

MODEL ANTI-GAMBLING ACT AND COMMENTARY

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PREFATORY NOTE

One of the most basic and significant findings of the United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce was:

"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 alleged philanthropists. Thus, the \$2 horse bettor and the 5-cent numbers player are not only suckers because they are gambling against hopeless odds, but they also provide the moneys which enable underworld characters to undermine our institutions."²

The Senate Committee figured "conservatively" that \$20,000,000,000 changes hands every year as a result of organized illegal gambling.³

It was obvious from the outset that most of this illegal harvest was being taken in violation of state and local, rather than federal, laws. The Senate Committee proposed several new federal measures aimed at the interstate aspects of illegal gambling, but itself repeatedly stressed that the problem would have to be dealt with primarily by state and city governments.

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² Third Interim Report, Special Committee to Investigate Organized Crime in Interstate Commerce, Sen. Rep. No. 307, 82nd Cong., 1st Sess. (1951) p. 2.

³ Second Interim Report, *ibid.*, Sen. Rep. No. 141, 82nd Cong., 1st Sess. (1951) pp. 13-14.

In shaping its own program, therefore, the Commission on Organized Crime asked for authority to review local gambling laws and to propose model legislation to curb this fantastic illegal enterprise at the local level. Such authority was given.⁴

A thorough study of gambling enactments in the 48 states—such as apparently had never been undertaken before—was made under the Commission's direction, and brought to light many discrepancies and shortcomings in existing patterns of control in this field.⁵ Simultaneously, however, the authors of this study reached another conclusion which is noteworthy to keep the instant draft in fair perspective:

"It must also be borne in mind that a poor statute vigorously enforced is more effective than the best of laws administered by corrupt police, indifferent prosecutors, or an unreasonably lenient judiciary . . . it can be generalized that nearly every one of the forty-seven states under study could break up organized gambling by full reliance on existing provisions in its laws, coupled with truly deterrent sentences and penalties."⁶

Gambling laws have never been fully codified. They are a patchwork, developed through the years to meet one evil and then another as each came to the attention of the legislators. The statutes bristle with long-forgotten phrases, "E.O.," "oontz," "little joker," "hokey-pokey," etc. Penalties vary, sometimes in the same jurisdiction, from a few dollars fine to many years' imprisonment for offenses that seem indistinguishable in degree of culpability.

As the Bauman-King study progressed, it became increasingly evident that the underlying problems were identical in all the related areas of gambling, and that the techniques for dealing with them could properly be standardized. It was therefore suggested that gambling could be defined and treated as a generic offense, like larceny or false pretenses, which would embrace all its vari-

⁴ Resolution 1(a), (c), adopted by House of Delegates, American Bar Association September 19, 1951.

⁵ Bauman and King, "A Critical Analysis of the Gambling Laws," American Bar Association Commission on Organized Crime and Law Enforcement, New York, 1952, pp. 73-112.

⁶ Bauman and King, *op. cit.*, pp. 74-75.

ants, instead of drawing the statute out in elaborate, separate proscriptions for lotteries, bookmaking, gambling casinos, card games, etc.

This is the chief innovation, and the main point of view adhered to, in the instant draft. Accordingly principal emphasis is placed throughout on generic definitions. Popular descriptions, e.g., "slot machines," "bookmaking," etc., are added to give prosecutors the additional advantage of being able to rely, where appropriate, on common knowledge and understanding of particular gambling activities, apart from the generic concepts. Activities and items which are so named need not be specially proved to be within the generic definitions, i.e., to be "gambling," "gambling devices," etc. See *State v. Rand*, 238 Iowa 250, 25 N.W. 2d 800 (1947). Note that this dual approach would effectively defeat the traditional efforts of the gambling profession to make trifling innovations in current practices so as to keep just outside the letter of the law.

The case for the generic approach was well stated by Franklin, J. dissenting in *McCall v. State*, 18 Ariz. 408, 161 P. 893, 899 (1916), in which the majority of the court held that operating a pari-mutuel machine did not fall within the prohibitions of the Arizona gambling laws:

"The language of the statute was skilfully framed in not denouncing as an offense the use of the pari-mutuel machine by name, in not descending into too minute particulars, but leaving the language broad enough to comprehend the mischief sought to be destroyed. One of any considerable experience at all must know that rules of conduct to be effective must necessarily be expressed in general terms, and depend for their application upon circumstances; and circumstances vary. . . . In the contest between the police and the betting confraternity, much ingenuity has been shown by the votaries of sport in devising means for evading the terms of such like enactments, and owing to the diversity in the statutes there is a consequent crop of legal decisions showing considerable divergence of judicial opinion.

"This is largely due to the lawmaking power in attempting to regulate human conduct by particularizing too much and failing to generalize by expressing their meaning in terms so that the mischief sought to be avoided could receive the application of the statute as the varying circumstances of the particular case arise."

It should be emphasized that the draft is propounded as a model, rather than as a uniform enactment. Some procedural features will doubtless have to be modified by various states to conform to their own patterns, and such matters as the classification of local officials and the range of specific penalty provisions are dealt with illustratively only. There is not the same need for absolute uniformity in criminal sanctions of this type as in commercial law, domestic relations laws, etc. The object is only to erect a barrier without gaps or loop-holes. It should also be noted that the Commission concurs with the Senate Committee and most leading students of the problem that gambling activity cannot be satisfactorily licensed on any significant scale. Emphasis is therefore on forthright prohibition throughout.

In organization, the draft is patterned loosely after Ala. Code 1940, Tit. 14, c. 46, which deals, in separate articles, with gambling offenses and then, seriatim, with gambling devices, gambling places, and special types of activity. The technique of extensive definition has been borrowed from current practice in drafting federal statutes. In general, the style used in revising Title 18 of the United States Code has been adhered to as closely as possible.

By far the most challenging problem in developing a uniform pattern of law to deal with gambling is the problem of delineating the kinds of activity encountered in the field. These are basically three: the professional, who is very frequently the racketeer-type career criminal; the patron of the professional, who is culpable, in a lesser degree, because his patronage makes the activities of the professional possible; and the casual gambler, who amuses himself with his friends in activities which may have no adverse effects on society.

The instant draft is designed to strike at the professional with every enforcement device which has proved effective in the experience of all the 48 states, to strike at the patron of the professional in a clearly defined category with lesser penalties, and, by an optional provision, to insulate the social gambler, in the third class, from all embarrassment and interference. The situation is both logically and practically complicated by the fact that 26 states (besides Nevada which has legalized all forms of gambling) have authorized pari-mutuel betting, in various forms,

in connection with track racing events. This is taken care of by a direct exclusion for acts or transactions "expressly authorized by law." States which have licensed charity raffles, etc., would also be covered pro tanto by this phrase.

The professional gambler has been clearly exposed as a social evil, and, as has been noted, his activities are recognized as the backbone of organized crime. His importance as the key to the situation has been widely recognized by the courts:

"The purpose of the Legislature was to discourage and repress gambling in all its forms and the law is to be construed so as to accomplish, so far as possible, the suppression of the mischief against which it was directed. The evil which the law chiefly condemns is betting and gambling organized and carried on as a systematic business. The reason is obvious. Curb the professional with his constant offer of temptation, coupled with ready opportunity, and you have to a large extent controlled the evil . . .

"The root of the evil lies in the exploitation by professionals of the gambling instinct innate in human nature. This, the statute condemns and seeks to eliminate not by regulatory prohibitions but by absolute suppression." *People v. Gravenhorst*, 32 N.Y.S. 2d 760, 771 (1942). See *Watts v. Malatesta*, 262 N.Y. 80, 186 N.E. 210 (1933).

MODEL ANTI-GAMBLING ACT *

1 SECTION 1. *Legislative Policy; Construction.* It is hereby
2 declared to be the policy of the legislature, recognizing the
3 close relationship between professional gambling and other
4 organized crime, to restrain all persons from seeking profit
5 from gambling activities in this state; to restrain all persons
6 from patronizing such activities when conducted for the
7 profit of any person; to safeguard the public against the evils
8 induced by common gamblers and common gambling houses;
9 and at the same time to preserve the freedom of the press
10 [*and to avoid restricting participation by individuals in*
11 *sport and social pastimes which are not for profit, do not*
12 *affect the public, and do not breach the peace*]. All the pro-
13 visions of this act shall be liberally construed to achieve these
14 ends, and administered and enforced with a view to carrying
15 out the above declaration of policy.

COMMENT ON SECTION 1

The technique of writing a statement of policy directly into a legislative enactment, instead of inserting a preamble in the bill, is a recent innovation. The result is that the statement is printed as part of the law in codifications, etc., and that the courts are more strongly induced to refer to it in applying the legislation. The technique has been used here primarily to set up a flexible guide for the courts on the problem of distinguishing the various classes of gambling activity, alluded to above. Subsequent provisions are necessarily complex, as the delineations would be meaningless if

* The National Conference of Commissioners on Uniform State Laws in the promulgation of its Uniform Acts urges, with the endorsement of the American Bar Association, their enactment in each jurisdiction. Where there is a demand for an Act covering the subject matter in a substantial number of the States, but where in the judgment of the National Conference of Commissioners on Uniform State Laws it is not a subject upon which uniformity between the States is necessary or desirable, but where it would be helpful to have legislation which would tend toward uniformity where enacted, Acts on such subjects are promulgated as Model Acts.

not finely drawn. Therefore this general statement has great importance in the structure of the draft, at least until the courts have built up a body of case law to supplement its technical language. The section is modeled after Section 1 of the National Transportation Act of 1940, which establishes a "national transportation policy" (Act of September 18, 1940, c. 722, Sec. 1, 54 Stat. 899, 49 U.S.C.A. 1, Supp., note).

The policy set forth will apply to all applications of any provision of the act, although it will not be allowed by the courts to override any operative language which is clear on its face. See *Yazoo & M. Valley R. Co. v. Thomas*, 132 U.S. 174, 188 (189). It will be given considerable weight in any case where the construction of the express language is doubtful. See *Coosaw Min. Co. v. South Carolina*, 144 U.S. 550, 562-3 (1892).

The policy statement begins with a brief reference to the current importance of professional gambling in relation to organized crime. The first and second clauses then directly describe the professional gambler and his patron in terms of the word "profit" as defined in Section 2.

The third clause refers to "common gamblers" and "common gambling houses" as an invitation to the courts to refer, where appropriate, to the large body of law which has been built up in relation to these old common law concepts.

The fourth clause alludes to freedom of the press, a peculiarly sensitive area because of the treatment of gambling information in Sections 2 (6) and 5.

The matter italicized is to be inserted in this section if the exemption, proposed optionally in Section 3 (2) is incorporated to protect casual, social gamblers from possible prosecution. See Comment on Section 3, post.

The second sentence specifically enjoins a liberal construction of the provision of the Act. Such an injunction is contained in criminal codes or codified law in many of the states, e.g., N.Y. Penal Law Sec. 21, and is generally recognized as freeing the courts from the common law requirement that penal statutes must be strictly construed in favor of the defendant. See *People v. Reilly*, 255 App. Div. 109, 111 (4th Dept. 1938), aff'd 280 N.Y. 509 (1939); *State v. Hemrich*, 93 Wash. 439, 161 P. 79 (1916); *Wade v. U.S.*, 33 App. D.C. 29 (1909); *James v. State*, 113 P. 226 (Okla. Crim. 1910).

1 SECTION 2. *Definitions*. As used in this act:

2 (1) "Gain" means the direct realization of winnings;
3 "profit" means any other realized or unrealized benefit, direct
4 or indirect, including without limitation benefits from pro-
5 prietorship, management, or unequal advantage in a series
6 of transactions.

7 (2) "Gambling" means risking any money, credit, de-

8 posit or other thing of value for gain contingent in whole or
9 in part upon lot, chance or the operation of a gambling de-
10 vice, but does not include: bonafide contests of skill, speed,
11 strength or endurance in which awards are made only to en-
12 trants or the owners of entries; bonafide business transactions
13 which are valid under the law of contracts; and other acts
14 or transactions now or hereafter expressly authorized by law.

15 (3) "*Professional gambling*" means accepting or offering
16 to accept, for profit, money, credits, deposits or other things
17 of value risked in gambling, or any claim thereon or interest
18 therein. Without limiting the generality of this definition, the
19 following shall be included: pool-selling and bookmaking;
20 maintaining slot machines, one-ball machines or variants
21 thereof, pinball machines [*which award anything other than*
22 *an immediate and unrecorded right of replay*], roulette wheels,
23 dice tables, or money or merchandise pushcards, punchboards,
24 jars or spindles, in any place accessible to the public; and
25 conducting lotteries, gift enterprises, or policy or numbers
26 games, or selling chances therein; and the following shall be
27 presumed to be included: conducting any banking or per-
28 centage game played with cards, dice or counters, or accept-
29 ing any fixed share of the stakes therein.

30 (4) "Gambling device" means any device or mechanism
31 by the operation of which a right to money, credits, deposits
32 or other things of value may be created, in return for a con-
33 sideration, as the result of the operation of an element of
34 chance; any device or mechanism which, when operated for
35 a consideration does not return the same value or thing of
36 value for the same consideration upon each operation thereof;
37 any device, mechanism, furniture, fixture, construction or in-
38 stallation designed primarily for use in connection with pro-
39 fessional gambling; and any sub-assembly or essential part
40 designed or intended for use in connection with any such
41 device, mechanism, furniture, fixture, construction or installa-
42 tion. [*But in the application of this definition an immediate*
43 *and unrecorded right of replay mechanically conferred on*
44 *players of pinball machines and similar amusement devices*
45 *shall be presumed to be without value.*]

46 (5) "Gambling record" means any record, receipt, ticket,
47 certificate, token, slip or notation given, made, used or in-
48 tended to be used in connection with professional gambling.

49 (6) "Gambling information" means a communication
50 with respect to any wager made in the course of and any in-
51 formation intended to be used for professional gambling. In
52 the application of this definition the following shall be pre-
53 sumed to be intended for use in professional gambling: in-
54 formation as to wagers, betting odds or changes in betting
55 odds.

56 (7) "Gambling premise" means any building, room, en-
57 closure, vehicle, vessel or other place whether open or en-
58 closed, used or intended to be used for professional gambling.
59 In the application of this definition, any place where a gam-
60 bling device is found shall be presumed to be intended to be
61 used for professional gambling.

62 (8) "Whoever" and "person" include natural persons,
63 partnerships and associations of persons, and corporations;
64 and any corporate officer, director or stockholder who au-
65 thORIZES, participates in, or knowingly accepts benefits from
66 any violation of this act committed by his corporation.

67 [(9) "Peace officer" means [police officer, sheriff, con-
68 stable, deputy, . . . etc.]]

69 [(10) "Court" means [county court, magistrate, justice
70 of the peace, commissioner, . . . etc.]]

COMMENT ON SECTION 2

Because of the complicated nature of the subject matter and the exceed-
ingly fine lines which must necessarily be drawn, the act is built around
ten definitions. This is also a fairly recent innovation in statutory draft-
ing, used extensively in circumstances such as these. See, e.g., Civil Aero-
nautics Act of 1938 (Act of June 23, 1938, 52 Stat. 977, 49 U.S.C. Sec. 401 et
seq.). It has been satisfactorily resorted to in certain criminal provisions
of Title 18 U.S.C., as revised (c. 9, Bankruptcy, Sec. 151; c. 51, Homicide,
Secs. 1111, 1112; c. 95, Racketeering, Sec. 1951). The courts have recognized
that a specific statutory definition supersedes all common and dictionary
meanings for the word defined. See *Fox v. Standard Oil Co.*, 294 U.S. 87,
95-6 (1935).

Section 2(1)-(3) "gambling" and "professional gambling."

These three subsections are the most sensitive point in the draft. They draw the narrow lines between the gambler and the professional gambler referred to above. Subsection (1) creates two terms of art, "gain," which only appears once in the draft, in subsection (2) of this section, and "profit," which appears frequently in all contexts where "gain" is desired to be excluded.

"Gain," which is ordinarily understood to be slightly broader than "profit," is equated with direct winnings. The word "winnings" always implies a game or wager, see *Middaugh v. State*, 103 Ind. 78, 2 N.E. 292 (1885), and is intended to include the direct favorable outcome of a play or bet and nothing else.

"Profit" ordinarily implies a net gain. See *Terre Haute Brewing Co. v. Dwyer*, 116 F. 2d 239, 242 (8th Cir. 1940); *King Feat. Synd. v. Courier*, 241 Iowa 870, 43 N.W. 2d 718 (1950). It is used in the definition in conjunction with the word "other" to reach any and all benefits other than gain/winnings—i.e., the precise measure of professional participation in gambling as opposed to the play of the patron or social gambler. The phrase "unequal advantage in a series of transactions" is included in the definition to reach the bookmaker who maneuvers himself into a profitable position by limiting odds or making layoffs, and the dealer or croupier who profits from the percentage factor in the game or device he is using. See, e.g., *People v. Bright*, 203 N.Y. 73, 96 N.E. 362 (1911).

Subsection (2), defining "gambling" (which in turn controls "professional gambling" by reference in subsection (3)), imposes a simple, classical definition upon the entire act. This definition was suggested by La. Rev. Stat. 1950, Sec. 14.90:

"Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit."

This accords with the traditionally recognized generic definition of the activity. See *Washington Coin Machine Ass'n v. Callahan*, 142 F. 2d 97 (D.C. Cir. 1944); *Chicago Patent Corp. v. Genco, Inc.*, 124 F. 2d 725, 727-8 (7th Cir. 1941). Note that the definition is tied directly to "the operation of a gambling device" which is in turn defined in subsection (4), so as to include, presumptively, the player of a slot machine, the patron of a roulette table, etc. The definition is also limited by the word "gain," discussed above.

The words "in whole or in part" are inserted to control the word "chance," to avoid the conflict in cases dealing with gambling devices and games which are governed partly by chance and partly by skill. (See *Boosakis v. Crawford*, 99 F. 2d 374 (D.C. Cir. 1938); *U.S. v. McKenna*, 149 F. 252 (1906); *Centerville v. Burns*, 174 Tenn. 435, 126 S.W. 2d 322 (1941); *State v.*

Kilburn, 111 Mont. 400, 109 P. 2d 1113 (1941); Anno., 135 A.L.R. 120. See also, "element" of chance, used for the same purpose in subsection (4) of this section, below.

The exclusions which follow the colon in this definition are inserted to be sure that the act does not conflict with bonafide races, etc., run for a purse or prize, with business transactions, e.g., insurance contracts and margin transactions, or with other laws, e.g., statutes authorizing pari-mutuel betting, charity raffles, etc.

The clauses dealing with lawful activity and business transactions are un-exceptional. Many gambling statutes omit them entirely. But cf. N.Y. Penal Law, Sec. 973; 18 U.S.C. Sec. 1305. The words "valid under the law of contracts" rely on the well established general rule that wagering contracts are void and unenforceable in the courts. See *Irwin v. Williar*, 110 U.S. 499, 507-511 (1884).

Subsection (3) distinguishes between "gambling" and "professional gambling," by tying the latter to the act of "accepting" bets or plays "risked in gambling," and by adding the all-important requirements "for profit." Thus there can never be professional gambling activity except in relation to "gambling"—which embraces the traditional generic concept of that term; and to this must be added, in every case, a showing that the professional has participated for something more than merely winnings depending on the hazards of the play.

The second sentence in subsection (3) includes specifically the four most common classes of gambling activity with their general popular names. Three are included without qualification while the fourth—card and dice games, and the like—is related to the definition by a presumption, to soften its impact on casual, social games. This would allow prosecutors to rely on common knowledge, and existing case law, in making cases arising out of these activities. The language used embraces all the main divisions, though does not follow the tendency of many statutes towards excessive elaboration, i.e., bets on horse races or elections, card games by name, etc.

Presumption of fact such as that created for the fourth class are always rebuttable by a positive showing of facts to the contrary. *Lincoln v. French*, 105 U.S. 614 (1881).

The italicized matter in brackets and parentheses in the second clause of these descriptions, which, read with the last sentence of subsection (4) of this section excludes the "free play" pinball game from the act, is inserted as an optional device to legalize these familiar games. The courts have split widely on this subject. See *Washington Coin Machine Ass'n v. Callahan*, 142 F. 2d 97 (D.C. Cir. 1944); *Geyer v. Whelan*, 59 Cal. App. 2d 255, 138 P. 2d 763 (1943). Compare *Holiday v. South Carolina*, 78 F. Supp. 918 (D.S.C. 1948), aff'd 335 U.S. 803 (1948); *People v. One Pinball Machine*, 316 Ill. App. 161, 44 N.E. 2d 950 (1942). The test imposed is the presence or absence of the so-called knock-off button or replay meter, which makes it possible for the machine to be used as a gambling device by means of

a mechanically recorded payoff made to winners by each location owner. This test has been noted with approval by several courts. See *Wigton's Return*, 151 Pa. Super. 337, 30 A. 2d 352 (1943); *People v. Gravenhorst*, 32 N.Y.S. 2d 760 (1942).

The phrase "accessible to the public," which governs the gambling devices enumerated in the second clause, relies on court interpretations of the word "public" which have extended it to include premises where only a limited clientele is admitted. See *State v. Baker*, 69 W. Va. 263, 71 S.E. 186 (1911); *Lockhart v. State*, 10 Tex. 275 (1853). The use of a fictional "social club" to defeat the concept of public access has been frequently struck down by the courts. *State v. Chauvin*, 231 Mo. 31, 132 S.W. 243 (1910); *Suburban Club v. State*, 222 S.E. 2d (Tex. Civ. App. 1949).

The words "gift enterprises" have been added in the second clause so as to include prohibited merchandising schemes, bank nights, etc. The courts have consistently held that the concept "lottery" is so broad as to include all gambling schemes and enterprises, *Horner v. U.S.*, 147 U.S. 449 (1893); *National Conference on Legalizing Lotteries v. Farley*, 96 F. 2d 86 (D.C. Cir. 1938), cert. den. 305 U.S. 624 (1938), but "gift enterprise" is also a recognized term of art, used in the Federal Lottery Act, 18 U.S.C. Secs. 1301-2 (Supp. IV, 1951), to insure a broad application of the provisions of that Act.

"Banking" and "percentage," used in the last clause, are well recognized generic terms for the whole gamut of gambling games played with cards. See *State v. Kilshaw*, 158 La. 203, 103 So. 740 (1925); *People v. Carroll*, 80 Cal. 153, 22 P. 129 (1899).

The last phrase, "accepting any fixed share" of stakes, etc., is aimed at the much litigated situation wherein an establishment allows a gambling operation on its premises, merely taking a percentage from the play for the use thereof. See *People v. Bright*, 203 N.Y. 73, 96 N.E. 362 (1911). Cf. *State v. Quaid*, 43 La. Ann. 1076, 10 So. 183 (1891); *Hopkins v. State*, 122 Ga. 583, 50 S.E. 351 (1905).

Section 2(4) "gambling devices."

This definition is a composite of several statutory attempts to describe gambling devices in such a way that the ingenuity of the trade cannot defeat the legislative intent. The first clause is based on the federal definition contained in S. 1624 82d Cong., 1st Sess. (1951) (amending the Federal Slot Machine Act), and is believed to be a clear, positive definition, avoiding limiting descriptive phrases such as "coin operated" which have vitiated many such statutes in the past.

The second clause is an excellent negative test found in N.C. Gen. Stat. 1943, Sec. 14-296, held constitutional in *Calcutt v. McGeachy*, 213 N.C. 1, 195 S.E. 49 (1938). These two tests, taken together, are believed to reach all variations of the slot machine, as well as other automatic devices designed and suitable for gambling.

The third clause is broader, reaching both devices which are not gambling machines in themselves and furniture, fixtures, contructions, and installations "designed" for use in connection with professional gambling. By tying the definition of gambling devices to the definition of professional gambling contained in subsection (3) of this section, the specific enumeration of devices set forth there is carried automatically into this subsection.

Note that this clause relates to structure rather than use (the latter being reached in Section 4(3), below). The word "designed" connotes the intent behind the manufacture. See *Smith v. Commonwealth*, 190 Va. 10, 55 S.E. 2d 427 (1949); *Jacobs v. Danciger*, 328 Mo. 458, 41 S.W. 2d 389 (1931); *People v. Stevens*, 98 Cal. App. 2S, 276 P. 155 (1929). The difficult phrase "readily adaptable" has been omitted in this context; any sham conversion feature would be reached by the test "designed," while "readily adaptable" items such as dice cups or playing cards would fall within the statutory prohibitions only when actually used illegally per Section 4(3).

The fourth clause, modeled on a term in the Slot Machine Act, Act of Jan. 2, 1951, c. 1194, Sec. 1, 64 Stat. 1134, 15 U.S.C. Sec. 1171, reaches sub-assemblies and essential parts, to avoid the subterfuge of dealing with incomplete or inoperative devices. Note that the optional exclusion of freeplay pinball machines, discussed above, is here cast in the form of a presumption only, so that such devices are still vulnerable if they are in fact fit for use for gambling purposes.

The emphasis on design and intent, as opposed to use, in this subsection clears up a very troublesome area of construction by specifying that actual use is not necessary to call the provisions of the act into play. See *Bobel v. People*, 173 Ill. 19, 50 N.E. 322 (1898); *State v. Brandt*, 122 N.J.L. 488, 6 A. 2d 203 (1930); *People v. Lippert*, 304 Mich. 685, 8 N.W. 2d 880 (1943).

Section 2(5) "gambling record."

This definition is aimed at all written evidences of professional gambling activity. It was suggested by modern emphasis on lottery tickets and numbers slips, but extends as well to bookmakers' records and other writings. There seems to be no logical basis for including one type of record and excluding any other. The definition is tied to use or intended use, so as to avoid hardship cases. Note that professional gambling only is included, so that only the professional gambler and his patron will be reached.

Section 2(6) "gambling information."

This subsection reaches into a comparatively new field, defining "gambling information" to adjust the statute to the modern situation wherein organized gambling depends largely on communications facilities to receive current betting information and place and accept wagers. Wagers are included separately per se.

The second sentence of this subsection creates a presumption of intended gambling use for a very limited class of information which has no legitimate news value under ordinary circumstances. If these items are kept out of communication circuits, for the most part, large-scale bookmaking would be impossible. Other items of lesser value to gamblers, e.g., scratches, starting line-ups, etc., would be subject to the controlling definition but would carry no presumption. Attention is called to the allusion to freedom of the press in the declaration of policy, Section 1, above; and note that the definition does not include use, as opposed to intended use, at all, thus making intent a direct measure of liability and excluding the innocent newspaper publisher or communications company which acts without knowledge of intended use. The subsection can probably go no further than this without encountering constitutional difficulties based on an impairment of freedom of the press. See *Parks v. Judge of Recorder's Court*, 236 Mich. 460, 210 N.W. 492 (1926).

Section 2(7) "gambling premises."

This is a composite of statutes aimed at places where gambling is conducted, tied to the broad definition of professional gambling contained in subsection (3), so as to include everything from the slot machine location to the largest gambling casino. The presumption has been added to facilitate enforcement and broaden the reach of Section 6, below.

Section 2(8) "whoever" and "person."

The first part of this definition is loosely paraphrased from Section 591 of Title 18, U.S.C., and is designed to insure the application of the act to associations and corporations. The matter following the semi-colon is aimed at the situation in which lottery syndicates and gambling casinos are operated by dummy corporations with the principals remaining concealed and sometimes far from the jurisdiction where the enterprises are conducted. Cf. N.Y. Penal Law Sec. 973. Terms of art, i.e., "principal," "accessory," etc., have been avoided because of general statutory provisions in many states defining them for the state's entire criminal code.

Section 2(9)-(10) "peace officer" and "courts."

These two open-ended definitions were inserted to suggest to each state the wisdom of specifying both the enforcement and the judicial officers who might properly be called upon to enforce the provisions of the act.

- 1 SECTION 3. *Gambling; [Exemption]; Professional Gam-*
- 2 *bling.*
- 3 (1) Whoever engages in gambling, or solicits or induces

4 another to engage in gambling shall be fined [not more than
5 \$500,] or imprisoned [not more than six months], or both.
6 [(2) *Natural persons shall be exempt from prosecution*
7 *and punishment under subsection (1) for any game, wager*
8 *or transaction which is incidental to a bonafide social rela-*
9 *tionship, is participated in by natural persons only, and in*
10 *which no person is participating, directly or indirectly, in*
11 *professional gambling.*]
12 (2) [(3)] Whoever engages in professional gambling,
13 or knowingly causes, aids, abets or conspires with another
14 to engage in professional gambling shall be fined [not more
15 than [\$1,000]] or imprisoned [not more than one year], or
16 both.

COMMENT ON SECTION 3

The courts have repeatedly affirmed the propriety of distinguishing between the professional gambler and his patron, the player, and of imposing heavier penalties on the former. *Ex parte Hernan*, 45 Tex. Crim. App. 343, 77 S. W. 225 (1903), aff'd 198 U.S. 579 (1905). See *U.S. v. Cella*, 37 App. D.C. 423 (1911); *Watts v. Malatesta*, 262 N.Y. 80, 186 N.E. 210 (1933); *Bamman v. Erickson*, 288 N.Y. 133, 41 N.E. 2d 920 (1942). This is done by the two subsections of this section (the penalties here and hereafter, though worked out in a scheme reflecting varying degrees of culpability, are illustrative only).

The optional subsection (2) is the product of many efforts to find a drafting device to exclude the casual social gambler from the operation of the act without, at the same time, opening a loophole that might facilitate evasions. The exclusion is made here, rather than in connection with the definition of "gambling" in Section 2(2), in recognition of the fact that even social gambling falls within the generic definition and cannot be logically removed by definition from the concept itself.

Some states have attempted expressly to protect the casual gambler and the private game, e.g., Mont. Rev. Codes 1947, Sec. 94-2403, excluding "all private homes" from gambling laws; some impose penalties on the professional only, and exclude all players, bettors, etc.; and about half impose penalties for all gambling, apparently leaving the problem of the social gambler to the discretion of enforcement authorities and the courts. None of those approaches has been entirely satisfactory.

The Commission has also had great difficulty with this problem of finding a formula which would exclude the social or casual gambler from prosecution and punishment, yet which would not result in opening a large breach in the statute for the benefit of professional gamblers and their patrons. The Commission recognizes that it is unrealistic to promulgate a law

literally aimed at making a criminal offense of the friendly election bet, the private, social card game among friends, etc. Nevertheless, it is imperative to confront the professional gambler with a statutory facade that is wholly devoid of loopholes.

It should be noted that the prosecuting attorneys who were asked for comment on prior drafts of the Model Act were also divided in their opinions as to the desirability of making an express exemption for the casual or social gambler. Many prosecutors were flatly opposed to any such exemption because it offered a loophole for the professional gambler.

Many state laws at the present time penalize all forms of gambling without exceptions for the social gambler. It is doubtful whether the latter has been unduly harassed under such laws.

Because of the sharp division of opinion as to how social, non-professional gambling should be dealt with, Section 3 offers two alternatives. Section 3, without the optional subsection (2), penalizes all gambling, as defined in Section 2(2), throwing the casual, social gambler into the same category as the patron of the professional. If the optional subsection is inserted (with the italicized matter in Section 1), Section 3 operates to exempt the social gambler from prosecution and punishment, so long as he is not participating in a professional game or play. This exemption still does not apply to the patron of the professional. The professional gambler himself is unaffected, as the primary target of the act. He is reached with the heavier penalties prescribed in subsection (2).

The optional subsection is as carefully and conservatively drawn as possible. With it, though the act still includes and prohibits, technically, all gambling activity, a narrow "exemption" from prosecution and punishment is created in favor of social gamblers. The intent is to cut the possibilities of escape through this classification, by culpable persons, to an absolute minimum. The device seems clearly to fall within the legislature's power of reasonable classification, as well as within the even broader power to grant amnesty or immunity. See *U.S. v. Hughes*, 175 F. 238 (W.D. Pa. 1892); *U.S. v. Swift*, 186 F. 1002 (N.D. Ill. 1911). Compare Section 8, below.

The optional subsection comes as close as possible to throwing the positive burden of proving compliance with its terms upon a defendant who claims exemptions. This means showing (or, for the prosecution, disproving), that the transaction claimed to be exempt meets three tests: first, that it arose out of a bonafide "social relationship"; second, that only natural persons participated therein (which would exclude gambling enterprises by charitable organizations whose non-profit character might otherwise be argued to carry them into the exemption); and third, that no participant was engaging in professional gambling as defined in Section 2(3).

The effect of these tests is actually an inversion of the definitions of "gambling" and "professional gambling" (Section 2(2) and (3)), in that any gambling which is related to professional gambling (i.e., precisely the identification of the culpable patron) is automatically excluded from the

operation of the exemption. Beyond this, the requirement of a bonafide social relationship would strike even for "gain," if the prosecution can show that the players were solicited as members of the public, as, for instance, in a game organized by a professional among strangers in a tavern, club car, etc.

"Social relationship" is concededly a vague concept, but it is a literal description of what is intended. Moreover, the word "social" has been the subject of considerable judicial consideration, since the Revenue Act of 1926, Sec. 500(c), 26 USCA 1710, imposes a tax on the dues of any "social . . . club." The word has been defined as "spent, taken, enjoyed, etc., in the company of one's friends or equals; as agreeable social relations." See *California State Automobile Ass'n v. Smyth*, 77 F. Supp. 131, 133 (N.D. Cal. 1948), rev'd on other grds., 175 F. 2d 752 (9th Cir. 1949), cert. den. 338 U.S. 905 (1949). See note 7, following Sec. 1710, 26 USCA. See also the discussion of "public," in comment on Section 2(3), above.

The Commission is satisfied that if an exemption for social gamblers is to be attempted, the optional subsection (2) presented herewith, coupled with the controlling declaration of policy in Section 1, would be adequate for the purpose. The subsection is left in optional form for acceptance or rejection by each jurisdiction adopting the act.

The first legislative body which has already considered this Model Act in substantially its present form, the Committee on the District of Columbia, United States Senate, recommended it for enactment and introduced it in Congress with the exemption included. S. Rept. No. 1989, 82d Cong., 2d Sess. (1952), pp. 22-3, 31-4; S. 3446, 82d Cong., 2d Sess. (1952).

Note that subsection (1) includes the offense of soliciting or inducing another to gamble. It is believed that this would reach any advertising of a gambling enterprise, and therefore no special prohibition against advertising has been included. Subsection (2) reaches principals, accomplices and conspirators, to give the statute a full sweep against organized gambling activities. The word "knowingly" was inserted to protect innocent persons, e.g., communications companies, etc., who might otherwise be penalized for unknowingly aiding a gambling enterprise by furnishing facilities, etc.

1 SECTION 4. *Gambling Devices; Gambling Records.*

2 (1) All gambling devices are common nuisances and are
3 subject to seizure, immediately upon detection, by any peace
4 officer, who shall hold the same subject to confiscation and
5 destruction by order of a court having jurisdiction.

6 (2) No property right in any gambling device shall
7 exist or be recognized in any person, except the possessory
8 right of officers enforcing this act.

9 (3) All furnishings, fixtures, equipment and stock, in-

10 cluding without limitation furnishings and fixtures adaptable
11 to non-gambling uses and equipment and stock for printing,
12 recording, computing, transporting, safekeeping or (except
13 as otherwise provided in subsection (3) of Section 5) com-
14 munication, used in connection with professional gambling
15 or maintaining a gambling premise, and all money or other
16 things of value at stake or displayed in or in connection with
17 professional gambling or any gambling device, shall be sub-
18 ject to seizure, immediately upon detection, by any peace
19 officer, and shall, unless good cause is shown to the contrary
20 by the owner, be forfeited to the state by order of a court
21 having jurisdiction, for sale by public auction or as other-
22 wise provided by law. Bonafide liens against property so
23 forfeited shall, on good cause shown by the lienor, be trans-
24 ferred from the property to the proceeds of the sale of the
25 property. Forfeit monies and other proceeds realized from
26 the enforcement of this subsection shall be paid equally into
27 the general funds of the state and the general funds of the
28 political subdivision or other public agency, if any, whose
29 officers made the seizure, except as otherwise provided by
30 law.

31 (4) Whoever knowingly owns, manufactures, possesses,
32 buys, sells, rents, leases, stores, repairs or transports any
33 gambling device, or offers or solicits any interest therein,
34 whether through an agent or employee or otherwise, shall
35 be fined [not more than {\$1,000},] or imprisoned [not more
36 than one year], or both. Subsection (2) of this section shall
37 have no application in the enforcement of this subsection.

38 (5) Whoever knowingly prints, makes, possesses, stores
39 or transports any gambling record, or buys, sells, offers or
40 solicits any interest therein, whether through an agent or
41 employee or otherwise, shall be fined [not more than {\$500},]
42 or imprisoned [not more than six months], or both, and in
43 the enforcement of this subsection direct possession of any
44 gambling record shall be presumed to be knowing possession
45 thereof.

COMMENT ON SECTION 4

Subsection (1) subjects gambling devices to seizure by any peace officer ("immediately upon detection" has been added to assure that complicated and burdensome warrant procedures, inapplicable to this problem, will not be imposed). Even destruction upon detection would probably not be unconstitutional, see *Durant v. Bennett*, 54 F. 2d 634, 638-9 (W.D.S.C. 1931), but the instant draft follows the majority of the statutes and requires an order of a "court having jurisdiction." See *State v. Robbins*, 124 Ind. 308, 24 N.E. 978 (1890).

It is not necessary to convict the owner, in personam, to reach these devices in rem. See *State v. Derry*, 171 Ind. 18, 85 N.E. 765 (1908); *Com. v. Kaiser*, 80 Pa. Super. 26 (1922).

"Jurisdiction" means jurisdiction over the person (or object) and subject matter, see *Petersen v. Falzarano*, 6 N.J. 447, 79 A. 2d 50 (1951), and must of course be read with the definition in Section 2(9). "Court having jurisdiction" seems as effective as more elaborate terms of art. Cf. Act of Oct. 28, 1919, c. 85, Tit. II, Sec. 21, 41 Stat. 314, 27 U.S.C. Sec. 33 (repealed).

Subsection (2), based on Miss. Code Ann. 1942, Sec. 2047, destroys, by legislative fiat, all property rights in gambling devices. See *Clark v. Holden*, 191 Miss. 7, 2 So. 2d 570 (1941). The result is that no vendor can enforce a sales contract, no insurance contract on expensive equipment (a "rigged" roulette table costs around \$10,000) is valid, and even in the event of a seizure, no replevin will lie once the subject is found to be a gambling device. The courts have already reached similar results in some cases; see, e.g., *Williams Mfg. Co. v. Prock*, 86 F. Supp. 447 (N.D. Tex. 1949); *Miller v. C. & N. W. R. Co.*, 153 Wis. 431, 141 N.W. 263 (1913).

Note that subsection (3) goes beyond gambling devices per se, and reaches all types of equipment, furniture, etc., and money, actually used in connection with professional gambling activities. See *State v. Tolisano*, 136 Conn. 210, 70 A. 2d 118 (1949); *Dorrell v. Clark*, 90 Mont. 585, 4 P. 2d 712 (1931); Anno. 79 A.L.R. 1007. Such things are enumerated by classes to insure the application of the paragraph to lottery printing presses, bookies' wire hook-ups, numbers operators' office equipment, casino fixtures, vehicles, etc. The parenthetical reference to Section 5(3) refers to the special problem, there disposed of, arising in connection with communications facilities installed by a public utility. All items subject to this subsection are forfeited, rather than confiscated for destruction, since they will usually have value for legitimate uses.

To avoid unreasonable hardship, a clause in the first sentence, and the second sentence, have been added for the protection, as far as possible, of innocent persons who have property rights in things subject to seizure. See *In re Teletype Machine No. 33335*, 126 Pa. Super. 533, 191 A. 210 (1937). Detailed provisions to this effect, see e.g., Mo. Rev. Stat., Sec. 4917 (1950 Supp.), were considered, but it was felt that the very general language

chosen would leave the courts properly free to consider all the facts and equities in each case.

The clause, "unless good cause is shown to the contrary by the owner" was used in the National Prohibition Act, Tit. 2, Sec. 26, 41 Stat. 315 (1919), 27 U.S.C. 40, and was adopted in a similar context by several states, e.g. S.D. Rev. Laws 1919, Sec. 10303. It has been judicially recognized as conferring precisely the desired discretion. See *Jackson v. U.S.*, 295 F. 620 (9th Cir. 1924); *U.S. v. Kane*, 273 F. 275 (D. Mont. 1921); *State v. Waul*, 59 S.D. 484, 240 N.W. 854 (1932); *State v. Severson*, 65 S.D. 1, 224 N.W. 179 (1929). Conditional vendors must assert their rights through the owner, and can only prevail on a showing that they had no knowledge or notice. See Anno.: 82 A.L.R. 609; 73 A.L.R. 1093; 61 A.L.R. 554; 47 A.L.R. 1058. Other lienors must meet the same test of bona fides. See *U.S. v. Masters*, 264 F. 250 (E.D. Mo. 1920); *U.S. v. 169 Barrels of Ethyl Alcohol*, 14 F. 2d 351 (E.D. Pa. 1926). Any state could insert a reference to its own forfeiture procedures in lieu of this clause, of course, without affecting the pattern of the section.

The final sentence makes a general provision for the disposition of funds, half to the state and half to the appropriate local subdivision, with an exception for any special provisions which the state may wish to make (an area in which there are presently many heterogeneous laws).

Subsection (4) is synthesized from the best of the gambling device statutes (Cf. N.Y. Pen. Code Sec. 982; Fla. Stat. Ann. Sec. 349.15; Cal. Pen. Code Sec. 330 (Deering, 1949)), and includes the vital elements of possession. It is believed that the language used covers all relationships to such devices, including transactions for the sale, mortgaging, etc. thereof. Note that this would not reach playing cards, dice, pool tables, and other gaming devices which are not primarily identified with professional gambling. Such devices would only become subject to seizure, under subsection (3), supra, when they are specifically so identified in a particular case. The last sentence was added to avoid an obvious inconsistency.

Subsection (5) penalizes, also with appropriate emphasis on possession, any knowing relationship to a gambling record (with a lesser penalty than that imposed in connection with gambling devices). The presumption in the last clause was taken from N.Y. Penal Law Sec. 975, upheld in *People v. Adams*, 176 N.Y. 351, 63 N.E. (1903), aff'd 192 U.S. 585 (1904). The holding that such statutes do not apply to records of completed lotteries, etc., *France v. U.S.*, 164 U.S. 676 (1897), would probably control this paragraph—rightly, it is believed. The holding that collateral records are not affected, *Francis v. U.S.*, 188 U.S. 375 (1903), would be avoided by the broad language of Section 2(5).

1 SECTION 5. *Gambling Information.*

2 (1) Whoever knowingly transmits or receives gambling

3 information by telephone, telegraph, radio, semaphore or
4 other means, or knowingly installs or maintains equipment
5 for the transmission or receipt of gambling information shall
6 be fined [not more than [\$1,000],] or imprisoned [not more
7 than one year], or both.

8 (2) When any public utility is notified in writing by a
9 law enforcement agency acting within its jurisdiction that
10 any service, facility or equipment furnished by it is being
11 used or will be used to violate this section, it shall discontinue
12 or refuse the furnishing of such service, facility or equip-
13 ment, and no damages, penalty or forfeiture, civil or criminal,
14 shall be found against any public utility for any act done
15 in compliance with any such notice. Unreasonable failure
16 to comply with such notice shall be prima facie evidence of
17 knowledge against such public utility. Nothing in this sub-
18 section shall be deemed to prejudice the right of any person
19 affected thereby to secure an appropriate determination,
20 as otherwise provided by law, that such service, facility or
21 equipment should not be discontinued or removed, or should
22 be restored.

23 (3) Facilities and equipment furnished by a public
24 utility in the regular course of business, and which remain
25 the property of such utility while so furnished, shall not be
26 seized pursuant to subsection (3) of Section 4 of this act
27 except in connection with an alleged violation of this act by
28 such public utility, and shall be forfeited only upon convic-
29 tion of such public utility therefor.

COMMENT ON SECTION 5

This section is the operative projection of Section 2(6), the definition of gambling information, aimed at anyone who transmits or receives gambling information, or wagers, by ordinary means of communication or by "semaphore or similar means." The latter is included to strike at the special operation of purloining gambling information from the track enclosures where pari-mutuels are being conducted. This is an especially vulnerable point of the bookmakers' wire service systems, and is the object of pending federal legislation. S. 1564, 82d Cong., 1st Sess. (1951).

The section also reaches any individual or carrier who "knowingly installs or maintains" equipment for transmitting or receiving such information.

The State of Florida has pioneered in legislation of this type. Fla. Stat. Ann. Secs. 365.01-14. See *McInerney v. Ervin*, 46 So. 2d 453 (Fla. 1950). A few additional states have been experimenting with controls in the same field, Mich. Stat. Ann. 1937, Sec. 28.537, and there is widespread interest in this feature of the draft.

Communications companies are in a very delicate position with respect to such legislation. On one hand, as common carriers, they are obliged to provide service to all applicants. On the other, they are under very strict prohibitions as to censoring or monitoring messages which they carry (Communications Act of 1934, Sec. 605, 48 Stat. 1064, 1103 (1934)). They may easily be made unknowing accomplices in gambling enterprises; at the same time, if they cooperate knowingly with gamblers they can play a very important role in facilitating illegal activity on a broad scale.

Weighing these considerations, it seems fair and proper to impose a special duty on utilities in this field—e.g., to cooperate with law enforcement agencies by removing offending facilities on demand. But with this duty they are also fairly entitled to immunity for the consequences of compliance. Subsection (2) creates this duty and immunity. It is based on enactments in two states, Fla. Stat. Ann. Secs. 365.08, 365.13, and Dela. Sen. Bill No. 14 (approved Jan. 29, 1952), Secs. 2, 4, and is acceptable, in principle, to representatives of the communications industry with whom it has been discussed.

Note that the subsection can be invoked only by a "law enforcement agency acting within its jurisdiction," and not by "any peace officer"—to insure maximum responsibility in its application. Also, since it is not self-executing, an incentive to compliance, the risk of prosecution based on knowledge, has been included.

Nearly all regulated carriers have tariff rules against providing service for an unlawful use. The effect of the notice from an enforcement agency would be to induce and facilitate the enforcement of such rules. Carriers are not relieved from the underlying duty to enforce their tariffs, with or without such notice, of course, nor from the broad application of the prohibitions in subsection (1).

While subscribers are deprived of any recourse against the carrier for damages when subsection (2) is invoked, they would still have full access to the courts or the proper regulatory body to test the propriety of the action and have their service continued or restored on a showing that no violation is in fact involved. The word "unreasonable" was used, modifying the sanction against the carrier, to invite procedures such as are actually used in doubtful cases: the carrier notifies the subscriber; the service is continued until at least the end of a subsequent business day; and the subscriber can address himself to the enforcement agency, the regulatory body, or a proper court for interim relief if it is warranted. The last sentence has been added to remove possible doubt or conflict on this point.

There are a number of cases holding that advice from a law enforce-

ment agency to the effect that communications facilities are being used unlawfully is a defensible ground for discontinuing service without special statutory authority. See *Hagerty v. Southern Bell Tel. & Tel. Co.*, 59 F. Supp. 107 (S.D. Fla. 1945); *Tracy v. Southern Bell Tel. & Tel. Co.*, 37 F. Supp. 829 (S.D. Fla. 1940). Cf. *McBride v. Western Tel. Co.*, 171 F. 2d 1 (9th Cir. 1949). The matter is by no means conclusively settled, however; the Federal Communications Commission has raised grave doubts about this result in *Katz v. Am. Tel. & Tel. Co.*, FCC Doc. 9500.

Note, with respect to telephone companies, that they are not regarded as "transmitting" messages sent through their facilities; they only provide the means by which the parties to a telephone conversation transmit for themselves. See *Southern Tel. Co. v. King*, 103 Ark. 160, 146 SW 489, 491 (1912); *State ex rel. Dooley v. Coleman*, 126 Fla. 203 170 So. 722 (1936).

Subsection (3) has been added as a special protection for public utilities in relation to the seizure and forfeiture provisions of Section 4(3). They are compelled by law to furnish facilities to subscribers, though their tariffs uniformly provide that equipment furnished by them shall remain their property. If they knowingly make installations or provide service for gambling uses they are punishable under this section. If, on the other hand, they have acted without knowledge, they should not be penalized at all. The privileged position conferred by this subsection fairly offsets the special burdens which the Act and other principles of law necessarily impose on such utilities.

1 SECTION 6. *Gambling Premises.*

2 (1) All gambling premises are common nuisances and
3 shall be subject to abatement by injunction or as other-
4 wise provided by law. In any action brought under this sub-
5 section the plaintiff need not show damage and may, in the
6 discretion of the court, be relieved of all requirements as
7 to giving security.

8 (2) When any property or premise is determined by a
9 court having jurisdiction to be a gambling premise, the owner
10 shall have the right to terminate all interest of anyone hold-
11 ing the same under him.

12 (3) When any property or premise for which one or more
13 licenses, permits or certificates issued by this state, or any
14 political subdivisions or other public agency thereof, are in
15 effect, is determined by a court having jurisdiction to be a
16 gambling premise, all such licenses, permits and certificates
17 shall be void, and no license, permit or certificate so can-

18 celled shall be reissued for such property or premise for a
19 period of [sixty days] thereafter. Enforcement of this sub-
20 section shall be the duty of all peace officers and all taxing
21 and licensing officials of this state and its political sub-
22 divisions and other public agencies.

23 (4) Whoever as owner, lessee, agent, employee, operator,
24 occupant or otherwise knowingly maintains or aids or per-
25 mits the maintaining of a gambling premise shall be fined
26 [not more than [\$1,000],] or imprisoned [not more than one
27 year], or both, and whoever does any act in violation of this
28 paragraph within any locked, barricaded or camouflaged
29 place or in connection with any electrical or mechanical
30 alarm or warning system or arrangement shall be fined [not
31 more than [\$1,000],] or imprisoned [not more than five
32 years], or both.

COMMENT ON SECTION 6

Subsection (1) makes the remedy of abatement available against any gambling premise as a common nuisance. This is a well accepted remedy. See *Mongogna v. O'Dwyer*, 204 La. 829, 16 So. 2d 829 (1943). Abatement procedures are not specified, since the states vary widely in their provisions in this respect. The remedy is intended to be available both to private citizens and enforcement officials. The two most fundamental modifications made by some of the statutes, relief from the requirement of showing damage and discretionary relief from giving bond, have been added since they appear to be desirable where necessary and harmless where unnecessary.

The remedy of padlocking such premises is not specifically included, since padlocking procedures vary widely among the states which have provided them. If the phrase "or as otherwise provided by law" does not suffice to preserve a general padlocking provision, or if one is desired in addition to the general sanction of abatement, appropriate provision should be made therefor in a separate act. For illustration, see Colo. Stat. Ann. 1935, c. 1, Secs. 1-11; Act of Oct. 28, 1919, c. 85, Tit. II, Secs. 22, 41 Stat. 314 (1919) (Volstead Act, repealed 49 Stat. 872, 1935).

Subsection (2) is patterned after N.M. Stat. 1951, Sec. 41-2210, other variations of which are found in several other states, and seems a wholesome creation of special rights in both landlords and chattel mortgagors when gambling violations occur. No correlative duty is imposed; any person interested as owner or otherwise in a gambling premise would be punishable, if knowledge is shown, under the broad terms of subsection (4), post.

Subsection (3) is patterned after Wis. Stat. 1949, Sec. 176.90. See *State v.*

Coubal, 248 Wis. 247, 21 N.W. 2d 381 (1946). Similar provisions have been enacted in several other states. This enactment has proved very effective in stamping out gambling activity in restaurants, taverns, etc. All applicable licenses are rendered void, but the safeguard of a court finding has been added to prevent arbitrary use of the subsection.

The duty to enforce subsection (3) is extended to all taxing and licensing officials as well as peace officers, another innovation of the Wisconsin statute which has proved to be very salutary.

Subsection (4) imposes a misdemeanor penalty on all persons in any way connected with a gambling premise. The second part of the subsection borrows an ingenious provision from Ala. Code 1940, Tit. 14, Secs. 294-302, which makes a felony offense of gambling activity conducted behind a locked or camouflaged door. See *Ah Sin v. Wittman*, 198 U.S. 500 (1905). A peace officer may always arrest a person committing a misdemeanor in his presence, and may seize evidence of the offense at the time of the arrest without a warrant. *Beard v. U.S.*, 82 F. 2d 837 (D.C. Cir. 1936), cert. den. 298 U.S. 655 (1936); *People v. One Pinball Machine*, 316 Ill. App. 161, 44 N.E. 2d 950 (1942). He may break into a premise, without a warrant, if he believes a felony has been or is being committed within, Am. Jur., "Arrest," Sec. 84; *Carroll v. U.S.*, 267 U.S. 132 (1925), with the same right to arrest and seize evidence. This enables the officer to apprehend violators of the gambling laws under all circumstances, whenever and wherever they are detected.

1 SECTION 7. *Repeated Offenses.* Any person who has been
2 convicted of a violation of Section 3(2), 4(4), 5(1) or 6(4)
3 of this act or [prior similar laws] may, upon any subsequent
4 violation of Section 3(2), 4(4), 5(1) or 6(4), be prosecuted
5 as a repeating offender, and upon conviction shall, in lieu of
6 any other penalty, be fined [not more than [\$5,000],] or
7 imprisoned [not more than ten years], or both.

COMMENT ON SECTION 7

Many states provide increased penalties for repeated violations of their gambling laws. Ala. Code 1940, Tit. 14, Sec. 275; Ill. Rev. Stat., c. 38, Sec. 410; Ore. Comp. L., Sec. 23-1006. This section is drawn with care to reach only the professional gambler, and makes prosecution thereunder discretionary in each individual case. Thus the prosecutor can weed out the flagrant violator and proceed against him by indictment, for a felony, where he would probably prefer to confine the prosecution of small operators to repeated informations for misdemeanors. Such an option does not seem to offend the courts. See *U.S. v. Novick*, 124 F. 2d 107, 109 (2d Cir. 1941), cert. den. 315 U.S. 813 (1942); *People v. Hines*, 284 N.Y. 93, 105, 29 N.E. 2d 483 (1940).

1 SECTION 8. *Witness Immunity.* In any proceeding arising
2 out of a violation of this act, if a natural person refuses to
3 answer a question or produce evidence of any other kind on
4 the ground that he may be incriminated under this act
5 thereby, the court, when requested in writing by the prose-
6 cuting attorney, shall, unless it finds that to do so would be
7 clearly contrary to the public interest, order such person to
8 answer or produce the evidence, and that person shall com-
9 ply with the order. After complying with the order, and if,
10 but for this section, he would have been privileged to with-
11 hold the answer given or the evidence produced by him, such
12 person shall not be prosecuted or subjected to penalty or
13 forfeiture under this act for or on account of any transaction,
14 matter or thing concerning which, in accordance with the
15 order, he gave answer or produced evidence. He may never-
16 theless be prosecuted or subjected to penalty or forfeiture
17 for any perjury or contempt committed in answering, or fail-
18 ing to answer, or in producing, or failing to produce, evidence
19 in accordance with the order.

COMMENT ON SECTION 8

This section is conformed in style as far as possible to the Model Witness Immunity Act propounded herewith. However, there are differences between the Model Witness Immunity Act and Section 8. These differences are due to the fact that the Model Witness Immunity Act is directed at the problem of obtaining the testimony of witnesses in return for immunity in all criminal prosecutions. The objectives of Section 8, however, are more modest in character. It seeks, through the device of immunizing witnesses, to make it possible to obtain the testimony of players and patrons who have knowledge of gambling activities against the culpable professional. Section 8 also makes it possible to obtain the testimony of minor underlings in large scale gambling conspiracies against the leaders of such conspiracies in return for immunity. Such a device, simple and effective, is an excellent aid in the enforcement of the gambling laws.

The courts have been somewhat troubled by the argument that players and patrons are accomplices, but have, for the most part, resolved this in favor of the prosecutor. See *Paylor v. U.S.*, 42 App. D.C. 428 (1914), cert. den. 235 U.S. 704 (1914).

Section 8 of the instant draft is not limited to criminal proceedings only, because of its obvious importance in civil actions and in rem proceedings arising under Sections 4(1) and (3) and 6(1), (2), and (3).

It is limited to possible incriminations under this Model Act itself, and to immunity for violations of this Model Act only in order to confine it to the special situations already alluded to.

States which enact the Model Witness Immunity Act may wish to substitute its provisions and safeguards in toto for the criminal-proceeding features of Section 8. This is left as a matter of policy to be determined when the adoption of the Model Witness Immunity Act is being considered.

1 [SECTION 9. *Restriction on Political Subdivisions.* No
2 county, city or other political subdivision or public agency
3 of this state shall license, tax, permit or authorize any act,
4 transaction or thing in violation of this act, and all rulings,
5 ordinances and regulations in conflict herewith shall be
6 null and void from the effective date of this act.]

COMMENT ON SECTION 9

This section is patterned after Ariz. Code Ann. 1939, Sec. 43-2705. In states having direct constitutional prohibitions relating to gambling it would be unnecessary, of course.

1 SECTION 10. *Severability.* If any provision of this act or
2 the application thereof to any person or circumstance is in-
3 valid, such invalidity shall not affect other provisions or ap-
4 plications of the act which can be given effect without the
5 invalid provisions or application, and to this end the pro-
6 visions of this act are declared to be severable.

COMMENT ON SECTION 10

This section is modeled on Cal. Pen. Code (Deering 1949), Sec. 330(b) (4).

1 SECTION 11. *Effective Date.* This act shall take effect
2 when approved, except Section 4 which shall take effect at
3 midnight of the thirtieth calendar day thereafter.

COMMENT ON SECTION 11

The operation of Section 4 is deferred by this section for a period of 30 days to allow for the disposition of prohibited gambling devices before they become contraband and forfeit.

Attention is called to the fact that this draft is confined to the direct prohibition of gambling activities, and is not extended to collateral areas such as civil liabilities of gambler to player or winner to loser; penalties against officers who fail to enforce the laws diligently; cheating at gambling; alterations in the common law as to aleatory contracts, etc. Current provisions affecting these areas—varying widely as they do—should be left untouched in the enactment of the instant draft.

The Committee of the National Conference of Commissioners on Uniform State Laws which cooperated with the American Bar Association Commission on Organized Crime in the preparation of the Model Anti-Gambling Act was:

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