RECOMMENDATIONS

to the

1970 Session of the New Jersey Legislature

concerning

Legislation Which Might Be Enacted to Curb the Power and Influence of Organized Crime in New Jersey

Frederick B. Lacey
United States Attorney
For the District of New Jersey

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LETTER OF TRANSMITTAL

January 26, 1970

Honorable Members of the Senate and General Assembly:

The undersigned, members of the special joint committee of the Legislature appointed by Senator Raymond H. Bateman, President of the Senate, and Assemblyman William K. Dickey, Speaker of the General Assembly, to confer with Mr. Frederick B. Lacey, United States Attorney for the District of New Jersey, regarding his views and recommendations relative to changes in the laws of this State which may be helpful in the fight against organized crime, and to consider such recommendations, are pleased to transmit this report of Mr. Lacey to the Legislature of the State of New Jersey.

Sincerely,

s/HARRY L. SEARS

Harry L. Sears

s/ALEXANDER J. MATTURRI

Alexander J. Matturri

s/HERBERT M. RINALDI

Herbert M. Rinaldi

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EXHIBITS (In Order of Reference Herein)

1. *State of New York, Employee Welfare Fund Act of 1956*

2. *State of New York, Labor-Management Improper Practices Act*

3. *Model Anti-Gambling Act,* With Comments

4. *Michigan Revised Criminal Code—Final Draft,* With Comments Section 6101 *et seq.*

5. *Consumer Credit Protection Act, Title II* (18 U.S.C. Section 891 *et seq.*)

6. *Hawaii Statute—Relating to the Regulation of the Conduct of Trade and Commerce* (Anti-trust)

7. *Brief of State of Florida Filed in State Ex rel Earl Faircloth v. Aztec Motel, Inc., et al.*

8. *United States Senate Bill No. S.* 2600 (July 11, 1969).

CREDITS

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PREFACE

I have been United States Attorney only since September 2, 1969. Yet, the domination by Organized Crime of our societal institutions is so pervasive that already I have been profoundly shocked by its massive presence.

Police departments have succumbed to moral decay. Sheriffs' offices are tarnished. Law enforcement at every level is found to be corruptible. The judiciary has been demeaned. Your own body has suffered some embarrassment from certain indiscretions of a few of your own members. Nor has the federal sphere been immune from the poison of corruption.

The spirit of reform, an irresistible moral force, must be sparked, fueled and disseminated. The danger to our State and nation must be starkly and strikingly announced by you and me as leaders in our respective areas. The slightest departure from high moral standards in public life must be punished, or at the very least, opened up to public scrutiny.

The three branches of government—legislative, judicial and executive—all have awesome responsibility in the war to be waged against organized crime. Men with impeccable reputations, of high character and integrity, whose backgrounds offer not the slightest impeachment of their honesty, should be persuaded to run for public office and to serve in appointive positions. The cynical and skeptical electorate must have its confidence restored in our form of government and its administration. This is the time for courageous abandonment of old political restraints, for the pursuit of goals created by our conscience, for throwing to the winds political caution, for denunciation and elimination of venal ties between political leaders and organized crime.

My confidence in the determination and will of Governor-elect William T. Cahill to eliminate Organized Crime is

unbounded.* But he alone can do little. A sophisticated political reporter recently issued this challenge:

> "Many New Jersey politicans and political scientists question whether any governor, no matter how dedicated to fighting organized crime, can be free to act forcefully as long as county leaders of both parties—and some of the counties under investigation are under G.O.P. control—retain the power of the enormous state patronage that is channeled through county court houses. That patronage, provided by a decentralized state government, has been translated into a virtual veto power over the appointment of county prosecutors and judges."**

My office—the chief prosecutive arm of Attorney General John N. Mitchell and the United States Department of Justice—stands ready to help, whether it be to operate in depth in certain delimited areas, to provide intelligence broadly, or to furnish example where example may be needed. But, in the final analysis, as I said when I took oath of office:

> ". . . it is at the state and local levels where law enforcement must succeed, or we all will fail. The Federal Government can provide leadership, and in certain limited areas can even operate massively. But state and local officers must be effective if our society is to survive the wave of crime."

It is fitting indeed that it is this Legislature which encouraged my legislative recommendations on Organized Crime. You already have demonstrated, in your last session, an awareness of the existence of the danger, and a willingness to do battle with it. I congratulate you for having established the Statewide Grand Jury, the State Commission of Investigation and the Criminal Law Revision Commission,*** and for enacting legislation concerning witness

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* Mr. Cahill's intention to reappoint Colonel David B. Kelly as Superintendent of the New Jersey State Police, is, as I have stated to him, most laudable, as is his intention to nominate Mr. George Kugler as Attorney General.

** Richard Reeves, *New York Times,* December 24, 1969.

*** It is noted that the Criminal Law Revision Commission and the State Commission of Investigation may report to this Legislature recommendations for criminal legislation. The Revision Commission's final report to the Governor and the Legislature is due on April 1, 1970. The SCI, by the terms of the legislation which established it, may undertake to assist the Governor in recommending criminal legislation in certain circumstances (N. J. S. A. 52:9M-3), and, further, it makes annual (and, if requested, interim) reports to the Governor and Legislature (N. J. S. A. 52:9M-10).

immunity (N. J. S. A. 2A:81–17.3), wiretapping and electronic surveillance (N. J. S. A. 2A:156A–1 *et seq.*), loansharking (N. J. S. A. 2A:105–5, 2A:119A–1 *et seq.*) and theft of and fraud in use of credit cards (N. J. S. A. 2A:111–40 *et seq.*).

Concerning my recommendations, should it be said that they are too narrow in scope in that they deal only with Organized Crime, the response is, of course, that Organized Crime, as it flourishes, engenders other crime.

Thus, by way of example, less than two years ago, the Governor's Select Commission of Civil Disorder issued its report concerning disorders (and resultant deaths, personal injury and property damage) that had recently occurred in New Jersey cities, particularly Newark. The Commission noted that disrespect for the police and city government in Newark in the form of "a pervasive feeling of corruption" was a major contributing factor to the riots in Newark in 1967. In the words of the report:

> "It is said that the City Commission of the 1930's and 1940's left Newark a heritage that has not been shaken off. There is a widespread belief that Newark's government is corrupt.
>
> "Knowledgeable and substantial people expressed this belief, off the record. . . . A source close to Newark businessmen said he understood from them that 'everything at City Hall is for sale.' A former state official, a former city official and an incumbent city official all used the same phrase: 'There's a price on everything at City Hall.' In the area of organized crime and police corruption, this belief has been reinforced by four Essex County Grand Jury presentments in this decade. . . ."

From these investigations and others,* one fact has emerged with absolute clarity: it is the organized criminal elements, with their vast resources of untaxed, often untraceable cash, that perpetrate most of the corruption of public officials. One analyst, whose work will be discussed more fully in connection with gambling legislation, has made the soundly-based conservative estimate that the gambling

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* See President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, pp. 187, 188, 191 (Washington, D. C., 1967).

revenues of organized crime* alone generate, throughout this nation, approximately two billion dollars in bribery and graft, corrupting public officials and law enforcers.**

Undoubtedly, it is the corrupting influence of Organized Crime that produces the contemptuous attitude toward local government in citizens of a municipality where the pervasive feeling is that "there's a price on everything at City Hall." Organized Crime establishes and pays that price to both law enforcement and elected officials alike. Dry up the cash treasuries available for this purpose and you will see the end of corrupt government followed by increasing respect for government, thus removing one (though not all) of the major causes of civil disorder.

It is this great money power which Organized Crime possesses that enables it to be the principal cause of much crime with which the public might not ordinarily associate it. As noted in the 1967 report of the President's Commission (*infra*):

> "The millions of dollars it can invest in narcotics or use for layoff money give it power over the lives of thousand of people and over the quality of life in whole neighborhoods.
>
> * * *
>
> "The sale of narcotics is organized like a legitimate importing-wholesaling-retailing business. . . . The large amounts of cash and the international connections necessary for large, long-term heroin supplies can be provided only by organized crime." *The Challenge of Crime in a Free Society*, pp. 187, 189.

The narcotics addict and the person in heavy debt to the gamblers or loansharks turn to burglary, robbery, embezzlement and other crimes to support their "habit" or to repay the bookies or shylock. These events are very directly the results of the activities of Organized Crime, though it is rarely the professional criminal who is arrested and prosecuted in connection therewith.

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* Estimated at between $6,000,000,000 and $7,000,000,000 per year, nationally, President's Commission . . . , *The Challenge of Crime in a Free Society*, 189.

** Rufus King, *Gambling and Organized Crime*, 34 (Washington, D. C., 1969).

It thus can fairly be said that no better means of fighting all crime exists than that of an all-out assault on Organized Crime.

Undoubtedly, the federal government must spare no effort in doing what it can to fight Organized Crime in this state and nation. Congress has evidenced its commitment by passing the Omnibus Crime Control and Safe Streets Act of 1968. Several bills specifically directed at Organized Crime activities are presently pending in the United States Senate:

S.30 (January 15, 1969—Sen. McClellan)
S.974–976 (February 7, 1969—Sen. Tydings)
S.1623–1624 (March 20, 1969—Sen. Hruska)
S.1861 (April 18, 1969—Sen. McClellan)
S.2022 (April 29, 1969—Sen. Hruska)
S.2122 (May 12, 1969—Sen. McClellan)
S.2292 (May 27, 1969—Sen. McClellan)

The United States Department of Justice is likewise committed to this joint endeavor against organized crime. As Attorney General Mitchell said on March 8, 1969:

> "I will spare no effort to attack the nationwide organization of racketeers who corrupt our youth with illegal narcotics, who taint out public officials with bribes and corruption, who pervert the outstanding ideals of the labor union movement, who employ murder and torture to collect their debts, and who, in a very real sense, prey mainly on the poor and less educated segments of our population."

Nonetheless, as heretofore stated, the people of New Jersey must rely ultimately upon efficient and honest law enforcement at the local, county and state level.

It is in this spirit that I submit hereafter my recommendations for legislation.*

* Our format is simply one of presenting a series of memoranda, each relating to a separate substantive area of criminal law. I have deliberately avoided presentation of specific drafts of legislation.

I. THE INCURSION OF ORGANIZED CRIME INTO THE LABOR-MANAGEMENT FIELD

A. INTRODUCTION:

There follows an exploration of approaches which might be taken to curtail criminal practices in the labor-management field in New Jersey.

New Jersey is a highly industrialized state where trade and industrial unions represent a large part of the labor force; there is increasing evidence of the presence in this state of entrenched organized criminal elements; and it is becoming increasingly apparent that such persons are perverting organized labor in order to secure monetary gain for themselves at the expense of employer and employee alike. They infiltrate the organizational hierarchy of unions and their welfare and pension funds, hire themselves out as "labor consultants" for the purpose of insuring against "trouble" from the labor movement, and gain influence over public officials charged with letting out and administering a large variety of public contracts.*

We urge passage of criminal legislation specifically aimed at keeping the criminal element out of the union hierarchy and the field of labor consultation. Additionally, it would be in order to review existing general criminal legislation in such areas as bribery, extortion and embezzlement, and the penalties therefor.

There is a substantial amount of federal legislation directed at purging the criminal element from the labor movement and punishing improper conduct by union officers

* Despite the fact that the emphasis of this memorandum is the encouragement of state legislation which will banish criminals from the union hierarchy and from labor "consultation," it should be noted that labor, as such, is not solely at fault. The employer-businessman who allows himself to be victimized by the strong-arm men of a criminally-infested local, or seeks the aid of organized crime in acquiring non-union labor or assuring against "labor trouble" is equally to blame. See Donald R. Cressey, *Theft of the Nation*, pp. 95-99 (New York, 1969); Robert F. Kennedy, *The Enemy Within*, Ch. 12 (New York, 1960); *The Challenge of Crime in a Free Society*, p. 191; Presentment of Union County Grand Jury, No. P-1, M-68, Nov. 24, 1969, *infra*.

and agents. However, no state should be reluctant to legislate in this field. It has been stated:

> "The fact that a business is engaged in interstate activities brings it within the scope of federal labor laws but does not necessarily remove it from the scope of state labor laws. Congress, when enacting a federal labor law, makes its determination as to whether or not to permit state law covering the same field to operate alongside the federal law. [Under the National Labor Relations Act establishing the NLRB, a degree of federal preemption of the field exists.]
>
> "In other instances of federal regulation, however, Congress has chosen not to preempt the field to the exclusion of state power, and let state labor statutes operate alongside the federal statutes, in interstate disputes, insofar as such state laws are not inconsistent with the federal law. In these instances, the state labor statutes supplement the federal statutes and interstate employers must comply with both federal and state statutes. Violation of either one of the statutes would result in action by the respective law enforcement agency and any conduct violating both the federal and the state statutes may result in prosecution by both the federal and state law enforcement agencies.
>
> [Though state legislation is the more severe, nevertheless it must be complied with.]
>
> "In the absence of federal laws regulating a particular segment of the labor law field, state laws regulating that segment have their full sway, regardless of whether or not an employer is engaged in interstate commerce." 1 *CCH Labor Law Reporter,* Para. 40, 253.

Additionally, reference is made to Section 604 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. Sec. 524:

> "Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any such crimes."

Thus, it is urged that an attack on the problem of criminal elements in the labor field should come from the State as well as the federal government. Indeed, especially in the area of particular criminal prosecutions, state and county authorities (if sufficient manpower and legislative authority are at their disposal) are better suited to act. The State should be, in this area as in others, the primary guardian of the interests of its citizens. The basic concern of the federal government must necessarily be with the administration on a national scale of labor policy as expressed by Congress. Because of their greater number in this State, their greater familiarity with the identity of persons in the labor movement here and New Jersey's particular problems, and their ability to enlist more personnel to administer state laws and regulations, state and county prosecutors should undertake the vast majority of prosecutions in this area of labor and Organized Crime.

B. Supervision of Persons In The Union Hierarchy and The Field of Labor Consultation:

At the outset it should be noted that any legislation designed to curb the infiltration of criminals into positions of authority and power in labor unions should be accompanied by parallel legislation designed to keep such persons out of controlling positions in the administration of employee welfare and pension funds. By way of illustration, Section 504(a) of the L-MRDA (29 U.S.C. Sec. 504 (a)) prohibits (under penalty of a $10,000 fine and/or up to one year's imprisonment) any person convicted within five years past of one of several specified serious crimes from serving either "(1) as an officer, director . . . or other employee . . . of any labor organization, or (2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce. . . ." However, there is no parallel prohibition in the federal Welfare and Pension Plans Disclosure Act (29 U.S.C. Sec. 301 et seq.) against such a person becoming an administrator, trustee or other employee of an employee welfare or pension fund. There have thus been instances where a convicted criminal who rises to a powerful position in a union assumes the position of

trustee of a jointly-administered* welfare or pension plan and proceeds to control the use of those vast funds (and also run the union) from this latter post from which he may not be excluded. New state legislation should exclude such convicted criminals from influential positions in either unions or funds.

As a guideline for legislation which could control the infiltration of criminals into the labor field, the Legislature can look to present legislation implementing the bi-state compact (with New York) which established the Waterfront Commission. N. J. S. A. 32:23–1 et seq. This legislation was passed to eliminate the criminal element from the piers of the harbor of greater New York. The pattern for accomplishing this objective is simple and appropriate N. J. S. A. 32:23–12 requires any person serving as a pier superintendent or hiring agent to be licensed. Under N. J. S. A. 32:23–13 and 32:23–14, any such person must show (through an application under oath) that he is of good character and integrity, and that within the five previous years he has neither been convicted nor served a sentence for conviction of any of an extensive number of serious crimes enumerated therein. In N. J. S. A. 32:23–18 there appear 13 grounds for the revocation or suspension of the license of a pier superintendent or hiring agent, including conviction of virtually any serious crime, or association with criminals. With certain variations, this pattern is repeated for the licensing of stevedores (N. J. S. A. 32:23–19, 32:23–21, 32:23–24) and port watchmen (32:23–39, 32:23–41, 32:23–44); for the registration of longshoremen (32:23–27, 32:23–29, 32:23–31); and for the designation of checkers from the ranks of registered longshoremen (32:23–105). The general provision for criminal penalties for violation of the compact declares the same to be a misdemeanor punishable by a fine of up to $500 and/or imprisonment for a period of one year. (N. J. S. A. 32:23–76.) Such a licensing procedure would appear particularly suited to the regulation of persons acting as labor consultants.**

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* With trustees designated by the contributing employer, who frequently abdicate their responsibility and leave the management of the funds to the union's designees.

** See the presentment of the Union County Grand Jury *re* the role of Nick Delmore and Sam DeCavalcante in the Mount Pleasant Village construction project in Parsippany, New Jersey, No. P-1, M-68, Nov. 24, 1969.

Another means of regulation which might be used either in conjunction with, or apart from, the licensing approach is that of requiring regular (at least annual) reporting and disclosure to appropriate state authorities by labor unions, employers, labor consultants and welfare or pension funds. Such reporting is designed to permit supervision of the administration of union treasuries and welfare funds. Complete financial statements and reports of certain types of transactions should be required. This is the basic emphasis of the Welfare and Pension Plans Disclosure Act (29 U.S.C. 301 *et seq.*) and the Labor-Management Reporting and Disclosure Act (29 U.S.C. 401 *et seq.*). For examples of state legislation, see New York's Employee Welfare Fund Act of 1956 and Labor and Management Improper Practices Act, copies of which (as most recently amended) are annexed to this memorandum.* Violations of the requirements of these acts are penal offenses.

The third means of regulation in this field is legislation directly excluding persons previously convicted (within a certain prior period of time) from holding positions of responsibility and influence in the hierarchy of unions and welfare or pension funds. As noted above, the federal L-MRDA has such an exclusion provision applicable to unions only** and not complemented by any parallel provision in the Welfare and Pension Plans Disclosure Act. The New York legislation discussed above contains no such exclusionary provisions. The best guide for the Legislature here can be found in the bi-state waterfront compact which was mentioned earlier. The compact declares that no person convicted of any one of several enumerated crimes "shall directly or indirectly serve as an officer, agent or employee of a labor organization, welfare fund or trust." (N. J. S. A.

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*New York's Employee Welfare Fund Act has detailed provisions permitting audit examinations by the State of a fund's books and records without notice, the expenses of which are to be borne by the fund. Such an examination is to be conducted at least once every five years. As the result of such an audit by the Insurance Department of the State of New York, the trustees of the Welfare Fund of Local 825 Operating Engineers, basically a New Jersey local that represents some employees in New York, were directed to refund to the Fund more than $40,000 paid on behalf of one Joseph Fay, who was in fact ineligible for coverage under the trust agreement because he was not an employee of the union, although carried in the union's reports as such. The union trustees, including one Peter Weber (*infra*), were censured for having permitted this. See also *Federal-State Regulation of Welfare Funds* (BNA, Washington, D. C. 1962).

**29 U. S. C. Sec. 504(a), *supra* at page 11.

32:23–80.2.) The criminal penalty for such an offense is a $500 fine and/or one year in jail for the offending person; furthermore, the Waterfront Commission has the express power to bring a civil action to compel a waterfront union to purge any such person from its ranks. *Ibid.* In addition, the collection of funds for unions having such criminals as officers, agents or employees is itself a misdemeanor carrying the same penalty as above. (N. J. S. A. 32:23–80.) This latter provision is an encouragement to self-policing by the unions.

In enacting statutes excluding convicted criminals from the hierarchy of unions or funds, the Legislature should insure that the legislation is broad enough to accomplish its purpose. It is suggested that the crimes upon which exclusion is based include (at the very least) all serious crimes of violence, narcotics offenses, fraud, extortion, bribery, perjury, larceny, gambling, any offense involving breach of a fiduciary duty, embezzlement or other misapplication of property, plus violation of any state or federal labor,* banking, investment or insurance law and any attempt to commit these criminal acts. As noted previously, exclusion should be from virtually any official or *de facto* position of influence in either a union or a welfare or pension fund. *Furthermore, no person convicted of any such crime should be permitted a license to engage in the field of labor consultation.*

The Legislature might also consider the propriety of providing for the removal of a person upon his conviction of a crime in the trial court so that he may not continue in office or practice during the period (often years) of appeals. It would appear that the public interest would permit this, despite the pendency of an appeal from the conviction.

C. Prosecution of Criminal Offenses In The Labor Theatre Under General or Tailored Criminal Statutes:

Because the typical labor-management situation involves several interests, each looking to make either a profit or a saving in a particular business venture, there is the regrettable potential for bribery, extortion, blackmail, larceny

* Such as Section 302 of the Labor-Management Relations (Taft-Hartley) Act, 29 U. S. C. Sec. 186.

and other criminal acts. For example, a public contract may involve the public authority letting out the contract, the primary contractor, subcontractors and materialmen, labor (both union and non-union) employed on the job, and labor (also of each type) not employed but desirous of employment there. In such a situation a union official may threaten to strike or picket a job if he is not personally compensated by a contractor or subcontractor; a contractor may bribe a union official in order to pay union members less than union scale or even to gain "permission" to employ cheaper, non-union labor, thereby enabling the contractor to bid low; a "labor consultant," for a "fee," may insure labor peace on a job operating on a tight budget or time schedule; and numerous related offenses may arise. The public authority may itself be riddled by bribery and corruption, or, even if not, may tend to ignore such improprieties concerning the labor involved, in the interests of having the project proceed to completion on schedule. A review of certain types of criminal statutes which, if zealously invoked and prosecuted, can check the growth of criminal activity in the labor theatre, is in order.

EXTORTION

In this area of the law, New Jersey has a general extortion statute: N. J. S. A. 2A:105–1 *et seq.* Under Secs. 2A:105–1 and 2A:105–2 a judge, magistrate or public official is guilty of a misdemeanor if he "receives or takes any fee or reward not allowed by law for performing his duties." The elements of threat by the criminal and fear in the victim are not necessary in this instance.* General extortion via threats conveyed by letter is a misdemeanor. N. J. S. A. 2A:105–3. Threats to kidnap, kill or injure for the purpose of extorting money constitute high misdemeanors punishable by up to 30 years imprisonment and/or up to $5,000 in fines. N. J. S. A. 2A:105–4. Under a 1968 statute aimed at loansharking, extortionate collection of principal and/or interest due on a loan is also a high misdemeanor carrying the penalty of up to 30 years in jail and/or a $100,000 fine. (N. J. S. A. 2A:105–5.)

* Similarly, see 18 Purdon's Penna. Stats. Ann. Sec. 4318; and 18 U. S. C. Sec. 186 (Taft-Hartley law) *infra.*

The inadequacy of the extortion statute to deal with the operations of the criminal "labor consultant" was brought to light in the recent presentment of the Union County Grand Jury. The grand jury found that the corporate principals (contractor-employers) were only too willing to make the pay-off to Delmore and DeCavalcante which allowed the non-union job to proceed free of union picketing or other action. One possible solution to this problem is specific legislation aimed at the labor area where the elements of threats or fear are not necessary components of the crime, as in N. J. S. A. 2A:105–1 and 2A:105–2. Perhaps a better solution would be to expand N. J. S. A. 2A:93–7 (bribery) to cover *de facto* agents of a labor organization (or welfare-pension fund) and labor consultants as well as any "duly authorized representative of a labor organization." If specific statutes directed at extortion (with the traditional elements of threats and fear) arising out of employer-labor confrontation appear desirable, the Legislature might consider the following statutes as guides:

(1) *Ill. Stats. Ann., Ch. 38, Sec. 12-6(a)(7)—"Intimidation"*

Anyone who, with the intent to cause another to perform or omit performance of any act, "communicates to another a threat to perform without lawful authority any of the following acts: . . . (7) Bring about or continue a strike, boycott or other collective action," is guilty of an offense punishable by a jail term up to 5 years and/or a fine not in excess of $5,000.

(2) *McKinney's Consol. Laws (Penal), N.Y., Sec. 155.05(6)*

Anyone who compels or induces another to give up property by instilling in the victim the fear that otherwise the offender will "cause a strike, boycott or other collective labor group action injurious to some person's business" (except where the property is for the benefit of that labor group) is guilty of committing larceny by extortion.

(3) *Section 602 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 522—"Extortionate Picketing."*

"(a) It shall be unlawful to carry on picketing on or about the premises of any employer for the pur-

pose of, or as part of any conpiracy or in furtherance of any plan or purpose for, the personal profit or enrichment of any individual (except a bona fide increase in wages or other employee benefits), by taking or obtaining any money or other thing of value from such employer against his will or with his consent. (b) Any person who wilfully violates this section shall be fined not more than $10,000 or imprisoned not more than 20 years, or both."

(4) *Federal Anti-Racketeering (Hobbs) Act, 18 U.S.C. 1951*

Extortion or robbery affecting commerce is punishable by a fine of up to $10,000 and a jail term up to 20 years.*

Should the Legislature choose to enact legislation directed specifically at extortion concerning either the inciting, prevention or cessation of collective labor action, the category of offenders should include any person, not only the representative or agent of a union or welfare or pension fund. Perhaps the requirements of threat and fear should be eliminated, at least where "labor consultants" are involved. Any such new legislation should classify the offense as a high misdemeanor; and, indeed, the offenses set forth in N. J. S. A. 2A:105–1 through 105–3 should be upgraded to such a status.

BRIBERY

As noted above, it is a misdemeanor in this State for one to bribe a "duly appointed representative of a labor organization," or for such person to accept a bribe. (N. J. S. A. 2A:93–7.) This office unequivocally supports the expansion of this category of offenders to include *de facto* agents and purported agents of labor unions and welfare or pension funds, and the so-called "labor consultant."** We recognize that difficulties may arise in drafting legislation which will

* Peter Weber, President and Business Manager of Local 825 of the Operating Engineers union, was recently convicted in the U. S. District Court for the District of New Jersey of extortion under this statute.

** The proposed General Revision of the Criminal Law of Delaware, now before its General Assembly as House of Representative Bill No. 444, goes part way, but not far enough, by extending the crime of bribery of persons who are not "public servants" to include "a duly appointed representative of a labor organization or duly appointed trustee or representative of an employee welfare trust fund." H.—444 Secs. 881, 882.

permit the legitimate consultant and mediator to receive a fee for his services and yet condemn the shakedown payments such as the Union County Grand Jury found were made to Nick Delmore and Sam DeCavalcante. Nevertheless, the effort should be made, perhaps as a part of legislation requiring the licensing of labor consultants and imposing reporting and disclosure requirements upon them.

We also recommend revision of penalties for bribery and corruption in the labor theatre. A violation of N. J. S. A. 2A:93–7, *supra*, is a misdemeanor, as is a violation of N. J. S. A. 2A:93–8 (bribery of a foreman for the purpose of securing employment under him) and 2A:93–4 (bribery of public officials other than judges, magistrates and legislators). These offenses, particularly since they involve persons with a fiduciary responsibility to persons affected by their actions, should be upgraded to the status of high misdemeanors, thus putting them on a par with the statutes condemning bribery of a judge or magistrate (N. J. S. A. 2A:93–1) and a legislator (2A:93–2). Any new legislation should make all bribery in the area of labor action a high misdemeanor.

Under New York law, bribery of a labor official is a specific crime. N. Y. Penal Law, Secs. 180.10 and 180.25. There is also a New York statute entitled *Commercial Bribery* which designates as criminal the conferring or attempting to confer of any benefit upon an employee, agent or fiduciary without the consent of the latter's employer or principal, with the intent to influence the bribee's conduct in relation to his employer's or principal's affairs. N. Y. Penal Law, Secs. 180.00 and 180.05.

The Special Committee of the Michigan State Bar for the Revision of the Criminal Code has, in its final draft for presentation to the Michigan Legislature, adapted the New York Commercial Bribery legislation as its Secs. 4201 and 4205. Commenting on the lack in its draft of specific legislation concerning bribery of union officials, the Committee said:

> "New York includes a series of sections on this subject [New York Revised Penal Law Secs. 180.10–180.30]. Michigan has no equivalent legislation. Sections 4201–4205 are broad enough to include an instance of this

sort, so that the Draft contains no other special legislation." Committee commentary to Secs. 4201–4205.

Although the Michigan Committee may be correct, in a strict, legal sense, this office would recommend the expansion of N. J. S. A. 2A:93–7 in the manner noted above, rather than the inclusion of labor bribery in a general commercial bribery statute.*

Section 302 of the Labor-Management Relations Act (Taft-Hartley Act), entitled *Restriction on Payments to Employee Representatives*, interdicts the payment, delivery or loan by an employer (or one acting on his behalf or in his interest) of "any money or thing of value" to, *inter alia*, "any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization." 29 U.S.C. 186(a)(4). The demand or acceptance of the same by such union officer or employee is likewise illegal. Violation of these provisions of the Taft-Hartley law is punishable by a fine not to exceed $10,000 and/or imprisonment up to one year. 29 U.S.C. 186(d). Under Title 18 U.S.C. 1954, the offer, acceptance or solicitation of fees, kickbacks, gifts, loans, etc. by the officer of an employee benefit plan to influence his "actions, decision or other duties" is a crime punishable by up to 3 years in jail and/or a fine of $10,000. The Legislature may find these statutes of some assistance in drafting any new legislation in this area of bribery in labor affairs.

EMBEZZLEMENT

Chapter 102 of Title 2A, N. J. S. A., sets forth 12 categories of embezzlement, conversion and misappropriation of funds. None of these is specifically directed against embezzlement or conversion of funds in his custody by an officer, agent or employee of a union or welfare or pension fund. Such action would appear to be covered by N. J. S. A. 2A:102–3 (embezzlement by an officer) or 2A:102–5 (embezzlement by an agent, bailee, employee, et al.), both mis-

* The present statute, N. J. S. A. 2A:170-88, making it a disorderly persons offense to corrupt an employee or agent is analagous to the commercial bribery statutes. Neither its scope nor its penalty is sufficient to make this statute a useful tool against organized crime.

demeanors. Misappropriation of union, welfare or pension funds by persons charged with their care and administration is a serious offense which occurs frequently. It cannot be imagined that members of the criminal element who infiltrate the union hierarchy will refrain from embezzling and otherwise converting to their own use the substantial treasuries to which they attain access. This office recommends that the Legislature enact a statute declaring that the embezzlement, conversion or misapplication of any of the assets of a labor organization or welfare or pension fund constitute a high misdemeanor. A guide for drafting such legislation can be found in Section 401(c) of the L-MRDA (29 U.S.C. 501(c)) which states:

> "Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years or both."

CONCLUSION

This office recommends that the New Jersey Legislature consider the enactment of legislation which will prevent members of Organized Crime from infiltrating the hierarchy of labor organizations or welfare and pension funds in this State, and from acting as so-called "labor consultants." A program of licensing, reporting and disclosure seems appropriate. In addition, the present criminal statutes concerning such crimes as extortion, bribery and embezzlement should be reviewed for the purpose of insuring that they are adequate to deal with the activities of these genres that are peculiar to the labor theatre. Penalties for violations of new and existing statutes in this area should be severe, or else the legislation cannot be effective either to remove violators from the scene or to deter further incursions. Finally, and perhaps most important, the Legislature, by way of sufficient appropriations or otherwise, should do what it can to insure that there is available to the state sufficient resources and dedicated manpower to prosecute thoroughly and without exception the criminal offenses in the realm of organized labor which have been discussed herein.

II. GAMBLING, THE MAJOR SOURCE OF ORGANIZED CRIME'S WEALTH

As noted in the preface, a conservative estimate of the annual illicit, untaxed revenue to Organized Crime from gambling approximates $6 billion to $7 billion per year nationally. Other estimates have run as high as $50 billion.* This is Organized Crime's largest source of revenue. The most prevalent and lucrative forms of gambling are lotteries (particularly "numbers"), off-track betting on horse races, other sports betting and dice games, all of which occur extensively in New Jersey. This revenue from gambling finances the even more pernicious activities of Organized Crime, such as loan-sharking, importation and wholesaling of narcotics, and corruption of public officials.

Such a huge business can only be conducted through a sophisticated organizational structure. As the President's Commission on Law Enforcement and Administration of Justice points out:

> "Most large-city gambling is established or controlled by organized crime members through elaborate hierarchies. Money is filtered from the small operator who takes the customer's bets, through persons who pick up money and slips, to second echelon figures in charge of particular districts, and then into one of several main offices. The profits that eventually accrue to organization leaders move through channels so complex that even persons who work in the betting operation do not know or cannot prove the identity of the leader." *The Challenge of Crime in a Free Society,* 189.

To drive Organized Crime from the field of gambling, one must minimize the profits to be made. If Organized Crime's leaders and monied interests cannot enjoy a substantial rate of return on a particular enterprise, they will abandon it, particularly if indictments are being returned and prosecuted vigorously, and punishment is sufficiently

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* *The Challenge of Crime in a Free Society,* 189; Salerno & Tompkins, *The Crime Confederation,* 227-228; R. King, *Gambling and Organized Crime,* 33; Richard M. Nixon, Presidential Message to Congress (April 23, 1969), 1.

severe. Gambling profit has to be high, because much of it must be used to corrupt officials and law enforcement personnel. "Protection" is absolutely essential to any continuing, large gambling operation, and, indeed, to the very existence of organized crime itself. This juxtaposition of the inherent tendency of many people to gamble, with the fact that most gambling is necessarily illegal, has produced "protection" and other corruption fueled by the huge gambling revenues. The question thus becomes, how does society strike at profitable, organized gambling?

Undoubtedly, comprehensive, effective legislation is the necessary foundation for any campaign against crime. It has been stated, accurately I feel, that in considering the enactment of a statutory scheme designed to deal effectively with gambling:

> "The legislator has the choice of (1) penalizing both the promoter and the player, (2) establishing a state monopoly or licensing program, or (3) penalizing only the promoter." 57 Kentucky Law Journal 564, 565 (1969).*

Whether he be designated "the promoter" (*Ibid.*), the "professional"** or one who "advances or profits from unlawful gambling activity,"*** the person who conducts, finances or otherwise promotes illegal gambling is the predator against whom the legislative effort must be directed. This is the person who all too often is a member of Organized Crime. As Rufus King† has stated, "[S]ociety can and *should* intervene at every point where sanctions are necessary to curb the activities of profit-motivated entrepreneurs seeking to exploit the weaknesses of their fellow man." Rufus King, *Gambling and Organized Crime,* 20 (New York, 1969) (Emphasis is the author's.)

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* These avenues are not mutually exclusive, however. As I shall discuss hereafter, the best approach is to employ both the first and second methods simultaneously, thus attacking the problem on two fronts.

** American Bar Association, "Model Anti-Gambling Act (1952)"—a copy of which is annexed to this memorandum.

*** 39 McKinney's New York Laws, Penal, Sec. 225.10; Michigan Revised Criminal Code (Draft) Sec. 6105—copy annexed hereto.

† A member of the Bars of New York, Maryland and the District of Columbia, who has, since serving as Special Legislative Counsel to the Senate (Kefauver) Committee on Organized Crime (1951), been recognized as a leading authority on the gambling activities of organized crime.

Several states have recently undertaken to recodify their criminal laws. I shall review briefly the modern gambling legislation enacted in New York (1965) and that currently under consideration by the legislatures of Michigan and Delaware. I shall discuss the Model Anti-Gambling Act as well. As noted above, copies of the Model Act and the proposed Michigan Legislation (both with comments) are enclosed. My observations will be focused upon the crucial requirement concerning use of this legislation against Organized Crime: does it reach the highly-placed criminal who organizes, runs, finances or otherwise promotes illegal gambling?

THE NEW YORK AND MICHIGAN (PROPOSED) STATUTES.

The Michigan Draft is virtually identical to the recent New York legislation. Each typifies the modern approach by commencing with an extensive definitions section that permits the substantive provisions to be brief yet clear and comprehensive. The thrust of both statutes is to penalize persons who either "advance gambling activity" or "profit from gambling activity."* The Michigan statute has been analyzed as follows:

> "The proposed Michigan statutes penalize two basic kinds of activity: (1) the advancing of unlawful gambling. . . . Advancement would include any type of conduct that would establish, create or aid any form of gambling. Generally "advancing" would include any activity that goes beyond being a player. (2) Profiting from unlawful gambling. Profiting is the receipt of money or other property other than as a player. These two terms encompass any form of exploitive gambling." 57 Kentucky Law Journal 564, 568-569 (1969). See also N.Y. Rev. Comm., Comments to Sec. 225.00, and Mich. Rev. Comm. Comments following Sec. 6106.

These Codes then proscribe "promoting gambling in the first degree" (N.Y. Sec. 225.10; Mich. Draft Sec. 6105) and "the second degree" (N.Y. Sec. 225.05; Mich. Draft Sec. 6106). Both laws penalize a person who "knowingly advances or profits from unlawful gambling activity." *Ibid.*

* 39 McKinney's New York Laws, Penal, Secs. 225.00(4), (5); Mich. Rev. Cr. Code (Draft) Secs. 6101(a), (i). All quotes herein are from the Michigan Draft, annexed *supra*.

The first degree offense (see annexed Michigan Draft for exact language) seeks to punish as a felony* "the cases of large-scale gambling enterprises that are the domain of Organized Crime." Mich. Rev. Comm. Comments following Sec. 6106. The language and statistics employed to create the first degree offense are well calculated to reach such large gambling enterprises. The Michigan Draft (but not the New York statute) also contains a section (6110) punishing, as a Class C felony, conspiracy "to advance or profit from gambling activity," and is designed "to levy appropriate penalties against organized or professional gamblers." Mich. Rev. Comm. Comments to Sec. 6110.

The New York and Michigan Codes next prohibit the "possession of gambling records" concerning bookmaking or illegal lotteries. These offenses are similarly divided into second and first degree offenses, depending upon the volume of records found in the defendant's possession. N.Y. Secs. 225.15, 225.20; Mich. Draft Secs. 6115, 6116. As stated in the New York Comments to Sec. 225.20:

> "This section which is new, raises the crime to felony stature when the records possessed are of a kind that persuasively depict the possessor as a substantial bookmaking, lottery or policy operator."

Violation of the second degree offense is a Class A misdemeanor, of the first degree offense, a Class C felony. Proof that the records found on the defendant are not for use in a bookmaking or lottery enterprise is a defense to prosecution for "possession of gambling records." N.Y. Sec. 225.25; Mich. Draft Sec. 6120. Subsequent sections in both Codes punish the possession of a gambling device as a Class A misdemeanor (N.Y. Sec. 225.30; Mich. Draft Sec. 6125) and

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* A "Class C felony"—carrying a maximum prison term of five years and/or a fine not exceeding $2,500 or (if the court elects) twice the defendant's gain from the crime. Mich. Draft Secs. 1401, 1501. Promoting gambling in the second degree is a "Class A misdemeanor" punishable by one year and/or $1,000, maximums. Mich. Draft Secs. 1415, 1505. Current New Jersey statutes punish all "gambling" promotion, without regard to degree, "by a fine of not less than $1,000 nor more than $5,000, or by imprisonment . . . for not less than 1 year nor more than 5 years, or both." N. J. S. A. 2A:112-3. All illegal offenses in connection with lotteries are "misdemeanors" in New Jersey. N. J. S. A. 2A:121-1 *et seq.* A misdemeanor is punishable under 2A:85-7 "by a fine of not more than $1,000, or by imprisonment for not more than 3 years or both."

establish provisions aiding the proof of a prima facie case (N.Y. Sec. 225.35; Mich. Draft Sec. 6130).*

The New York and Michigan statutes are commendable in several respects. They are comprehensive, clear and well organized. They are appropriately drafted to reach the high-level, professional gambling promoter, if evidence can be obtained which implicates him. The top man who relies on his "cut" from a large lottery or numbers operation, and whose activities thus do not include patent promotion of the enterprise, is expressly covered by these statutes. Arguably, this person is not reached by present New Jersey law (N. J. S. A. 2A:112–3; 2A:121–1, et seq.) other than as an aider, abettor or conspirator. However, there are certain features of the New York and Michigan statutes which I would not recommend for adoption in New Jersey.

As recently noted by the Supreme Court of New Jersey, "New Jersey's comprehensive policy against gambling, except where specifically authorized by the people under our State Constitution . . . has been clear and of long standing."** *State v. Puryear,* 52 N.J. 81, 85 (1968). Any legislative revisions should continue to promote this policy. The New York and proposed Michigan statutes provide, through the definitions of the term "player," that (1) "the citizen who places the bet is not criminal" and (2) "friendly social games are not criminal, and a person does not promote or advance gambling if he merely invites friends in for a game and provides cards or other gambling paraphernalia." Mich. Rev. Comm. Comments following Sec. 6106. Since the second of these exclusions is less radical and is also a suggestion found in the Model Act, I shall not discuss it at present. The first, however, merits comment at this juncture.

The Michigan Commission makes the following comments upon removing criminal liability from the "player":

> "This recognizes the fact that gambling is widespread and that there is in actuality no widespread condemnation of the conduct as such. It is only those who exploit the urge to gamble who are within the coverage of Chapter 61. Eliminating criminal penalties also makes

* Mich. Draft Sec. 6130(2)(b), *supra,* annexed, is a provision not enacted in its New York counterpart.

** Though its efforts in routing organized crime from illegal gambling have not been successful to date.

> it impossible for the bettor ("player" in the Draft language) to claim privilege against self-incrimination if he is called as a witness for the state and should therefore facilitate prosecution." *Ibid.*

It has been similarly stated of the Michigan Draft:

> "More significantly, the exemption of bettors should make their testimony more readily available to prosecutors since the exemption will bar bettor reliance on self-incrimination as a ground for refusing to testify." Israel, *The Process of Penal Law Reform,* 14 Wayne L. Rev. 772, 816 (1968).

Here in New Jersey, the self-incrimination rationale is inapplicable because of the new witness immunity statute. N. J. S. A. 2A:81–17.3. Under that statute, the prosecution will have the option whether to confer immunity on a "player" in exchange for testimony concerning his involvement. This option should be left to the prosecutor, thus allowing him maximum flexibility in building a case against organized gambling. Furthermore, a person who is faced with a possible prosecution often turns out to be a much more cooperative witness than one over whose actions the prosecutor has no form of control; for the former knows that the extent of prosecutorial efforts against him and the sentence which will be imposed upon him may well depend upon how cooperative he is. Therefore, the rationale that removal of potential criminal liability from players will enhance prosecutions because witnesses may not claim the privilege of self-incrimination is not persuasive. By retaining the penalty against the player, the Legislature will provide prosecutors with a useful tool, to be used in combination with the immunity statute, for culling out information about organized gambling.

There is an even more persuasive reason, however, for retaining the criminal penalty against the bettor in illegal, organized gambling operations. New Jersey will soon establish a lottery run by the State.* It is in the interest of the State to encourage participation in that lottery, to the exclusion of illegal gambling, in order to maximize the State's revenue and reduce that of Organized Crime. One selling point of the State lottery, naturally, is that it is legal and,

* See remarks, *infra.*

therefore, no one may be fined or jailed for participating in it. Take away this advantage by allowing the "player" to participate in legal and illegal gambling alike, and you will deal a crippling blow to the State lottery and its objectives.*

For the reasons above, the concept of relieving the player from criminal liability should not be adopted, and any adaptation of the New York or Michigan (proposed) gambling statutes should entail the deletion therefrom of provisions which effectuate that concept. Any new legislation should incorporate present New Jersey law (i.e., N. J. S. A. 2A:112–1, 2A:170–18) penalizing the participant (or "player").

Another shortcoming of the New York and Michigan statutes is that the crimes of promotion of gambling in the first degree (felony) and possession of gambling records in either the first (felony) or second degree (misdemeanor) apply only to "bookmaking" and "a lottery or mutual scheme or enterprise." N.Y. Secs. 225.10, .15, .20; Mich. Draft, Secs. 6105, 6115, 6116. Only the misdemeanor offense of promoting gambling in the second degree applies to any "unlawful gambling activity." The promoter of a large-scale bookmaking operation or numbers racket is a felon, but the backer of a big crap game or card game is not. The person who possesses records of a bookmaking or lottery operation is a criminal, but apparently one who possesses records of the winnings, losses, credit or indebtedness of the player in a floating crap game is not. Statistical distinctions of volume are easier to fix concerning bookmaking and lotteries; and such operations are the most likely to produce records which can be seized. This is why, in all likelihood, the New York and Michigan (proposed) statutes have taken their present form. There are gaps in coverage, however, which this Legislature should fill by making promotion of *any* large-scale gambling operation an aggravated offense, and possession of *any* gambling records either a misdemeanor or aggravated offense depending upon whether an extensive, organized operation is indicated.

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* It could well be argued that New York's decision not to penalize the player of an illegal lottery or other gambling enterprise has contributed to the failure of the New York Lottery (begun on June 1, 1967) to raise the revenues expected of it.

A third criticism of the New York and Michigan gambling legislation is the slight penalty imposed upon the misdemeanor offenses noted above. A Class A misdemeanor carries maximum penalties of one year in jail and/or a $1,000 fine. These are offenses aimed not at players (who are excluded from criminal liability, *supra*) but at "advancers" and "profiteers" of illegal gambling. These meagre penalties serve as no deterrent to such persons. Quite the contrary, they indicate a policy of legislative leniency. Although, by definition, the felony provisions (*supra*) will almost certainly encompass the Organized Crime cases, problems of volume of evidence could arise which would rule out first degree felony prosecutions within the terms of those latter statutes, though a known Organized Crime figure is involved. In short, I would recommend penalties of one to five years in jail for violations of any misdemeanor offenses involving any person engaged in gambling as a business;* and I would further recommend fines in such cases at least equal to (or as much as treble) the proceeds of the particular gambling operation involved, with a minimum of $2,500.**

THE PROPOSED DELAWARE LEGISLATION

The Delaware General Assembly presently has before it House Bill No. 444, which is a proposed revision of the penal laws of that state. Sections 1401 through 1432 constitute a recodification of the gambling laws. Delaware's bill punishes the "player" involved in a lottery (Sec. 1401), a bookmaking operation (Sec. 1403(4)), or a "crap game" (Sec. 1406), and is commendable to that extent. However, its substantive provisions are cumbersome, and could have been better handled by the New York and Michigan format of comprehensive definitions allowing the substantive provisions to be direct and brief. Section 1412 provides a quasi-civil procedure for the Attorney General to invoke in order to revoke the services of a public utility "being used . . . to disseminate information in furtherance of gambling or for gambling purposes." As I will note hereafter, I favor the retention of the present system in New Jersey which

* As per current N. J. S. A. 2A:112-3.

** Only severe penalties such as these will truly affect the large, prosperous gambling entrepreneur.

places such legislation concerning participation by public utilities in chapters separate from that which interdicts substantive gambling offenses. Sections 1421 through 1428 set forth extensive procedures which the Attorney General is to follow (including a court hearing on notice) to effectuate the removal of obstructions to access to premises where gambling is suspected. Similarly, such civil provisions should not be included in the chapter concerning substantive gambling offenses. Moreover, such a cumbersome proceeding could *invite* the use of obstructions to gambling premises, which would afford the operators ample time to dispose of evidence. I would not recommend enactment of such legislation for New Jersey.

THE MODEL ANTI-GAMBLING ACT

The Model Anti-Gambling Act was drafted in 1952 by the American Bar Association Commission on Organized Crime. The National Conference of Commissioners of Uniform State Laws approved it in that same year. Although adopted in only two states (Tennessee and Indiana), it "has influenced statutory revisions to some extent in a few others."* No study of modern gambling legislation would be complete without consideration of this Model Act and the extensive comments written by Mr. Rufus King, then and now one of the foremost authorities on the involvement of Organized Crime in gambling. For this reason, a copy of this Model Act, with comments, has been annexed hereto. Because the Model Act is clear and direct, and the comments comprehensive, I shall limit my observations.

Section 3 of the Model Act punishes the person who engages in "gambling" and, more severely, punishes the person who engages in "professional gambling." A comprehensive definition of "professional gambling" in Section 2(3) assures that the substantive provision (Sec. 3) has sufficient scope to reach the organizer, banker and promoter. An optional subsection of Section 3 would exempt from punishment as players "natural persons" engaging in "any game, wager or transaction which is incidental to a bona fide social relationship . . . and in which no person is participating, directly or indirectly in professional gambling." As noted

* King, *Gambling & Organized Crime* (New York, 1969), 82.

previously, the New York and proposed Michigan legislation similarly exclude social gambling. The pros and cons of granting specific statutory acknowledgment to the sort of gambling in a social context which society at large does not condemn are ably discussed at pages 17 and 18 of the comments to the Model Act,* *infra*. I concur in the decision of the ABA Commission to present such an exclusion from criminal liability as an optional provision; and to this extent commend it, together with the relevant comments, to this Legislature for consideration.

Section 4(5), incorporating the definition of "gambling record" in section 2(5), penalizes anyone who "prints, makes, possesses, stores or transports any gambling record." Thus it is not limited to records of bookmaking and lotteries as in the New York and proposed Michigan legislation. As noted at page 15 of Mr. King's comments: "There seems to be no logical basis for including one type of record and excluding any other." I agree, and, as suggested earlier, would recommend alteration of the New York and Michigan examples (N.Y. Penal Law Secs. 225.15, 225.20; Mich. Draft Secs. 6115, 6116) to include records of any type of gambling operation, with records indicating large enterprises serving as a basis for an aggravated offense.

Sections 4(1–3), 5(2) and 6(3) of the Model Act deal respectively with seizure of gambling devices, notice to public utilities disseminating gambling information, and suspension of licenses held by premises where gambling takes place. As noted briefly hereafter, these issues are all covered under New Jersey statutes and regulations in chapters separate from substantive gambling legislation. The New Jersey format is preferable. Section 5(1) prohibits the transmittal or reception of gambling information by telephone, telegraph or other means. N. J. S. A. 2A:146–3 indicates the better approach which interdicts such transmittal of "any message" which promotes "any unlawful pursuit" or "practice declared illegal." This New Jersey statute would, of course, cover gambling. This Legislature should consider prohibiting the receipt as well as the transmittal of such information, however. A simple modification of 2A:146–3 could accomplish this result.

* See also Wayne R. Lafave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 Texas L. Rev. 434, 436-438 (1967).

Section 6(4) of the Model Act punishes as a misdemeanor the maintenance of gambling premises, but in addition "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." Model Act Comments, p. 24, *infra*. The Model Act also includes in the felony category premises armed with "any electrical or mechanical alarm or warning system." Model Act Sec. 6(4). Since the promoters of organized gambling are prone to conduct their operations on premises well locked, camouflaged and armed with warning systems, such a provision as the second part of Section 6(4) could be a useful tool in prosecuting such persons and securing the imposition of substantial punishment upon them.

RELATED LEGISLATION

As the discussion of the Model Anti-Gambling Act and the proposed Delaware legislation indicates, statutes concerning licensing, utilities and seizure of property can play a role in the deterrence and prosecution of illegal gambling.* Since these areas of the law involve proceedings which are basically civil or administrative, I favor retention of the pattern presently in effect in New Jersey: that is placing such legislation in titles and chapters of the Revised Statutes other than that concerned with gambling as a criminal offense. The approach of the Model Act, which is to consolidate provisions for license revocation, orders to utilities, and seizure of property with the criminal gambling statutes, is less appropriate.

The present New Jersey legislation and practice concerning these above related areas is as follows:

(1) N. J. S. A. 2A:152–6 provides for the destruction and other disposal of any furniture or gambling devices "seized or captured by the police." The county prosecutor is directed to so dispose of these goods "and it shall be unlawful to return them to the person or persons owning the same." *Ibid.* N. J. S. A. 2A:152–7, et seq., declares that any money seized "in connection with any arrest for violation of or

* See also Sec. 6140 of the proposed Michigan Revision, *infra*, concerning forfeiture of gambling property. This statute does not appear in the New York revision of the gambling laws.

conspiracy to violate any gambling law of this state" is "contraband." Disposition of such money, which may result in official forfeiture, is treated in N. J. S. A. 2A:152-8 through 2A:152–9.5.

(2) Concerning licensing, the Division of Alcoholic Beverage Control of the Department of Law and Public Safety, acting pursuant to N. J. S. A. 33:1–31(g) and the Division's Regulation No. 20 (Rules 6 and 7), may revoke or suspend the alcoholic beverage license of any licensee who engages in or permits gambling upon the licensed premises.

(3) Brendan T. Byrne, President of the Board of Public Utility Commissioners, has advised, through the Board's Counsel, William Gural, that state prosecuting and police authorities generally receive the cooperation of telephone, telegraph and other communications companies in discontinuing services to premises where gambling is being conducted.

Once such a communications company has knowledge (from the police, prosecutor or any other source) that its facilities are being used to "further or promote the interest of any unlawful pursuit" (N. J. S. A. 2A:146–3), it runs the risk of being chargeable with a violation of that statute if it continues to provide service. See also *State v. Western Union Tel. Co.*, 12 *N. J.* 468 (1953).

The statutory and regulatory bases in these areas appear adequate to serve as supplements to the criminal gambling statutes. I have no recommendations for legislative amendments or additions to these related laws other than that 2A:146–3 might well be expanded to cover expressly a person who receives as well as transmits any message in violation thereof.*

I have discussed the modern gambling statutes at some length in order to stress the need which prosecutors have for the best possible statutory tools, and to suggest appropriate forms for the same. However, I must acknowledge that good criminal legislation, alone, is of little value. As

*N. J. S. A. 2A:121-4 declares that any person who "receives from any person by letter, telephone, telegraph or any other means of communication, a list of numbers or drawing of any lottery" is guilty of a misdemeanor. There is no such direct statutory prohibition of receipt of information in connection with other gambling enterprises, however.

Messrs. Bauman and King observed in *A Critical Analysis of the Gambling Laws,* ABA Commission on Organized Crime and Law Enforcement (New York, 1952), 74-75:

> "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."*

THE NEW JERSEY LOTTERY

As previously noted, an attack upon the attractiveness of illegal gambling should come from more than one direction, if possible. The citizens of New Jersey, by directing that a State Lottery be established, have thus afforded the State a golden opportunity to go into direct competition with the lotteries run by organized crime, thereby substantially reducing profits from these illegal enterprises.

To accomplish this desired result (and the equally important one of raising substantial revenues for the State) the State must present a lottery which is as accessible and attractive as the prevalent illegal "numbers" operation. There should be frequent pay-offs to winners, perhaps daily. These pay-offs should be at ratios exceeding the 600 to 1 figure which is tops for numbers games.** The State should be able to do this, since it need not pay for the corrupting of public officials and police, a necessary expense of the illegal enterprise. Computerization of operations could minimize record-keeping and other administrative costs.

The price of participation is an important consideration. Illegal numbers operators will often take bets in amounts as small as five cents. If the State Lottery is to attract the person who customarily plays the "numbers" it must

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* Quoted in Comments to Model Anti-Gambling Act, *infra.*, at p. 4. See also remarks of Ralph M. Caprio, past president of the Essex County Grand Jury Ass'n., *Newark Star Ledger,* December 17, 1969.

** *New York Times,* December 17, 1969; Salerno & Tompkins, *The Crime Confederation,* 356-357. The latter authors observe that "no enterprising operator has managed to take over the market by offering a higher payoff than any other banker in the area." *Ibid.*

permit participation at a low price. In commenting upon the shortcomings of the New York Lottery, Mr. Salerno has stated: "When the lottery was passed, one dollar was the lowest denomination ticket authorized. And the word from the numbers operators is that the state lottery is not cutting into business at all." *The Crime Confederation,* 361. Although originally opposed to the lottery, Governor Rockefeller indicated in January, 1969, that "so long as it had been voted into law, he would now approve of a reduction of the price to twenty-five cents, so as to compete with illegal betting operations." *Ibid.*

I was pleased to observe that the State Lottery Commission has retained Mathematica, Inc., of Princeton, a research and consulting firm, to develop a practical system for the sale of the State Lottery's tickets. *New York Times,* December 23, 1969. The problem of reaching persons who are inclined to gamble is a difficult one, not solved merely by permitting play for small amounts. Mr. Salerno has expressed the following opinion concerning the manner of sale of tickets in a state-run lottery:

> "Government operation of the numbers game could, and should, employ people from the same neighborhoods who work in them now. It is not necessary to pass a civil service examination to sell numbers, and such people would have, many of them for the first time, the dignity and self-respect that comes from honest employment, and the security that comes with honest employee fringe benefits. They would also have a closer affinity with government and with other elements of legitimate society than they have ever enjoyed." *The Crime Confederation,* 358.

I don't feel that I, or anyone, should endorse this idea without thorough scrutiny of the premises and conclusions which Mr. Salerno proffers. This idea should not be rejected, however, but should be carefully considered by the State Lottery Commission and this Legislature.*

* Mr. Salerno has also expressed other ideas such as plowing the state's income from its lottery back into the poorer communities where play is expected to be heavy, via educational and job training benefits, investments and a liberal loan policy. *Ibid.* Such use of lottery proceeds should be considered and if adopted should be widely publicized so that these people will know that these funds will be reinvested by the State in their community.

New Jersey has the opportunity to profit from the knowledge of some of the shortcomings of the New York lottery and the New Hampshire Sweepstakes, which have been accurately characterized by Mr. King as being too "pristine." *Gambling & Organized Crime,* 162. Do not be reluctant to allow the New Jersey lottery to serve as a laboratory experiment in taking the "action" away from organized crime. The State has everything to gain (including revenue) and little to lose in undertaking such a venturesome experiment.*

CONCLUSION

I recommend to this Legislature consideration, adoption, adaptation, and in certain instances rejection of the modern gambling legislation such as appears in the New York Penal Code (Sections 225.00 et seq.), the Michigan Draft proposals, the pending Delaware bill (H-444) and the Model Anti-Gambling Act, in the particulars noted above in this chapter. I further recommend that the State Lottery Commission and this Legislature adopt a lottery designed to capture the dollar (or quarter) which is currently bet with the agents of Organized Crime. By taking such action on both fronts, this Legislature will have properly played its part in the effort to strike a crippling blow at illegal organized gambling in our State.

* It is noted with favor in the recent press that the entire lottery question has been submitted for review by the Criminal Division of the Justice Department.

III. THE EXTORTIONATE AND USURIOUS EXTENSION OF CREDIT (LOANSHARKING)

The following remarks from the 1967 report of the President's Commission on Law Enforcement and the Administration of Justice summarize succinctly the glaring problem presented by loansharking as operated by Organized Crime:

> "In the view of most law enforcement officials loan sharking, the lending of money at higher rates than the legally prescribed limit, is the second largest source of revenue for Organized Crime. Gambling profits provide the initial capital for loan-shark operations.
>
> "No comprehensive analysis has ever been made of what kinds of customers loan sharks have, or of how much or how often each kind borrows. Enforcement officials and other investigators do have some information. Gamblers borrow to pay gambling losses; narcotics users borrow to purchase heroin. Some small businessmen borrow from loan sharks when legitimate credit channels are closed. The same men who take bets from employees in mass employment industries also serve at times as loan sharks, whose money enables the employees to pay off their gambling debts or meet household needs.
>
> "Interest rates vary from 1 to 150 percent a week, according to the relationship between the lender and borrower, the intended use of the money, the size of the loan, and the repayment potential. The classic '6-for-5' loan, 20 percent a week, is common with small borrowers. Payments may be due by a certain hour on a certain day and even a few minutes' default may result in a rise in interest rates. The lender is more interested in perpetuating interest payments than collecting principal; and force, or threats of force of the most brutal kind, are used to effect interest collection, eliminate protest when interest rates are raised, and prevent the beleaguered borrower from reporting the activity to enforcement officials. No reliable estimates exist of the gross revenue from organized loan sharking; but profit margins are higher than for gambling operations, and many officials classify the business in the multibillion-dollar range." *The Challenge of Crime in a Free Society,* p. 189.

For a similar discussion punctuated by some specific examples, see Ralph Salerno and John S. Tompkins, *The Crime Confederation*, 228–232 (New York, 1969).

As I noted in my prefatory remarks, this Legislature has recently enacted statutes aimed at curbing loansharking. For example, (a) N. J. S. A. 2A:105–5, which was enacted in 1968, provides that any person who employs extortionate means "with intent to obtain the payment or repayment of the principal of any loan or any part thereof or interest on said loan or any part thereof from any other person . . . is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 30 years or by a fine of not more than $100,000 or both." (b) Chapter 119A of Title 2A (also enacted in 1968) is directed at the placement of a "shylocked" loan. It provides that a lender who charges more than 50% interest per annum on a "loan or forebearance of any money or other property" is guilty of a misdemeanor punishable by a fine of up to $5,000 and/or a maximum prison term of 5 years (N. J. S. A. 2A:119A–1). "Any person who engages in the business of making" such loans or forebearances is guilty of a high misdemeanor punishable by as much as a $10,000 fine and/or 25 years imprisonment (N. J. S. A. 2A:119A–3). The extortionate loan statute, which complements these two sections concerned basically with usury, is 2A:119A–2 which reads as follows:

> "Any person who knowingly participates in any way in the use of actual or threatened force, violence, or fear in connection with a loan or forebearance prohibited by section 1 of this act, or who conspires so to do, shall be guilty of a high misdemeanor and shall be punished by a fine of not more than $10,000.00, or by imprisonment for not more than 25 years, or both."

These statutes represent a conscientious effort on the part of the legislature to deal with the problem of loansharking. However, because they involve the intermingling of usury and extortion provisions without full appreciation of the fact that these are distinct subjects, they are subject to criticism in three important particulars.

(1) As noted above, 2A:119A–1 *et seq.* are basically designed to punish the person engaged in making usurious

loans, which are defined as loans bearing interest at a rate of more than 50% per annum. Although in fact this limitation would result in the interdiction of nearly all of the loans granted by Organized Crime's shylocks,* it does present a blueprint for a 49% "legal" loan, which was hardly the Legislature's intent.** On February 17, 1969, Assembly Bill No. 537 was introduced. This bill is directed to the loan made "at a rate exceeding the maximum rate permitted by law and less than a rate exceeding 50% per annum." This is an effort to solve the dilemma of the 49% loan. As will be indicated hereafter, this approach does not provide the entire answer.

(2) 2A:105–5, *supra*, declares unlawful the use of extortion to collect the principal or interest due upon "any loan," regardless of the interest rate or other terms. By a strict, careful reading of the statute, however, it is inapplicable to events such as threats or injury which might occur when the loan is placed rather than when the shylock seeks "to obtain the payment or repayment." *Ibid.* Thus a loan could be contracted under extortionate circumstances; however, if payment were later made without the need for further threat or injury, 2A:105–5 would not have been violated. Furthermore, if the interest rate were less than 50% per annum, 2A:119A–2, *supra*, would not apply, though it is broad enough to cover loans contracted under extortionate circumstances initially. There is thus a gap in the legislative coverage.

(3) These recent statutes (2A:105–5 and 2A:119A–1 *et seq.*) are not of sufficient breadth and scope to cover all of the transactions and factual contexts which may arise between a loanshark and his victim. 2A:105–5 applies only to a "loan," and 2A:119A–1 *et seq.* only to "the loan or forbearance of any money or other property." Thus, these statutes cover only loans, perhaps due to the assumption that a "loanshark" would be involved only in such transactions.*** However, extortionate means of placement and collection

* See Commission Report, *supra*.

** See veto message of Governor Hughes concerning this legislation (then Senate Bill No. 729), dated September 10, 1968. This bill was passed over the Governor's veto.

*** The term "forbearance" adds little if anything to the scope of N. J. S. A. 2A:119A-1 *et seq.* *Black's Law Dicitionary* (4th ed. 1951); *Webster's New Collegiate Dictionary* (2d ed. 1951).

of funds advanced can result from a joint venture, partnership "agreement," bailment, brokerage transaction, stock subscription or any other financial arrangement. As the statutes presently read, proof of a situation other than a "loan" would be a defense to prosecution thereunder.

Moreover, the scope of extortionate conduct under these statutes is either too narrow or unclear. The only person who can be convicted under 2A:105–5 is one who "injures or causes to be injured . . . or threatens to steal or forcibly take away . . . or threatens to kill or do bodily injury to" his victim. 2A:119A–2 applies to "any person who knowingly participates in any way in the use of actual or threatened force, violence or fear." 2A:105–5 is certainly of narrow scope, applying only to actions directed at the body of the victim. 2A:119A–2 purports to have a broader impact, but is at best unclear as to whether the Legislature intended it to cover actions directed other than to the victim's person.

SUGGESTED SOLUTIONS:

As previously stated, the inadequacies of the present statutory pattern stem from the inappropriate mixture of statutes aimed at extortion and usury. These subjects should be severed and treated in separate chapters.

One chapter should deal with the crime of usurious loans. Extortion, either in the inception or collection of a usurious loan, should not be an element of all or any of the violations of the usury law. Such a usury law could be achieved through the combination of Chapter 119A of Title 2A, N. J. S. A., and Assembly Bill No. 537 (2/17/69) without including either 2A:119A–2 or section 2 of the Bill (the extortion provisions).

A second chapter should deal with advances made or collected under extortionate circumstances. Such a statute would not be a usury law because it would not be limited to loans, and the rate of interest might be evidentiary, but not a necessary element of the crime. See *2 U.S. Cong. & Admin. News*, (1968) 2027, 2029. Title II of the federal Consumer Credit Protection Act of 1968 (18 U.S.C., Secs. 891 *et seq.*) provides a good model of comprehensive legislation directed at "extortionate credit transactions" of any conceivable

type. Similar legislation at the state level should be implemented in order that an effective attack against shylocking from both federal and state quarters will be a reality. A copy of this federal legislation is annexed.*

The value of this new federal law lies in its wide scope. Section 892 states that "Whoever makes any extortionate extension of credit or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both." Section 893 similarly punishes the person who bankrolls such extortionate extensions of credit actually made by others. Section 894 provides the same punishment to "Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means (1) to collect or attempt to collect any extension of credit or (2) to punish any person for the nonrepayment thereof." Thus, the three significant incidents which may occur in connection with an extortionate extension of credit are covered. The crucial terms: "extortionate extension of credit" and "extortionate means" are defined in such a way as to leave no doubt that their scope is extensive:

> "(1) To extend credit means to make or renew any *loan,* or to enter into any agreement, tacit or express, whereby the repayment of satisfaction of any *debt* or *claim,* whether acknowledged or disputed, valid or invalid, and *however arising,* may or will be deferred." 18 U.S.C. Sec. 891(1) (Emphasis added)
>
> "(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. Sec. 891(6).
>
> "(7) An extortionate means is any means which involves the use or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. Sec. 891(7).

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* Lest the Legislature have any thoughts that Congress intended to preempt the field of law with respect to extortionate credit transactions, its particular attention is drawn to section 896 (18 U. S. C.), which expressly states the contrary and sanctions State legislation and administrative action in this area.

The federal act thus encompasses virtually any financial arrangement which the mind could conceive where an advancement under extortionate conditions might arise. It also interdicts all extortionate acts, whether directed to the "person, reputation or property" of the victim or any other person.* Such a broad scope is essential to any anti-loansharking statute.

CONCLUSION

By way of summary, the Legislature, by its enactments in 1968, has shown its awareness of the threat of organized loansharking in New Jersey. However, this legislation does contain some inadequacies in organization and scope (as described above) which should be remedied. Severance of usury and extortion laws, coupled with the enactment of comprehensive legislation similar to the federal Extortionate Credit Transactions statute (18 U.S.C., Secs. 891 *et seq.*) in the extortion area, would provide that remedy.

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* For a similar federal statute where threats to property interest are condemned, see 18 U. S. C., Sec. 1951 (the "Hobbs Act").

IV. INFILTRATION AND CONTROL OF LEGITIMATE BUSINESS BY CRIMINAL ELEMENTS

The purpose of this chapter is to suggest certain legislative approaches which might be considered in an effort to prevent criminal elements from infiltrating and controlling "legitimate" businesses.

It is now commonly recognized that the ownership and control of many businesses is falling into the hands of Organized Crime and that such businesses are often characterized by price fixing, market allocation, concerted refusals to deal, and efforts to monopolize. Attorney General Mitchell has recognized these anti-competitive characteristics of criminal control of businesses and has stated the following with respect thereto: ". . . in its legitimate business enterprises, Organized Crime frequently demands higher prices for its goods and services than is generally offered on the market place, and provides a lower quality of products. Because of its internal structure, there is little doubt that markets are divided among gangsters, and that prices are fixed. In addition, the close internal structure of Organized Crime makes it quite clear that in almost every legitimate enterprise owned by an organization, a gangster fits in some way into the overall crime conspiracy."

In order to curb these anti-competitive activities of crime-controlled businesses, the Legislature should consider passage of state anti-trust laws similar to the Sherman and Clayton Acts. The language of state anti-trust laws should track that of the federal statutes as closely as possible so that courts may be encouraged to draw upon federal case law as precedent. Pertinent provisions of the foregoing federal statutes which should be considered include Sections 1, 2, 13, 14 and 18 of Title 15, United States Code.

In addition to its use as a means of curbing the anti-competitive activities of crime-controlled businesses, the passage of an effective anti-trust law would serve the following purposes:

(1) To investigate businesses where suspected mob infiltration is believed to exist.

(2) To attack the property interests of Organized Crime.*

The majority of states have statutes prohibiting contracts, combinations and conspiracies in restraint of trade; and several states expressly prohibit monopolies. An example of such legislation is the comprehensive Hawaii statute, a copy of which is annexed. To date, New Jersey has no such laws, although several have been proposed.** I agree with Assemblyman Dickey that now is the time for New Jersey to adopt anti-trust legislation. See *Newark Star Ledger,* December 17, 1969. State anti-trust statutes have in most instances been held valid. For instance, a New York court has held that

> "the only discernible limits upon state action affecting interstate commerce, where similar and consistent federal legislation exists, are: (1) That some local interest be involved and; (2) That no federal agency has acted with respect to the particular matter being considered by the state agency." *Leader Theatre Corp.* v. *Randforce Amusement Corp.,* 58 N.Y.S. 2nd 304, 308 (Sup. Ct. N.Y. Cnty. 1948).

To be effective, anti-trust legislation must include provisions permitting the Attorney General to compel testimony of individuals with information or knowledge of possible violations of the anti-trust laws. Provisions such as this would be an excellent means of investigating industries where indications of infiltrations by Organized Crime exist. I suggest the enactment of a provision similar to Section 28 of the Tentative Draft of the Uniform State Antitrust Act, which provides that no person is excused from attending or testifying or producing documents in any proceeding or investigation brought by the Attorney General, but grants immunity from prosecution for any person so testifying or producing documents.***

Another approach which might be considered for the use in combating the infiltration of "legitimate" business by

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* See also recommendations for establishment of the State Lottery, *supra.*

** See, A-172 and A-230 (1969 Session).

*** See Section 21 of the annexed Hawaii statute. New Jersey's new immunity statute (N. J. S. A. 2A:81-17.3) would be inapplicable to such an investigation by the Attorney General since it applies only to "any criminal proceeding before a court or grand jury."

Organized Crime is by the enactment of laws similar to those existing in Florida which attack this infiltration directly. Sections 932.58-932.60 of the Florida Statutes provide as follows:

"932.58 Forfeiture of charter and revocation of permit.—The attorney general is authorized to institute civil proceedings in the circuit court to forfeit the charter of a corporation organized under the laws of this state or to revoke the permit authorizing a foreign corporation to conduct businesses in this state, when:

"(a) Any of the corporation officers or any other person controlling the management or operation of such corporation, with the knowledge of the president and a majority of the board of directors or under such circumstances wherein the president and a majority of the directors should have knoweldge, is a person or persons engaged in activities such as organized violent revolutionary or unlawful activity aimed at the overthrow of the Government of the State of Florida or any of its political subdivisions, institutions or agencies, organized homosexuality, organized crimes against nature, organized prostitution, organized gambling, organized narcotics, organized extortion or organized embezzlement or who is connected directly or indirectly with organizations, syndicates or criminal societies engaging in such; or

"(b) A director, officer, employee, agent or stockholder acting for, through or on behalf of such corporation has, in conducting the corporation's affairs, purposely engaged in a persistent course of violent revolutionary or unlawful activity aimed at the overthrow of the Government of the state of Florida or any of its political subdivisions, institutions or agencies, homosexuality, crimes against nature, intimidation and coercion, bribery, prostitution, gambling, extortion, embezzlement, unlawful sale of narcotics or other such illegal conduct, with the knowledge of the president and majority of the board of directors or under such circumstances wherein the president and a majority of the directors should have knowledge, with the intent to compel or induce other persons, firms or corporations to deal with such corporation or engage in any such illegal conduct, and

"(c) For the prevention of future illegal conduct of the same character, the public interest requires the

charter of the corporation to be forfeited and the corporation to be dissolved or the permit to be revoked.

"932.59 Enjoining operation of a business. The attorney general is authorized to institute civil proceedings in the circuit court to enjoin the operation of any business other than a corporation, including a partnership, joint venture or sole proprietorship, when:

"(a) Any person in control of any such business, who may be a partner in a partnership, a participant in a joint venture, the owner of a sole proprietorship, an employee or agent of any such business, or a person who, in fact, exercises control over the operations of any such business, has, in conducting its business affairs, purposely engaged in a persistent course of violent revolutionary or unlawful activity aimed at the overthrow of the Government of the state of Florida or any of its political subdivisions, institutions or agencies, homosexuality, crimes against nature, intimidation, coercion, bribery, prostitution, gambling, extortion, embezzlement, unlawful sale of narcotics or other such illegal conduct with the intent to compel or induce other persons, firms or corporations to deal with such business or engage in any such illegal conduct, and

"(b) That for the prevention of future illegal conduct of the same character, the public interest requires the operation of the business to be enjoined."

Assemblyman-Elect Martin E. Kravarik has prefiled a bill (A-91) for consideration by this Legislature, which is basically identical to the Florida statute (with the exception of the wise omission of references to homosexuality and crimes against nature). He has also prefiled A-92, which would apply these provisions to "banks, financial institutions and insurance companies."

While such statutes have a laudatory purpose, they may well be struck down by the courts for failure to define that which they seek to attack. For instance, there is no definition of such terms in sub-section 932.58(a) as "organized" or "connected."

We have inquired of the office of Earl Faircloth, Attorney General of the State of Florida, through Assistant Attorneys General George R. Georgieff and Arden Siegendorf, as to what action has been taken by his office pursuant to the

new Florida legislation. They have advised that twenty-one suits have been filed in state courts there, that two of them have been dismissed due to rectification of the corporation's association with Organized Crime and that a third has been dismissed without prejudice "upon a technicality."* In at least one matter (*State Ex rel Earl Faircloth v. Aztec Motel, Inc., et al.,* Cir. Ct., Dade County, Docket #69-17423), the trial court, per Judge John Kehoe, has denied the defendants' motion to dismiss the complaint on constitutional grounds. A copy of the memorandum of law filed on behalf of the State of Florida concerning that motion is annexed hereto, and I refer you to it for a thorough analysis of the constitutional issues.** I strongly recommend, however, that any New Jersey counterpart of the Florida legislation contain a section of definitions as clear and precise as possible. Such a format would be consistent with that employed in modern statutory drafting, and would serve here to safeguard against constitutional attacks based upon alleged vagueness.

As noted previously, Mr. Kravarik's bill, A-92, would establish "Florida type" legislation against banks, financial institutions and insurance companies. The Legislature might also consider other types of legislation directed at specific industries. For instance, the California Insurance Code includes a provision permitting the commissioner to decline to grant, or to suspend or revoke, a certificate of authority to do business "If any officer or director of such holder has been convicted on, or pleaded guilty or nolo contendere to, an indictment or information in any jurisdiction charging a felony for theft, larceny, mail fraud, or violation of any corporate securities statute or any insurance statute." 42 Cal. Code 704.5. See also N. J. S. A. 17:17–10, which permits New Jersey's Commissioner of Banking and

* This latter suit is to be re-filed soon.

** Defendants to one of the Florida state court actions have commenced a constitutional attack upon these statutes via a collateral federal proceeding. In the case of *Sam Green et al.* v. *Faircloth,* S. D. Fla. Docket #69-1306 Civ. C. A., these defendants have moved before federal Judge Clyde Atkins for an order conveying a request to Chief Judge Brown of the United States Court of Appeals for the Fifth Circuit that the latter empanel a three-judge federal court to determine the constitutionality of this Florida legislation, pursuant to 28 U. S. C. Sec. 2281. Judge Atkins has conveyed the request sought for; however, the three-judge court has not yet been empaneled. Proceedings in the state case against Sam Green, et al., have been stayed upon the consent of the State of Florida, therefore no injunction against the prosecution of that case was entered by the federal court.

Insurance to "refuse to issue a certificate of authority if he finds that any of the company's directors or officers has been convicted of a crime involving fraud, dishonesty, or like moral turpitude or that said persons are not persons of good character and integrity."

As with legislation designed to exclude criminals from the labor movement, *supra,* this type of statute should be of sufficient scope to accomplish its purpose. The designated crimes should be extensive, including all types which reasonably relate to the fitness of a person to be associated with the particular industry. The persons covered should include not only officers and directors but agents, employees, substantial stockholders (perhaps 10% holders) and persons who in fact exercise significant influence over the company's operation. The issuing authority's power should include those of suspension and revocation of certificates previously granted as well as that of initial refusal. Industries such as banking and insurance where the funds of others are directly entrusted to the company, and where the State thus has a clear interest, particularly lend themselves to legislation directly excluding convicted criminals.

In a related area, the Legislature might consider broadening the extortion laws to cover situations where Organized Crime forces legitimate businessmen to buy the goods and use the services of crime-controlled businesses by the use of threats and violence. Organized Crime must often resort to threats or violence in order to sell its goods and services because they are offered at prices higher than those generally prevailing in the market place. If these practices are outlawed, the risk in attempting to market such goods and services would tend to discourage mob investment in "legitimate" businesses. To effect this, the Legislature might consider amending or supplementing N. J. S. A. 2A:105–4.

CONCLUSION

To date, little has been done on either the State or Federal levels to attack the infiltration of "legitimate" businesses by criminal elements. The way is open, therefore, for thoughtful experimentation in this area through, *inter alia,* the passage of such legislation as that reviewed above.

V. THE GARBAGE INDUSTRY

The New Jersey State Commission of Investigation, in a report to Governor Hughes and the Legislature, dated October 7, 1969, indicated that organized criminal elements are moving into the garbage collection and disposal industry in New Jersey. Our own investigations confirm this.*

The major tools of this movement are predicated upon Organized Crime's ability to control bidding on garbage contracts, its control of prime dumping sites, and its working relationship with certain union leaders.

In April, 1969, Assembly Bill Number 919 [A-126, 1970] was introduced in the Legislature. Under the provisions of this bill, the garbage industry would essentially become a public trust and be regulated by the Public Utilities Commission.

Collusive bidding and the other methods of organized criminal encroachment into the garbage industry would be severely limited by proper administration of A-126 (1970), and by passage of other legislation that would place the health aspects of garbage collection and disposal under the regulation of the State Department of Health. I favor such legislation.

I also believe that additional legislation is advisable, directed at enabling municipalities to operate their own collection facilities, thereby lessening vulnerability to collusive pressure and price rigged increases in contracts. This requires that the state make available public dumping sites in strategic areas of New Jersey. These sites could be used by municipalities, with the major cost of maintenance being passed onto the taxpayers of the municipalities. It should be noted that the cost to the taxpayers under such an arrangement could be significantly lower than present rates.

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* Note also recent hearings conducted by New York's State Investigation Commission into Organized Crime's ties with the garbage disposal business in Yonkers, New York (*New York Times*, December 19, 1969).

At present, any town that desires to do its own garbage collection is usually precluded by the general unavailability of adequate, reasonably priced, strategically located garbage dumps.

Should the state fail to approve A-126 (1970) this year, and expand governmental concern for the abuses presently occurring in the garbage industry, organized criminal elements will become an even greater factor in this industry in every county of the State.

VI. STATE NARCOTICS LEGISLATION

The members of Organized Crime who have vast sums of cash available to them often employ this money power to conduct the large importation and wholesale distribution of narcotic drugs. As noted by the President's Commission of 1967: "The large amounts of cash and international connections necessary for large, long-term heroin supplies can be provided only by Organized Crime." *The Challenge of Crime in a Free Society,* 189.

Our recent inquiry to Phillip Wilens, Deputy Chief of the Narcotics & Dangerous Drugs Section of the Criminal Division, United State Department of Justice, has confirmed Attorney General John N. Mitchell's statement that a proposed model state law for the control of dangerous drugs will soon be submitted to each state governor. Mr. Wilens advised that this legislation is being prepared in conferences between federal and state officials; that the final draft is currently in process; and that it will be released in early 1970. Because this model will constitute a comprehensive statutory treatment of the drug problem, I am deferring to it and am not offering any legislative suggestion on narcotics at this time.

New Jersey State Library

VII. ROBBERY, THEFT, FRAUDS AND CHEATS, EMBEZZLEMENT, EXTORTION AND BRIBERY

In my recommendations concerning suggested labor legislation, I have discussed revisions in the laws relating to extortion, bribery and embezzlement which are needed to combat abuses in the labor theatre. My comments on loansharking embody suggested legislative changes in that area which track the federal Extortionate Credit Transactions legislation. 18 U.S.C., Secs. 891, *et seq.* Additionally, my comments concerning criminal infiltration of "legitimate" businesses include the suggestion that N. J. S. A. 2A:105–4 be amended or supplemented to interdict the "strong-arm" business practices characteristic of Organized Crime.

Aside from these areas, however, and after a careful review of the pertinent sections of Title 2A, N. J. S. A., it seems clear that the general statutory laws of this State concerning the crimes of robbery, theft, frauds and cheats, embezzlement, extortion and bribery are substantially in line with the laws of other jurisdictions, as to both the scope of criminal acts covered and the penalties imposed. Therefore, I make no recommendation for substantive statutory changes in these areas other than those previously made concerning labor, business and loansharking legislation.

As noted in my prefatory remarks, however, I fully endorse the objectives of the Criminal Law Revision Commission, one of which is to recodify New Jersey's criminal law in its entirety. Rewording, reorganization and reindexing of even those laws which have adequate substance are very much needed.

VIII. THE REORGANIZATION OF THE PROSECUTIONAL SYSTEM OF THE STATE OF NEW JERSEY

I agree with the position taken by the New Jeresy Joint Legislative Committee to Study Crime and Criminal Justice, Governor-elect Cahill, and those members of the 1969 Legislature who have introduced such bills as S-649, S-650, A-463 and A-801: it is time to reorganize and alter the prosecutional system in New Jersey. Such changes are particularly needed to enhance the prosecution by state authorities of offenses committed by the higher-echelon members of Organized Crime. These cases are invariably complex, require many man hours of investigation, and demand of a prosecutor intense, thorough preparation.

Much has been said concerning increased participation by the Attorney General, or a State Division of Criminal Justice, in the prosecution of crime in this State. The question of whether or not County Prosecutors and Assistant Prosecutors should be required to relinquish completely their private law practices has also been discussed actively by members of the executive, legislative and judicial branches of New Jersey government. I shall relate my observations and suggestions on these issues to the general theme of my presentation: what new legislation can best equip the State of New Jersey to combat Organized Crime?*

Division of Criminal Justice:

I recommend legislation establishing within the Department of Law and Public Safety, and subject to the supervision of the Attorney General, a Division of Criminal Justice ("the Division") (or Division of Prosecution as described by Governor-elect Cahill in his pre-election *Position Paper: The Prevention of Crime—The Enforcement of Law*). Supervision of the prosecution of all state criminal cases and of the offices of the County Prosecutor would be lodged in this Division. It should be headed by an Assistant

*I thank Manuel Carballo, counsel to Governor Hughes, and Assistant Attorney General Donald M. Altman for supplying this office with legislative materials and their observations on the present subject.

Attorney General, and staffed by Deputy Attorneys General and its own investigatory personnel (perhaps obtained by assignment from the New Jersey State Police).*

A Division within the Department of Law and Public Safety is preferable to a separate Department of Criminal Justice with cabinet rank, for several reasons. The Attorney General should remain the primary legal official of the State, directing the State's efforts in all aspects of law and public safety. Creation of a Department to which there would be delegated jurisdiction over all aspects of criminal prosecutions would remove these matters from the supervision of the Attorney General. Such a severance would invite problems of reassignment, coordination of operations and added expense that should be avoided. The Divisional arrangement should minimize such administrative difficulties, thus insuring the efficient, organized law enforcement and prosecution so indispensable to combat criminal elements.

The Legislature should establish the Division so as to enable the Attorney General to sever from the ordinary prosecutorial process, and thereafter treat specially, offenses in which there is reason to believe members of Organized Crime are involved. Because of the clandestine nature of most of these offenses and the insulated position of the highly placed professional criminals, such cases present problems of investigation and prosecution which the County Prosecutors (even if serving on a full-time basis, *infra*) should not be required to bear alone.** Therefore, the implementing legislation should require the respective County Prosecutors to inform the Attorney General of all cases which appear to have Organized Crime implications. It should further provide that the Attorney General, on his own initiative, may assume control of such cases and organize the investigation and prosecution thereof, through the use of the State Grand Jury and otherwise. This latter

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* I agree with Governor-elect Cahill that the State Police should be part of a separate Division, of parallel status, whose efforts are to be coordinated with the Division. *Position Paper, supra.*

** An informal survey by this office has revealed that the case load of the offices of most County Prosecutors is staggering. It is unrealistic to expect an Assistant Prosecutor carrying a load of more than 200 "ordinary" criminal cases to prosecute a complex loansharking or public corruption case with the complete attention and exhaustive preparation which such a matter requires.

power should be delegable by the Attorney General (either wholly or partially) to the Assistant Attorney General in charge of the Division.

In organizing the state's efforts in an organized crime case, the Attorney General should have the greatest possible flexibility. He should be able to assign the investigative function either to local, county or state investigative personnel, or to direct that there be a coordinated effort among two or more such units. He should be empowered to assign prosecution of the case to one or more of the following: Deputy Attorneys General in the Division, the County Prosecutor or Assistant County Prosecutor in a County where the crime took place, County Prosecutors or Assistants from other counties, or specially retained counsel. The use of Deputy Attorneys General in such cases is particularly advisable because such persons could specialize in Organized Crime cases, unencumbered by the case loads borne by county prosecutors, thus developing an expertise therein.

Under the system outlined above, organized, thorough prosecution of Organized Crime cases should be possible to an extent not presently realized in this State.

FULL-TIME PROSECUTORS:

It has been particularly gratifying to me to see that Governor-elect Cahill has maintained the position that County Prosecutors in certain counties should relinquish their private law practices and devote full attention to that public office. It is to be noted that in 1953 President Eisenhower and Attorney General Herbert Brownell took similar constructive action concerning the office which I presently hold. I heartily endorse Mr. Cahill's initial step of demanding that the men whom he will soon appoint as prosecutors in five large counties (Union, Bergen, Hudson, Mercer, Passaic) accept the job on a full-time basis.* There should be a legislative basis for this action so that it may not be allowed to lapse should there at some future date be a chief executive less dedicated to this important policy. The amendments to N. J. S. A. 2A:158–1 proffered in Senate

* See *Newark Evening News*, December 24, 1969; *Newark Star Ledger*, December 28, 1969.

Bill No. 650 and Assembly Bill No. 801 introduced in the last session contain appropriate language.

One qualification to the plan for full-time prosecutors should be explored. Study might well reveal that a full-time prosecutor is not warranted in the less populated counties of the State. Senator Dumont indicated to our office that he felt this might well be the case in the three counties which he represents.* Governor-elect Cahill has also acknowledged this, indicating that the County Prosecutor whom he will appoint in Burlington County need not (at least initially) devote his entire time to that position.**

On a permanent, legislated basis, two possibilities for establishing Prosecutors for the smaller counties come to mind. Each such County could continue to have its own Prosecutor, serving on a part-time basis unless changing conditions in population and case load demanded a change to full-time status. Alternatively, two or more small counties could be consolidated under the jurisdiction of one full-time Prosecutor. The pattern of consolidation used to establish State Senatorial Districts could serve as a model.*** For a permanent, long-range solution I favor this latter approach of regionalization because it insures that all County Prosecutors will be devoting their entire efforts to this public office, free from potential conflicts, and at the same time does not burden the taxpayers of a small county (or the State at large) with the expense of supporting a full-time Prosecutor where the work load does not require it.

If the State of New Jersey is to increase its efforts to combat Organized Crime, the offices of the County Prosecutors must be staffed with a sufficient number of Assistant Prosecutors to handle such prosecutions when directed to do so by the Attorney General (*supra*). Assistant Prosecutors should also be called upon to relinquish their private practices. The Legislature should establish salary levels which will insure to these full-time Assistants adequate compensa-

* Hunterdon, Warren and Sussex Counties.

** *Newark Evening News*, December 24, 1969; *Newark Star Ledger*, December 28, 1969.

*** One rather clear exception would be the Third District (Camden, Gloucester and Salem Counties). Camden County is of sufficient size to warrant a full-time Prosecutor. Gloucester and Salem combined might warrant one.

tion. There should be some legislation providing tenure for Assistants so that they may be induced to spend more than one or two years in that position. It is particularly important in complex, protracted Organized Crime investigations and prosecutions that Assistant Prosecutors be men of some experience when they assume responsibility for such a case and that they remain on the case for its duration. To enhance cooperation and agreement between the Attorney General and the County Prosecutors, the Assistants should be appointed by the Prosecutors, subject to the approval of the Attorney General.* As noted earlier, the Attorney General should have the authority to reassign Assistant Prosecutors to other counties, particularly for the prosecution of organized crime cases.

Such a program for full-time Prosecutors and Assistants will be substantially more expensive than the present system. It is inaccurate to assume that the number of Assistant Prosecutors can be sharply reduced when such positions are filled by full-time personnel. Inquiries by this office have disclosed that offices of County Prosecutors are substantially under-manned at present. If an increased number of prosecutions in the Organized Crime theatre develop, the pressure on these offices will be increased even if Deputy Attorneys General are used extensivly in such matters. Undoubtedly the cost of prosecution in this State will rise, and it would seem necessary for the State as a whole to bear the major part of such increase. Indeed, increased centralization of prosecution costs would seem advisable in light of the recent difficulties encountered by the County Prosecutor of Camden County concerning appropriations from that county's Board of Chosen Freeholders. *In Re A. Donald Bigley, Camden County Prosecutor; Board of Chosen Freeholders of Camden County, Appellant,* ..... N. J. ..... (December 1, 1969).

CONCLUSION

I recommend legislation to accomplish the following:

(1) Creation of a Division of Criminal Justice (or Prosecution) within the Department of Law and Public Safety

* See Assembly Bill No. 801, Para. 2 (1969 Session).

and thus under the jurisdiction of the Attorney General, charged with the authority and obligation to direct and supervise criminal prosecutions brought in the name of the State of New Jersey.

(2) Establishment of full-time County (or, in some instances, regional) Prosecutors and Assistant Prosecutors.

(3) Assumption by the State as a whole of the increased cost resulting from the adoption of this system of full-time prosecutorial personnel.

IX. SOME OBSERVATIONS CONCERNING UNANNOUNCED ENTRY TO ARREST OR SEARCH; AND SENTENCING

The basic purpose of this memorandum has been to explore some possibilities for substantive legislation calculated to curb the influence of Organized Crime in New Jersey. In concluding my presentation, however, I should like to discuss briefly two topics which are more in the nature of criminal practice or procedure, namely: (1) the unannounced entry to arrest or search; (2) the sentencing of a member of Organized Crime.*

It is often necessary for an arresting or searching officer of the law to obtain access to premises without announcing his presence or purpose. Several cases which are the product of the activities of Organized Crime are included in this category. Gambling records or paraphernalia at a bookmaker's premises could be quickly destroyed or secreted if the officer announced himself. Narcotics can be similarly disposed of. Money, cards or dice can be swept off the table or floor. Any "top hood" whose arrest is sought may be in the company of several of his henchmen who are likely to be armed.

New York has sought to codify a rule permitting unannounced entry by means of the following statute, enacted in 1964:

> "The officer may break open an outer or inner door or window of a building, or any part of the building, or any thing therein to execute the warrant . . . (b) without notice of his authority and purpose, if the judge, justice or magistrate issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The judge, justice or magistrate may so direct only upon proof under oath, to his satisfaction, that the property sought may be easily and quickly destroyed or disposed of, or that

* My thanks to Professors Robert E. Knowlton and John G. Graham of Rutgers University Law School for having given my office the benefit of their valuable observations on some of the issues discussed in this chapter.

danger to the life or limb of the officer or another may result, if such notice were to be given." 66 McKinney's Laws of New York, Code of Cr. Proc. Sec. 799.*

The enactment of a statute such as New York's would accomplish no practical result in New Jersey, however, other than the undesirable one of perhaps limiting the broad powers of unannounced entry which New Jersey decisions have conferred upon officers of the law. Our Supreme Court has held:

> "The common law of arrest is extant in New Jersey. . . . Ordinarily the common law relates that peace officers may break into a dwelling for the purpose of making an arrest only after demanding admittance and explaining their purpose. . . . Compliance with the general mandate is not required, however, where: (1) immediate action is required to preserve evidence . . . (2) the officer's peril would be increased . . . or (3) the arrest would be frustrated." *State v. Fair,* 45 N. J. 77, 86 (1965).

A no-announcement rule of similar breadth was held constitutional by the United States Supreme Court in *Ker v. California,* 374 U. S. 23 (1963).

The New Jersey common law rule is preferable to the New York statute because (1) it applies to arrests and searches with or without warrants and (2) in the case where a warrant is being executed the officer need not obtain a prior determination by a judge but rather may be guided by the circumstances present at the moment of execution. For example, *State v. Fair* involved an arrest without warrant and the seizure of evidence incidental thereto; *State v. Miller,* 47 N. J. 273 (1966), concerned the execution of an arrest warrant accompanied by an incidental seizure of heroin and paraphernalia; *State v. Juliano,* 97 N. J. Super 28 (App. Div. 1967), involved the execution of a search warrant for gambling records. In all instances, the unannounced entry of the premises was sustained upon the principles set forth in *Fair.*

In short, the common law rule of unannounced entry is of sufficient scope to grant to peace officers all of the power and

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* The proposed revision of New York's Code of Criminal Procedure, which will be introduced to the New York Legislature this year, essentially adopts the rule and language of the present law (Sec. 799). See *Proposed New York Criminal Procedure Law,* 1969 Bill (West Publ. Co. 1969), Secs. 690.35 et seq.

authority in this area which the United States Constitution would permit. See *Ker v. California, supra.* No statute could really expand that power; therefore, none should be enacted.

SPECIAL SENTENCING PROVISIONS:

Throughout this memorandum, I have tried to emphasize the necessity for sentences sufficiently severe to deter persons from embarking upon criminal conduct and to impose meaningful punishment upon the professional criminal of Organized Crime who has chosen to make such conduct a way of life. Fines should be structured to strike hard and deep at the large sums of money which Organized Crime garners from gambling, extortion, narcotics, loansharking and pernicious business practices. Yet fines alone are rarely adequate, either as deterrents or punishment where a member of Organized Crime is involved. A fine often has no more effect than a license fee or the "protection" money paid on a regular basis. To supplement an extensive, imaginative approach to an attack at Organized Crime's treasury, there must be a special approach to sentencing a convicted professional criminal.

Recidivist statutes, such as those presently in effect in New Jersey (N. J. S. A. 2A:85–8 et seq.), and mandatory minimum jail sentences are two well-recognized methods of increasing the impact of a jail sentence upon a convicted criminal. The Legislature should consider enactment of statutes employing the latter concept to prevent such persons as professional gamblers from "escaping" from a meaningful conviction by way of a mere fine.* A more imaginative and direct approach is embodied in Title VIII of bill number S-30 (Mr. McClellan—January 15, 1969) presently pending in the United States Senate. This provision would bring about the enactment of, *inter alia,* a new section (Sec. 3576) of Title 18 of the United States Code providing for an increased sentence (up to 30 years) for a convicted felon determined at a post-conviction hearing to be either "a professional offender or an Organized Crime

* See the comments of Ralph M. Caprio, past president of the Essex County Grand Jury Association, *Newark Star Ledger,* December 17, 1969.

offender.'' These terms are defined in subsection (f) of the proposed section 3576 as follows:

''(f) As used in this section, the term—

''(1) 'professional offender' means any person who has knowingly devoted himself to criminal activity as a major source of livelihood, or who has substantial income or resources not explained to be derived from a source other than criminal activity; and

''(2) 'organized crime offender' means a person who, with intent that conduct constituting a series of crimes be performed, plans, counsels, promotes, finances, organizes, manages, advises, supervises, directs, or conducts a conspiratorial relationship, composed of five or more conspirators involving a structured division of labor, and having as its objective the engaging in or causing of the performance of such conduct as a part of a continuing course of activity. A person shall not be considered an organized crime offender within the meaning of this definition unless conduct constituting more than one crime as part of a continuing course of activity is engaged in or caused by one or more of the conspirators to effect the objective of the relationship.''

These definitions may well supply the certainty sufficient to withstand the attack that this proposed legislation is void for vagueness. The language used should be considered by drafters of any legislation seeking to designate Organized Crime as its specific target.*

EPILOG

I have attempted in the foregoing materials to suggest areas where new legislation can provide for our State's prosecutorial authorities better tools to be used in gaining indictments and convictions of members of Organized Crime. These suggestions and others which undoubtedly will be submitted to you should be considered a call for further imaginative legislation of the pattern enacted during your last term. Now is the time to move against Organized Crime on all fronts.

FREDERICK B. LACEY,
United States Attorney.

* Such as Assemblyman-elect Kravarik's prefiled A-91 and A-92, discussed previously.

EXHIBIT 1

STATE OF NEW YORK

EMPLOYEE WELFARE FUND ACT OF 1956

(As Amended to July 1, 1964)

RICHARD E. STEWART
Superintendent of Insurance
Insurance Department
Welfare Fund Bureau
55 John Street
New York, New York 10038

FRANK WILLE
Superintendent of Banks
Banking Department
100 Church Street
New York, New York 10007

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Preface

The laws relating to the registration, examination and supervision of employee welfare funds are contained in Article III-A of the Insurance Law and Article II-A of the Banking Law. The former relates to funds required to be registered with the Insurance Department and the latter to funds required to be registered with the Banking Department. The laws were originally enacted in 1956 (L. 1956, ch. 774, effective September 1, 1956) and they were amended in 1957, 1958, 1959, 1960, 1961, 1962 and 1964.

(L. 1957, ch. 808, effective April 22, 1957;
L. 1958, ch. 857, effective April 19, 1958;
L. 1959, ch. 645, effective April 21, 1959;
L. 1960, ch. 454, effective April 12, 1960;
L. 1960, ch. 301, effective January 1, 1961;
L. 1961, ch. 392, effective April 11, 1961;
L. 1962, ch. 310, effective September 1, 1963;
L. 1964, ch. 37, effective July 1, 1964).
On the following pages are the texts of the laws as so amended.

INSURANCE LAW—ARTICLE III-A*

Employee Welfare Funds

Section 37. Declaration of policy.
37-a. Definitions.
37-b. Registration.
37-c. Examinations; authorization and requirement.
37-d. Examinations; conduct.
37-e. Examinations; publication.
37-f. Examinations; expenses.
37-g. Annual statement to superintendent.
37-h. Special statements to superintendent.
37-i. Annual reports to employers and employees.
37-j. Annual statements by insurance companies, service plans and corporate trustees and agents.
37-k. Regulation under other laws.
37-l. Compliance and enforcement.
37-m. Injunctions.
37-n. Supplementary regulations; extensions of time.
37-o. Loans for educational purposes.
37-p. Construction.
37-q. Separability.

§ 37. Declaration of policy.

It is hereby declared to be the policy of the state that employee welfare funds are of great benefit to employees and their families and that their growth should be encouraged; that the establishment and management of such funds vitally affect the well-being of millions of people and are in the public interest; and that such funds should be supervised by the state to the extent necessary to protect the rights of employees and their families, without imposing burdens upon such funds which might discourage their orderly growth and without duplicating the supervisory responsibilities presently vested in any state agencies.

§ 37-a. Definitions.

1. Employee welfare funds. The term "employee welfare fund", as used in this article, shall mean any trust fund or other fund established or maintained jointly by one or more employers together with one or more labor organizations, whether directly or through trustees, to provide employee benefits, by the purchase of insurance or annuity contracts or otherwise, and to which is paid or contracted to be paid anything, other than income from investments of such fund for the benefit of employees employed in this state, and, if the principal office of the employer is located outside of the

* Article III-A added L. 1956, ch. 744, eff. Sept. 1, 1956

state, for at least twenty such employees; provided, however, that such term, as used in this article, shall not include any such fund where its over-all management is vested, alone or jointly with other trustees, in a corporate trustee which is subject to supervision by the superintendent of banks of this state or any other state or is a member of the federal reserve system.

(Am'd L. 1957, ch. 808, eff. Apr. 22, 1957.)

2. Employee benefits. The term "employee benefits", as used in this article, shall mean one or more benefits or services for employees or their families or dependents, or for both, including, but not limited to, medical, surgical or hospital care or benefits, benefits in the event of sickness, accident, disability or death, benefits in the event of unemployment, or retirement benefits.

3. Trustees. The term "trustee" as used in this article, shall mean the person or group of persons who or which is charged with or has the general power of administration over an employee welfare fund and may include a pension board or committee, a board of individual trustees, a board of administration or the like; provided, however, such term shall not include a corporate trustee which is subject to supervision by the superintendent of banks of this state or any other state or is a member of the federal reserve system; nor shall such term include any insurer licensed under the laws of this state or authorized to do business herein.

(Am'd L. 1958, ch. 857, eff. Apr. 19, 1958.)

4. Superintendent. The term "superintendent", as used in this article, shall mean the superintendent of insurance.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

5. Employed in this state. The term "employed in this state", as used in this article, shall mean employed at a place of business maintained by the employer in the state of New York.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

6. Employer. The term "employer", as used in this article, shall mean all persons part or all of whose employees or members are covered by an employee welfare fund.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

7. Person. The term "person", as used in this article, shall mean all individuals (acting alone or in representative capacities), partnerships, associations, corporations, labor unions and other entities.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

8. Labor organization. The term "labor organization", as used in this article, shall mean any labor union or any organization of any kind, or any agency or employee representation committee, association, group or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

§ 37-b. Registration.

1. The trustees of every employee welfare fund shall register such fund with the superintendent within three months after the effective date of this article, and the trustees of every employee welfare fund commencing to do business in this state after the effective date of this article shall register such fund with the superintendent within three months after so commencing. Such registration shall be in such form and shall contain such information relating to the organization, operations and affairs of such fund as may be prescribed by the superintendent.

2. If it is found that the conditions which originally required registration with the superintendent of insurance have ceased to exist and that new conditions exist which would not require the registration of an employee welfare fund with either the superintendent of banks or the superintendent of insurance, then the superintendent of insurance may, on application of the trustees or on his own motion, cancel the registration of such fund.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 37-c. Examinations; authorization and requirement.

1. The superintendent may examine into the affairs of any employee welfare fund as often as he deems it necesary, and he shall do so at least once in every five years.

2. The trustees of every employee welfare fund shall be responsible for the maintenance of accurate records of its books and accounts in conformance with generally accepted accounting principles and with any regulations prescribed with regard thereto.

(Am'd L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 37-d. Examinations; conduct.

1. Whenever, pursuant to this article, the superintendent shall determine to examine the affairs of any employee welfare fund he shall make an order indicating the scope of the examination and may appoint as examiners one or more competent persons not employed by the trustees of such fund or interested in such fund. A copy of such order shall, upon demand and before the examination begins, be exhibited to the trustees of the employee welfare fund whose affairs are to be examined. Any examiner authorized by the superintendent shall have convenient access at all reasonable hours to the books, records, files, assets, securities, and other documents of such employee welfare fund, including those of any affiliated or subsidiary fund thereof, which are relevant to the examination, and shall have power to administer oaths and to examine under oath the trustees of such fund and their officers, agents and employees and any other persons having custody or control of such books, records, files, assets, securities or other documents, regarding any matter relevant to the examination.

2. The examiner or examiners in charge of such examination shall make a true report of every examination made by him, verified under oath, which shall comprise only facts appearing upon the

books, records or other documents of the trustees of such fund or as ascertained from the sworn testimony of its trustees, or their officers, agents or employees, or other persons examined concerning its affairs, and such conclusions and recommendations as may reasonably be warranted from such facts.

3. In connection with any such examination, the superintendent may appoint one or more competent persons as appraisers with authority to appraise any real property or any interest therein which, as security or otherwise, may constitute a part of the assets of any employee welfare fund. The report of such appraiser shall be a supplement to the report of the examiner or examiners in charge.

§ 37-e. Examinations; publication.

1. All reports of examinations and investigations, including any duly authenticated copy or copies thereof in the possession of any employee welfare fund, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof, in which event he may publish a copy of any such report or any part thereof in such manner as he may deem proper.

2. In any action or proceeding against the trustees of any employee welfare fund, or against their officers, agents, or employees, such report, or any part thereof, if published by the superintendent, shall be admissible in evidence and shall be presumptive evidence of the facts stated therein.

3. The superintendent may assemble and file for public inspection such information covering forms of trust indentures in use, commission and fee schedules adopted by insurers and compensation paid to trustees of employee welfare funds and such other matters affecting the establishment and administration of such funds as, in his opinion, are in the public interest.

§ 37-f. Examinations; expenses.

The expenses of every examination of the affairs of any employee welfare fund, including any appraisal of real property, made pursuant to the authority conferred by any provision of this chapter, shall be borne and paid by the employee welfare fund so examined. For any such examination by the superintendent or a deputy superintendent personally, the charge made shall be only for necessary travelling expenses and other actual expenses. In all other cases the expenses of examination shall also include reimbursement for the compensation paid for the services of persons employed by the superintendent or by his authority to make such examination or appraisal; provided, however, that (1) for funds with contributions of less than thirty thousand dollars, as reported in the annual statement filed with the superintendent for the latest fiscal year covered by the examination, the charge shall not exceed three hun-

dred dollars, (2) for funds with contributions between thirty thousand dollars and one hundred fifty thousand dollars the charge shall not exceed one percent of such contributions, and (3) the superintendent, with the approval of the comptroller, may in his discretion for good cause shown remit or reduce such charges. All charges, including necessary travelling and other actual expenses, as audited by the comptroller and paid on his warrant in the usual manner by the comptroller to the person or persons making the examination or appraisal, shall be presented to the trustees of the employee welfare fund in the form of a copy of the itemized bill therefor as certified and approved by the superintendent or a deputy superintendent. Upon receiving such certified copy such trustees shall pay the amount thereof to the superintendent, to be paid by him into the state treasury.

(Am'd L. 1959, ch. 645, eff. Apr. 21, 1959.)

§ 37-g. Annual statement to superintendent.

The trustees of every employee welfare fund shall file in the office of the superintendent, annually within five months after the close of the fiscal year used in maintaining the records of such fund, a statement, to be known as the annual statement of such fund, executed in duplicate, verified by the oath of its trustee or, if there is more than one trustee, then by the oaths of at least two of such trustees, showing its condition and affairs during such fiscal year. Such fiscal year shall not be changed without the consent of the superintendent. Such statement shall be in such form and contain such substantiation by vouchers and otherwise and such other information as the superintendent shall from time to time prescribe. The superintendent shall cause to be prepared and furnished to the trustees of every employee welfare fund required by law to report to him printed forms of the statements and schedules required by him.

(Am'd L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 37-h. Special statements to superintendent.

In addition to any other statements or reports required by this article, the superintendent may also address to the trustees of any employee welfare fund or to any of its other officers, agents or employees or to any employer or labor organization representing any employees eligible for employee benefits thereunder any inquiry in relation to the transactions or condition of the fund or any matter connected therewith. Every person so addressed shall reply in writing to such inquiry promptly and truthfully, and such reply shall be verified, if required by the superintendent, by such individual or individuals as he shall designate.

(Am'd L. 1958, ch. 857, eff. Apr. 19, 1958.)

§ 37-i. Annual reports to employers and employees.

The trustees of every employee welfare fund shall, annually, within five months after the close of the fiscal year used in maintaining the records of such fund, file a report with the superintendent to be

known as the annual report of such fund, verified by the oath of its trustee, or if there is more than one trustee, then by the oaths of at least two of such trustees, showing its condition and affairs during such fiscal year. Such report shall be in such form and contain such matters as the superintendent shall from time to time prescribe. Such annual report shall be kept on file with the superintendent and at the principal office of the trustees and such report, or such portion thereof as the superintendent shall deem appropriate and relevant, shall be made available by the superintendent or by the trustees, or both, for inspection by any employer contributing to such fund, by any labor organization which is a party to an agreement establishing such fund, or by any employee covered by such fund. In addition and to such extent that he deems it to be in the public interest, the superintendent may require the trustees to mail such report, or such portions thereof as the superintendent shall deem appropriate and relevant, to employees covered by the fund, to contributing employers or to any labor organization which is a party to an agreement establishing such fund, or to any or all of such parties.

(Am'd L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 37-j. Annual statements by insurance companies, service plans and corporate trustees and agents.

Any insurance company, hospital, surgical or medical service plan providing benefits under an employee welfare fund, and any corporate trustee or agent holding or administering all or any part of an employee welfare fund shall, within four months after the end of each policy or fiscal year, furnish to the trustees of the fund a statement of account setting forth such information relating to the fund as the trustees of the fund may need from it in order to comply with the requirements of this article.

(Am'd L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 37-k. Regulation under other laws.

Where the trustees of any employee welfare fund are subject to and comply with the requirements of any law of this state other than this article or the law of any other state or of the United States with respect to registration, filing, examination, statements or reports, such requirements of this article or any of them may be waived by the superintendent with respect to any such fund or trustees to the extent that they are included in such other laws. Application for such a waiver shall be made in writing to the superintendent on such forms as he may require and any waiver issued by him hereunder shall be in writing and shall be filed in his office. The superintendent may, at any time, revoke any such waiver if, in his opinion, such other laws fail to accomplish adequately the purposes of this article. The action of the superintendent pursuant to this section shall be subject to judicial review.

(Am'd L. 1958, ch. 857, eff. Apr. 19, 1958.)

§ 37-l. Compliance and enforcement.

1. The trustees of every employee welfare fund shall be respon-

sible in a fiduciary capacity for all money, property, or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund.

2. (a) No employee welfare fund and no employer or labor organization representing any employees eligible for employee benefits thereunder, and no trustee or other officer or employee or* any such fund, employer or labor organization shall receive, directly or indirectly, any payment, commission, loan or other thing of value from any insurance company, insurance agent, insurance broker or any hospital, surgical, dental or medical service plan, in connection with the solicitation, sale, service or administration of a contract providing employee benefits for such fund; and no such employer, labor organization, trustee, officer or employee shall receive any payment, commission, loan, service or any other thing of value from such fund, or which is charged against such fund or would otherwise be payable to such fund, either directly or indirectly, except that any such person may receive any employee benefits to which he is otherwise entitled, and any such trustee or other officer or employee of a fund, may receive from such fund reasonable compensation for necessary services and expenses rendered or incurred by him in connection with his official duties as such; provided, however, that nothing in this subdivision shall affect the payment of any dividend or rate credit or other adjustment due under the terms of any insurance or annuity contract.

(Par. (a) am'd L. 1958, ch. 857, eff. Apr. 19, 1958; L. 1964, ch. 37, eff. July 1, 1964.)

(b) No insurance company, insurance agent or insurance broker and no hospital, surgical, dental or medical service plan, shall either directly or indirectly, pay any commission, make any loan or give any other payment or thing of value to any employee welfare fund or to any employer or labor organization representing any employees eligible for employee benefits thereunder or to any trustee or other officer or employee of any such fund, employer or labor organization, in connection with the solicitation, sale, service or administration of a contract providing employee benefits for such fund.

(Par. (b) added L. 1957, ch. 808, eff. Apr. 22, 1957; am'd L. 1958, ch. 857, eff. Apr. 19, 1958; L. 1964, ch. 37, eff. July 1, 1964.)

(c) The superintendent may, after notice and a hearing, prohibit the trustees of an employee welfare fund from employing or retaining or continuing to employ or retain any person upon finding that such employment or retention involves a conflict of interest which is not in the best interests of the fund or adversely affects the interests of covered employees. Any such finding by the superintendent shall be subject to judicial review.

(Former par. (c) relettered par. (d) and new (c) added L. 1958, ch. 857, eff. Apr. 19, 1958.)

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* So in originals; should be "of". See Banking Law § 71(2a).

(d) The superintendent may, by regulation or order, and upon such terms and conditions as he may require, authorize or approve any transaction or transactions otherwise prohibited by this subdivision upon his finding that the transaction or transactions promote or will promote the best interests of the relevant employee welfare funds, and do not or will not adversely affect the interests of the covered employees.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957; formerly par. (c) relettered (d) L. 1958, ch. 857, eff. Apr. 19, 1958.)

3. (a) No insurance company shall pay any dividend or retrospective rate credit on any covering policy except by check payable to the affected employee welfare fund or by credit memo forwarded to such fund.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

(b) No employee welfare fund shall pay any premium on a covering policy except by check payable to the insurance company directly.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957. Former subd. 3 renumbered 4.)

4. No political contributions shall be made directly or indirectly by or from any employee welfare fund.

(Subd. 4, formerly 3, renumbered 4 by L. 1957, ch. 808, eff. Apr. 22, 1957. Former subd. 4 renumbered 5.)

5. The superintendent may impose a penalty of not to exceed twenty-five hundred dollars upon any trustee or other officer, agent or employee of any employee welfare fund subject to this article or may remove such trustee, officer, agent or employee from office or employment, or both such penalty and removal, if after notice and a hearing he shall find that he has wilfully failed to comply with the requirements of this article. Any such action of the superintendent under this subdivision shall be subject to judicial review.

(Subd. 5, formerly 4, renumbered 5 and am'd by L. 1957, ch. 808, eff. Apr. 22, 1957; L. 1958, ch. 857, eff. Apr. 19, 1958. Former subd. 5 renumbered 6.)

6. In any case where, after notice and a hearing, the superintendent finds that any employee welfare fund has been depleted by reason of any wrongful or negligent act or omission of a trustee or of any other person, he may transmit a copy of his findings to the attorney general, who may bring an action in the name of the people of the state, or intervene in an action brought by or on behalf of an employee, for the recovery of such fund for the benefit of the employees and such other persons as may have an interest in the fund.

(Subd. 6, formerly 5, renumbered 6 by L. 1957, ch. 808, eff. Apr. 22, 1957.)

7. (a) Any person who wilfully violates or causes or induces the violation of any provision of this article or any regulation hereunder shall be guilty of a misdemeanor.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957; par. lettered par. (a) L. 1958, ch. 857, eff. Apr. 19, 1958.)

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to

disclose a material fact in any registration, examination, statement or report required under this article or the regulations thereunder shall be guilty of a misdemeanor.
(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

(c) Any person who makes a false entry in any book, record, report, or statement required by this article or any regulation thereunder to be kept by him for any employee welfare fund, with intent to injure or defraud such fund or any beneficiary thereunder, or to deceive any one authorized or entitled to examine the affairs of such fund shall be guilty of a misdemeanor.
(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

(d) Nothing in paragraphs (b) or (c) of this subdivision shall be construed in any manner to limit the effect of paragraph (a).
(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

§ 37-m. Injunctions.

The superintendent may maintain and prosecute in the name of the people of the state an action against any trustee or any other person or persons subject to the provisions of this article, for the purpose of obtaining an injunction restraining such person or persons from doing any acts in violation of the provisions of this article. In such action if the court finds that a defendant is threatening or is likely to do any act or acts in violation of this article, and that such violation will cause irreparable injury to the interests of the people of this state or the beneficiaries of the employee welfare fund involved, the court may grant an injunction restraining such violation. The court may, on motion and affidavits, grant a preliminary injunction ex parte and an interlocutory injunction, upon such terms as may be just; but the people of the state shall not be required to give security before the issuance of any such injunction.

§ 37-n. Supplementary regulations; extensions of time.

1. The superintendent may from time to time promulgate appropriate supplementary rules and regulations designed to carry out the express provisions and purposes of this article.

2. For good cause shown, the superintendent may grant reasonable extensions of time for doing any act required by this article.

3. (a) The trustees of any employee welfare fund which has its principal place of business without the state, shall within ten days after registering a fund with the superintendent, file with the secretary of state a designation, duly acknowledged, irrevocably appointing the secretary of state as their agent upon whom may be served any summons, subpoena, subpoena duces tecum or other process directed to such trustees, in any action or proceeding brought under the provisions of this article arising out of or in connection with any transaction, matter or thing relating to such fund. If the trustees shall fail to make such designation in the manner and within the period above set forth, or, in case of a fund which was registered with the superintendent on the effective date

of this act, within six months after such effective date, such trustees shall be deemed to have irrevocably appointed the secretary of state as such agent upon whom service of such process may be made.

(b) Service of such process shall be made by serving the secretary of state with a copy thereof and such service shall be sufficient provided that notice thereof and a copy of the process are sent within ten days thereafter by the moving party to the trustees at the office address of the fund by registered mail with return receipt requested. In any examination or hearing instituted by the superintendent, service of such process shall be complete ten days after the receipt by the superintendent of a return receipt purporting to be signed by the trustees or their agent or agents in accordance with the rules and customs of the post office department, or, if acceptance was refused by the trustees or their agents, the original envelope bearing a notation by the postal authorities that receipt was refused. In any action or proceeding instituted in any court in this state having jurisdiction of the subject matter, the moving party shall file with the clerk of the court in which such action or proceeding is pending, or with the judge or justice of such court, in case there be no clerk, an affidavit of compliance herewith, a copy of the process, and either the return receipt or the original envelope bearing a notation of refusal, as the case may be. Such affidavit and other papers shall be filed within thirty days after the return receipt or original envelope is received by the moving party, at which time service of process shall be complete. Service of any process made in accordance with this subdivision shall be deemed to have been made personally within the state and, in the case of a court action or proceeding, within the territorial jurisdiction of the court from which such process issued.

(Subd. 3 added L. 1958, ch. 857, eff. Apr. 19, 1958; am'd L. 1962, ch. 310, eff. Sept. 1, 1963.)

4. The trustees of every employee welfare fund shall preserve all its records of final entry and all reports and statements required by this article and the regulations thereunder for a period of at least six years from the date of making the same; provided, however, that preservation of photographic reproduction thereof or records in photographic form shall constitute compliance with the requirements of this section.

(Subd. 4 added L. 1958, ch. 857, eff. Apr. 19, 1958.)

(Former § 37-n renumbered 37-o; new 37-n added L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 37-o. Loans for educational purposes.

Subject to the restrictions contained in this article, any employee welfare fund may lend money to any employees covered by such fund or their children, who are attending or planning to attend colleges in this state or elsewhere, to assist them in meeting their expenses of higher education, where such loans are made by such employee welfare fund and guaranteed by the New York higher education assistance corporation in accordance with the provisions

of article fourteen of the education law, and in such cases no further security for the repayment of such loans shall be required of the borrowers by such employee welfare fund.

(Added L. 1961, ch. 392, eff. Apr. 11, 1961.)
(Former § 37-o renumbered 37 p.)

§ 37-p. Construction.

Nothing in this article shall be construed to relieve the trustees of any employee welfare fund from compliance with any other provision of this chapter or any other applicable laws of this state.

(Formerly § 37-n, renumbered 37-o, L. 1957, ch. 808, eff. Apr. 22, 1957; renumbered 37-p, L. 1961, ch. 392, eff. Apr. 11, 1961.)

§ 37-q. Separability.

If any provision of this article or the application of such provision to any person or circumstance shall be held invalid, the remainder of this article and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

(Formerly § 37-p, added L. 1957, ch. 808, eff. Apr. 22, 1957; renumbered 37-q, L. 1961, ch. 392, eff. Apr. 11, 1961.)

BANKING LAW—ARTICLE II-A*

Employee Welfare Funds

Section 60. Declaration of policy.
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§ 60. Declaration of policy.

It is hereby declared to be the policy of the state that employee welfare funds are of great benefit to employees and their families and that their growth should be encouraged; that the establishment and management of such funds vitally affect the well-being of millions of people and are in the public interest; and that such funds should be supervised by the state to the extent necessary to protect the rights of employees and their families, without imposing burdens upon such funds which might discourage their orderly growth and without duplicating the supervisory responsibilities presently vested in any state agencies.

§ 61. Definitions.

1. Employee welfare funds. The term "employee welfare fund", as used in this article, shall mean any trust fund or other fund established or maintained by or on behalf of one or more employers together with one or more labor organizations to provide employee benefits, by the purchase of insurance or annuity contracts or otherwise, with the over-all management of such fund vested, alone or jointly with other trustees, in a corporate trustee which is subject to supervision by the superintendent of banks of this state or any other state or is a member of the federal reserve system, and to which fund is paid or contracted to be paid anything, other than income from investments of such fund, for the benefit of employees employed in this state, and, if the principal office of the employer is located outside of the state, for at least twenty such employees. (Am'd L. 1957, ch. 808, eff. Apr. 22, 1957.)

2. Employee benefits. The term "employee benefits", as used in this article, shall mean one or more benefits or services for employees

*Article II-A added L. 1956, ch. 744, eff. Sept. 1, 1956.

or their families or dependents, or for both, including, but not limited to, medical, surgical or hospital care or benefits, benefits in the event of sickness, accident, disability or death, benefits in the event of unemployment, or retirement benefits.

3. Trustees. The term "trustee", as used in this article, shall mean the person or group of persons who or which is charged with or has the general power of administration over an employee welfare fund and may include a pension board or committee, a board of individual trustees, a board of administration or the like; provided, however, such term shall not include a corporate trustee which is subject to supervision by the superintendent of banks of this state or any other state or is a member of the federal reserve system; nor shall such term include any insurer licensed under the laws of this state or authorized to do business herein.
(Am'd L. 1958, ch. 857, eff. Apr. 19, 1958.)

4. Superintendent. The term "superintendent", as used in this article, shall mean the superintendent of banks.

5. Employed in this state. The term "employed in this state", as used in this article, shall mean employed at a place of business maintained by the employer in the state of New York.
(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

6. Employer. The term "employer", as used in this article, shall mean all persons part or all of whose employees or members are covered by an employee welfare fund.
(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

7. Person. The term "person", as used in this article, shall mean all individuals (acting alone or in representative capacities), partnerships, associations, corporations, labor unions and other entities.
(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

8. Labor organization. The term "labor organization", as used in this article, shall mean any labor union or any organization of any kind, or any agency or employee representation committee, association, group or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.
(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

§ 62. Registration.

1. The trustees of every employee welfare fund shall register such fund with the superintendent within three months after the effective date of this article, and the trustees of every employee welfare fund commencing to do business in this state after the effective date of this article shall register such fund with the superintendent within three months after so commencing. Such registration shall be in such form and shall contain such information relating to the organization, operations and affairs of such fund as may be prescribed by the superintendent.

2. If it is found that the conditions which originally required registration with the superintendent of banks have ceased to exist and that new conditions exist which would not require the registration of an employee welfare fund with either the superintendent of banks or the superintendent of insurance, then the superintendent of banks may, on application of the trustees or on his own motion, cancel the registration of such fund.
(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 63. Examinations; authorization and requirement.

1. The superintendent may examine into the affairs of any employee welfare fund as often as he deems it necessary, and he shall do so at least once in every five years.

2. The trustees of every employee welfare fund shall be responsible for the maintenance of accurate records of its books and accounts in conformance with generally accepted accounting principles and with any regulations prescribed with regard thereto.
(Am'd L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 64. Examinations; publication.

1. All reports of examinations and investigations, special reports rendered to the superintendent pursuant to section sixty-seven of this article, or correspondence and memoranda concerning or arising out of such examinations or investigations, including any duly authenticated copy or copies thereof in the possession of any employee welfare fund or the banking department, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof, in which event he may publish or authorize the publication of a copy of any such report or other material referred to in this subdivision one, or any part thereof, in such manner as he may deem proper.
(Am'd L. 1960, ch. 454, eff. Apr. 12, 1960.)

2. In any action or proceeding against the trustees of any employee welfare fund, or against their officers, agents or employees, report of examination or investigation, or any part thereof, if published or authorized to be published by the superintendent, shall be admissible in evidence and shall be presumptive evidence of the facts stated therein.
(Am'd L. 1960, ch. 454, eff. Apr. 12, 1960.)

3. The superintendent may assemble and file for public inspection such information covering forms of trust indentures in use and compensation paid to trustees of employee welfare funds and such other matters affecting the establishment and administration of such funds as, in his opinion, are in the public interest.

§ 65. Examinations; expenses.

The expenses of every examination of the affairs of any employee welfare fund, including any appraisal of real property, made pur-

suant to the authority conferred by any provision of this chapter, shall be borne and paid by the employee welfare fund so examined, but the superintendent, with the approval of the comptroller, may in his discretion for good cause shown remit such charges. For any such examination by the superintendent or a deputy superintendent personally, the charge made shall be only for necesary travelling expenses and other actual expenses. In all other cases the expenses of examination shall also include reimbursement for the compensation paid for the services of persons employed by the superintendent or by his authority to make such examination or appraisal. All charges, including necessary travelling and other actual expenses, as audited by the comptroller and paid on his warrant in the usual manner by the comptroller to the person or persons making the examination or appraisal, shall be presented to the trustees of the employee welfare fund in the form of a copy of the itemized bill therefor as certified and approved by the superintendent or a deputy superintendent. Upon receiving such certified copy such trustees shall pay the amount thereof to the superintendent, to be paid by him into the state treasury.

§ 66. Annual statement to superintendent.

The trustees of every employee welfare fund shall file in the office of the superintendent, annually within five months after the close of the fiscal year used in maintaining the records of such fund, a statement, to be known as the annual statement of such fund, executed in duplicate, verified by the oath of its trustee or, if there is more than one trustee, then by the oaths of at least two of such trustees, showing its condition and affairs during such fiscal year. Such fiscal year shall not be changed without the consent of the superintendent. Such statement shall be in such form and contain such substantiation by vouchers and otherwise and such other information as the superintendent shall from time to time prescribe. The superintendent shall cause to be prepared and furnished to the trustees of every employee welfare fund required by law to report to him printed forms of the statements and schedules required by him.

Every employee welfare fund shall, at the time of filing the annual statement, pay to the superintendent the sum of fifty dollars as a fee for reviewing such annual statement, provided, however, for funds with annual contributions of less than thirty thousand dollars, as reported in such annual statement, the fee shall be twenty-five dollars .

(Am'd L. 1957, ch. 808; L. 1960, ch. 301, eff. Jan. 1, 1961.)

§ 67. Special statements to superintendent.

In addition to any other statements or reports required by this article, the superintendent may also address to the trustees of any employee welfare fund or to any of its other officers, agents or employees or to any employer or labor organization representing any employees eligible for employee benefits thereunder any inquiry

in relation to the transactions or condition of the fund or any matter connected therewith. Every person so addressed shall reply in writing to such inquiry promptly and truthfully, and such reply shall be verified, if required by the superintendent, by such individual or individuals as he shall designate.
(Am'd L. 1958, ch. 857, eff. Apr. 19, 1958.)

§ 68. Annual reports to employers and employees.

The trustees of every employee welfare fund shall, annually, within five months after the close of the fiscal year used in maintaining the records of such fund, file a report with the superintendent to be known as the anual report of such fund, verified by the oath of its trustee, or if there is more than one trustee, then by the oaths of at least two of such trustees, showing its conditions and affairs during such fiscal year. Such report shall be in such form and contain such matters as the superintendent shall from time to time prescribe. Such annual report shall be kept on file with the superintendent and at the principal office of the trustees and such report, or such portion thereof as the superintendent shall deem appropriate and relevant, shall be made available by the superintendent or by the trustees, or both, for inspection by any employer contributing to such fund, by any labor organization which is a party to an agreement establishing such fund, or by any employee covered by such fund. In addition and to such extent that he deems it to be in the public interest, the superintendent may require the trustees to mail such report, or such portions thereof as the superintendent shall deem appropriate and relevant, to employees covered by the fund, to contributing employers or to any labor organization which is a party to an agreement establishing such fund, or to any or all of such parties.
(Am'd L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 69. Annual statements by corporate trustees and agents, insurance companies and service plans.

Any corporate trustee or agent holding or administering all or any part of an employee welfare fund, and any insurance company or hospital, surgical or medical service plan providing benefits under an employee welfare fund shall, within four months after the end of each policy or fiscal year, furnish to the trustees of the fund a statement of account setting forth such information relating to the fund as the trustees of the fund may need from it in order to comply with the requirements of this article.
(Am'd L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 70. Regulation under other laws.

Where the trustees of any employee welfare fund are subject to and comply with the requirements of any law of this state other than this article or the law of any other state or of the United States with respect to registration, filing, examination, statements or reports, such requirements of this article or any of them may be

waived by the superintendent with respect to any such fund or trustees to the extent that they are included in such other laws. Application for such a waiver shall be made in writing to the superintendent on such forms as he may require and any waiver issued by him hereunder shall be in writing and shall be filed in his office. The superintendent may, at any time, revoke any such waiver if, in his opinion, such other laws fail to accomplish adequately the purposes of this article. The action of the superintendent pursuant to this section shall be subject to judicial review.
(Am'd L. 1958, ch. 857, eff. Apr. 19, 1958.)

§ 71. Compliance and enforcement.

1. The trustees of every employee welfare fund shall be responsible in a fiduciary capacity for all money, property, or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund.

2. (a) No employee welfare fund and no employer or labor organization representing any employees eligible for employee benefits thereunder, and no trustee or other officer or employee of any such fund, employer or labor organization shall receive, directly or indirectly, any payment, commission, loan or other thing of value from any insurance company, insurance agent, insurance broker or any hospital, surgical or medical service plan, in connection with the solicitation, sale, service or administration of a contract providing employee benefits for such fund; and no such employer, labor organization, trustee, officer or employee shall receive any payment, commission, loan, service or any other thing of value from such fund, or which is charged against such fund or would otherwise be payable to such fund, either directly or indirectly, except that any such person may receive any employee benefits to which he is otherwise entitled, and any such trustee or other officer or employee of a fund, may receive from such fund reasonable compensation for necessary services and expenses rendered or incurred by him in connection with his official duties as such; provided, however, that nothing in this subdivision shall affect the payment of any dividend or rate credit or other adjustment due under the terms of any insurance or annuity contract.
(Am'd L. 1958, ch. 857, eff. Apr. 19, 1958.)

(b) No insurance company, insurance agent or insurance broker and no hospital, surgical or medical service plan, shall either directly or indirectly, pay any commission, make any loan or give any other payment or thing of value to any employee welfare fund or to any employer or labor organization representing any employees eligible for employee benefits thereunder or to any trustee or other officer or employee of any such fund, employer or labor organization, in connection with the solicitation, sale, service or administration of a contract providing employee benefits for such fund.
(Am'd L. 1958, ch. 857, eff. Apr. 19, 1958.)

(c) The superintendent may, after notice and a hearing, pro-

hibit the trustees of an employee welfare fund from employing or retaining or continuing to employ or retain any person upon finding that such employment or retention involves a conflict of interest which is not in the best interests of the fund or adversely affects the interests of covered employees. Any such finding by the superintendent shall be subject to judicial review.

(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

(d) The superintendent may, by regulation or order, and upon such terms and conditions as he may require, authorize or approve any transaction or transactions otherwise prohibited by this subdivision upon his finding that the transaction or transactions promote or will promote the best interests of the relevant employee welfare funds, and do not or will not adversely affect the interests of the covered employees.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957; formerly par. (c) relettered par. (d) by L. 1958, ch. 857, eff. Apr. 19, 1958.)

3. (a) No insurance company shall pay any dividend or retrospective rate credit on any covering policy except by check payable to the affected employee welfare fund or by credit memo forwarded to such fund.

(b) No employee welfare fund shall pay any premium on a covering policy except by check payable to the insurance company directly.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

4. No political contributions shall be made directly or indirectly by or from any employee welfare fund.

(Formerly subd. 3; renumbered subd. 4, by L. 1957, ch. 808, eff. Apr. 22, 1957.)

5. The superintendent may impose a penalty of not to exceed twenty-five hundred dollars upon any trustee or other officer, agent or employee of any employee welfare fund subject to this article or may remove such trustee, officer, agent or employee from office or employment, or both such penalty and removal, if after notice and a hearing he shall find that he has wilfully failed to comply with the requirements of this article. Any such action of the superintendent under this subdivision shall be subject to judicial review.

(Formerly subd. 4; renumbered and am'd L. 1957, ch. 808, eff. Apr. 22, 1957; L. 1958, ch. 857, eff. Apr. 19, 1958.)

6. In any case where, after notice and a hearing, the superintendent finds that any employee welfare fund has been depleted by reason of any wrongful or negligent act or omission of a trustee or of any other person, he may transmit a copy of his findings to the attorney general, who may bring an action in the name of the people of the state, or intervene in an action brought by or on behalf of an employee, for the recovery of such fund for the benefit of the employees and such other persons as may have an interest in the fund.

(Formerly subd. 5, renumbered subd. 6 by L. 1957, ch. 808, eff. Apr. 22, 1957.)

7. (a) Any person who wilfully violates or causes or induces the violation of any provision of this article or any regulation hereunder shall be guilty of a misdemeanor.
(Added L. 1957, ch. 808, eff. Apr. 22, 1957; lettered par. (a) by L. 1958, ch. 857, eff. Apr. 19, 1958.)

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact in any registration, examination, statement or report required under this article or the regulations thereunder shall be guilty of a misdemeanor.
(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

(c) Any person who makes a false entry in any book, record, report or statement required by this article or any regulation thereunder to be kept by him for any employee welfare fund, with intent to injure or defraud such fund or any beneficiary thereunder, or to deceive any one authorized or entitled to examine the affairs of such fund shall be guilty of a misdemeanor.
(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

(d) Nothing in paragraphs (b) or (c) of this subdivision shall be construed in any manner to limit the effect of paragraph (a).
(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

§ 72. Injunctions.

The superintendent may maintain and prosecute in the name of the people of the state an action against any trustee or any other person or persons subject to the provisions of this article, for the purpose of obtaining an injunction restraining such person or persons from doing any acts in violation of the provisions of this article. In such action if the court finds that a defendant is threatening or is likely to do any act or acts in violation of this article, and that such violation will cause irreparable injury to the interests of the people of this state or the beneficiaries of the employee welfare fund involved, the court may grant an injunction restraining such violation. The court may, on motion and affidavits, grant a preliminary injunction ex parte and an interlocutory injunction, upon such terms as may be just; but the people of the state shall not be required to give security before the issuance of any such injunction.

§ 73. Supplementary regulations; extensions of time.

1. The superintendent may from time to time promulgate appropriate supplementary rules and regulations designed to carry out the express provisions and purposes of this article.

2. For good cause shown, the superintendent may grant reasonable extensions of time for doing any act required by this article.

3. (a) The trustees of any employee welfare fund which has its principal place of business without the state, shall, within ten days after registering a fund with the superintendent, file with the secretary of state a designation, duly acknowledged, irrevocably

appointing the secretary of state as their agent upon whom may be served any summons, subpoena, subpoena duces tecum or other process directed to such trustees, in any action or proceeding brought under the provisions of this article arising out of or in connection with any transaction, matter or thing relating to such fund. If the trustees shall fail to make such designation in the manner and within the period above set forth, or, in the case of a fund which was registered with the superintendent on the effective date of this act, within six months after such effective date, such trustees shall be deemed to have irrevocably appointed the secretary of state as such agent upon whom service of such process may be made.

(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

(b) Service of such process shall be made by serving the secretary of state with a copy thereof and such service shall be sufficient provided that notice thereof and a copy of the process are sent within ten days thereafter by the moving party to the trustees at the office address of the fund by registered mail with return receipt requested. In any examination or hearing instituted by the superintendent, service of such process shall be complete ten days after the receipt by the superintendent of a return receipt purporting to be signed by the trustees or their agent or agents in accordance with the rules and customs of the post office department, or, if acceptance was refused by the trustees or their agents, the original envelope bearing a notation by the postal authorities that receipt was refused. In any action or proceeding instituted in any court in this state having jurisdiction of the subject matter, the moving party shall file with the clerk of the court in which such action or proceeding is pending, or with the judge or justice of such court, in case there be no clerk, an affidavit of compliance herewith, a copy of the process, and either the return receipt or the original envelope bearing a notation of refusal, as the case may be. Such affidavit and other papers shall be filed within thirty days after the return receipt or original envelope is received by the moving party, and service of process shall be complete ten days thereafter. Service of any process made in accordance with this subdivision shall be deemed to have been made personally within the state and, in the case of a court action or proceeding, within the territorial jurisdiction of the court from which such process issued.

(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

4. The trustees of every employee welfare fund shall preserve all of its records of final entry and all reports and statements required by this article and the regulations thereunder for a period of at least six years from the date of making the same; provided, however, that preservation of photographic reproduction thereof or records in photographic form shall constitute compliance with the requirements of this section.

(Added L. 1958, ch. 857, eff. Apr. 19, 1958.)

(Former § 73 renumbered § 74; new § 73 added L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 74. Construction.

Nothing in this article shall be construed to relieve the trustees of any employee welfare fund from compliance with any other provision of this chapter or any other applicable laws of this state.

(Formerly § 73, renumbered § 74 by L. 1957, ch. 808, eff. Apr. 22, 1957.)

§ 75. Separability.

If any provision of this article or the application of such provision to any person or circumstance shall be held invalid, the remainder of this article and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

(Added L. 1957, ch. 808, eff. Apr. 22, 1957.)

EXHIBIT 2

STATE OF NEW YORK

DEPARTMENT OF LABOR

LABOR AND MANAGEMENT

IMPROPER PRACTICES ACT

(Article 20-a of the New York State Labor Law)

In Effect October 1, 1969

STATE OF NEW YORK

NELSON A. ROCKEFELLER
Governor

DEPARTMENT OF LABOR

M. P. CATHERWOOD
Industrial Commissioner

DIVISION OF LABOR AND MANAGEMENT PRACTICES

State Office Building Campus
Albany, New York 12226

Copies of this Article (limited to two copies per request) may be obtained free of charge from the State of New York, Department of Labor, Office of the Administrative Director, State Office Building Campus, Albany, N.Y. 12226 or the State Office Building, 80 Centre Street, New York, N.Y. 10013.

LP-15 (7-69)

New Jersey State Library

IMPROPER PRACTICES ACT

as added by L1959, C451, eff. June 1, 1959

Section 720. Findings and policy.
721. Definitions.
722. Fiduciary obligations of officers and agents.
723. Specific prohibited financial interests and transactions.
724. Obligation of employers and others.
725. Enforcement of fiduciary obligations.
726. Financial reporting.
727. Accounting requirements.
728. Enforcement of financial reporting and accounting duties.
729. Rules and regulations; extensions of time.
730. Advisory council.
731. Construction and saving clause.
732. Separability.

§ 720. Findings and policy. The rights of employees to organize and to bargain collectively through labor organizations of their own choosing have been affirmatively protected by the constitution and statutes of this state and by parallel federal laws. Encouraged by these laws, a substantial proportion of the employees in this state have become members of, and contribute financially to, labor organizations for the purpose of bargaining collectively with their employers concerning wages and other conditions of employment. To the officers and agents of their labor organizations, these employees have entrusted their funds and the power to act in their behalf in achieving the purposes of their labor organizations.

Experience has shown instances where officers and agents of some labor organizations have abused their positions of fiduciary responsibility.

Experience has also shown instances in which some employers, employer organizations and labor relations consultants have participated in or induced such abuses of fiduciary responsibility by officers and agents of such labor organizations.

Responsible leaders of the labor movement have recognized that union officers and agents have a fiduciary duty to serve the members of the union honestly and faithfully, and these leaders have taken courageous action against those who have violated their trust. Experience, however, has shown that labor's efforts to correct abuses from within need to be aided and supplemented by legislation.

Such abuses have had a harmful effect on the general welfare, health and safety of employees and the public. Accordingly, it is hereby declared to be the public policy of the state of New York that officers and agents of a labor organization shall be held to a

§ 720 cont'd

fiduciary obligation in handling the labor organization's assets; that such officers and agents shall not acquire financial interests which interfere or tend to interfere with the faithful performance of their responsibility to the labor organization; and that such officers and agents shall account fully to the members of such labor organization for all assets and financial transactions. It is hereby further declared to be the public policy of the state of New York that employers, employer organizations, labor relations consultants and other persons shall not participate in or induce violations of such fiduciary obligation by officers and agents of labor organizations.

§ 721. Definitions. When used in this article, the term:

1. "Person" includes one or more individuals, partnerships, associations, or corporations, whether acting for themselves or in a representative capacity.

2. "Labor organization" means any organization of any kind which exists for the purpose, in whole or in part, of representing employees employed within the state of New York in dealing with employers or employer organizations or with a state government, or any political or civil subdivision or other agency thereof, concerning terms and conditions of employment, grievances, labor disputes, or other matters incidental to the employment relationship, and shall include the parent national or international organization of a local labor organization. The term "labor organization" shall not include any professional association or organization of teachers which has been incorporated pursuant to section two hundred sixteen of the education law or has registered with the board of regents pursuant to section two hundred thirty-seven of the education law.

Subd 2 as last amended by L1961, C417, eff. April 11, 1961

3. "Employer" means any person conducting a business or employing another within the state of New York, but shall not include a state government or any political or civil subdivision or other agency thereof.

Subd 3 as last amended by L1960, C825, eff. April 25, 1960

4. "Employer organization" means any organization of any kind which exists for the purpose, in whole or in part, of representing employers in dealing with employees or labor organizations concerning terms and conditions of employment, grievances, labor disputes, or other matters incidental to the employment relationship at a place of business maintained in the state of New York.

§ 721 cont'd

5. "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities or collective bargaining activities, but shall not include a director, officer or regular employee of such employer, employer organization or labor organization, or an attorney engaged in the practice of law.

6. "Officer" means any person holding or in fact performing or authorized to perform the functions of an office named or described in the constitution, charter, articles of incorporation, articles of association or by-laws of a labor organization or employer organization.

7. "Agent" means any person, other than an attorney engaged in the practice of law, who represents or is authorized to represent a labor organization or employer organization, alone or with others, in its dealings with employers, employees, members, employer organizations, labor organizations, or other persons, regardless of whether his relationship to the labor organization or employer organization is that of an independent contractor or employee.

§ 722. Fiduciary obligations of officers and agents. No officer or agent of a labor organization shall, directly or indirectly

1. Have or acquire any pecuniary or personal interest which would conflict with his fiduciary obligation to such organization;

2. Engage in any business or financial transaction which conflicts with his fiduciary obligation; or

3. Act in any way which subordinates the interests of such labor organization to his own pecuniary or personal interests.

§ 723. Specific prohibited financial interests and transactions.

1. Without limiting his fiduciary obligation provided in section seven hundred twenty-two, it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization:

(a) To have, directly or indirectly, any financial interest in any business or transaction of either an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or an employer who is in the same industry as such an employer;

§ 723 cont'd

(b) To have, directly or indirectly, any financial interest in the business or transaction of any person who sells to, buys from, or otherwise deals with (i) an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or (ii) an employer organization which represents such employer, or (iii) an employer who is in the same industry as such an employer;

(c) To have, directly or indirectly, any financial interest in the business of any person who sells to, buys from, or otherwise deals with his labor organization;

(d) To have, directly or indirectly, any financial interest in any transaction with his labor organization for the purchase or sale of property or services, except reasonable compensation for services rendered by him to such organization as officer or agent;

(e) To receive, directly or indirectly, any payments, loans, or gifts from (i) an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or (ii) an employer organization which represents such employer, or (iii) an employer who is in the same industry as such an employer; provided, however, that such an officer or agent may receive reasonable compensation for services rendered by him as an employee of such employer, or payments required by collective agreement to be made in lieu of wages for time lost from work while engaged in collective bargaining, handling of grievances, or otherwise in the administration of a collective agreement;

(f) To lend any funds of the labor organization, directly or indirectly, to either any officer, agent, or employee of such organization, or any business in which an officer, agent, or employee of such organization has, directly or indirectly, a financial interest; provided, however, that loans may be made from a loan fund which has been set aside in accordance with a written resolution of the governing board of the labor organization for the specific purpose of making personal loans to its officers, agents, and employees generally, in compliance with established, written rules; or

(g) To lend or invest any funds of the labor organization, directly or indirectly, in any business of an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, except where the governing board of the labor organization has adopted a written resolution finding and determining that such loan or investment will promote the best interests of the employees and will not adversely affect collective bargaining.

§ 723 cont'd

2. The fact that conduct or acts of an officer or agent of a labor organization have not caused damage to such organization or any of its members, or have been ratified or acquiesced in by such organization or its members, shall not be relevant in determining whether such conduct or acts constitute a violation by such officer or agent of any of the obligations provided in section seven hundred twenty-two and in this section.

3. Nothing contained in this section shall prohibit an officer or agent of a labor organization from:

(a) holding a financial interest acquired as an employee through a regularly established employee benefit plan, including a stock purchase, profit sharing, pension or retirement plan;

(b) holding securities traded on a securities exchange registered as a national exchange under the securities exchange act of nineteen hundred thirty-four, or securities traded on over-the-counter markets within the meaning of such act, or shares in an investment company registered under the investment company act of nineteen hundred forty, or securities of a public utility holding company registered under the public utility holding company act of nineteen hundred thirty-five, and all federal laws amendatory and supplemental to such acts; provided, however, that any investment in such securities or shares shall not constitute more than one per cent of the outstanding securities or shares of the respective class or classes of securities or shares which he holds;

Par. (b) as last amended by L1961, C397, eff. April 11, 1961

(c) lending to, or investing in, any business owned predominantly by a labor organization or labor organizations; or

(d) receiving gifts, otherwise lawful, from employers whose employees his labor organization represents and from employer organizations which represent such employers, provided the cumulative retail value of such gifts from all such employers and employer organizations does not exceed one hundred dollars in any calendar year.

4. Nothing contained in this section shall prohibit any labor organization from:

(a) Acquiring a nominal number of shares in any corporation for the purpose of qualifying as stockholder in order to obtain financial statements of the corporation; or

(b) Lending to, or investing in, any business owned predominantly by a labor organization or labor organizations.

§ 724. Obligation of employers and others. No employer, employer organization, labor relations consultant or other person shall knowingly participate in or induce any conduct or act which violates any of the obligations of any officer or agent of a labor organization provided in section seven hundred twenty-three.

§ 725. Enforcement of fiduciary obligations. 1. Where an officer or agent of a labor organization has violated or is violating any of his obligations provided in sections seven hundred twenty-two and seven hundred twenty-three, such labor organization and the parent organization of such labor organization shall each have the right to bring an action or proceeding in any court of competent jurisdiction for legal or equitable relief to redress such violation of obligation. Any member of such labor organization shall have the right to bring such action or proceeding if (a) after request by any member that such action or proceeding be brought, such organization shall fail to do so, or (b) such request would be futile, or (c) such organization has failed to prosecute diligently any such action or proceeding which it has brought.

2. If any such action or proceeding is determined in favor of such organization or any such member, the court may award, in addition to other costs authorized by law, reasonable attorneys' fees and disbursements out of any moneys awarded or funds or assets recovered in such action or proceeding.

3. Any employer, employer organization, labor relations consultant, or other person who knowingly participated in or induced any conduct or act which violates any of the obligations of an officer or agent of a labor organization provided in sections seven hundred twenty-two and seven hundred twenty-three, shall be subject to the same liabilities and judicial remedies as such officer or agent, including but not limited to joint and several liability with such officer or agent for any losses suffered by the labor organization, or any member thereof, as a result of any such violation of obligation, and joint and several liability to pay over to such labor organization or such member any gains or profits made as a result of such knowing participation or inducement.

4. Each wilful and knowing violation of any of the provisions of section seven hundred twenty-three or seven hundred twenty-four of this article shall constitute a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

§ 726. Financial reporting. 1. Every labor organization and employer organization shall file with the industrial commissioner within six months after this article becomes effective and thereafter annually within five months after the end of its fiscal year, a

verified report showing the financial condition and financial transactions of the organization during the fiscal year. The president or chief executive officer and the treasurer or chief financial officer of the organization personally shall be responsible for the preparation and filing of the report, and both shall verify such report.

The report shall be in such form and contain such matters as the industrial commissioner may determine from time to time to be necessary to disclose accurately the organization's financial condition and operations during the preceding fiscal year, including the following:

(a) the name of such organization and the address of its principal place of business;

(b) the names, titles, and compensation, allowances, and expenses of its three principal officers and of any of its other officers or agents whose aggregate compensation, allowances, and expenses for the year exceeded ten thousand dollars;

(c) loans of funds or gifts of the labor organization, directly or indirectly, to any officer, agent, or employee of the labor organization where the aggregate of such loans during the fiscal year exceeds two hundred fifty dollars or the aggregate of such gifts during the year exceeds one hundred dollars, in the case of the particular individual;

Par. (c) as last amended by L1960, C825, eff. April 25, 1960

(d) loans or investments of funds of the labor organization in any business of an employer whose employees the labor organization represents or seeks to represent for purposes of collective bargaining; and

(e) the amounts and sources of its receipts, the amounts and purposes of its disbursements during the fiscal year, and its assets and liabilities as of the end of the year.

The industrial commissioner may, to effectuate the purposes of this article, vary the nature of the report required according to the size and type of the organization.

2. Every labor organization and employer organization organized after the effective date of this article shall file a report with the industrial commissioner within ninety days after the date on which it first (a) adopts a constitution, or (b) holds an election of officers, or (c) makes a collective bargaining agreement. The report shall contain such information relating to the organization, operation, and affairs of such organization as may be prescribed by the industrial commissioner, including, but not limited to, its name and business address, the names of its officers, its affiliation, if any, with any parent organization, and the date on which

§ 726 cont'd

its fiscal year ends. The president or chief executive officer and the treasurer or chief financial officer of the organization personally shall be responsible for the preparation and filing of the report, and both shall verify such report.

Subd 2 as last amended by L1967, C77, eff. March 14, 1967

3. (a) Every employer who in his fiscal year made any payment, loan or gift, directly or indirectly:

(1) to any person for the performance of, or under an arrangement to perform, any acts of:

(i) interference with, or restraint or coercion of, employees in their forming or joining labor organizations;

(ii) interference with, or restraint or coercion of, employees in their choice of representatives for purposes of collective bargaining; or

(iii) interference with, or restraint or coercion of, employees in their engaging in concerted action for mutual aid and protection.

(2) to any officer or agent of a labor organization;

and

every employer, in whose business or financial transactions an officer or agent of a labor organization has any financial interest, if such labor organization represents, or seeks to represent, for purposes of collective bargaining, the employees of such employer or the employees of other employers in the same industry, shall file with the industrial commissioner annually within five months after the end of his fiscal year a verified report on a form prescribed by the industrial commissioner and signed by the owner, a partner, or in the case of a corporation, by the president and treasurer, or corresponding principal officers, setting forth the following:

(i) the name of the employer, the nature of his business and the address of his principal place of business;

(ii) the name of any employers' organization of which he is a member;

(iii) the name of each labor organization which the employer recognizes as a representative of his employees for purposes of collective bargaining, or which has served notice on the employer that it demands recognition as such representative;

(iv) payments, loans or gifts made directly or indirectly during the preceding fiscal year, to any person for the performance of, or under an arrangement to perform, any of the acts described in subparagraph (1) of this subdivision.

(v) any financial interest which an officer or agent of a labor organization which represents or seeks to represent his employees for purposes of collective bargaining, has, directly or indirectly, in the employer's business or financial transactions;

(vi) any payments, loans or gifts made by the employer, directly or indirectly, to an officer or agent of a labor organization.

(b) Nothing in this subdivision shall be construed to apply to payments to employees for services rendered in the regular course of employment, or payments required by collective agreement to be made in lieu of wages for time lost from work while engaged in collective bargaining, handling of grievances, or otherwise in the administration of a collective agreement. Nothing contained in item (v) of paragraph (a) of this subdivision shall require an employer to report holdings by an officer or agent of a labor organization which constitute one per cent or less of the outstanding securities or shares of the respective class or classes of securities or shares described in paragraph (b) of subdivision three of section seven hundred twenty-three.

Subd 3 as last amended by L1969, C312, eff. October 1, 1969

4. Every labor relations consultant shall file with the industrial commissioner within six months after this article becomes effective, and thereafter annually within five months after the end of his fiscal year, a verified report showing his receipts and disbursements during the preceding fiscal year for, and any agreement or arrangement in which he has participated in any way for the performance of any acts of, interference with, or restraint or coercion of employees in their forming or joining labor organizations, choosing of representatives for purposes of collective bargaining, or engaging in concerted action for mutual aid and protection.

The report shall be in such form and contain such other matters as the industrial commissioner may determine from time to time to be necessary to disclose accurately the labor relations consultant's activities and effectuate the purposes of this article.

5. The industrial commissioner shall accept in lieu of any report required under this section, a duplicate copy of a report filed with the federal government if such report contains information substantially equivalent to that required by this section and is verified as required by this section.

6. The industrial commissioner may, for the purpose of assuring the completeness of any report required to be filed by this section or compliance with such reporting requirements, address to any officer, agent, or employee of a labor organization, employer organization, employer, or labor relations consultant inquiries relating to the financial matters and financial transaction required to be reported by this section, and may require that replies to such inquiries be submitted in writing and verified by such individuals as he designates.

§ 726 cont'd

7. The contents of all reports submitted under subdivisions one, two, three, four and five of this section shall be public information, and such reports shall be available for public inspection under such conditions as the industrial commissioner shall prescribe. The contents of all reports submitted under subdivision six of this section shall be made available to the advisory council established under section seven hundred thirty and to appropriate law enforcement agencies and officials, and the advisory council and the industrial commissioner may use such contents in the preparation and publication of studies, reports and surveys.

8. Every labor organization and employer organization shall make available to each of its members, in such manner as the industrial commissioner shall prescribe, a copy of its annual financial report or such portions thereof as the industrial commissioner shall find relevant and appropriate. The officers responsible for the preparation and filing of reports under subdivision one of this section shall be responsible for providing copies of reports under this subdivision. Where the industrial commissioner has accepted a report under subdivision five of this section, it shall be sufficient compliance with the requirements of this subdivision if such annual financial report is made available to such members in the manner prescribed by the federal government.

§ 727. Accounting requirements. 1. Every labor organization and employer organization shall maintain detailed and accurate books and records of account in conformity with generally accepted accounting principles and in accordance with standards prescribed by the industrial commissioner; provided, however, that the standards prescribed may vary according to the size and type of the organization. Every employer and every labor relations consultant shall maintain detailed and accurate books and records of account of all matters required to be reported under section seven hundred twenty-six of this article. All books and records of account shall be preserved for a period of five years after the filing of reports based on the information which they contain, or for a period of five years from the time that such reports should have been filed. The persons required to prepare and file reports under section seven hundred twenty-six of this article, shall be responsible for the maintenance and preservation of books and records of account required by this section.

Subd 1 as last amended by L1969, C312, eff. October 1, 1969

2. The industrial commissioner, when he has reasonable cause to believe that the required accounting standards have not been maintained or that the books and records do not accurately reflect

§ 727 cont'd

the financial condition and financial transactions of the labor organization or employer organization, may examine the books and records of the organization, subpoena witnesses and documents, and make such other investigation as is necessary to enable him to determine the facts relative thereto.

The industrial commissioner, when he has reasonable cause to believe that the books and records do not accurately reflect the matters required to be reported by the employer or labor relations consultant, may examine the books and records of such employer or labor relations consultant, subpoena witnesses and documents, and make such other investigation as is necessary to enable him to determine the facts relative thereto.

§ 728. Enforcement of financial reporting and accounting duties.

1. Any officer, agent, or employee of any labor organization or employer organization, or any employer or labor relations consultant who wilfully fails or refuses to comply with any provision of sections seven hundred twenty-six or seven hundred twenty-seven of this article, or who makes or files a report or reply required under these sections knowing that it contains false information, shall be guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

2. Any officer, agent, or employee of a labor organization or employer organization, or any employer or labor relations consultant who knowingly causes any person to fail or refuse to comply with any provision of sections seven hundred twenty-six or seven hundred twenty-seven of this article, or who causes any person to make or file a report or reply required under these sections knowing that it contains false information shall be guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

3. Any prosecution brought under subdivisions one and two of this section shall, in the case of a labor organization or an employer organization, be conducted in the county where such organization has a place of business and, in the case of an employer or labor relations consultant, in the county where such person resides or has a place of business; provided, however, that if such organization does not have a place of business within the state of New York or such person has neither a residence nor place of business within the state, the prosecution shall be conducted in the county of Albany.

Subd 3 as added by L1965, C329, eff. October 1, 1965

§ 728 cont'd

4. If any officer, agent, or employee of a labor organization or employer organization, or any employer or labor relations consultant fails or refuses to comply with any provision of sections seven hundred twenty-six or seven hundred twenty-seven of this article, or causes any person to fail or refuse to comply with the provisions of these sections, the industrial commissioner may issue an order directing compliance. If the order is not complied with within ten days after issuance, there may be instituted in the name of the people of the state a proceeding to compel compliance with these sections.

Subd 4 as renumbered by L1965, C329, eff. October 1, 1965

§ 729. Rules and regulations; extensions of time. 1. The industrial commissioner may, from time to time, promulgate, amend and rescind appropriate rules and regulations designed to carry out the express provisions and purposes of this article.

2. For good cause shown, the industrial commissioner may grant reasonable extensions of time for doing any act required by this article.

§ 730. Advisory council. 1. An advisory council is hereby established consisting of three members appointed by the governor, one of whom shall be designated as chairman by the governor and who shall serve as chairman at the pleasure of the governor. All members of the advisory council shall be appointed for terms of three years, such terms to commence on June first and expire on May thirty-first; provided, however, that of the members first appointed one shall be appointed for a one-year term expiring on May thirty-first, nineteen hundred sixty, and one shall be appointed for a two-year term expiring on May thirty-first, nineteen hundred sixty-one. Any member chosen to fill a vacancy created otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he is to succeed.

2. The advisory council shall keep informed as to current facts and trends relating to ethical practices of labor and management, and shall from time to time make reports to the governor and the legislature concerning the operation, administration and enforcement of this article, together with any recommendations for improvement or revision. In the event that federal legislation is enacted having objectives similar to this article, the advisory council shall make recommendations to the governor and the legislature for reducing or eliminating any duplication in the financial reporting or other procedures required by such legislation and by this article.

3. The members of the advisory council shall receive the sum of fifty dollars for each day or part thereof spent in attendance at meetings or otherwise in the work of the council, but no member shall be entitled to compensation in excess of two thousand dollars during any one year; and, in addition, they shall be allowed actual and necessary traveling expenses.

§ 731. Construction and saving clause. 1. Nothing contained in this article shall be construed to relieve any labor organization, employer organization, or any of its officers, agents, employees, representatives or members, or any employer or labor relations consultant from compliance with any other provision of this chapter or any other applicable law of this state.

§ 731 cont'd

2. Nothing contained in this article shall be construed to limit the responsibilities or duties of any officer or agent of a labor organization or employer organization under the common law or any law of this state, and nothing contained in this article shall be construed to take away or limit any right or remedy to which members of a labor organization or employer organization are entitled under the common law or any law of this state.

3. Nothing contained in this article shall be construed to limit or otherwise affect the right of any person under any statute or rule of law to organize or join labor organizations, to bargain collectively, to picket, strike, or engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, or the right of any labor organization under any statute or rule of law to carry on such activities, nor to enlarge or otherwise affect the power of courts to issue injunctions under section eight hundred seven of this chapter.

Subd 3 as last amended by L1965, C329, eff. October 1, 1965

§ 732. Separability. If any provision of this article or the application of such provision to any person or circumstance shall be held invalid, the remainder of this article and the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

EXHIBIT 3

MODEL ANTI-GAMBLING ACT

Drafted by

THE AMERICAN BAR ASSOCIATION COMMISSION
ON ORGANIZED CRIME

And Subsequently Submitted to
and Approved by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

at its

ANNUAL CONFERENCE
MEETING IN ITS SIXTY-FIRST YEAR
AT SAN FRANCISCO, CALIFORNIA
SEPTEMBER 8-13, 1952

WITH
COMMENTS

APPROVED BY THE AMERICAN BAR ASSOCIATION AT ITS MEETING AT
SAN FRANCISCO, CALIFORNIA, SEPTEMBER 19, 1952

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:

KURT F. PANTZER, 1313 Merchants Bank Bldg., Indianapolis, Indiana, *Chairman,*
ROBERT K. BELL, 801 Asbury Avenue, Ocean City, New Jersey,
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ROBERT E. WOODSIDE, Attorney General, Harrisburg, Pennsylvania,
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Copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
1419 First National Bank Bldg.,
Omaha 2, Nebr.

MODEL ANTI-GAMBLING ACT AND COMMENTARY

BY

RUFUS KING [1]

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.

[1] Consultant to the Commission, formerly Consultant to the Senate Committee to Investigate Organized Crime in Interstate Commerce and of the Subcommittee Investigating Crime and Law Enforcement in the District of Columbia; member of the New York and District of Columbia Bars.

[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 *

SECTION 1. *Legislative Policy; Construction.* It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and other organized crime, to restrain all persons from seeking profit from gambling 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 sport and social pastimes which are not for profit, do not affect the public, and do not breach the peace*]. All the provisions of this act shall be liberally construed to achieve these ends, and administered and enforced with a view to carrying 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

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* 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).

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

(1) "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.

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

posit or other thing of value for gain contingent in whole or in part upon lot, chance or the operation of a gambling device, but does not include: bonafide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entries; bonafide business transactions which are valid under the law of contracts; and other acts or transactions now or hereafter expressly authorized by law.

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

(4) "Gambling device" means any device or mechanism by the operation of which a right to money, credits, deposits or other things of value may be created, in return for a consideration, as the result of the operation of an element of chance; any device or mechanism which, when operated for a consideration does not return the same value or thing of value for the same consideration upon each operation thereof; any device, mechanism, furniture, fixture, construction or installation designed primarily for use in connection with professional gambling; and any sub-assembly or essential part designed or intended for use in connection with any such device, mechanism, furniture, fixture, contruction or installation. [*But in the application of this definition 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.*]

(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.

(6) "Gambling information" means a communication with respect to any wager made in the course of and any information intended to be used for professional gambling. In the application of this definition the following shall be presumed to be intended for use in professional gambling: information as to wagers, betting odds or changes in betting odds.

(7) "Gambling premise" means any building, room, enclosure, vehicle, vessel or other place whether open or enclosed, used or intended to be used for professional gambling. In the application of this definition, any place where a gambling device is found shall be presumed to be intended to be used for professional gambling.

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

[(9) "Peace officer" means [police officer, sheriff, constable, deputy, . . . etc.]]

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

COMMENT ON SECTION 2

Because of the complicated nature of the subject matter and the exceedingly fine lines which must necessarily be drawn, the act is built around ten definitions. This is also a fairly recent innovation in statutory drafting, used extensively in circumstances such as these. See, e.g., Civil Aeronautics 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. Courrier,* 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 *Boosalis 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 unexceptional. 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); *Gayer v. Whelan,* 59 Cal. App. 2d 255, 138 P. 2d 763 (1943). Compare *Holliday 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. 28, 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 subassemblies 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.

SECTION 3. *Gambling; [Exemption]; Professional Gambling.*

(1) Whoever engages in gambling, or solicits or induces

another to engage in gambling shall be fined [not more than $500,] or imprisoned [not more than six months], or both.

[(2) *Natural persons shall be exempt from prosecution and punishment under subsection (1) for any game, wager or transaction which is incidental to a bonafide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling.*]

(2) [(3)] Whoever engages in professional gambling, or knowingly causes, aids, abets or conspires with another to engage in professional gambling shall be fined [not more than [$1,000]] or imprisoned [not more than one year], or 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.

SECTION 4. *Gambling Devices; Gambling Records.*

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

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

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

cluding without limitation furnishings and fixtures adaptable to non-gambling uses and equipment and stock for printing, recording, computing, transporting, safekeeping or (except as otherwise provided in subsection (3) of Section 5) communication, used in connection with professional gambling or maintaining a gambling premise, and all money or other things of value at stake or displayed in or in connection with professional gambling or any gambling device, shall be subject to seizure, immediately upon detection, by any peace officer, and shall, unless good cause is shown to the contrary by the owner, be forfeited to the state by order of a court having jurisdiction, for sale by public auction or as otherwise provided by law. Bonafide liens against property so forfeited shall, on good cause shown by the lienor, be transferred from the property to the proceeds of the sale of the property. Forfeit monies and other proceeds realized from the enforcement of this subsection shall be paid equally into the general funds of the state and the general funds of the political subdivision or other public agency, if any, whose officers made the seizure, except as otherwise provided by law.

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

(5) Whoever knowingly prints, makes, possesses, stores or transports any gambling record, or buys, sells, offers or solicits any interest therein, whether through an agent or employee or otherwise, shall be fined [not more than [$500],] or imprisoned [not more than six months], or both, and in the enforcement of this subsection direct possession of any gambling record shall be presumed to be knowing possession 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 hookups, 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*, 55 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. 849.15; 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, 68 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).

SECTION 5. *Gambling Information.*

(1) Whoever knowingly transmits or receives gambling

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

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

(3) Facilities and equipment furnished by a public utility in the regular course of business, and which remain the property of such utility while so furnished, shall not be seized pursuant to subsection (3) of Section 4 of this act except in connection with an alleged violation of this act by such public utility, and shall be forfeited only upon conviction 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 *McInerny v. Ervin,* 46 So. 2d 458 (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.

SECTION 6. *Gambling Premises.*

(1) All gambling premises are common nuisances and shall be subject to abatement by injunction or as otherwise provided by law. In any action brought under this subsection the plaintiff need not show damage and may, in the discretion of the court, be relieved of all requirements as to giving security.

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

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

celled shall be reissued for such property or premise for a period of [sixty days] thereafter. Enforcement of this subsection shall be the duty of all peace officers and all taxing and licensing officials of this state and its political subdivisions and other public agencies.

(4) Whoever as owner, lessee, agent, employee, operator, occupant or otherwise knowingly maintains or aids or permits the maintaining of a gambling premise shall be fined [not more than [$1,000],] or imprisoned [not more than one year], or both, and whoever does any act in violation of this paragraph within any locked, barricaded or camouflaged place or in connection with any electrical or mechanical alarm or warning system or arrangement shall be fined [not more than [$1,000],] or imprisoned [not more than five 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 salutory.

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.

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

SECTION 8. *Witness Immunity.* In any proceeding arising out of a violation of this act, if a natural person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated under this act thereby, the court, when requested in writing by the prosecuting attorney, shall, unless it finds that to do so would be clearly contrary to the public interest, order such person to answer or produce the evidence, and that person shall comply with the order. After complying with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, such person shall not be prosecuted or subjected to penalty or forfeiture under this act for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. He may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence 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.

[SECTION 9. *Restriction on Political Subdivisions.* No county, city or other political subdivision or public agency of this state shall license, tax, permit or authorize any act, transaction or thing in violation of this act, and all rulings, ordinances and regulations in conflict herewith shall be 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.

SECTION 10. *Severability.* If any provision of this act or the application thereof to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions 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).

SECTION 11. *Effective Date.* This act shall take effect when approved, except Section 4 which shall take effect at 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.

EXHIBIT 4

MICHIGAN REVISED CRIMINAL CODE—FINAL DRAFT, WITH COMMENTS, SECTIONS 6101 ET SEQ.

CHAPTER 61. GAMBLING

Section
6101. Definitions.
6105. Promoting Gambling in the First Degree.
6106. Promoting Gambling in the Second Degree.
6110. Conspiracy to Promote Gambling.
6115. Possession of Gambling Records in the First Degree.
6116. Possession of Gambling Records in the Second Degree.
6120. Possession of Gambling Records: Defense.
6125. Possession of a Gambling Device.
6130. Gambling Offenses: Prima Facie Proof.
6135. Lottery Offenses: No Defense.
6140. Forfeiture of Gambling Devices and Gambling Proceeds.

[Definitions]

Sec. 6101. The following definitions apply to this chapter:

(a) "Advance gambling activity." A person "advances gambling activity" if, acting other than as a player, he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases or toward any other phase of its operation. A person advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation.

(b) "Bookmaking" means 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.

(c) "Contest of chance" means any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree

upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

(d) "Gambling." A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance.

(e) "Gambling device" means any device, machine, paraphernalia or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. However, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within this definition.

(f) "Lottery" or "policy" means an unlawful gambling scheme in which (i) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated the winning ones; and (ii) the winning chances are to be determined by a drawing or by some other method; and (iii) the holders of the winning chances are to receive something of value.

(g) "Mutuel" or "the numbers game" means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme.

(h) "Player" means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to

play, permitting the use of premises therefor and supplying cards or other equipment used therein. A person who engages in "bookmaking" as defined in paragraph (b) is not a "player." The burden of injecting the issue that he is a player is on the defendant, but this does not shift the burden of proof.

(i) "Profit from gambling activity." A person "profits from gambling activity" if, 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.

(j) "Slot machine" means a gambling device that as a result of the insertion of a coin or other object operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value. A device so constructed or readily adaptable or convertible to such use is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance.

(k) "Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

(l) "Unlawful" means not specifically authorized by law.

Committee Commentary

The section is based on New York Revised Penal Law § 225.00; the exception to the definition of "gambling" in subsection (d) is taken from Wisconsin Statutes § 945.01 (1) (1963). The significance of the several definitions is discussed in the commentaries to particular sections in the chapter.

[Promoting Gambling in the First Degree]

Sec. 6105. (1) A person commits the crime of promoting gambling in the first degree if he knowingly advances or profits from unlawful gambling activity by:

(a) Engaging in bookmaking to the extent that he receives or accepts in any one day more than 5 bets totaling more than 500 dollars; or

(b) Receiving in connection with a lottery or mutuel scheme or enterprise (i) money or written records from a person other

than a player whose chances or plays are represented by such money or records, or (ii) more than 500 dollars in any one day of money played in the scheme or enterprise.

(2) Promoting gambling in the first degree is a Class C felony.

Committee Commentary

The section is based on New York Revised Penal Law § 225.10. Its significance is discussed in the Commentary to §§ 6105 to 6106 below.

[Promoting Gambling in the Second Degree]

Sec. 6106. (1) A person commits the crime of promoting gambling in the second degree if he knowingly advances or profits from unlawful gambling activity.

(2) Promoting gambling in the second degree is a Class A misdemeanor.

Committee Commentary

The section is adapted from New York Revised Penal Law § 225.05. Its significance is discussed in the Commentary to §§ 6105 to 6106 below.

Committee Commentary to §§ 6105 to 6106

Relationship to Existing Law

Michigan has the usual array of statutes prohibiting gambling and lotteries and penalizing assistance given to gambling enterprises. The provisions in the Penal Code make it a misdemeanor to acept money or anything of value contingent on an uncertain event [C.L.1948, § 750.301]; a misdemeanor to keep or occupy a building for gambling [C.L.1948, § 750.302]; a misdemeanor (actually a felony because it calls for imprisonment in the state prison) to keep a gaming room or table for hire, gain or reward [C.L.1948, § 750.303]; a misdemeanor to sell pools or register bets [C.L.1948, § 750.304]; a misdemeanor to publish or distribute betting odds [C.L.1948, § 750.305; this cannot constitutionally apply to publication of the information after the event in question, Parks v. Judge of Recorder's Court, 236 Mich. 460, 210 N.W. 492 (1926)]; a misdemeanor (actually a felony in light of the penalty) to furnish teletype and similar services other than telephone service to provide racing results [C.L.1948, § 750.305a] a misdemeanor to possess pool tickets and other memoranda [C.L.1948, § 750.306]; a misdemeanor to frequent or attend a place where gambling is permitted [C.L.1948, § 750.309]; a felony to gamble in stocks, bonds and commodities [C.L.1948, § 750.313]; a misdemeanor to win at gambling [C.L.1948, § 750.314]; a misdemeanor not to sue for gambling losses within three months after paying the winner [C.L.1948, § 750.315]; a misdemeanor to publish and sell betting odds on horse races [C.L.1948, § 750.330]; a misdemeanor to race horses or other animals except as provided by law [C.L.1948, § 750.331]; a felony to enter a horse fraudulently in a speed contest [C.L.1948, § 750.332]; a misdemeanor (actually a felony on the basis of the penalty) to operate a lottery or gift enterprise [C.L.1948, § 750.372]; a misdemeanor (actually a felony on the basis of the penalty) to sell lottery tickets [C.L.1948, § 750.373]; and a misdemeanor to advertise or print tickets for a lottery [C.L.1948, § 750.375].

It is also an offense to gamble at a boxing or other match licensed by the State Athletic Board of Control [C.L.1948, §§ 431.125, 431.126] or to gamble within two miles of a church during services [C.L.1948, § 752.525].

Only a few aspects of these statutes have been litigated. One is the proof necessary to sustain a charge of maintaining a gambling room. If the de-

fendant admitted witnesses and remained in apparent charge for a period of time, the proof is sufficient [People v. John's 336 Mich. 617, 59 N.W.2d 20 (1953); People v. Murphy, 239 Mich. 60, 214 N.W. 165 (1927)]. Otherwise, it will be necessary to prove actual control and knowledge of the gambling activity [People v. Johnson, 323 Mich. 573, 36 N.W.2d 151 (1949)].

A second is what constitutes a gambling device. Punchboards fit the definition because they have no significant use other than to pay stakes; it is enough that the defendant has them and that they may be used for gambling anywhere in the state, there being no legislative requirement that the devices be used on the premises where they are found [People v. Lippert, 304 Mich. 685, 8 N.W.2d 880 (1943). A pinball machine is a gambling device when it earns free plays; "where there is an element of chance in the operation of the slot machine—where the one who plays the machine stands to win or lose money, trade checks, prizes, by a chance—the machine is a gambling device" [Oatman v. Port Huron Chief of Police, 310 Mich. 57, 16 N.W.2d 665 (1944)]. If officers are lawfully in a place where slot machines are present, the offense is being committed in their presence and they may take the machines with them as evidence [People v. Alicki, 321 Mich. 701, 33 N.W.2d 124 (1948)].

A third relates to what a lottery is. The fact that the Constitution forbids legislative authorization of a lottery or permission to sell lottery tickets [Art. IV, § 41 (1963)] has resulted in liberal judicial construction of the statutes prohibiting lotteries. "A lottery is a scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished" [People v. Elliott, 74 Mich. 264, 267-68, 41 N.W. 916 (1889)]. Therefore, it is the sale of the chances in Michigan, and not the place of the actual drawing that matters. The essentials of a lottery are "consideration, prize and chance," so that a theater "bank night" scheme constitutes a lottery [Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc., 276 Mich. 127, 267 N.W. 602 (1936)]; the factor of consideration was found in the fact that people had to buy a ticket to the theater to participate, and that some would attend because of the lottery who would otherwise not come, so that there was direct financial benefit for the theater operator. It also does not matter that the lottery is operated by a non-profit charitable organization to provide funds for its work; "it is enough now to say that the law draws no distinction between commercial and charitable lotteries, each being *malum prohibitum*" [Society of Good Neighbors v. Mayor of Detroit, 324 Mich. 22, 28, 36 N.W.2d 308 (1949)]. The Supreme Court held, however, that a television program in which the viewer marked numbers on a card and could mail in the completed card for a prize was not a lottery, because there was no admission requirement and no requirement that the viewer leave his home; the Court was also influenced by the fact that federal and state decisions had held this type of program not to be a lottery. It felt also that this was not within the traditional concept of a lottery because the viewer remained passive and was not encouraged to gamble [ACF Wrigley Stores, Inc. v. Wayne Prosecuting Attorney, 359 Mich. 215, 102 N.W.2d 545 (1960)].

A fourth involves control over distribution of betting information. The enactment of the law specially regulating horse racing and parimutuel betting do not repeal the statute prohibiting distribution of race betting information [C.L.1948, § 750.305] by implication [People v. Lightstone, 330 Mich. 672, 48 N.W.2d 146 (1951)]. The state can also ban printing and distribution of publications that show betting odds in advance of the event in question, whether the printing is done in or out of the state, but cannot constitutionally prohibit publication after the event has occurred [Parks v. Judge of Recorder's Court, 236 Mich. 460, 210 N.W. 492 (1926)]. However, the Supreme Court ruled that the prosecuting attorney could not invoke the padlock law against Western Union because its facilities were being used to transmit bets to points outside the state and to forward winnings to bettors in Michigan. The Court held that the betting took place where the bets were delivered, which was outside Michigan, and that in any event equity would not enjoin the commission of a crime [State ex rel. Washtenaw County Prosecuting Attorney v. Western Union Telegraph Co., 336 Mich. 84, 57 N.W.2d 537 (1953)]. It is not clear what impact

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this decision may have on the special statute that prohibits any firm other than a telephone company providing telephones or an electric service company from installing devices to transmit racing results [C.L.1948, § 750.305a].

The Draft is intended to preserve the present coverage of Michigan law, though in a considerably more simplified form. In only two respects does the new language limit existing law: (1) THE CITIZEN WHO PLACES THE BET IS NOT CRIMINAL. This recognizes the fact that gambling is widespread and that there is in actuality no widespread condemnation of the conduct as such. It is only those who exploit the popular urge to gamble who are within the coverage of Chapter 61. Eliminating criminal penalties also makes it impossible for the bettor ("player" in the Draft language) to claim privilege against self-incrimination if he is called as a witness for the state, and should therefore facilitate prosecution. [Compare the privilege holding in the abortion case of In re Vickers, 371 Mich. 114, 123 N.W.2d 253 (1963), in which the woman could not withhold testimony because she had committed no crime in obtaining an abortion.]

(2) FRIENDLY SOCIAL GAMES ARE NOT CRIMINAL, AND A PERSON DOES NOT PROMOTE OR ADVANCE GAMBLING IF HE MERELY INVITES FRIENDS IN FOR A GAME AND PROVIDES CARDS OR OTHER GAMBLING PARAPHERNALIA. This results from the qualification of the term "player" in § 6101(h) exempting one who "gambles at a social game of chance on equal terms with other participants" as long as he does nothing more than to provide without fee or remuneration the use of premises or the necessary equipment. Private consensual games are generally accepted as socially if not legally proper, and there is no point in preserving the fiction that they are undesirable. However, to control evasion by professional gamblers, the burden of injecting the issue that he is a player is on the defendant.

All exploitive gambling and lottery schemes, however, are made criminal. There are two basic kinds of activity which are penalized. One is "advancing" unlawful gambling activity. This is defined in § 6101 (a) to include any activity that goes beyond being a "player" under § 6101(h), including setting up the game, acquisition of the necessary equipment, providing the place, bringing in the players and financing the operation. This would comprehend the present statutes covering providing premises, equipment, information and communications facilities, plus anything else falling outside the language of present statutes that in fact facilitates the enterprise. However, the advancing must be "knowingly," so that there is no strict liability and no criminality based on criminal negligence or recklessness.

The other activity is "profiting" from unlawful gambling activity, the receipt of money or other property, other than as a player as defined in § 6101(h) as proceeds from gambling activity based on a prior agreement or understanding to that effect. This is intended to reach those criminal entrepreneurs where provable activities do not fall within the definition of "promoting," who are in effect conspirators but not aiders.

The definitions of "contest of chance" in § 6101(c) and "gambling" in § 6101(d) are comprehensive enough that they include any sort of activity that brings in gain based on chance. It is unnecessary to list any of the games by name, except as they specifically receive mention in the first-degree promotion section [§ 6105]. The definition of "something of value" in § 6101(k) includes money, property, tokens and the opportunity to have free plays, and thus restates the interpretation of existing law adopted by the Michigan Supreme Court [Oatman v. Port Huron Chief of Police, 310 Mich. 57, 16 N.W.2d 665 (1944)].

However, the definition of "gambling" in § 6101(d) exempts stock and commodity transactions and insurance from the coverage of this Chapter. These activities are subject to strict control under special laws; fraudulent activity is governed by Chapters 18, 20 and 21.

Some gambling is now permitted by law; other gambling might be in the future as long as it does not constitute a lottery prohibited by Const. Art. IV, § 41 (1963). Rather than list these forms of betting by name, the same thing is accomplished through the term "unlawful gambling," "unlawful" being defined in § 6101(l) as not specifically authorized by law.

The basic activities of advancing and profiting from gambling are punished as Class A misdemeanors under § 6106. However, this is not a sufficient penalty in the case of large-scale gambling

enterprises that are the domain of organized crime. Section 6105, therefore, makes available Class C felony penalties against a person who either (1) engages in bookmaking in which in any one day he takes more than five bets totaling more than $500.00, or (2) in a lottery or mutuel operation receives money or records from someone who is not a player or receives more than $500 in any one day of operation. "Bookmaking" is defined in § 6101(b) as taking bets as a business, rather than casually, upon the outcome of future contingent events. The definition of "lottery" in § 6101(f) corresponds to the tests used by Michigan courts [*e. g.*, Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprises, Inc., 376 Mich. 127, 267 N.W. 602 (1936)], and the definitions of "mutuel" and "numbers game" in § 3500(7) provide a test not now spelled out in Michigan legislation [*cf.* C.L.1948, § 750.304].

The small bookmaker only "advances gambling" and therefore only violates § 6106 [promoting gambling in the second degree]. However, if he takes more than five bets for more than $500 in any one day, he commits the first degree offense.

Similarly, the numbers runner who keeps his bets small commits only a Class A misdemeanor under § 6106. But if he acts as "bagman" or if he has a take of more than $500 in any one day of operation, he moves into the "professional" class and can be convicted under § 6105 of a Class C felony.

[Conspiracy to Promote Gambling]

Sec. 6110. (1) A person commits the crime of conspiracy to promote gambling if he conspires to advance or profit from gambling activity.

(2) "Conspire" means to engage in activity constituting a criminal conspiracy as defined in section 1015.

(3) Conspiracy to promote gambling is a Class C felony.

Committee Commentary

The section is adapted from C.L.1948, § 750.157a.

Most gambling activity is at the misdemeanor level only. A conspiracy to engage in that activity would therefore be punished under common law at the misdemeanor level only. Until March 1967, however, conspiracy in Michigan as a common-law crime was punishable under the general statute that declares any common-law offense to be a felony [see the Commentary to § 1015]. Public Act No. 296 of 1966 now makes conspiracy a statutory crime [C.L.1948, § 750.157a] and provides that in general a conspiracy to commit a misdemeanor is itself a misdemeanor. However, this provision standing alone would make it exceedingly difficult to levy appropriate penalties against organized or professional gamblers, for most of the activities that might be proven against them or that might be proven to be the objects of the criminal agreement are at the misdemeanor level. Therefore, subsection (b) of the new statute makes any conspiracy to violate the gambling or wagering laws a felony punishable by up to five years maximum imprisonment and a maximum fine of $10,000.

The Draft preserves this legislative judgment by making it a Class C felony to conspire to advance or profit from gambling activity, these terms being defined in § 6101(a) and (i). The Draft embodies the judgment that it is preferable to treat this special aspect of conspiracy in this chapter rather than to qualify the general definition of conspiracy in § 1015. To avoid too wide a sweep, however, the conspiracy must be limited to advancing or profiting from gambling activity. If any activity covered by Chapter 61 that does not amount to advancing or profiting from gambling activity should become the object of a conspiracy, and is punishable as a misdemeanor if completed, the ordinary penalty provisions of § 1015 would apply. Considering the fact that players and social gamblers are not made criminals by Chapter 61, however, it is likely that almost all significant acts related to organized gambling will

constitute either advancing or profiting from gambling, so that the net coverage of § 6110 is substantially the same as that of C.L.1948, § 750.157a.

In all other respects the doctrines of criminal conspiracy are incorporated by reference from § 1015 through § 6110(2).

[Possession of Gambling Records in the First Degree]

Sec. 6115. (1) A person commits the crime of possession of gambling records in the first degree if with knowledge of the contents thereof, he possesses any writing, paper, instrument or article:

(a) Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise, and constituting, reflecting or representing more than 5 bets totaling more than 500 dollars; or

(b) Of a kind commonly used in the operation, promotion or playing of a lottery or mutuel scheme or enterprise, and constituting, reflecting or representing more than 500 plays or chances therein.

(2) A person does not commit a crime under subsection (1) (a) if the writing, paper, instrument or article possessed by the defendant constituted, reflected or represented bets of the defendant himself in a number not exceeding 10. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(3) Possession of gambling records in the first degree is a Class C felony.

Committee Commentary

The section is adapted from New York Revised Penal Law § 225.20. Its significance is discussed in the Commentary to §§ 6115 to 6120 below.

[Possession of Gambling Records in the Second Degree]

Sec. 6116. (1) A person commits the crime of possession of gambling records in the second degree if with knowledge of the contents thereof he possesses any writing, paper, instrument or article:

(a) Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise; or

(b) Of a kind commonly used in the operation, promotion or playing of a lottery or mutuel scheme or enterprise.

(2) A person does not commit a crime under this section if the writing, paper, instrument or article possessed by the defendant constituted, reflected or represented plays, bets or chances of the defendant himself in a number not exceeding 10. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(3) Possession of gambling records in the second degree is a Class A misdemeanor.

Committee Commentary

The section is adapted from New York Revised Penal Law § 225.15. Its significance is discussed in the Commentary to §§ 6115 to 6120 below.

[Possession of Gambling Records: Defense]

Sec. 6120. A person does not commit the crime of possession of gambling records in either degree if the writing, paper, instrument, or article possessed by the defendant is neither used nor intended to be used in the operation or promotion of a bookmaking scheme or enterprise, or in the operation, promotion or playing of a lottery or mutuel scheme or enterprise. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

Committee Commentary

The section is adapted from New York Revised Penal Law § 225.25. Its significance is discussed in the Commentary to §§ 6115 to 6120 below.

* * *

Committee Commentary to §§ 6115-6120

Relationship to Existing Law

Several statutes now penalize the possession of the papers and records necessary to the operation of lotteries, bookmaking and numbers rackets: registering bets [C.L.1948, § 750.304]; publication and distribution of betting odds [C.L.1948, § 750.305]; possession of policy or pool tickets or memoranda [C.L.1948, § 750.306]; reports on betting odds on horse races [C.L.1948, § 750.330]; possession of lottery tickets [C.L.1948, §§ 750.373, 750.374]; and printing or publishing lottery tickets [C.L. 1948, § 750.375].

The Draft continues the basic coverage of the present statutes, though with more exact definitions. The item possessed must relate to bookmaking, lottery or policy activities in the sense that it is "commonly used" for the purpose. The defendant must be shown to have knowledge of the content of the item, though possession establishes the knowledge prima facie under § 6130. The gradation into Class A misdemeanor and Class C felony is made on exactly the same basis as the division in promoting gambling activities [§§ 6105-6106]. This is justified by the fact that at times all the state can prove is the possession of the slips, and not the actual promotion of or profiting from gambling activity that is required under §§ 6102-6105. In another sense this also penalizes directly activity that is still preparatory to the ultimate gambling activity. Since, however, there is as much evident participation in the overall scheme in the possession instance as in promotion itself, the penalties are properly the same.

There are two limited exceptions, however. One is that a man may have not more than ten slips that represent his own bets [§§ 6115(2), 6116(2)]. This of course involves material within the peculiar knowledge of the defendant himself, and since the burden of injecting the issue is on him, this means that in most instances he will have to take the stand on his own behalf and testify to the circumstances under which he acquired that many slips. If he has more than ten slips, he is always "commercial" for purposes of the section.

The other is that he can show in every case that though he knew the contents of the article in question, it was not in fact being used or to be used in the operation or promotion of bookmaking, a lottery or mutuel [§ 6120]. The reason for this is stated in the Commission Staff Comments to the New York Revised Penal Law [p. 296].

> ". . . Since the requirements of proof are thus relaxed to a showing that the records possessed are of 'a kind commonly used in' bookmaking, lottery and policy enterprises, a 'defense' section is added for the protection of defendants who, though possessing such contraband, might be able to demonstrate innocent intent

or motives. This section renders it a defense to any prosecution for possession of gambling records that 'in fact,' the records possessed were neither used nor intended to be used for the indicated criminal purposes . . ."

Placing the burden of injecting the issue on the defendant means that he will have to testify to the circumstances under which he acquired the article, which is control enough on excessive use of the defense.

[Possession of a Gambling Device]

Sec. 6125. (1) A person commits the crime of possession of a gambling device if with knowledge of the character thereof he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:

(a) A slot machine; or

(b) Any other gambling device, believing that it is to be used in the advancement of unlawful gambling activity.

(2) Possession of a gambling device is a Class A misdemeanor.

Committee Commentary

The section is adapted from New York Revised Penal Law § 225.30.

Several statutes now penalize traffic in paraphernalia that facilitate gambling: permitting gambling apparatus in a building or place [C.L.1948, § 750.302]; permitting a gaming room or gaming table to be kept in premises controlled by the defendant [C.L.1948, § 750.303], and possessing property to be used or awarded in a lottery [C.L.1948, § 750.372]. Prohibited devices include punchboard [People v. Lippert, 304 Mich. 685, 8 N.W.2d 880 (1943)]; slot machines [People v. Alicki, 321 Mich. 701, 33 N.W.2d 124 (1948)]; and pinball machines [Oatman v. Port Huron Chief of Police, 310 Mich. 57, 16 N.W.2d 665 (1944)].

Some aspects of the present legislation constitute promoting gambling under § 6106. However, it is helpful to enforcement to punish the possession of gambling devices separate from the possession of betting memoranda. This is the aim of § 6125. The prohibited commodities are slot machines, defined in § 6101(i) and gambling devices, defined in § 6101(e). The latter specifically excludes from its operation lottery and policy memoranda to avoid overlap with §§ 6115 and 6116. Pinball machines continue to be covered because "gambling device" in § 6101(e) refers to "gambling activity" as defined in § 6101(d), and gambling activity turns on the possibility of receiving "something of value" defined in § 6101(k) to include free plays. Therefore, the doctrine of the *Oatman* case is preserved.

Proof of possession establishes knowledge prima facie under § 6130, but the belief in the use to which something other than a slot machine will be put must be established by the state beyond a reasonable doubt. No belief is necessary in the case of a slot machine.

Punishment is indicated at the Class A misdemeanor level because felony penalties under Chapter 61 are reserved for large-scale operators of the lottery or numbers enterprise.

[Gambling Offenses; Prima Facie Proof]

Sec. 6130. (1) Proof of possession of any gambling device or of any gambling record specified in section 6115 and 6116 is prima facie evidence of possession thereof with knowledge of its character or contents.

(2) In any prosecution under this chapter in which it is necessary to prove the occurrence of a sporting event, (a) a published report of its occurrence in any daily newspaper, magazine or other periodically printed publication of general circulation, or (b) evidence that a description of some aspect of the event was written, printed or otherwise noted at the place in which a violation of this chapter is alleged to have been committed, shall be admissible in evidence and shall constitute prima facie proof of the occurrence of the event.

Committee Commentary

The section is adapted from New York Revised Penal Law § 225.35 and C.L.1948, § 750.307.

The Draft avoids strict liability in Chapter 61; in each instance it requires knowledge of the results or objectives of the activity. This poses no problem in matters of promoting gambling activity, because the act imports the knowledge as a matter of common experience. However, possession poses a special problem of proof. Accordingly, proof of possession of the article in question establishes the requisite knowledge as prima facie proof. The defendant can rebut this, though usually only by taking the stand. It should be noted that the Draft continues the present law, which incorporates prima facie proof provisions in the sections prohibiting transmission of racing results [C.L.1948, § 750.305a] and possession of pool and lottery tickets [C.L.1948, § 750.306].

Some cases also require proof of a sporting event. The New York statute permits this to be done by putting periodicals in evidence. The present Michigan statute accomplishes a similar result by taking proof of information posted at the place where the betting was done as proof of the event [C.L.1948, § 750.307]. Since both tests may be helpful, subsection (2) combines them both. The defendant may rebut this if he can, but it is not too likely that he will.

[Lottery Offenses: No Defense]

Sec. 6135. It is no defense under any section of this chapter relating to a lottery that the lottery itself is drawn or conducted outside Michigan and is not in violation of the laws of the jurisdiction in which it is drawn or conducted.

Committee Commentary

The section is adapted from New York Revised Penal Law § 225.40, and restates the substance of C.L.1948, § 750.376 and *People v. Elliott*, 74 Mich. 264, 41 N.W. 916 (1889). It takes account of enterprises like the Irish Sweepstakes and the New Hampshire lottery. Because "players" as defined in § 6101(g) are not criminals under this chapter, only the seller is covered.

[Forfeiture of Gambling Devices and Gambling Proceeds]

Sec. 6140. Any gambling device or gambling record possessed or used in violation of this chapter is forfeited to the state, and shall by court order be turned over to the department of state police for whatever disposition its director may order. Money used as bets or stakes in gambling activity in violation of this chapter shall by court order be transmitted to the general fund of the state.

Committee Commentary

The section codifies existing practice.

EXHIBIT 5

CONSUMER CREDIT PROTECTION ACT, TITLE II
(18 U. S. C., Sections 891 *et seq.*)

CHAPTER 42—EXTORTIONATE CREDIT TRANSACTIONS

Sec.
891. Definitions and rules of construction.
892. Making extortionate extensions of credit.
893. Financing extortionate extensions of credit.
894. Collection of extensions of credit by extortionate means.
895. Immunity of witness.
896. Effect on State laws.

§ 891. Definitions and rules of construction

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor," with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor," with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal

means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 159.

§ 892. Making extortionate extensions of credit

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business

at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

Added Pub.L. 90–321, Title II, § 202(a), May 29, 1968, 82 Stat. 160.

§ 893. Financing extortionate extensions of credit

Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both.

Added Pub.L. 90–321, Title II, S. 202(a), May 29, 1968, 82 Stat. 161.

§ 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b) (1) or the circumstances described in section 892(b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Added Pub.L. 90–321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

§ 895. Immunity of witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter is necessary to the public interest, he, upon the approval of the Attorney General or his designated representative, may make application to the court that the witness be instructed to testify or produce evidence subject to the provisions of this section. Upon order of the court the witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor may testimony so compelled be used as evidence in any criminal proceeding against him in any court, except a prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90–321, Title II, § 202(a), May 29, 1968, 82 Stat. 162.

§ 896. Effect on State laws

This chapter does not preempt any field of law with respect to which State legislation would be permissible in the absence of this chapter. No law of any State which would be valid in the absence of this chapter may be held invalid or inapplicable by virtue of the existence of this chapter, and no officer, agency, or instrumentality of any State may be deprived by virtue of this chapter of any jurisdiction over any offense over which it would have jurisdiction in the absence of this chapter.

Added Pub.L. 90–321, Title II, § 202(a), May 29, 1968, 82 Stat. 162.

EXHIBIT 6

HAWAII STATUTE

Relating to the Regulation of the Conduct of Trade and Commerce

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. *Definitions.* As used in this Act.

(1) "Commodity" shall include, but not be restricted to, goods, merchandise, produce, choses in action and any other article of commerce. It also includes trade or business in service trades, transportation, insurance, banking, lending, advertising, bonding and any other business.

(2) "Person" or "persons" includes individuals, corporations, firms, trusts, partnerships and incorporated or unincorporated associations, existing under or authorized by the laws of this State, or any other state, or any foreign country.

(3) "Purchase" or "buy" includes, "contract to buy," "lease," "contract to lease," "acquire a license" and "contract to acquire a license."

(4) "Purchaser" includes the equivalent terms of "purchase" and "buy."

(5) "Sale" or "sell" includes "contract to sell," "lease," "contract to lease," "license" and "contract to license."

(6) "Seller" includes the equivalent terms of "sale" and "sell."

SECTION 2. *Combinations in Restraint of Trade, Price-Fixing and Limitation of Production Prohibited.*

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is declared illegal.

(2) Without limiting the generality of the foregoing no person, exclusive of members of a single business entity consisting of a sole proprietorship, partnership, trust or corporation, shall agree, combine, or conspire with any other person or persons, or enter into, become a member of, or participate in, any understanding, arrangement, pool,

or trust, to do, directly or indirectly, any of the following acts, in the State or any section of the State:

(a) fix, control, or maintain, the price of any commodity;

(b) limit, control, or discontinue, the production, manufacture, or sale of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;

(c) fix, control, or maintain, any standard of quality of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;

(d) refuse to deal with any other person or persons for the purpose of effecting any of the acts described in (a) to (c) of this subsection.

(3) Notwithstanding the foregoing subsection (2) and without limiting the application of the foregoing subsection (1), it shall be lawful for a person to enter into any of the following restrictive covenants or agreements ancillary to a legitimate purpose not violative of this Act, unless the effect thereof may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State:

(a) A covenant or agreement by the transferor of a business not to compete within a reasonable area and within a reasonable period of time in connection with the sale of said business;

(b) A covenant or agreement between partners not to compete with the partnership within a reasonable area and for a reasonable period of time upon the withdrawal of a partner from the partnership;

(c) A covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business or agricultural uses, or covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business uses and of the lessor to be restricted in the use of premises reasonably proximate to any such leased premises to certain business uses;

(d) A covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal in competition with his employer or principal, during the term of the agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

(4) Any price-fixing arrangement authorized under sections 205-20 through 205-26, Revised Laws of Hawaii 1955, as amended, shall be excluded from the prohibition of this section.

SECTION 3. *Requirements and output contracts; tying agreements.*

No person shall sell or buy any commodity, or fix a price or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the other person or persons shall not deal in the commodity of a competitor of the seller, or shall not deal with the competitor of the purchaser, as the case may be, when the effect of the sale or purchase or the condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State.

SECTION 4. *Refusal to deal.*

No person shall refuse to sell any commodity to, or to buy any commodity from, any other person or persons, when the refusal is for the purpose of compelling or inducing the other person or persons to agree to or engage in acts which, if acceded to, are prohibited by other sections of this Act.

SECTION 5. *Mergers, Acquisitions, Holdings and Divestitures.*

(1) No corporation shall acquire and hold, directly or indirectly, from and after the effective date of this Act, the whole or any part of the stock or other share capital of any other corporation, or the whole or any part of the assets of any other corporation where the effect of such acquisition and holding may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. Provided that this subsection shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this subsection prevent a corporation from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporation, when the effect of such formation is not substantially to lessen competition.

(2) No corporation shall hold directly or indirectly, the whole or any part of the stock or other share capital of any other corporation, or, the whole or any part of the assets of any other corporation, acquired prior to the effective date of this Act, where the effect of such holding is substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. Where the Court shall find that the holding of such stock, share capital, or assets is substantially to lessen competition or tend to create a monopoly, and is therefore not in the public interest, then the Court shall order the divestiture or other disposition of such stocks, share capital, or assets

of such corporation, and shall prescribe a reasonable time, manner and degree of such divestiture or other disposition thereof, provided that the court shall not order the divestiture or other disposition of the assets of such corporation unless it is necessary to eliminate the lessening of competition or the tendency to create a monopoly, and the assets are reasonably identifiable and separable, and it can be done without causing undue hardship on the economic entity.

SECTION 6. *Interlocking Directorates and Relationships.*

(1) That from and after six months from the effective date of this Act no person shall be at the same time a director, officer, partner, or trustee in any two or more firms, partnerships, trusts, associations or corporations or any combination thereof, engaged in whole or in part in commerce, if such firms, partnerships, trusts, associations or corporations or any combination thereof, are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of this Act.

(2) From and after six months from the effective date of this Act, no person shall be at the same time a director, officer, partner, or trustee in any two or more non-competing firms, trusts, partnerships or corporations or any combination thereof, any one of which has a total net worth aggregating more than $100,000, or a total net worth of all the business entities aggregating more than $300,000, engaged in whole or in part in trade or commerce in this State where the effect of a merger between such business entities whether legally possible or not may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. The total net worth herein mentioned with reference to a corporation shall consist of the capital, surplus and undivided profits; the total net worth with reference to a firm or partnership shall consist of the capital account; and the total net worth with reference to a trust shall consist of the principal of the trust.

This subsection shall not apply to an interlocking directorship between a bank doing a banking business and any other business firm or entity.

(3) No person shall by the use of a representative or representatives effectuate the result prohibited in the preceding subsections where the act or acts of such representative or representatives acting in their capacities as directors, officers, partners or trustees of such business entities indicate an attempt directly or indirectly to manipulate the conduct of the business entities to the detriment of any of such entities and to the benefit of any other entity in which such person has an interest.

(4) The validity or invalidity of any act of any director, officer or trustee done by such director, officer or trustee while occupying such position in violation of the provisions of this section shall be determined by the statutory and common law of the State of Hawaii relating to corporations, trusts or associations as the case may be except that it shall not be affected by the provisions of Section 1-9, Revised Laws of Hawaii 1955. The non-applicability of Section 1-9, Revised Laws of Hawaii 1955 shall be limited to this section only.

The State Attorney General may bring an action at any time to cause a director, officer or trustee who may be occupying such position in violation of this section, to vacate the office or offices to effectuate the termination of the prohibited interlocking relationship. The State Attorney General or any person affected by any act or acts of such director, officer or trustee may move to cause such director, officer or trustee who may be occupying such position in violation of this section to vacate the office or offices to effectuate the termination of the prohibited interlocking relationship, in any action or proceeding in which the person affected, and any such director, officer or trustee, or the legal entities in which such director, officer or trustee holds office are parties to the action or proceeding, without the necessity of bringing a separate action to try title to office. The court upon finding that a director, officer or trustee is holding office in contravention of this section shall order such person to terminate the interlocking relationship, and in the case of a trustee, the court may, when it deems appropriate, order the State Attorney General to institute proceedings for the removal of such trustee from his office, and the findings of the court of such violation of this section by such trustee shall be a sufficient cause of action to maintain such proceeding. Any remedy provided in this section shall not limit and is in addition and cumulative to any other remedy available under any other section of this Act or any other law.

SECTION 7. *Monopolization.*

No person shall monopolize, or attempt to monopolize or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State.

SECTION 8. *Exemption of Labor Organizations.*

The labor of a human being is not a commodity or article of commerce. Nothing contained in this Act shall be construed to forbid the existence and operation of labor organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profits, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, lawfully carrying out the legitimate objects thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under this Act.

The provisions of this Act shall not apply to the conduct or activities of labor organizations or their members which conduct or activities are regulated by Federal or State legislation or over which the National Labor Relations Board or the Hawaii Employment Relations Board have jurisdiction.

SECTION 9. *Exemption of certain cooperative organizations; insurance transactions; approved mergers of federally regulated companies.*

(1) Nothing contained in this Act shall be construed to forbid the existence and operation of fishery or agricultural cooperative organizations or associations instituted for the purpose of mutual help, and which are organized and operating under Chapters 175A or 176, Revised Laws of Hawaii 1955, as amended, or which conform and continue to conform to the requirements of the Capper-Volstead Act (7 U.S.C. 291 and 292), provided that if any such organization or association monopolizes or restrains trade or commerce in any section of this State to such an extent that the price of any fishery or agricultural product is unduly enhanced by reason thereof the provisions of this Act shall apply to such acts.

(2) This Act shall not apply to any transaction in the business of insurance which is in violation of any section of this Act if such transaction is expressly permitted by the insurance laws of this State; and provided further that nothing contained in this section shall render this Act inapplicable to any agreement to boycott, coerce, or intimidate or act of boycott, coercion or intimidation.

(3) This Act shall not apply to mergers of companies where such mergers are approved by the federal regulatory agency which has jurisdiction and control over such mergers.

SECTION 10. *Contracts void.*

Any contract or agreement in violation of this Act is void and is not enforceable at law or in equity.

SECTION 11. *Suits by persons injured; amount of recovery, injunctions.*

(1) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this Act:

(a) may sue for damages sustained by him, and, if the judgment is for the plaintiff, he shall be awarded threefold damages by him sustained and reasonable attorneys' fees together with the costs of suit; and

(b) may bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, he shall be awarded reasonable attorneys' fees together with the costs of suit.

(2) The remedies provided in this section are cumulative and may be sought in one action.

SECTION 12. *Suits by the State; amount of recovery.*

Whenever the State of Hawaii, any county, or city and county is injured in its business or property by reason of anything forbidden or declared unlawful by this Act, it may sue to recover actual damages sustained by it. The Attorney General may bring an action on behalf of the State or any of its political subdivisions or governmental agencies to recover the damages provided for by this section, or by any comparable provisions of federal law.

SECTION 13. *Injunction by attorney general.*

The attorney general may bring proceeding to enjoin any violation of the provisions of this Act.

SECTION 14. *Violation a misdemeanor.*

(1) Any person who violates any of the provisions of Sections 2, 4, 7 or 15 of this Act, including any principal, manager, director, officer, agent, servant or employee, who had engaged in or has participated in the determination to engage in an activity that has been engaged in by any association, firm, partnership, trust, or corporation, which activity is a violation of any provision of Sections 2, 4, 7 or 15 of this Act, is punishable if a natural person by a fine not exceeding $10,000 or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court; if such person is not a natural person then by a fine not exceeding $20,000.

(2) The actions authorized by this section and Section 16 shall be brought in the circuit court of the circuit where the offense occurred.

SECTION 15. *Individual liability for corporate act.*

Whenever a corporation violates any of the penal provisions of this Act, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who have authorized, ordered or done any of the acts constituting in whole or in part such violation.

SECTION 16. *Investigation.*

(1) Whenever it appears to the attorney general, either upon complaint or otherwise, that any person or persons, has engaged in or engages in or is about to engage in any act or practice by this Act prohibited or declared to be illegal, or that any person or persons, has assisted or participated in any plan, scheme, agreement or combination

of the nature described herein, or whenever he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such complainant to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes to be in the public interest to investigate. The attorney general may also require such other data and information from such complainant as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter.

(2) Whenever the attorney general has reason to believe that any person may be in possession, custody, or control of any documentary material, objects, tangible things or information (hereinafter referred to as "documentary evidence") pertinent to any investigation of a possible violation of this Act and before the filing of any complaint in court, he may issue in writing, and cause to be served upon such person, an investigative demand requiring such person to produce such documentary evidence for examination.

(3) Each such demand shall:

(a) state that an alleged violation of the section or sections of this Act which are under investigation;

(b) describe and fairly indentify the documentary evidence to be produced, or to be answered;

(c) prescribe a return date within a reasonable period of time during which the documentary evidence demanded may be assembled and produced;

(d) identify the custodian to whom such documentary evidence is to be delivered; and

(e) specify a place at which such delivery is to be made.

(4) No such demand shall:

(a) contain any requirement which would be held to be unreasonable if contained in a subpœna duces tecum issued by a court of this State in aid of a grand jury investigation of such possible violation; or

(b) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpœna duces tecum issued by a court of this State in aid for a grand jury investigation of such possible violation.

(5) Any such demand may be served by any attorney employed by or other authorized employee of this State at any place within the territorial jurisdiction of any court of this State.

(6) Service of any such demand or of any petition filed under subsection 15 of this section, may be made upon a partnership, trust, corporation, association, or other legal entity by:

(a) delivering a duly executed copy thereof to any partner, trustee, executive officer, managing agent, or general agent thereof,

or to any agent, thereof authorized by appointment or by law to receive service or process on behalf of such partnership, trust, corporation, association, or entity; or

(b) delivering a duly executed copy thereof to the principal office or place of business in this State of the partnership, trust, corporation, association, or entity to be served; or

(c) depositing such copy in the United States mails, by registered or certified mail duly addressed to such partnership, trust, corporation, association or entity at its principal office or place of business in this State.

(7) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand or petition.

(8) The attorney general shall designate a representative to serve as custodian of any documentary evidence, and such additional representatives as he shall determine from time to time to be necessary to serve as deputies to such officer.

(9) Any person upon whom any demand issued under subsection (2) has been duly served shall deliver such documentary evidence to the custodian designated therein at the place specified therein (or at such other place as such custodian thereafter may prescribe in writing) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). No such demand or custodian may require delivery of any documentary evidence to be made:

(a) at any place outside the territorial jurisdiction of this State without the consent of the person upon whom such demand was served; or

(b) at any place other than the place at which such documentary evidence is situated at the time of service of such demand until the custodian has tendered to such person a sum sufficient to defray the cost of transporting such material to the place prescribed for delivery or the transportation thereof to such place at government expense.

(10) The custodian to whom any documentary evidence is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this section. The custodian shall issue a receipt for such evidence received. The custodian may cause the preparation of such copies of such documentary evidence as may be required for official use by any individual who is entitled, under regulations which shall be promulgated by the attorney general, to have access to such evidence for examination. While in the possession of the custodian, no such evidence so produced shall be available for examination, without the consent of the

person who produced such evidence, by any individual other than a duly authorized representative of the office of the attorney general. Under such reasonable terms and conditions as the attorney general shall prescribe, documentary evidence while in the possession of the custodian shall be available for examination by the person who produced such evidence or any duly authorized representative of such person.

(11) Whenever any attorney has been designated to appear on behalf of this State before any court or grand jury in any case or proceeding involving any alleged violation of this Act, the custodian may deliver to such attorney such documentary evidence in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of this State. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary evidence so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(12) Upon the completion of the investigation for which any documentary evidence was produced under this section, and any case or proceeding arising from such investigation, the custodian shall return to the person who produced such evidence all such evidence (other than copies thereof made by the attorney general or his representative pursuant to subsection (10) of this section) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(13) When any documentary evidence has been produced by any person under this section for use in any investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the court of such investigation, such person shall be entitled, upon written demand made upon the attorney general to the return of all documentary evidence (other than copies thereof made by the attorney general or his representative pursuant to subsection (10) of this section) so produced by such person.

(14) In the event of the death, disability, or separation from service in the office of the attorney general of the custodian of any documentary evidence produced under any demand issued under this section, or the official relief of such custodian from responsibility for the custody and control of such evidence, the attorney general shall promptly designate another representative to serve as custodian thereof, and transmit notice in writing to the person who produced such evidence as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such evidence all duties and responsibilities imposed by this section upon his prede-

cessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(15) Whenever any person fails to comply with any investigative demand duly served upon him under subsection (6) of this section, the attorney general, through such officers or attorneys as he may designate, may file, in the district court of any county in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of such demand, except that if such person transacts business in more than one such county such petition shall be filed in the county in which such person maintains his principal place of business, or in such other county in which such person transacts business as may be agreed upon by the parties to such petition. Such person shall be entitled to be heard in opposition to the granting of any such petition.

(16) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the county within which the office of the custodian designated therein is situated, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section, or upon any constitutional right or privilege of such person.

If the court does not set aside such demand, such person shall be assessed court cost and reasonable attorneys' fees and such other penalties not greater than those specified under Section 14 of this Act. If the Court sets aside such demand, such person shall be given the total cost of such petition.

(17) At any time during which any custodian is in custody or control of any documentary evidence delivered by any person in compliance with any such demand, such person may file, in the district court of the county within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(18) Whenever the attorney general has reason to believe that any person has information pertinent to any investigation of a possible violation of this Act and before the filing of any complaint in court, he may seek a subpœna from the clerk of the district court in the county where such person resides, is found or transacts business, requiring his presence to appear before a district magistrate licensed to practice law in the Supreme Court of this State to give oral testimony under

oath on a specified date, time and place. The clerk of the district court may also issue a subpœna duces tecum under like conditions at the request of the attorney general. Any witness subpœnaed shall be entitled to be represented by counsel and any subpœna shall state the alleged violation of the section or sections of this Act. The scope and manner of examination shall be in accordance with the rules governing depositions as provided in the Hawaii Rules of Civil Procedure. The person subpœnaed may at any time before the date specified for the taking of the oral testimony, move to quash any subpœna before said district magistrate from whose court any subpœna was issued for such grounds as may be provided for quashing a subpœna in accordance with the rules governing depositions as set forth in the Hawaii Rules of Civil Procedure.

(19) No person shall be excused from attending an inquiry pursuant to the mandates of a subpœna, or from producing any documentary evidence, or from being examined or required to answer questions on the ground of failure to tender or pay a witness fee or mileage unless demand therefor is made at the time testimony is about to be taken and as a condition precedent to offering such production or testimony and unless payment thereof be not thereupon made. The provisions for payment of witness fee and mileage do not apply to any officer, director or person in the employ of any person or persons whose conduct or practices are being investigated. No person who is subpœnaed to attend such inquiry, while in attendance upon such inquiry, shall, without reasonable cause, refuse to be sworn or to answer any question or to produce any book, paper, document, or other record when ordered to do so by the officer conducting such inquiry, or fail to perform any act hereunder required to be performed.

(20) Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part, by any person with any investigative demand made under this section, wilfully removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary evidence in the possession, custody or control of any person which is the subject of any such demand duly served upon any person shall be fined not more than $5,000.00 or imprisoned not more than one year, or both. Any person wilfully failing to comply with a subpœna issued pursuant to subsection (18) of this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(21) Nothing contained in this section shall impair the authority of the attorney general or his representatives to lay before any grand jury impaneled before any circuit court of this State any evidence concerning any alleged violation of this Act, invoke the power of any such court to compel the production of any evidence before any such grand jury, or institute any proceeding for the enforcement of any order or

process issued in execution of such power, or to punish disobedience of any such order or process by any person.

(22) As used in this section the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

(23) It shall be the duty of all public officers, their deputies, assistants, clerks, subordinates and employees to render and furnish to the attorney general, his deputy or other designated representatives when so requested, all information and assistance in their possession or within their power.

(24) Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall wilfully disclose to any person other than the attorney general the name of any witness examined or any other information obtained upon such inquiry, except as so directed by the attorney general shall be punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both.

(25) The enumeration and specification of various processes do not preclude or limit the use of processes under the Hawaii Rules of Civil Procedure but are deemed to be supplementary to said rules or the use of any other lawful investigative methods which are available.

SECTION 17. *Additional parties defendant.*

Whenever it appears to the court before which any civil proceeding under this Act is pending that the ends of justice require that other parties be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside, engage in business, or have an agent, in the circuit where such action is pending.

SECTION 18. *Duty of the attorney general; duty of county attorney, etc.*

(1) The attorney general shall enforce the criminal and civil provisions of this Act. The county attorney of any county, the prosecuting attorney and the corporation counsel of the city and county shall investigate and report suspected violations of the provisions of this Act to the attorney general.

(2) Whenever the provisions of this Act authorize or require the attorney general to commence any action or proceeding, including proceedings under Section 16 of this Act, the attorney general may require the county attorney, prosecuting attorney, or corporation counsel, of any county or city and county, holding office in the circuit where the action or proceeding is to be commenced or maintained, to maintain the action or proceeding under the direction of the attorney general.

SECTION 19. *Court and venue.*

Any action or proceeding, whether civil or criminal, authorized by the provisions of this Act shall be brought in the circuit court for the circuit in which the defendant resides, engages in business, or has an agent, unless otherwise specifically provided herein.

SECTION 20. *Judgment in favor of the State as evidence in private action; suspension of limitation.*

(1) A final judgment or decree rendered in any civil or criminal proceeding brought by the State under the provisions of this Act shall be prima facie evidence against such defendant in any action or proceeding brought by any other party under the provisions of this Act, or by the State, county or city and county, under Section 12 against such defendant as to all matter respecting which said judgment or decree would be an estoppel as between the parties thereto. This section shall not apply to consent judgments or decrees entered before any complaint has been filed; provided, however, that when a consent judgment or decree is filed, the state attorney general shall set forth at the same time the alleged violations and reasons for entering into the consent judgment or decree. No such consent judgment or decree shall become final until sixty days from the filing of such consent judgment or decree or until the final determination of any exceptions filed, as hereinafter provided, whichever is later. During such sixty day period any interested party covered under Section 11 of this Act may file verified exceptions to the form and substance of said consent judgment or decree, and the court, upon a full hearing thereon may approve, refuse to enter, or may modify such consent judgment or decree.

(2) A plea of nolo contendere in any criminal action under this Act shall have the effect of admitting each and every material allegation in the complaint, and a final judgment or decree rendered pursuant to such plea shall be prima facie evidence against such defendant in any action or proceeding brought by any other party under the provisions of this Act, or by the State, county or city and county, under Section 12 against such defendant as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

(3) Whenever any civil or criminal proceeding is instituted by the State to prevent, restrain, or punish violations of any provisions of this Act, but not including an action under Section 12, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

SECTION 21. *Immunity from prosecution.*

(1) In any investigation brought by the attorney general pursuant to Section 16 of this Act, no individual shall be excused from attending, testifying, or producing documentary materials, objects or tangible things in obedience to an investigative demand, subpœna or under order of court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty.

(2) No individual shall be criminally prosecuted or subjected to any criminal penalty under this Act for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence in any investigation brought by the attorney general pursuant to Section 16 of this Act, or any county attorney, prosecuting attorney, or corporation counsel of any county or city and county, provided no individual so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

SECTION 22. *Limitation of actions.*

Any action to enforce a cause of action arising under the provisions of this Act shall be barred unless commenced within four years after the cause of action accrues, except as otherwise provided in Section 20 of this Act. For the purpose of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of such violation.

SECTION 23. *Severability.*

If any portion of this Act or its application to any person or circumstances is held to be invalid for any reason, then the remainder of this Act and each and every other provision thereof shall not be affected thereby.

SECTION 24. *Effective Date.*

This Act shall take effect on August 21, 1961.

APPROVED this 12th day of July, 1961.

WILLIAM F. QUINN
Governor of the State of Hawaii.

EXHIBIT 7

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. 69-17423 (J. J. Kehoe)

STATE ex rel. EARL FAIRCLOTH, as Attorney General of the State of Florida,

Plaintiff,

vs.

AZTEC MOTEL, INC., a Florida corporation, et al.,

Defendants.

MEMORANDUM OF LAW RE: CONSTITUTIONAL ISSUES RAISED BY MOTION TO DISMISS

I. *§ 932.58, Fla. Stat. (1969), is a valid exercise of the Legislature's power.*

The defendants do not attack the power source of this statute, however, the plaintiff contends that the Legislature clearly had the authority to pass this law. There are at least three power sources for the statute, to-wit: (1) the power to charter corporations; (2) the police power regarding business regulations; and, (3) the common law authority of the Attorney General.

The first power source for the enactment of § 932.58, is the State's power to charter corporations. Under this provision, charters are granted not as a matter of right, but as a *privilege.*

> "It is well established that no corporation can exist without the consent or grant of the sovereign and that the power to create corporations is one of the attributes of sovereignty. The right to act as a corporation does not belong to citizens by common right, but is a special privilege." 18 *Am. Jur. 2d,* Corporations, § 24. Accord, *Cook v. Case Plow Works Co.,* Fla. 1923, 96 So. 292.

The second power source is the State's police power to regulate business. "[The] police power is the exercise of the sovereign right of a government to promote order, safety, health, morals and general welfare of society within constitutional limits." *Lincoln Federal Labor Union v. Northwestern I & M Co.,* 31 N.W. 477, 487, 149 Neb. 507, affirmed 335 U.S. 525, S.Ct. 251, 260, 93 L.Ed. 212, 6 A.L.R. 473.

This power

> "is not confined to the regulation of such classes of business as are essentially illegal, for it extends likewise to lawful callings . . . When any business, lawful in nature, is such that it may be conducted in such a way as to become harmful to the public or when supervision is necessary to confine it to legitimate channels, the state has a right to throw around it such safeguards as will fully protect the public." *16 Am.Jur. 2d,* Constitutional Law, § 314.

Under the police power, the Legislature has the authority to regulate business and, as in this case, provide for the revocation of a corporate charter where it considers that the continuing operation of the corporation would be violative of the public welfare. "It is clear that any business or business practice may be regulated if such regulation is necessary to the public welfare, health and safety." *People v. Victor,* 287 Mich. 506, 512, 283 N.W. 661, 669 (1939).

In a recent Florida case, the court stated:

> "The police power is not to be confined narrowly within the field of public health, safety or morality. It is within the police power to regulate occupations or businesses which, by their nature, their location, or the manner in which they are conducted, if conducted without restriction, are or may be materially injurious to the public health, morals, comfort, prosperity, or convenience, or otherwise detrimental to the general welfare." *Rotenberg v. City of Fort Pierce,* 202 So. 2d 782 (4th D.C.A., Fla. 1967).

Police power may further be defined as "an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state . . ." *Clark v. Dwyer,* 56 Wash. 2d 425, 353 P. 2d 941 (1960). The infiltration of legitimate businesses by organized crime should certainly be considered a public evil.

In the case of *Pompano Horse Club v. State,* 93 Fla. 415, 111 So. 801, 805 (1927), the court quoted with approval from *Purity Extract Co. v. Lynch,* 226 U. S. 1929, 33 S. Ct. 44, 57 L. Ed. 184:

> "It is also well established that when a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective."

There is no question but that a state is free to adopt "whatever economic policy that may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." *Nebbia v. People of State of New York,* 291 U. S. 502, 537, 54 S. Ct. 505, 516, 78 L. Ed. 944.

The Supreme Court of Delaware, speaking on this subject, said:

> "The police power in Delaware is both comprehensive and vague . . . The test of constitutionality of its exercise is whether the end result and the method adopted bear a reasonable relation to the public health, safety, morals or general welfare. *All doubts are resolved in favor of the challenged statute.*" *Opinion of the Justices,* 243 A. 2d 716, 717 (Del. 1968).

Florida has consistently followed this view as evidenced by the case of *Hunter v. Owens,* 80 Fla. 812, 86 So. 839, 843-4 (1920), where it was held that:

> "The validity of a statute exerting the police power does not depend upon the absolute assurance that the purpose designed can in fact be or will most probably be fully accomplished as contemplated, or upon the certainty that it will best conserve the purpose intended or that the purpose designed is necessary or expedient for the general welfare. Matters of policy, expediency, and wisdom are determined by the enactment of statutes; and the validity is dependent only upon actual conflicts with organic law."

It is submitted that based upon the authorities, supra, the Legislature was well within its constitutional limits in enacting this statute. The regulation of organized crime definitely comes under the police power and the means chosen to regulate this evil have a rational relationship to the end results, i.e., to prevent organized crime from infiltrating legitimate businesses.

As a third power source, this statute would appear to be little more than a codification of the common law power of the Attorney General. See, 19 *C.J.S.,* Corporations, § 1699; *State ex rel Landis v. S.H. Kress & Co.,* 115 Fla. 189, 155 So. 823 (1934).

II. *Sec. 932.58, Fla. Stat. (1969), is not void for vagueness.*

In paragraphs 7, 9, 12, 13 and 15 of their motion to dismiss, defendants attempt to assert, in several different ways, that *Fla. Stat.* Sec. 932.58 is unconstitutional due to its alleged vagueness. Plaintiff maintains that the instant statute clearly falls within the constitutionally permissible standards setting forth the validity of regulatory statutes of a remedial nature imposing civil sanctions.

A. *Sec. 932.58 meets civil standards of certainty.*

Plaintiff first maintains that *Fla. Stat.* Sec. 932.58 is to be judged according to the far more lenient standards of certainty in wording which are applied to regulatory statutes which impose civil sanctions, i.e., injunctions and forfeiture of a privilege.

It is first apparent that the "void for vagueness rule" does apply to civil actions. *A. B. Small Co. v. American Sugar Ref. Co.,* 267 U.S. 233

(1925). However, the United States Supreme Court has also long recognized that "the standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948). Hence the Court has consistently refused to apply the high standard used in criminal cases to actions involving civil sanctions. *United States v. Raines*, 362 U.S. 17, 24 n. 4 (1960). The result of the less stringent standard utilized where civil sanctions are employed has been "that except in *Small* (which was a case put in a unique posture by such previous holdings as *Cohen*), *no vagueness attack on a non-criminal statute has succeeded.* "Comment, The Void-For-Vagueness Doctrine," 109 *U. Pa. L. Rev.* 67, 70 n. 16 (1960).

In case after case, the United States Supreme Court has upheld statutes employing civil sanctions even where the statutory language attacked was very vague. See *Boyd Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (so far as practicable); *United States v. Petrillo*, 332 U.S. 1 (1947) (in excess of the number of employees needed); *United States v. Ragen*, 314 U.S. 513 (1942) (reasonable allowance); *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936) (in fair and open competition); *Sproles v. Binford*, 286 U.S. 374 (1932) (shortest practicable route); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (unjust rent).

It should next be emphasized that the instant act, calling for revocation of corporate charters, is a civil regulatory and remedial statute, employing a civil sanction. As previously noted, "The right to act as a corporation does not belong to citizens by common right, but is a special privilege." 18 *Am. Jur. 2d* Corporations Sec. 24. In this regard, the United States Supreme Court has squarely held that "Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is *revocation of a privilege voluntarily granted.*" *Helvering v. Mitchell*, 303 U.S. 391, 399–400 (1937). Thus, "[t]he remedy of the state [in revoking a corporate charter], however denominated, is now recognized as being civil rather than criminal in its nature, and the right to proceed civilly exists independently of criminal proceedings." 19 *C.J.S.* Corporations, Sec. 1696.

It should lastly be emphasized that where, as here, the legislature acts to revoke a privilege voluntarily granted, "the severity of [the] sanction is not determinative of its character as 'punishment.'" *Flemming v. Nestor*, 363 U.S. 603, 616 n. 9 (1960). For an excellent discussion of this point see *Thompson v. Whitter*, 185 F. Supp. 306 (D.D.C. 1960) (three judge panel), appeal dismissed for want of a substantial federal question, 365 U.S. 465 (1961).

The instant statute is therefore to be judged by the lenient standards applied to remedial regulatory statutes employing civil sanctions. In

this area the United States Supreme Court has *never* struck down a statute which was attacked as unduly vague.

B. *Sec. 932.58 is valid under even criminal standards.*

Even with regard to the standards of certainty applied to criminal statutes, the United States Supreme Court has long recognized that "few words possess the precision of mathematical symbols, most statutes must deal with unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibition." *Boyd Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952). It thus becomes clear that,

> "Where the legislative regulatory object is appropriate and the conduct intended to be prohibited is not fairly susceptible of definition in other than general language, there is no constitutional impediment to its use." *State v. Dennis*, 194 A. 2d 3, 7 (N.J. App. 1963)

In turning to *Fla. Stat.* Sec. 932.58(a), at issue in this case, we find there are actually two distinct provisions at issue herein (which should be considered separately since the statute has expressly been declared to be severable). The first provision calls for the revocation of a corporation's charter where any corporate officer or controlling person, with the knowledge of the officers or directors "is a person or persons engaged in activities such as . . ." several criminal offenses, on an organized basis. The crimes listed, e.g., prostitution, narcotics, and extortion, are all existing crimes which have long had statutory or common law definitions. Clearly this provision cannot be attacked as unduly vague and, in fact, the motion to dismiss does not so allege.

The second provision allows revocation where person "is connected directly or indirectly with organizations, syndicates or criminal societies engaging in such" enumerated crimes. Here the defendants assert the statute is unduly vague in that it does not define what "indirectly connected with" means.

It should first be emphasized that a statute is not unconstitutional simply because the terms used in the statute are not defined therein. 82 *C.J.S.*, Statutes Sections 66, 68. In such cases it is simply assumed that the legislature intended the normal meaning of the word as it has already been understood or judicially construed. The term "connected" normally means joined or linked together by some tie, as of causality, relationship or intimacy. *United States v. Algeme Kunstzijde Unie*, 226 F. 2d 115, 119 (4th Cir. 1955), and when used with the preposition "with", generally means to regard as associated. *Weber v. Standard Min. & Mill Co.*, 84 P. 2d 752 (Wyo. 1938).

Actually, the terms "directly" or "indirectly", when used in this context, are mere surplussage. When the legislature uses the phrase "connected with" it is presumed to mean directly or indirectly, unless a contrary term is used. 15A *C.J.S.* Connect n. 62.5.

As but one example of the fact the phrase "connected with" is not unduly vague, plaintiff would refer this court to *Fla. Stat.* Sec. 849.09 (1) (d), which makes it unlawful for any person to be "connected in any way with any lottery or lottery drawing." Criminal pleadings tracking this statutory language have specifically been held by the Supreme Court of Florida to be sufficiently definite so long as they factually allege in what manner the connection exists. Compare *Strachaan v. State*, 116 Fla. 736, 156 So. 885 (1934), with *Fletcher v. State*, 65 So. 2d 845 (1953).

Thus, plaintiff maintains that neither of the two distinct provisions contained in Sec. 932.58 (a) *Fla. Stat.* (1969), is unconstitutional for vagueness since they use widely construed terms which have been held sufficiently definite even applying criminal standards.

III. *Sec. 932.58 supra, does not abridge due process of law.*

Defendants assert in their motion to dismiss, without giving any specific reason therefore, that the statute deprives them of due process of law. Plaintiff maintains that procedural due process is not abridged since defendants have notice and an opportunity to be heard and further that revocation of a corporate charter is not a deprivation of substantive due process.

Forfeitures of property,

> "have usually been deemed constitutional as against the objection of their being in deprivation of property for public use without compensation, or without due process of law, when such forfeiture fairly tends and as reasonably necessary to accomplish a legitimate purpose under the police power." 37 *C.J.S.* Forfeitures Sec. 4.

In fact, it has specifically been held that statutes subjecting corporations to penalties or forfeiture of its charter for the acts of its agents are not repugnant to the due process clause, notwithstanding the effect is to deprive innocent stockholders of the property rights. *New York Cent. & H.R.R. Co. v. United States,* 212 U. S. 481 (1909); *Brictson Mfg. Co. v. Close,* 25 F. 2d 794 (8th Cir. 1928) cert. den. 278 U. S. 666 (1929). Thus, the forfeiture of corporate charter in the exercise of the police power is not a deprivation of due process of law.

IV. *Sec. 932.58, supra, does not establish "guilt by association."*

Defendants herein assert the statute is unconstitutional because it establishes guilt by association. Plaintiff submits that any fair reading of the statute negates this argument.

As previously noted, Sec. 932.58 (a), allows revocation where an officer or director is "engaged in" activities such as organized gambling, extortion, etc. Clearly this section penalizes the director or officer for his *own* acts.

The second provision allows revocation where the officer or director is "connected . . . with" organizations engaging in same. Here it might be possible to construe the statute as dealing with an "association" in the social sense. However, it is axiomatic that where a statute is susceptible of two interpretations, one constitutional and one unconstitutional, that the court will construe it to be consitutional. 30 *Fla. Jur.* Statutes Sec. 72.

Furthermore, a reading of the preamble to the statute indicates legislative intent:

> "Whereas, organized crime and vice are increasing in affluence and power and such power naturally flows from the investment of vast sums of wealth procured illegally, and
>
> Whereas, growing amounts of illicit capital representing the proceeds of organized crime and vice are seeking the protection of the corporation laws of Florida, and
>
> Whereas, organized crime, and vice under the authority of law can create in this state legal entities fully clothed with respectability, capable of holding legal title to property and exercising other privileges, Now, Therefore,"

From this provision it becomes clear that the proper construction (and the constitutional one) to be given this provision is some monetary connection between the corporation and criminal organizations in a situation where a majority of the directors knew or should have known of such connection. See 30 *Fla. Jur.* Statutes Sec. 101. So construed, it is also apparent that this second provision is not merely "guilt by association." It would only be so if this Court were to construe the provision contrary to clear legislative intent.

V. *Miscellaneous Objections.*

Defendants assert that the statute violates the provisions of Article I of the Florida Constitution defining treason (Sec. 20), since it deals in part with organized violent revolutionary activities. No real argument has been advanced here as to why such a provision is unconstitutional and the plaintiff would simply note that such activity has already long been proscribed in our penal code. See *Fla. Stat.* Sections 876.23 and 24.

Defendants last assert that the statute deprives them of access to the courts under Art. I, Sec. 21 of the Florida Constitution. Plaintiff finds no merit in this argument since all the defendants have been served,

individually and in their corporate capacity, and can now be heard before this Court.

VI. *Conclusion*

The Legislature of the State of Florida has made a policy decision that, to whatever extent possible, organized crime should not be allowed to seek the "shield" of the corporate laws of this State. That policy decision is not subject to question by the courts. 6 *Fla. Jur.* Constitutional Law Sec. 71. That policy decision has a sound basis in fact as disclosed by legislative investigations conducted by both the Legislature and the U. S. Congress which demonstrate that organized crime uses the takeover of legitimate businesses to "wash" the proceeds of its illegal operations and to "shake down" other legitimate businessmen. Surely it is within the Legislature's power to declare that the legitimate businessmen of this State need not have to compete with other businesses which have behind them the vast proceeds of organized crime's illicit activities.

The Legislature has effectuated this policy by enacting a statute which denies the *privilege* of corporate existence to persons with organized criminal connections. The statute is couched in terms long-given judicially cognizable meanings and widely-used in various regulatory and penal statutes. See 8A *Words and Phrases*, Connected With; 12A *Words and Phrases*, Directly or Indirectly.

Such a corporate forfeiture statute is neither a deprivation of due process of law nor, if construed in accordance with its obvious legislative intent, an attempt to create "guilt by association." Its power source is adequate; its wording is sufficiently definite; and hence, its constitutionality is manifestly present.

Respectfully submitted,

EARL FAIRCLOTH
ATTORNEY GENERAL
Tallahassee, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law was delivered by hand to Mr. Richard Kenney, Esq., Attorney for Defendants, this 6th day of November, 1969.

ASSISTANT ATTORNEY GENERAL

EXHIBIT 8

91ST CONGRESS
1ST SESSION

S. 2600

IN THE SENATE OF THE UNITED STATES

JULY 11, 1969

Mr. HRUSKA (for himself, Mr. DIRKSEN, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Bail Reform Act of 1966 to authorize consideration of danger to the community in setting conditions of release, to provide for pretrial detention of dangerous persons, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3146 of title 18, United States Code, is amended as follows:

(a) by inserting in subsection (a) the words "or the safety of any other person or the community" (1) after "as required" in the first sentence and (2) after "for trial" in the second sentence;

(b) by adding the following sentence at the end

of subsection (a): "No financial condition may be imposed to assure the safety of any other person or the community.";

(c) by amending subsection (b) to read as follows:

"(b) In determining which conditions of release, if any, will reasonably assure the appearance of a person as required and the safety of any other person or the community, the judicial officer shall, on the basis of available information, take into account such matters as the nature and circumstances of the offense charged, the weight of the evidence against such person, his family ties, employment, financial resources, character and mental conditions, past conduct, length of residence in the community record of convictions, and any record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings."

(d) by deleting the period at the end of subsection (c), and adding ", and shall warn such person of the penalties provided in section 3150A of this title."; and

(e) by adding a new subsection:

"(h) The following shall be applicable to any person detained pursuant to this chapter:

"(1) The person shall be confined, to the extent practicable, in facilities separate from convicted persons awaiting or serving sentences or being held in custody pending appeal.

"(2) The person shall be afforded reasonable opportunity for private consultation with counsel and, for good cause shown, shall be released upon order of the judicial officer in the custody of the United States marshal or other appropriate person for limited periods of time to prepare defenses, or for other proper reasons.

SEC. 2. Chapter 207 of title 18, United States Code, is amended by adding after section 3146 the following new sections:

"§ 3146A. Pretrial detention in certain noncapital cases

"(a) Whenever a judicial officer determines that no condition or combination of conditions of release will reasonably assure the safety of any other person or the community, he may, subject to the provisions of this section, order pretrial detention of a person charged with:

"(1) a dangerous crime as defined in section 3152 (3) of this title;

"(2) a crime of violence, as defined in section 3152 (4) of this title, allegedly committed while on bail or other release, or probation, parole or mandatory release pending completion of a sentence, if the prior charge is a crime of violence, or if the person has been convicted of a crime of violence within the ten-year period immediately preceding the alleged commission of the present offense; or

"(3) an offense who, for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror.

"(b) No person described in subsection (a) of this section shall be ordered detained unless the judicial officer—

"(1) holds a pretrial detention hearing in accordance with the provisions of subsection (c) of this section;

"(2) finds that—

"(A) there is clear and convincing evidence that the person is a person described in subsection (a) of this section;

"(B) based on the factors set out in subsection (b) of section 3146 of this title, there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community; and

"(C) except with respect to a person described in subparagraph (3) of subsection (a) of this section, on the basis of information presented to the judicial officer, there is a substantial probability that the person committed the offense for which he is present before the judicial officer; and

"(3) issues an order of detention accompanied by written findings of fact and the reasons for its entry.

"(c) The following procedures shall apply to pretrial detention hearings held pursuant to this section:

"(1) Whenever the person is before a judicial officer, the hearing may be initiated on oral motion of the United States attorney.

"(2) Whenever the person has been released pursuant to section 3146 of this title and it subsequently appears that such person may be subject to pretrial detention, the United States attorney may initiate a pretrial detention hearing by ex parte written motion. Upon such motion the judicial officer may issue a warrant for the arrest of the person and such person shall be brought before a judicial officer in the district where he is arrested. He shall then be transferred to the district in which his arrest was ordered for proceedings in accordance with this section.

"(3) The pretrial detention hearing shall be held immediately upon the person being brought before the judicial officer for such hearing unless the person or the United States attorney moves for a continuance. A continuance granted on motion of the person shall not exceed five calendar days, in the absence of extenuating circumstances. A continuance on

motion of the United States attorney shall be granted upon good cause shown and shall not exceed three calendar days. The person may be detained pending the hearing.

"(4) The person shall be entitled to representation by counsel and shall be entitled to present information, to testify, and to present and cross-examine witnesses.

"(5) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

"(6) Testimony of the person given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but such testimony shall be admissible in proceedings pursuant to sections 3150, 3150A, and 3150B of this title, in perjury proceedings, and as impeachment in any subsequent proceedings.

"(7) Appeals from orders of detention may be taken pursuant to section 3147 of this title.

"(d) The following shall be applicable to persons detained pursuant to this section:

"(1) To the extent practicable, the person shall be given an expedited trial.

"(2) Any person detained shall be treated in accordance with section 3146 of this title—

"(A) upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person; or

"(B) whenever a judicial officer finds that a subsequent event has eliminated the basis for such detention.

"(3) The person shall be deemed detained pursuant to section 3148 of this title if he is convicted.

"(e) The judicial officer may detain for a period not to exceed five calendar days a person who comes before him for a bail determination charged with any offense, if it appears that such person is presently on probation, parole, or mandatory release pending completion of sentence for any offense under State or Federal law and that such person may flee or pose a danger to any other person or the community if released. During the five-day period, the United States attorney or the Corporation Counsel for the District of Columbia shall notify the appropriate State or Federal probation or parole officials. If such officials fail or decline to take the person into custody during such period, the person shall be treated in accordance with section 3146 of this title, unless he is subject to detention pursuant to this section. If the person is subsequently convicted of the offense charged, he shall receive credit toward service of sentence for the time he was detained pursuant to this subsection."

"§ 3146B. Pretrial detention for certain persons addicted to narcotics

"(a) Whenever it appears that a person charged with a crime of violence, as defined in section 3152 (4) of this title, may be an addict, as defined in section 3152 (5) of this title, the judicial officer may, upon motion of the United States attorney, order such person detained in custody for a period not to exceed three calendar days, under medical supervision, to determine whether the person is an addict.

"(b) Upon or before the expiration of three calendar days, the person shall be brought before a judicial officer and the results of the determination shall be presented to such judicial officer. The judicial officer thereupon (1) shall treat the person in accordance with section 3146 of this title, or (2) upon motion of the United States attorney, may (A) hold a hearing pursuant to section 3146A of this title, or (B) hold a hearing pursuant to subsection (c) of this section.

"(c) A person who is an addict may be ordered detained in custody under medical supervision if the judicial officer:

"(1) holds a pretrial detention hearing in accordance with subsection (c) of section 3146A of this title;

"(2) finds that—

"(A) there is clear and convincing evidence that the person is an addict;

"(B) based on the factors set out in subsection (b) of section 3146 of this title, there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community; and

"(C) on the basis of information presented to the judicial officer, there is a substantial probability that the person committed the offense for which he is present before the judicial officer;

and

"(3) issues an order of detention accompanied by written findings of fact and the reasons for its entry.

"(d) The provisions of subsection (d) of section 3146A of this title shall apply to this section."

SEC. 3. Section 3147 of title 18, United States Code, is amended:

(a) by changing the title to read:

"§ 3147. Appeals from conditions of release or orders of pretrial detention."

(b) by adding after the phrase "the offense charged," in subsection (b) the phrase "or (3) a person is ordered detained or an order of detention has been permitted to stand by a judge of the court having original jurisdiction over the offense charged".

SEC. 4. Section 3148 of title 18, United States Code, is amended by striking out the last sentence and adding "The provisions of section 3147 shall apply to persons described in this section."

SEC. 5. Section 3150 of title 18, United States Code, is amended:

(a) by adding the letter "(a)" before the word "Whoever".

(b) by inserting the phrase "or prior to surrender to commence service of sentence" (1) after the word "chapter" and (2) after the word "certiorari";

(c) by deleting the phrase "or imprisoned not more than five years" and inserting in lieu thereof the phrase "and imprisoned not less than one year and not more than five years";

(d) by deleting the phrase "or imprisoned for not more than one year" and inserting in lieu thereof the phrase "and imprisoned not less than ninety days and not more than one year"; and

(e) by adding at the end thereof the following new subsections:

"(b) Any failure to appear after notice of the appearance date shall be prima facie evidence that such failure to appear is willful. Whether the person was warned when released of the penalties for failure to appear shall be a fac-

tor in determining whether such failure to appear was willful, but the giving of such warning shall not be a prerequisite to conviction under this section.

"(c) The trier of facts may convict under this section even if the defendant has not received actual notice of the appearance date if (1) reasonable efforts to notify the defendant have been made and (2) the defendant, by his own actions, has frustrated the receipt of actual notice.

"(d) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment."

SEC. 6. Chapter 207 of title 18, United States Code, is amended by adding after section 3150 the following new sections:

"§ 3150A. Added penalties for crimes committed while on release

"Any person convicted of an offense committed while released pursuant to section 3146 of this title shall be subject to the following penalties in addition to any other applicable penalties:

"(1) a term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while released; and

"(2) a term of imprisonment of not less than ninety days and not more than one year if convicted of committing a misdemeanor while released.

"The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to conviction under this section.

"Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

"§ 3150B. Sanctions for violation of release conditions

"(a) A person who has been conditionally released pursuant to section 3146 of this title and who has violated a condition of release shall be subject to revocation of release and an order of detention and to prosecution for contempt of court.

"(b) Proceedings for revocation of release may be initiated on motion of the United States attorney. A warrant for the arrest of a person charged with violating a condition of release may be issued by a judicial officer and such person shall be brought before a judicial officer in the district where he is arrested. He shall then be transferred to the district in which his arrest was ordered for proceedings in accordance with this section. No order of revocation and detention shall be entered unless, after a hearing, the judicial officer finds that—

"(1) there is clear and convincing evidence that such person has violated a condition of his release; and

"(2) based on the factors set out in subsection (b)

of section 3146 of this title there is no condition or combination of conditions of release which will reasonably assure that such person will not flee or pose a danger to any other person or the community.

The provisions of subsections (c) and (d) of section 3146A of this title shall apply to this subsection.

"(c) Contempt sanctions may be imposed if, upon a hearing and in accordancce with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more that $1,000, or both.

"(d) Any warrant issued by a judge of the District of Columbia Court of general sessions for violation of release conditions or for contempt of court, for failure to appear as required, or pursuant to subsection (c) (2) of section 3146A of this title, may be executed at any place within the jurisdiction of the United States. Such warrants shall be executed by a United States marshal or by any other officer authorized by law."

SEC. 7. Section 3152 of title 18, United States Code, is amended by adding the following new paragraphs:

"(3) The term 'dangerous crime' means (1) taking or attempting to take property from another by force or threat of force, (2) unlawfully breaking and entering or attempting to break and enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein, (3) arson or attempted arson of any premises adapted for overnight accommodation of persons or for carrying on business, (4) rape, carnal knowledge of a female under the age of sixteen, assault with intent to commit either of the foregoing offenses, or taking or attempting to take immoral, improper or indecent liberties with a child under the age of sixteen years, or (5) unlawful sale or distribution of a narcotic or depressant or stimulant drug, as defined by any Act of Congress and if the offense is punishable by imprisonment for more than one year.

"(4) The term 'crime of violence' means murder, rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper or indecent liberties with a child under the age of sixteen years, mayhem, kidnaping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses, as defined by any Act of Con-

gress or any State law, if the offense is punishable by imprisonment for more than one year.

"(5) The term 'addict' means any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954, as amended, so as to endanger the public morals, health, safety, or welfare."

SEVERABILITY

SEC. 8. If a provision of this Act is held invalid, all valid provisions which are severable shall remain in effect. If a provision of this Act is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications.