overestimated lottery returns for 1971 and was unable to balance the state budget as a result.[19] In 1972, Connecticut incurred a $6.5 million deficit when lottery profits were not as high as anticipated.[20] In New York, the administration of the lottery was itself jeopardized because actual lottery revenues could not pay the operation's overhead. Governor Rockefeller thus requested $400,000 from the legislature in 1970 to defray the lottery's operating and advertising costs.[21] In 1971, lottery officials were forced to remove $57,000

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[17] See Weinstein and Deitch at 35-48.

[18] N.Y. Times, May 16, 1970, at 18, col.1.

[19] N.Y. Times, Feb. 17, 1971, at 29, col. 5.

[20] N.Y. Times, Apr. 16, 1972, at 1, col. 1.

[21] N.Y. Times, Jan. 21, 1971, at 58.

from reserve funds to pay winners,[22] and in 1972 they had to postpone several seasonal bonus drawings for lack of funds.[23] More recently, the New Jersey lottery---normally one of the most profitable---ran $19 million (35%) short of its 1974 projections.[24] Manifestly, if lottery profits fluctuate so widely, they are not as useful to the states as are more dependable sources of income.

Insofar as lottery profits may be predicted, they apparently exaggerate ups and downs in the economy. The most preferable taxes, of course, are those which smooth out business cycles. During inflationary periods, for example, sales and income taxes remove cash from the aggregate economy, thereby discouraging further purchases and price increases. Property taxes remain in effect and provide steady income for essential government services. These taxes plus public borrowing then stimulate the economy.

Whereas levies on sales and income temper the business cycle, lotteries probably have the opposite effect. In times of recession and unemployment, for example, more and more people buy lottery tickets, hoping for an instant solution to their financial woes. Cash flows from the

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[22] N.Y. Times, Dec. 15, 1971, at 55.

[23] N.Y. Times, Apr. 28, 1972, at 43.

[24] N.Y. Times, Jan. 22, 1975, at 83.

bettors to the government at the very time when taxes should be falling. Periods of affluence, on the other hand, may reduce public interest in the lottery's profits, so the government may not draw all the money from the economy it should. Hence, state-run lotteries may have a tendency to exaggerate the peaks and valleys of economic activity. The government's duty is clearly to tame, not spur, such economic gyrations.[25] As the Task Force on Legalized Gambling concluded, lotteries do, indeed, draw money from the wrong people in the wrong way.

Lotteries also allocate money to the wrong people in the wrong way. As mentioned above, lotteries raise revenue at a cost far above that of conventional taxes. Further, state-run games typically allocate a smaller percentage of revenue to prizes than do the illegal games. Earmarking lottery profits for specified programs rarely lives up to the public's expectations or to the state's representations.

Although bettors "win" lottery prizes on occasion, the only entity which consistently "wins" is the state. It wagers nothing but sets the rules of the game. Compared to other forms of gambling the state lottery pays out in winnings only a small portion of its total revenues.

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[25] See Kinsey at 14.

When two people bet a dollar on a sporting event, one person or the other gets the whole dollar. Sports bookmakers generally pay out 95.5 cents on the dollar; parimutuel bookmakers, 83 cents; slot machines, 75 cents to 95 cents; and numbers games, 60 cents to 70 cents. The state lotteries---by statute---pay only about 40 cents to 45 cents into the prize fund for every dollar wagered.[26]

After prizes are paid, the remainder goes to the "house" for state revenue or for payment of operating expenses. Some states, in fact, set their lottery payout priorities in terms of the government share.[27] Prizes and expenses are paid from the amount left over.

Because payout ratios are limited by statute, gamblers as a class can never "beat the house." So long as bettors play the game, the state cannot lose. Indeed, Consumer Reports studies the lotteries in 1974 and concluded that because of their low payout they were "bad buys" relative to other gambling opportunities.[28]

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[26] "State Lotteries: A Legal Sucker Bet," Consumer Reports at 178 (Feb. 1974). See, e.g., Me. Rev. Stat. Ann. tit. 8, §366 (Supp. 1975); Mich. Stat. Ann. §18.969 (12) (Supp. 1975); N.H. Rev. Stat. Ann. §284:21-t (Supp. 1975); Ohio Rev. Code Ann. §3770.06 (B) (Supp. 1975). See also N.Y. Times, July 4, 1976, §4, at 4, col. 3.

[27] See Ill. Rev. Stat. ch. 120, §1157.2(10)(Supp. 1975) and N.J. Rev. Stat. §5:9-7(11)(1973).

[28] "State Lotteries: A Legal Sucker Bet," Consumer Reports at 179 (Feb. 1974).

Moreover, lottery officials rarely publicize prize structures and statutory payout ratios. Since no law requires such disclosure, it is doubtful that more than a handful of bettors realize the odds they face.

States are therefore able to misrepresent or alter their odds in many ways. They may announce an increase in the number of prizes, for example, without revealing a corresponding decline in their size. Without having to pay one additional cent, states can boast of improving the "probability of winning."[29]

Some states may also be able to misrepresent their payout ratios by allocating unclaimed prize money to bonus prize funds.[30] Unclaimed prizes may perhaps be counted once as the initial prize and again as the bonus prize. Hence, the money might conceivably be counted twice toward the statutory payout percentage even though it is paid to a prizewinner only once. Some states, instead, allocate unclaimed prizes to the general

[29] Ernest T. Bird, "State Lotteries--A Good Bet," State Government at 19 (Winter 1972) [hereinafter cited as Bird]. Consumer Reports stated that "skillfully worded claims are obviously designed to persuade unwary ticket purchasers that the 1974 lottery will be even more generous than its predecessors. In fact, however, the same old payback has merely been divided into twenty times as many parcels." "State Lotteries: A Legal Sucker Bet," Consumer Reports at 178 (Feb. 1974); see also N.Y. Times, Feb. 9, 1974, at 33, col. 6.

[30] Me. Rev. Stat. Ann. tit. 8, §361 (Supp. 1975) allows money not claimed within one year after the prize drawing to be "reallocated as prizes in the form of special promotions." Md. Ann. Code art. 88D, §16 (Supp. 1975) requires unclaimed prizes to "remain in the State Lottery Fund for further use as prizes." As of April 16, 1975, unclaimed prizes in Connecticut revert to the prize structure of the lottery. See Regulation 19 adopted pursuant to Conn. Gen. Stat. Ann. §12-561 (Supp. 1975).

fund.[31] Such money may be figured into the payout ratio even though it actually goes into the state's share. Such practices obviously make unfavorable odds even worse.

Lottery officials are even less willing to publicize the "actual payout" than the statutory payout, for states simply do not pay winners as well as they say they do. By the same token, states do not conform to earmarking programs as well as they say they do. New Hampshire, for example, declares "that the primary purpose of the sweepstakes is to raise revenue for the benefit of public education."[32] The state would probably need to subsidize local education anyway; the lottery simply frees up general tax revenue for other non-

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[31] Del. Code Ann. tit. 29, §4812 (Supp. 1975) allocates unclaimed prize money to the state's general fund. Section 4815 instructs the Director of the Delaware State Lottery Office to "pay as prizes not less than 45 percent of the total amount of tickets which have been sold, which percentage shall include prizes already awarded."

See also Mich. Stat. Ann. §§18.969(12) and 18.969(33) (Supp. 1975) and R. I. Gen. Laws Ann. §§42-61-11 and 42-61-15 (Supp. 1975).

The amount of money which remains unclaimed each year is not insignificant. As states began to use computer-numbered card stubs instead of written address stubs, it became increasingly difficult to track down winners. Thus, New York wound up in 1972 with more than $300,000 in uncollected prizes. Connecticut had $2.9 million in unclaimed lottery prizes in 1974. See N.Y. Times, Apr. 6, 1972, at 3 and Jan. 12, 1975, §4, at 6. Rhode Island ended up with $1 million unclaimed in fiscal 1975. N.Y. Times, Nov. 5, 1975, at 37, col. 2.

[32] N.H. Rev. Stat. Ann. §284:21-i (Supp. 1975).

educational purposes. Earmarking in New Hampshire is thus a clever way to assuage moralistic critics of state-run gambling without necessarily allocating any more money to education. Indeed, the Ithaca Journal reports that New Hampshire

> harps on the theme that all profits go to education. But the lottery. . .has never paid more than 3 per cent of the costs of New Hampshire schools, and some years less than 1 per cent. New Hampshire still ranks 50th among the 50 states in state aid to education.[33]

Earmarking, in short, may be simply a way for states to retain their normal budget priorities but to give the appearance of special assistance to a worthwhile program.

Lottery profits, moreover, may be re-allocated to the general fund just as easily as they were initially allocated to the special programs. When New York instituted its lottery in 1967, the profits were set aside for education. When the state faced a budget crisis in 1968, though, the legislature quietly dumped the lottery profits into the general fund. Since then, of course, the New York lottery has failed. The latest New York lottery, enacted in 1976, again allocates profits to education.[34] One wonders when the legislature will also want to subvert the noble purposes of this lottery.

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[33] Ithaca Journal, Dec. 9, 1975, at 15.

[34] See N.Y. Times, July 4, 1976, §4, at 4, col. 3 and N.Y. State Fin. Law §92-C (Supp. 1976).

Similar chicanery occurs in Connecticut. Until December, 1975, lottery profits were earmarked "solely for educational equalization grants to towns...." A Special Session of the legislature, however, voted to allocate lottery profits "first for educational equalization grants" with the balance to become part of the general fund.[35] Thus the legislature remains able to advertise education as the primary purpose of the lottery, even though some lottery profits can now be used for other purposes. The politicians have thus managed to incur all the benefits---but none of the costs---of earmarking.

Earmarking rarely accomplishes what the public expects. It normally replaces rather than supplements money that would otherwise be appropriated for worthwhile programs. Money earmarked one year can easily be sent to the general fund the next. Legislatures can always write provisions that have the appearance, though not the effect, of funnelling money to specified projects.

Voters might overlook many of these flaws if the lotteries were able to earn lots of extra money for the states and to ease the overall tax burden. In fact, lotteries contribute very little to state financing. The Ithaca Journal reports that in 1974,

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[35] See Conn. Gen. Stat. Ann. §12-568 (Supp. 1975) and the annotations which follow. (emphasis added in quotation). See also N.Y. Times, Dec. 6, 1975, at 33, col. 4.

> after all the promotion costs and payoffs to players were made, the 12 operating lotteries returned only $277 million--- three-tenths of one percent of the $90 billion it cost to run state and local government in those states.[36]

The Task Force on Legalized Gambling estimates that even lotteries operating at an "optimal" level would yield "in most states only 1 or 2 percent of the revenue of state and local government."[37]

When the New York and New Hampshire lotteries began, for example, both generated revenue at a level far lower than that anticipated.[38] In recent years, they have produced only about $2 per capita, well below the $10 per capita "optimal" level of operation.[39] In 1975 the New York lottery completely toppled, primarily because of economic and bureaucratic difficulties.[40] Delaware also halted its lottery after ticket sales fell from

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[36] Ithaca Journal, Dec. 9, 1975, at 15.

[37] Easy Money at 51. The New York Times, however, reports that "lotteries, for all their problems and occasional irregularities, have become so lucrative for hard-pressed state governments that they appear to have become a permanent feature of public financing." N.Y. Times, Feb. 2, 1976, at 1, col. 6.

[38] Easy Money at 50.

[39] Easy Money at 51.

[40] See N.Y. Times, Nov. 29, 1975, at 79; Ithaca Journal Nov. 28, 1975, at 1; N.Y. Times, Nov. 4, 1975, at 37, col. 1; N.Y. Times, Oct. 22, 1975, at 37, col. 7. The New York legislature, however, has since created another lottery. See Ithaca Journal, July 10, 1976, at 1, col. 4, and at 15, col. 1; N.Y. Times, July 4, 1976, §4, at 4, col. 3; N.Y. Times, September 1, 1976, at 1, col. 6.

172,000 in the first week to less than 50,000 in the fourth.[41] As one economist has observed,

> The economic view of the lottery suggests what seems to me to be the fundamental cause of the unimpressive results of today's state-operated lotteries: government is simply offering the consumer an inferior product in comparison with the package available from private enterprises.[42]

On balance, the lottery does not distinguish itself as an effective revenue-raising tool. To be sure, it is a "voluntary" tax which also affords relatively harmless amusement. But the lottery is also apparently in significant part regressive, inefficient, haphazard, and a deceptive way to raise and reallocate funds. Failing to satisfy consumers in the marketplace, it has generated much less income for the states than expected. Politicians now face the problem of how to deal with the voluntary tax that bettors do not want to pay.

2. The Lottery as a State-Run Business.

When revenues from conventional taxes do not meet the government's expectations, politicians normally enforce the tax laws more strictly. More coercion yields more income. The selling point of the lottery, however, is its voluntariness. When state-run lotteries fail to

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[41] N.Y. Times, Apr. 13, 1975, at 41, col. 1. For New Jersey's lottery woes, see N.Y. Times, Dec. 17, 1975, at 96, col. 8.

[42] F. D. Stocker, "The Lottery--Fiscal Responsibility or Irresponsibility?" Proceedings of the National Tax Ass'n. at 508 (1968). Economist Stocker answers the question in the title of his paper by finding lotteries an "irresponsible" form of revenue raising.

generate as much revenue as anticipated, politicians become uncertain how to react. The ways in which they have reacted to lottery shortfalls has had profound political impact.

Lacking experience and competition, the first states to introduce lotteries offered their tickets in an unattractive and non-businesslike fashion. Sales programs lacked the creativity characteristic of American free enterprise. As experience and competition developed, however, politicians quickly realized that lotteries were not going to displace organized crime and raise revenues by themselves. The states had to treat lottery players as consumers of a product. "Selling" the lottery thus involved clever marketing, advertising, and salesmanship---not the coercive power of the state. States began to seek ways to compete with each other and with organized criminals for the lucrative gambling market. As they experimented with their games, they discovered that the success of a lottery depends on several factors:

(1) frequent drawings;

(2) inexpensive tickets;

(3) good chances of winning a prize;

(4) high payout ratios;

(5) attractive prizes;

(6) simple buying, drawing, and paying procedures;

(7) readily accessible ticket outlets;

(8) fast notice of results; and

(9) the opportunity for players to choose their own ticket numbers.

The performance of state lotteries has been directly related to their ability to achieve an attractive combination of these factors.[43] A survey of the experiences of the early lottery states demonstrates the importance of these 9 factors.

a. The States Create a Market for the Lottery.

New Hampshire, enjoying the advantage of introducing the first modern lottery in America, experienced brisk ticket sales at the outset. In 1964, it grossed more than $5 million, paid out $1.8 million in prizes, and netted nearly $3 million for education. When the New York lottery began in 1967, however, New Hampshire's gross revenues fell to $2.5 million. By 1970 gross revenues had dropped to $2 million and net profit had fallen to roughly $800,000.[44] After an auspicious start, New Hampshire clearly suffered from marketing difficulties and from mounting competition.

First, New Hampshire, with only 600,000 inhabitants in 1964, relied too heavily on out-of-state bettors.

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[43] See Weinstein and Deitch at 35-48.

[44] Id. at 68. See also Easy Money at 50. Until 1970 New Hampshire required a local option vote every 2 years to ratify the lottery. Curiously, the margin of approval for the 1964-1970 period rose from 3-to-1 to 6-to-1. See, State Revenue at 11, and G. Sullivan, By Chance a Winner 103 (1972). See also N.H. Rev. Stat. Ann. §284:21-k (Supp. 1975).

Twelve states introduced lotteries from 1967 to 1976, each taking a slice from the lottery pie.[45] New Hampshire's sweepstakes, losing its monopoly position, novelty, and appeal to non-resident bettors, simply had to settle for a smaller slice.

Second, the cost of a New Hampshire lottery ticket was $3. More a minor investment than an impulse purchase, the ticket was too costly for some bettors. The Granite State priced itself out of the urban and low-income markets where numbers games are the strongest. If New Hampshire intended to displace organized illegal gambling, this was hardly the way to go about it. If New Hampshire intended to raise revenue by displacing the Mafia, it needed a ticket that all potential bettors could afford.

Third, New Hampshire sold its lottery tickets only at race tracks and the 49 state liquor stores. This was an admirable way to capture the tourist trade. But these locations were plainly inconvenient for the general public. When other states established lotteries, New Hampshire was especially unprepared to win its domestic gambling market.

Fourth, New Hampshire operated its lottery without the benefit of the computer. To circumvent federal prohibitions against interstate transportation of lottery tickets and equipment, New Hampshire forced players to

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[45] Easy Money at 50, 51.

fill in each stub by hand. The procedure was "costly and annoying to many potential players."[46]

Fifth, persons playing the New Hampshire lottery could not choose their own ticket number, had to wait months for drawings, could not find out winning numbers on interstate media, and had to pay federal income tax on their prizes.[47] Hence, sales dwindled. New Hampshire failed to create a lottery for the market.

In 1967 New York also introduced a lottery. Although it cut New Hampshire's gross revenues in half, it "similarly failed to meet its early revenue projections...."[48]

Learning from the mistakes of New Hampshire and New York, however, New Jersey instituted a lottery in 1970[49] and tailored it to suit the consumer. New Jersey offered 50 cent tickets and selected winners first monthly, then weekly. New York, however, continued to draw prizes every month; New Hampshire every four. New Jersey also offered a high payout ratio, setting aside roughly 70% of total revenue for the payment of prizes, expenses, and start-up

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[46] Until the enactment of 18 U.S.C. §1307 (Supp. 1975) which carved out an exception for state-conducted lotteries, 18 U.S.C. §1301 (1970) banned the interstate transportation of lottery tickets. See Easy Money at 31 and U.S. v. Fabrizio, 385 U.S. 263 (1966).

[47] See Easy Money at 31, 35, 50-51. See also 18 U.S.C. §1304 (1970) and 18 U.S.C. §1307 (Supp. 1975).

[48] Easy Money at 50. See also State Revenue at 16.

[49] See N.J. Stat. Ann. §§5:9-1 et seq. (Supp. 1975). See generally Easy Money at 50-51.

costs.[50] The Garden State also computerized its entire lottery system; tickets individually numbered by machine permitted faster sale and selection and reduced chances of fraud and forgery. New Hampshire and New York persisted in using handwritten stubs. New Jersey also introduced tickets offering more than one chance to win. Thus, a player who failed to win the top prize in one drawing might win an even larger grand prize in another. As a result of these marketing techniques, New Jersey sold $178 million worth of lottery tickets in fiscal 1971.[51] "In the first year of direct competition, New Jersey outgrossed New York by almost three to one."[52]

New Jersey's success was not lost on the other lottery states. New Hampshire also began holding weekly drawings. Sales more than doubled to $4.3 million.

> New York then overhauled its lottery along New Jersey lines, increasing prizes from 30 to 40 percent of gross sales, slashing ticket prices, and introducing weekly drawings. Sales jumped immediately, reaching a high in fiscal 1972 of $77 million.[53]

New Jersey's lottery, although most successful, soon began to suffer form the competition of New York and Pennsylvania. The Garden State then introduced the

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[50] N.J. Stat. Ann. §5:9-7(11)(1973).

[51] See N.Y. Times, July 4, 1976, §4, at 4, col. 3.

[52] Easy Money at 50.

[53] Id. See also State Revenue at 12.

daily lottery. This strategy failed to overwhelm the competition, however, "and New Jersey began experimenting with special prizes, cars, and groceries to revive public interest."[54] To expedite notification, for example, New Jersey established a lottery "hot-line." For a toll-free call, bettors could find out the daily and weekly winning numbers. Billboards throughout the state advertised the special phone number.[55]

In May, 1975, Governor Brendan Byrne announced that New Jersey would run a daily "pick-your-own-number" lottery for six weeks.[56] As the first realistic competition to organized illegal gambling, the Garden State's new game approximated the operation of the popular numbers rackets.

New Hampshire, Massachusetts, New York, and Connecticut have all moved from weekly to instant lotteries.[57] Bettors buy a $1 lottery card on which small chemical windows may be scratched away to reveal various symbols. If the symbols form a certain

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[54] Easy Money at 51.

[55] See generally New Jersey State Lottery Commission, Annual Report (1973).

[56] N.Y. Times, May 9, 1975, at 1, col. 1. Daily numbers games have also been introduced in Massachusetts and Rhode Island in 1976. Second Interim Report at 61. Most recently, New York joined the "instant lottery" crowd. N.Y. Times, Sept. 1, 1976, at 1, col. 6.

[57] See, e.g., Conn. Gen. Stat. Ann. §12-568(b) (Supp. 1975).

combination, then the player wins and can often collect small prizes from the agent who sold him the ticket. This lottery offshoot generated controversy in Massachusetts where it was likened to a slot machine which encourages winners and losers alike to pour money into additional chances. Citing the impossibility of coming out ahead in such a spree, one legislator dubbed it the "instant loser" game.[58]

After the first eight weeks of operation, however, the New Hampshire instant sweepstakes produced a 172% jump in lottery revenue over the previous year.[59] This success encouraged New Jersey to consider a similar game to be conducted along with the existing daily numbers game.[60]

Not every state, of course, has gone to this extreme in its marketing. Most have simply employed the traditional selling techniques that businessmen have used for decades. Massachusetts, Connecticut, and New Hampshire, for example, have drastically expanded the number of their ticket outlets. Although the Granite State initially restricted sales to racetracks and state liquor stores, it now allows sales at branch offices

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[58]Conversation between Phillip G. Rapoza, Cornell Institute on Organized Crime student aid, and State Senator David Locke. Spring 1973. On the dangers of the instant lotteries, see Second Interim Report at 64.

[59]New Hampshire Sweepstakes Commission, New Hampshire Sweepstakes News, March 28, 1975.

[60] N.Y. Times, May 9, 1975, at 1, col. 1.

of the Sweepstakes Commission, toll stations, some state parks, and mobile units.[61] Massachusetts and Connecticut have each established more than 3,000 ticket outlets.[62] The result of these marketing techniques has been increasing competition among the lottery states, and greater promotion of the state-run games. Rising to the challenge, Connecticut raised its top prize to $1 million.[63] Other states spurred public interest by spreading prize money thinner, offering more but leaner prizes.[64] Some states economized on claims procedures by allowing ticket agents to award small prizes at the instant won.

One of the most innovative lottery marketing techniques has appeared in Michigan. In Dearborn, auto workers enjoy the opportunity to buy tickets with a portion of each paycheck through an automatic "payroll deduction plan."[65] In effect, the program is little more than a sugar-coated withholding tax.

In short, the recent history of the state lotteries

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[61] N.H. Rev. Stat. Ann. §284:21-h (Supp. 1975).

[62] Weinstein and Deitch at 65-66. See Conn. Gen. Stat. Ann. §12-569(a)(Supp. 1975).

[63] N.Y. Times, Feb. 20, 1974, at 21.

[64] Bird at 19 and "State Lotteries: A Legal Sucker Bet," Consumer Reports 178-79.

[65] N.Y. Times, Nov. 12, 1972, at 63.

can be characterized as a roller coaster of successes and failures. Three broad phases of development can be discerned in the trends of the lotteries. The first is typified by New Hampshire's early experience. Without competition or precedent, New Hampshire set up its lottery on a "take-it-or-leave-it" basis. As a novelty and monopoly it fared well, but it ultimately suffered from competition and poor marketing strategy.

The second phase is typified by New Jersey's successful lottery. Influenced by consumer preferences and tailored to the bettor, the game has remained consistently profitable. Observing New Jersey's success, other states revamped their lotteries, leading to a new wave of competition and promotion. States began to create lotteries for the market.

In the third and current phase, however, the states create markets for the lottery. The bureaucracies which administer and advertise the lotteries have a vested interest in their success. Legislatures depend more and more on lottery revenue to balance state budgets. Raising money has become the paramount government concern with respect to lotteries. Patrons of illegal games apparently cannot be enticed in great numbers to play the government's game, so the government must create a gambler who will. Now that the states have entered the lottery business, the vast power of the government is now directed toward fashioning a new breed of bettors.

The public receives little information about the lotteries and retains even less control over them. The government is geared up to "sell" the lottery. The inertia of the lottery and its bureaucracies---unrestrained by a knowledgeable citizenry---makes it difficult for the government to balance policies inconsistent with the existence of the state-run games.

Historically, once the question of whether to run a lottery was answered in the affirmative, the only remaining question was, "How do we make it successful?" The government's focus has been on the second question. The questions are in fact closely interrelated. Consequently, this section will re-examine the desirability of lotteries in light of how the states have promoted them.

The Task Force on Legalized Gambling summarized the problem this way:

> A state government engaging in legalized gambling requires a bureaucracy that, once established, acquires a life of its own. In addition to assuring the continuation of its own jobs and responsibilities, the bureaucracy will look for expansion of its jurisdiction---thus placing excessive and misplaced reliance on gambling activities for revenue production instead of developing more effective and more equitable sources of revenue.[66]

To legislators, the lottery means patronage. Although

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[66] Easy Money at 8. In general, the administrative bureaucracies of lotteries are listed in State Revenue at 8-10.

some states require bipartisan lottery commissions[67] and civil service procedures for lottery staffs,[68] other states have turned the lottery into a political plum. In Massachusetts, Republican opposition to the lottery prompted the Democratic majority in the legislature to grant all hiring and supervisory powers to the Democratic state treasurer rather than to the Republican governor.[69] Both parties managed to benefit, however, because so few lottery jobs require civil service procedures.[70] Because the lottery offers a way for legislators to reward the faithful[71] while generating profit for the state, many state governments have thus been eager to create---and preserve---a lottery bureaucracy.

The lottery is as important to its administrators as it is to its creators. Although it means patronage and profits to the politicians, the lottery offers jobs

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[67] See, e.g., Ill. Rev. Stat. ch. 120 §1156 (Supp. 1975); Me. Rev. Stat. Ann. tit. 8, §351 (Supp. 1975); N.J. Stat. Ann. §5:9-5 (1973); and Ohio Rev. Code Ann. §3770.01 (Supp. 1975).

[68] See, e.g., Md. Ann. Code art. 88D, §8(c)(Supp. 1975).

[69] See Mass. Gen. Laws Ann. ch. 10, §§23 and 24 (1973 and Supp. 1975).

[70] "State Lotteries: A Legal Sucker Bet," Consumer Reports at 179 (Feb. 1974).

[71] Phillip G. Rapoza, Cornell Institute on Organized Crime student aid, relates that when the Massachusetts Lottery was established, there were several instances in which staff members of various legislators became full-time lottery employees.

and power to its administrators. New York's recent lottery law, for instance, provides that the director of the lottery division

> may appoint such deputies, directors, assistants and other employees, committees and consultants as he may deem necessary. . .[and] fix their compensation. . .within the amounts provided therefor;[72]

Delaware allows its director of the state lottery to "appoint such professional, technical, and clerical assistants and employees as may be necessary to perform the duties imposed upon the office by this chapter."[73] In these states, at least, jobs for lottery employees depend entirely on the existence of the lottery and the discretion of its director.[74] Administrators therefore have a demonstrable stake in the continuation of the games. Lottery staffs typically derive power as well as jobs from the games. The New Jersey Lottery Commission, for example, may

> promulgate such rules and regulations governing the establishment and operation of a state lottery as it deems necessary and desirable in order that the mandate of the people. . .may be fully implemented....

Such regulations cover certain enumerated areas but may

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[72] N.Y. Tax Law §1603 (Supp. 1976).

[73] Del. Code Ann. tit. 29, §4805(b)(2)(Supp. 1975).

[74] New York's Governor Carey, for example, recently laid off all 318 Lottery Division employees. Ithaca Journal, Nov. 28, 1975, at 1.

also include "[s]uch other matters necessary or desirable for the efficient and economical operation and administration of the lottery...."[75] Most state lottery commissions enjoy similar power.[76] Lottery directors are, in general, solely responsible for conducting the day-to-day business of the lottery.[77] Such delegations of authority allow lottery commissions and directors ample opportunity to expand their jurisdictions and to operate the games without much legislative interference. Because they derive broad powers and lucrative jobs from the state-run games, lottery officials thus set the perpetuation of the legalized gambling system as their first priority.

Outside advertisers and contractors, too, have a stake in the perpetuation of the lottery. Connecticut paid Systems Operations, Inc. $275,000 to expand ticket outlets and to streamline the system generally. Massachusetts hired Arthur D. Little consultants for $300,000 to expand the number of ticket sellers. IBM won a $194,000 contract for the necessary computers and related programs.[78] The Scientific Games Corp. recently won a $2.5 million contract

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[75] N.J. Stat. Ann. §5:9-7 (1973).

[76] See, e.g., Ill. Rev. Stat. ch. 120, §§1157.1 and 1157.2 (Supp. 1975) and Me. Rev. Stat. Ann. tit. 8, §353 (Supp. 1975).

[77] See, e.g., Md. Ann. Code art. 88D, §8 (Supp. 1975) and N.Y. Tax Law §1603 (Supp. 1976).

[78] See generally N.Y. Times, Feb. 27, 1972, §3, at 17, col. 1 and N.Y. Times, Feb. 2, 1976, at 1, col. 6.

from New York for

> the development of a complete lottery system including the printing of 150 to 200 million tickets, security planning, production of manuals for vendor and bank use, and related administrative manuals.[79]

In New Jersey, Bozell & Jacob won a $1 million, 9-month advertising contract for 1975. The firm also collects $2750 per month for unspecified "public relations" work.[80] The firm has won glowing praise from the New Jersey lottery chief for its innovative and effective sales schemes. The schemes include awarding Jaguar automobiles, vacation homes, college educations, Super Bowl tickets, and use of a jet airplane.[81] To be sure, the firm has done a great deal for New Jersey---but New Jersey has paid a great deal in return.

Because these advertising contracts depend solely on the existence of the lottery, ad agencies plainly have a stake in its continuation. Not accountable to the voters, the admen are concerned solely with making the lottery successful. As hired guns, they shape the public image

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[79] Ithaca Journal, July 10, 1976, at 15, col. 1.

[80] N.Y. Times, Nov. 18, 1973, at 119, col. 3. Bozell replaced Bofinger and Kaplan which had received the previous ad contract without public bidding. Bofinger was later accused of making illegal contributions to the campaign of Governor Cahill.

[81] N.Y. Times, Nov. 18, 1973, at 119, col. 3. To illustrate the overall effectiveness of this lottery promotion, it is noteworthy that lotteries "are the third most available form of gambling" and are accessible at approximately 70,000 sales outlets. Second Interim Report at 61.

of the state game. They create consumers---gamblers---from persons who otherwise might never bet. Ad agencies, though, never have to answer to the voters for their conduct. They are simply part of the insulated and growing bureaucracy which benefits from and shapes the lottery but which sets the continuation of the game as its primary objective.

Bureaucratic inertia, alone, however, does not subvert public policy. The deeper problem is whether the lottery is a sound way to raise money. Only when the lottery is identified as a good or bad system will anyone know whether the bureaucracy is moving society in a positive or negative direction. The game's worth can only be assayed by a careful and thoughtful balancing of all its economic, political, social, and moral implications. This is what the lottery bureaucracy is supposed to do. Unfortunately, with its stake in the venture it cannot be counted on to do this balancing well---or even to do it at all.

Indeed, balancing needs to be done. The Task Force on Legalized Gambling found that "a policy designed to maximize public revenue from gambling may conflict with other policies in the public interest."[82]

States also recognize that such trade-offs exist. Delaware requires that its lottery be operated to "produce the maximum amount of net revenues consonant with the

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[82] Easy Money at 8 (emphasis in original).

dignity of the State and the general welfare of the people."[83] A Michigan statute provides that the "lottery shall produce the maximum amount of net revenues for the state consonant with the general welfare of the people."[84] These provisions tacitly acknowledge that lottery profits may be inconsistent with other state policies.

That the lotteries are economically unsound has already been discussed in this chapter.[85] Some of the tax aspects of the lottery, however, reflect not only inherent shortcomings of the game but also the government's inability to balance policies.

The lottery, by all accounts, is not a fair tax. Even worse, it enables states to avoid the hard decisions that lead to fair taxes. In part because of its lottery, New Jersey managed for years without a broad-based income tax. Thanks to the courts, at least, it now has one.[86] New Hampshire has similarly dodged tax reform and relied primarily on "sin taxes." One observer noted that if New Hampshire ever replaces its lottery

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[83] Del. Code Ann. tit. 29 §4805(a)(Supp. 1975).

[84] Mich Stat. Ann. §18.969(9) (Supp. 1975). See also N.J. Stat. Ann. §5:9-7a (1973). Pennsylvania, in contrast, simply lists aiding the elderly and curbing illegal gambling as the purposes of its lottery. Pa. Stat. Ann. tit. 72, §3761-2 (Supp. 1975).

[85] An earlier section of this chapter dealt with the economic implications of the lottery. See text, supra.

[86] See N.Y. Times, July 11, 1976, §4, at 4, col. 1 and N.Y. Times, Jan. 25, 1976, §E, at 7, col. 1.

with more conventional revenue measures it will "consign the Sweepstakes to a long list of revenue oddities... including the head tax, a tax on poultry and a tax on inventories."[87] Meanwhile, bureaucratic inertia and palliatives like earmarking divert attention from the question of whether lotteries belong in state tax schemes at all.[88]

In short, states and lottery bureaucracies have grown so financially dependent on the lottery[89] that they will not rid themselves of a game unless it becomes a spectacular and blatant failure.[90] Otherwise, states concentrate on making their games increasingly profitable, blinding themselves to the deeper political questions. Emphasizing profit through promotion, however, raises still other serious political issues.

Without constant stimulation, the novelty of the lottery is apparently not long-lasting. Accordingly, states continually pander to the public's appetite for excitement, escape, and easy money. As summarized by the director of the New Jersey lottery, "Lotteries are

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87 Sam Rosen, "Lottery as a Source of Public Revenue," Taxes at 621 (Sept. 1966).

88 Id. See also Ithaca Journal, Dec. 9, 1975, at 15.

89 See N.Y. Times, Feb. 2, 1976, at 1, col. 6.

90 Delaware and New York have experienced such failures. See N.Y. Times, Apr. 13, 1975, at 41, col. 1; Nov. 29, 1975, at 79; Nov. 4, 1975, at 37, col. 1; and Nov. 29, 1975, at 1, col. 3.

like living things. They must be massaged to retain the interest and excitement of the public."[91]

Connecticut's 1974 Annual Report refers to a special "benchmark research study" to "analyze consumer awareness, purchase patterns and attitudes...."[92] The result of this high-level effort was Captain Cash. Advertisements depict him---dressed like Flash Gordon---flying into stores to explain the advantages of lottery gambling.[93] Ad campaigns elsewhere emphasize four-leaf clovers, pots of gold, and cartoon formats. Typical sales slogans include "Hit it big!" and "Someone is always winning; it might as well be you!"

Ticket drawings are no more tasteful or sophisticated than ticket sales. New Jersey conducts drawings around the state on a 32-foot trailer called the "Showmobile." Jack Taylor, the state's emcee, comes on stage to the tune of "I'm Looking Over a Four-Leaf Clover." He selects winners amid computer-like machines, bouncing balls, bright colors, blinking lights, and, of course, beautiful women.[94] New Jersey once hired the noted

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91 N.Y. Times, Jan. 13, 1973, at 1, col. 1.

92 Connecticut State Lottery Division, Commission on Special Revenue, Annual Report at 2 (1974).

93 It is noteworthy that such advertising does not seem designed for Connecticut's highest-paid and best-educated residents.

94 N.Y. Times, Sept. 20, 1972, at 1, col. 4.

"miser" Jack Benny to make a million-dollar award. During the thrilling festivities, Benny pretended to pass out. As an added touch, Henry Mancini and the orchestra performed for the audience.[95]

Lottery promoters also go to great lengths to ensure that all potential winners attend the final drawing. New York has flown in finalists from Brazil and driven others by limousine from the farthest tip of Long Island "...just so the news media can record their reactions when they win." Indeed, one finalist with a heart condition brought his nurse to the drawing in case the excitement overwhelmed him.[96]

Such sensational spectacles plainly degrade all of those involved, but particularly the state. When one state agency panders to public emotion and irrationality at this level, it casts the whole government into disrepute. Recent history indicates that the government can easily fall into disrepute without lotteries, but this is no argument for allowing them to hasten the process.

Deceit in lottery advertising also shakes public confidence in the government. States often award more, but smaller, prizes to create the illusion of higher

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[95] N.Y. Times, Aug. 5, 1971, at 26, col. 1.

[96] Bird at 22.

overall payout.[97] States sometimes employ misleading slogans.[98] States emphasize Captain Cash, the "Showmobile", and Jack Benny's dramatic award. States preserve the illusion that earmarking provides special benefits to worthwhile programs.[99] But they do not publicize payout ratios. They do not discuss what happens to unclaimed prizes. They do not reveal how each "new and different" game is new and different. They avoid the subject of income tax on winnings. One wonders how the government would respond to private industry's use of similar advertising techniques were it also in the lottery business.

Neal R. Pierce, writing for the Gannett News Service, described the problem this way:

> When lottery revenues began to plummet, a state is forced into a frantic search to get some alluring new twist to its games---drawings as frequent as once a day, cheaper tickets, and million-dollar payoffs (with astronomical odds against winning.)
>
> To succeed, each new wrinkle requires intensive, expensive

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[97] Id.

[98] Massachusetts, for example, no longer uses the slogan "One Winner Every 30 Seconds!". Instead, instant lottery tickets in Massachusetts now advertise that one out of five ticket holders wins. The latter is apparently more accurate than the former.

[99] Ithaca Journal, Dec. 9, 1975, at 15.

> promotion. Lottery states plunge deeper and deeper into the demeaning business of enticing their citizens into a new form of gambling---and that at a time of unprecedented public disillusionment about the integrity of government.[1]

Though not as widespread as degrading advertising, instances of corruption in the lottery bureaucracy have also shaken public confidence in the government. New Jersey's first lottery contract was not put up for public bidding. The firm winning the contract was later linked to illegal contributions to Governor Cahill's campaign.[2] Investigators discovered that New York's official ticket printer also printed stubs for illegal lottery operators.[3] Authorities also found a New York state computer supervisor forging tickets.[4] Registry of Motor Vehicle personnel (who act as prize cashiers in New York) were twice caught submitting fraudulent tickets for collection in their own names.[5] Irregularities have also occurred in Maryland, New Jersey, New Hampshire, Ohio, and Rhode Island.[6]

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[1] Id.

[2] N.Y. Times, Nov. 18, 1973, at 119, col. 3.

[3] N.Y. Times, Mar. 21, 1974, at 86.

[4] N.Y. Times, Aug. 12, 1972, at 25.

[5] N.Y. Times, Oct. 9, 1971, at 34, and Sept. 19, 1972, at 110.

[6] See N.Y. Times, Jan. 24, 1974 at 80, col. 7; Mar. 16, 1974, at 63, col. 3; Aug. 31, 1974, at 49; July 18, 1972, at 21; July 11, 1972, at 25; Aug. 17, 1972, at 37; and Feb. 2, 1976, at 1, col. 6.

Most states, of course, try to eliminate corruption from their games. At one point, the directors of the New Hampshire, New York, and New Jersey lotteries were all former FBI agents.[7] A former FBI official headed the lottery security force in Massachusetts.[8] Nonetheless, instances of corruption receive widespread publicity and thus lend the impression that the whole government is incurably venal. The government cannot afford to allow its dismal public image to be further eroded by lottery corruption.[9]

State promotion of lotteries is troublesome not only because of its effect on the government but also because of its effect on the public. High pressure sales expose the public to subtle behavior modification techniques. To be sure, the government induces persons to join the Army or to buy bonds during military or economic emergencies. But pervasive government marketing is inconsistent with a free society during periods of normalcy.

The foremost advantage of the lottery as a revenue measure is that participation is voluntary. Once the

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[7] Sullivan at 121-22.

[8] Massachusetts State Lottery Commission, Facts About the Massachusetts Lottery 1 (undated).

[9] The public has lost confidence in the government and the lottery bureaucracy not only through corruption but also through bureaucratic ineptitude. See, e.g., N.Y. Times, Apr. 13, 1975, at 41, col. 1; Nov. 22, 1974, at 43; Oct. 22, 1975, at 37, col. 7; and Nov. 4, 1975, at 37, col. 7; and Nov. 4, 1975, at 37, col. 1.

state begins to induce gambling through a barrage of advertising, that advantage becomes illusory. The Task Force on Legalized Gambling reports that current lottery sales techniques may "signal the beginning of a new technology---behavior modification by government persuasion."[10]

Persuasion may be more dangerous than coercion for it is an unseen force. A person realizes that he is forced to pay a tax, but not that he is enticed to gamble. Lottery promotion may therefore be so insidious that it may never be accorded its full weight as an anti-lottery consideration.

b. State and Federal Lottery Controls

The states not only manipulate the public but also create public disrespect for the law. States have flouted federal lottery laws, created special state-tax loopholes for winnings, and treated state-run and unlawful gambling inconsistently. The combination of these factors calls into question the ability of the states to draft or to obey gambling laws, once they have entered the lottery business.

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[10] Easy Money at 75. The results of lottery marketing are plain Almost "one-quarter of the adult population in the United States bought lottery tickets in 1974. Lotteries have a broader participation rate than any other form of commercial gambling, drawing players from all demographic groups." Moreover, since "the introduction of the original New Hampshire Sweepstakes in 1964, the state lotteries have systematically increased public awareness and participation in this passive form of legal gambling through their ability first to identify their market and, second, to produce and advertise a diverse line of games in order to cater to the particular desires of different segments of the population within their states." Second Interim Report at 62.

The early lotteries were markedly hampered by federal controls. For years it has been a federal crime to broadcast lottery information,[11] mail lottery tickets,[12] or transport lottery tickets or advertisements across state lines.[13] There has been a federal excise tax on certain wagers.[14] Prizes are federally taxable as income.[15] State-run lotteries have thus been placed at a competitive disadvantage relative to their illegal counterparts and to conventional businesses.[16]

States have responded in several ways to these federal restrictions. To protect visiting bettors---and itself--- New Hampshire devised a clever system of record-keeping. The out-of-state customer would pay his $3.00 and write his name and address on a stub. The original, entitling the winner to a prize, never left New Hampshire. The duplicate, "acknowledging" the transaction but insufficient for collection, was retained by the bettor. The process

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[11] 18 U.S.C. §1304 (1970). But see 18 U.S.C. §1307 (Supp. 1975).

[12] 18 U.S.C. §1302 (1970). But see 18 U.S.C. §1307 (Supp. 1975).

[13] 18 U.S.C. §1301 (1970). But see 18 U.S.C. §1307 (Supp. 1975).

[14] 26 U.S.C. §§4401, 4402, and 4421 (1967 and Supp. 1975).

[15] 26 U.S.C. §74 (1967).

[16] See generally Easy Money at 14-15, 31-32, and 81-86; and Ernest T. Bird, "State Lotteries--A Good Bet," State Government (Winter 1972).

was inconvenient but necessary to circumvent federal prohibitions against interstate transportation of lottery tickets.[17]

By the same token, New York developed an ingenious method to evade laws against mailing lottery prizes.[18]

> Lottery officials would open a bank account in Albany in the winner's name. They would then close out the account, and the bank would mail a bank draft to the winner.[19] Although unchallenged more because of its form than its substance, the scheme did enable lottery officials to mail prizes to distant or out-of-state winners.

Lottery-related shipments had to be made by intra-state truck or bus.[20] Billboard paper needed in western New York could not be transported across a corner of Pennsylvania on its way from New York City. Drivers were forced to follow more expensive routes entirely within New York.[21]

States thus managed to get around most federal

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[17] Easy Money at 31. But see U.S. v. Fabrizio, 385 U.S. 263 (1966).

[18] 18 U.S.C. §1302 (1970). But see 18 U.S.C. §1307 (Supp. 1975).

[19] Bird at 23.

[20] Id. at 20.

[21] Sullivan at 105.

controls. Staying within the letter of the law raised costs and lowered efficiency, but most states did their best under the circumstances.

Lottery states had a more difficult time publicizing lottery information. Some newspapers had to refuse lottery advertisements because a few readers received their subscriptions by mail.[22] Although most states turned to billboards and subway signs, some tried to broadcast lottery information.

In 1968 the Federal Communications Commission began to bear down on the state lotteries. It ruled that federal law applied to state and private lotteries alike. Later F.C.C. guidelines allowed the broadcasting of opinion polls on lotteries and news of their political and economic effects. Interviews with winners were permitted if the stories were more of a human interest than a promotional nature. Of course, the F.C.C. still prohibited broadcasting winning numbers, advertisements, or prize lists.[23]

As a result of the various prohibitions, the states either had to violate the law and face prosecution, or circumvent the law and raise costs. Edward J. Powers, Executive Director of the New Hampshire Sweepstakes, lamented that,

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[22] Id. at 106.

[23] N. Y. Times, Feb. 28, 1970, at 57, col. 1.

> The full potential of this program as a revenue producer will not be realized until the severe federal restrictions relating to the use of the mails, radio, and television are relaxed, and the same merchandizing channels open to other forms of business are made available.[24]

The federal government, however, was in no mood to give the state lotteries any special break. Indeed, in 1974, Attorney General William B. Saxbe threatened to seek a permanent injunction against the operation of the state games. He then conferred with the governors of the thirteen lottery states and indicated that the games generally violated at least three federal criminal statutes.[25] As a result of the Justice Department's pressure on the states, Rep. Peter Rodino and Sen. Richard Schweiker introduced legislation to exempt the state lotteries from the laws in question.[26]

In 1975, Congress carved an exception for the state-run games. The new statute provided that the bans on mailing lottery tickets, broadcasting lottery information, and transporting lottery tickets across state lines did not apply to state-authorized lotteries.[27] States have since found it easier to market and operate

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[24] Sullivan at 105. See also N.Y. Times, Apr. 5, 1974, at 78, col. 1.

[25] N.Y. Times, Aug. 21, 1974, at 1, col. 1.

[26] N.Y. Times, Sept. 7, 1974, at 1, col. 4.

[27] 18 U.S.C. §1307 (Supp. 1975).

their lotteries.

The lottery states, however, have been less successful in circumventing and changing the federal tax laws. All winnings are still taxed as ordinary income.[28] Illegal gambling, however, offers confidentiality to its participants. As a practical result, winnings from those games go untaxed. Winning a legalized lottery, in contrast, is a public affair. It is extremely difficult to evade taxes on those prizes. Taxing legalized winnings, therefore, simply encourages bettors to patronize unlawful games.[29] Consequently, Rep. Stuart B. McKinney of Connecticut recently tried to exempt state-lottery prizes from federal income taxation. The Internal Revenue Service and the Treasury Department supported him, but he was ultimately unsuccessful.[30] Unable to change the income tax law, states have instead changed their payment schedules. Winners frequently receive prizes payable over long periods of time to reduce overall tax burdens.

States have had greater success in changing and avoiding the federal excise tax on certain wagers. At first, all wagers were subject to a ten percent

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[28] 26 U.S.C. §74 (1967).

[29] Easy Money at 15. See also Second Interim Report at 13-17.

[30] N.Y. Times, Mar. 31, 1973, at 42, col. 1.

levy[31] except those placed on a lottery where "the ultimate winners...are determined by the results of a horse race...."[32] A loophole existed for the benefit of the lottery states, but the horse-race-rule restricted politicians seeking to introduce new types of lotteries.

Responding to state pressure, Congress lowered the excise tax rate on wagers from ten to two percent.[33] Sen. Abraham Ribicoff and Rep. William Cotter later introduced a bill to free states from the excise tax altogether.[34] State agitation for a wider loophole is far from over.[35]

In sum, the states have led a three-pronged attack on federal tax and anti-lottery laws. When convenient, they have obeyed the letter, though rarely the spirit, of the federal lottery laws. When compliance was too costly, they simply violated the law, secure in the knowledge that the Justice Department could hardly treat states like common criminals. Nonetheless, when federal officials finally tried to make states conform to the

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[31] 26 U.S.C. §4401 (1967). But see Supp. 1975 for reduction of the tax rate.

[32] 26 U.S.C. §4402 (1967).

[33] 26 U.S.C. §4401 (Supp. 1975).

[34] N.Y. Times, June 14, 1975 at 12, col. 3.

[35] On the issue of Federal taxes and state-conducted gambling, see Easy Money at 83-85.

law, the states pressed Congress to make laws conform to the states. Lottery states have not won all they have sought, but their extraordinary ability to find, and to create, loopholes in the federal criminal code does little to engender public respect for the law. States that require compliance and orderly reform from the public should ask no less of themselves.[36]

Lottery officials have also sought favorable statutory reform at the state level. Accordingly, Delaware, Maine, Michigan, New Hampshire, New Jersey, Pennsylvania, and Rhode Island generally exempt lottery winnings from state and local taxes.[37] This exemption makes state-run lotteries better able to compete with illegal games. The net result, however, is to tax earned income but not fortuitous winnings. Such a loophole, designed more to enrich the state than to relieve taxpayers, does little to cultivate confidence in state tax structures.

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[36] State lotteries and Federal banking controls have also led to conflict. In 1968, most lottery vendors in New York were banks. The Federal government forced banks out of the lottery business, however, presumably to preserve their integrity. See Sullivan at 106, 109 (1972) and 12 U.S.C. §§25a, 339, 1730, and 1829a, as of 1974.

[37] Del. Code Ann. tit. 29, §4817 (Supp. 1975); Me. Rev. Stat. Ann. tit. 8, §367 (Supp. 1975); Mich. Stat. Ann. §18.969(34) (Supp. 1975); N.H. Rev. Stat. Ann. §284:21-r (Supp. 1975); N.J. Stat. Ann. §5:9-23 (1973); Pa. Stat. Ann. tit. 72, §3761-14 (Supp. 1975); and R. I. Gen. Laws Ann. §42-61-17 (Supp. 1975).

State criminal codes, as well as tax structures, promote disrespect for the law. For years, law enforcement officials have prosecuted gambling. Various states have recently legalized some forms of gambling. Lotteries, however, represent state conduct which actively promotes gambling. The inconsistency of these co-existing policies has not been lost on the public. The Commission on the Review of the National Policy Toward Gambling has summarized the problem as follows:

> Throughout the Nation, gambling is at the same time prohibited and encouraged. . . .State-run lotteries and numbers games have been instituted, but these same forms of gambling are prohibited if privately run.
>
> The existence of gambling that is sanctioned, licensed, or run by the various States---and the attendant publicity---promote peoples' interest in gambling and increase their desire to gamble. Policies that help to create a public demand for gambling coexist with policies that prohibit the supplying of services to meet the demand. . . .Policymakers, however, apparently see no connection between their decisions and the existence of the illegal gambling market.[38]

State lottery policies have eroded respect for the law. The states have found and created loopholes in some federal laws and have simply disobeyed others. States exempted windfall lottery winnings from taxation. States carved exceptions from criminal codes to permit their

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[38] Second Interim Report at 31-32.

own brand of gambling. The result is growing public disillusionment with the government, the law, and the lottery.[39] Such a trend, of course, makes the tough fight against organized crime even more arduous.

3. The Effect of Lotteries on Organized Crime.

The Task Force on Legalized Gambling believes the law enforcement role of legalized gambling is more important than its revenue potential.[40] Nonetheless, "legalization is not an effective weapon against organized crime."[41] Moreover,

> while legalization of gambling may be useful in combatting illegal gambling activity in some circumstances, it is no substitute for a broad and sustained assault on all aspects of organized crime.[42]

The reasons for the lottery's failure to reduce illegal gambling are many. Illegal operators offer confidentiality to their patrons. The Internal Revenue Service will not learn of a bettor's winnings. The bettor's family will not learn of his losses.

Unlawful games typically draw their personnel---and their sales---from low-income urban areas. Numbers promoters and players frequently share ethnic, racial,

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[39] See generally id. at 25-38. See also Easy Money at 78-79.

[40] Easy Money at 2.

[41] Easy Money at 9.

[42] Easy Money at 10 (emphasis in original deleted).

or geographic roots. State-run games are therefore foreign and resented intrusions on the neighborhood games. Since numbers rackets generally enjoy such strong community identification and orientation, they can easily extend credit to bettors. States, however, demand cash on the barrelhead.

In general, numbers games offer better odds, higher payout, cheaper tickets, and faster drawings than the state-run games. Illegal operators allow bettors to select their own ticket numbers and afford simple, convenient procedures for playing and paying off.

In sum, about the only advantage of playing a legal game is that it is legal.[43] In 1972, the head of the New York lottery admitted:

> We have no hard evidence that our lottery operation has hurt the illegal numbers racket. But at least we offer the opportunity to those of its patrons who might wish to divert their money to legal channels, for the public good, instead of lining the pocket of the criminal element.[44]

The lottery has not been fully successful at fighting crime nor at raising revenue. The difficulty is that the two objectives are incompatible. The Task Force on Legalized Gambling concludes that a "legal game may further one or the other objective but seldom both...."

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[43] Easy Money at 57; N. Y. Times, Oct. 1, 1972, at 81, col. 4; Apr. 26, 1970, at 49, col. 1; Dec. 13, 1972, at 114, col. 4.

[44] Bird at 25.

> Legalization is an effective law enforcement strategy only to the extent that legal games draw customers away from existing illegal games. This objective requires a high prize structure, which means lower profits or revenues; otherwise, the game may attract novice players, but it will not draw established customers away from illegal games. Clearly, such a game is no solution for law enforcement problems. The tendency of governments to create new low prize games such as daily lotteries, while permitting the de facto decriminalization of illegal games, has demonstrable defects---limited revenues, continued illegality, continuous police payoffs, and increased hypocrisy.[45]

Trying to balance the dual objectives has resulted in a two-tier market. Unable to compete with the underworld, states have created new gamblers, increasing the public's overall appetite for gambling. A recent study indicates that the "introduction of a State Lottery appears to increase numbers playing rather than to decrease it as is often predicted."[46] Of course, this was not the intent of the first lottery promoters, but once the states committed themselves to the lottery business, they had to make the games successful.

A cruel dilemma faces the states. If they ever manage to supplant the numbers rackets in the inner city, they will exploit the same poor people that criminals have always victimized. If the states continue to create

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[45] Easy Money at 11-12.

[46] Second Interim Report at 44.

new gamblers, they will dramatically increase the total amount of gambling conducted in America. A third choice, of course, is to shut down the legalized games, but that option has been practically foreclosed by a growing state dependence on lottery jobs and profits.[47]

4. Conclusions About Modern Lotteries.

On balance, the lottery is an unsound way to raise money and an ineffective way to fight crime. Unlike a traditional "sin tax" which yields revenue while reducing "sin," the lottery can only yield revenue by increasing "sin."

Marketing the lottery numbs the states' sensitivity to the public interest and undercuts the voluntariness of public participation. As states promote their games they engender public disillusion with government and disrespect for the law.

Narrowing the lottery's objectives, however, might improve its performance. If at all, lotteries should be run strictly to service the public's desire for risk or to displace the mob (with all revenues after expenses returned in prizes). Politicians would lose their financial stake in the lottery's success and could then resume their policy-balancing role.[48]

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[47] N.Y. Times, Feb. 2, 1976, at 1, col. 6.

[48] See Easy Money at 7; Robert K. Kinsey, "The Role of Lotteries in Public Finance," National Tax J. at 19 (March 1963).

Many persons, however, question whether states should be in the lottery business at all. This chapter's exploration of the lottery's costs and benefits demonstrates that no easy answer exists. It does show, however, that the current lotteries are undesirable. States should narrow and define the objectives of their lotteries, or perhaps eliminate them altogether.[49]

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[49]These conclusions are not unlike those of Ezell at 280-81:

> [I]f history teaches anything, a study of the over thirteen hundred legal lotteries held in the United States proves these things: they cost more than they brought in if their total impact on society is reckoned; and that one hundred and sixty years' experience indicates that the most careful supervision cannot eradicate the inevitable abuses in a system particularly susceptible to fraud.
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> Whether the lottery's abolition was a major reform of part of a recovering cycle is yet to be seen. It is certain, though, the American people will be given ample opportunity to decide.

Chapter VIII. MODERN CODES

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Chapter

CHAPTER VIII. MODERN CODES

A. Introduction

In 1971, a Roman Catholic Church in Iowa conducted a fund-raising picnic attended by 3,000 people. The church sponsored, among other activities, bingo, roulette, and crap games, all illegal under Iowa law. State Attorney General Richard Turner had the parish priest arrested for keeping an illegal gambling house. The priest was fined $100. Later that year, in response to pressure from those who felt the Catholics had been harrassed, Turner also shut down the carnival games at the Iowa State Fair.[1] Indeed, one newspaper then reported that, "Cub Scouts will be in violation of Iowa gambling laws if they charge for bean bag or ring tosses at their carnival. . . ."[2]

Adverse public reaction to the "bingo busts" brought quick legislative response. In 1972, the Iowa constitution, a product of an earlier Jacksonian era, was amended. The following year the legislature enacted the first major changes in the state's century-old gambling laws.[3] The intent of the

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[1] See N.Y. Times, June 24, 1975, at 15, col. 1 and "Fat City Iowa," Newsweek, Apr. 28, 1975, at 10.

[2] N.Y. Times, June 21, 1972, at 86, col. 1.

[3] See Iowa Code §§726.1 to 726.13 (Supp. 1974). See also Iowa Code §§726.1 to 726.13 (Supp. 1975) for additions to and corrections of these initial reforms.

reform was to legalize the gambling that Turner had halted but which Iowans deemed harmless. In the rush to allow certain forms of gambling 'incidental to a bona fide social relationship,'[4] the Iowa legislature almost overlooked the professional gambler. The new code provisions did permit social gambling and prohibit casinos and house profits,[5] but they also created dangerous loopholes. Bookmaking operations and "punchcard" games were acknowledged to be legal.[6] The dollar limitations on "social" games were unenforceable.[7] Iowa was reportedly so "wide open for gambling" that it was attracting professional gamblers from the West Coast, Las Vegas, and Chicago.[8] In 1974, with the gambling code revisions in effect, Iowa's booming new gambling industry handled an estimated $37 million.[9] The effects of Iowa's legislative reform proved to be unexpectedly and strikingly broad.

In Washington, D.C., in 1973, the Washington Lawyers'

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[4] See Act of May 30, 1973, ch. 153, §20, [1973] Acts of Iowa 353. This provision, codified as Iowa Code §726.12, has since been repealed by Act of July 17, 1975, ch. 99, §25, Acts of Iowa 251.

[5] Id.

[6] Division of Vice Enforcement, Iowa Dept. of Public Safety, Gambling in Iowa--Social Gambling Law Violations (unpublished report covering January 1, 1972 to March 31, 1975) at 2-3 (1975).

[7] N.Y. Times, June 24, 1975, at 15, col. 1.

[8] "Fat City Iowa," Newsweek, Apr. 28, 1975, at 10.

[9] N.Y. Times, June 24, 1975, at 15, col. 1.

Committee for Civil Rights under Law proposed a model for a legalized numbers game.[10] The proposal thoroughly discussed the factors which would enable a legal game to compete effectively with an illegal game: high payoffs, frequent drawings, and accessible numbers sellers. Unfortunately, the recommendations ended without a full and detailed description of the operation. The Lawyers' Committee did point out that the evils of numbers games can be fought without total prohibition. In no part of the report, however, did the Committee discuss how to combat the illegal, unlicensed operations which might remain in existence after legal games are begun.

The examples of actual reform by Iowa and proposed reform by the Lawyers' Committee point out the pitfalls of modern thinking about gambling. Legalization of selected gambling operations cannot be successfully accomplished unless illegal operations can be kept under control. Careful and deliberate decriminalization on the one hand requires tight prohibition and vigorous law enforcement on the other. States have strong interests in allowing some social and charitable gambling but also in curbing organized and professional gambling. Optimizing these interests requires delicate balancing and thoughtful drafting. This chapter will examine the recent legislation of a number of states to determine how effectively

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[10] See Washington Lawyers' Committee for Civil Rights under Law, Legalized Numbers in Washington (1973).

the law enforcement part of that balance has been struck legislatively in dealing with gambling.

B. Illegal Gambling

1. The size of the problem

Most observers agree that organized gambling is big business.[11] Estimates of the amount wagered annually through organized illegal operations vary greatly, but virtually all are in the billions of dollars.[12] A recent study estimates that 16 million Americans bet more than $5 billion in 1974.[13] Although organized crime controls an estimated 50% of illegal

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[11]The term "organized illegal gambling" is meant to include unlawful professional gambling in which one or more of the participants runs the gambling activity as a business and seeks to make a profit from it (e.g., bookmaking, numbers, operating a casino, owning slot machines). It is not meant to include private social gambling between friends, where, except for the operation of chance, one player has no greater opportunity than the other of gaining from the outcome of the event bet on.

[12]See Commission on the Review of the National Policy Toward Gambling, Second Interim Report at 25-39, 46 (1976) [hereinafter cited as Second Interim Report]. See also Task Force on Legalized Gambling, Easy Money at 53 (1974) [hereinafter cited as Easy Money].

[13]Second Interim Report at 1, 39, 40, 46. See also J. Marcum and H. Rowen, "How Many Games in Town? The Pros and Cons of Legalized Gambling," The Public Interest, No. 36, Summer 1974 at 28-41 [hereinafter cited as Marcum and Rowen]. The Commission on the Review of the National Policy Toward Gambling presents estimates far below those of the Justice Department and other authorities. The Commission's estimates excluded the bets that bookies "lay off" on one another. The survey found urban dwellers who presumably do the most gambling particularly non-responsive. Some high-income bettors, perhaps not trusting the confidentiality of the survey, may have understated their gambling losses. In short, the illegal handle in America remains largely a matter of guesswork.

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gambling in some areas of the country,[14] the large syndicates are not responsible for all of the problems. Many operations are strictly local in scope, and are not tied either financially or administratively to other underworld activities.[15] Nonetheless, it is beyond doubt that organized crime profits tremendously from illegal gambling.[16] Further, many illegal gambling networks, whether local or national, use some of their revenues for the corruption of law enforcement officials.[17] At the very least, this bribery vitiates the effectiveness of other criminal laws.

2. The nature of the response

In recent years, many states have reviewed and rewritten their gambling laws. Three reasons serve to explain this trend. The first is that the nation has been experiencing a general penal law recodification movement. Gambling laws are thus reconsidered as part of the general criminal laws of

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[14] See U.S. Department of Justice figures from May, 1974, cited in Easy Money at 9. The estimated percentages of illegal gambling controlled by the Mafia in various areas of the country are: Far West, 29.2%; Midwest, 47.4%; Northeast, 53.2%; Southeast, 35.7%; and Southwest, 2.0%.

[15] Easy Money at 9.

[16] "Law enforcement officials agree almost unanimously that gambling is the greatest source of revenue for organized crime." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime at 2 (1967). See also "The Conglomerate of Crime," Time, Aug. 22, 1969, at 19-20.

[17] It was recently estimated that pay-offs to law enforcement personnel from gambling activities alone are as high as $500 million a year. Marcum and Rowen at 40. See also Second Interim Report at 28-29.

various states.

The second reason is that a number of states have responded to calls for the legalization of "victimless crimes." Many persons believe that no one is injured by gambling, especially by private or social gambling. Hence, there is some incentive to relax gambling laws, at least for some charitable or non-commercial forms of the activity.

The third reason is that society feels increasingly threatened by the professional forms of gambling. The Kefauver Committee in 1950-1951 helped uncover and publicize the danger posed by organized crime.[18] Its reports exposed the link between gambling, "big-time racketeering and gangsterism."[19] Since 1952, many states have revamped their gambling laws in response to these revelations.

Helping to touch off state revision of these laws was the Model Anti-Gambling Act. Drafted by the American Bar Association Commission on Organized Crime, the act was approved by the National Conference of Commissioners on Uniform State Laws in 1952.[20] The statement of legislative policy for the act takes note of ". . . the close relationship between professional gambling and other organized crime, . . ." and declares the legislature's intent ". . . to restrain all persons from seeking profit from gambling activities. . . ."[21]

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[18] The Kefauver Committee on Organized Crime (Didier ed. n.d.).

[19] Id. at 175.

[20] See ABA Commission on Organized Crime, Model Anti-Gambling Act (1952) [hereinafter cited as Model Act].

[21] Id. §1.

The Model Act differs from those state provisions existing when it was drafted by treating gambling as a generic offense having particular characteristics. State laws generally treated gambling as a great number of games and schemes, each of which had to be specifically enumerated and banned.[22]

Since the drafting of the Model Act, at least 25 states have enacted similar modern anti-gambling provisions.[23] It

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[22] Id. at 4-5.

[23] These materials are concerned mainly with states whose criminal code sections prohibiting gambling (1) deal with gambling totally or for the most part as a generic offense, and (2) are aimed at curbing organized (professional, commercial, syndicated) illegal gambling. Not included in the count are those states which have merely added a single section prohibiting gambling as a business to a list of prohibited games and schemes. Two states, Indiana and Tennessee, which added major portions of the Model Act to their lists of illegal games have been included.

The following states have rewritten or added substantial modern provisions to their anti-gambling codes:

Colorado: Colo. Rev. Stat. Ann. §§18010-101 to -108 (1974);
Connecticut: Conn. Gen. Stat. Ann. §§53-278a to -278g (Supp. 1975);
Delaware: Del. Code Ann. tit. 11, §§1401 to 1432 (1975);
Georgia: Ga. Code Ann. §§26-2701 to -2712 (Supp. 1972-1974);
Hawaii: Hawaii Rev. Stat. §§712-1220 to -1231 (Supp. 1974);
Illinois: Ill. Rev. Stat. ch. 38, §§28-1 to -9 (1970, Supp. 1975-1976);
Indiana: Indiana's criminal gambling provisions can be found at Ind. Ann. Stat. §§10-2301 to -2336 (1956); the provisions based on the Model Act are found at id. §§10-2329 to -2336 and also at Ind. Code §§35-25-1-1 to -8 (1971);
Kansas: Kan. Stat. Ann. §§21-4302 to -4308 (1974);
Kentucky: Ky. Rev. Stat. Ann. §§528.010 to 528.100 (1971);
Maine: Me. Rev. Stat. Ann. tit. 17-A, §§951 to 958 (Supp. 1975);
Minnesota: Minn. Stat. §§609.75 to .76 (1964, Supp. 1975-1976);
New Hampshire: N.H. Rev. Stat. Ann. §§647:1 to :2 (1974);
New Mexico: N.M. Stat. Ann. §§40A-19-1 to -14 (1972);
New York: N.Y. Penal Law §§225.00 to 255.40 (1967, Supp. 1974-1975);
North Dakota: N.D. Cent. Code §§12.1-28-01 to -02 (Supp. 1975);
Oklahoma: Okla. Stat. Ann. tit. 21, §§981 to 988 (Supp. 1975);
Ohio: Ohio Rev. Code Ann. §§2915.01 to 2915.06 (1975);

continued

is appropriate, therefore, to examine the major forms of gambling and how state codes respond to them.

C. The Many Forms of Illegal Gambling

The list of illegal ways to win money is almost endless. The four major types of gambling, however, are bookmaking, numbers games, casino operations, and gambling machines.[24] Once the elements of the four broad categories are set forth, this chapter will consider how the modern codes deal with them.

1. Bookmaking

Bookmaking is by far the largest money-maker of all forms of illegal gambling. Recent estimates of the bookmaking handle exceed $3.7 billion per year. More than $2.3 billion

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Fn. 23 cont.
Oregon: Ore. Rev. Stat. §§167.117 to 167.162 (1974);
Pennsylvania: Pa. Stat. Ann. tit. 18, §§5512 to 5514 (1973);
Tennessee: Tennessee's criminal gambling provisions are found at Tenn. Code Ann. §§39-2031 to -2037 (1955); the provisions based on the Model Act are found at id. §§39-2031 to -2037 (Supp. 1974);
Texas: Tex. Penal Code arts. 47.01 to 47.09 (1974);
Utah: Utah Code Ann. §§76-10-1101 to -1109 (Supp. 1973);
Virginia: Va. Code Ann. §§18.2-325 to 18.2-340;
Washington: Wash. Rev. Code Ann. §§9.46.010 to 9.46.900 (Supp. 1974) and §§9.47.080 to 9.47.100, 9.47.120 (1961);
Wisconsin: Wis. Stat. §§945.01 to 945.12 (1958, Supp. 1975-1976).

Future references to all codes cited here will omit the date. References to Indiana's and Tennessee's codes will be only to their modern sections unless there exists a conflict between the new sections and the old. In those instances, the appropriate older sections will also be discussed.

[24] Illegal revenue is also produced by bingo and card games not run in casinos, but because of the similarity between bingo and lottery activities and between non-casino card games and those run in casinos, both bingo and cards can be subsumed under a discussion of the other forms of gambling.

is bet on sports events, and the rest is bet on horses.[25] In a normal operation, the bookmaker acts like a broker, accepting bets from various individuals. He seeks to take in more from his losing bettors than he must pay out to his winning bettors. Any balance in his favor is his brokerage fee.[26] The scale of bookmaking operations ranges from individuals taking bets in pool rooms to huge organizations headquartered in elaborate offices.[27]

The more successful bookmakers use middlemen to gather and record clients' bets and to funnel them to the bookmaker himself. The middlemen, paid on a percentage basis, are not concerned with balancing the bets in the bookmaker's favor. The diverging objectives of the bookmaker and his middleman may easily lead to friction between them.[28]

In part because bookmakers cannot count on their middlemen to help balance the bets in their favor, they often resort to the process known as "laying off" bets on other bookmakers. By this process, smaller bookmakers avoid the risk of suffering more "winners" than "losers" by transferring some bets to larger bookmakers who use the smaller bookmakers'

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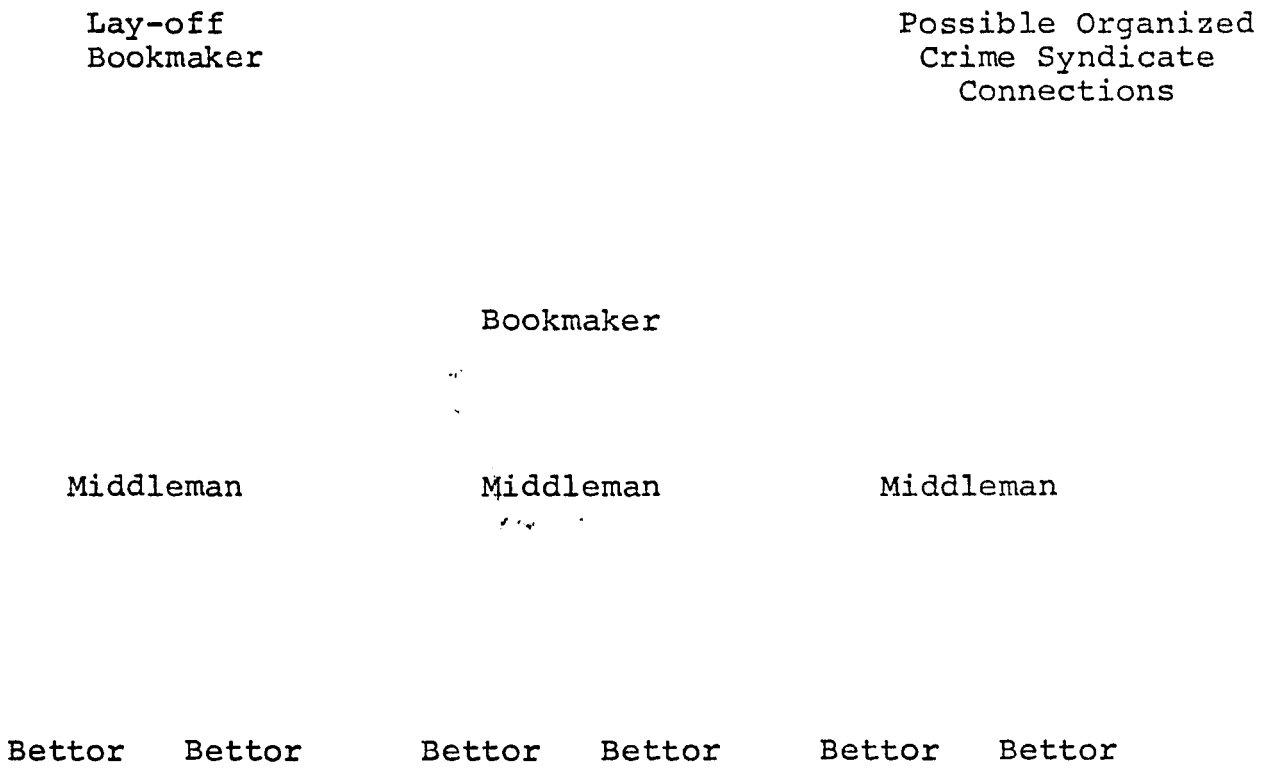
[25] Second Interim Report at 46.

[26] Technical Publications Unit, FBI Laboratory, Gambling Technology at 9-10 [hereinafter cited as Gambling Technology].

[27] See P. Bauman and R. King, "A Critical Analysis of the Gambling Laws," 1 ABA Commission on Organized Crime, Organized Crime and Law Enforcement at 78-79 (M. Ploscowe ed. 1952) [hereinafter cited as Bauman and King].

[28] Gambling Technology at 10.

BOOKMAKING ENTERPRISE



bets as part of their own balancing process.[29]

In addition to soliciting, recording, and balancing bets, the bookmaker also needs fast communications to operate his business. First, many bets are placed by telephone.[30] Second, bookmakers must have immediate access to changing odds and handicaps for sporting events and races.[31] Third, they must quickly learn the winners of those events so they can make fast collections and payoffs. Finally, bookmakers must find out the post times of races so they will not get "past posted," i.e., defrauded by bets placed after the winner of a race is known, though not to the bookmaker.[32]

Although not an element of bookmaking itself, one secondary effect of the activity deserves mention. Betting on sporting events often leads to "fixed" races and games.[33] Sports betting is primarily a habit of the affluent.[34] With

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[29] Easy Money at 41-42.

[30] See Bauman and King at 78, 80-81, 84.

[31] See Senate Committee on Government Operations, Final Report, S. Rep. No. 1310, 87th Cong., 2d Sess., at 3-24, 43-46 (1962).

> Large scale gambling. . . requires the widespread use of telephones. Regular customers phone in daily wagers to bookmakers and layoff bets are accepted by telephone from out-of-town gamblers.

Id. at 33.

[32] See id. at 13-14, 44.

[33] See id. at 26-33, 45-46.

[34] Gambling Technology at 17. See also "The Conglomerate of Crime," Time, Aug. 22, 1969, at 20, and Easy Money at 37.

huge stakes riding on some contests, it becomes worthwhile for a professional gambler to try to influence the outcome of events by bribing or interfering with the participants or officials. An apparently "victimless" gamble may lead to collateral social and law enforcement problems.

2. Numbers

After bookmaking, the numbers game is the second largest money-maker in illegal gambling. Numbers schemes, run mainly in Eastern and Midwestern cities, are a form of lottery, but because of their annual billion dollar handle and method of operation, they merit special attention.[35]

Though variations of the game exist, the typical operation is multi-staged. First, the collector, who maintains close ties with the public,[36] accepts a wager[37] from the bettor. Unlike the normal lottery bettor, however, the numbers player chooses his own three-digit number between 000 and 999, writes it on a slip, and gives it to the collector. In large operations, a "pick-up man" takes the slips and money from the collector to an area "controller"

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[35] Second Interim Report at 46. See also Marcum and Rowen at 38.

[36] Gambling Technology at 47.

[37] Wagers on numbers games are usually very small in comparison to other forms of betting. They can be as low as one cent or as high as ten dollars, but most range from a nickel to a dollar. See "The Conglomerate of Crime," Time, Aug. 22, 1969, at 20, and J. Drzazga, Wheels of Fortune 144 (1963) [hereinafter cited as Drzazga].

responsible for several collectors. The controller may make preliminary tabulations before he forwards the day's receipts to the "bank," the central office of the numbers operation.[38] The winning number, drawn daily, may be based on a variety of numerical occurrences, ranging from stock market sales to parimutuel totals.[39]

The odds against winning on a three-digit numbers game are 1000-to-1. The average payoff, however, is only 550-to-1.[40] If there are excessive bets on certain numbers, banks, like bookmakers, will lay off bets on other gambling operators.[41]

An important characteristic of numbers games is the large volume of records which must be kept. To maintain a smooth flow of business, numbers operators must record all bets, collections due, and winnings payable.[42] As will be seen,

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[38] Drzazga at 144; Gambling Technology at 48.

[39] Drzazga at 143; Easy Money at 42.

[40] Marcum and Rowen at 31. The 45% profit is paid out on a percentage basis to the various members of the organization. The collectors receive between 20% and 24%; the controllers get between 6% and 10%; and the bank nets 10%. Bauman and King at 93.

While 550-to-1 is the average pay-off nationwide, the costs of operation vary from scheme to scheme. In Philadelphia, for example, the price of corrupting police officers is so high that a winning bettor is only paid off at a rate of 400-to-1. Testimony of Walter Phillips, Dep. Atty. Gen., Office of the Special Prosecutor, Hearings in Philadelphia before Commission on the Review of the National Policy Toward Gambling, May 28-29, 1975.

[41] Drzazga at 143. The "lay-off" men are paid a premium for their services. Id.

[42] Gambling Technology at 49.

NUMBERS ENTERPRISE

Lay-off

Possible Organized Crime Syndicate Connections

Numbers Bank

Controller Controller Controller

Pick-up Man

Seller/Collector Seller/Collector Seller/Collector

Bettor Bettor Bettor Bettor Bettor Bettor

these extensive records may be almost as useful to law enforcement officials as they are to the gamblers themselves.

3. Lotteries

Lottery schemes are similar to numbers operations but handle only about $200 million a year and net $50 million.[43] Most of the illegal wagers on lotteries are made on the Irish Sweepstakes and other foreign schemes.[44] In most lotteries, the operator or his agent sells the bettor a printed ticket, usually displaying a number, which entitles the bettor to win a prize if by chance the number is subsequently drawn.[45] Many variations on this theme also constitute a lottery, but three essential elements must be present: consideration, chance, and a prize.[46]

Bingo, for example, is a form of lottery. The player gives consideration for his card and wins by chance if the appropriate number or letter/number combination is drawn.[47] The use of punchboards and punchcards also constitute lottery schemes. The operator sells the bettor a chance to pick a hole in a board containing a slip of paper or to punch out a cardboard disc in a card. If the player is lucky enough to

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[43] Marcum and Rowen at 38.

[44] Id. at 31.

[45] See the discussion of legal lotteries in Easy Money at 35.

[46] See Drzazga at 249.

[47] Id. at 256-57.

pick the correct hole or disc he wins a prize.[48] Hence, these games also demonstrate the elements of a lottery, although they are not as prevalent as the Irish Sweepstakes and other widely played lotteries.

4. Casinos

Illegal casino operations handle about $110 million annually.[49] Beyond estimates of the handle and take, little can be calculated about the extent of the casino industry. Casinos range in size from dingy backrooms to plush clubs, although since the late 1950's the plush illegal club has nearly vanished. They often operate in conjunction with food, liquor, and entertainment enterprises.[50] Legal casinos derive half their revenues from craps and dice games, another quarter from blackjack, and the last quarter from roulette, slot machines, baccarat, and side games such as poker.[51] Illegal casinos, on the other hand, usually offer only floating crap and blackjack games.[52] Casinos frequently offer gambling devices (e.g., slot machines) as well. As with the records in numbers games, the presence of tangible gambling devices in casino areas may reduce investigative and evidentiary problems for law enforcement officials.

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[48] Id. at 272-74.

[49] Second Interim Report at 46. But see Marcum and Rowen at 38. ($2 billion with $150 million profit).

[50] See Bauman and King at 96.

[51] Easy Money at 36-37.

[52] Id. at 36.

5. Gambling machines

Gambling machines today come in a myriad of forms, but the classic ("one-arm bandit") slot machine is still the mainstay of the business. Gambling machines, other than those used in casino operations, provide an illegal net profit of about $70 million from a handle of about $400 million per year.[53] Though such devices are illegal in most parts of the country, they apparently are tolerated in some localities.

The traditional slot machine, paying off on a certain percentage of occasions, often retains as much as 50% of its handle.[54] To evade the prohibitions of certain detailed laws, gamblers have developed many variations of the "one-armed bandit." For example, some machines have human operators who the players pay to throw the switch; the machine itself does not operate by coin.[55] Gamblers have also developed pinball machines with "free game" counters and reset buttons so that players can redeem free games for cash.[56] In addition, to avoid prohibitions against operating mechanical devices, some gamblers have engineered electronic gambling devices with no

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[53] Marcum and Rowen at 38. This, like many early estimates, is apt to be revised downward.

[54] Id. at 37. See also Drzazga at 205.

[55] Drzazga at 200.

[56] Id. at 198-99.

moving parts.[57]

D. The Modern Gambling Codes: An Introduction

The modern codes attempt to combat the illegal gambling described above in a number of ways. Some codes try to curb a certain activity through several overlapping prohibitions. Others simply make elaborate use of one or another method of prohibition.

The simplest method identifies the activity, e.g., conducting an unlawful lottery, defines it, and then proscribes it. A second method outlaws a broad category of behavior, e.g., gambling for profit, which encompasses the narrower activity of conducting an unlawful lottery. A third method defines and prohibits the places, things, or service activities which are crucial to a successful gambling operation. Often banned are gambling premises, gambling records and devices, and transmission of gambling information.

All of these methods have advantages and disadvantages. Prohibiting the possession of gambling slips, for example, greatly simplifies the prosecutor's evidentiary burden. Unless gambling for profit is also outlawed, however, the upper echelon administrators and beneficiaries of an illegal

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[57] See S. Searcy and J. Patterson, "Practice Commentary," following Tex. Penal Code art. 47.01 at 296.

numbers scheme may go largely unprosecuted.

Gambling activities, in short, exist in extraordinary variety. They permit participation and benefit at all levels, from the occasional bettor to the Mafia chieftain, from the small-time bookie to the corrupt policeman. Hence, well-considered, multi-faceted prohibitions will be needed to cast the widest net over the most wrongdoers. The potential effectiveness of many modern code provisions in dealing with bookmaking, numbers, casinos, and gambling machines can now be considered.

1. Bookmaking

a. The approach of the Model Act

The modern codes generally prohibit bookmaking. The Model Act attacks bookmaking in two ways. It explicitly forbids bookmaking by way of illustration. It also includes bookmaking in the broad definition of "professional gambling" as ". . . accepting or offering to accept, for profit, money, credits, deposits or other things of value risked in gambling. . . ." The generic definition of professional gambling is broad enough to include all forms of bookmaking.[58]

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[58] Model Act §2. "Gambling" is defined as "risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance or the operation of a gambling device. . . ." "Gain" and "profit" are defined together: "'Gain' means the direct realization of winnings; 'profit' means any other realized or unrealized benefit, direct or indirect, including without limitation benefits from proprietorship, management, or unequal advantage in a series of transactions." Id.

The act goes on to prohibit both gambling (risking something of value on chance) and professional gambling (gambling for winnings and profit) and excepts only gambling "incidental to a bonafide social relationship."[59] Bookmaking, of course, would violate both the gambling and professional gambling prohibitions and would not fall into the one exception.[60] Four states have followed this basic pattern in prohibiting bookmaking.[61]

Fn. 58 cont.
The definition of "gambling" proposed by the Model Act attempts to close the loophole created by the chance-skill distinction of the common law. For example, in People ex rel. Ellison v. Lavin, 179 N.Y. 164, 71 N.E. 753 (1904), the New York Court of Appeals overturned the decision of the Appellate Division, which had held that because of a certain amount of skill involved in estimating a monthly tax on cigars, the contest to pay cash prizes for the closest estimates was not a lottery. Unfortunately, the Model Act goes somewhat overboard. In order to criminalize a bet between two non-players of a chess game (e.g., a bookie and a bettor) on the results of the game, the very small element of chance in this highly sophisticated game of skill must be emphasized. The same would be true of bets on football games and even horseraces. (See R. Denzer and P. McQuillan, "Practice Commentary" following N.Y. Penal Law §225.00 at 23). Every activity on which money was bet would have to be viewed as "contingent. . . in part upon. . . chance" if such bets were to be prohibited.

The New York statute's definition of "gambling" (N.Y. Penal Law §225.00[2]) rectifies the strained definition of the Model Act by including bets on the outcome of (1) chance and (2) a future contingent event.

[59] Model Act §3.

[60] The exception for a genuine social relationship cannot provide a loophole for the bookmaker because the profit element makes him a "professional" and thereby destroys the exception. Id.

[61] See Colo. Rev. Stat. Ann. §§18-10-102 to -103; Conn. Gen. Stat. Ann. §§53-278a to 278b; Ind. Code §§35-25-1-2 to -3 (there is no exception here for social gambling); Tenn. Code Ann. §§39-2031 to -2033 (also no exception for social gambling).

b. The approach of the New York-type statutes

The New York statute departs from the Model Act with a more descriptive approach. It specifically defines bookmaking as

> . . . advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.[62]

It bans high level bookmaking under the prohibition against "promoting gambling [risking value on chance or contingent event] in the first degree." This includes advancing or profiting from unlawful gambling activity by "[e]ngaging in bookmaking to the extent that [the bookie] receives or accepts in one day more than five bets totaling more than five thousand dollars. . . ."[63] Small-time bookmakers, excluded from the first-degree charge by its dollar limits, would then be in violation of the catch-all charge of "promoting gambling in the second degree."[64] Five other states similarly

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[62]N.Y. Penal Law §225.00. The same section defines "gambling" and the phrase "advance gambling activity," which excludes mere players from its purview and includes aiding any form of gambling activity by setting up games, soliciting, keeping records, or permitting premises to be used for gambling.

Note that only a strained definition of "public" will include the bookmaker who only accepts lay-off bets from other bookies and not from the "man on the street."

[63]Id. §225.10.

[64]"A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity." Id. §225.05.

distinguish between small and big-time operators in their bookmaking statutes.[65]

c. The approach of the Wisconsin-type statutes

The third general approach to bookmaking is taken by Wisconsin. The Wisconsin statute includes an explicit description of bookmaking in its definition section, but then inexplicably fails to use the defined word in banning commercial gambling.[66] The prohibition against commercial gambling, however, provides stiff punishment for "Whoever . . . [f]or gain, receives, records, or forwards a bet or offer to bettor, with intent to receive, record, or forward a bet or offer to bet, possesses facilities to do so. . . ."[67] Bookmakers may also be prosecuted for the less serious crime of "gambling."[68] Seven states follow schemes similar to that

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[65] See Hawaii Rev. Stat. §§712-1220 to -1223; Ill. Rev. Stat. ch. 38, §§28-1 to 1.1; Ky. Rev. Stat. Ann. §§528.010 to 528.040; Me. Rev. Stat. Ann. tit. 17-A, §§953, 954; Ore. Rev. Stat. §§167.117, 167.122 to 167.127.

[66] Wis. Stat. Ann. §945.01(5); "'bookmaking' means the receiving, recording or forwarding of a bet or offer to bet on any contest of skill, speed, strength, or endurance of man or beast." "A bet is a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement." A list of lawful business exceptions follows. Id. §945.01(1).

[67] Id. §945.03; though it is difficult to imagine bookies taking bets beyond the scope defined in §945.01(5), the description of bookmaking activity given under "commercial gambling" is perhaps broader. (The quotation in the text is printed differently than it is printed in the original, but the words and meaning are identical).

[68] Id. §945.02 provides penalties for anyone who "makes a bet."

of Wisconsin.[69]

d. The approach of other modern codes

Of the remaining states with modern codes,[70] most simply prohibit bookmaking per se. North Dakota's and Utah's statutes both forbid general gambling, which covers bookmaking. They also prohibit the more specific characteristics of bookmaking which distinguish the bookie from the common bettor.[71] Delaware's statute banning bookmaking describes in detail and prohibits the essential elements of a bookmaking operation. Avoiding the pitfalls of being too specific,[72] however, the statute also prohibits the receipt of, or agreement to receive, money for the purpose of betting.[73]

New Hampshire, in contrast, strikes at bookmaking only

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[69] See Ga. Code Ann. §§26-2701 to -2703; Kan. Stat. Ann. §§21-4302 to -4304; Minn. Stat. Ann. §§609.75 to 609.76; N.M. Stat. Ann. §§40A-19-1 to -3; Ohio Rev. Code Ann. §§2915.01 to 2915.02 (the statute defines bookmaking and then prohibits bookmaking specifically); Okla. Stat. Ann. tit. 21, §982A2; Texas Penal Code arts. 47.01 to 47.03. Although "bookmaking" is not defined by these statutes, it is nevertheless prohibited.

[70] See note 23, supra.

[71] North Dakota prohibits engaging in "gambling" (N.D. Cent. Code §12.1-28-02), and more specifically, receiving "wagers for or on behalf of another person" (id.). Utah also prohibits participating in "gambling" (Utah Code Ann. §76-10-1102) and "gambling promotion," which is defined as deriving or intending to derive "an economic benefit other than personal winnings from gambling and. . . induc[ing] or aid[ing] another to engage in gambling. . ." (id. §76-10-1104).

[72] See Bauman and King at 76, where the authors criticize the older statutes for failing to take account of new bookmaking practices.

[73] See Del. Code Ann. tit. 11, §1403.

indirectly, by prohibiting unlawful gambling and loaning money for the purpose of gambling.[74] Pennsylvania's statute specifically forbids bookmaking but nowhere defines the term. It also bans the receipt of a bet but again leaves the term "bet" to a common law definition.[75] Finally, Virginia's new code prohibits bookmaking by outlawing "[t]he making, placing, or receipt of any bet or wager. . . ." A bookie can only be prosecuted for the more serious offense of conducting an illegal gambling operation if he can be characterized as an "operator."[76]

e. Conclusions about the approach of modern codes

The modern codes exhibit three general methods of combatting bookmaking itself. They overlap to a considerable extent, but each has some noteworthy advantage. Statutes like the Model Act concentrate on the "profit" element of bookmaking.[77] This enables law enforcement officials to prosecute the upper

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[74] N.H. Rev. Stat. Ann. §647:2.

[75] Penn. Stat. Ann. tit. 18, §5514.

[76] See Va. Code Ann. §§18.2-325 to -326, 18.2-328. "An operator includes any person, firm or association of persons, who conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling enterprise, activity or operation." Id. §18.2-325(3). Presumably this will cover larger bookies, like those covered by the New York statute, part of whose profits must go to financing the operation.

[77] Model Act §2. Of the other states which follow the Model Act, supra note 61, Colorado's statute concentrates most heavily on the profit element. Colo. Rev. Stat. Ann. §18-10-102(3).

echelon criminals who might benefit from, more than participate in, the actual bookmaking.

Provisions fashioned after the Wisconsin statutes, in contrast, focus on the integral elements of bookmaking: receiving, recording, and forwarding bets.[78] This approach strikes directly at the essence of bookmaking. It also has the advantage of reducing evidentiary problems for investigators and prosecutors; it is simpler to prove that a person accepted a bet on the phone than to prove that he profited from some complicated bookmaking scheme.

If a middle course can be charted between the Model Act and Wisconsin statutes, the New York approach is it.[79] New York defines bookmaking by describing most of its elements. It emphasizes the profit factor, however, in the section prohibiting the operation of a gambling enterprise as a business. This statute combines the best features of the other two approaches and therefore seems preferable. Investigators in New York are able to choose whether to prove the elements of bookmaking activity or to prove that certain persons were enriched by the scheme. Law enforcement officials can obviously combat bookmaking most effectively when they can

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[78] Wis. Stat. Ann. §945.03. The phrase "for gain" is used but not defined. The other states following the Wisconsin model, supra note 69, do not include the phrase, "for gain," but merely describe the operation.

[79] N.Y. Penal Law §§225.00 and 225.10. See also statutes listed supra note 65.

take the easiest route to conviction.

Moreover, the New York-type statutes distinguish between major and minor bookmakers.[80] When the penalties correspond to the relative culpability, the organizers and supervisors of bookmaking activities may be more effectively deterred.[81] Law enforcement officials thus have better incentives and weapons to get at the top figures in large bookmaking operations.

f. Location

Virtually all bookmaking operations are based in a particular location, e.g., a poolroom, an office, or the back room of a bar. All the modern statutes have provisions which prohibit the use of premises for such gambling purposes.[82] The Model Act defines "gambling premise"[83] as a place used for

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[80] Compare N.Y. Penal Law §§225.10 and 225.05.

[81] The other statutes discussed, supra notes 77, 78 and accompanying text, also contain prohibitions against gambling (having lesser sanctions) under which bookmaking would fall. Those also include players who are not profiting from gambling activity and do not put a dollar distinction on bookmaking activities which would distinguish big-time bookies from small operators. As already mentioned, supra note 65, Hawaii's code, modeled after New York's, does contain an added prohibition against gambling which would include bookies and players. Hawaii Rev. Stat. §712-1223.

[82] Indiana's modern section does not contain a provision concerning gambling places. The provisions that exist are in the old parts of the code.

[83] Model Act §2(7); the word "premise," though given a legal definition by the act, should actually be used in its plural form, "premises," which means: "a specified piece or tract of land. . . a building, buildings, or part of a building." Webster's Third New International Dictionary (Grove ed. 1961). Some states which have followed the Model Act have made this change. See, e.g., Colo. Rev. Stat. Ann. §18-10-102(7).

"professional gambling."[84] Section 6 provides: (1) that gambling premises are common nuisances subject to abatement; (2) that once a court declares property to be gambling premises, the owner has a right to terminate the interest of anyone holding under him; (3) that if the property declared to be gambling premises is required to have a license, e.g., a bar or liquor store, the license shall be suspended; and (4) that the knowing maintenance of gambling premises by "owner, lessee, agent, employee, operator, or occupant," subjects that person to criminal penalty.[85] Further, if the gambling premises are in a locked or barricaded place or have electrical or mechanical warning systems, the persons maintaining the premises are subject to more stringent penalties.[86] The Model Act provides the most comprehensive array of penalties and remedies against the use of premises for gambling activities. A number of states have adopted the plan in toto or with minor modifications.[87] The remaining states, with a few

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[84] Model Act §2(7).

[85] Id. §6.

[86] Id. §6(4). Presuming that the more stringent penalty is a felony provision, when a law enforcement officer encounters a locked door behind which he has probable cause to believe there is gambling activity, he may break down the door. See id. comment on Section 6, subsection 4, at 27.

[87] See Colo. Rev. Stat. Ann. §§18-10-102(7), 18-10-107 (omits the "owner termination" and "license suspension" provisions); Conn. Gen. Stat. Ann. §§53-278a(7), 53-278e (not only permit but require the owner to terminate the interests of the person holding under him); Ill. Rev. Stat. ch. 38, §28-3 (omits the "owner

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exceptions, merely prohibit a person from using or permitting a place to be used for gambling purposes.[88] All the modern

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termination" provision); Tenn. Code Ann. §§39-2033(7), 39-2036 (confuses penalties because both §39-2033 "Keeping a gambling house--Penalty," and §39-2015, "Keeping a place for betting on horserace--Penalty," appear to be embodied in §39-2036, "Gambling premises a common nuisance--Abatement--License revoked --Owner liable--Penalty," yet the penalties for the various sections all differ); Wash. Rev. Code Ann. §§9.46.020(11), 9.46.020(15), 9.46.220, 9.46.250 (owner-operator is penalized as a "professional gambler," which leads to some circularity of definition since "gambling premises" means a place used for "professional gambling" and a person is engaged in "professional gambling" if, having control over the premises, he permits it to be used for gambling activity).

[88] See Hawaii Rev. Stat. §§712-1220(1), 712-1223; Me. Rev. Stat. Ann. tit. 17-A, §952; N.Y. Penal Law §§225.00(4), 225.05; Ore. Rev. Stat. §§167.117(9), 167.122. All penalize advancing or promoting gambling activity which includes, in essence, having control over property and knowingly permitting it to be used for gambling purposes.

See also Ga. Code Ann. §§26-2701(b), 26-2703(a), 26-2704; Kan. Stat. Ann. §§21-4302(5), 21-4304(a), 21-4305; Minn. Stat. Ann. §§609.75(5), 609.755(4), 609.76(1); N.M. Rev. Stat. Ann. §§40A-19-1(D), 40A-19-3(A), 40A-19-4; N.D. Cent. Code §§12.1-28-01(4), 12.1-28-02(4)(d); Okla. Stat. Ann. tit. 21, §983; Tex. Penal Code arts. 47.01(2), 47.03, 47.04; Wis. Stat. Ann. §§945.01(4), 945.03(1), 945.04. These statutes first define in an all-inclusive manner the term used to mean "premises" and then criminalize knowingly permitting a place to be used as gambling premises. These provisions seem to aim at the owner/lessor who might not be directly involved in the gambling activity. The above statutes also use premises to define the criminal activity of the "professional" gambler (contrast Model Act §2[7]), and criminalize operating gambling premises by criminalizing "professional" gambling. Wisconsin has made "permit[ting] the operation of a gambling place" a crime penalized by a maximum $5,000 fine/one year in prison (Wis. Stat. Ann. §945.03[1]) and "permit [ting] real estate to be used as a gambling place" a crime penalized by a maximum $200 fine/6 months in prison (id. §945.04). The words "operation" and "use" have not been defined, and there appears to be no difference between the two penalized activities. Also, New Mexico treats gambling places as nuisances per se.

continued

codes, except possibly those of Indiana and Delaware, include provisions broad enough to make any bookmaking headquarters illegal. The Model Act, however, gives law enforcement officials some special weapons to fight bookmaking. "Professional gambling" is a necessary element of the crime of maintaining gambling premises[89] which must be proved beyond a reasonable doubt before the owner or occupant can be

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Finally, see Del. Code Ann. tit. 11, §§1404, 1421-1428. The first section prohibits the use of a "building, structure, room or rooms" for gambling purposes, but may leave open vehicles and locations which are outdoors; the latter sections prohibit obstructions of any place which the attorney general has "reasonable cause to believe" is used for illegal gambling and then provide a procedure for enjoining such obstructions and a criminal penalty for violating the injunction; Ky. Rev. Stat. Ann. §528.070 and N.H. Rev. Stat. Ann. §647.2(I) (both prohibit those in control of premises from permitting them to be used for gambling); Ohio Rev. Code Ann. §2915.03 (This section is similar to the two preceding ones, but it makes the standard for culpable state of mind recklessness rather than knolwedge. It also makes the premises a nuisance.); Penn. Stat. Ann. tit. 18, §§5513, 5514 (the first prohibits permitting people to gather at a place in order to gamble; the second prohibits setting up a place for bookmaking activities); Utah Code Ann. §76-10-1102 (This is another single section which prohibits the person in control of property from permitting it to be used as gambling premises. Because the necessary control may be "in whole or in part," this section presumably extends to agents and employees who have minimal contact with the property.); Va. Code Ann. §18.2-329. This section appears to require that an owner/occupant of property used for illegal gambling notify a law enforcement officer of the continuing activity or else face a penalty. A subsequent section, id. §18.2-334, exempts private residences from this prohibition if they are "not commonly used for such games of chance and there is no operator. . . ." As a result there appear to be ambiguities which perhaps leave loopholes and at least make statutory interpretation overly complicated with regard to the prohibition against gambling premises. Virginia's statute does contain a section, id. §18.2-339, which permits owners to be enjoined from permitting a place to be used as gambling premises.

[89] Model Act §2(7).

criminally prosecuted for maintaining gambling premises. Since a civil abatement action requires a lesser standard of proof (preponderance of the evidence), the use of the premises for gambling might be enjoined in the civil action, even when there is not enough evidence to convict the gamblers in a criminal proceeding. Law enforcement officials, therefore, may be able to accomplish in a nuisance type action what they might not otherwise be able to accomplish in a criminal prosecution.[90]

Yet another innovation in combatting gambling premises can be found in the Ohio statutes. There, "recklessness" is the culpable state of mind required of an owner who permits gambling on his property.[91] Recklessness is a lesser standard than "knowledge" or "intent" so it is easier in Ohio to prosecute owners whose premises are used for gambling purposes. Owners should thus become more careful about whom they rent, lease, or lend property to, and gamblers in Ohio may well encounter more difficulty in finding premises at which to set up gambling headquarters.

g. Use and possession of gambling records

The importance of records to bookmaking cannot be

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[90]Manifestly, because of the differing standards of proof between civil and criminal actions, the "fact" that gambling occurred on certain premises would receive no res judicata effect in subsequent criminal prosecutions even if "proved" in the earlier abatement action.

[91]Ohio Rev. Code Ann. §2915.03(2).

overestimated. Especially in large operations, it is not humanly possible to remember all the simple or combination bets taken on horses, the point spreads or odds given on sports teams, or the accounts payable and receivable. Such crucial information must be written down.[92] It is surprising, therefore, that five states with otherwise effective modern bookmaking statutes have failed to prohibit clearly the possession of gambling records, betting slips, and similar paraphernalia.[93] The majority of states, however, have forbidden the possession of gambling records as an indirect but effective way to prosecute bookmaking.

There are three basic ways to deal with gambling records and related paraphernalia. The Model Act and a number of other statutes define "gambling records" or some similar term, provide for seizing them, and set a penalty for possessing them. The penalty for possession is typically less than the penalty for "professional gambling" or the offense which

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[92] See generally, Gambling Technology.

[93] See Ga. Code Ann. §26-2707, ("Possession of gambling device or equipment," might provide a vehicle to the possession of betting slips, but the word "device" would probably derive its meaning from "gambling device," which refers to machines. Id. §26-2701[c]); N.H. Rev. Stat. Ann. §647:2 (only provides for forfeiture of equipment used in violation of it); N.D. Cent. Code (the gambling statute defines "gambling apparatus," id. §12.1-28-01(3), in a way which would include gambling records, but then never criminalizes their possession); Penn. Stat. Ann. (the statute penalizes the recording of bets, id. tit. 18, §5514(3), but does not criminalize the possession of the records).

otherwise comprehends bookmaking per se.[94] Four other states have created two degrees of "possession of gambling records" which are distinguished by the dollar amounts and number of bets reflected in the records. The penalties for the two degrees of possession parallel those for the two degrees of bookmaking itself.[95] The final group of states generally

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[94] See Model Act §2(5). "'Gambling record' means any record, receipt, ticket, certificate, token, slip or notation given, made, used or intended to be used in connection with professional gambling"; id. §4(5) provides a penalty for knowingly printing, making, possessing, storing, or transporting any gambling record. The seizure provisions of the Model Act only apply to gambling devices which are gambling machines or furniture. See also Colo. Rev. Stat. Ann. §§18-10-102(5), 18-10-104, 18-10-105; Conn. Gen. Stat. Ann. §§53-278a(5), 53-278(c); Tenn. Code Ann. §§39-2033(5), 39-2034(5)(the statute has no seizure provision for gambling records); Tex. Penal Code arts. 47.01(5), 47.07 (defines the term "gambling paraphernalia" to include records but lacks seizure provisions); Utah Code Ann. §§76-10-1101(4), 76-10-1105, 76-10-1107 (defines "gambling device or record"); Va. Code Ann. §§18.2-325(a)(2), 18.2-331, 18.2-336 (gambling records included under "gambling devices"); Wash. Rev. Code Ann. §§9.46.020(12), 9.46.230.

[95] See N.Y. Penal Law §§225.15, 225.20. The sections differ only in that §225.20, "Possession of gambling records in the first degree," carries a felony charge and requires the recorded bets to total more than five and be worth more than $5,000. Setting aside the numerical requirements, each section makes it a crime to possess "any writing, paper, instrument, or article. . . [o]f a kind commonly used in the operation or promotion of a bookmaking scheme"[emphasis added]. Under this provision law enforcement officers do not have to show that the particular records in question were used in bookmaking (see R. Denzer and P. McQuillan, "Practice Commentary" following N.Y. Penal Law §225.15 at 55). The statute does provide an affirmative defense to the charges, and allows the defendant to show that the records were not used or intended to be used in gambling operations. Id. §225.25.

See also Hawaii Rev. Stat. §§712-1224, 712-1225, 712-1227; Ky. Rev. Stat. Ann. §§528.050, 528.060; Ore. Rev. Stat. §§167.132, 167.137, 167.142.

equates possession of gambling records or facilities for recording bets with either professional gambling or a lesser violation. The possession is thus criminalized indirectly.[96]

Possession of gambling records, it may be argued, should be penalized less severely than bookmaking itself. Possession is, after all, the least culpable mainifestation of gambling. In addition, if all gambling-related offenses were punished equally, then prosecutors would enjoy little opportunity to engage in plea-bargaining and policemen would have no incentive to charge wrong-doers with more complicated gambling offenses. Nonetheless, there are strong arguments to the contrary. First, records are absolutely essential to bookmaking; controlling the possessory crime is tantamount to controlling the substantive crime. Second, records are the most visible and tangible evidence of the offense. Law enforcement officials can combat bookmaking operations more readily when the most conspicuous evidence of their existence is outlawed. Most modern legislatures have been careful to delineate the states of mind required for various elements of substantive

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[96] See Del. Code Ann. tit. 11, §1403; Ill. Rev. Stat. ch. 38, §28-1(5); Kan. Stat. Ann. §21-4304(b). Kansas also defines "gambling device" to include "any token, chip, paper, receipt or other document which evidences. . . the making of a bet" and bans both transferring devices, §21-4306, and possession of devices, §21-4307; Minn. Stat. Ann. §609.76(b): N.M. Stat. Ann. §40A-19-3(c); Ohio Rev. Code Ann. §§2915.01(F)(1)(Defining "gambling device" as "a book, totalizer; or other equipment for recording bets"), 2915.02(A)(5)(criminalizing possions of a "gambling device); Wis. Stat. Ann. §945.03(2). Under §945.03(6) Wisconsin's ban on commercial gambling also prohibits maintaining "any record, paraphernalia, tickets, certificates, bills, slips, tokens, papers, writing or other devices used. . . in gambling."

crimes; punishing a person harshly for "unconscious possession" is less and less likely. If knowing possession is required, then sqeamishness about punishing an unconscious, innocent possessor is unwarranted. The lack of state-of-mind requirements in some early criminal possession statutes may explain why lesser penalties for possession still persist. Gambling codes which equate possession of records to bookmaking itself (or at least equate the penalties)[97] may be preferable to those codes which provide lesser penalties for possession.[98] If reductions in penalties are to be allowed in relation to culpability, it may be more sensible to arrange degrees of possession of gambling records than to let all possessors off with penalties lighter than those for bookmaking itself. It is logical to distinguish between major and minor gambling operations.[99] The New York statute and those following it achieve this objective.[1]

h. Service activities

Fast and reliable communications are critically important to bookmakers. They cannot run their operations successfully without quick access to odds information and race and game

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[97] See generally notes 95, 96 supra.

[98] See generally note 94 supra.

[99] See notes 80, 81 supra, and accompanying text.

[1] See note 95, supra.

results. As a result, thirteen states have enacted provisions which deal specifically with communicating gambling information.[2] Ten of those states outlaw the transmission and receipt of such information and the installation of communications equipment with the knowledge that it is to be used for conveying gambling information.[3] Wisconsin, however, only bans transmitting and receiving such information.[4] Oklahoma and Kansas prohibit only the installation of communications equipment for use in conveying gambling information.[5] Several of the statutes also contain procedural provisions for notifying public utilities that their equipment is being used for communicating gambling information. The utilities are then required to discontinue service to that equipment.[6]

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[2] "Gambling information" means information, possibly including bets, but more properly referring to odds and winners. The receiving of bets is typically banned as bookmaking per se.

[3] See Colo. Rev. Stat. Ann. §§18-10-102(6), 40-10-106; Conn. Gen. Stat. Ann. §§53-278a(6), 53-278d; Del. Code Ann. tit. 11, §1411; Ga. Code Ann. §26-2706; Ill. Rev. Stat. ch. 38, §28-1(10); Ind. Code §§35-25-1-2(5), 35-25-1-5; Ohio Rev. Doce Ann. §2915.02(3); Tenn. Code Ann. §§39-2033(6), 39-2035; Texas Penal Code art. 47.05, Wash. Rev. Code Ann. §§9.46.010(10), 9.46.240.

[4] See Wis. Stat. Ann. §§945.01(6), 945.03(7).

[5] Kan. Stat. Ann. §21-4308; Okla. Stat. Ann. tit. 21, §986 also prohibits allowing the continued use of communications facilities when their use for gambling purposes is known.

[6] As examples, but not as an all-inclusive list, see Conn. Gen. Stat. Ann. §53-278d and Wis. Stat. Ann. §945.06.

Since communicating gambling information and installing equipment for that purpose can be construed as materially aiding gambling activity, five additional states apparently ban those service activities by prohibiting the promotion of gambling activity.[7]

The conveyance of gambling information is so important to bookmakers and other professional gamblers that it should be explicitly dealt with in the anti-gambling statutes. The statutes must be written broadly enough to keep up with rapidly changing communications technology. By the same token, the statutes must be written with enough specificity to avoid subtle First Amendment problems. At the present, some states are careful to except 'legitimate news reporting' from conduct otherwise illegal under the gambling laws.[8] The preferred statutes, therefore, are those which (1) contain this

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[7]See Hawaii Rev. Stat. §§712-1220(1), 712-1223; Ky. Rev. Stat. Ann. §§528.010(1), 528.030; Me. Rev. Stat. Ann. tit. 17-A, §952; N.Y. Penal Law §225.00(4), 225.05; Ore. Rev. Stat. §§167.117(a), 167.122.

[8]See, e.g., Colo. Rev. Stat. Ann. §§18-10-101, 18-10-102(4). The legislative declaration states the policy to be: "To safeguard the public against the evils induced by common gamblers and common gambling houses; and at the same time to preserve the freedom of the press. . . ." The definition of "gambling information" provides that: "[L]egitimate news reporting of an event for public dissemination is not gambling information within the meaning of this article."

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exception; (2) prohibit the intentional transmission or receipt of gambling information; and (3) prohibit the installation of communications facilities when the installer knows that the equipment will be used to convey gambling information.

The prohibitions against these service activities may easily be linked to procedural provisions authorizing the use of electronic surveillance techniques.[9] Wiretapping can provide concrete evidence that gambling information has been conveyed or that gambling itself has occurred. Hence, it would be sensible for legislatures to consider together the statutes permitting wiretapping and the statutes forbidding

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Ind. Code §35-25-1-5 excepts from its prohibition the "transmission of any information concerning the result of any race, [etc.]. . . after the race. . . has occurred. . . ." Thus, illegal gambling information can be transmitted after an event, so bookies can still get fast private information if they so desire. A simple exception for legitimate news reporting would have left a smaller loophole.

[9]An in-depth discussion of wiretapping is beyond the scope of this chapter. Electronic surveillance, however, is a valuable tool in investigating organized crime, and the relationship of surveillance provisions to prohibitions against transmitting gambling information should not be overlooked. See generally G. R. Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis," in Task Force Report, supra note 16 at 91ff. Note, however, that bookmaking and the transmission of gambling information may not be a problem in all jurisdictions. In those localities it should not be necessary to extend electronic surveillance provisions to gambling violations. See ABA Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance (approved draft, 1971) at 104.

the conveyance of gambling information.[10]

Sports corruption is not an integral part of a successful bookmaking operation. Nonetheless, an ability to "fix" contests can make betting large sums of money an extremely profitable proposition, and large bets and bookmaking go hand in hand. As part of their modern gambling laws, therefore, four states have passed provisions which are intended to curb sports corruption by banning the offering, soliciting, and accepting of bribes in the athletic world.[11] The policy argument behind the statutes is, of course, to maintain the integrity of American sports.[12]

i. The effectiveness of the modern statutes

Bookmakers try to profit from taking and reinsuring bets.

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[10]The gambling information provisions which deal explicitly with public utilities raise a question applicable to all anti-gambling laws. Which provisions should be in the criminal laws and which provisions should appear elsewhere in a state's code? While total recodification cannot be dealt with in this chapter, the problem of excess language in the codes should not be overlooked. The provisions dealing specifically with public utilities, for example, probably ought to be dealt with under public utilities licensing provisions, not under gambling.

[11]See Ga. Code Ann. §§26-2711, 26-2712; N.M. Stat. Ann. §40-19-13 (presumably this provision covers coaches and officials as well as athletes, though there is some question as to the meaning of the term "participant"). Ohio Rev. Code Ann. §2915.06 (this is a broad statute aimed at "corrupting sports;" it would cover more than just briber); Wis. Stat. Ann. §§945.07, 945.08 (Wisconsin specifically bans a participant, his coach, owner, or trainer from betting on an opponent in a contest at which admission is charged. The penalty is that for a misdemeanor. There is also a misdemeanor charge for accepting or soliciting a bribe). The other statutes treat all bribery attempts to acceptances of bribes as felonies.

[12]See "Committee Comment" following Ohio Rev. Code Ann. §2915.06 at 96.

They usually work in one location and maintain copious records. Typically, they receive bets and exchange gambling information by phone. Hence, the most effective anti-bookmaking statutes will be those which (1) strike at the profit of the enterprise; (2) outlaw gambling premises; (3) make illegal the knowing possession of gambling records; and (4) prohibit the service activities which provide bookmakers with communications facilities. This multi-faceted approach will offer the best hope of achieving legal control of the many manifestations of bookmaking.

2. Numbers

a. Conduct and characteristics

Pennsylvania and Oklahoma fail to define lotteries but do prohibit them.[13] The rest of the states studied[14] define and forbid some activity which includes the three elements of a lottery: consideration, chance, and prize. Numbers games are a type of lottery and are thus typically prohibited by the lottery statutes.[15] All the statutes prohibit some activity under which a lottery or numbers game would fall.[16] Each

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[13]See Pa. Stat. Ann. tit. 18, §5512, which presumably leaves "lottery" open to common law definition. See also Okla. Stat. Ann. tit. 21, §981.

[14]See note 23, supra.

[15]See, e.g., Ill. Rev. Stat. ch. 38, §§28-2(b), 28-2(c); and N.Y. Penal Law §225.00(11).

[16]For Colorado, Connecticut, Indiana, and Tennessee, see note 61, supra. These statutes ban professional gambling.

For the code section numbers of Hawaii, Kentucky, Maine, New York and Oregon, see notes 62-65, supra. These statutes distinguish the lottery operator and policy banker (large scale operators) from their ticket salesmen and collectors by providing lighter penalties for the latter.

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statute is sufficiently flexible to ban all contests with the characteristics of a lottery.[17]

Although the anti-lottery statutes focus primarily on the elements of consideration, chance, and prize, they must often take into account three other concerns. First, a number of states have legal lotteries, and these drawings can be used as the basis for lotteries which are illegal in a neighboring

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For Georgia, Kansas, Minnesota, New Mexico, Ohio, and Texas, see note 69, supra. These statutes basically equate operating a lottery with commercial gambling, which is prohbitied. See also Del. Code Ann. tit. 11, §§1401, 1402; Ill. Rev. Stat. ch. 38, §§28-1, 28-2 (Illinois make operating a policy game "syndicated gambling" [id. §28-1.1] and puts more severe penalties on the policy bank); N.H. Rev. Stat. Ann. §647:1; N.D. Cent. Code §§12.1-28-01 to -02; Pa. Stat. Ann. tit. 18, §5512; Utah Code Ann. §§76-10-1101 to -1102, 76-10-1104 (the statute defines "lottery," subsumes lottery under "gambling," and criminalizes gambling); Va. Code Ann. §§18.2-325 to -326, 18.2-328; Wash. Rev. Code Ann. §§9.46.020, 9.46.220; Wis. Stat. Ann. §§945.01 to 945.03.

[17]In dealing with the question of lotteries, and more particularly with the question of consideration, legislatures must decide whether or not they will prohibit promotional activities such as "bank nights." Historically, these promotions have caused courts problems in the interpretation of lottery provisions, and decisions have gone both ways. In State v. Hundling, 220 Iowa 1369, 264 N.W. 608 (1936), the Iowa Supreme Court reversed the conviction of a theater manager accused of running a lottery because the "bank night" scheme, in which a participant would receive a prize if his name were drawn, did not require that the participant pay anything for the chance of having his name drawn. There was no consideration involved; therefore, there was no lottery.

In State v. Dorau, 124 Conn. 160, 198 A. 573 (1938), on the other hand, the Connecticut Supreme Court of Errors upheld the lottery conviction of a theater manager. Though the participants paid no price for the chance of having their names drawn, consideration was not deemed an essential element of a lottery under the court's interpretation of the Connecticut statute.

Thus, if promotional activities are not to be banned by the lottery provisions of the criminal statutes, legislatures should make explicit those exceptions. See, e.g., Wis. Stat. Ann. §945.01(2) making "consideration" an essential element of a lottery and listing various actions which do not constitute consideration under the statute.

jurisdiction. Several states have therefore either banned "foreign lotteries" or disallowed them specifically as a defense to a lottery prosecution.[18]

Second, since large lottery schemes typically have an elaborate chain of command, it is sensible and fair to relate penalty to culpability. New York, for example, treats lottery and numbers violations as it treats bookmaking; first and second degree gambling promotion are distinguished by how much money the offender handled and what role he played in the gambling hierarchy.[19] Four other states follow this pattern.[20]

Third, several states specifically prohibit advertising a lottery scheme.[21] Such activity need not be proscribed explicitly; it could easily be subsumed under the heading of advancing or promoting gambling.

b. Location

Lotteries and numbers games, like bookmaking, are generally headquartered at specific premises. Illegal lotteries and numbers games, therefore, may be hampered by prohibiting the use or maintenance of such premises. This is true even if the

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[18]See, e.g., Del. Code Ann. tit. 11, §1402, N.Y. Penal Law §225.40; Me. Rev. Stat. Ann. tit. 17-A, §957.

[19]N.Y. Penal Law §§225.05, 225.10.

[20]Hawaii, Kentucky, Maine, and Oregon; for code section numbers, see note 65, supra.

[21]See, e.g., Minn. Stat. Ann. §609.755.

gamblers change their location frequently. With two exceptions,[22] all the modern statutes clearly prohibit the use of premises for conducting illegal lotteries.[23] This is a logical and effective way to control yet another integral element of this pervasive form of illegal gambling.

c. Use and possession of gambling records

Banning the knowing possession of lottery tickets, numbers slips, betting records, and other paraphernalia is another effective way to combat lottery and numbers operations. Only one of the states studied permits the possession of such records.[24] A plurality of states follow the same rule with respect to lottery tickets and numbers slips as they do with respect to bookmaking records.[25] Four of the five states having no possession provisions for bookmaking records do have such provisions for lottery and numbers records.[26] The rest of the states outlaw the possession of lottery and numbers

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[22]Indiana and Pennsylvania.

[23]For the code sections of the remaining states see notes 87, 88, supra, and for a discussion of the gambling premises provisions, see notes 82-91 and accompanying text. (Note that Indiana, New Hampshire, and Pennsylvania do not have such provisions in their listed sections; see second series note 22, supra, and accompanying text).

[24]Indiana.

[25]For the states, their code sections, and further discussion, see notes 94, 95, supra, and accompanying text.

[26]See Ga. Code Ann. §26-2703(f); N.H. Rev. Stat. Ann. §647:1 (II); N.D. Cent. Code §12.1-28-02(2)(a), which, in the receiving of a lottery chance, implicitly criminalized the possession of such chance; Pa. Stat. Ann. tit. 18, §5512(b)(2).

paraphernalia, or the facilities for conducting numbers games, These statutes usually resemble the bookmaking statutes, although they may appear in separate sections or subsections of the codes.[27] Whatever the approach taken, it makes sense to ban the possession of lottery and numbers paraphernalia because possessory offenses are relatively simple to discover and prosecute, and records are an integral part of all lottery and numbers schemes.[28]

d. Service activities

Conveying gambling information is probably less important to lottery operators than to bookmakers. Still, many numbers operators find it necessary to lay off bets on heavily played numbers. This must be accomplished quickly. Prohibiting the conveyance of gambling information may thus impede this often critical element of lottery and numbers schemes.[29]

As mentioned earlier, punch boards, push cards, pull tabs, and similar devices have been deemed lottery schemes.[30] While

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[27] See Del. Code Ann. tit. 11, §1401; Ill. Rev. Stat. ch. 38, §28-1(8). (Note that possession of lottery tickets, etc. is not illegal, while possession of policy [numbers] tickets, slips, records, documents, etc. is illegal); Kan. Stat. Ann. §21-4304(d); Minn. Stat. Ann. §609.76(3); N.M. Stat. Ann. §§40A-19-2(D), 40A-19-3(E); Ohio Rev. Code Ann. §§2915.01(F)(2), 2915.02(A)(5); Wis. Stat. Ann. §§945.02(3), 945.03(4), 945.03(5).

[28] For a discussion of all possession provisions, see notes 92 to 1, supra, and accompanying text. The discussion pertains to bookmaking, but in the spirit of a generic treatment of gambling applies equally well to lotteries and numbers.

[29] See generally second series notes 2 to 7, supra, and accompanying text discussion of gambling information.

[30] See note 48, supra, and accompanying text.

such items may be construed as gambling paraphernalia, they more properly fall under the term "gambling devices." All the statutes studied have provisions concerning gambling devices. Most of the laws ban the possession, manufacture, transportation, and use of such machines.[31] A few states, however, limit the definition of gambling devices to such an extent that lottery-related paraphernalia may not be prohibited.[32] No gaping loopholes emerge as a result, but states should not pass up the opportunity explicitly to outlaw lottery-related devices.[33]

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[31]The "device" provisions are examined more thoroughly under the discussion of slot machines, infra.

[32]See Ill. Rev. Stat. ch. 38, §28-2 (appears to require that the device receive money or else be designed for use in a gambling place); N.D. Cent. Code §12.1-28-02(4)(e) (criminalizes only the maintenance of a coin-operated gaming device); Tex. Penal Code art. 47.01(3) (limits "gambling device" to a "mechanical contrivance"); and Del. Code Ann. tit. 11, §1432(a); Hawaii Rev. Stat. §712-1220(5); N.Y. Penal Law §225.00(7); Ore. Rev. Stat. §167.117(4). The latter four states except "lottery tickets and other items used in the playing shares of lottery schemes." Thus, if punchboards, etc. are deemed lottery schemes, and only lottery schemes, it appears that they are not covered by the prohibitions against the possession of gambling devices. Hawaii, New York, and Oregon, however, probably achieve a comparable prohibition under the heading of advancing/promoting gambling activity, which in those states carries a penalty greater than or equal to that for possession of gambling devices.

[33]Two Supreme Court cases bear on statutes dealing with the possession of lottery records. In France v. United States, 164 U.S. 676 (1897), it was held that possession statutes did not apply to records of completed lotteries. Unless counteracted by appropriate statutory language, a valuable tool in the prosecution of numbers operations may be severely limited. Numbers banks retain betting slips for up to a week after the drawing (Gambling Technology at 49); possession of these slips, even after the drawing, ought to be criminalized. In Francis v. United States, 188 U.S. 375 (1903), it was held that even copies of gambling records fell outside the proscription of a narrowly drawn possession statute. Preferable provisions would be broad enough to include such collateral records. See generally Model Act at 22.

e. Conclusions about the modern codes

A lottery or numbers game is the payment of a consideration for a chance to win a prize. Such games normally are situated in a single location and use communications equipment to lay off excess bets. More importantly, the schemes often depend upon the use of tangible records and devices. Hence, anti-lottery statutes are most effective when they (1) employ the three-element definition; (2) ban the use of premises for lotteries and numbers games; (3) outlaw the conveyance of lottery-related information; and (4) make illegal and seizable any lottery-related records and devices.

3. Casinos

a. Conduct and location

Casinos bring to mind images of rooms crowded with people playing games of chance or testing their luck with gambling devices. Casinos by definition are gambling premises. With the exception of only one state,[34] all modern codes prohibit the maintenance or use of such gambling premises.[35] Some states also allow gambling premises to be enjoined as nuisances through civil proceedings.[36] Some recent statutes also treat

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[34]Indiana; see note 82, supra.

[35]These are the same provisions which were discussed in the bookmaking and numbers sections, supra. For a list of the code sections, see notes 87, 88, supra; for a discussion of prohibitions against gambling premises, see notes 82-91, supra, and accompanying text.

[36]See, e.g., Colo. Rev. Stat. Ann. §18-10-107 and Va. Code Ann. §18.2-339.

The preferable provisions permit both law enforcement officials and private citizens to bring the nuisance action. Further, private citizens should not have to show special damages and should not have to pay a security bond, as they would in nuisance actions not involving gambling premises. See Model Act §6 and "comment" at 26; see also, "Equitable Devices for Controlling Organized Vice," 48 J. of Crim. L. C. and P. S. 623-32 (1958).

the operation of gambling premises behind locked doors as a felony. Hence, law enforcement officers with probable cause to believe that gambling is occurring may break into the premises without a search warrant to effect the arrest of the gamblers.[37]

The modern codes take three general approaches to outlawing casinos. These provisions parallel the bookmaking prohibitions. The statutes similar to the Model Act focus on the profit element of casino operation, differentiating only between "gambling" and "commercial gambling."[38] The New York line of statutes, however, prohibits casinos under the headings of "advancing," or "profiting from gambling activity." Both are considered the promotion of gambling in the second degree.[39]

The Wisconsin type statutes concentrate on the "gambling premises" aspect of casino operations. The statutes further ban sharing in the earnings of such premises. In addition, they often strike at casinos by simply banning betting.[40]

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[37] See, e.g., Conn. Gen. Stat. Ann. §53-278e(d). See also note 86, supra.

[38] For the codes and section numbers, see note 62, supra.

[39] See Hawaii Rev. Stat. §§712-1220(1), 712-1222, 712-1223; Ky. Rev. Stat. Ann. §§528.010(1), 528.030, 528.040; Me. Rev. Stat. Ann. tit. 17-A, §§953, 954; N.Y. Penal Law §§225.00(4), 225.05; Ore. Rev. Stat. §§167.117(9), 167.122; and Wash. Rev. Code Ann. §§9.020(15), 9.46.220.

[40] Ga. Code Ann. §§26-2702, 2602703(a); Kan. Stat. Ann. §§21-4304, 21-4304(a); Minn. Stat. Ann. §§609.755, 609.76(2); N.M. Stat. Ann. §§40A-19-2, 40A-19-3(A); N.D. Cent. Code §12.1-29-01(4)(c) (does not prohibit betting, but does criminalize engaging in a gambling business); Ohio Rev. Code Ann. §2915.02(4)(penalizes "betting or playing any. . . game of chance as substantial source of income or livelihood"); Tex. Penal Code arts. 47.02,

In one way or another, the remaining states all directly outlaw casinos.[41] As with bookmaking, however, the most effective provisions are those which attack the profit element and the actual running of a casino. All the modern statutes hamper casino activity in some way, but the prohibitions against advancing and profiting from gambling activity appear to strike hardest at the root of the illegal activities.

b. Gambling devices

Gambling devices are a crucial element in casino activities. All the statutes studied generally forbid the possession, manufacture, and transportation of such equipment.[42] The definitions of "gambling devices" are typically broad

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47.03(1); Utah Code Ann. §§76-10-1102, 76-10-1104 (prohibited activity is "gambling" not "betting"); Va. Code Ann. §§18.2-326, 18.2-328 (the prohibited activity here is "illegal gambling"); Wis. Stat. Ann. §§945.02, 945.03(1).

[41]Delaware concentrates on the "gambling premises" aspect of casinos, though the bookmaking provisions might be successfully applied to casino operators. See Del. Code Ann. tit. 11, §§1403, 1404.

Illinois only penalizes wagering and its statute does not appear to bring casino operation under the harsher provisions of "syndicated gambling." See Ill. Rev. Stat. ch. 38, §§28-1(a)(1) and (2).

New Hampshire only penalizes gambling. See N.H. Rev. Stat. Ann. §647:2(II).

Pennsylvania criminalizes (1) allowing persons to assemble for gambling and (2) soliciting persons to visit gambling premises; the statute does not penalize gambling or profiting from gambling. See Pa. Stat. Ann. tit. 18, §5513(2) and (3).

[42]The "device" provisions are examined more thoroughly under the discussion of gambling machines, infra.

enough to strike at all types of gambling but are especially useful in combatting casinos. The devices are variously described as "contrivance[s] which for a consideration [afford] the player an opportunity to obtain something of value,"[43] or as mechanisms which, "when operated for a consideration, do not return the same value or thing of value for the same consideration upon each operation. . . ."[44] New York presents a somewhat broader definition: "any device, machine, paraphernalia, or equipment [used or usable] in the playing phases of any gambling activity. . . ."[45]

Equally important provisions, however, are those which prohibit the use of and permit the seizure of furniture and fixtures which are not gambling devices per se. These are items not directly used in the conduct of gambling but must relate to and facilitate the illegal activity. For example, the Connecticut statute provides for the seizure of "[a]ll furnishings, fixtures, equipment and stock. . . used in connection with professional gambling or maintaining a gambling premise [sic] . . . ."[46] The New Mexico statute requires the seizure of "[a]ny gambling device or other

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[43]Wis. Stat. Ann. §945.01(3).

[44]Conn. Gen. Stat. Ann. §53-278a(4).

[45]N.Y. Penal Law §225.00(7).

[46]Conn. Gen. Stat. Ann. §53-278c(c).

equipment of any type used in gambling. . . ." [47] Hawaii shares New York's broad definition of "device" and also provides for seizing those devices "used or usable in the playing phases of any gambling activity. . . ."[48] Though the word "usable" appears to expand the scope of what may be seized, furnishings like tables can be seized only if found in use at proven gambling premises.[49] Ten states permit the seizure of gambling-related furniture and fixtures. [50] A

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[47] N.M. Stat. Ann. §40A-19-10.

[48] Hawaii Rev. Stat. §§712-1220(5), 712-1230.

[49] Note that gambling stakes or proceeds are also made seizable by a number of statutes, though no statute explicitly classifies the stakes or proceeds as "a gambling device."

Statutes which require the seizure of gambling proceeds are important in discouraging professional gambling activities. See second series notes 90, 91, infra, and accompanying text.

[50] See Colo. Rev. Stat. Ann. §§18-10-102(4), 18-10-104, 18-10-105 (it appears that in order for equipment to be seized which is not a gambling device per se, the officers making the seizure have to find that equipment in use in connection with professional gambling); Conn. Gen. Stat. Ann. §53-278c(c) (this provides for the seizure of "furnishings and fixtures adaptable to nongambling uses"); Hawaii Rev. Stat. §§712-1220(5), 712-1230 (see comment following Colo. supra); N.M. Stat. Ann. §40A-19-10 (equipment of any type used in gambling is to be seized); Ore. Rev. Stat. §§167.117(4), 167.162 (see comment following Colo. supra); Penn. Stat. Ann. tit. 18, §5513 (this section provides for the confiscation of "any device to be used for gambling" and presumably could be extended to gambling devices per accidens, even though the term gambling devices is not defined); Tenn. Code Ann. §39-2034(3) (see comment following Conn., supra); Utah Code Ann. §76-10-1107 (this provides for the seizure of equipment "used or kept for the purpose of being used for gambling"); Va. Code Ann. §18.2-235(2)(a), 18.2-336 (the equipment must be "actually used in an illegal gambling operation"); Wash. Rev. Code Ann. §9.46.230(3)(see comment following Conn., supra).

continued

single raid and a well-drawn statute could result in the confiscation of virtually all the personal property at the gambling premises. States enacting such statutes thus provide extraordinary disincentives to the operation of casinos.

c. Gambling records

Records are typically crucial to the success of large casinos. In general, state provisions concerning casino records are similar to the provisions for bookmaking or lottery records. Several states, however, have no such provisions.[51] Statutes following the Model Act treat all gambling records alike.[52] States like New York, which outlaw two degrees of "possession of gambling records," exclude casino records from their prohibitions. Possession of casino records must therefore fall under the ban against advancing

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Ill. Rev. Stat. ch. 38, §§28-2(a) and 28-5 provide for the seizure of "gambling devices," but the pertinent words defining that term are "any mechanism, furniture, fixture, equipment or other device designed primarily for use in a gambling place." Thus defined, "gambling devices" seems to imply devices per se rather than convertible fixtures.
The remaining statutes either define "devices" to exclude furniture and fixtures, or they omit seizure provisions.

[51] See, e.g., note 93, supra. Delaware also appears to have no such provision covering casino records. Del. Code Ann. tit. 11, §1403 appears to cover only the possession of bookmaking records.

[52] See note 94, supra, for codes and section numbers and the accompanying text for discussion.

or promoting gambling activity.[53] By the same token, the remaining states generally equate the possession of facilities to record bets with the crimes of gambling or commercial gambling.[54]

Indirect prohibitions against the possession of casino records, however, pose several problems. First, states which do not explicitly outlaw such records pass up an attractive opportunity to strike at some of the most tangible and easily discovered evidence of gambling. Second, legislatures which fail to define "gambling records" run the risk that courts may define the term too narrowly or broadly.[55] Third, the records of all unlawful gambling should be banned so that the gambling laws might become more consistent and fair. No gambler should be able to escape punishment by promoting casino operations instead of bookmaking. Fourth, by not dealing with gambling records explicitly, legislatures may fail to consider the best

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[53]"Such conduct includes but is not limited to conduct directed . . . toward the arrangement of any of [the gambling activity's] financial or recording phases, or toward any other phase of its operation." N.Y. Penal Law §225.00(4). Under this provision the possession of records must "materially aid" the the gambling activity. Advancing gambling activity is banned in id. §225.05. See also, Hawaii Rev. Stat. §§712-1220, 712-1223; Ky. Rev. Stat. Ann. §528-101(1), 528.030; Ore. Rev. Stat. §§167.117(a), 167.122.1.

[54]See Illinois, Kansas, Minnesota, New Mexico, Ohio and Wisconsin code sections in note 96, supra. These provisions were probably written to apply to bookmaking records. However, they should implictly cover casino records, especially if given a liberal construction.

[55]See note 94, supra.

punishment for that specific manifestation of gambling. It may be quite sensible to punish possession of gambling records as severely as the gambling itself. But this is a decision that legislatures should make deliberately, not indirectly.[56] Hence, the statutes which deal with casino operations most effectively are those which treat gambling records explicitly but in context of other anti-gambling laws.

d. Conclusions

Casino operators depend heavily upon maintaining an established location for gambling. They also employ gambling records, devices, and furnishings to facilitate their operations. Banning these premises and objects, therefore, will clearly strike at the foundation of casino activity. Nuisance injunctions and what amount to forcible entry provisions are also useful in controlling these illegal enterprises.[57] Of course, prohibitions against profiting from, promoting, or advancing casino operations are desirable because they include casino operators at all levels of participation.

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[56]Both the statutes in the New York group, supra, second series note 53, and the statutes in the Wisconsin group, supra, second series notes 54 and 96, equate the penalties for possession of records, or facilities to take bets, with those for the activity per se.

[57]Note that these provisions are useful in enforcing bookmaking and numbers prohibitions but are discussed with more particularlity here because of the necessity of gambling premises in casino-type operations.

4. Gambling devices

a. Definition

Before gambling devices can be effectively prohibited they must be explicitly defined. Statutes resembling the Model Act emphasize the design and intended use of such machines. Through a long and detailed description they define gambling devices to include all slot machines, similar equipment used to gamble, and their integral components.[58] Statutes following the Wisconsin model offer a briefer definition. It covers all types of machines used for gambling but probably omits their parts.[59] Statutes like that of New York are equally brief and inclusive;[60] if anything, some

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[58] See, e.g., Conn. Gen. Stat. Ann. §53-278a(4).

[59] A gambling machine is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accomapnied by some skill and whether or not the prize is automatically paid by the machine.

Wis. Stat. Ann. §945.01(3).

[60] 'Gambling device' means any device, machine, paraphernalia, or equipment which is used or usable on the playing phases of any gambling activity, whether such activity consists of gambling between persons or gambling by a persons involving the playing of a machine.

N.Y. Penal Law §225.00(7). The phrase "usable in playing phases," under liberal construction, should include components; it also includes in the prohibition gambling devices per se which are not discovered in use.

New York, however, does not make full use of its efficient definition because it goes on to define "slot machine" very narrowly. Id. §225.00(8).

Hawaii, which basically follows the New York model, eliminates this redundancy, Hawaii Rev. Stat. §712-1220.

of the succinct definitions are too broad. Consequently several statutes carefully except certain amusement devices, typically those which give free plays but return no more valuable consideration. These exceptions normally leave no gaping loopholes for cagey commercial gamblers.[61] Some statutes, however, may be drawn too narrowly, failing to deal with purely electronic devices.[62]

b. Prohibition

Despite slight definitional differences, all the statutes studied prohibit the use or possession of "gambling devices" or some similar term aimed primarily at slot machines. Many of the statutes also forbid "dealing" in gambling devices, i.e., manufacturing, selling, or transporting them.[63] Of

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[61]Connecticut's "gambling device" confers something of value to a winner. The statute excepts pinball machines with the following language: "[p]rovided an immediate and unrecorded right of replay mechanically conferred on players of pinball machines and similar amusement devices shall be presumed to be without value."

[62]See Tex. Penal Code art. 47.01(3), which limits "gambling device" to "any mechanical contrivance" and thereby appears to exclude gambling machines with no moving parts. See also, S. Searcy III and J. Patterson, "Practice Commentary" following Tex. Penal Code art. 47.01, at 296.

[63]See Colo. Rev. Stat. Ann. §18-10-105; Conn. Gen. Stat. Ann. §53-278c; Del. Code Ann. tit. 11, §1405; Ga. Code Ann. §26-2707; Hawaii Rev. Stat. §712-1226; Ill. Rev. Stat. ch. 38, §28-1(3); Ind. Code §35-25-1-4 (Indiana and Tennessee, infra, both superimpose modern possession prohibitions on older ones and do not change the penalties of the old sections which differ markedly from those for the new sections); Kan. Stat. Ann. §§21-4304(3), 21-4306, 21-4307; Ky. Rev. Stat. Ann. §528.080; Minn. Stat. Ann. §609.76(4) and (5); N.H. Rev. Stat. Ann. §647:2(III); N.M. Stat. Ann. §§40A-19-3(F), 40A-19-5; N.Y. Penal Law §225.30; N.D. Cent. Code §12.1-28-02(4); Ohio Rev. (2) Code Ann. §2915.02(5); Ore. Rev. Stat. §167.149; Penn. Stat. Ann. tit. 18, §5513; Tenn. Code Ann. §39-2034 (see comment

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course, the most comprehensive provisions are the most desirable.

Some statutes punish manufacturers more severely than possessors of gambling devices,[64] according to the apparently differing culpabilities of the two offenders. Nonetheless, it is arguable, once again, that professional gambling and dealing in or possessing gambling devices should all be punished equally. All are manifestations of the same basic crime: gambling for profit,[65] and as long as knowledge is the required state of mind, there is little chance that an unconscious possessor will be wrongly punished. All persons involved in professional gambling, therefore, should be punished alike.

Although all states punish possession directly, only thirteen permit the seizure and forfeiture of gambling devices.[66] Since gambling equipment is frequently quite expensive, the risk of loss may be sufficient to deter some gamblers from going into business at all. In any case,

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following Ind. Code, supra); Tex. Penal Code art. 47.06; Utah Code Ann. §76-10-1105; Va. Code Ann. §18.2-331 (effective October 1, 1975); Wash. Rev. Code Ann. §9.46.230; Wis. Stat. Ann. §§945.03(5), 945.05.

[64] See, e.g., Kan. Stat. Ann. §§21-4306, 21-4307.

[65] See, e.g., Conn. Gen. Stat. Ann. §§53-278c, 53-278b(b).

[66] For Connecticut, Pennsylvania, Tennessee, and Washington code sections, see second series note 63, supra. See also Colo. Rev. Stat. Ann. §18-10-104; Ga. Code Ann. §26-2708; Hawaii Rev. Stat. §712-1230; Ill. Rev. Stat. ch. 38, §28-5; Ky. Rev. Stat. Ann. §528.100; N.M. Stat. Ann. §40A-19-10; Ore. Rev. Stat. §167.162; Utah Code Ann. §76-10-1107; Va. Code Ann. §18.2-336.

seizure and forfeiture provisions hamper the renewal of gambling operations that have been raided and increase gamblers' expenses.

c. Conclusions

The basic problem in banning gambling devices is that of definition. Definitions must be brief, but not overly broad or narrow. They must exclude genuine amusement machines but take into account advanced technology. The prohibitions themselves must be similarly well-drafted. For completeness, dealing in gambling devices should be punished as possession. Seizure and forfeiture provisions offer an effective complement to the criminal sanctions.[67] Finally, dealing in gambling devices can be punished as harshly as gambling itself to maximize deterrence.

E. The Modern Gambling Codes: Special Problems

1. The gambler: victim or criminal?

The individuals who benefit the most from organized illegal gambling are probably prosecuted the least. Removed from the day-to-day operations and protected by long chains of command, organized crime syndicate leaders or enterprise owners are often overlooked by the modern gambling statutes. By the same token, the small-time bettor--the victim of professional gamblers--is frequently punished along with the

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[67]Moreover, the cash contents of such machines ought to be seizable. See also second series note 49, supra, and second series notes 90, 91, infra and accompanying text.

persons who took advantage of him. To be most effective, therefore, the gambling statutes should more carefully consider these participants at the top and bottom of the gambling structure.

a. Organized crime

The gambling laws are surely not the only weapon against organized crime. Nevertheless, they should be flexible enough to permit prosecution of persons not directly involved in the gambling business but who still profit from it. The Model Act, for example, acknowledges "the close relationship between professional gambling and other organized crime."[68] It does not, however, allow a person who merely profits from a gambling business to be prosecuted directly. States following the Act must therefore employ aiding-and-abetting or conspiracy theories to reach behind-the-scenes profiteers.[69]

New York allows the prosecution of persons who "profit from gambling activity,"[70] although the crime committed is

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[68] Model Act §1.

[69] Indiana adds such a provision to its professional gambling penalty clause, which covers anyone who "knowingly causes, aids, abets or conspires with another to engage in professional gambling. . . . " Ind. Code §35-25-1-3.

[70] A person 'profits from gambling activity' when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

N.Y. Penal Law §225.00(5).

only "promoting gambling in the second degree."[71] The result is anomalous here as in the Model Act. An organized crime leader may be guilty of only a misdemeanor under New York's gambling law, but a lower-level bookie or numbers banker may be guilty of a felony.[72] Wisconsin, on the other hand, permits prosecution of a person "who participates in the earnings of" a gambling place,[73] but allows no reduction of penalty.

In general, leaders of organized crime syndicates may only be punished if they profit from, aid, or abet gambling operations. Proving that a defendant profited from illegal gambling is a problem in itself. Evidentiary difficulties aside, however, law enforcement officials should be able to prosecute organized crime profiteers for their important but distant role in gambling.[74] Manifestly, the penalties for this upper-echelon participation should be at least as severe as those for actual operation of illegal gambling enterprises.

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[71] Id. §225.05.

[72] Id. §225.10. A syndicate head could be prosecuted for a felony if it were shown that he received more than $500 in one day from a lottery. This appears to be the only circumstance in which a felony conviction could be handed down.

[73] Wis. Stat. Ann. §945.031.

[74] Successful prosecution of such profiteers would be greatly furthered by the use of wiretaps and electronic surveillance.

b. The small-time bettor

While participation at the upper level of the gambling ladder may not be punished enough, participation at the lower level of the ladder may be punished too severely. Small-time betting frequently violates modern gambling statutes. Those states which prohibit betting do so because it keeps the professional gambler in business.[75] New York-type statutes, on the other hand, except the player from criminal penalty since he is more a victim than a wrongdoer.[76] There are strong arguments on both sides of the issue.

On the one hand, the professional gambler would quickly be out of business without the small-time bettor. Discouraging betting thus cuts into the professional's income. Outlawing betting may also protect the bettor's family and dependents by punishing him for squandering his money on gambling.

On the other hand, the player is obviously the victim of the professional. The collective players in the United States bet an estimated $5 billion each year.[77] It would be

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[75] See Model Act, at 6. See also Colo. Rev. Stat. Ann. §§18-10-102(2), 18-10-103, which criminalize gambling and except social gambling (where no one is a professional) from prohibition; Wis. Stat. Ann. §§945.01(1) and 945.02 outlaw betting and provide no exceptions for bets between friends.

[76] N.Y. Penal Law §§225.00(3)(defines player as a contestant or bettor who receives no profit other than personal winnings) and (4)(excepts the player from the rubric "advance gambling activity"). Hawaii uses the same statutory form as New York, but criminalizes the player by not excepting him from "advance gambling activity." Hawaii Rev. Stat. §712-1220(1).

[77] Second Interim Report 46 (1976).

anomalous and unfair to punish the very person that society is trying to protect. He is normally the best source of evidence against the gambling oprators; he is more logically a witness than a defendant. These policy issues, however, can ultimately be balanced only by the citizens and legislators of each jurisdiction.

c. Social activities

Social gamblers must be treated as thoughtfully as are the organized criminals and the small-time bettors. As a practical matter, it makes little sense to outlaw friendly bets on Monday night football or penny-a-point gin games. Such activity is hard to detect and not as harmful to society as commercial gambling. Outlawing widely-played social games breeds disrespect for the law in general and for the gambling statutes in particular. Hence, many states explicitly except social gamblers as well as small-time bettors from their gambling laws.

The problem arises, of course, of how to create a desirable exception without a pernicious loophole. A social gambling exception may also lead on occasion to search and seizure or probable cause problems, complicating the fight against unlawful gambling.[78] These difficulties can be

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[78] See, e.g., Spinelli v. United States, 393 U.S. 410 (1969), under which affidavits for search warrants might well have to establish, to a magistrate's satisfaction, absence of social gambling in order to establish probable cause.

addressed in several ways. Ohio defines the basic crime of gambling to include only professional gambling and betting. Social gambling is simply omitted from the definition, although public gaming is prohibited.[79] The Colorado statute also defines gambling but specifically excludes games or bets incidental to a bona fide social relationship in which none of the participants is a professional gambler.[80] In a somewhat more indirect fashion, Virginia creates a social gambling exception by permitting gambling in a private residence, "providing such private residence is not commonly used for games of chance. . . ,"[81] and no professional gamblers are involved.

Texas and Hawaii offer two of the best social gambling exceptions. They define the activity tightly and they make it an affirmative defense to a prosecution for gambling. Hence, they place the burden of proving (by a preponderance of the evidence) that his activity was social gambling on the defendant.[82]

A subtle problem posed by legalized social gambling is cheating. Desiring to keep the legal games "honest" and

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[79]Ohio Rev. Code Ann. §§2915.02, 2915.04.

[80]Colo. Rev. Stat. Ann. §18-10-102(2). As soon as a professional gambler is involved, the exception no longer applies.

[81]See Va. Code Ann. §§18.2-325, 18.2-334.

[82]See Tex. Penal Code arts. 47.02(b), 47.04(b); Hawaii Rev. Stat. §712-1231.

"friendly," some states outlaw cheating. The relevant Ohio provision, for example, makes cheating a misdemeanor of the first degree. If more than $150 is involved, however, the crime becomes a fourth degree felony. The penalties for cheating and unlawful gambling in Ohio are thus the same.[83] In short, it is hardly surprising that states regulate legal forms of gambling which were previously "dangerous" enough to merit outright prohibition.

2. Penalties

Penalty provisions are the most varied and inconsistent elements of the state gambling laws. If any pattern can be discerned and if public sentiment can be gauged, a tripartite scheme emerges. Large-scale operators and leaders of criminal organizations should probably be treated as felons. Small-time operators should be considered misdemeanants. Social gamblers should receive no penalty whatsoever. Bettors should be punished slightly, if at all.

At present, a number of states place all small and large-scale commercial gamblers in the same category. In some jurisdictions they are guilty only of a misdemeanor.[84] In

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[83]Ohio Rev. Code Ann. §2915.05; see also id. §2915.02.

[84]See, e.g., Conn. Gen. Stat. Ann. §53-278b(b), making the professional gambler a misdemeanant. The Connecticut statute draws no distinction between the large and small time oeprators. Id. §53-278a(3).

others they are guilty of a felony.[85] States like New York, however, try to distinguish the gamblers according to their relative culpabilities.[86] Thus, the waitress who is an occasional numbers seller is not lumped in with the numbers banker who handles hundreds of thousands of dollars daily. Unfortunately, the New York-type statutes fail to punish adequately persons who operate gambling devices or who profit enormously from gambling enterprises.[87] In dealing with persistent professional gamblers, repeating offender provisions should prove useful. Although such statutes often apply to an entire penal code, some states have incorporated special repeating offender provisions into the gambling statutes.[88]

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[85] See, e.g., Kan. Stat. Ann. §21-4304, which treats large and small time operators alike as commercial gamblers and makes commercial gambling a misdemeanor.

[86] See, e.g., N.Y. Penal Law §§225.05, 225.10; Me. Rev. Stat. Ann. tit. 17-A, §§953, 954; Fla. Stat. Ann. §849.25.

[87] See second series notes 48-50, supra, and accompanying text.

[88] See, e.g., Ohio Rev. Code Ann. §2915.02 making the first offense a misdemeanor and the second a felony; Conn. Gen. Stat. Ann. §53-278f, a separate section covering all penalties in the gambling code and providing for a "penalty of the next most serious classification of offense."

There is evidence to suggest that even with the existence of stiff sentencing provisions professional gamblers serve little time in prison. In New York State the probability of an organized crime member going to prison for a gambling violation is one in fifty. Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 92 Cong., 2d Sess. at 4190 (1972). Beyond the scope of this chapter, but also worthy of consideration, are the questions of whether increased penalties for recidivists should be mandatory and also whether sentences in general should be subject to appellate review.

As noted above, some modern codes permit nuisance actions for the abatement of gambling premises.[89] A number of statutes also provide for the seizure and destruction of gambling devices.[90] In addition, important in discouraging gambling are sections permitting the seizure of vehicles and funds connected with gambling enterprises.[91] Supreme Court decisions suggest that tightly-drawn statutes could permit the seizure and forfeiture of vehicles and even real estate used for gambling. The owner or lienholder would need to know nothing of the illegal activity.[92] Of course, legislatures may be reluctant to go this far. There can be little doubt of the deterrent effects of such provisions.

A final way in which states often penalize gambling is through license suspension. In such jurisdictions, state-licensed enterprises, e.g., food or beverage establishments risk loss of license by permitting gambling on the premises. This effectively removes gambling from some of the busiest and most desirable public locations. In addition, the

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[89] See, e.g., Conn. Gen. Stat. Ann. §53-278e.

[90] See, e.g., Ga. Code Ann. §26-2708.

[91] See, e.g., id. §§26-2709, 26-2710.

[92] See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (permitting the seizure of a leased yacht on which marijuana was found but of which the owner, Yacht Leasing Company, had no knowledge); Dobbin's Distillery v. United States, 96 U.S. 395 (1878) (permitting the seizure of a mill from the owner/lessor who did not know the occupant/lessee was engaged in illegal activity for which one penalty was seizure).

possibility of suspension puts the licenses under the dual control of the licensing and regular law enforcement authorities.[93]

3. Evidence and presumptions

Gambling is tough to uncover and tougher to prove. A number of states have therefore created statutory changes in the rules of evidence to make gambling prosecutions more fair and consistent. Generally, the legislatures list facts that establish prima facie cases or give rise to presumptions.[94] The most common presumptions deal with states of mind. Possession of a gambling device leads to a rebuttable presumption that the possessor knew that such device was used in connection with gambling.[95] Similarly, in prosecutions

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[93] See, e.g., Conn. Gen. Stat. Ann. §53-278(c). "All peace officers and all taxing and licensing officials of this state and its political subdivisions and other public agencies shall enforce this subsection." Id.

[94] An in-depth discussion of the presumptions in criminal prosecutions is beyond the scope of this chapter. A good analysis of the topic is found in Christie and Pye, "Presumptions and Assumptions in Criminal Law: Another View," 1970 Duke L. J. 919. Presumptions, however, are coming under judicial review. See, e.g., Mullaney v. Wilbur, 121 U.S. 684 (1975), in which the Maine practice of shifting to the defendant the burden of proving "heat of passion" in order to reduce a murder charge to mansalughter was held unconstitutional.

[95] See, e.g., N.Y. Penal Law §225.35(1). Statutes which follow the Model Act often contain a provision that "direct possession of any gambling record shall be presumed to be knowing possession thereof." Conn. Gen. Stat. Ann. §53-278e(e). There is obviously some ambiguity in the phrase and a question arises as to whether "knowing" applies to the act of possessing or the fact that the records are gambling records. Both the Model Act and the New York scheme are followed in the state of Washington. See Wash. Rev. Code Ann. §§9.46.020, 9.46.260.

for transmission of gambling information, information concerning wagers and betting odds is presumed to be connected with professional gambling.[96] According to another statute, places where gambling devices are found are presumed to be gambling premises.[97] To ease the burden of proving the occurrence of a "sporting event," some states admit as prima facie evidence any report of the event published and placed in general circulation.[98] Finally, several statutes which differentiate between "possession" and "possession with intent to transfer" a gambling device created a presumption which facilitates prosecution under the harsher "transfer" provision.[99] Other modern statutes relate to the admissibility of certain evidence. One permits the introduction of evidence (1) of a place's general reputation as gambling premises or (2) that it was visited by known gamblers.[1] Another

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[96] See, e.g., Colo. Rev. Stat. Ann. §18-10-102(6). Texas makes "proof that an actor communicated gambling information or possessed a gambling device, [etc.] . . . prima facie evidence that the actor did so knowingly and with the intent to further gambling." Tex. Penal Code art. 47.08.

[97] See, e.g., Wash. Rev. Code Ann. §9.46.020(11).

[98] See, e.g., Ky, Rev. Stat. Ann. §528.090.

[99] Proof of possession of any device designed exclusively for gambling purposes, which is not set up for use or which is not in a gambling place, creates a presumption of possession with intent to transfer.

Kan. Stat. Ann. §21-4306(2). Of course, in any statutory scheme which provides the same penalty for possession and transfer, such a presumption is unnecessary.

[1] See, e.g., Wis. Stat. Ann. §945.01(4)(b).

provision specifically allows the introduction of "overheard telephone messages . . . which tend to prove . . . gambling activity.[2] In short, several jurisdictions facilitate the prosecution of gambling cases by creating statutory presumptions and admissibility standards.

4. Legalized gambling

Another aspect of the modern codes which merits discussion is the method used to except legal gambling from the general anti-gambling provisions. In growing numbers, states have been instituting their own lotteries and permitting raffles and bingo games for the benefit of charity.[3] Obviously, the criminal code must fully exempt these activities without creating dangerous loopholes for the professional gambler. Thus, some states specifically exclude from their gambling laws any game created and sponsored by the state government. This is the most awkward form of draftsmanship, however, since the same exception must be welded onto every gambling prohibition in the code.[4] It is more efficient to define

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[2]Del. Code Ann. tit. 11, §1431.

[3]See, e.g., Cal. Penal Code §326.5 now permitting bingo games for charity; Vt. Stat. Ann. tit. 13, §2143; and H.B. 90, ch. 87, Wash. Stat. (1976).

See also proposed constitutional amendments to permit charitable gambling in North Dakota, Laws of North Dakota, House Concurrent Resolution No. 3087, ch. 616 (1975) and in Oregon, Oregon Laws 1975, House Joint Resolution 14.

[4]See, e.g., Conn. Gen. Stat. Ann. §§53-278a to 278g.

and ban all "unlawful" gambling. All gambling-related prohibitions would refer only to "unlawful gambling," and lawful gambling presumably would be only those games specifically authorized elsewhere in the statutes.[5] Whenever a new state-sponsored game was introduced, it would be automatically excepted; no other clumsy amendments would have to be made. Moreover, state-authorized games would be patently distinct from the proscribed, unlawful games. Words would better retain their common-sense meanings because of the distinction. It is confusing to the layman to say that a 'lottery' "conducted by or under the authority of any state" is not "gambling" as he understands that word.[6]

5. Problems with the modern codes

Several factors detract from the force, clarity, and craftsmanship of the new codes. The most troublesome difficulties are caused by adding to, instead of repealing, outdated gambling provisions.[7] A well-drafted new code can effectively ban everything from professional bookmaking to Thursday night bingo, if that is desired. Tacking succinct new statutes onto old-fashioned and endless lists of outlawed

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[5] See, e.g., N.Y. Penal Law §§225.00(12); Ore. Rev. Stat. §167.117(13); and Me. Rev. Stat. Ann. tit. 17-A, §952(11).

[6] See Conn. Gen. Stat. Ann. §53-278a(2).

[7] See Ind. Ann. Stat., Ind. Code, and Tenn. Code Ann. sections of note 23, supra.

activities leads more to confusion than to double coverage.[8] Hence, new gambling statutes should be written on a clean slate and not merely appended to antiquated criminal codes.

Some states, although avoiding this error, have enacted statutes too brief and narrow to be effective. Some states have left out in rem seizure provisions which help curtail gambling.[9] Others omit key definitions, leaving the courts to interpret such words as "pool-selling" and "bookmaking."[10] Legislatures must be careful to control unlawful gambling in every reasonably possible way.

Another problem area relates more to craftsmanship than to confusion or brevity. A number of the gambling codes contain provisions which would more logically appear outside the criminal code altogether. Statutes concerning the validity of gambling contracts, for example, belong more properly with

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[8] See, e.g., Tenn. Code Ann. §39-2004 which provides a fine of $200 to $500 and imprisonment of one to three years for any person

> who shall keep or exhibit . . . [a] gaming table. . . [for 'aiding or assisting the playing of any game of keno, craps, faro, three-card monte, mustang, red and black, high ball, roulette, twenty-one and hazard'], or operate the same either as owner or employee. . . .

See also id. §39-2034 (provides a maximum $1,000 fine and maximum 1 year sentence in a county jail or workhouse for anyone who "knowingly owns, manufactures, possesses, buys, sells, rents, leases. . . [etc.] any gambling device," which is defined, in part, as "any device, mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with professional gambling." Id. §39-2033[4]). Clearly, a gaming table is a gambling device and "keeping" equals "possession."

[9] See, e.g., N.H. Rev. Stat. Ann. §§647:1, 647:2.

[10] See, e.g., Pa. Stat. Ann. tit. 18, §5514.

the state's civil code.[11] By the same token, statutes creating a duty among peace officers to enforce the gambling code are more appropriate to the code sections dealing with the powers and duties of policemen.[12]

Finally, some statutes set up a gambling control commission and require licensing of the legalized games.[13] From the prospective of legal craftsmanship, states are welcome to regulate lawful gambling, but they should probably not do so in their criminal codes. The administrative law or licensing sections would make a better home for such regulations. For maximum force and clarity, legislatures should not tolerate surplusage in their penal codes.

F. Appendix: Proposed Code

What follows is a draft gambling control statute. It embodies most of the suggestions made in this chapter. For a legislative draftman, it should provide a text to work with in revising his state code.

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[11] See, e.g., Ill. Rev. Stat. ch. 38, §§28-7, 28-8.

[12] See, e.g., Utah Code Ann. §76-10-1106.

[13] See, e.g., Wash. Rev. Code Ann. §§9.46.040 to 9.46.180.

Model Gambling Control Act

[insert appropriate enacting clause]

[Statement of Purpose]

[It is the purpose of this Act, recognizing the close relation between professional gambling and other forms of organized crime, to curtail unlawful gambling through the imposition of appropriate sanctions and the provisions of suitable remedies.]

Sec. 1 [Short Title] This Act shall be known and may be cited as the "Gambling Control Act of [insert date]."

Part I

Sec. 2 [Definitions]

As used in this Act:

(a) "advance gambling activity" means engaging in conduct which materially aids gambling, including:

(1) bookmaking

(2) conduct directed toward:

(i) the creation or establishment of the particular game, contest, scheme, enterprise, or activity involved;

(ii) the acquisition or maintenance of premises, paraphernalia, equipment or apparatus for it;

(iii) the transmission of any information

not constituting news reporting assisting in the conduct of it;

(iv) the solicitation or inducement of persons to participate in it;

(v) the actual conduct of the playing phases or it; or

(vi) the arrangement of any its financial or recording phases or any other phase of its operations; or

(2) having substantial proprietary control or other authoritative control over premises being used for gambling activity, permitting such activity to occur or continue or making no effort to prevent its occurrence or continuation;

(b) "bookmaking" means engaging in gambling activity by accepting bets as a business upon the outcome of a future contingent event;

(c) "contest of chance" means any gambling game, contest, scheme, enterprise or activity, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that the knowledge, skill, speed, strength, or endurance of the contestants may also be a factor in it;

(d) "gambling" means staking or risking something of value upon the outcome of a future contingent event not under the player's control or influence, with the intent that the player or someone else will receive something

of value in the event of a particular outcome, but not including bona fide business transactions under the law of contracts, including:

(1) a contract for the purchase or sale at a future date of a security or commodity;

(2) an agreement to compensate for loss caused by the happening of chance;

(3) a contract for indemnity or guaranty; and

(4) a contract for life, health, or accident insurance;

(e) "gambling device" means any thing, including money, that is used or is primarily designed for use:

(1) in the storage of information in the operation, promotion, or playing of any gambling game, contest, scheme, enterprise, or activity; or

(2) in the playing phases of any gambling game, contest, scheme, enterprise, or activity;

(f) "knowing state of mind" means, with respect to a person's conduct, awareness by the person of the nature of his conduct;

(g) "lottery" means a gambling game, contest, scheme, enterprise, or activity in which:

(1) the player pays or agrees to pay something of value for a chance, represented and differentiated by a number or by a combination of numbers or by some other medium, one or more of which chances is to be designated the winning chance;

(2) the winning chance is to be determined through a drawing or by some other method based on an element of chance by conduct on the part of persons conducting or connected with the game, contest, scheme, enterprise, or activity; and

(3) the holder of the winning chance is to receive something of value;

(h) "mutuel" "policy" or "numbers" means a form of lottery in which the winning chance or play is not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the game, contest, scheme, enterprise, or activity, but upon the basis of the outcome of a future contingent event otherwise unrelated to the particular game, contest, scheme, enterprise, or activity;

(i) "person" means any individual or entity capable of holding a legal or beneficial interest in property;

(j) "player" means a person who engages in gambling activity solely as a person who stakes or risks something of value on the outcome of a future contingent event and who is not a bookmaker;

(k) "profit from gambling activity" means to accept or receive something of value, other than as a player, with knowledge that it represents participation or will represent participation in the proceeds of gambling activity;

(l) "reckless state of mind" means, with respect to an existing circumstance, awareness by the person of a risk that such circumstance exists and a disregarding by such person of such risk, where such risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation;

(m) "social gambling" means gambling:

(i) in which the only participants are players of the age of majority;

(ii) from which no person receives of become entitled to receive something of value or any profit whatsoever other than as a player, including from any source, fee, renumeration connected with the gambling or activity such as arrangement or facilitation of the same contest, scheme, enterprise, or activity or permitting the use of premises or selling or supplying for profit refreshments, food, drink, service, or entertainment to participants, players or spectators; and

(iii) where it is not engaged in or at any business establishment, including a hotel, motel, tavern, bar, nightclub, cocktail lounge, restaurant, massage parlor, billiard parlor, or any public area, including a public park, public building, public hospital, public beach, school grounds, public means of transportation or place of worship;

(n) "something of value" means:

(1) any money or property;

(2) any token, object, or article exchangeable for money or property;

(3) any form of credit or promise contemplating transfer of money or property or any interest in it; or

(4) an extension of a service or entertainment, [not including an unrecorded and immediate right of replay of a game not exchangeable for money or property;] and

(o) "unlawful" means not expressly authorized by statute.

Sec. 3 [General Rules of Construction and State of Mind]

(a) [Rule of Construction]--[This Act shall be construed neither strictly nor liberally, but in light of its purpose, and so that its sanctions will be fully utilized.]

(b) [State of Mind]--Unless otherwise provided, a person is criminally or civilly liable under this Act only if:

(1) his state of mind with respect to his conduct is knowing; and

(2) his state of mind with respect to an attendant circumstance is reckless.

Sec. 4 [Syndicated Gambling]

(a) [Offense].--A person is guilty of syndicated gambling if he:

(1) engages in unlawful bookmaking to the extent

that he receives or accepts in any 24-hour period or in connection with a particular event more than five bets having an aggregate value risked by the player in excess of $5,000.

(2) receives in connection with (i) an unlawful lottery, or (ii) an unlawful mutuel policy, or numbers game, contest, scheme, or enterprise, money or written records from any person, other than a player whose chances or plays are represented by such money or records; or

(3) receives in connection with an unlawful: (i) lottery; (ii) unlawful mutuel policy or numbers game, contest, scheme, or enterprise, other than bookmaking, bets having an aggregate value risked by the players in excess of $500 in any 24-hour period of playing in the game, contest, scheme, or enterprise.

(b) [Grading].--A person who commits syndicated gambling shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Sec. 5 [Possession of Syndicated Gambling Records]

(a) [Offense].--A person is guilty of possession of syndicated gambling records if he possesses any writing, paper, instrument or article:

(1) of a kind commonly used in the operation or promotion of a bookmaking game, contest, scheme or

enterprise and constituting, reflecting, or representing more than 500 plays or chances in it; or

(3) of a kind commonly used as a statement or summary of individual acts, plays, or chances described in subsections (a) (1) or (2) which is being used or is intended by him to be used in the operation of an unlawful gambling activity.

(b) [Grading].--A person who commits possession of syndicated gambling records shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 6 [Unlawful Gambling]

(a) [Offense].--A person is guilty of unlawful gambling if he advances or profits from unlawful gambling activity.

(b) [Grading].--A person who commits unlawful gambling shall be fined not more than $5,000, or imprisoned not more than two years, or both.

Sec. 7 [Possession of Gambling Records]

(a) [Offense].--A person is guilty of possession of gambling records if he possesses any writing, paper, instrument or article, which is being used or is intended by him to be used in the operation of an unlawful gambling activity.

(b) [Grading].--A person who commits possession of gambling records shall be fined not more than $5,000, or imprisoned not more than one year, or both.

Sec. 8 [Trafficking in a Gambling Device]

(a) [Offense].--A person is guilty of trafficking in a gambling device if he possesses, sells, distributes, manufactures or assembles a gambling device, which was or is to be used in the advancement of unlawful gambling activity.

(b) [Grading].--A person who commits trafficking in a gambling device shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 9 [Scope of Title II]

(a) [Defense Precluded].--In a prosecution under this title, it is not a defense that the gambling activity, including the drawing of a lottery, which was involved in the otherwise unlawful conduct takes place outside this [insert appropriate phrase] and is not in violation of the laws of the jurisdiction in which it takes place.

(b) [Affirmative Defense].--In a prosecution under this title, it is an affirmative defense, the burden of proof of which rests on the defendant by a preponderance of the evidence, that

(1) the defendant advanced the gambling activity solely as a player, or

(2) the gambling activity engaged in was solely social gambling.

Part III

Sec. 10 [Cheating at Gambling]

(a) [Offense].--A person is guilty of cheating at a gambling activity if, with intent to defraud, he corrupts the outcome of:

(1) the subject of a bet;

(2) a game, contest, scheme, enterprise, or activity of knowledge, skill, speed, strength, or endurance; or

(3) a game, contest, scheme, enterprise, or activity of chance.

(b) [Grading].--A person who commits cheating at a gambling activity shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 11 [Sports Bribery]

(a) [Offense].--A person is guilty of sports bribery if, with intent to corrupt the outcome or margin of outcome of a publicly exhibited sporting contest:

(1) he gives anything of value to a participant, official, or other person associated with the contest, he accepts anything of value.

(2) as a participant, official, or other person associated with the contest, he accepts anything of value.

(b) [Grading].--A person who commits sports bribery shall be fined not more than $5,000 or imprisoned for not more than

five years, or both.

(c) [Definition].--As used in this section, "publicly exhibited sporting contest" means a game, contest, scheme, enterprise or activity in any sport involving human beings or animals, whether as individual participants or teams of participants, the occurrence of which is publicly announced in advance of the event.

Part IV

Sec. 12 [Evidence]

(a) [Inferences and Rebuttable Evidence].--In an action relating to this Act:

(1) Proof of transmission of information assisting in the conduct of gambling activity not consisting of news reports, unless satisfactorily explained, gives rise to an inference that the person who transmitted the information was aware of the risk that such transmission would materially aid the gambling activity.

(2) Proof of substantial proprietary control or other authoritative control over premises used for gambling activity, unless satisfactorily explained, gives rise to the inference that the person who had such control was aware of the risks that his exercise of control would materially aid the gambling activity.

(3) Proof of possession of syndicated gambling records, gambling records, or a gambling device gives

rise to an inference that the person who had such possession was aware of the risk that it had such a character and contents.

(4) Where it is necessary to prove the occurrence of a sports event, a published report of its occurrence in a daily newspaper, magazine or other periodically printed publication of general circulation shall be admissible in evidence and shall constitute rebuttable evidence of the ocurrence of such event.

(5) Where it is necessary to prove that premises have been used for gambling activity, proof that the premises have a general reputation as a place for gambling activity or that at or about the time in question it was frequently visited by persons who have the reputation for engaging in gambling activity shall be admissible in evidence and shall constitute rebuttable evidence of the occurrence of such gambling activity.

(6) Where it is necessary to prove that gambling activity occurred on premises, proof that a law enforcement officer received or overheard telephone messages evidently intended for those on the premises that tend to prove that gambling activity was occurring on the premises is admissible and shall constitute rebuttable evidence of the occurrence of such gambling activity on the premises.

(b) [Accomplice Evidence] In a prosecution for conduct in violation of this Act, the testimony of an accomplice, if believed beyond a reasonable doubt, is sufficient for a conviction.

Part V

Sec. 13 [Extended Sentences] A person who has been convicted of:

(a) syndicated gambling shall, upon a subsequent conviction for such offense, be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) unlawful gambling shall, upon a subsequent conviction for the such offense, be fined not more than $10,000 or imprisoned not more than four years, or both.

(c) trafficking in gambling devices shall, upon a subsequent conviction for such offense, be fined not more than $10,000 or imprisoned not more than four years, or both.

(d) possession of syndicated gambling records shall, upon a subsequent conviction for such offense, be fined not more than $10,000 or imprisoned not more than four years, or both.

(e) possession of gambling records shall, upon a subsequent conviction for such offense be fined not more than $10,000 or imprisoned not more than two years, or both.

(f) cheating at gambling shall, upon a subsequent conviction for that offense, be fined not more than $10,000 or imprisoned not more than four years, or both.

(g) sports bribery shall, upon a subsequent conviction for such offense, be fined not more than $10,000 or imprisoned not more than ten years, or both.

Sec. 14 [Alternative Fine]

(a) [Twice Gain or Loss] In lieu of a fine otherwise authorized by law, a person who has been found guilty of conduct constituting an offense in violation of this Act through which he derived something of value or by which he caused personal injury or other loss, may be sentenced to pay a fine that does not exceed twice the gross value gained or twice the gross loss caused, whichever is the greater, plus the costs of investigation and prosecution.

(b) [Hearing] The court shall hold a hearing to determine the amount of the fine to be paid under subsection (a).

Sec. 15 [Civil Forfeiture] All personal property, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct constituting an offense in violation of this Act is subject to civil forfeiture as provided by law.

Sec. 16 [Injunctions]

(a) [General] In addition to what is otherwise authorized by law, the [insert appropriate phrase] shall have jurisdiction to prevent and restrain conduct constituting an offense in violation of this Act. The [insert appropriate phrase] may

issue appropriate orders, including:

(1) ordering any person to divest himself of any interest in any organization;

(2) imposing reasonable restraints on the future conduct of any person, including making investments or prohibiting any person from engaging in the same type of organization involved in the offense; or

(3) ordering the dissolution or reorganization of any organization, making due provision for the rights of innocent persons.

(b) [Application by (insert appropriate phrase] The [insert appropriate phrase] may institute proceedings under subsection (a). In any such proceeding, the [insert appropriate phrase] shall move as soon as practicable to a hearing and a determination. Pending final determination, the [insert appropriate phrase] may at any time enter such restraining orders or prohibition or take such other actions as are in the interest of justice.

(c) [Application by Private Party] Any person may institute proceedings under subsection (a). In such proceedings, relief shall be granted in conformity with the principles which govern the granting of injunctive relief upon threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant

loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination of merits.

Sec. 17 [Damages]

(a) [Suit by the (insert appropriate phrase)] If the [insert appropriate phrase] is injured by reason of any violation of this Act, the [insert appropriate phrase] may bring a civil action and recover damages as specified in subsection (c) (1) and the costs of the action.

(b) [Suit by a Private Person] If a private person is injured by reason of any violation of this Act, the private person may bring a civil action and recover damages as specified in subsection (c) (2), attorney's fees, and costs of investigation and litigation, reasonably incurred.

(c) [Treble Damages] Damages recoverable in an action brought under

(1) subsection (a) shall be the actual damages sustained;

(2) subsection (b) shall be three times the actual damages sustained plus, where appropriate, punitive damages.

Sec. 18 [Procedure]

(a) [Intervention] The [insert appropriate phrase] may, upon timely application, intervene in any civil action or proceeding brought under this Act if [insert appropriate

phrase] certifies that in his opinion the action or proceeding is of general public importance. In such action or proceeding, [insert appropriate phrase] shall be entitled to the same relief as if the [insert appropriate phrase] had instituted the action or proceeding.

(b) [Estoppel] A final judgment or decree rendered in favor of the [insert appropriate phrase] in any criminal action or proceeding under this Act shall estop the defendant in such action or proceeding in any subsequent civil action or proceeding under this Act as to all matters as to which such judgment or decree in such action or proceeding would be an estoppel as between the parties to it.

(c) [Limitations] No civil cause of action shall be brought under this Act more than five years after such action occurs. If a criminal prosecution, civil action, or other proceeding is brought or intervened in by the [insert appropriate phrase] to punish, prevent or restrain any conduct constituting an offense in violation of this Act, the running of the period of limitations provided by this subsection with respect to any cause of action arising under this Act, which is based in whole or in part on any matter complained of in any such prosecution, action or proceeding brought by the [insert appropriate phrase], shall be suspended during the pendency of such prosecution, action or proceeding and for two years following its termination.

Part VI

Sec. 19 [General Provisions]

(a) [Severability Clause] [insert appropriate severability clause.]

(b) [Amendments to Other Acts]

(1) [Immunity] [Whenever, in the judgement of (insert appropriate phrase), testimony or production of other evidence by any person in any criminal prosecution, civil action or other proceeding under this Act is necessary, such (insert appropriate phrase) may make application to (insert appropriate phrase) that the person be instructed to testify or produce evidence, and upon order of the (insert appropriate phrase), such person shall not be excused from testifying or otherwise producing evidence on the ground that the testimony or evidence may tend to incriminate him, provided that no testimony or other evidence compelled under such order or any evidence derived from such testimony or other evidence may be used against such person in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.]

(2) [Electronic Surveillance] [Insert, if necessary, an appropriate amendment to existing legislation authorizing electronic surveillance to provide for such surveillance in investigations and prosecutions under this Act.]

(c) [Repealers] [Insert appropriate repealers.]

(d) [Effective Date] [Insert effective date.]

Chapter IX. Civil Law

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CHAPTER IX. CIVIL LAW

A. Introduction

These materials have attempted to tell the story of the development of the law of gambling. A comprehensive analysis of the development of the rules of the civil law of gambling would, however, probably exhaust several additional chapters of these materials. Legal rules not only exist, they have exceptions. To examine each in its origins, development and present contours would require a full explanation of the surrounding circumstances that allow for the exceptions. In addition, the United States includes 51 independent legal jurisdictions. Each has its own distinct heritage and body of law. With respect to the civil law of gambling, these jurisdictions do not break into any readily discernible groups. At best, this chapter, therefore, will limit itself to identifying the majority or predominant rules and note significant or unusual doctrines that have been adopted in minority jurisdictions. The approach, too, will be primarily analytical and only secondarily historical.

The policy considerations behind the various rules of the civil law in the gambling area, moreover, are often not articulated at all by the enacting legislature. Some civil provisions are also inconsistent with one another. A legislature, at times, will pass a criminal statute to promote one policy, while the courts will adopt or enforce civil rules to promote another. Such contradictions have become particularly apparent in the conflict between old civil law rules and modern criminal codes that decriminalize various forms of gambling. The possibility of anomalies in this area does not, of course, inevitably lead to the conclusion that the traditional civil law positions are outmoded or should be discarded in particular jurisdictions.

Rather, it does indicate that each state should re-examine its own civil doctinres and rules in this area at the same time that it reconsiders its criminal statutes to insure that they remain consistent with such modern views of gambling that are ultimately accepted in the area of the criminal law. It is the purpose of this chapter, therefore, to give policy makers an introduction to the contours of the traditional doctrines and rules of the civil law dealing with the various forms of gambling to facilitate that systematic and comprehensive re-examination of an entire body of law that ought to accompany any wise reform.

B. Early Common Law

1. The English common law heritage

Since gaming and wagering were not illegal at common law,[1] the debts arising from such transactions were enforceable in the courts. The judiciary, however, seldom tried such cases. They begrudged the time spent on determining the outcome of frivolous wagers. As a rule, they ignored these actions until they had exhausted all the other entries on the docket.[2] Further, the courts refused to enforce any bet based on an illegal game or any legal game held to violate public policy or morality.[3]

From 1650 onward, the assent of the middle class in England altered the old common law attitude to gaming and wagering. Not tolerant of "frivolous" activities,[4] the new

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[1] See The Case of Monopolies, 11 Co. Rep. 84, 87, 77 Eng. Rep. 1260, 1263 (1603); Rex v. Rogier, 1 B. & C. 272, 275, 107 Eng. Rep. 102, 103 (1823); Jenko v. Tupin, 13 Q.B.D. 505, 513, 516 (1884).

[2] G. Stutfield, The Law Relating to Betting, Time-Bargains, and Gaming I (1884) [hereinafter cited as Stutfield].

[3] See Jones v. Randall, 1 Cowp. 37, 39, 98 Eng. Rep. 954, 955 (K.B. 1774); DaCosta v. Jones, 2 Cowp. 729, 735, 98 Eng. Rep. 1331, 1334 (K.B. 1778).

[4] See II Acts and Ordinances of the Interregnum 1249, 1250 (1657).

middle classes sought to suppress the excesses and abuses of gaming.

While Puritan legislation as such did not survive, its basic principles foreshadowed the subsequent civil law on gambling in England. Puritan tenents on excess were thus reflected in the Statute of Charles II (1664)[5] and the Statute of Anne (1710).[6] Entitled "An Act against deceitful, disorderly, and excessive gaming," the Statute of Charles II was primarily designed to protect "the younger sort" from debauchment at the hands of "sundry, idle, loose, and disorderly Persons . . . to the Loss of their precious Time and utter Ruin of their Estates and Fortunes."[7] It aimed to limit fraudulent and excessive gambling.

The victim of cheating or fraud in gaming could bring suit for the recovery of three times the sum lost. If his suit were successful, he and the Crown would equally divide the amount so recovered. If the victim failed to sue within six months of his loss, during the next year "any person" was permitted to sue in his place and to recover the loser's share as a reward.[8]

Gaming debts, secured on credit in excess of £100, were judicially unenforceable if they had been incurred "at any one Time or Meeting." Contracts relating to the payment of these debts were "utterly void of none effect."

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[5]16 Car. II, c. 7 (1664).

[6]9 Anne, c. 14 (1710).

[7]16 Car. II, c. 7, §1 (1664).

[8]Id. §2.

Further, any securities conveyed in relation to such debts were also declared void.[9] In the case of "excessive gaming," any person could sue the winner for a penalty similar to the one for cheating.[10]

The statute of Anne (1710) is particularly important, for it not only filled in gaps in the Statute of Charles II, it also formed the basis of much of the early American civil law on gambling. The statute penalized cheaters or frauds at gaming or wagering,[11] and virtually outlawed professional gambling.[12] More important, it declared all securities given for money lost at gambling or for repayment of money knowingly lent for this purpose to be wholly void.[13] It also permitted anyone who had lost more than £10 at any one sitting to recover this sum plus costs through the courts.[14] If the actual loser failed to sue within three months, then anyone not in collusion could sue for treble the amount lost. One-half of the amount recovered went to the plaintiff in the action, and the other half to the poor of the community.[15]

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[9] Id.

[10] Id.

[11] 9 Anne, c. 14, §5 (1710).

[12] Id. §§6-8.

[13] Id. §1.

[14] Id. §2.

[15] Id.

While it did not mention "contracts", the Statute of Anne did affect the enforceability of some gaming contracts. Any such contract for which a security had been given was void. If a contract exceeded £10, the loss was recoverable and the contract was illegal whether a security was given or not.[16] The statute did not affect gaming contracts less than £10. These claims remained enforceable.[17]

Although the Statute of Anne was enacted to reform gambling practices, in at least one area it produced an unexpected and undesirable result.

> The Statute of Anne in making securities 'void to all intents and purposes,' worked great injustice in the case of innocent holders for value of bills and notes which had originally been given for gaming transactions.[18]

A bona fide purchaser for value of a note issued in payment of a gambling debt was unable to recover on it in the courts.[19]

2. Early American civil law on gambling

The Statute of Anne served as the basis of American civil law on gambling. Colonial legislatures enacted gambling laws whose content and language was directly taken from this statute. After the Declaration of Independence, most states legislatively received the pre-1776 law of England which included the Statute of Anne.

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[16]H. Street, The Law of Gaming 383 (1937).

[17]See McAllester v. Haden, 2 Camp. 438, 170 Eng. Rep. 1210 (1810); Emery v. Richards, 14 M. & W. 728, 153 Eng. Rep. 668 (Ex. 1845).

[18]Stutfield at 9.

[19]Pope v. St. Leger, 1 Lut. 484, 125 Eng. Rep. 256 (1793).

American jurisdictions, either through their courts or legislatures, did alter one aspect of the Statute of Anne. The statute had declared that "all notes, bills, bonds, judgments, mortgages or other securities or conveyances" whose consideration in whole or in part was based upon gambling were "utterly void, frustrate, and of none effect to all intents and purposes." "Contracts" was not included in this provision. Interpreting this clause with other sections of the statute, English jurists determined that while securities based on gambling consideration could be void, the contract could still be valid. Contracts for under £10 would be enforced by the English courts.[21] Significantly several American legislatures added "contracts" to the list of void negotiable instruments.[22] In other jurisdictions, the courts avoided the contract-security distinction drawn by their English counterparts. Noting that the English law was received to the extent that it was consistent with the American socio-political experience,[23] these courts ruled that gaming was so abhorred that public policy, independent of statute, proscribed the enforcement of gambling contracts.[24]

For brief periods, some jurisdictions, however, did enforce gambling contracts.[25] Iowa and Oregon, for example,

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[21] See McAllester v. Haden, 2 Camp. 438, 170 Eng. Rep. 1210 (1810); Emery v. Richards, 14 M. & W. 728, 153 Eng. Rep. 668 (Ex. 1845).

[22] See, e.g., Act of February 8, 1797, §2, Revised Laws of the State of New Jersey 224 (Patterson ed., 1800); Act of November 3, 1788, ch. 5, N.C. Laws (1788).

[23] See, generally, P.S. Reinsch, The English Common Law in the Early American Colonies (1970); see also, R. Pound, The Spirit of the Common Law 113-16 (1921).

[24] See, e.g., Perkins v. Eaton, 3 N.H. 152, 155 (1825) (Richardson, C. J.) (held: not enforcible).

[25] See, e.g., Act of December 25, 1838, §1, repealed by Act of February 13, 1843, ch. 76, §§1-13, Rev. Stat. Iowa 273 (1843).

enacted legislation which enforced such contracts. Texas and other states which had been dominated by civil law countries also enforced gambling contracts.[26] Idaho adopted the common law of England rather than the laws of England.[27] Under the common law of England, the courts would enforce gambling debts and obligations, except those that were contra bono mores.[28] Louisiana, like France, did, and still does, enforce wagers and gambling contracts that promote horseracing, shooting matches, and foot races.[29] These "skills of war" had been considered so vital to military preparedness that their encouraged development outweighed the doctrine of contra bono mores. Most of these laws, however, were short-lived. In time, legislatures generally promulgated statutes modeled after the Statute of Anne.

The states retained other sections of the Statute of Anne, as well as the section on void negotiable instruments. Individuals participating in a civil proceeding were immunized to criminal charges for their gambling activity.[30] For three

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[26] See Spanish Civil Code, Arts. 125-126, in I Sayles Early Law of Texas 171.

[27] See [1863] Idaho Laws 527.

[28] See 6 Encyclopedia of the Laws of England 48 (1898).

[29] See La. Stat. Ann.--Civil Code, art. 2983 (West 1952).

[30] See Public Statute Laws of Connecticut, Title 80, ch. 2, §§1-4 (1808).

to six months, losers of gambling transactions were given the exclusive right to recover their losses. After this time elapsed, anyone not in collusion with the loser could sue for treble the amount lost.[31] One-half of the amount recovered went to the informer. The other half usually went to the local jurisdiction's poor or schools.[32]

During the 1800's the courts and legislatures further developed the civil law of gambling. By the 1870's, the civil law had largely crystalized into its present form. Although forms of gambling have been legalized, (e.g. parimutuel betting) some of this body of civil law has only recently received the renewed attention of refomers.

Today, the issue can be raised whether the basically hostile position of civil law is inconsistent with the policy goal of decriminalization. In legalizing gaming, legislatures have often ignored the impact of the unmodified civil law on the reformed criminal law. The civil law could impede the purposes of the reform, particularly if the thrust of legalization is to encourage gambling. Often, however, the purpose of the legislature will not necessarily call for the reform of the civil law. What is needed, however, is careful attention to the relevant questions.

C. Modern Civil Law

1. Gambling transactions

Most states have legislation invalidating contracts resulting from gambling transactions.[33] These statutes usually have been modeled after the Statute of Anne.[34]

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[31] Id. ch. 3, §1.

[32] See, e.g., Penal Code of the Hawaiian Kingdom, ch. 42, §§1-2 (1869).

[33] See, e.g., Ore. Rev. Stat. §465.090 (1974).

[34] 9 Anne c. 14 (1710).

Significantly, most of these statutes have added "contracts" to the Statute of Anne's list of void negotiable instruments. This modification of statutory language has freed American courts from examining the issue of whether gambling contracts remain valid even though their security is void. Until the Gambling Act of 1835, this issue had plagued the English courts.[35]

In states that have not enacted such statutes, the courts have generally refused to enforce wagering contracts. This conclusion has been based on either of two rationales. Courts have objected that the English common law rule sustaining the validity of gambling contracts was not suited to the American experience.[36] They would, therefore, not enforce gambling transactions for they were against public policy. Other courts have noted that the Statute of Anne has been adopted by the courts of that jurisdiction as part of the received common law of England.[37] Ignoring the subtle distinction between contracts and securities, these courts have refused to enforce gambling contracts, debts, and notes or conveyances in consideration of such contracts.

There are exceptions to the general rule of non-enforceability of gambling contracts. A contract resulting from a gambling transaction will be enforced if the contract can be separated from the illegal acts or contract and if the plaintiff does not need to rely on the illegal transaction to establish his case.[38] The courts may also enforce a tainted contract if

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[35]Gaming Act of 1835, 5 & 6 Will. IV, c. 41, §1 (1835).

[36]See, e.g., Appleton v. Maxwell, 10 N. M. 748, 65 P. 158 (1901).

[37]See, e.g., Scott v. Cowtrey, 7 Nev. 419 (1872); West Indies, Inc. v. First National Bank, 67 Nev. 13, 214 P.2d 144 (1950).

[38]See, e.g., Ross v. Lincoln Savings & Loan Ass'n., 178 A.K. 1134, 13 S.W.2d 600 (1929).

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to do so will defeat the illegal purpose of the parties and tend to deter others from entering into similar contracts.[39]

When gambling under specified conditions has been made legal (or at least has not been criminalized), the courts have split on the issue of whether contracts arising out of these authorized transactions are legally enforceable in a civil action. Most courts have adopted the view that these contracts remain void.[40] Others have adopted the view that they are valid and enforceable.[41] There may be specific statutory provisions for the enforcement of these debts.[42]

2. Holders in due course

In states that void negotiable instruments whose consideration was money won or lost in gaming, a problem arises when an innocent purchaser for value seeks to enforce an instrument based on gambling consideration.

According to section 3-305 of the Uniform Commercial Code, a holder in due course takes the instrument subject to the jurisdictional illegalities that might render it a nullity.

> [I]f under that law the effect of . . . the illegality is to make the obligation entirely null and void, the defense may be asserted against a holder in due course.

Some states have exempted the holder in due course from statutory provisions rendering instruments based on a gambling consideration void.[43]

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[39] See, e.g., Cardwell v. Kelly, 95 Va. 570, 28 S.E. 953 (1898).

[40] See, e.g., Tuckett v. Herdic, 5 Tex. Civ. App. 690, 24 S.W. 992 (1893).

[41] See, e.g., Mehler v. McLean, 19 La. App. 425, 139 So. 681 (1932).

[42] See Intercontinental Hotels Corp. (P.R.) v. Golden, 15 N.Y. 229, 254 N.Y.S. 2d 527 (1964) discussing Puerto Rico's code.

[43] See, e.g., Conn. Gen. Stat. Ann. §4738 (1930).

In an action by the transferee of such a note, the plaintiff has the burden of showing that he took the note as a holder in due course.[44] The enforceability of the note, however, depends largely upon whether state statutes render these contracts void or voidable. If a statute explicitly declares negotiable instruments related to gambling void, the holder in due course is probably without a remedy. The rationale of the court is that to allow the holder in due course to recover would contravene the state's policy against gambling.[45] Otherwise, by implication all gambling debts would be valid by the mere endorsement and delivery to an unsuspecting third party. Other courts have determined that the law makes such negotiable instruments only voidable. The holder in due course can enforce such instruments, for the courts do not desire to place the burden of the loss on this innocent individual.[46]

3. Collateral contracts

A renewal note, replacing a note arising out of a gambling transaction, has no more validity than the original note.[47] The same defenses may be raised just as the compromise of a gambling debt cannot constitute consideration for a new promise.[48]

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[44] See, e.g., Huffman v. Kahn, 167 Okla. 389, 29 P.2d 767 (1934).

[45] See, e.g., Swinney v. Edwards, 8 Wyo. 54,55 P. 306 (1897).

[46] See, e.g., Huffman v. Kahn, 167 Okla. 389, 29 P.2d 767 (1934).

[47] See, e.g., Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708 (1907); Fowler v. Cheirret, 69 Id. 224, 204 P.2d 502 (1949).

[48] Id.

Usually all contracts and conveyances collateral to gambling transactions are void.[49] This rule has been applied to invalidate a bond given to secure a bet or wager,[50] or to indemnify a stakeholder,[51] or one taken in compromise of an action on a gambling contract.[52]

Where the courts[53] or legislature[54] have determined that judgments based on negotiable instruments arising out of gambling debts are void, a judgment is usually subject to collateral attack.[55] In contrast, it has been held that the illegality of a gambling contract on which a default judgment was obtained did not vitiate the judgment.[56]

4. Recovery of money lent for gambling purposes

A person who knowingly lends money to another person intending to use the money for an unlawful purpose may be held to be particeps criminis; he is, therefore, denied access to the courts.[57] Most states declare that loans made for

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[49] See, e.g., Shropshire v. Glascock, 4 Mo. 536 (1837).

[50] See, e.g., Cohn v. Brinson, 112 Miss. 348, 73 So. 591 (1916).

[51] See, e.g., Columbia Bank & Bridge Co. v. Haldeman, 7 W. & S. 233 (Pa. 1844).

[52] See, e.g., Shropshire v. Glascock, 4 Mo. 536 (1837).

[53] See, e.g., Campbell v. McConnel, 214 Ill. App. 342 (3rd 1919).

[54] See, e.g., Schwartz v. Battifarno, 2 N.J. 478, 67 A.2d 148 (1949).

[55] Id.

[56] See, e.g., Holland v. Pirtle, 29 Tenn. 167 (1849), Contra. Schwartz v. Bettifarno, 2 N.J. 478, 67 A. 2d 148 (1949).

[57] See, e.g., Higgins v. McCrea, 116 U.S. 671 (1885).

the purpose of enabling the borrower to gamble are not recoverable by the lender. This rule, however, does not apply in all circumstances. For example, some courts have held that money loaned for gambling may be recovered if the borrower did not use it for that purpose. As long as the illegal contract remains executory, the courts will encourage its repudiation.[58] Other courts have drawn a fine distinction between the person who lends money to be used for gambling purposes and the person who lends money with the knowledge that it may be used for gambling purposes.[59] The lender must have intended such use or have participated in the gambling. Further, some courts will not recognize or enforce securities taken for money which was loaned for the express purpose of gambling in a manner prohibited by law.[60] On the other hand, there are courts which will not allow the mere knowledge of the lender to defeat enforcement of the security.[61]

If the borrower takes the loan to pay an antecedent gambling debt, the lender can usually recover his money.[62] In such cases, knowledge of the lender as to the purpose of the loan will not defeat recovery.[63] In a few states, the

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[58] See, e.g., Higginbotham v. McGready, 183 Mo. 96, 81. S.W. 883 (1904).

[59] See, e.g., Singleton v. Bank of Monticello, 113 Ga. 527, 38 S.E. 947 (1901); Sondheim v. Gilbert, 117 Ind. 71, 18 N.E. 687 (1888).

[60] See, e.g., Tyler v. Carlisle, 79 Me. 210, 9 A. 356 (1887).

[61] Id.

[62] See, e.g., Armstrong v. American Exchange National Bank, 133 U.S. 433 (1889); Hamilton v. Abadjian, 30 Cal.2d 9, 179 P.2d 804 (1947). But see Waugh v. Beck, 114 Pa. 422, C. A. 923 (1886) where recovery was denied to lenders who knew money was going to be used to repay gambling debts.

[63] Id.

courts have construed statutes barring recovery for loans that are used for gambling purposes to include loans for antecedent gambling debts.[64]

Consistent with these opinions are cases which hold that the proprietor of a gambling establishment who gives money or credit to someone to enable that person to gamble in the house has no action to collect on his debt.[65] Also, where a participant in a game facilitates the play of another participant by making a loan or cashing a check, that person has no action if the actual bettor refuses to pay the loan, or the check is dishonored.[66] Finally, a lender who takes any active part in the transaction whatsoever--even the simple act of depositing the loan as margin--will usually be denied recovery.[67]

5. Actions against the stakeholder

Where participants want to assure the safety of the wager, they may entrust the wagered money to a stakeholder who will reward the whole amount to the winner of the bet. The law is well-settled where a party to the bet seeks to recover his wager, but there are few minority rules.

a. Illegal bets

The majority rule is that the bettor may recover his bet from the stakeholder when the stake is demanded or the wager is repudiated prior to the event. The policy of the courts is to encourage the repudiation of an illegal contract.[68] The courts will aid the repenting gambler.

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[64] See, e.g., Schoenberg v. Adler, 105 Wis. 645, 81 N.W. 1055 (1900).

[65] See, e.g., Hamilton v. Abadjian, 30 Cal.2d 49, 179 P.2d 804 (1947); Lavich v. Nitzbeg, 83 Cal. App.2d 381, 188 P.2d 758 (1948).

[66] See, e.g., Brinley v. Williams, 189 Okla. 183, 114 P.2d 463 (1941).

[67] See, e.g., Oliphant v. Markham, 79 Tex. 543, 15 S.W. 569 (1891).

[68] See, e.g., Bernard v. Taylor, 23 Or. 416, 31 P. 968 (1893).

In most jurisdictions, after the money has been paid to the winner, the parties are considered to be equally at fault. In this situation the law declines to help either party since they are in pari delicto.[69]

Some jurisdictions allow recovery after the event but before payment.[70] This rule is applied whether the result is disputed[71] or undisputed[72]. In these jurisdictions, the courts have determined that public policy demands the defeat of all gambling transactions.

In both situations--either suit before or after the event--the courts, however, are split as to whether a bettor who desires to withdraw his stake may do so for any reason whatsoever or only for a reason indicating an intention to repudiate the wagering agreement.

Some courts have allowed recovery in a situation where the demand not to pay over the winnings to the other party represented, in effect, a notice that the plaintiff had withdrawn from the wager.[73] In other jurisdictions, however, the bettor may withdraw his stake even if his demand fails to manifest an intention to repudiate the bet, or even if it is in affirmance of the bet.[74]

A small number of jurisdictions will not permit a bettor to recover his stake from the stakeholder.[75] These courts

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[69] Id.

[70] See, e.g., Gehres v. Ater, 148 Ohio St. 89, 35 Ohio Ops. 74, 73 N.E.2d 513 (1947).

[71] See, e.g., Stacy v. Foss, 19 Me. 335 (1841).

[72] See, e.g., Wheeler v. Spencer, 15 Conn. 28 (1843). This rule is effective even in the face of statute making all gambling contracts void and unenforceable. Gehves v. Ater, 148 Ohio St. 89, 35 Ohio Ops. 74, 73 N.E.2d 513 (1947).

[73] See, e.g., M'Allister v. Hoffman, 16 S.& K. 147 (Pa. 1829).

[74] See, e.g., Fisher v. Hildreth, 117 Mass. 558 (1875).

[75] See, e.g., Murdock v. Kilbourn, 6 Wis. 468 (1857).

absolutely refuse to aid a party to an illegal transaction.

In most jurisdictions where a penal statute has been enacted to make the act of wagering itself a criminal offense, the courts have not allowed the bettor, who stands in pari delicto in the execution of the crime, to recover his bet.[76]

In those jurisdictions where the bettor is allowed to recover his stake on demand prior to the time it has been paid over to the winner, the stakeholder pays it over at his own peril if he does so after a demand by the bettor.[77] The stakeholder acts as a trustee for both parties and holds the money without any right or duty other than the duty of returning it on demand to its lawful owner. If, however, in the absence of a statute to the contrary[78] and prior to notice of repudiation, the stakeholder pays the money over to the winner in good faith upon final determination of the results, the bettor cannot recover his stake from the stakeholder.[79]

In actions by the winner to recover his winnings from the stakeholder, it is clear that he cannot recover both stakes if the loser objects.[80] Nor can he recover the loser's stake from the stakeholder where it has already been returned to the loser.[81]

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[76] See, e.g., Matthews v. Lopes, 24 Cal. App. 63, 140 P. 306 (1914).

[77] See, e.g., Kearney v. Webb, 278 Ill. 17, 115 N.E. 844 (1917).

[78] See, e.g., Van Pelt v. Schauble, 68 N.S.L. 638, 54 A. 437 (1903).

[79] See, e.g., Gilmore v. Woodcock, 69 Me. 118 (1879).

[80] See, e.g., Worthington v. Black, 13 Ind. 344 (1859).

[81] See, e.g., Rust v. Gott, 9 Cow. 69 (NY 1810).

b. Legal bets

In the case of a legalized game, courts have viewed the relation between the parties and stakeholder as a contract rather than a trust.[82] The stakeholder serves as a bailee.[83] If the stakeholder wrongfully refuses or fails to pay the winner, the winner may maintain an action at law to recover the amount won or any unpaid balance.[84] Nevertheless, the payment is usually enforceable only in accordance with the terms of the appropriate statute and regulations. A stakeholder making payments in accordance with these rules is, therefore, relieved of all liability to other claimants.[85]

6. Fraud

In the absence of a statute, the issue of who bears the risk in a fraudulently conducted gambling transaction, whether legal or illegal, has apparently not come before many American courts Under the common law, losses attributed to gambling contracts or transactions can not be recovered since the law will not aid a party considered as in pari delicto with the winner. Applying this rule, several courts have denied recovery for money or property that has been lost through fraud or cheating.[86] Courts have also cited public policy as preventing the investigation of trickery in illegal games.[87] In a

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[82] See, e.g., Oregon Racing Commission v. Multnomah Kennel Club, 242 Or. 572, 411 P.2d 63 (1966).

[83] Id.

[84] See, e.g., Bollin v. Los Angeles County Fair, 43 Cal. App.2d. 884, 111 P.2d 753 (1941).

[85] See, e.g., Holberg v. Westchester Racing Association, 184 Misc. 581, 53 N.Y.S.2d 490 (1945).

[86] See, e.g., Bannon v. Hennessey, 281 F. 193 (D.C.R.I. 1922).

[87] Id. at 194.

majority of jurisdictions, however, the courts have allowed recovery by applying the "unequal fault doctrine." Under this doctrine, the court distinguishes between degrees of fault among the participants and then grants recovery to the "less blameworthy loser."[88]

Several justifications have been given for the court's disregard of the in pari delicto doctrine. First, while public policy disapproves of gaming or enforcing gambling transactions, to deny relief to a victim of fraudulent gambling would offend public morals to a greater extent.[89] Second, the wager has not been won in view of the law; the money is paid without consideration and by mistake and may be recovered.[90]

The "unequal fault" doctrine is applied in various ways where the plaintiff-loser attempts or intends to defraud the other participants. The court must decide whether the loser's own fraudulent conduct precludes his recovery. Some courts have denied recovery to avoid determining "which party had cheated the most."[91]

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[88] See, e.g., Grim v. Cheatwood, 208 Okla. 570, 257 P.2d 1049 (1953).

[89] See, e.g., Webb v. Fulchire, 25 N.C. (3 Leed L.) 485 (1843); McClatchey v. Guaranty Bank & Trust Co., 228 La. 1103, 85 So.2d 226 (1956).

[90] Id.

[91] See, e.g., Abbe v. Marr, 14 Cal. 210 (1859); Schmitt v. Gibson, 12 Cal. App. 407, 107 P. 571 (1910).

Numerous courts, on the other hand, have granted recovery to the plaintiff despite his intent to defraud others.[92] As one case noted:

> Viewing the conduct of [plaintiff] in its most reprehensible light, nevertheless the interest and welfare of the public would be better subserved by causing the loss to fall upon those who aided and assisted in criminal practices followed as an occupation than by the punishment of the individual victim. It would be doubtful wisdom to extend encouragement to organizations of confidence men, who prey upon the public, by allowing them to use the rule in pari delicto as a shield of defense, when a part of the scheme they employ is to place those they seek and then defraud in the position they rely on.[93]

Other courts have rationalized that the transaction did not constitute a wager.[94]

Where several persons engage in fraudulent gaming and share in the rewards, all are jointly and severely liable to the loser.[95] Several courts have allowed a plaintiff-loser's suit against individuals who, while not directly benefiting from the fraud, aided and assisted the swindlers with full knowledge of the intended fraud.[96]

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[92] See, e.g., Stewart v. Wright, 147 F. 321 (8th Cir. 1906) aff'g. 130 F. 905, cert. denied 203 U.S. 590 (1907).

[93] Stewart v. Wright, 147 F. 321, 329 (8th Cir. 1906).

[94] See, e.g., Snydor v. Nelson, 101 Ill. App. 619 (1902).

[95] See, e.g., Bynum v. Brady, 82 Ark. 603, 100 S.W. 66 (1907).

[96] See, e.g., Stewart v. Wright, 147 F. 321 (8th Cir. 1906), aff'g. 130 F. 905, cert. denied 203 U.S. 590 (1907).

7. Statutory right to recover losses

a. Introduction

To inhibit gambling, most states have enacted statutes that authorize the recovery of gambling losses paid to the winner. Remedial rather than penal,[97] these provisions further the public interest by allowing the loser to overcome the doctrine of in pari delicto.

b. Right of "offset"

Often when the loser sues to recover his losses, the winner will attempt to reduce the judgment sought by offsetting this amount with sums owed by the loser to the winner from previous gambling transactions. Most courts will allow these counterclaims. These jurisdictions reason that the recovery provisions were not meant to shield the loser from accounting for his winnings.[98] Other courts make a distinction if the winner is a common gambler. These courts will deny the offset to an individual who earns his living from gambling, for they feel that the common gambler and his "customer" are not in pari delicto. The common gambler will be better deterred if he is denied the ability to counterclaim.[99]

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[97] See, e.g., Heitfield v. Benevolent & P.O. of K., 36 Wash.2d 685, 220 P.2d 655 (1950).

[98] See, e.g., Hutton v. Curty, 93 Ohio St. 339, 112 N.E. 1019 (1916).

[99] See, e.g., Macchio v. Breunig, 125 Conn. 113, 3 A.2d 670 (1939); Heitfield v. Benevolent & P.O. of K., 36 Wash.2d 685, 220 P.2d 655 (1950).

c. Assignability of the right to recover

The loser's statutory right to recover usually may be assigned to a third person.[1] Some statutes, however, authorize recovery by some other person if the loser fails to exercise his right within a specified period.[2]

Since the Statute of Anne, the civil law has tried to proscribe excessive gambling. By permitting "any other person" to recover, the law has not lost its deterrent effect. The winner can never be assured of his gains.

To deter the professional or common gambler, the courts have denied these individuals these statutory benefits.[3] Assignable rights to third parties, in the case of professional gamblers, would frustrate the legislative purpose.[4]

d. Persons liable

Statutes generally permit recovery only from those persons who either actually win and receive money from the loser or are in privity with the loser.[5] Courts have construed that these statutes entitle a net loser to recover from a net winner in a game involving several participants; the winner does not necessarily have to win any money directly from the loser.[6] Where there are several individual winners,

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[1] See, e.g., Van Pelt v. Schauble, 68 N.J.L. 638, 54 A. 437 (1903).

[2] See, e.g., Donovan v. Eastern Racing Ass'n., 324 Mass. 393, 86 N.E.2d 903 (1949).

[3] See, e.g., Brown v. Thompson, 77 Ky. (14 Bush) 538 (1879).

[4] See, e.g., Galtrof v. Levy, 174 Misc. 1004, 22 N.Y.S.2d 374 (1940).

[5] See, e.g., Pumping v. Arkansas National Bank, 121 Ark. 202, 180 S.W. 749 (1915).

[6] See, e.g., Crooks v. McMahon, 48 Mo. App. 48 (1891).

they are severally rather than jointly liable to extent of the amount won from the loser.[7] If several players have conspired against the loser, then they are jointly and severally liable to the loser for the total amount lost.[8]

Statutory language may immunize the person that operates a room where, for a fee, outsiders can play games among themselves. Absent a specific statute, the owner of such a house is not liable to the loser.[9] Other statutes, however, take various positions: (1) making the owner strictly liable for all losses;[10] (2) making him strictly liable for gambling transactions knowingly conducted on his premises;[11] and (3) making him liable for all losses if he participated in the game.[12]

e. Statutory time limitations

Statutory time limitations for civil suits present several problems. Most statutes state that the loser may sue to recover his losses within a specified time from the game. After that, any person can sue to recover the losses.[13] The issue arises whether the time period serves as a statute of limitions on the loser. Courts have also been asked to resolve the meaning of "any person."

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[7] See, e.g., Matlow v. Johnson, 145 Ala. 373, 39 So. 710 (1905).

[8] See, e.g., Bynum v. Brady, 82 A.K. 603, 100 S.W. 66 (1907).

[9] See, e.g., Landley v. Fischer, 266 App. Div. 352, 235 N.Y.S. 368 (1929).

[10] See, e.g., White v. Wilson, 100 Ky. 367, 38 S.W. 495 (1897).

[11] See, e.g., Kemp v. Hammond Hotels, 226 Mass. 409, 115 N.E. 572 (1917).

[12] See, e.g., Nagle v. Randall, 115 Minn. 235, 132 N.W. 266 (1911).

[13] See, e.g., Gehres v. Ater, 148 Ohio St. 89, 35 Ohio Ops. 74, 73 N.E.2d 513 (1947).

Some courts have construed the time limitation on the loser's right of recovery to be a statute of limitations.[14] Other authority, however, considers this time limitation to be a condition precedent to the right of recovery itself.[15] This distinction can be very important if, for one reason or another, the loser's action is commenced after the expiration of the true period. In this case, the right is extinguished if it is not commenced within the proscribed time, but that is not necessarily true if the statute of limitations can be shown to have been tolled or suspended by the occurrence of some event.[16]

Failure to bring an action within the time limitation does not necessarily bar the loser from bringing a suit. Some courts have determined that the loser has exclusive rights to sue for the initial time period. The phrase "any person" also permits the loser to sue after this initial period.[17] Several decisions have held the contrary opinion.[18]

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[14] See, e.g., White v. Turner-Hudnut Co., 322 Ill. 133, 152 N.E. 572 (1926). This limitation has been held to apply to only those actions falling within the precise terms of the statute. Gehres v. Ater, 148 Ohio St. 89, 73 N.E.2d 513 (1947).

[15] See, e.g., Myers v. Fridenberg, 70 N.J. Eq. 3, 62 A. 532, aff'd. 71 N.Y. Eq. 776, 65 A. 1118 (1905).

[16] See, e.g., Francis v. Mauldin, 215 S.C. 374, 55 S.E.2d 337 (1949).

[17] See, e.g., Hors v. Layton, 3 Ohio St. 352 (1854).

[18] See, e.g., Kizer v. Walden, 198 Ill. 274, 65 N.E. 116 (1902); Holland v. Swain, 94 Ill. 154 (1879).

The effect of a statute of limitations in the case of a claim against a stakeholder or a counterclaim for a set-off has been considered with varying results. In general, it appears that the limitation is inapplicable in an action against a stakeholder.[19] This is not always certain with set-offs.[20]

Where statutes lack a special limitation period, the courts have had problems deciding what, if any, general statutes of limitations applies. In practically all cases, the general statute of limitations for an action on a statutory penalty has been held to apply to actions brought by "any person."[21]

8. Miscellaneous common law remedies

a. Executory contracts

Where the general policy of a jurisdiction is hostile to gambling, the law will generally attempt to frustrate gambling transactions. When the transaction or contract remains executory, the contract may be repudiated and rescinded. Any money paid on an unexecuted contract may be recovered if the depositor on a wager demands its return prior to the the event's occurrence.[22]

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[19] See, e.g., Burroughs v. Hunt, 13 Ind. 178 (1859).

[20] See, e.g., Connor v. Black, 132 Mo. 150, 33 S.W. 783 (1896).

[21] See, e.g., Donovan v. Eastern Racing Association, 324 Mass. 393, 86 N.E.2d 903 (1949).

[22] See, e.g., Bernard v. Taylor, 23 Ore. 416, 31 P. 968 (1893).

b. Property returned to the loser

Jurisdictions are split, however, as to whether one can enforce a note or promise to pay for lost property returned to the loser by the winner. Some courts hold that there is a new agreement and that the new promise to pay is enforceable.[23]

Three qualifications limit this rule. First, the loser may rescind payment on the new note if he was defrauded by the winner. Second, an owner may recover money or property lost by an unauthorized third party.[24] Finally, a loser under the influence of drugs or alcohol may rescind payment on the new note if the winner instigated the gambling but remained sober.[25] Nevertheless, recovery is barred if the loser paid his losses after the game with full knowledge of the circumstances under which the money was won.[26]

Other jurisdictions prohibit the enforcement of the new note or promise while allowing the loser to retain possession of the property.[27]

c. Lotteries

Since lotteries have enjoyed some measure of legalization, the law sometimes treats lotteries in a different fashion. Most anti-lottery statutes do not punish persons who have

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[23] See, e.g., Bell v. Parker, 33 Ky. 51 (1835).

[24] See, e.g., Becker v. Fitch, 66 Okla. 57, 167 P. 202 (1917).

[25] See, e.g., Batman v. Cook, 120 Ill. App. 203 (1905).

[26] See, e.g., Whiteside v. Tabb, 3 Tenn. 383 (1813).

[27] See, e.g., Stanford v. Howard, 103 Tenn. 24, 52 S.W. 140 (1899).

purchased a lottery ticket. The courts have held that the purchaser may recover the purchase price of the ticket [28] for two reasons. First, they emphasize that that since there is no penalty for the subscriber, the subscriber is not in pari delicto with the promoter. Second, they point out that these statutes were enacted to protect the public and that denial of recovery would thwart the original legislative purpose. The courts will not, however, intervene to determine the rights of ticket holders[29] or operators[30] involved in an illegal lottery.

d. Tort law

Tort actions will usually lie for personal injury or property damages in connection with illegal gambling activity. In several jurisdictions, however, recovery has only been allowed where the participation was collateral to the cause of action and not the proximate cause of the injury.[31] Illegal gambling activity has not barred recovery for willfully inflicted danger by a participant.[32]

No majority opinion has been formulated as to the duty of care owed to the person who enters the premises of another in order to gamble. Some courts have ruled that the

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[28]This is usually true even in those jurisdictions where there is no anti-lottery statute, and in some jurisdictions this remedy is expressly provided by statute.

[29]See, e.g., Dennis v. Weaver, 103 Ga. App. 824, 121 S.E.2d 190, aff'd. 217 Ga. 448, 122 S.E.2d 571 (1961).

[30]See, e.g., Curez v. Watkins, 97 Ark. 153, 133 S.W. 1016 (1911).

[31]See, e.g., Havis v. Jacovetto, 126 Colo. 407, 250 P.2d 128 (1952).

[32]See, e.g., Welch v. Wesson, 72 Mass. 505 (1856).

person has the status of an invitee or guest to whom the proprietor owes a duty of ordinary care.[33] Other courts, however, have ruled that such persons are trespassers or licensees to whom no duty is owed other than the duty to refrain from willfull or wanton injury.[34]

Courts have also not established any clear policy for recovery of damage done to property used for gambling. Some courts deny recovery under any circumstances,[35] while other courts will grant recovery where there is no evidence that at the time of the injury the property was being used for illegal purposes or where the owner can show there is a legal use for such items.[36] Recovery may always be gained when the property used for gaming purposes also has a market value when used for lawful purposes.[37]

e. Partnerships

American courts are unanimous in their refusal to uphold the validity of partnerships formed to carry on any illegal gambling business or activity.[38] They will

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[33] See, e.g., Manning v. Noa, 345 Mich. 130, 76 N.W.2d 75 (1956).

[34] See, e.g., Hansen v. Cohen, 203 Or. 157, 276 P.2d 391 (1954), opin. revised 203 Or. 134, 278 P.2d 898 (1955), reh. denied 203 Or. 163, 278 P.2d 898 (1955).

[35] See, e.g., Miller v. Chicago & N.W. Railway Co., 153 Wis. 431, 141 N.W. 263 (1913).

[36] See, e.g., Gulf C.& S.F.Ry.Company v. Johnson, 71 Tex. 619, 9 S.W. 602 (1888).

[37] See, e.g., Edwards v. American Express Co., 121 Iowa 744, 96 N.W. 740 (1903).

[38] See, e.g., Brower v. Johnson, 56 Wash.2d 321, 352 P.2d 814 (1960).

refuse recovery to a person who advances money to another person for use by them as partners in illegal wagering.[39] They have also refused to recognize the terms of a partnership agreement between persons who, among other things, agreed to induce others through misrepresentation to make wagers on races.[40]

Equity courts have also consistently declined to aid in settling the affairs of partnerships formed to engage in gambling,[41] bookmaking,[42] operating illegal gambling devices,[43] keeping a gambling house,[44] or maintaining lotteries in violation of the law.[45] Some equity courts will enforce partnership agreements relating to business operations not connected to the illegal purpose of the partnership.[46]

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[39] See, e.g., Shaffner v. Pinchback, 133 Ill. 410, 24 N.E. 867 (1890).

[40] See, e.g., Morrison v. Bennett, 20 Mont. 560, 52 P. 553 (1898).

[41] See, e.g., Bloodworth v. Gay, 213 Ga. 51, 96 S.E.2d 602 (1957).

[42] See, e.g., Shaffner v. Pinchback, 133 Ill. 410, 24 N.E. 867 (1890).

[43] See, e.g., Brower v. Johnson, 56 Wash.2d 321, 352 P.2d 814 (1960).

[44] See, e.g., Martin v. Seabaugh, 128 La. 442, 54 So. 935 (1911).

[45] See, e.g., Bloodworth v. Gay, 213 Ga. 51, 96 S.E.2d 602 (1957).

[46] Id.

f. Replevin

An owner cannot use replevin to recover devices adaptable only to illegal uses.[47] Replevin is, however, available to recover gambling devices that do have a legitimate use.[48]

g. Agency Relationships

The majority rule is that an agent will not be permitted to recover money advanced or liabilities incurred on behalf of his principal in an illegal gambling transaction.[49] This rule has been applied by several courts to prevent an agent from recovering fines or penalties paid by the agent on behalf of the principal.[50] Some courts have allowed a principal to recover entrusted money or property that, while originally designated for illegal gambling purposes, had been used for other purposes by the agent.[51] The principal, in this case, is, of course, not relying on an illegal contract.

When the principal attempts to recover the fruits of an illegal gambling transaction from an agent or bailee, the courts distinguish between the participating and non-participating agent or bailee. The agent or bailee who has not participated in the transaction cannot prevent recovery by the principal or bailor.[52] The agent

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[47] See, e.g., Mullen v. Moseley, 13 Idaho 457, 90 P. 986 (1907).

[48] See, e.g., Wagner v. Upshur; 95 Md. 519, 52 A. 509 (1902).

[49] See, e.g., Kemp v. Hammond Hotels, 226 Mass. 409, 115 N.E. 572 (1917).

[50] See, e.g., Mills Novelty Co. v. Dupouy, 203 F. 254 (7th Cir. 1913).

[51] See, e.g., Kearney v. Webb, 278 Ill. 17, 115 N.E. 844 (1917).

[52] Id.

or bailee who actively participated in the transaction can defeat recovery by the principal, for the principal is relying on an illegal contract.[53]

h. Equitable Enforcement

Equity will not normally intervene in gambling transactions to compel payment to the winner or to order recovery by the loser since both parties are in pari delicto.[54] Nevertheless,equity will, for public policy reasons, in the proper case restrain the enforcement of an unexecuted, illegal gambling contract.[55]

Equity will also grant relief to an individual fraudulently induced to enter a gambling transaction since he is considered not to be in pari delicto.[56] Finally, in some jurisdictions, equity will enjoin payment on negotiable instruments given in consideration for a gambling debt[57] or order the cancellation of such a debt.[58]

i. Judgments

The majority rule is that an original judgment rooted in gambling can be perpetually enjoined or set aside.[59] A significant minority of courts, however, has held that where such a judgment is obtained by default equity will not interfere with the judgment.[60]

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[53] Id.

[54] See, e.g., Albertson v. Laughlin, 173 Pa. 525, 34 A. 216 (1896).

[55] See, e.g., Petillon v. Hipple, 90 Ill. 420 (1899).

[56] See, e.g., Grim v. Cheatwood, 208 Okla. 570, 257 P.2d 1049 (1953).

[57] See, e.g., Rice v. Winslow, 182 Mass. 273, 65 N.E. 366 (1902).

[58] See, e.g., Chapin v. Dake, 57 Ill. 295 (1870).

[59] See, e.g., Pearce v. Rice, 142 U.S. 28 (1891).

[60] See, e.g., Owens v. Van Winkle Gin & Machine Co., 96 Ga. 408, 23 S.E. 416 (1895).

j. Damages

Most jurisdictions have abandoned the original provision of the Statute of Anne which allowed treble damages for third party recovery. A third party may only recover the actual amount lost by the loser.[61] A number of jurisdictions, however, still retain the original provisions authorizing treble damage recovery by third parties.[62]

9. Futures

In early English common law, difference transactions were never regarded as illegal. There were bilateral bargains under which one party agreed to pay the other the amount of increase or decrease in the price of a stock or stocks between certain dates without transferring the stock. Because of the financial ruin wrought by stock speculators of the so-called "South Sea Bubble," difference transactions were viewed as actually being wagers on stock market fluctuations. The first statute designed "to prevent the infamous practice of stockjobbing"[63] was enacted by Parliament in 1734. Popularly known as Barnard's Act, this statute declared that,

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[61] See, e.g., N.H. Rev. Stat. Ann. ch. 338 (1966); N.J. Stat. Ann. §2A: 40-46 (1952).

[62] See, e.g., Mass. Gen. Laws Ann. ch. 137, §1 (1967):

> Whoever, by playing at cards, dice or other game, or by betting on the sides or hands of those gaming, loses to a person so playing or betting money or goods, and pays or delivers the same or any part thereof to the winner, or whoever pays or delivers money or other thing of value to another person for or in consideration of a lottery, policy or pool ticket, certificate, check or slip, or for or in consideration of a chance of drawing or obtaining any money, prize or other thing of value in a lottery or policy game, pool or combination, or other bet, may recover such money or the value of such goods in contract; and if he does not within three months after such loss, payment or delivery, without covin or collusion, prosecute such action with effect, any other person may sue for and recover in tort treble the value thereof.

[63] 7 Geo. 2, c. 8 (1734).

> . . . all and every such Contract and Agreement [difference transaction] shall be specifically performed and executed on all sides, the stock or security thereby agreed to be assigned, transferred, or delivered, shall actually be so done, and the Money, or other Consideration thereby agreed to be given and paid for the same, shall also be actually and really given and paid.64

In the United States, the development of agriculture and commerce gave rise to stock exchanges. As in England, "bucket slop" transactions accompanied these emerging financial institutions. Using public policy arguments, courts in the 1800's suppressed these difference transactions. As one justice noted in 1833,

> All observers agree that the inevitable effect of such dealings is to encourage wild speculations; to derange prices to the detriment of the community; to discourage the disposition to engage in steady business or labor, where the gains, though sure, are too slow to satisfy the thirst for gaining when once aroused; and to fill the cities with the bankrupt victims of such disasters as any "Black Friday" may develop. 65

Gradually, legislatures assumed the tenor of the courts; legislation voiding certain futures transactions was enacted by most states. These statutes, along with most court decisions, still remain in effect. The courts and legislatures, however, have fashioned several fine distinctions that allow the securities and commodities markets to function.

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[64] Id. §5.

[65] Justh v. Holliday, 13 D.C. 346, 348-49 (D.C. Sup. Ct. 1883).

The basic rule originally formulated by the courts was that contracts for the sale and future delivery of personal property were valid where one or both of the parties actually intended to deliver the subject matter, even though at the time of the making of the contract, the seller did not have the property which was the subject of the contract, had not entered into any contract to buy such property, and had no other means of obtaining it than to go into the market and buy it.[66] Where both parties understood and intended that one party would not be bound to deliver themerchandise and the other to receive it and pay the price, but that a settlement would be made by the payment of the differences in prices, the contract was, however, deemed a wagering contract.[67] If such wagering contracts violate the law, the courts will declare such a futures contract void.[68] To further curb fraudulent practice, most states also required commission merchants and brokers to furnish their customers with a written statement setting forth the names of the parties, the location, and the price of any purchase or sale executed by them on behalf of the customer. Failure to do so may be prima facie evidence of the transaction's illegitimacy.[69]

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[66] See, e.g., Albers v. Lamson, 380 Ill. 35, 42 N.E.2d 627 (1942).

[67] See, e.g., Bruna's Appeal, 55 Pa. 294 (1867).

[68] See, e.g., Ferris and Hardgrove v. Buff, 20 Wash.2d 161, 146 P.2d 331 (1944).

[69] See, e.g., Minn. Stat. Ann. §624.70 (1964).

When applying these rules the courts must now attempt to determine what the actual intent of the parties was at the time they entered into the contract.[70] If they intended delivery, the contract is valid and enforceable; if they did not, it is invalid and unenforceable.[71] In spite of the apparent simplicity of this rule, its application is more problematic. For example, the courts have generally permitted the parties, once they have entered into a valid agreement, to settle the contract by paying the difference between the contract price and the market price instead of actually delivering the property.[72] They have also allowed parties to validate an invalid wagering contract by entering into a subsequent agreement for actual sale and delivery.[73] Further, establishing the intention of the parties may prove to be difficult or even impossible, and courts have struggled with such factual issues for years.[74]

10. Legal prize contests, gift enterprises and lotteries[75]

Absent any question of legality, the announcement of a contest and its rules represents an offer[76] to all persons who are willing and able to accept and comply with

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[70] See, e.g., Stewart Bros. v. Beeson, 177 La. 543, 148 So. 703 (1933).

[71] See, e.g., Jamieson v. Wallace, 167 Ill. 388, 47 N.E. 762 (1897).

[72] See, e.g., Brown v. Conty, 115 Conn. 226, 161 A. 91 (1932).

[73] See, e.g., In re Taylor's Estate, 192 Pa. 304, 43 A. 973 (1899).

[74] See, e.g., Browne v. Thorn, 260 U.S. 137 (1922).

[75] An understanding of these subjects, including the problems associated with their definition, will be assumed. This section will be confined to a discussion of the civil rights and remedies relating to them.

[76] This offer is revocable at any time prior to its acceptance. Minton v. F.G. Smith Piano Co., 36 D.C. App. 137 (1911).

its conditions. The offer becomes an enforceable contract after someone has accepted it by doing something in reliance on it.[77] The performance of the act required by the offer is sufficient consideration to support the contract.[78] Under general contract rules, there must be substantial performance and compliance with the terms of the offer before a contract is formed.[79] Where this has occurred, the offeror can be forced to comply with the terms of the offer.[80] There is no contract between the offeror and a person who intentionally violates the rules, because there is no acceptance.[81]

The rights of a winner or contestant are strictly limited by the terms and conditions of the contest which are made public.[82] A winner may assign his prize, and the acceptance of a lesser prize amounts to an accord and satisfaction in a later controversy over the right to a prize.[83]

After acceptance and partial performance, the rules of the contest cannot be changed without the consent of the contestants, who have the option of bringing an action based on breach of contract or continuing with the contest under the new rules.[84] The contestant may waive his objection

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[77] See, e.g., Las Vegas Hacienda, Inc. v. Gibson, 77 Nev. 25, 359 P.2d 85 (1961).

[78] Id.

[79] See, e.g., Scott v. Peoples Monthly Co., 209 Iowa 503, 228 N.W. 263 (1929).

[80] See, e.g., Las Vegas Hacienda, Inc. v. Gibson, 77 Nev. 25, 359 P.2d 85 (1961).

[81] See, e.g., Scott v. People's Monthy Co., 209 Iowa 503, 228 N.W. 263 (1929).

[82] See, e.g., Tilley v. Cook County, 103 U.S. 155 (1880).

[83] See, e.g., Hertz v. Montgomery Journal Publishing Co., 9 Ala. App. 178, 62 So. 564 (1913).

[84] Id.

to any rule changes, expressly or by implication.[85] In a like manner, the offeror may conduct the contest in such a way as to estop himself from demanding compliance with the original terms.[86]

Generally, when the contest rules indicate that the "decision of the judges will be final," the courts will not entertain an action to overturn the judges' final decision.[87] If the plaintiff can show that the decision was fraudulently made,[88] or that it was not made in accordance with the rules of the contest,[89] the courts will entertain a suit on a contest.

The courts have faced more difficult problems when the prize was awarded to a person who was later disqualified, or an announced "winner" who, upon re-examination of the results, was found not to be the rightful victor. The courts are split on the question of whether the sponsor or the real winner can recover the prize. In addition, no clear rule has developed for when the original winner is subsequently disqualified.[90] In this particular case, the sponsor can usually regain possession of the prize, particularly if the redetermination was made with the tacit consent of the defendant.[91]

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[85] Id.

[86] See, e.g., Long v. Chronicle Publishing Co., 68 Cal. App. 171, 228 P. 873 (1924).

[87] See, e.g., Groves v. Cardene Products Co., 324 Ill. App. 102, 57 N.E.2d 507 (1944).

[88] See, e.g., Davidson v. Times Printing Co., 63 Wash. 577, 116 P. 18 (1911).

[89] See, e.g., Minton v. F.G. Smith Piano Co., 36 D.C. App. 137 (1911).

[90] See, e.g., Bryant v. Deseret News Publishing Co., 120 Utah 241, 233 P.2d 355 (1951).

[91] See, e.g., Amlie Strand Hardware Co. v. Moose 176 Minn. 598, 224 N.W. 158 (1929).

D. Conflict of Laws

1. The enforcement of foreign gambling transactions

When one seeks to enforce a gambling contract in the courts of a jurisdiction other than where the contract was made or performed, questions arise as to which jurisdiction's laws govern the legality of the transaction. The choices are the law of the forum where the action was brought, the law of the place where the contract was made, or the law of the place where the transaction was performed.

When dealing with foreign futures contracts, the forum court must decide whether the transaction sought to be enforced is the contract between the customer and the broker or the one between the broker and the exchange. If it is the first type of contract, then the law of the original contracting location controls. If it is of the other type, the law of the place where the orders are executed is the applicable law.

Traditionally, contract actions are governed by the law of the state where the contract was made or where it was performed.[92] A forum court applying this rule ascertains "the place in which, under the general law of contracts, the principal event necessary to make a contract occurs."[93] That place's laws would govern the transaction for choice of law purposes.

Criticized for its failure to take into account the content of either the forum or foreign law before determining which law applies,[94] the traditional rule has been supplanted

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[92] Restatement (First) of Conflict of Laws §311, Comment (1934).

[93] Id. See also 2 J. Beale, Conflict of Laws 1045 (1935).

[94] See generally, Prebble, "Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to Conflict of Laws," Part I, 58 Cornell L. Rev. 433 (1973); Reese, "Choice of Law: Rules or Approach," 57 Cornell L. Rev. 315 (1972).

by a more modern conflicts analysis, the "significant contacts" test.[95] The contacts to be taken into account in determining the law applicable to an issue include:[96]

(a) the place of contracting;

(b) the place of negotiation of the contract;

(c) the place of performance;

(d) the location of the subject matter of the contract; and

(e) the domicil, residence, nationality, place of incorporation, and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Other courts have adopted a rule which balances each jurisdiction's competing interests in choosing the applicable law.[97]

Since the legality of the consideration is at issue, negotiable instruments given to pay gambling debts or to lend for gambling purposes involve legality of contracting, not performance. The law of the state where the instrument is made, therefore, should usually govern its validity.[98]

2. The public policy defense

The general rule is that after it has been determined that foreign law governs the validity of a contract, it will be enforced in accordance with the provisions of that foreign law unless to do so would contravene the public policy of the forum state. While the law of the place where the instrument was made or the place which has the most "significant contacts" should govern its validity, these tests are qualified by a "but for" analysis of the forum's public policy: the foreign law controls but for the public policy of the forum.

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[95] Restatement (Second) of Conflict of Laws §188 (1971).

[96] Id. §188 (2).

[97] Id.

[98] 2 J. Beale, The Conflict of Laws §347.3 (1935).

The question before the forum court is whether the forum's anti-gambling policy is strong enough to justify the refusal of the courts to recognize a gambling debt which, although void if incurred in the forum, was validly contracted in a jurisdiction where the gambling transaction was legal.[99] Violations of the laws of the forum state may not be enough to find a public policy prohibiting enforcement of a foreign contract. Strong public policy may be found in prevailing social and moral attitudes of the community.[1] Mr. Justice Cardozo, when he sat on the New York Court of Appeals, characterized this defense in the following terms:

> The courts are not free to refuse to enforce a foreign right at the pleasure of judges, to suit their individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principal of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal. 2

By utilizing the public policy analysis, some courts avoid the question of which law to apply by finding a contract as against public policy regardless of whether another state's law governs it validity.[3]

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[99] See, e.g., Caribe Hilton Hotel v. Toland, 63 N.J. 301, 307-308, 307 A.2d 85, 86 (1973).

[1] See, e.g., Sullivan v. German National Bank, 18 Colo. App. 99, 70 P. 162 (1902); Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 254 N.Y. S.2d 257 (1964).

[2] Loucks v. Standard Oil Co., 224 N.Y. 99, 111; 120 N.E. 198, 208 (1918).

[3] See, e.g., Ciampittiello v. Ciampitiello, 134 Conn. 51, 54 A.2d 669 (1947); Hilton of San Juan, Inc. v. Lateano, 6 Conn. Cir. Ct. 680, 305 A.2d 680 (1972); Hamilton v. Blakenship, 190 A.2d 904 (D.C. App. 1963); Young v. Sand, Inc., 122 So.2d 618 (1960); Dorado Beach Hotel Corp. v. Jernigan, 202 So.2d 830 (1967); Pope v. Hanke, 186 Ill. 43, 57 N.E. 798 (1894); Gooch v. Faucett, 122 N.C. 270, 29 S.E. 362 (1898); Winward v. Lincoln, 23 R.I. 476; 51 A. 106 (1902).

There is, however, a growing tendency among courts, especially those of states that are decriminalizing gambling, to reject defenses based on public policy.[4] Gambling is no longer so objectionable as to be against public policy. As the Supreme Court of New Jersey in Carible Hilton Hotel v. Toland stated:

> New Jersey's public policy no longer condemns gambling per se. Rather our policy has become one of carefully regulating certain permitted forms of gambling while prohibiting all others entirely. 5

Finding this policy to be the same as Puerto Rico's, the New Jersey Court concluded that it was not against the public policy of its state to enforce checks drawn on a New Jersey bank given in payment of gambling debts incurred in Puerto Rico.

3. "Long-Arm"statutes

In addition to traditional conflict of law rules, the development of "long-arm" statutes must be considered in looking at the multi-state enforceability of gambling contracts. Long-arm jurisdiction, in short, potentially affords states that validate gambling contracts an opportunity, in effect, to insure their enforcement beyond their borders. Appropriate legislation extending in personum jurisdiction to causes of action arising out of gambling transactions would enable a state to protect its interests in enforcing gambling debts incurred within its jurisdictions. Enforcement would, therefore, no longer be precluded by the public policy of a foreign jurisdiction.

Nevertheless, these statutes would be subjected to due process analysis. Since International Shoe Company v. Washington,[6] to assert in personam jurisdiction over a person not within the territory of the forum, the person being sued must:

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[4]For cases where public policy does not preclude the validity of a foreign gambling contract, See Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc., 194 Cal. App.2d 177, 14 Cal. Rptr. 805 (1961); Caribe Hilton Hotel v. Toland, 63 N.J. 301, 307 A.2d 85 (1973).

[5]63 N.J. at 308-09, 307 A.2d 85 at 88.

[6]326 U.S. 310 (1945).

> have certain minimum contacts with it [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' 7

While "fundamental fairness" lacks preciseness, the courts have substantially defined the concept. One commentator has noted:

> [D]ue process embodies a test of fundamental fairness in all steps of the proceedings; that our sense of fairness is outraged by certain assertions of jurisdiction on the part of States unconnected with the parties or with the controversy; and that this sense of unfairness stems partly from the inconvenience and expense involved, partly from the idea of unfair surprise, partly from anticipation of an improper choice of law, and partly from more general notions of the limits of a state's rightful sovereignty. 8

Several arguments are available for the state in which the gambling contract was legally consummated to assert its jurisdiction. First, when he traveled to the state and engaged in legal gambling activities, the defendant purposefully availed himself of the laws and facilities of the forum state.[9] The possibility of litigation arising there cannot be unanticipated. Second, the cause of action arose out of the defendant's contacts with the forum.[10] Third, the forum state may have

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[7] 326 U.S., at 316.

[8] Currie, "The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois," 1963 Ill. L.F. 533,535 [hereinafter cited as Currie].

[9] See Hanson v. Denckla, 357 U.S. 335, 353 (1958).

[10] "Minimum contact" in personum jurisdiction is always limited to causes of action arising out of those minimum contacts. International Shoe, in dicta, provided the impetus for this requirement:

> . . . [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319.

a special interest in enforcing gambling contracts;[11] denial of jurisdiction may prevent the plaintiff from obtaining relief in a foreign jurisdiction. Fourth, by any objective standard, the state asserting jurisdiction is the most convenient forum: its law will be applied, witnesses to the transaction will likely reside in the state, and the plaintiff will be a resident of the state. These factors will outweigh any forum non conveniens argument posited by an out-of-state defendant to defeat the exercise of jurisdiction.

To defeat jurisdiction, the defendant could make two arguments. First, he might emphasize his status as an individual as opposed to that of a foreign corporation, for, in such a case, more than minimum contacts with the forum should be required before asserting jurisdiction.[12] Second, if the forum is relying on general long-arm jurisdiction language rather than statutory language that specifically includes gambling transactions, the defendant might argue that the forum cannot show special need for providing relief to the plaintiff; traditionally the courts have more readily asserted long-arm jurisdiction for tort damages than monetary (or contractual) damages.[13]

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[11] See, e.g., McGee v. International Life Insurance Co., 355 U.S. 220 (1957); Buckeye Boiler Co. v. Superior Court, 71 Cal.2d 893, 80 Cal. Rptr. 113, 458 P.2d 57(1969).

[12] This argument is probably unsound.

> Cf. "There is no earthly reason for limiting [the International Shoe test] to corporations. If it is fair to subject corporations with certain business contacts with the State to suit there, it is no less so to do the same with individuals similarly situated.

Currie at 561.

[13] See, e.g., McKee Electric Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 283 N.Y.S.2d 34, 229 N.E.2d 604 (1967); Grobark v. Addo Machine Co., 16 Ill.2d 426, 158 N.E.2d 73 (1959). But see Patte-Bennett Gallahes, Inc. v. Franklyn, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970); Simms v. Hobbs, 411 P.2d 503 (Okla. 1966).

4. Forum-Selection clauses

To avoid the uncertainties of the International Shoe test, persons engaged in the gambling business may wish to utilize forum-selection clauses which can be inserted into credit-extension contracts signed by all gamblers before they are allowed to gamble on credit. Historically, because they felt that these clauses invaded the province of the court to decide whether or not it possessed jurisdiction to try a case, American courts have not viewed such clauses favorably. But most courts today reluctantly admit that the parties can determine which court will decide any disputes which might arise.

In 1964, moreover, the United States Supreme Court upheld a forum-selection clause in a contract:[14]

> [I]t is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether. 15

Eight years later in an admiralty case involving an international forum-selection clause,[16] the Court reaffirmed its general support of these clauses, stating that "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances."

Even when such clauses are held to be valid, they are subject to attack on several fronts. First, the courts need not enforce them if to do so would violate a strong public policy of the forum state.[17] Second, the clause should not

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[14] National Equipment Rental v. Szukhent, 375 U.S. 311 (1964).

[15] Id. at 315-16.

[16] The Bremin v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

[17] Id. at 15.

be enforced if the forum appears to have been arbitrarily chosen[18] or if it is an inconvenient forum.[19] Finally, the clause should be disregarded if there is evidence that it was obtained through fraud, or under circumstances manifesting undue influence or seriously disparate bargaining positions between the parties.[20] In gambling cases, the last argument would appear to be the greatest threat.

5. Recognition of a foreign judgment

If one party obtains a money judgment in an action based on a gambling debt, that judgment must be recognized in the courts of the other states, regardless of the state's individual attitude toward the enforcement of gambling contracts. This result is mandated by the Full Faith and Credit Clause of the Constitution[21] and the terms of 28 U.S.C. §1738 (1964). This proposition is also supported by two decisions of the Supreme Court.

In the first case, Fauntleroy v. Lum,[22] the Court held that the Mississippi courts were required to recognize a judgment entered in Missouri which was based on a gambling transaction that had taken place in Mississippi; the transaction was governed by Mississippi law and was invalid according to that law. In its opinion the Court stated:

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[18] See Von Mehron and Tautman, "Jurisdiction to Adjudicate: A Suggested Analysis," 79 Harv. L. Rev. 1121, 1138-39 (1966).

[19] The Bremin v. Zapata Off-Shore Co. 407 U.S. 1, 17 (1972) (Dicta).

[20] Id. at 12-13.

[21] Art. IV, §1.

[22] 210 U.S. 230 (1908).

> Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action . . . and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law. Of course, a want of jurisdiction over either the person or the subject matter might be shown. . . . But as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law. 23

This decision was affirmed by the Court in Magnolia Petroleum Co. v. Hunt, when the Court said:[24]

> The constitutional command requires a state to enforce a judgment of a sister state for its taxes . . . or for a gambling debt, Fauntleroy v. Lum, 210 U.S. 230 (1908), or for damages for wrongful death. . . . although the suit in which the judgment was obtained would not have been maintained under the laws and policy of the forum to which the judgment is brought. 25

E. Modern Codes

Recently, a number of jurisdictions have enacted modern codes dealing with gambling. Prior gambling legislation was repealed by many of these acts. Several jurisdictions have, however, failed to indicate what disposition was made of their civil statutes relating to gambling.[26] A question, therefore, arises as to the status of the civil gambling law in these jurisdictions.

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[23] Id. at 237.

[24] 320 U.S. 430 (1943).

[25] Id. at 439.

[26] See, e.g., Fla. Stat. Ann. §849.27 (1965) repealed, ch.74-382, §26, (1974) Fla. Laws.

Failure to re-enact the civil statutes may not eliminate the prior civil law. Courts, rather than reformulating the civil law, could still follow previous case law and establish a common law on gambling for civil suits. This law may well, of course, require modification because of the new code relating to the criminal law if the courts discern that the previous civil law would frustrate the purposes of the criminal law reform. If the civil law does not clash with the reform, the civil law could remain intact.

F. Policy Considerations Regarding Changes in the Civil Law Enforcement of Contracts

The civil law on gaming developed when gambling was considered inconsistent with the American ideal. As states decriminalize gambling, the issue arises as to whether the civil law ought to be modified to accommodate the fact of decriminalization.

Several justifications have been advanced for decriminalization. The most prevalent and politically attractive argument for legalizing gambling is that the increased state revenue derived from a tax on legal games can be used to fund state social programs.[27] This argument is little more than a proposal to tax an activity which had previously escaped such a levy.[28]

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[27]Whether or not legalized gambling does in fact create substantial additional revenues to support programs which would not otherwise be carried out presents a topic for hot debate. See Task Force on Legalized Gambling, Easy Money (1974) [hereinafter cited as Easy Money].

[28]E.g., Cigarette smoking is viewed by many, including the Surgeon General, as a potentially harmful activity. Yet it is still legal, and each year the local, state, and federal governments derive large sums of money from taxes on the sales of cigarettes.

A second argument advocates that decriminalization will serve as a basis for a large-scale, well orchestrated assault on organized crime. With the exception of the southwest, organized crime syndicates have gained control of most large illegal gambling operations in the United States.[29] Profits derived from these activities, it is suggested, are used to capitalize other criminal operations[30] such as narcotics trafficking, loan sharking[31] and racketeering,

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[29] Easy Money at 9.

[30] This argument is often over emphasized. Some would have us believe that the revenues from illegal gambling operations actually support other illegal activities. Even the Cosa Nostra, however, cannot escape the harsh realities of the economic laws. Just as normal "businessmen" must remain flexible--constantly reviewing their operations with an eye toward eliminating unprofitable activities--the Cosa Nostra cannot afford to prop up a losing enterprise with the profits derived from other activities.

[31] Loan sharking is also dependent on gambling in another, more subtle way. John Drzazga described this relationship in the following terms:

> A loan shark is frequently present to accomodate any bettors who wish to continue after their funds are gone. Exhorbitant and usurious rates of interest are charged. If the loan is not repaid with interest, the borrower may find himself recuperating in a hospital, or worse. Such violence may result in a small loss to the loan shark, but such loss is merely an essential advertising expenditure as it serves as a means of intimidation to other borrowers.

J. Drzazga, Wheels of Fortune at 53 (1963) [hereinafter cited as Drzazga]. See also, Volz and Bridges, The Mafia Talks at 106 (1969).

to bribe police, prosecutors, judges, and juries, and to support the very costly "enforcement mechanisms," essential to any successful operation.[32]

It is argued, therefore, that through competition, legal games will reduce the profits of illegal games. The revenues realized by taxing legal games can be used to finance "strike forces" and other law enforcement agencies specifically aimed at organized criminal activity.[33] Reduced profits of illegal games would curtail the ability to bribe officials.[34] Eliminating the "victimless crime" of gaming would free law enforcement manpower for more important duties. In addition, decriminalization coincides with some elements of the sentiments of the public, who endorse a general libertarian philosophy. Within limits, gambling is seen as a harmless form of entertainment. By eliminating a body of laws prohibiting victimless crime decriminalization will increase the public's respect for the law.[35]

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[32]An April 9, 1961, report of the N.Y. State Investigation Committee alleged that no single criminal activity had been more responsible for corruption of public officials than gambling. According to the Commission, gambling revenues are used to pay for murders, to underwrite the labor racketeers, to corrupt the public officials, to erect stills, to obtain firearms unlawfully, to purchase contraband drugs, and to pave the way for the introduction of prostitution. Drzazga at 73.

[33]Easy Money at 10-11.

[34]Id.

[35]Recent studies by The Commission on the Review of the National Policy Toward Gambling indicates that although 80% of the American people favor legalization of some forms of gambling, no form of gambling received a majority support for legalization in a state where it was not already legal. Indeed, too, participation in illegal gambling is also significantly greater in states where at least three types of gambling is legal, a result which suggests that partial legalization creates a climate favorable to the illegal forms. Second Interim Report: Commission on the Review of the National Policy Toward Gambling at 42-43 (1976).

Opponents of legalization, on the other hand, argue that the benefits of decriminalization are illusory; the adverse effects of legal gambling will far outweigh the supposedly positive aspects. State-sanctioned games will never be competitive with illegal games.[36] Players of legal games will be novices who have never gambled, rather than old customers of illegal operations. Legalization will cause an increase in the total amount of gambling. Exposing an increased number of people to the "thrill and glamour" of gambling, legalization will have a significant impact on the financial security of many families and the incidence of compulsive gambling. A vigorous drive to eliminate official corruption and illegal games will keep gambling activity at an acceptable level.[37] Opponents argue that legalization cannot accomplish these goals.

However general policy considerations, such as these, are resolved, decriminalization of gambling, it is argued, may also require a change in the civil rules regarding the enforcement of gambling debts. To compete successfully, legal games will have to match the amenities of the illegal schemes by offering equal or better features. Legal games will have to award equal or higher pay-offs; they will also have to provide credit at better rates or with less risk of violent enforcement. The inability to enforce gambling debts in a court of law may well prevent the legal operation from extending credit sufficient to maintain its business, thus making it impossible to attract the heavy bettor who relies on easy credit. Enforceable debts would enable the legal houses to extend credit to the optimum extent; further, their profitability would be comparatively increased by barring illegal operators from the courts.

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[36] Id. at 6-8.

[37] For a discussion of all of these arguments see generally Easy Money.

However attractive this reasoning might appear, it is subject to countervailing considerations. The extension of credit is never likely to be available in a game operated or managed by government employees. It is hard to imagine the taxpayers or legislators granting anyone the discretion to extend government credit for gambling purposes. Many would question the propriety of allowing the state to establish a gambling operation in the first place. In terms of practical politics, moreover, it is doubtful that state-approved credit extension could win popular support, especially during state financial crisis.

Privately-run legal operations that customarily extend credit to "high rollers", moreover, have apparently seen no need to alter the civil law. For example, Nevada for more than a century has countenanced the operation of legal gambling casinos within the state, but the Nevada courts have consistently refused to enforce contracts based on gambling consideration.[38] When England carried out sweeping reforms of its gambling laws in the 1950's and 1960's, it considered and expressly rejected suggestions that it change the civil law making wagering transactions unenforceable in the courts.[39]

During its hearings, the Royal Commission that recommended the gambling reforms to Parliament heard several arguments for making gambling debts enforceable. While the original purpose of the rule was to discourage gambling, some witnesses felt the rule actually encouraged gaming--individuals immune to suit for their gambling debts were free to bet beyond their means. Others felt

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[38]Scott v. Courtney, 7 Nev. 419 (1872); West Indies, Inc. v. First National Bank of Nevada, 67 Nev. 13, 214 P.2d 144 (1950).

[39]Report of the Royal Commission on Betting, Lotteries, and Gaming, 1949-51 at 135 (London, 1964) [hereinafter cited as Royal Commission Report].

a change would eliminate some dishonest schemes. Even the Roman Catholic Church did not object to the enactment of a rule which would make enforceable debts which the church felt the parties were morally obligated to honor.[40]

Nevertheless, the Commission rejected these arguments with respect to private gambling contracts between two individuals. It felt that this type of transaction was not appropriate for judicial consideration and would further burden the case load of the courts.[41]

While the Commission accepted this argument for private wagering transactions, it hesitated to do so with regard to organized forms of gambling. A person who wins a bet placed with a licensed bookie should be able to enforce the payment of his winnings. Nevertheless, an analysis of the legal issues and an examination of the safeguards and enforcement mechanisms already existing convinced the Commission that "there is no strong argument in favor of making any change in the law."[42]

In Nevada, factors other than those cited in England have apparently militated against a change in civil law. The American income tax laws, as a general rule, put a premium on the accrual of expense items at the earliest possible date and the deferral of income items until the latest possible date. Businesses normally must evaluate all aspects of their operations and then choose between an accrual or cash basis of accounting.[43] The present tax

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[40] Id. at 135.

[41] Id.

[42] Id. at 135-36.

[43] See generally 26 U.S.C. §§167, 441, 446.

law enables the Las Vegas casinos to use the accrual method for noting their expenses while in effect recording their income on a cash basis. Since gambling contracts are unenforceable, the casinos can postpone the accrual of income relating to all such contracts held by them until the date the contracts are actually satisfied.

The most important reason for the casinos' failure to support civil law reform apparently is that such changes would be of little practical significance. The casinos simply do not need to rely on the courts to collect their debts. Indeed, few operators would apparently welcome such legal sanctions. The rules and customs associated with various gambling activities are informal and loosely drafted. Since these regulations were never designed to cover all possible contingencies, the courts would be faced with the difficult task of interpreting ambiguous rules.[44] The court instead may elect to formulate its own rules founded on the common law. These judicial regulations might be unfavorable to the owners. Court cases, moreover, have the potential of generating much adverse publicity: casinos want to project an image of winning, not losing.

Present day casinos apparently do not need the aid of the courts, for they have developed highly refined mechanisms for protecting themselves. The heart of this process is a sophisticated system for evaluating the credit standing of persons seeking an advance. By extending credit only to those who appear to be able and willing to honor their obligations, even void ones, the casino can substantially reduce its risk. Most "high rollers" will eventually meet their obligations because they want to protect their reputations with the house. Since the "house always wins", most casinos will even let persons who owe them money continue to play on a cash basis.

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[44] Royal Commission Report at 135-36.

In recent years, the casinos have, moreover, advanced a more effective regulatory devise--the junket. A junket is nothing more than a group of persons who are flown to Las Vegas on a chartered plane. Benefited by special hotel rates, these customers are encouraged to gamble as much as possible. Many have proven records as "high rollers". Newcomers will not be "eligible" for future trips if they do not prove to be avid gamblers. The promoter and organizer of the trip, the junketer, serves as a middleman between the hotel and individual customers. To maintain his business with a particular hotel-casino, the junketer will normally guarantee the credit of his group.

If the casino extends credit to a member of the junket and that person refuses to honor his debts, the hotel simply collects from the junketer. The junketer then pursues the individual. If the individual can not pay, the junketer may refuse to permit him to travel in the future. In addition, some junketers refer such debtors to loan sharks who will lend them money at usurious rates, and use force if necessary to collect the loan. From the hotel's point of view, this system is satisfactory for it insulates the hotel management from any potentially criminal liability of the loan shark.[45]

Even under the current system, the houses suffer some losses. But, they will still suffer losses no matter what reforms are introduced in the civil law. Casinos will not support legislative reform until the advantages of a new system are perceived to be clearly greater than those of the current arrangement.

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[45]This foregoing example is strictly hypothetical. It merely demonstrates one method by which a general junket system widely used by the Nevada gambling industry today could serve as a shield for illegal loan-sharking activities.

The most compelling argument for reform of the civil law, however, is the desire for preserving the symmetry of the law[46]: the civil and criminal rules must be consistent with one another. The civil law and criminal law should promote the same goals. If certain games are not illegal, debts associated with their play should be enforced.

To maintain the symmetry between criminal and civil law, however, may not be a goal of the legislature. The reasons for eliminating the criminal sanctions are not necessarily related to the considerations which impinge on the decision to alter the civil rules. Legalization may not reflect a change in society's attitude towards gambling. The legislature may, in short, consistently decriminalize gambling without altering the civil law.

The legislature may want to discourage potentially widespread gambling. By inhibiting credit extension through voiding of gambling contracts, the legislature limits the potential for harm. From this prospective, the civil and criminal rules--which at first glance appear to be inconsistent--complement one another to further this policy.

Other reasons for maintaining the present civil posture may account for the discrepancy between criminal and civil law. Judges and legislators may not feel that such questions should be considered by the courts or that the issues involved are amenable to fair and efficient solution in the courts.[47]

Finally, the legislature may wish to establish a quasi-judicial procedure to entertain disputes arising from legal gambling transactions.[48] Governed by rules adopted by the

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[46] See Beeson, "Enforcement of Gambling Debts in the Context of Decriminalization" at 6 (unpublished paper in the Cornell Law Library, 1975).

[47] Royal Commission at 135.

[48] Id. at 136.

legislature, these proceedings could be as informal or formal as the legislature desires. In addition, the findings could be used in any subsequent licensing or revocation proceedings. Further appeal to the courts could be limited or denied altogether.[49]

G. Some Additional Policy Issues[50]--Fraud

1. Introduction

Decriminalization of gaming erodes the rationale disallowing recovery for the victim of a fraudulent illegal game. If public policy desires to discourage fraudulent practices or to punish the most blameworthy participant,[51] this goal is more readily attained by applying or enacting penal statutes. In conjunction with this policy the civil law should eliminate the "unequal fault doctrine" and in pari delicto exceptions. While the forum may elect not to aid

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[49] See, e.g., Weishrod v. The Fremont Hotel, 74 Nev. 227, 326 P.2d 1104 (1958). In Nevada all gaming activities are monitored by the state tax commission. Patrons who feel they have been cheated are free to submit complaints to this body, which in the appropriate case will conduct a factual inquiry. In Weishrod, the court stated, after attending to this procedure:

> Nor can it realistically be contended that such administrative determination would not inure to the benefit of the gambling patron in a proper case. No licensee is likely to place his license in jeopardy through refusal to pay a gambling debt found to be properly due.
>
> We therefore have no doubt that if the tax commission had felt that the respondent was honestly indebted on the transaction here involved resort to the courts need never have been had.

74 Nev. at 229-30.

[50] The following discussion is nothing more than an introduction to some of the problems and their possible solutions. A complete analysis would include an in-depth evaluation of many topics (e.g., due process, tort law, indemnification) and their relation to this subject.

[51] See, e.g., Falkenberg v. Allen, 18 Okla. 210, 90 P. 415 (1907).

the participant in an illegal enterprise, the current rules prevents recovery when the victim is defrauded in a legal game. Having broken no law by playing the game, the victim is not in pari delicto with the defendant. Because it assumes the guilt or fault of both parties, the unequal fault doctrine should also be inapplicable. Both these rationales ought to be abandoned when the courts are confronted with problems of fraud arising from legal games.

The question then arises what sort of recovery should be allowed when the victim has been defrauded in a legal game. The state's interest in fraudulent gambling suits, however, may not be the same in relation to state-operated games and to private games.

One reason a state legalizes gambling is to insure that all gambling takes place in a relatively controlled environment where the games are conducted honestly, protecting the public. Viewed from this prospective, the state appears as a guarantor for the honesty of these games.

The state has a direct interest in assuring that all games conducted by its employees or its licensees are free from fraud. The state can use several tools to assure this result. It can indict any wrongdoer. It can revoke the license of a wrongdoer. It can also grant relief to the victim.

The state's interests, however, are less critical in a private game. The state has not assumed responsibility for assuring the honesty of private games. It has merely removed the criminal sanctions applied to them. The state's responsibility may extend only to applying criminal sanctions against cheaters in such games. Alternatively, the legislature may decide that the interests of the victim in a private game are sufficient to justify providing a civil remedy to him as well.

Should a state allow suits for defrauded gambling participants, it will still have to resolve how the victim's own wrongdoing affects his rights. Courts have split on the

issue of whether committed or attempted fraud by the victim should bar his recovery.[52] Some courts have apparently discerned an interest so worthy of protection that this interest outweighs the victim's own "unclean hands".[53] In deciding whether to reform this aspect of the civil law, the legislature should not overemphasize the deterrent effect of civil litigation on the other participants; in most cases, the state does not have an overwhelming reason to aid the victim.

Determining the risk of loss for a fraudulent game is affected by the circumstances of each game. In a private game, absent other factors (such as attempted fraud by the victim), liability is placed on the party perpetuating the fraud.

In the case of a public game, the issues are more complex. While recovery will be allowed from the perpetrator of the fraud--the dealer, the pit-boss, or the cashier,--the courts or legislators must determine the extent of the liability in reference to others. Under tort law, the employer is held liable for any intentional tort committed by the employee where its purpose, however misguided, is wholly or in part to further the master's business.[54] This principle could extend liability to employers. The question has not been resolved whether corporate or shareholder assets would be subject to execution in a fraudulent gambling suit. If the game is state-run, public policy may not want state revenues and assets subject to such causes of action.

Other considerations will also affect decisions to reform the civil law. The plaintiff awarded a civil remedy should be able to satisfy the court's judgment; unsatisfied

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[52] See Supra Part III Section F.

[53] This is a judgment similar to the one which must be made in all con games which normally take advantage of an individual's greed or dishonesty.

[54] Prosser, The Law of Torts 464 (1971).

awards may defeat the purpose of the reform. Some measures may be needed to insure the court's remedy. If knowledge or participation is requisite to establish the employer's liability, the employer may neglect those precautions which would insure the honesty of games. The doctrine of sovereign immunity may insulate state-run games.

Another key issue in this debate relates to the burden of proof placed on the plaintiff. Fraud in a gambling transaction is difficult to prove, particularly when the game is held in a casino type operation. To establish liability, the victim must ascertain the individual responsible for the fraud. The state may wish to lighten this burden by applying some sort of strict liability to the operator or by recognizing certain presumptions in favor of the plaintiff.[55] For example, the court could automatically grant relief to anyone proving they lost money at a game fraudulently conducted at a casino. The doctrine of respondent superior could vicariously impose liability on the employer.[56] This principle would still be negated by the defense that the employee acted outside the scope of his employment when he conducted a dishonest game.

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[55] See notes 258-269 infra and accompanying text.

[56] The doctrine of respondeat superior imposes liability upon an employer without regard to the employer's personal negligence or fault. In much the same way the workmen's compensation laws effect the policy judgment that it is best to make the employer strictly liable instead of litigating the questions of fault and negligence. The defense that the employee was acting outside the scope of his employment when he broke the law by conducting a dishonest game could be foreclosed at the outset by drawing an analogy to the case of the employee driver who is guilty of a traffic violation at the time of the accident. Of course, the employer may have a cause of action against the employee after the victim has been compensated.

Finally, fraudulent gaming suits, like gambling contract suits, may not be considered amenable to formal adjudication.[57] The legislature may establish another mechanism for dealing with these cases. It may, on the other hand, ignore providing a procedure to adjudicate these claims.

2. Strict Tort Liability[58]

At common law, the tort of deceit--the tort upon which plaintiff would have based his claim in a gambling fraud case--included five elements: (1) the making of a false representation--ordinarily one of fact--by the defendant; (2) knowledge by the defendant that his representation was false; (3) an intent to induce the plaintiff to rely on such information; (4) justifiable reliance on such information by the plaintiff; and (5) damage to the plaintiff, resulting from such reliance.[59]

As noted in the previous section, the plaintiff would face difficulty in establishing the second element, scienter Establishing knowledge on the part of the casino owner would be even more difficult. This burden adversely affects the plaintiff. The plaintiff's recovery may be limited to the

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[57] See, e.g., Catts v. Phalen, 43 U.S. 371 (1844).

[58] The concept of strict liability in tort as it might relate to recovery in fraudulent gambling transactions will be discussed in some detail because it seems to offer the greatest possibility for reform in this area of the civil law. There are also at least two other possibilities, neither one of which appears preferable to the strict liability in tort solution. The first one would be the establishment of a regulatory scheme which would include terms for the application of criminal fines and forfeitures as well as the indemnification of fraud victims. The second remedy would be the adoption of a sort of "Uniform Commercial Code of Gambling" detailing the rules of gambling transactions, including those which relate to fraud and the calculation or damages.

[59] See generally, Prosser, The Law of Torts, 685-86 (1971).

individual with whom he dealt, this individual may be judgment-proof or difficult to find. By setting up a "facade of ignorance," the owner of the game may insulate himself from an adverse judgment. Even though the owner may desire to maintain tight control over his employees, he may be forced to adopt methods to avoid liability in the courts. For example, the owner of a casino could organize his house in such a way as to make each of the dealers "independent contractors" who pay a cut to the house.

Eliminating the scienter requirement , on the other hand, would in effect make the owner and operator of a public game strictly liable for all activities taking place in connection with his business. This would lessen the burden of proof on the plaintiff and insure that a financially responsible defendant was available for easy service of process. More important, however, this reform would place the financial burden on the one party who is in the best position to (1)insure that fraud does not occur and (2) pass the costs of preventing fraud and indemnifying its victims to the general public. This result would promote one of the purposes of decriminalization.

In recent years, many courts have concerned themselves with the subject of strict liability in tort in a line of products liability cases.[60] These modern products liability cases have been limited to situations involving personal injuries, but strict liability in tort is not necessarily limited to that type of damage. Prior to 1850 (and for sometime thereafter) when Brown v. Kendall[61]

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[60] See, e.g., Cintrone v. Hertz Truck Leasing and Rental Service, 45 N.Y. 434, 212 A.2d 769 (1965). See, generally Prosser,"The Fall of the Citadel (Strict Liability to the Consumer)", 50 Minn. L. Rev. 791 (1966).

[61] 60 Mass. (6 Cush.) 292 (1850).

injected the issue of fault or negligence into the debate, a person was generally held to be responsible for any harm caused by his own acts.[62] But even after Kendall, strict liability continued to be imposed in numerous situations. For example, bailees are strictly liable for damages resulting from the misdelivery of goods;[63] trespassers are liable for any harm they cause to the land even if their entry onto the land was a reasonable mistake;[64] owners of trespassing animals are strictly liable for the damages caused by such animals;[65] one who is engaged in ultrahazardous activity is liable for any damages caused by his activities no matter what his level of care;[66] and the owners of automobiles are vicariously liable for damage caused by drivers other than themselves.[67]

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[62] See generally, Peck, "Negligence and Liability Without Fault in Tort Law," 46 Wash. L. Rev. 225 (1971).

[63] See, Prosser, The Law of Torts, at 87-89.

[64] Id. at 63-65.

[65] Id. at 496-98.

[66] Id. at 505-16.

[67] Id. at 483-86.

These cases and the products liability cases have three features in common which make it particularly appropriate for the courts to apply the doctrine of strict liability to gambling cases.[68] First, the injured party would, in most cases, encounter a very difficult burden of proof if a different standard were applied. The evidence is usually no longer in existence, or in a form inappropriate for use in court. Second, the defendant usually has control over or superior knowledge of the transaction which led to the harm. Finally, these cases would have the effect of socializing the costs of the injury, placing the financial burden on the party which is usually best able to afford it.

This analogy can be extended to gambling transactions. As gambling is decriminalized, strict liability becomes a leading principle for those jurisdictions desiring to reform the civil law.

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[68] See, Peck, supra. at 240.

Chapter X. ENGLISH LAW

A. The Law from 1776-1836

1) Gaming and Wagering

2) Lotteries

B. The Era of Suppression and Regulation: 1836-1945

1) Gaming Suppressed: 1837-1920

2) Gaming Regulated: 1920-1945

3) Lotteries Suppressed: 1836-1945

C. Gambling in Great Britain 1945-1976

1) The English Welfare State

2) The Royal Commission 1949-1951

3) Radical Legislation

4) Modification of the New Law

D. Conclusion

A. The Law from 1776-1836

1. Gaming and Wagering.

The Revolution of 1776, of course, marked a clear dividing line in the development of American gambling law. The basic lines of that development have already been traced in these materials. The old common law tolerance of gaming began to shift with the rise of Cromwell and the Puritan Regime in the middle of the 17th Century. The Restoration of the Stuart monarchy in 1660, however, turned English society in a different direction. Hanover England did not change that basic direction. While the law continued to impose some type of limitations on most forms of gambling, the practice of the people continued to ignore it.

Despite statutory prohibitions, the gaming-houses which had sprung up to cater to the aristocratic passion for gambling during the Restoration, moreover, continued to operate clandestinely in the large metropolitan areas of England throughout the eighteenth and nineteenth centuries.[1] Fraud and cheating in such places were not uncommon.[2]

It was also during the I8th and 19th Centuries[3] that the professional bookmaker made his first appearance in

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[1] See generally J. Ashton, The History of Gambling in England (1969) [hereinafter cited as Ashton].

[2] Id. at 139.

[3] Id. at 141-44.

England.[4] He accepted both on-course and off-course bets on horseraces, from aristocrat and commoner alike. For the working class, though, he conducted the precursor of the modern numbers game. In this game, an individual could purchase a chance on which number would be drawn in the Government lottery. On describing these "insurance" schemes, one contemporary commentator wrote:

> The mind shrinks with horror at the existences of a System in the Metropolis [of London], unknown to our ancestors . . . by which Gambling establishments have been formed upon commerical principles of methodical arrangements, with vast capitals employed for the most infamous and diabolical purposes.[5]

The directors of the "System" commonly bribed local police and judges. They also used enforcers to collect debts and to discourage potential informers.[6]

Parliament was not immediately concerned with the operations of the bookmaker. Instead, its attention was focussed on the unforeseen hardships which arose from judicial enforcement of the first section of the Statute of Anne.[7] Making securities void worked great injustice on innocent holders for value of bills and

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[4] Royal Commission on Lotteries and Betting 1932-33, Final Report, Cmd. No. 4341, at 11 (1934) [hereinafter cited as Royal Commission 1932-33].

[5] P. Colquhoun, A Treatise on the Police of the Metropolis 142, 145 (7th. ed. 1806) [hereinafter cited as Colquhoun].

[6] See J. Rubenstein, Gambling Enforcement and Police Corruption 3-4 (Unpubl. paper prepared for the Commission on the Review of the National Policy Toward Gambling 1974).

[7] 9 Anne c. 14, §1 (1710).

notes which had originally been given for gaming transactions.[8] Though innocent themselves, third party holders for value could not collect on these securities.[9] In most situations, any bill or note given for a gambling debt was void whether it remained in the original holder's hands or was passed on.[10]

To remedy this situation, a statute was enacted in 1835 which declared that all securities given for gambling transactions were not to be considered void, but instead as having been given for an illegal consideration.[11] Thus, the original holder was precluded from judicially enforcing the security against the debtor, but a third party without prior notice of the security's illegality could. A third party who possessed prior notice of the security's illegality, however, could not enforce it against the debtor.[12]

The statute further provided that where a debtor was compelled by statute to pay any holder, endorsee, or assignee of a previously issued security all or part of what was due, he could recover the amount he had paid from the person to whom the security had originally

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[8]G.H. Stutfield, The Law Relating to Betting, Time-Bargains and Gaming, 9. (1884) [hereinafter cited as Stutfield].

[9]Shillito v. Theed, 7 Bing. 405, 131 Eng. Rep. 156 (C.P. 1831).

[10]However, a third party without notice could collect from an indorser if the indorsement had been given in consideration of a valid debt. Bower v. Brampton, 2 Str. 1155, 93 Eng. Rep. 1096 (K.B. 1741).

[11]Gaming Act, 5 & 6 Will. IV, c. 41, §1 (1835).

[12]Hay v. Ayling, 16 Q.B. 423, 117 Eng. Rep. 941 (1851).

been given.[13] Unfortunately, Parliament had not foreseen that "holder" would be interpreted to include more than just a person who had acquired title to the security in his own right.[14] Cases inevitably arose where the debtor could recover from the original holder the sum he had paid to an intermediate holder without the original holder ever actually having received payment.[15] This troublesome provision was eventually repealed in 1922,[16] and the new statute did not provide the debtor with any right of recovery.

2. Lotteries.

During the period following the American Revolution, the Government continued to prohibit all lotteries except those it authorized and ran itself.[17] The government lottery was primarily a pastime for the upper and middle classes because of the relatively high cost of tickets. Even so, the lower classes were not excluded

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[13] Gaming Act, 5 & 6 Will. IV, c. 41, §2 (1835). The acceptor of a bill who was conpelled to pay the amount of a bill to a bona fide holder could also, under section 2, recover the amount he had paid from the drawer of the bill. Stutfield at 25.

[14] H. Street, The Law of Gaming 411. (1937) [hereinafter cited as Street].

[15] Sutters v. Briggs, [1922] 1 A.C. 1.

[16] Gaming Act, 12 & 13 Geo. V, c. 19, §1 (1922).

[17] Royal Commission 1932-33, at 6.

entirely from participation. Although they were unable to afford tickets for the legitimate lottery, the working class and the poor enthusiastically participated in at least two forms of illicit lotteries.

The first form was that of the "little go." In essence, this was nothing more than a private lottery held between the annual drawings of the official lottery for a substantially smaller sum. There were, generally, five or six "little goes" in a year, and these were often conducted by two or three of the official lottery-office keepers.[18] Although clearly illegal under the 1698 statute forbidding private lotteries, these enterprises continued because of the great demand for them and the large profits they could realize.

The little goes were frequently plagued by fraud. As one contemporary newspaper stated:

> No man of common sense can suppose that the lottery wheels [of the little goes] are fair and honest, or that the proprietors act upon principlaes anything like honour or honesty; for, by the art and contrivance of the wheels, they are so constructed with secret springs, and the application of gum, glue, etc., in the internal part of them, that they can draw the numbers out or keep them in at pleasure, just as it suits their purposes. . . the whole [enterprise] being a gross fraud, and imposition, in the extreme. . . . [In short,] the term of little goes for the private lotteries is apt enough, for the poor devils who risk their

[18] Ashton at 291.

> property there have but little, and that little goes to naught.[19]

In 1802, Parliament enacted legislation which proclaimed little goes to be public nuisances.[20] Anyone convicted of conducting either a little go or any other lottery was subject to a fine of £500.[21]

The second form which the illicit lottery schemes took was that of the "insurance." The operators of these schemes shrewdly capitalized on the desire of the lower classes to participate in lottery activity by selling chances on which official tickets would be drawn during each day of the Government lottery's existence.[22] This form was particularly popular because the numbers drawn in the Government lottery were publicly announced, thus leaving little opportunity for fraud. In many ways, this scheme was the forerunner

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[19] Id. at 288-90.

[20] Lottery Act, 42 Geo. III, c. 119, §1 (1802).

[21] Id. §2.

[22] See Royal Commission 1932-33, at 7. Under the Government lottery system, every purchased ticket was drawn from one drum and then matched with a ticket drawn from another drum. These two tickets indicated the prize won by the holder of the first ticket. This was a time-consuming process and generally took about forty-two days to complete. The general practice was to "insure" against the drawing of a particular ticket on a particular day, with the cost of insurance rising as the drawing progressed. This practice was nothing more than gambling on each draw of the lottery, but the State received no benefits from it.

of the modern numbers game in the United States.

Like the little goes, the insurances were illegal under both the 1698 statute and the 1802 statute. Nevertheless, police officials found the insurance schemes more difficult to suppress.[23] The public favored this form of gambling, but more importantly, these schemes were conducted in a much more organized fashion than the little goes. Frequently, enforcers were employed and public officials were bribed. These schemes were so widespread that, at their peak, there were apparently some four hundred insurance offices operating in the London area.[24]

In 1808, the House of Commons appointed a Select Committee on Lotteries

> . . .to enquire how far the evils attending lotteries have been remedied by the laws passed respecting the same; and to report. . . upon such further measures as may be necessary for the remedy thereof.[25]

The Select Committee concluded that

> . . .under no system of regulations which can be devised, will it be possible for Parliament to adopt it [the State lottery] as an efficient source of Revenue, and at the same time divest it of all the Evils and Calamities of which it has hitherto proved so baneful a source.[26]

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[23] See generally Colquhoun.

[24] Ashton at 298.

[25] Royal Commission 1932-33, at 6.

[26] Id. Appendix III, at 173.

The committee recommended that the Government lottery be abolished because of its high operation expense and because it seemed unalterably beset with "the Evils and Calamities" of the insurance schemes.[27]

The Select Committee's Report did not lead to the immediate abolition of the Government lottery. Even with strong opposition in Parliament, the lottery continued until 1826. In 1823, Parliament authorized the last lottery, and though retaining the Lottery Commission until 1826, it provided for the discontinuance of all lotteries after the 1826 drawing.[28] This last drawing thus marked the close of an era of Government-run lotteries.

At the same time as the development of opposition in Parliament, the English public apparently lost interest in the Government lotteries:

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[27] Id. at 173-74.

[28] Lotteries Act, 4 Geo. IV, c. 60 (1823).

The British Parliament
being, at length, convinced of their
mischievous tendency,
His Majesty GEORGE IV.
on the 9th of July 1823,
pronounced sentence of condemnation
on the whole race;
from which time they were almost
NEGLECTED BY THE BRITISH PUBLIC.
Very great efforts were made by the
Partisans and friends of the family to
excite
the public feeling in favour of the last
of the race, in vain:
It continued to linger out the few
remaining
moments of its existence without attention,
or sympathy, and finally terminated
its career unregretted by any
virtuous mind.[29]

In fact, a contemporary newspaper reported that Parliament's decision to discontinue the lottery was not only not regretted, but even "hailed, by far the greatest portion of the public, with joy."[30]

The abolition of Government lotteries marked the beginning of an era of suppression of all lotteries in Great Britain. For the most part, prosecutions for lottery-related offenses were brought under the Lotteries Act of 1802. Nevertheless, no provision contained in this statute outlawed the promotion of foreign lotteries in England. As circulars advertising lotteries in Hamburg or other places began to pour in, Parliament remedied this ommission through the Lotteries Act of 1836.[31]

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[29] Ashton at 240.

[30] Id. at 277.

[31] Lotteries Act, 6 & 7 Will. IV, c. 66 (1836).

B. The Era of Suppression and Regulation: 1836-1945

1. Gaming Suppressed: 1837-1920.

In 1837, Queen Victoria ascended to the throne of England. Unlike some of her predecessors, most particularly Charles II and Queen Anne, Queen Victoria abhorred the luxury and idleness which had become typical of the royal court. She believed in the value of hard work, earnestness, morality, propriety, and temperance, and whole-heartedly practiced all of these Puritan virtues. In a sense, Victoria's ascendancy was akin to a Puritan Restoration. The aristocracy followed the example set by their sovereign, and the nineteenth century became an era of great industrial, imperial, and commercial expansion.

"Work" was the watchword of Victorian England:

> Except for 'God,' the most popular word in the Victorian vocabulary must have been 'work.' It was, of course, the means by which some of the central ambitions of a commerical society could be realized: money, respectability, and success. But it also became an end itself, a virtue in its own right. . . children heard a biblical injunction that was endlessly repeated: 'Work while it is today, for the night cometh when no man can work.' By the same token idleness was inexcusable.[32]

In such a society, where hard work was thought to lead directly to material reward, the idle occupation of gambling, with its indiscriminate bestowal of riches,

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[32]W.E. Houghton, The Victorian Frame of Mind 242-43 (1957).

both shocked and affronted the Victorian masses. As a result, Parliament enacted legislation to suppress this insidious activity.

Neither the Statute of Anne nor the Gaming Act of 1835 had affected gaming or wagering contracts per se, but only those securities given in connection with such contracts. This limited legislation was not sufficient to satisfy Victorian England. Consequently, in 1844, select committees were appointed in both Houses of Parliament to examine the status of Great Britain's existing gambling laws. These committees found that the old gaming enactments were obsolete. Sports which had been unlawful three centuries earlier were now regarded as healthy forms of recreation. The committees recommended that the old laws be repealed; the political motives upon which they had been based had disappeared long ago. They also recommended that

> the Law should henceforth take no cognizance whatever of Wagers; that all Statutes making it penal should be repealed; and that debts so contracted should be recovered by such means only as the Usages and customs of Society can enforce for its own protection.
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> . . . .
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> The Courts of Law should be entirely relieved from the obligation of taking cognizance of claims for money won by wagers of any kind.[33]

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[33] Royal Commission 1932-33, at 9.

Parliament implemented these recommendations in the Gaming Act of 1845. Section 18 of the Act provided that ". . . all Contracts or Agreements, whether by Parole or in Writing, by way of gaming or wagering, shall be null and void. . . ."[34] Thus, no suit could be brought in any court, either of law or of equity, for the recovery of money or other valuable consideration against the debtor or the stakeholder.[35] The effect of the statute, in Justice Lush's words, was to make a wager

> . . . a Thing of neutral character, not to be encouraged, but on the other hand, not to be absolutely forbidden; and it selft an ordinary bet a mere debt of honour, depriving it of legal obligation; but not making it illegal.[36]

Nevertheless, the courts initially allowed stakeholders to circumvent this provision by recognizing some actions brought against the debtor. In these cases, the debtor had promised to pay subsequent to his issue of the original security. This new promise had to have been given for fresh consideration or else it was not enforceable.[37] This

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[34] 8 & 9 Vict. c. 109, §18 (1845).

[35] Id.

[36] Haigh v. Town Council of Sheffield, L.R. 10 Q.B. 102, 109 (1874).

[37] Not reporting an individual was sufficient consideration to support an action on a subsequent promise to pay gambling losses. Hyams v. Stuart King, [1908] 2 K.B. 696. Forbearance to sue for the amount of the debt was not sufficient because, under the 1845 statute, the stakeholder did not in fact have a cause of action. Poteliakhoff v. Teakle, [1938] 2 K.B. 816.

permissive trend was reversed in the landmark decision of Hill v. William Hill (Park Lane) Ltd. The House of Lords, by a majority of only one vote, held that promises to pay gambling debts, even though supported by valid consideration, remained agreements within the meaning of section 18 of the 1845 statute, and were, therefore, unenforceable.[38]

The Gaming Act of 1845 did more than make all gaming and wagering transactions void and unenforceable. It also authorized police to enter suspected gaming-houses and arrest all persons found within, if a warrant had previously been obtained.[39] Increased, too, were the penalties for gaming offenses;[40] alehouses and billiard parlors were also required to be licensed.[41]

One consequence of the Gaming Act of 1845 was the emergence and rapid spready of betting shops throughout England. Since the Gaming Act had rendered betting transactions void and unenforceable, professional bookmakers began to require stakes to be deposited with them in advance to ensure payment.[42] For their own and

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[38]Hill v. William Hill (Park Lane) Ltd., [1949] A.C. 530.

[39]Gaming Act, 8 & 9 Vict. c. 109, §§3, 6, 7 (1845).

[40]Id. §4. Penalties on gaming-house keepers and others involved in the business could be those under the "Act for Mayntenance of Artyllerie" 33 Hen. VIII, c. 9 (1541), plus a fine of £100, or imprisonment, with or without hard labor for six months.

[41]Gaming Act, 8 & 9 Vict. c. 109, §§10, 11 (1845).

[42]See Royal Commission 1932-33, at 11.

also their patrons' convenience, bookmakers opened shops in the large metropolitan areas and advertised conspicuously.

As the popularity of racing and betting grew, so did abuses and scandals:

> In the second quarter of the century the Turf was getting in a scandalous condition. A fair race was hardly known for the St. Leger. . . .[43]

Duels were fought over questionable ownership, horses were drugged, poisoned, and illegally run in races for which they were not eligible. Still, the Select Committee of 1844 felt that the existing penalties and regulations which controlled horseracing and betting on the turf were sufficient. They were much more concerned with the laxness and neglect which accompanied the suppression of gaming-houses in race towns.[44] Some shops would "bet anyway, and against anything. . . and should any misfortune occur, such as a wrong horse winning, forget to open the next day."[45] Other larger shops would make bets against a favorite horse and aggregate enough money to buy it. Not surprisingly, when the race was run, the "favorite" would lose. Scandals became so widespread that Parliament was finally forced into action. The Attorney General testified before the House of Commons:

> Servants, apprentices, and workmen, induced by the temptation of receiving a large sum

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[43] Ashton at 193.

[44] Id. at 198.

[45] Id. at 212.

> for a small one, took their few shillings to these places, and the first effect of their losing, was to tempt them to go on spending their money in the hope of retrieving their losses; and, for this purpose, it not unfrequently happened that they were driven into robbing their masters and employers. There was not a prison, nor a house of correction in London, which did not every day furnish abundant and conclusive testimony of the vast number of youths who were led into crime by the temptation of these establishments. . . .[46]

To combat these problems, Parliament enacted "An Act For the suppression of Betting Houses" in 1853.[47] Its object was not to interfere with bets made between individuals, but "to suppress the opening of houses, shops, or booths, for the purpose of betting, the owner of which held himself forth to bet with all comers."[48] To accomplish this end, a distinction between betting and betting houses, analogous to that made between games and gaming-houses by the 1541 statute of Henry VIII,[49] was introduced into this area of gambling law. The Betting Act of 1853 thus did not make wagering illegal, but declared any "House, Office, Room, or other Place" used for the purpose of taking bets to be "a common Nuisance,"[50] and imposed penalties on those who kept or advertised such places.[51]

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[46] Id. at 214.

[47] 16 & 17 Vict. c. 119 (1853).

[48] Royal Commission 1932-33, at 12.

[49] 33 Hen. VIII, c. 9 (1541).

[50] 16 & 17 Vict. c. 119 (1853).

[51] Id. §§3, 4, 7, 8.

Due to the ambiguity of the phrase "other Place," this statute proved to be a fertile source of litigation. A spot under a tree in Hyde Park, a strip of ground next to a race course, an area under a large umbrella, a stool placed on the ground, and the general area of a racecourse were all held to be "places" within the meaning of the statute.[52] As Chief Judge Earle stated in Doggett v. Catterns:

> The mischief. . . is precisely the same, whether the party stands under the shelter of an oak tree or of a roof or of a covering of canvass: I think the words are large enough to embrace it.[53]

In Powell v. Kempton Park Racecourse Co., the Court of Appeals realized that a "place" had to have some limit unless betting were to be prohibited altogether. Lord Esher stated:

> It need not be a building. . . [or] a covered place. . . but it must be a defined space, capable from its condition of being used by a person who desires so to use it as if it were his house, room, or office. . . .[54]

When the matter reached the House of Lords on appeal in 1899, very little effort was made to define place. Instead, the character of the user was emphasized; the person taking bets had to exercise some form of "dominion or control"

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[52]Doggett v. Catterns, [1864] 17 C.B. (n.s.) 669; Shaw v. Morley, [1868] L.R. 3 Ex. 137; Bows v. Fenwick, [1874] L.R. 9 C.P. 339; Gallaway v. Maries, [1881] 8 Q.B.D. 275; Hawke v. Dunn, [1897] 1 Q.B. 579.

[53]Doggett v. Catterns, [1864] 17 C.B. (n.s.) 669.

[54]Street at 160-61.

over the area.[55]

Although the Act of 1853 appeared to have closed betting houses, there was as much ready money betting as before.[56] The Gaming Act of 1845 also suffered from ineffectiveness; in 1854 Parliament enacted another statute with the same legislative purpose.[57] This new statute reiterated a number of the old statute's provisions, but went further by increasing the penalties for gaming offenses and also be broadening police enforcement power.

The efforts of the police to enforce the 1845, 1853, and 1854 gambling statutes eventually forced gamesters and bookmakers to abandon their formerly secure establishments, where if they carried on their trade in the streets or in other public places, they would then be subject to prosecution under the Vagrancy Act of 1824.[58] The Vagrancy Act, however, appeared incapable of combatting bookmaking in the streets, and bookmaking still flourished in the

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[55]Powell v. Kempton Park Racecourse Co., [1899] A.C. 143. See also id. at 162.

[56]Ashton at 215.

[57]Gaming Houses Act, 17 & 18 Vict. c. 38 (1854).

[58]Vagrancy Act, 5 Geo. IV, c. 83 (1824). This act provided "every person playing or betting in any Street, Road, Highway or other open and public Place, at or with any Table or Instrument of gaming, at any Game or pretended Game of Chance" was a "Rogue and Vagabond" and was subject to three months imprisonment and hard labor. Id., §4. The statute was modified in 1873 to read "Every person playing or betting by way of wagering or betting in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering

latter half of the nineteenth century. In 1901 and 1902, the House of Lords appointed a Select Committee on Betting to investigate the problem.

> The Committee's main conclusion was that it was impossible altogether to suppress betting but that the best method of reducing it was to localise [sic] it as far as possible on racecourses and other places where sport was carried on.[59]

Parliament thus incorporated the Select Committee's findings in the Street Betting Act of 1906,[60] which forbade betting in all public places except racecourses on days when races were being held. First offenders could be fined £10, second offenders, £20. Any subsequent offenders were subject to a fine of £50 or six months imprisonment if indicated, or a fine of £30 or three months imprisonment if they received a summary conviction.[61]

None of the legislation of this period sought to outlaw betting per se. Instead, legislation was designed to limit the places where gambling occurred, not the act of gambling itself. By prohibiting gambling houses and betting shops, Parliament hoped to prevent social unrest

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or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond," and offenders were subject either to punishment under the 1824 Act or to a fine not more than 20 shillings for a first offense, or a £5 fine for a subsequent offense in lieu of imprisonment. Vagrant Act Amendment Act, 36 & 37 Vict. c. 38 (1873). Local bylaws and the Street Betting Act of 1906, 6 Edw. VII, c. 43, supplemented and eventually superseded this provision. Street at 244.

[59] Royal Commission 1932-33, at 13.

[60] Street Betting Act, 6 Edw. VII, c. 43 (1906).

[61] Id. §1.

and disorder. With no more common havens, the rowdy congregations of gamblers and wagerers would lose their focal points and eventually disappear. The prohibition against the disorder that gambling could engender, but not against gambling itself, left the crafty bookmaker free to establish a place of business and to accept bets on credit if he did so through letters, telegrams, or eventually the telephone. In fact, much wagering was carried on in this manner.

The popularity of betting did not suffer greatly from these statutes. The introduction of parimutuel betting was well enough received to bolster whatever slumps in appeal it may have encountered. Developed in France in the late nineteenth century by Joseph Oller, this system allowed individual bettors to wager on the contestant of their choice. The bettors whose choice won received their payoff from the large pool of all bets made. In the late nineteenth and early twentieth centuries, this type of betting showly but steadily grew in popularity. It allowed an individual bettor not only to make his own selection but also to make it on the basis of apparently fair odds. Parimutuel betting was used primarily for horse and dogracing, but also began to appear in connection with football (i.e., soccer) matches.

Officials of the professional football association, concerned that parimutuel betting could lead to corruption

of their sport,[62] mounted an intensive lobbying campaign in Parliament for the abolition of such betting. These efforts were rewarded by the Ready Money Football Betting Act of 1920.[63] This statute, in effect, prohibited the taking of wagers on football matches when a "ready money" (i.e., cash) transaction was involved. No prohibition was placed on wagers made on credit.

2. Gaming Regulated: 1920-1945.

Parimutuel or pool betting continued to grow after World War I, enhanced by the rapid development of the totalizer machine in the post-war period. This machine, invented in 1913 by a New Zealander, George Julius, allowed the odds on any contestant in a parimutuel betting scheme to be computed more quickly and accurately than ever before.

The increasing use of totalizers in wagering, moreover, soon attracted the attention of Parliament. It perceived a new and lucrative source of revenue in the fast, accurate, and extensive system of tabulating bets. In 1923, the House of Commons appointed a select committee to investigate the possibility of placing a duty on betting.[64] It reported that a duty on betting would be

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[62] Royal Commission 1932-33, at 14.

[63] Ready Money Football Betting Act, 10 & 11 Geo. V, c. 52 (1920).

[64] Royal Commission 1932-33, at 14.

practicable, and Parliament subsequently passed the Finance Act of 1926 which imposed an excise tax on every bet made with a bookmaker in Great Britain.[65]

The yield from this tax, however, fell substantially short of the expectations of Parliament and the Exchequer. Initially estimated at £6,000,000, the Budget receipts for 1927-28 only amounted to £2,669,242.[66] Further, various factions of the English populace resented the duty. Some objected to the inevitable instances of evasions, others to the state's recognition of gambling. As a result, the excise tax was discontinued in 1930.[67]

Although the revenue scheme was a failure, Parliament still perceived a need for the regulation of totalizers. Consequently, in 1928, it enacted the Racecourse Betting Control Act.[68] This statute created the Racecourse Betting Control Board.[69] The Board was given the power to license racecourses and to authorize the use of totalizers at such courses,[70] as long as the wagering remained under the Board's supervision. To finance its supervisory functions, the Board could impose a duty on the total amount collected by the on-track bookmakers.[71]

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[65] 16 & 17 Geo. V, c. 2, §15 (1926).

[66] Royal Commission 1932-33, at 15.

[67] Id.

[68] 18 & 19 Geo. V, c. 41 (1928).

[69] Id. §2.

[70] Id. §3.

[71] Id. §3(3), (4).

In 1930, Parliament was confronted with a new problem which prompted it to reevaluate its position on gambling. The Irish Free State had begun to promote its Sweepstakes in England at that time. Although Parliament was not overly concerned with the illegality of Ireland's actions, the enthusiasm with which the British populace received the Irish Sweepstakes unsettled the Legislature. In response, Parliament appointed a Royal Commission in 1932 to examine and evaluate the range of British law relating to wagering and lotteries. Part of the Royal Commission's report reiterated the existing prohibition on lotteries within British bounds; other portions of it recommended stiffer regulations concerning racecourses. The betting report suggested that a limit be placed on the number of days during which an approved racecourse could permit totalizer betting. It also recommended that all racecourses in England seeking to allow betting facilities on their grounds should be required to obtain a license.[72] Both of these recommendations were subsequently incorporated in the Betting and Lotteries Act of 1934.[73] English gaming and wagering law, for the most part, did not change again until 1960.

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[72] Royal Commission 1932-33, at 81, 163.

[73] 24 & 25 Geo. V, c. 58, §§1, 2 (1934). This Act also contained a provision which permitted the use of totalizers on licensed dog racecourses. Id. §11.

3. Lotteries Suppressed: 1836-1945.

After the passage of the Lottery Act of 1836, Parliament directed little of its attention to legislation concerning lotteries until almost a century later. The only significant piece of legislation regarding lotteries enacted during this period was the Art Unions Act of 1846.[74] Under this Act, art unions or associations formed for the purpose of purchasing works of art and then distributing them by lot among their members were exempted from all statutes that outlawed lotteries or lottery associated activity.

Although a form of numbers game did operate in the poorer districts of the large cities, public authorities did not consider it a serious threat. Nor did they take action against the regularly held charity raffles.[75] This situation changed dramatically, however, in 1930, when the Irish Free State began to promote the Irish Hospitals Trust Sweepstakes both in Ireland and in the United Kingdom. Prodded into action by the English populace's eager acceptance of the Irish Sweepstakes, Parliament decided to conduct an extensive review and evaluation of British gaming and lottery law. No longer would the Government ignore the forms of gambling it had previously allowed to operate unscathed.

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[74] 9 & 10 Vict. c. 48 (1846).

[75] Royal Commission 1932-33 at 44-45.

The royal commission appointed to study the matter[76] concluded that it would be foolish for the Government to try to run a large-scale lottery to compete with the Irish Sweepstakes, considering past history.[77] Instead, it recommended that Parliament enact a comprehensive lottery statute that would prohibit all lotteries in England.[78] The comm'-sion suggested three exceptions: art union lotteries, private lotteries held among members of an organization of a permanent character, and small lotteries incidental to bazaars.[79] The reason for these exceptions was simple:

> Very small lotteries for small prizes do no social harm, and provided the danger of fraud and nuisance can be prevented, there is a good case for removing them from the ambit of the criminal law.[80]

The royal commission's recommendations were subsequently implemented in the Betting and Lotteries Act of 1934.[81] Little change in English lottery law has occurred since.

C. Gambling in Great Britain 1945-1976

1. The English Welfare State.

In the midst of World War II, leaders of British

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[76] Id. at 138.

[77] Id. at 143.

[78] Id. at 146.

[79] Id. at 146-47.

[80] Id. at 144.

[81] Betting and Lotteries Act, 24 & 25 Geo. V, c. 58, Part II (1934).

government revealed great foresight by appointing Sir William Beveridge to study and recommend those governmental policies which would most ease the post-war reconstruction of the shattered British economy. In his report,[82] Sir William stated that in order to firmly reestablish itself, England would have to secure for its populace what he described as "the five freedoms"--freedom from want, disease, ignorance, squalor, and idleness. To secure these freedoms, Beveridge recommended that the government adopt a social security system for all British citizens, regardless of income, which would last "from the cradle to the grave." His plan covered unemployment, ill health, maternity, widowhood, and old age.

Immediately after the end of the war, the Labour Party won control of the British government for the first time and began to implement the recommendations of the Beveridge report. Beveridge's suggested economic reforms spoke of change for England; they also focussed attention on the issue of social change.

2. The Royal Commission 1949-1951.

In 1949, Parliament appointed a royal commission "to enquire into the existing law and practice thereunder relating to lotteries, betting and gaming. . . ."[83] The

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[82] Beveridge, Social Insurance and Allied Services, Cmd. No. 6404 (1942).

[83] Royal Commission on Betting, Lotteries and Gaming 1949-51, Report, Cmd. No. 8190, at iii (1951) [Hereinafter cited as Royal Commission 1949-51].

inquiry of the Royal Commission on Betting, Lotteries and Gaming was both wide-ranging and thorough. Not only did it scrutinize the state of existing gambling legislation, but it also studied the economic, social, and moral impact of gambling on English society. Whereas Beveridge's report had focussed primarily on economic reform, the new study was geared more toward social reform.

Its examination of the existing gambling laws led the commission to the conclusion that "[t]he law relating to betting, lotteries and gaming. . . is obscure, illogical, and difficult to enforce."[84] It recommended that all previous legislation other than the Racecourse Betting Act of 1928 and the Betting and Lotteries Act of 1934 be repealed and replaced by a single, unified statute. It also suggested the retention of the rule of judicial non-enforcement of gambling transactions.[85]

The Royal Commission's study of the impact of gambling on English society showed that gambling was an established part of England's economic and social life: ". . . at least 4 out of 5 adults in all walks of life have taken part at some time in their lives in some form of

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[84] Id. at 5.

[85] Id. at 135-36, 141, 142.

gambling. . . ."[86] Although the annual expenditure on gambling activities was large, approximately £70 million, this sum amounted to only "about .8% of total personal expenditure on entertainment and personal indulgence." Further, gambling absorbed no more than one-half to one per cent of England's national resources.[87]

From a moral perspective, the harm to individuals and to society caused by gambling, the Commission concluded, was minimal:

> Our concern with the ethical significance of gambling is confined to the effect which it may have on the character of the gambler as a member of society. . . from our general observation and from the evidence which we have heard we can find no support for the belief that gambling, provided that it is kept between reasonable bounds, does serious harm either to the character of those who take part in it, or to their family circle and the community generally.[88]

The Commission did add a caveat:

> It is in immoderate gambling that the dangers lie; an individual or a community in whose life gambling plays too prominent a part betrays a false sense of values which cannot but impair the full development of the personality or the society. It is the concern of hte State that gambling, like other indulgences such as the drinking of alcoholic liquor, should be kept within reasonable bounds. . . .[89]

To the Royal Commission, other leisure pursuits were

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[86] Id. at 15.

[87] Id. at 19, 20. Personal expenditure as a measure is equivalent to the total amounts staked less the amounts returned in the form of winnings. Id. at 17.

[88] Id. at 45.

[89] Id.

preferable to gambling. Yet, this preference alone was not sufficient to justify governmental interference.[90] The Royal Commission concluded that:

> . . . gambling, as a factor in the economic life of the country or as a cause of crime, is of little significance and that its effects on social behaviour, insofar as these are a suitable object for legislation, are in the great majority of cases less important than has been suggested to us by some witnesses. We therefore consider that the object of gambling legislation should be to interfere as little as possible with individual liberty to take part in the various forms of gambling but to impose such restrictions as are desirable and practicable to discourage or prevent excess.[91]

In accord with its principle of governmental non-interference except "to discourage or prevent excess," the Royal Commission proposed a plan that would permit all adults to place bets wtih professional bookmakers at both on-track and off-track locations. To insure the integrity of the bookmakers, the plan required that both bookmakers and their offices be licensed by an official regulatory agency. The Racecourse Betting Control Board was to retain supervision over betting regulations involving the use of totalizers.[92]

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[90] Id. at 53-55.

[91] Id. at 55 (emphasis added).

[92] Id. at 62-116, 138-41.

As for gaming, the Royal Commission did endorse the traditional prohibition on gaming in public places, but it also provided for the adult use of gaming facilities as long as the proceeds derived from any gaming-related fees were not devoted to private gain. Fees for the use of the facilities could not exceed five shillings, and the total value of the stakes at any one time could not exceed £20.[93]

3. Radical Legislation.

Throughout the 1950's, the Royal Commission's report served as a springboard for discussion and debate about gambling for both Parliament and the British populace. It was not until 1960, however, that parliamentary action was taken on its proposals. The Royal Commission's recommendations were incorporated in the Betting and Gaming Act of 1960[94] which was described by one commentator as "about as radical a piece of social legislation as has been seen for a long time."[95]

The first fourteen sections of the Betting and Gaming Act legalized betting, but only within the specific bounds of an exacting licensing system. Betting was permitted only with licensed bookmakers,[96] and only on premises

[93] Id. at 124-31, 141.

[94] 8 & 9 Eliz. II, c. 60 (1960).

[95] Betting and Gaming Act 1960 (I), III Law J. 300 (1961).

[96] 8 & 9 Eliz. II, c. 60, §2 (1960).

licensed for this purpose.[97] In each locality, a Committee of Local Justices was established to inquire into the fitness of applicants for both bookmaking and betting shop licenses. These committees also were to issue such licenses and to renew them upon their expiration after conducting a new examination.[98] Persons convicted of bookmaking without a license of of bookmaking on unlicensed premises were subject to fines and/or imprisonment.[99]

Both licensed bookmakers and betting shops were subject to stringent regulations. Bets could not be taken in public places[1] nor from anyone under eighteen years of age.[2] Licensed premises were forbidden to open on Good Friday, Christmas, or Sundays. Patrons of licensed premises could not be encouraged to bet, nor could television, radio, or other entertainment be provided on the premises. In addition, no licensed betting shop could be part of a route running from the street to premises used for non-gambling purposes.[3] Violation of these regulations, or the commission of an offense involving fraud or dishonesty, subjected the offenders to revocation of both their bookmaking

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[97] Id. §4.

[98] Id. §2, Sch. 1.

[99] Id. §27(2).

[1] Id. §6 and §5, Sch. II.

[2] Id. §7 and §5, Sch. II.

[3] Id. §5, Sch. II.

and their betting shop licenses.[4] Under the Act, the Racecourse Betting Control Board retained its power to license and to regulate pool betting in any form on horse and dogracing tracks.[5]

Most of the remaining provisions of the Act dealt with gaming. All prior statutes relating to unlawful games, gaming or gaming-houses were repealed.[6] Gaming was then legalized but only insofar as it conformed to three general criteria:

> (1) the chances in the game had to be equally favorable to all players, or the game had to be conducted in such a manner as to make them so;
> (2) all the money staked on the game had to be returned to the players in full as winnings; and
> (3) no other payment was to be required for a person to take part in the game.[7]

In some circumstances, gaming machines were also legalized.[8] Participation in a game held in a gaming-house by a person under eighteen years of age was still prohibited,[9] as was gaming by anyone in a public place.[10]

Under the Betting and Gaming Act of 1960, British gambling legislation was consolidated for the first time. With the exceptions of the Racecourse Betting Act of 1928

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[4] Id. §8.

[5] Id. §§11, 12.

[6] Id. §15.

[7] Id. §16(1).

[8] Id. §17.

[9] Id. §16(3).

[10] Id. §18.

and the Betting and Lotteries Act of 1934, all legislation relating to gambling was contained in one statute.[11]

4. Modification of the New Law.

The Betting and Gaming Act of 1960 was designed to interfere as little as possible with individual freedom while it prevented the commercial exploitation of gambling. Unfortunately, the Act allowed gaming activity to grow unchecked until it reached a state of sprawling confusion. Between 1961 and 1967 some 1,000 legal gaming clubs sprang up in Great Britain.[12] As these clubs proliferated, organized crime began to take over their management,[13] thus aggravating an already chaotic situation.

> [A] series of acts of violence exhibiting the characteristic, if for Britain unfamiliar, hallmarks of enforced protection, extortion, and gang warfare. . . gave rise to a considerable degree of public unease and indignation and to determined demands to put an end to underworld infiltration.[14]

The Gaming Board offered four reasons for the rapid growth of the gaming clubs and the influx of criminal elements:

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[11] Later, when Parliament enacted the Betting, Gaming, and Lotteries Act 1963, c. 2, all of Britain's gambling legislation was consolidated.

[12] Gaming Board for Great Britain, Annual Report 1969, at 13 (1970) [hereinafter cited as Gaming Board Report 1969].

[13] O. Newman, Gambling: Hazard and Reward 41 (1972) [hereinafter cited as Newman].

[14] Id.

(1) the sporadic and highly selective enforcement of gambling laws in general;

(2) the courts' and the police force's unfamiliarity with the new law;

(3) the existence of unforeseen loopholes in the Act which were being skillfully used by commercial entrepreneurs; and

(4) a trend in public opinion strongly in favor of the relaxation of the traditional prohibitions on gambling.[15]

The loopholes contained in the 1960 and 1963 Gaming Acts may have been the most significant factors in their undoing. Under section 16(1) of the Betting and Gaming Act of 1960, gaming was deemed lawful if, among other criteria, the odds of a game were equally favorable to all players, or if the gaming were conducted in a manner to achieve such equalized odds. Unfortunately, the statute failed to specify what exactly constituted "conducting gaming" so that the odds of success were equally favorable to all. This ambiguity caused the most problems when applied to roulette.

By its very nature, roulette is not a game of equal odds. Rarely, if ever, is every combination on the table covered. Consequently, the holder of the bank has a pronounced advantage over the other players. To conform to the requirements of section 16(1), the casino operators would periodically offer the bank to the players. The patrons of the casino were understandably reluctant to

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[15] Gaming Board Report 1969 , at 13-14.

accept the bank, for, in the short run at least, the potential liability of the banker was overwhelming. The offer of the bank was abused frequently by the casino operators. Often, the announcements of the casino's offer were mady only in French or through inconspicuous notices.[16]

In Kursaal Casino Ltd. v. Crickitt,[17] a casino operator had required potential bankers to show their financial viability before he would pass the bank to them. Not surprisingly, only one player other than the promoter had held the bank in an eighteen month period. The court held that the odds during this peiod had been tipped decidedly in favor of the casino, and that the game was therefore illegal. This prompted the Kursaal Casino to modify its requirements for passing the bank to a player, but it still required a potential banker to give proof of his financial means. Since only two patrons were given the bank in a six month period under this scheme, it, too, was declared illegal.[18] In spite of such decisions, the state of the law dealing with equal odds was so uncertain that police enforcement was inhibited. With little interference offered by the police, commercial casinos encountered few obstacles and essentially became entrenched in English culture.

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[16] Newman at 41.

[17] Kursaal Casino Ltd. v. Crickitt, [1966] 1 W.L.R. 960 (Q.B.D.).

[18] Kursaal Casino Ltd. v. Crickitt, [1968] 1 W.L.R. 53 (H.L.).

Another loophole in the Betting and Gaming Act of 1960 was contained in section 16(7). Although section 16(1)(c) of the Act forbade the payment of a fee for the privilege of gaming, under section 16(7) this provision could be circumvented if the gaming were held in a private club. Unfortunately, the previous case law and both the 1960 and 1963 statutes failed to define "private club." Consequently, many clubs, especially those for playing bingo, were established as private clubs, thus leaving their promoters free to collect an entrance fee.

Throughout the 1960's, the Churches' Council on Gambling, a coalition of church groups opposed to all gambling, actively lobbied for the repeal of the new law and the reinstatement of the old prohibitions. By 1968, it was clear that if the new gambling law was to survive, its gaming provisions had to be modified. Thus, the Parliament enacted the Gaming Act of 1968.[19]

The Gaming Act of 1968 repealed the previous gambling statutes and instituted a system of licensing and regulation for casinos, bingo clubs, and private clubs similar to the system previously established to control betting offices. Playing against a bank, or games with unequal odds, or games that required a fee for the privilege of playing

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[19]Gaming Act 1968, c. 65.

were prohibited in unlicensed or unregistered places.[20] Gaming in public places[21] and gaming by persons under eighteen years of age[22] remained illegal. Persons convicted of violating any of these prohibitions were subject to fines or imprisonment.[23]

The Gaming Act also established a British Gaming Board to oversee the administration and enforcement of its provisions.[24] Beneath the Gaming Board were local magistrates' committees which had the power to license gaming establishments. A license could be issued to a casino only after it had procured a certificate of consent from the Gaming Board. This certificate would be issued only after the Board had investigated the financial status of the casino, the background of its financiers, and the demand for gaming facilities in

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[20] Id. §§2, 3, 4. Section 40 of this Act did allow members' clubs or a miners' welfare institute to charge for the privilage of participating in gaming as long as the charge did not exceed sixpence or a sum set by the Secretary of State. The Gaming Act of 1973 dropped the qualification of being a members' club in an attempt to extend section 40 to other clubs. Gaming Amendment Act 1973, c. 12, §1(2). The section, as amended, applied to the gaming activities "of a club." The Secretary of State was given further discretionary power to raise and lower charges depending on the situation. Id. §1(3).

[21] Id. §5.

[22] Id. §7.

[23] Id. §8.

[24] Id. §10.

the proposed area.[25]

Social clubs which intended to run gaming on their premises also had to register with the local authorities. They were required to provide proof that they were indeed bona fide social organizations which conducted other activities beside gaming for their members.[26]

Local authorities could issue special licenses for bingo clubs upon the receipt of a certificate of consent from the Gaming Board. Under these special licenses, the clubs could not run any other forms of gaming than bingo on their premises.[27]

The Gaming Act provided that the Secretary of State could regulate how the licensed clubs were conducted and the types of games they could run, upon consultation with the Gaming Board.[28] Under the statute, licensed clubs were not only forbidden to conduct gaming on Sundays,[29] but they also could not advertise any of their activities.[30] To ensure that the regulations of the local licensing authorities were followed, the Gaming Board and the Secretary of State could authorize inspectors to aid the regular

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[25] Id. Sch. II.

[26] Id. Sch. III.

[27] Id. §20, and Sch. III.

[28] Id. §22.

[29] Id. §18.

[30] Id. §42.

police force.[31]

Although gambling machines were legalized under this statute, they could only be used on licensed premises,[32] and the amount charged for their use and the size of the possible winnings were both restricted.[33]

Violations of any of the statute's provisions or of any of the regulations of local licensing authorities subjected the violator to fines or imprisonment. Further, his license could be revoked.[34]

The effect of the Gaming Act of 1968 was dramatic. By 1970, the number of legitimate casinos in England, Wales, and Scotland had dropped from 1,000 to 158 and the number of legitimate bingo clubs had fallen from 3,000 to 1,557.[35] By 1973, the number of licensed casinos was down to 134, but the number of bingo clubs had increased to 1,813.[36] The violence which had been associated with the casinos also virtually disappeared.

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[31] Id. §43.

[32] Id. §31.

[33] Id.

[34] Id. §§23, 24, 38, 39.

[35] Gaming Board for Great Britain, Annual Report 1970, at 17 (1971).

[36] Gaming Board for Great Britain, Annual Report 1973, at 7 (1974).

D. Conclusion

In the past two hundred years, British gambling law has undergone profound changes. Governmental policy, which originally was directed at the suppression of gambling, has developed to the point where gambling is now recognized as a legitimate recreational activity which needs only to be regulated to prevent excess and fraud. The success of the new British regulatory system recently led one governmental committee to consider legalizing lotteries on a large scale, thus reversing a century and a half old policy of suppression.[37]

The British government's recognition of gambling as a legitimate form of recreational activity is highly pragmatic. Gambling had become firmly established in English economic and social life, even though its role is small.[38] Great Britain has come to terms with a persistant and familiar foe, and has apparently struck a workable balance between permissiveness and regulation, fitting to its own economic and cultural needs.

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[37] Interdepartmental Working Party on Lotteries, Report, Cmd. 5506 (1973).

[38] The Royal Commission on Betting, Lotteries, and Gaming 1949-51, found that in 1950 gambling consumed .8 percent of total personal expenditures and between 1/2 and 1 percent of Great Britain's total national resources. Royal Commission 1949-51, at 20. A social scientist working independently found that in 1967 gambling consumed no more than 1.1 percent of total personal expenditures and .78 percent of the country's resources. The similarity of these statistics seems to indicate that gambling will not vanish soon from English life. Newman at 64.

Santayana, in an oft quoted dictum, observed that he who would not remember the past is doomed to relive its mistakes. It was with that observation in mind that these materials reviewed the development of the law of gambling from its earliest origins in English history. Both a broad and detailed picture was painted. Specific conclusions were reached as the canvas unfolded. Specific suggestions for needed reforms, too, were offered; it remains now only to make some general observations.

If history teaches any lesson, it is that the forms of gambling must be examined each on its own terms. The law has taken few "gambling positions". Instead, it has attempted to deal with public or private lotteries, wagering, and in specific locations, on sporting or other events, machine gambling, and casino-type operations. Reformers, too, ought to distinguish these types of gambling in discussions of reform.

Wagering was first dealt with in American history out of a desire to restrict idleness. The harsh facts of pioneer life in Puritan New England left little time for aristocratic pleasures. Others enacted similar laws out of a concern for the maintenance of public order in tavern life. This was particularly true in the South, where a Tidewater Aristocracy itself had little aversion to amusements. Lotteries were widely permitted and promoted in early times as a means of raising revenue when techniques of banking and taxation were not yet fully developed. Ultimately, they were prohibited because

of documented and perceived abuses, including the presence of fraud and legislatively granted special privileges thought inconsistent with the basic principles of a democratic society. Casino gambling, too, was only slowly brought under control. In the West, it was only its inconsistency with the felt demands of family life in a young farming community that led to its outlaw. The life style of the casino, bordello, and sallon, appropriate to a male dominated cattle grazing and mining community, had to give way when settlers gained control of the political processes. Moral concerns alone, rooted in particular religious doctrines, seldom dominated public policy; it was only when they were joined with other concerns that they were reflected in the law. Wisdom would seem to indicate, therefore, that reform of the law applicable to gambling now must go beyond a re-examination of its traditional moral underpinnings; its public policy considerations, too, must be rethought. Our society must decide whether issues of relating to public attitudes toward work, public order, fraud and taxation, special privileges, and the character of public amusement are consistent with a change in policy toward the various forms of gambling.

The law has also long recognized that different forms of gambling have different impacts on society. It is only on a superficial level that our legal policies can be considered contradictory. From a public policy viewpoint, gambling has never been thought to be inherently objectionable. Careful attention has always been placed on its social consequences; it has always been recognized, too, that its different forms have had different consequences. Questions

must be asked about who operates it, who participates in it, levels of participation, methods of promotion, places of participation, and degrees of regulation. A publicly run lottery, only mildly advertised, selling high price tickets to the middle and upper classes to finance needed social improvements is gambling in its most benign form. A private lottery, fraudulently milking the poor for the benefit of organized crime that serves as a source of public corruption and the capitalization off other criminal endeavors is gambling in its most vicious form. Other combinations of these basic elements will, of course, produce forms of gambling having different mixtures of benefit and burden. The obvious point is that each new combination must be evaluated on its own terms. Sweeping generalizations, in short, ought always to be avoided.

It seems, too, that our ability to control through law enforcement various forms of gambling varies. It is too often observed that gambling enforcement is inherently ineffective. Generally, the speaker will have one form of gambling in mind, but his statement will be uttered without qualification. History, however, shows that gambling enforcement can be quite effective with the commitment of few resources against certain of its public forms. The federal gambling ship legislation was effective upon passage. Few enforcement efforts have been taken, yet the statute has been singularly successful. Similarly, overt casino or machine gambling can be controlled with a minimum of honest enforcement personnel. It is only when efforts are made to control, for example, clandestine private lotteries or sports wagering that the problems

tend to outrun society's present level of enforcement resources. The formulation of new gambling policies, therefore, ought to proceed in full awareness of these distinctions and enforcement limitations. Here, as elsewhere, people get what they pay for.

A comprehensive review of the development of the law of gambling also demonstrates the complexity of the legal policies that have grown up over the years. Comprehensive reform must take that complexity into consideration. Seldom can any issue be worked out by the consideration of only one body of law. The criminal law and its general policy of prohibition lies at the heart of society's legal attitutdes toward the various forms of gambling. Yet the criminal law is supported by a complex series of parallel civil rules, few of which have been reduced to statutory form. Reform, therefore, of the heart may have unintended consequences in the extremeties, unless careful attention is given to the civil law.

If the policy of the civil law is important, even more so is the policy of taxation. The most important single factor in the success of various efforts to substitute forms of public gambling for private illegal gambling is tax policy. Several general conclusions must be drawn. All of the evidence seems to indicate that there is no justification for the highly publicized expectation that the decriminalization of gambling would provide an important new source of revenue for public treasuries. Legalized gambling, too, probably cannot simultaneously serve the twin objectives of maximum gains in revenue and improved law enforcement through

competition with illicit forms of gambling. Finally, tax laws must be reformulated, recognizing economic facts of life, so that taxation does not put lawful forms of gambling in uncompetitive positions with unlawful forms.

Finally, the relation of the law of other jurisdictions must be considered in the formulation and execution of new policies. The impact of the law of any one jurisdiction is a complex intermixture of criminal, civil, and tax policy. Equally so, the policy of neighbor states, and even more so, the policy of the federal government must be taken into account. Federal tax policy alone can frustrate the implementation of state efforts to work out new gambling policy choices. Indeed, unless it is possible to coordinate federal and state policy, it may not be possible to make new starts at the state level. Acting alone, therefore, a state may not be able to effect a new start; it may even be unwise to try.

This conclusion began with a reference to Santayana. It is appropriate that it end with a reference to Shaw, who suggested, with Hegel, that the only thing that history teaches is that history does not teach. The development of the law of gambling seems to have about it a tendency to return to where it began. A historian can only comment that it need not be so.

END