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Criminal Law--Gambling--The Need for Legislative Reform

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CRIMINAL LAW—GAMBLING—THE NEED FOR LEGISLATIVE REFORM.—The Kentucky Revised Statutes presently regulating gambling lack precision and do not deal effectively with the Commonwealth's problem in this area. There are thirty-one sections in Chapter 436 (Offenses Against Morality) pertaining to gambling. Eight of these penalize the citizen who places a bet,¹ while the remainder restrict the promotional aspects of various types of gambling. The fact that each phase and type of gambling is dealt with separately limits the efficacy of the statutes to their own specifically defined terms. Each charge must be individually tailored to the explicit section and clause of the statute, a process which often produces mistakes and results in fewer convictions.² Kentucky now has the power to punish its citizens for some activities generally viewed as innocuous and socially acceptable and lacks the power to effectively prevent the promotion of certain forms of gambling which are detrimental. If these statutes are to be revised, it is imperative that the legislators achieve a balance between a seemingly natural human response which has never been completely repressed,³ and an exploitation of that response which thrives on corruption. Certainly the myopic and shotgun approach which has produced the present regulations should be abandoned.

The problem of devising a gambling statute cannot be solved without considering the socio-economic situation. Gaming has been romanticized on the one hand, and hotly condemned on the other. Dos Passos, in his Yale Law Journal article, quotes Lecky, who stated, "Gaming is not in itself a crime. Few moralists will pretend that a man is committing an immoral act if he stakes a few pence or shillings on a game of chance. . . ."⁴ The fact that gambling is not always "immoral" should not obscure the statistics which show that as much as fifty billion dollars exchange hands annually as a result of illegal gambling

¹ KRS § 436.200 (1962) penalizes any person who engages in any hazard or game on which money or property is bet, won or lost. KRS § 436.270 (1962) penalizes any person who engages in any game, table, bank machine or contrivance. KRS § 436.300 (1962) penalizes betting on billiards or pool. KRS § 436.330 (1962) penalizes betting on elections. KRS § 436.380 (1962) prohibits the procurement of a lottery ticket. KRS § 436.460 (1962) prohibits presence in betting premises. KRS § 436.490 penalizes off-track betting. KRS § 436.500 (1962) penalizes any person who places a bet on a prize fight.

² *Raden v. Commonwealth*, 287 Ky. 282, 152 S.W.2d 937 (1941), where the indictment did not allege that the machine, which was not of the sort specifically mentioned in the statute, was such as is ordinarily used for gambling purposes.

³ Note, *Statutory Trends Toward Legalization of Gambling*, 34 IOWA L. REV. 647, 648-49 (1949).

⁴ Dos Passos, *Gambling and Cognate Vices*, 14 YALE L.J. 9, 17 (1904). The article contends that gambling is not a crime against nature, but an offense against society. The main purpose of the laws against gambling should be to keep it from public view.

activities in the United States.⁵ The fact that millions of Americans are fleeced of their money through devious means and insurmountable odds is not as foreboding as the realization that these sums are used to bribe public officials in order to insure a continuance of the gambling operations, and to invest in the invidious and lucrative activities of narcotics traffic, prostitution, and loan sharking. The late Senator Robert Kennedy warned that "[t]he fundamental strength of our democracy . . . is at stake. . . . What really concerns me is the great wealth of the racketeers and the power that goes with it—the power to corrupt police and public officials, and in some instances, gain political control of an area."⁶ The task of drafting gambling legislation is complicated by derivative, but separate crimes. 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.

Kentucky's gambling regulations, functionally the same since 1894, penalize both the promoter and the player.⁷ However, Kentucky exempts from prosecution both the player and the promoter of State-regulated pari-mutuel betting.⁸ Horse racing has achieved a high position among our state's traditional cultural institutions. Such a double standard (the clothing of one form of betting with respectability and another with anathema) is evidence of our irrational ambivalence toward gaming. Kentucky was the first state to undertake local regulation of horse racing by the establishment of a State Racing Commission in 1906.⁹ Other states did not create racing commissions until the post depression years when additional revenue sources were necessary. It was thought that legalized pari-mutuel betting would eliminate bookies, but this has not occurred and today there is more bookmaking and off-course betting than before the advent of state control.¹⁰ In 1950 it was estimated that bookmaking yield-

⁵ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIME IN A FREE SOCIETY 189 (1967). Estimates of the annual intake have varied from \$7 billion to \$50 billion. Analysis of organized criminal betting operations indicates that the profit is as high as $\frac{1}{3}$ of the gross, i.e., 6 to 7 billion dollars each year.

⁶ GAMBLING 176-77 (R. Henman ed. 1967). See *Myth About Gambling*, 190 THE NATION 219 (1960). "Now days gambling is not only a major source of municipal corruption; it provides the organization which enables the syndicate to operate even more lucrative rackets. By refusing to recognize the reality of today's organized gambling, the public is placing the stamp of approval on large-scale municipal corruption. . . ."

⁷ Ch. 58, §§ 1955-80 [1884] Ky. Acts 413.

⁸ KRS § 436.480 (1962).

⁹ Day, *Horse Racing and the Pari-Mutuel*, 269 ANNALS 55, 59 (1950).

¹⁰ Peterson, *Obstacles to Enforcement of Gambling Laws*, 269 ANNALS 9, 16 (1950).

ed three to ten billion dollars annually.¹¹ Kentucky race tracks produce an annual gross receipt in excess of \$90 million.¹² Perhaps the only solution to this ludicrous situation is to legalize bookmaking. Louis Lawrence succinctly states the dilemma: "Most assuredly, gambling is an economic waste. It is no less so at a race track than in a bookmaker's room."¹³ The antipodal position of the state concerning off track and on track betting can be explained in terms of economics and ethics. Pari-mutuel wagering represents a sizable fraction of state wide revenue, the loss of which most state legislators would be hesitant to risk. The social eminence which horse racing now enjoys might be destroyed by the legalization of bookmaking. John Day, past director of the Service Bureau of Thoroughbred Racing Associations, argues for a retention of the status quo. He contends that:

The principal problem of racing today is not the individual cheat, but the perhaps well-meaning, but ill-advised legislator who would impose additional taxes or legislate conditions such as off-course betting or night racing, which would lead to abuses and ultimately cause a reaction against what is traditionally a fine sport and economically significant industry.¹⁴

Certainly the race tracks themselves have a vested interest in preventing the legalization of off-course gambling which might readily reduce attendance figures.

The player (excluding authorized race track betting) is subject to penalty in Kentucky. There is no rationale for this. At first blush it might seem illogical to condemn one aspect of gambling (the promotional aspect) while ignoring another (the participational aspect); the two are interdependent. However, the only interest a state could have in preventing its citizens from gaming would be to protect their morals. "Gambling law is intended for social protection rather than an effort to formulate public morals . . . most laws prohibit the business of gambling which exists solely to exploit a human weakness. . . ."¹⁵ Whether or not gambling is immoral is not the state's concern. If it is, then this must be inculcated on the people by reformers, the church, the school, and the family, and not forced upon them by the state. There are other interests to be protected by seeking to deter the promotion of gambling. They have already been mentioned—to insure a stable tax base from the gambling which operates under the auspices

¹¹ Lawrence, *Bookmaking*, 269 ANNALS 46, 52 (1950).

¹² 31 Ky. State Racing Comm'n Biennial Rep. (1967).

¹³ Lawrence, *supra* note 11, at 52.

¹⁴ Day, *supra* note 9, at 61.

¹⁵ Peterson, *supra* note 10, at 18.

of the state, and to prevent other illegal operations which are financed by the proceeds from unauthorized organized gambling.

The second choice open to the legislators is to propose a state monopoly or a licensing program. Since a state monopoly does not seem advisable, licensing seems to be the best alternative. Licensing is a matter of restraint and regulation, whereas a monopoly would tag the state with the ambition of making money from a human weakness. Governor Thomas Dewey believed that "[i]t would be an indecent thing for a government to finance itself so largely out of the weakness which it had deliberately encouraged."¹⁶ A licensing program might ultimately be the wisest decision, but it is doubtful whether it should be attempted now.¹⁷ Nevada has been relatively successful with its experiment in legalized gambling but there is evidence that a certain percentage of money is skimmed from the taxable proceeds free to be put to whatever illegal purpose the gambling operators might desire.¹⁸ "In proportion to population Nevada certainly has as many, if not more top ranking racketeers engaged in the gambling business as has any other state in the union."¹⁹ It cannot be gainsaid that organized gambling on a large scale attracts exploiting elements. There is no reason to believe that licensing laws would not be vulnerable to the same sort of corruption that has made deterrence laws ineffective in some circumstances.²⁰

Inevitably the only cogent argument against legalized gambling is the probability of corruption. The threat and reality of corruption is bound to exist until other forms of gambling can clothe themselves in some additional extrinsic value (like horse racing) other than the lure of easy money, or until the public realizes that gambling does not have the disastrous social consequences it is generally thought to have. This is not to say that if gambling were to achieve social acceptance

¹⁶ Letter from Governor Thomas Dewey to the New York State Legislature, Jan. 16, 1950, in 269 ANNALS 36 (1950).

¹⁷ See also M. McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 207 (1966). McLuhan traces a circular development of society from tribal civilizations to individualistic civilizations, and now, he contends, we are re-orienting ourselves in a tribal society.

In tribal societies, gambling, on the other hand, is a welcome avenue of entrepreneurial effort and individual initiative. Carried into an individualist society, the same gambling games and sweepstakes seem to threaten the whole social order. Gambling pushes individual initiative to the point of mocking the individualist social structure. The tribal virtue is the capitalist vice. *Id.*

¹⁸ W. TURNER, GAMBLER'S MONEY 142 (1965). To use the money for any legitimate purpose would reveal the fact that it has not been taxed.

¹⁹ V. PETERSON, GAMBLING . . . SHOULD IT BE LEGALIZED? 91 (1950).

²⁰ Peterson, *supra* note 10, at 18.

and respectability all corruption would vanish. Anything as lucrative as gambling will always attract exploiting forces. However, once gambling becomes an accepted institution, the energies of society and government could be directed at keeping it clean, rather than eradicating it.

Gambling is slowly losing some of what are considered to be its social evils. But there still remains adequate support for the belief that gambling tends to disrupt the family unit, destroy work incentive, and produce unwanted character traits. Very few scientific works have been devoted to gambling. Most literature on the subject starts from the premise that gambling is evil. One recent study revealed that none of the violent attacks that have been levied against gambling are justified.²¹ No difference was found between bettors and non-bettors in their relationship with their families and spouses.²² It was also established that there is no substantiation for the assertion that gambling causes "occupational apathy."²³ The study found that gambling provided bettors with the hope for social advancement. It was determined that most of the habitual gamblers came from the lower classes—people who find little opportunity for advancement in their work. These people do not expect to become rich, but only hope to become rich. Thus the socially induced frustrations of the lower classes may be partially eased through legalized gambling. The study concluded that "by reducing these tensions and strains, it (gambling) diminishes the expression of potentially deviant behavior and can be regarded as an activity which contributes to the continuity of the existing order."²⁴

When gambling ceases to represent a threat to society, it can be legalized. Kentucky could take a step in the correct direction by abolishing present regulations which subject the player to penalty, and by making more effective the provisions which punish the promoters. This could be done by adopting a law similar to that of New York²⁵ or that which Michigan has proposed.²⁶ All exploitive gambling would be made criminal. The proposed Michigan statutes penalize two basic kinds of activity:²⁷ (1) The advancing of unlawful gambling.

²¹ N. TEC. GAMBLING IN SWEDEN 106 (1964).

²² *Id.* at 106.

²³ *Id.*

²⁴ *Id.* at 117.

²⁵ N.Y. PEN. LAW § 225.10 (McKinney 1965).

²⁶ MICH. REV. CRIM. CODE § 6106 (1967).

²⁷ MICH. REV. CRIM. CODE § 6105 (1967) states:

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

(Continued on next page)

Gambling is defined as risking something of value upon the outcome of a contest of chance or a future contingent event not under control of the player. 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. The player is not penalized as long as he does not receive any profit other than personal winnings. The defense of being a player is controled by requiring the defendant to raise the issue. This would mean that he would have to testify as to the circumstances that resulted in his indictment.²⁸

A statute of this nature would benefit Kentucky. The process of framing an indictment would be simplified, which would increase the efficiency of the law. It would allow people to engage in gambling while preventing this activity from being exploited.

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CRIMINAL LAW—STOP AND FRISK—THE NEED FOR LEGISLATIVE REFORM.—A man walks slowly down a residential street at an extremely late hour in an area where there have been numerous reports of break-ins. Can a municipal or county police officer in the state of Kentucky stop this person and require of him his name, his address, and his purpose for being out so late? If the officer does not receive satisfactory answers can he frisk the person? Under present Kentucky law, he may not. At the present there is no codified law in Kentucky governing the procedure known as "stop and frisk." There are no cases directly in point, but there are some that set up guidelines for a police officer's actions in dealing with suspected offenders. These cases deal with arrest and search without a warrant. They have variously held

(Footnote continued from preceding page)

(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.

The maximum sentence for a class C felony is 5 years and the maximum fine is \$2,500.

²⁸ MICH. REV. CRIM. CODE § 6101; §§ 6115-20, Comment (1967).