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Perspectives on Ohio Bingo Regulation: An Historical Analysis and Proposals for Change

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**PERSPECTIVES ON OHIO BINGO REGULATION:
AN HISTORICAL ANALYSIS AND PROPOSALS
FOR CHANGE**

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INTRODUCTION

ONE NEED not do extensive research into the historical background of bingo or lottery regulation in the State of Ohio before becoming aware that the current state of confusion in the law is not without precedent. Particularly in the large metropolitan centers, regulating and policing schemes and games of chance have presented a perennial problem.¹ With the advent of constitutionally authorized charitable bingo in November of 1975,² several legislative regulatory schemes were enacted. Each eventually gave rise to a more serious proliferation of problems in enforcing the legislative limitations. The critical proportions of the bingo problem were reflected in Amended House Bill 1547, enacted on December 6, 1976 as an emergency measure. As explained in section three of that bill:

This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for this necessity is that its enactment into law at the earliest possible time will clarify the rights and obligations of charitable organizations conducting bingo games . . . and enable certain charitable organizations to use the proceeds of bingo games for those beneficial charitable activities that have in the past been sustained by their support. . . .³

Unfortunately, the new law failed to eliminate most of the difficulties in regulating bingo. Loopholes enabling proceeds to be spent for noncharitable

¹ *E.g.*, *Morman v. Youngstown*, No. 74-90 (Ohio Ct. App. Feb. 5, 1975); *Nadlin v. Starick*, 24 Ohio Op. 2d 272, 194 N.E.2d 81 (C.P. Montgomery County 1963) (Dayton); *Zepp v. Columbus*, 50 Ohio Op. 47, 112 N.E.2d 46 (C.P. Franklin County 1951); *Loder v. Canton*, 65 Ohio L. Abs. 517, 111 N.E.2d 793 (C.P. Stark County 1951); *Kraus v. Cleveland*, 42 Ohio Op. 490, 94 N.E.2d 814 (C.P. Cuyahoga County 1950), *affd.*, 89 Ohio App. 504, 96 N.E.2d 814 (1950), *appeal dismissed*, 155 Ohio St. 98, 97 N.E.2d 549 (1951); *State ex rel. Gabalac v. The New Universal Congregation of Living Souls*, No. 76-9-1960 (C.P. Summit County filed Sept. 1976) (Akron); *State ex rel. Campbell v. Charities Unlimited, Inc.*, No. 75-1-278 (C.P. Summit County filed Jan. 31, 1975) (Akron).

In the relatively small and/or rural Ohio counties, not only has no bingo litigation been reported, but it appears that little bingo activity occurs. The few organizations conducting bingo in the counties from which the writers received responses to inquiries directed to all 88 Prosecuting Attorneys are licensed and primarily church sponsored. Letter from James R. Scott, Guernsey County Prosecuting Attorney, February 16, 1977 (four licensed religious organizations; no problems or complaints); Letter from Lucien C. Young, Jr., Noble County Prosecuting Attorney, February 15, 1977 (no bingo, but Roman Catholic Church with application pending); Letter from Russel J. McMaster, Paulding County Assistant Prosecuting Attorney, February 17, 1977 (no bingo problems); Letter from Elmer Spencer, Adams County Prosecuting Attorney, February 15, 1977 (no knowledge of any bingo in the county); Letter from the Honorable Henry E. Shaw, Judge of the Delaware County Court of Common Pleas, February 14, 1977 (no bingo litigation); Letter from the Honorable Harry Sargeant, Jr., Judge of the Fremont Municipal Court, former Sandusky County Prosecuting Attorney, February 14, 1977 (no problems or cases).

² OHIO CONST. Art. XV, § 6 was amended, effective November 5, 1975, pursuant to the adoption H.J.R. 10016 by the electorate in the general election. The vote tally was yes: 1,388,606; no: 1,195,660.

³ Am. Sub. H.B. No. 1547, § 3, 111th General Assembly (1976).

purposes remained and were capitalized upon. The legislative scheme continued to prove incapable of achieving the purported legislative goals.

It is the purpose of this comment to facilitate the enactment and enforcement of comprehensive, workable bingo legislation for the State of Ohio. To this end, Part I of this comment will explore the history of bingo regulation in Ohio, and gambling legislation as it relates to bingo, to illuminate the policy behind the present law. In Part II, the writers present an analysis of the recent, and frequent, amendments to Chapter 2915 of the Ohio Revised Code as they relate to legalized bingo, followed by a critical appraisal of the effectiveness of the current statutes in regulating bingo. Part III discusses comparable legislation in nine other major states. This legislation will be contrasted with Ohio law to identify similar problems and to evoke drafting ideas which may help close many existing loopholes in the law. Finally, in Part IV, the writers suggest drafting strategies and proposals for rewriting significant portions of the bingo law.

The writers make no value judgments on the social or moral efficacy of legalized bingo. All suggestions herein are directed to drafting legislation which achieves the public policy goals chosen by the people of Ohio and their elected representatives. It is hoped that the suggestions offered will be useful in the legislative process of adopting a comprehensive bingo law; the authors shall endeavor to present all theoretical and practical considerations so that the proposals proffered will reflect the wide range of legislative choices open to the people of Ohio. The goal is to place bingo in the background, operating smoothly in accord with a fair legislative scheme, absent controversy.

I. THE HISTORY OF BINGO IN OHIO

If, from the tangled body of law surrounding bingo in Ohio, one factor can be singled out as crucial, that factor would be Article XV, section six of the Ohio Constitution of 1851. That provision, for almost one and a quarter centuries, read:

Lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.

At first glance it may be difficult to apprehend the applicability of this provision to bingo. However, as will be more fully demonstrated,⁴ the courts in Ohio have consistently held bingo to be a lottery,⁵ subject to constitutional prohibition.

⁴ See text accompanying notes 52-77 *infra*.

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See cases cited note 71 *infra*.

A. *Pre-Constitutional Gambling Regulation*

Ohio's first anti-gambling provisions were passed on February 14, 1805 under the title "An act, for the prevention of certain immoral practices." Every "species, kind or way of gambling at hazard or chance, under any pretense whatever, for money or any other article of value, and betting thereon," were prohibited.⁶ In 1807 the General Assembly of Ohio passed the first law denominating the conduct of a lottery as an offense.⁷ That law provided that no lottery could be conducted unless authorized by a special act of the legislature. Failure to obtain authorization was a criminal offense. The Act was a strong prohibition of all private lotteries.⁸ Strengthening the state's anti-gambling stance, an 1814 act prohibited the use of gaming tables and equipment, and certain forms of gambling which partook of a "game" aspect.⁹

With general prohibitions of games of chance now on record, as well as the qualified anti-lottery statute, the General Assembly endeavored to complete the list of criminal activities by adding the prohibition against the operation of all schemes of chance¹⁰ in 1831.¹¹ In the intervening period from 1807, the legislature had passed a number of special acts authorizing lotteries to raise funds for such purposes as constructing bridges, dams, and buildings.¹² Thus, at the time of the Constitutional Convention of 1851 all

⁶ 3 Ohio Laws 218 ch. XLIII § 3 (1805). Violators were fined ten dollars.

⁷ 5 Ohio Laws 91 ch. XXIX (1807).

⁸ Sections 1 & 3 of the Act provided:

[N]o person or persons shall, without a special act of the legislature, within this state, open set on foot, carry on, promote, draw or make publicly or privately, any lottery, game or device of chance of any nature or kind whatsoever, . . . ; and that every person, who shall offend in the premises against the true intent and meaning of this act, and shall thereof be convicted in the court of common pleas . . . shall be fined in a sum not exceeding five thousand dollars That the grand juries . . . make strict enquiry and present every person who shall offend against the provisions of this act. . . .

⁹ 14 Ohio Laws 63, 72 (1816). For a summary of early gambling legislation, see *State v. Simonian*, 77 Ohio App. 201, 66 N.E.2d 260 (1945).

¹⁰ As will be more fully discussed in the text accompanying notes 48-54 *infra*, games of chance were treated as examples of gambling in an individual fashion by means of apparatus generally associated with the playing of a game. Schemes of chance, on the other hand, classified the type of gambling which occurred in group-oriented activities, such as policy and raffles, in which participants "competed" with one another for the chance to win a prize. Current definitions are codified in OHIO REV. CODE ANN. § 2915.01(D)(E) (Page Supp. 1976); the vague differentiations contained therein are characteristic of the decades of confusion surrounding the proper classification of individual gambling activities.

¹¹ 29 Ohio Laws 144, 152 §§ 43, 44 (1831). There were two acts involved: one, a comprehensive listing of crimes, the second, dealing with lotteries and schemes of chance, a listing of offenses. Section 43 prohibited the setting on foot, promoting, or like activity, of any lottery or scheme of chance. Section 44 denominated the sale of lottery tickets or any share in a scheme of chance as a punishable offense, but specifically exempted the drawing or sale of lottery tickets when authorized by the state.

¹² In *State v. Simonian*, 77 Ohio App. at 209, 66 N.E.2d at 263-64, the court lists several such statutes.

gambling, whether games or schemes of chance, was illegal in Ohio, except those lotteries legislatively authorized to fund special projects.

B. *The Constitutional Meaning of "Lotteries"*

Responding to existing legislation which reflected an almost unequivocally negative attitude toward both the promotion of and participation in gambling, the representatives to the Constitutional Convention of 1851 chose to incorporate an absolute prohibition of all lotteries within the Constitution. Far from expressing approbation toward gambling other than lotteries, the convention appears to have merely eliminated legislatively sanctioned lotteries,¹³ the one remaining form of hazard and chance still permitted in Ohio. The criminalization of the other manifestations of the gambling spirit was accepted as sanction enough, making an express declaration of unconstitutionality unnecessary.¹⁴

With the adoption of Article XV, section six of the 1851 Constitution, the people of Ohio expressed an exceptionally strenuous objection to lotteries, providing that they "forever be prohibited". This unusual wording, with the implications outlined above, bore weight in formulating a public policy toward games and other schemes of chance. Relying on the intent of the provision, courts in Ohio treated the Constitution as broadly prohibiting lotteries in the generic sense, thus extending the threat of unconstitutionality to other games and schemes of chance.

Gambling, deemed an immoral activity by the General Assembly, was considered contrary to public policy even prior to 1851. All forms were

¹³ See text accompanying note 12 *supra*.

¹⁴ Although no contemporary source reflects the accuracy of this interpretation, the court, in *State v. Simonian*, reached a similar conclusion:

It will be seen, therefore, that up to this time (1830-1851) while such forms of gaming or gambling as are mentioned in Section 13066, General Code, were the subject of constant and repeated legislation, providing punishment . . . , the public policy of the state included approval of lotteries and schemes of chance enterprises now covered by Section 13064, General Code. It is interesting also to note that when the people of the state adopted the Constitution of 1851, nothing therein was said of gaming or gambling as such, or in the amendments to that Constitution later adopted. The prohibition of the Constitution is against lotteries and the sale of lottery tickets only.

The adverse attitudes of the Legislature, even before the creation of the state, toward the employment of gambling machines or devices was so pronounced, and their use so adverse to the policy of the state, that it apparently was thought unnecessary to write any prohibition thereof into the Constitution. It was only because the Legislature had seen fit to employ the scheme of a lottery for public and private purposes that the people considered it necessary to prohibit lotteries in the Constitution.

77 Ohio App. at 211, 66 N.E.2d at 264.

For those with access, the record of the 1851 Convention debates refers to the adoption of the anti-lottery provision, 1 Debates 164, 263; 2 Debates 318, 569, 633, 664, 854, 864, 870.

classified as equally harmful to the public good.¹⁵ The Constitution flatly prohibited direct or indirect approval.¹⁶ The gambling instinct was classified as an evil in and of itself; therefore, any device or scheme which served to arouse it was equatable with a lottery for the purposes of applying the public policy expressed in the Constitution.¹⁷ The "immoral" element of gambling was considered to be the risking of money by the gamblers,¹⁸ or at least the giving of some consideration, for the chance to win a greater return.¹⁹ By defining lottery in such a way as to make it any chance to risk something of value, almost all forms of gambling could be treated as lotteries. Although the courts seldom relied solely on the constitution in anti-gambling litigation, they did repeatedly invoke it as evidencing a strong public policy, while at the same time holding the conduct to be statutorily proscribed.²⁰

In light of the probable restricted meaning of the word "lottery" as used in the 1851 Constitution, judicial extension of the concept to other forms of gaming and scheming by chance is somewhat surprising. The courts, however, may not be straining the application if the background intent of the drafters is accepted as being hostile to all risks based upon chance-taking. The development of the judicial definition of "lottery" is helpful in gaining an understanding of the checkered history of bingo in Ohio.

In *Stevens v. Cincinnati Times-Star Co.*,²¹ the Ohio Supreme Court promulgated a definition of lottery: a scheme held out to the public in which participation depended upon payment of a pecuniary consideration and in which lot or chance determined who won a prize with value superior to that risked to enter the scheme. The three elements, to recur in all subsequent definitions of lottery, were thus established: consideration to play, success by chance, and a prize of value. Note that the *Stevens* Court spoke

¹⁵ *Nadlin v. Starick*, 24 Ohio Op. 2d 272, 273, 194 N.E.2d 81, 83 (C.P. Montgomery County 1963). See also *Harriman Inst. of Social Research, Inc. v. Carrie Tingly Crippled Children's Hosp.*, 43 N.M. 1, 84 P.2d 1088 (1938), where the court equates professional and charitable gambling because they have the same (adverse) social results.

¹⁶ *Columbus v. Barr*, 160 Ohio St. 209, 212, 115 N.E.2d 391, 393 (1953).

¹⁷ *Kraus v. Cleveland*, 12 Ohio Op. 206 (C.P. Cuyahoga County 1938).

¹⁸ [1958] OHIO ATT'Y GEN. OP., No. 2291, at 384.

¹⁹ See *Kroger v. Cook*, 24 Ohio St. 2d 170, 265 N.E.2d 780 (1970).

²⁰ See, e.g., *Stillmaker v. Department of Liquor Control*, 18 Ohio St. 2d 200, 249 N.E.2d 61 (1969); *Westerhaus v. Cincinnati*, 165 Ohio St. 327, 135 N.E.2d 318 (1956), *aff'g* 71 Ohio L. Abs. 353, 127 N.E.2d 412 (Ohio Ct. App. 1955); *Snyder v. Alliance*, 41 Ohio App. 48, 179 N.E. 426 (1931); *State v. Smith*, 83 Ohio L. Abs. 426, 165 N.E.2d 481 (C.P. Summit County 1960); *Kraus v. Cleveland*, 12 Ohio Op. 206 (C.P. Cuyahoga County 1938); *Mills Operating Co. v. Village of Toronto*, 20 Ohio N.P. (n.s.) 525, 28 Ohio Dec. 316 (C.P. Jefferson County 1918); *Gevaras v. Cleveland*, 8 Ohio Op. 178 (Cleveland Mun. Ct. 1937).

of a scheme held out to the public as well.²² These latter factors were eliminated from the broad definition of lottery, but were retained to distinguish schemes from games of chance.²³ Later courts concentrated both on extending the reach of the constitutional policy to other gambling activities exhibiting the three elements and on defining the content of each element itself.

In *Troy Amusement Co. v. Attenweiler*,²⁴ a theater conducted a "bank night". Patrons signed sheets from which names would be picked at random, with money prizes for the winners. This scheme was held to be a lottery; the three elements of consideration, chance, and prize were present. The vice was discerned in the dominating element of chance, which pervaded the entire scheme. The questionable consideration given — chances were free, but the scheme was promotional — was not considered crucial. This growing emphasis on *chance* and deemphasis on consideration is noteworthy, since it later provided the rationale for extending the scope of constitutionally prohibited lotteries to cover activities with far less connection to the traditional and common understanding of such schemes.²⁵

By 1951 the courts were struggling to maintain a reasonable approach to the classification of gaming activities as lotteries, while at the same time keeping the broadest definition possible operative. In *Wishing Well Club v. Akron*,²⁶ the court, citing *Stevens*, reiterated the three determinative factors in identifying an activity as a lottery: consideration, prize, and chance. Presumably, whenever these elements can be found, a lottery exists despite the presence of other factors such as skill. The court buttressed its decision by noting:

²² *Stevens* involved a newspaper guessing scheme. Although not comparable to the lotteries specially authorized prior to 1851, see text accompanying notes 7-12 *supra*, such a scheme could fit into a more generic concept of lottery as the distribution of numerous "chances" to win a single prize. Similarly, in *Troy Amusement Co. v. Attenweiler*, 64 Ohio App. 105, 28 N.E.2d 207 (1940), the court used a broad classification to declare a "bank night" scheme unconstitutional.

The similarities to lotteries represented by the *Stevens* and *Troy* schemes do not make their classification, as unconstitutional, unwarranted. Other courts, however, e.g., *Westerhaus v. Cincinnati*, 165 Ohio St. 327, 135 N.E.2d 318 (1956), suggested that even pinball machines, which exhibited price, chance, and prize, might be constitutionally infirm. The court avoided making this decision by resorting to clear statutory prohibitions of such gaming devices. See also *Kraus v. Cleveland*, 12 Ohio Op. 206 (C.P. Cuyahoga County 1938).

²³ See text accompanying notes 47-51 *infra*.

²⁴ 64 Ohio App. 105, 28 N.E.2d 207 (1940).

²⁵ Relying on the presence of chance, the Cuyahoga County Court of Common Pleas in *Kraus v. Cleveland*, 12 Ohio Op. 206 (1938) reached the determination that pinballs and slot machines, already proscribed by statutes, were probably prohibited by the Constitution as well.

²⁶ 66 Ohio L. Abs. 406, 112 N.E.2d 41 (C.P. Summit County 1951).

The Constitution of Ohio uses the word "lottery" in no restricted or qualified sense. It expressly provides that "lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited." These words constitute an exceptionally strong and unambiguous declaration of public policy.²⁷

Accepting the unrestricted definition language, the court in *Zepp v. Columbus*²⁸ found that the "sweeping" and "potent declaration . . . of public policy with reference to lotteries"²⁹ required that all activities involving chance be prohibited. The court recognized, however, that "all lotteries are gambling or schemes of chance but all gambling is not necessarily a lottery."³⁰ Presumably, gambling where no element of chance, but only skill, is involved would be constitutional, not fitting within the definition of lottery. On the other hand, the mere presence of any element of chance to determine a winner could transform an activity into a lottery.³¹

In effectuating Article XV, section six, the courts reiterated, often with vehemence, the policy of outlawing unsavory activities as harmful to the public welfare. The legal climate for any game or scheme of chance was, not surprisingly, hostile. This judicial hostility was reemphasized throughout the 1960's and 1970's. *State v. Lisbon Sales Book Co.*³² spoke of activities "in the nature of lotteries" being forbidden, adopting the broad reading by now familiar in the state.³³ As late as 1975, the Attorney General of the State reinforced the broad construction of "lottery" for purposes of the Constitution.³⁴ Construing "lottery" in its generic sense, the court in *State ex rel Campbell v. Charities Unlimited*,³⁵ held that:

The fact that the Ohio Constitution refers only to lotteries does not mean that other forms of gambling are not prohibited. Any game that has the elements of consideration, chance and prize, . . . is in contravention of the Constitution.³⁶

Seemingly, such sweeping classifications would have sufficed to eliminate the "immoral" and "evil" practices of hazarding money for a chance to win. However, the necessity of establishing the elements of chance, con-

²⁷ *Id.* at 410, 112 N.E.2d at 43.

²⁸ 50 Ohio Op. 47, 112 N.E.2d 46 (C.P. Franklin County 1951).

²⁹ *Id.* at 49, 112 N.E.2d at 49.

³⁰ *Id.* at 50, 112 N.E.2d at 49.

³¹ See *Westerhaus v. Cincinnati*, 165 Ohio St. 327, 135 N.E.2d 318 (1956).

³² 176 Ohio St. 482, 200 N.E.2d 590 (1964).

³³ See, e.g., *Kroger v. Cook*, 24 Ohio St. 2d 170, 265 N.E.2d 780 (1970), *aff'g on other grounds*, 17 Ohio App. 2d 41, 244 N.E.2d 790 (1968); *Nadlin v. Starick*, 24 Ohio Op. 2d 272, 194 N.E.2d 81 (C.P. Montgomery County 1963).

³⁴ [1975] OHIO ATT'Y GEN. OP., No. 005, at 2-16.

³⁵ No. 75-1-278 (C.P. Summit County filed Jan. 31, 1975).

³⁶ *Id.* at 5.

sideration, and prize threatened not to cover all possible schemes in which chance could rear its ugly head. To meet this problem, the courts in Ohio redefined those three elements in an extremely broad manner. Few activities escaped being declared unlawful.

The element of consideration was weakened into near non-existence. In 1923, the court in *Bader v. Cincinnati*³⁷ held that the concept of consideration in contract law was more stringent than in the area of lottery. Therefore, the distribution of tickets by a restaurant owner to customers without extra charge and to others gratis was distribution for consideration: his restaurant was patronized. Similarly, grocery store promotional schemes for which no purchase was necessary to acquire a chance to win were held to be lotteries. The promotion itself benefited the stores enough to be considered price,³⁸ and a portion of the purchase price supported the game.³⁹

Prize was delineated more finely in gambling device litigation, in which it was a crucial element as well, to include any return, from free games⁴⁰ to extra amusement.⁴¹ If necessary, such a definition could be used by analogy in lottery cases.

The element of chance necessary to make an activity a lottery was originally required to be predominant or substantial.⁴² By 1941, the absence of skill as a predominant factor was crucial in finding sufficient chance to constitute a lottery. The injection of an element of skill in determining a winner could not defeat the chance factor,⁴³ if chance controlled the outcome.⁴⁴ It cannot be assumed, however, that slight chance would suffice; the requirement of significance was still applicable,⁴⁵ although diluted.

Thus, lotteries for constitutional purposes were defined as broadly as necessary to cover schemes held out to a group of persons who, by participation,

³⁷ 1 Ohio L. Abs. 835 (C.P. Hamilton County 1923).

³⁸ *Great Atlantic and Pacific Tea Co. v. Cook*, 15 Ohio Misc. 181, 240 N.E.2d 114 (C.P. Franklin County 1968), *aff'd sub. nom.*, *Kroger v. Cook*, 24 Ohio St. 2d 170, 265 N.E.2d 780 (1970).

³⁹ *Id.* at 186, 240 N.E.2d at 118-19.

⁴⁰ *Westerhaus v. Cincinnati*, 165 Ohio St. 327, 135 N.E.2d 318 (1956), *aff'g* 71 Ohio L. Abs. 353, 127 N.E.2d 412 (Ohio Ct. App. 1955); *State v. Smith*, 83 Ohio L. Abs. 426, 165 N.E.2d 481 (C.P. Summit County 1960); *Gevaras v. Cleveland*, 8 Ohio Op. 178 (Cleveland Mun. Ct. 1937).

⁴¹ *Stillmaker v. Department of Liquor Control*, 18 Ohio St. 2d 200, 249 N.E.2d 61 (1969). *Cf.* *State v. Krauss*, 114 Ohio St. 342, 151 N.E. 183 (1926), where a slot machine which also dispensed mints indicated before purchase the number of tokens it would dispense. The court held that the prohibition of replay removed the element of chance and profit.

⁴² *Akron v. Stojanovic*, 24 Ohio N.P. (n.s.) 479 (Akron Mun. Ct. 1923).

⁴³ *State ex rel Sergi v. Youngstown*, 68 Ohio App. 254, 40 N.E.2d 477 (1941), *appeal dismissed*, 138 Ohio St. 123, 32 N.E.2d 852 (1941).

⁴⁴ *What Are Games of Chance and Lotteries?*, 4 OHIO ST. L.J. 237, 238-239 (1938).

⁴⁵ *See Fisher v. State*, 14 Ohio App. 355 (1921).

conferred some benefit upon a promoter in order to win anything of value through the operation of an element of chance. Bingo, meeting this requirement, was denominated a scheme of chance and thus a lottery repugnant to the Constitution.

C. *The Statutory Scheme for Lotteries and Other Schemes of Chance: Post-1851*

The statutory provisions which were effective prior to the adoption of the 1851 Constitution continued in effect thereafter. The crimes of gambling and gaming remained separately codified from the offenses of conducting lotteries or schemes of chance until 1910, when the General Code of Ohio placed lottery and gaming offenses under the same chapter: "Gambling".⁴⁶ The provisions of the General Code relating to games and schemes of chance, public gaming and like offenses, were contained in sections 13054 through 13081. The most important sections relating to bingo were section 13064, which prohibited the promotion of lotteries and schemes of chance, and section 13066, outlawing the exhibition of gambling devices for gain. Section 13064, in relevant part, read:

Whoever establishes, opens, sets on foot, carries on, promotes, makes, draws, or acts as "backer" or "vendor" for or on account of a lottery or scheme of chance, . . . shall be fined . . . and imprisoned

Thus, the operation of a bingo game, a lottery or scheme of chance, rendered the person so involved criminally liable. Similarly, section 13066 exacted criminal penalties from

Whoever keeps or exhibits for gain or to win or gain money or other property, a gambling table, or faro or keno bank, or a gambling device or machine, or keeps or exhibits a billiard table for the purposes of gambling or allowing it to be so used

While in this form, the statutes were relatively effective in exacting criminal penalties from those who conducted schemes or games of chance which met the definition of returning a prize determined by chance for a consideration given to participate.

The distinction between schemes and games established for statutory purposes was based on the suggestion made in *Stevens v. Cincinnati Times-Star Co.* that lotteries and schemes involved public participation.⁴⁷ Games of chance, on the other hand, usually involved operation of a device, by a

⁴⁶ *State v. Simonian*, 77 Ohio App. 201, 212-13, 66 N.E.2d 260, 265 (1945).

⁴⁷ 72 Ohio St. 112, 117, 73 N.E. 1058, 1060 (1905). *Accord*, *State v. Simonian*, 77 Ohio App. 201, 213, 66 N.E.2d 260, 265 (1945) ("A lottery or a scheme of chance, at least usually, involves participation by the public or a number of persons.").

person who pitted the results of his ability or luck against the device itself, or the exhibition of such devices.⁴⁸

The first time this distinction became important, other than for technical reasons of proper indictments, was after September 21, 1943. Effective on that date, General Code section 13064, relating to the promotion and conducting of lotteries or schemes of chance, was amended by adding the words "for his own profit" after "whoever". Thus, anyone promoting a lottery or scheme of chance with no benefit inuring to himself therefrom could not be charge with criminal activity. Despite claims to the contrary, this exemption was held not to extend beyond the particular code section in which it appeared; promoting games of chance was criminal even if not inuring to one's own profit.⁴⁹ Coupled with the judicial interpretation of exhibiting gaming devices "for gain" to the effect that the gain involved need not flow to the exhibitor, but could flow to the user or another and fall under the statutory prohibition,⁵⁰ the results were somewhat anomalous. Those schemes most clearly prohibited by Article XV, section six—lotteries—could be conducted not-for-profit without risk of criminal sanction; those games brought within the purview of the constitutional prohibition only by applying generic definitions as to consideration, prize, and chance were completely criminalized.⁵¹

Bingo had been fortunate enough to have earned the classification of lottery and scheme, rather than game, of chance.⁵² By decriminalizing non-profit schemes, charitable bingo received the favored status it continues to enjoy. Between 1943 and 1975 charitable bingo was unconstitutional, but also noncriminal. No sanctions were exacted for promoting it. Prior to the 1943 Amendment to the General Code, the only schemes of chance allowed within the State of Ohio were those in which the element of consideration or prize was missing, thereby removing the activity from the realm of lottery and gambling.⁵³ Thus, it is not surprising that the removal of criminal sanctions from activities which fulfilled the definition of lottery as construed for constitutional purposes resulted in challenges to the constitutionality of amended section 13064.

⁴⁸ 77 Ohio App. at 213, 66 N.E.2d at 265.

⁴⁹ *Id.*

⁵⁰ See *Westerhaus v. Cincinnati*, 71 Ohio L. Abs. 353, 127 N.E.2d 413 (Ohio Ct. App. 1955), *aff'd*, 165 Ohio St. 327, 135 N.E.2d 318 (1956); *State v. Simonian*, 77 Ohio App. 201, 66 N.E.2d 260 (1945); *Kraus v. Cleveland*, 42 Ohio Op. 490 (C.P. 1938); *Akron v. Stojanovic*, 24 Ohio, N.P. (n.s.) 479 (Akron Mun. Ct. 1923).

⁵¹ *Cf. State v. Schwember*, 154 Or. 533, 60 P.2d 938 (1936), where the court distinguishes lotteries from ordinary forms of gaming on the basis of its broad public effect on all classes of people, as contrasted to the confinement of gaming to few persons and places.

⁵² See, e.g., *Kraus v. Cleveland*, 89 Ohio App. 504, 96 N.E.2d 314 (1950).

⁵³ See *State Ex. Devoux v. Ohio*, 14 Ohio Op. 283 (Cleveland Mun. Ct. 1939).

The first test case arose in Mahoning County and was decided on July 6, 1944, less than one year after the effective date of the amendment. In *Disabled Veteran's Chapter No. 2 v. O'Neill*,⁵⁴ plaintiff alleged that it had for some years been conducting a bingo game for the general public, the proceeds of which were turned over to charity and charitable organizations. No money from the game inured to the profit of either the veterans' organization or its members. Plaintiff's members who were conducting a bingo session were arrested by Youngstown police pursuant to a municipal ordinance which denominated the operation of *any* lottery or scheme of chance as illegal. The court refused to enjoin the defendant police presumably because the ordinance criminalized activities exempted from criminality by section 13064.⁵⁵ The court held that the decriminalization of not-for-profit lotteries conflicted with the absolute prohibition of lotteries in Article XV, section six, and was therefore unconstitutional to the extent of the amendment's effect.⁵⁶ This decision was not appealed.

A second attack on the constitutionality of section 13064 was raised in *State v. Lloyd*⁵⁷ by a criminal defendant, who claimed that because the statute did not punish not-for-profit lottery operators, it conferred special privileges and immunities upon some lotteries. In rejecting this assertion, the court held that a separate code section⁵⁸ outlawed the "numbers" game in which defendant engaged, and this separable provision could not be tainted by any possible unconstitutionality of section 13064. Defendant's contention that the General Assembly enacted the legislation "for the purpose of permitting charities, fraternal organizations and religious institutions to conduct harmless amusements, such as small raffles, wheels and bingo games, etc., in which there is an element of chance"⁵⁹ was also rejected. Because legislative acts are presumed constitutional, and no explicit authorization to conduct lotteries and schemes of chance was contained in section 13064, such authorizations would not be read into the act in order to declare it unconstitutional. Failure to provide penalties was not necessarily unconstitutional. As the issue need not be decided to dispose of the case, the court refused to render a definitive statement on constitutionality.

Such a definitive statement was made by the Ohio Supreme Court in

⁵⁴ 43 Ohio L. Abs. 479 (C.P. Mahoning County 1944).

⁵⁵ *Id.* at 480. Contemporary newspaper accounts alleged that the "for his own profit" amendment was designed to legalize charitable bingo, already operated throughout the state by churches and other organizations. *Gang Tactics Are Feared In Big Bingo Racket*, Akron Beacon Journal, Nov. 17, 1945, at 1.

⁵⁶ 43 Ohio L. Abs. at 480.

⁵⁷ 30 Ohio Op. 441 (Cincinnati Mun. Ct. 1944).

⁵⁸ 120 Ohio Laws 663, 664 § 13064-1 (1944).

1948. In *State v. Parker*,⁶⁰ the defendant claimed that since he operated a bingo hall not-for-profit, he could not be charged with a violation of the statute criminalizing schemes of chance. The Supreme Court agreed, holding that the state's failure to prove a profit-making venture was fatal to its cause. In addition, the court explained that Article XV, section six was not self-executing, but required legislation in order to assess penalties for a violation. As long as the statute merely executed Article XV, section six by prescribing penalties for certain violations thereof (*i.e.*, those lotteries conducted for one's own profit), it did not conflict and was thus constitutional. The legislature need not fully execute the provisions of the Constitution; any partial execution consistent with the prohibition did not violate the Constitution.

The nonself-executing language of *Parker* spawned several misconceptions and resulted in attempted regulation of lotteries such as bingo, under the rationale that such lotteries were not unlawful, but permissible.⁶¹ Some courts accepted the proposition that if no statute prohibited the lottery, it could exist legally, and law enforcement officials were powerless to eliminate the game.⁶²

However, the position which eventually gained general acceptance was first taken by the courts which decided *Kraus v. Cleveland*.⁶³ Faced with the argument that a municipality could regulate bingo for charitable purposes because no prohibition against lotteries or schemes of chance not conducted for one's own profit existed in Ohio, the Cuyahoga County Court of Common Pleas rejoined that the absence of criminal penalties did not change the effect of the constitutional invalidity of all lotteries. Bingo was held to be a lottery; its conduct for charitable purposes was forbidden, although not criminal. The Court of Appeals distinguished the nonself-executing aspect of Article XV, section six from that aspect which was self-executing.⁶⁴ Although in the absence of statute no penalties for lotteries existed in Ohio, the Constitution was self-executing to the extent that it declared a mandatory public policy against, and prohibition of, all lotteries. Thus, any attempt to regulate lotteries

⁶⁰ 150 Ohio St. 22, 80 N.E.2d 490 (1948).

⁶¹ Such claims were advanced, usually unsuccessfully, in many reported cases. *See, e.g.*, *VFW v. Sweeney*, 64 Ohio L. Abs. 277, 111 N.E.2d 699 (C.P. Cuyahoga County 1952). In *Disabled Veteran's Ch. No. 2 v. O'Neill*, 43 Ohio L. Abs. 479, 480 (C.P. Mahoning County 1944), the court inferred authorization from Section 13064 by deciding that the statute conflicted with the Constitution.

⁶² *E.g.* *Jamestown Lion's Club v. Smith*, 45 Ohio Op. 157, 100 N.E.2d 540 (C.P. Greene County 1951). The Court held that statutory penalties for lotteries conducted for one's own profit were ineffective to set constitutional prohibitions against charitable bingo into operation.

⁶³ 42 Ohio Op. 490, 94 N.E.2d 814 (C.P. Cuyahoga County 1950), *aff'd*, 89 Ohio App. 504, 96 N.E.2d 314 (1950), *appeal dismissed*, 155 Ohio St. 98, 97 N.E.2d 549 (1951).

⁶⁴ 89 Ohio App. 504, 96 N.E.2d at 317.

necessarily involved allowing them to exist and was unconstitutional. As stated by the court:

Neither the legislature of the state nor the council of a municipal corporation has the power to authorize, for any purpose, charitable or otherwise, the right to conduct a lottery or sell lottery tickets in direct conflict of such constitutional provision. Such an act or ordinance would be unconstitutional and void.⁶⁵

Consequently, lotteries for profit were unconstitutional and subject to criminal sanctions; lotteries not-for-profit were simply unconstitutional.

D. *Filling the Legislative Void Through Municipal Regulation*

The lack of an effective mechanism with which to control not-for-profit schemes of chance⁶⁶ led several municipal corporations to enact ordinances which established criminal penalties for the promotion of all profit and non-profit lotteries. These ordinances were invariably attacked as being void, the argument being that in the attempt to punish not-for-profit lotteries they conflicted with the general laws of Ohio, contrary to the Ohio Constitution.⁶⁷

Assuming that such ordinances could be given effect, the court in *Gutches v. Columbus*⁶⁸ refused to render a declaratory judgment on the legality of plaintiff's bingo games which raised funds for charitable purposes. No determination that the plaintiff was free from state criminal proceedings would aid in deciding whether or not the sheriff could lawfully arrest him for violating a Columbus ordinance. The same result was reached in *Zepp v. Columbus*,⁶⁹ where the court intimated that bingo, as a lottery, was prima facie unconstitutional, but declined to declare that bingo was valid or invalid if conducted for charitable purposes.

Those courts which reached the substantive issue of a municipality's power to pass ordinances which penalized the promotion of lotteries whether or not the proceeds inured to the promoter's own profit were almost unanimous in the decision that such ordinances did not conflict with General Code section 13064. In *Wishing Well Club v. Akron*,⁷⁰ the Summit County Court

⁶⁵ *Id.* at 511, 96 N.E.2d at 317.

⁶⁶ The state attempted to regulate the bingo games which proliferated after the not-for-profit exemption by levying a 3 percent amusement tax. This effort was suspended in 1947 when doubts of constitutionality were raised. *Bingo Take*, Akron Beacon Journal, Dec. 26, 1948, at A-6. With state abdication, the cities adopted taxing and regulatory ordinances in an attempt to control the multi-million dollar bingo business. *Constitution Tested*, Akron Beacon Journal, Oct. 19, 1950, at 6; *Civic Justice Group Eyes Bingo Ordinance*, Akron Beacon Journal (editorial), July 26, 1948, at 1 (discusses the Akron licensing and fee scheme, which eventually generated over \$70,000 annually).

⁶⁷ See OHIO CONST. Art. XVIII, §3.

⁶⁸ 65 Ohio L. Abs. 604, 111 N.E.2d 764 (C.P. Franklin County 1951).

⁶⁹ 50 Ohio Op. at 49, 112 N.E.2d at 48.

⁷⁰ 66 Ohio L. Abs. 406, 112 N.E.2d 41 (C.P. Summit County 1951).

of Common Pleas noted that bingo was a lottery;⁷¹ its nonprofit status could not change its essential character. The fact that the General Assembly had not prescribed criminal penalties for nonprofit lotteries did not preclude a municipality from so doing. No permission or legalization of nonprofit schemes of chance could exist in light of the Article XV, section six prohibition; therefore, no conflict could be found when an ordinance went one step further than the statute in executing the constitutional provision.⁷² The Supreme Court adopted this position in *Columbus v. Barr*,⁷³ noting that excepting certain unconstitutional activities from the operation of the criminal law did not, and could not, implicitly legalize those activities. The constitutional provision precluded the legislature from either directly or indirectly legalizing lotteries. Thus, section 13064 did not permit charitable lotteries, and consequently no municipal proscription of such lotteries could be in conflict with that statute.

Other municipalities attempted to regulate charitable bingo, which they regarded as permissible. The Cleveland ordinance which gave rise to *Kraus v. Cleveland* created a comprehensive scheme for licensing and regulating the operation of bingo games. All games were required to be licensed; the granting of licenses was restricted to those organizations which contributed the proceeds of the games to charitable purposes. After prescribing the form of application, the ordinance also provided that a public hearing before an appointed commissioner would be held to determine if the applicant met the character, location, building, and other standards set in the ordinance. Once licensed, the games were subject to supervision by the commissioner; to that end hours and regulations were imposed and a report of gross income, expenses, and money actually given to the charitable beneficiary was required.⁷⁴

This ordinance, when challenged as unconstitutional, was defended by the city as necessary to prevent racketeers from conducting bingo without inspection and control and to determine whether the proceeds did or did not inure to the promoter's profit. The ordinance was asserted to be necessary

⁷¹ *Id.* at 410, 112 N.E.2d at 44. *Accord*, *Kraus v. Cleveland*, 89 Ohio App. 504, 96 N.E.2d 314 (1950); *Nadlin v. Starick*, 24 Ohio Op. 2d 272, 194 N.E.2d 81 (C.P. Montgomery County 1963); *VFW v. Sweeney*, 64 Ohio L. Abs. 277, 111 N.E.2d 699 (C.P. Cuyahoga County 1952); *Zepp v. Columbus*, 50 Ohio Op. 47 112 N.E.2d 46 (C.P. Franklin County 1951); *Loder v. Canton*, 65 Ohio L. Abs. 517, 111 N.E.2d 793 (C.P. Stark County 1951); *Disabled American Veterans Ch. No. 2 v. O'Neill*, 43 Ohio L. Abs. 479 (C.P. Mahoning County 1944).

⁷² *Accord*, *Loder v. Canton*, 65 Ohio L. Abs. 517, 111 N.E.2d 793 (C.P. Stark County 1951); *contra*, *Dayton Gymnastic Club v. Board of Liquor Control*, 68 Ohio L. Abs. 153, 121 N.E.2d 569 (C.P. Franklin County 1951) (holding that the Board could not suspend the club's liquor license for conducting charitable bingo, for its rule conflicted with the general law in not allowing an activity which section 13064 allowed).

⁷³ 160 Ohio St. 209, 115 N.E.2d 391 (1953).

⁷⁴ CLEVELAND ORDINANCES §§ 2925-11—2925-19, as quoted in *Kraus v. Cleveland*, 89 Ohio App. at 507-08, 96 N.E.2d at 316.

in light of the statutory exemption in General Code section 13064. As noted above, the city was unsuccessful in sustaining the validity of its regulatory scheme. Similarly, Dayton's attempt to regulate charitable bingo on an informal basis was struck down as an unconstitutional legalization of an activity clearly in contravention of public policy.⁷⁵ Bingo not-for-profit could not be prosecuted (in the absence of a broader city ordinance); neither could existing games be regulated.

After 1953, the state of the law regarding charitable bingo can be summarized as:

1. Such bingo was in violation of Article XV, section six of the Ohio Constitution, since it was a lottery.
2. Such bingo was not in violation of the state criminal law proscribing the promotion of lotteries for one's own profit.⁷⁶
3. Municipal ordinances penalizing charitable bingo as a crime were valid and operative.
4. The attempts of municipal corporations to authorize and regulate the conducting of charitable bingo were unconstitutional and void.⁷⁷

E. Charitable Bingo Operations Prior to 1975

The amount of litigation makes it clear that the constitutional prohibition of bingo was unsuccessful in keeping bingo operations out of the state.⁷⁸ The

⁷⁵ See *Nadlin v. Starick*, 24 Ohio Op. 2d 272, 194 N.E.2d 81 (C.P. Montgomery County 1963).

⁷⁶ Cf. *State v. Drayzga*, 86 Ohio L. Abs. 268, 173 N.E.2d 722 (Ohio Ct. App. 1961); *State v. Polozzi*, 55 Ohio Misc. 34, 336 N.E.2d 471 (Akron Mun. Ct. 1975), which dismissed indictments charging violations of the anti-lottery statute for failure to allege that defendants operated the lotteries for their own profit.

⁷⁷ When *Kraus v. Cleveland* invalidated Cleveland's licensing and regulatory scheme, other municipalities, such as Akron, were forced to abandon their own regulatory schemes. See note 68 *supra*. Local authorities then closed down all bingo operations as unconstitutional, or allowed them to continue without possibility of policing them. See Reports, Akron Beacon Journal, Feb. 7, 1951, at 1; Mar. 19, 1951, at 1; Apr. 19, 1951, at 27; Apr. 25, 1951, at 10.

⁷⁸ Even before section 13064 removed criminal penalties from non-profit bingo games, games flourished in certain areas. Akron was the home of one hundred bingo games, two of which were sufficiently profitable to be the targets of professional racketeers for "skimming off". Akron Beacon Journal, Aug. 12, 1938, at 1. The Akron Law Department's policy of allowing churches and clubs to conduct bingo with impunity was probably somewhat responsible for this proliferation. *Id.*, Aug. 22, 1938, at 11. However, the absence of regulations allowed professional gamblers to be involved in the games and to earn good money from operating them. *Id.*, Mar. 6, 1939, at 1. By September 1943, when the new amendment went into effect, bingo games were estimated as mulcting one half million dollars from Akron residents annually. *Id.*, Sep. 19, 1943, at A-1. After the amendment, bingo was estimated to gross \$3,500,000 annually in the Akron area alone. *Id.*, Dec. 26, 1948, at A-6. Only four to five percent was donated to charity; no state agency kept control over operations. *Id.*, June 28, 1944, at 13; Nov. 13, 1945, at 1. Hundreds of games operated under the guise of charities without fear of being closed down unless all games were prohibited. *Id.*, Feb. 7, 1951, at 1. When the General Assembly examined a regulatory scheme in 1949, evidence that big operators controlled bingo and kept all but 2 percent from charity was presented. *Id.*, Feb. 8, 1949, at 1. Shady characters were constantly alleged to be in control of bingo in the state, by

Kraus Court took note that in the six years in which the licensing ordinance operated, forty parlors were licensed for play.⁷⁹ Although one court expressed approval of charitable bingo as a public good rather than public harm,⁸⁰ others opined that the same objectionable features which made bingo for profit against public policy inhered in bingo not-for-profit as well.⁸¹ Most courts, when presented with the opportunity, excoriated so-called "charitable" bingo as partaking of all the evil features of the business of gambling. In fact, the inescapable inference is that often "charitable" bingo was the business of gambling.⁸²

The Common Pleas Court in *Kraus v. Cleveland* pointed out that the proceeds which eventually went to charity were a "minute fractional dole" of the total income from the bingo games. The court continued:

And in the face of the testimony that, in all probability, false reports are being made to the city, it is apparent that instead of controlling conduct of the operators to keep out racketeers, the ordinance is breeding and protecting vultures who operate a nefarious swindle in the shadow of legal protection and beneath a cloak of sweet charity.⁸³

Dealing with more concrete facts, the Court of Appeals noted that out of an annual gross income of over four million dollars, less than three percent was eventually applied to charity.⁸⁴

Similar objections were registered by the Common Pleas judge who decided *Wishing Well Club v. Akron*.⁸⁵ The Wishing Well Club was incorporated as nonprofit; its purpose was "aiding in community growth or development or of charitable, philanthropic or benevolent instrumentalities conducive to public welfare."⁸⁶ Although the corporate records did not reveal that the corporation had retained any income for itself from the bingo pro-

virtue of the section 13064 loophole which allowed not-for-profit bingo to be free of criminal sanctions. *Id.*, Feb. 8, 1951, at 6. The public supported the continuation of bingo, objecting to its total prohibition as the Constitution commanded. *Id.*, Mar. 19, 1951, at 1; Apr. 25, 1951, at 10.

⁷⁹ 89 Ohio App. at 506, 96 N.E.2d at 315.

⁸⁰ *Jamestown Lions Club v. Smith*, 45 Ohio Op. 157, 100 N.E.2d 540 (C.P. Greene County 1951). *Cf.* *Dayton Gymnastics Club v. Board of Liquor Control*, 68 Ohio L. Abs. 153, 121 N.E.2d 569 (C.P. Franklin County 1953), where the court refused to allow license suspension, perhaps partially because the club had devoted over \$30,000 of its profits to underprivileged children.

⁸¹ *E.g.*, *Nadlin v. Starick*, 24 Ohio Op. 2d 272, 194 N.E.2d 81 (C.P. Montgomery County 1963).

⁸² The writers query whether the inability to regulate non-criminal games did not contribute to this precise problem, which, it appears, is still with us.

⁸³ 42 Ohio Op. at 493, 94 N.E.2d at 819.

⁸⁴ 89 Ohio App. at 505, 96 N.E.2d at 315.

⁸⁵ 66 Ohio L. Abs. at 412, 112 N.E.2d at 45.

⁸⁶ *Id.* at 407, 112 N.E.2d at 42.

ceeds, the gross profits of \$654,020.15 garnered between January 31, 1949 and March 31, 1951 resulted in a net donation of \$2775.79 to charity.⁸⁷ The court indicated that like figures were not unusual among bingo operators.

[In] the various cases in which this Court has had a judicial question to determine in connection with Bingo operations, I have observed that the annual gross income of the corporation conducting the games has ranged from approximately a quarter of a million to a half a million dollars, and that only token donations have been made to charity. These so-called corporations, not for profit, wear a cloak of fraud . . . Behind these self-styled "charitable corporations" stand the real parties in interest — commercialized gamblers, taking huge sums of money for their own benefit . . . The corrupting influences that come from these operations must be obvious to every good citizen.⁸⁸

The situation did not improve, despite the apparent freeing of law enforcement officers to close down only profit seeking bingo games. In 1963, the court in *Nadlin v. Starick* justified its unfriendly reception of the city managers' proposal to regulate charitable bingo with the observation that such games had not earned themselves a sympathetic reception. Their activities gave little or no credence to the claim that sound public policy could favor their operation while forbidding bingo for profit. One representative bingo operation had two years' gross receipts exceeding \$300,000.00. From that, annual salaries of over \$25,000.00 were paid, annual hall rental amounted to \$42,000.00, and approximately \$3,000.00, or one percent, was given to charity.⁸⁹

From the foregoing examples, it is obvious that local officials and judges were concerned with the operation of bingo for personal profit under the guise of charitable fund-raising. Some gauge of general public concern is offered by an examination of several attempts to amend the Constitution as it related to lotteries.

In 1937, an amendment to Article XV, section six was proposed by initiative petition to allow the state to conduct a lottery.⁹⁰ However, such a proposal was not adopted until 1972, when the electorate approved amending the Constitution to read:

Lotteries, and the sale of lottery tickets for any purpose whatever, shall forever be prohibited in this state, except that the General Assembly may authorize an agency of the State to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, pro-

⁸⁷ *Id.* The court notes that a \$10,000 annual salary each was paid to a full-time and a part-time employee. No other accounting is mentioned.

⁸⁸ *Id.* at 412, 112 N.E.2d at 45.

⁸⁹ 24 Ohio Op. at 2d at 275, 194 N.E.2d at 84-85.

⁹⁰ [1937] OHIO ATT'Y GEN. OP. NO. 790.
<http://ideaexchange.uakron.edu/akronlawreview/vol10/iss4/5>

vided the entire net proceeds of any such lottery are paid into the general revenue fund of the state.

The Attorney General interpreted the passing of this amendment as indicating a change of attitude toward lotteries, that change being one of restricted approval.⁹¹

One proffered amendment sought to remove the difficulties of the non self-executed constitutional prohibition against lotteries not-for-profit by amending the constitution to read:

Lotteries, and the sale of lottery tickets, for personal profit, shall forever be prohibited in this state.⁹²

This attempt, which would have legitimized regulation of charitable lotteries, failed of passage.

In 1974 when the legislature reorganized the Criminal Code, Chapter 2915 dealing with gambling was likewise rewritten. All schemes and games of chance were subjected to the same treatment. The exclusion of not-for-profit activities was continued, and included schemes or games designed to produce income solely for charitable purposes and those from which no money was received at all.⁹³ Thereby, the questions of proper classification of an activity as scheme or game were rendered moot for almost all purposes.⁹⁴ Charitable bingo thus was still accorded its legislative loophole, as was bingo for amusement only. However, no regulation could be effected. The demand for a constitutional amendment authorizing charitable bingo and its regulation resulted in the November 5, 1975 amendment adopted by the electorate.⁹⁵ The amendment to Article XV, section 6 stipulated:

[T]he General Assembly may authorize and regulate the operation of bingo to be conducted by charitable organizations for charitable purposes.

After this final amendment, one court declared that the constitutional amendments adopted by an "overwhelming vote of the people" indicated a change in public attitude and policy toward all gambling, but especially toward state lotteries and charitable bingo, which were given "an imprimatur of respectability."⁹⁶

⁹¹ [1974] OHIO ATT'Y GEN. OP. No. 57.

⁹² [1958] OHIO ATT'Y GEN. OP. No. 3042.

⁹³ OHIO REV. CODE ANN. §2915.02 (Page 1975).

⁹⁴ *Id.* §2915.01 (E). For an indication of legislative intent, see committee comments following section 2915.02.

⁹⁵ The final tally was Yes: 1,388,606; No: 1,195,660. The amendment passed in only twenty-four of Ohio's eighty-eight counties; most metropolitan areas and northeastern Ohio counties voted in favor of the amendment. Akron Beacon Journal, Nov. 5, 1975, at A-11.

⁹⁶ *Ryals v. Collins*, 46 Ohio Misc. 25, 27, 345 N.E.2d 658, 659 (Shaker Heights Mun. Ct. 1975).

Charged with the authority to legislate regulations for charitable bingo, the General Assembly enacted Amended Substitute Senate Bill 398, which went into effect on May 26, 1976, to promulgate licensing requirements and define those organizations eligible for a license.

II. OHIO BINGO LEGISLATION

A. *The Statutory Scheme: Chapter 2915*

When the new Ohio Criminal Code was promulgated in 1974, Chapter 2915 on Gambling was restructured. Section 2915.01 established definitions which were operative throughout the chapter. Although schemes of chance⁹⁷ and games of chance⁹⁸ were separately defined, generally being distinguished as public versus individual schemes for winning a prize as determined by chance, the group of offenses applicable to the conduct of bingo⁹⁹ did not require a determination of whether an activity was a game or scheme. Rather, the applicable term of art which defined an offense was "scheme or game of chance conducted for profit." This term expressly excluded any activity which was not designed to produce income for its backer, promoter, or operator as well as any activity "designed to produce income solely for charitable purposes when the entire net income after deduction of necessary expenses is applied to such purposes."¹⁰⁰

The Legislative Committee Comments explain that the purpose of these definitions was to exclude pleasure and charitable operations from criminality. The legislature preferred to concentrate its attacks on the business of gambling,¹⁰¹ and to aid enforcement by prohibiting public gaming.¹⁰² Thus, no operation from which profits did not flow to the personal benefit of its backers was criminalized by section 2915.02. In effect, Chapter 2915 authorized any individual to conduct schemes or games of chance for pleasure or to earn money applicable to charitable purposes after the deduction of "necessary expenses." The provision was used by professional organizations as legal authority to set up casino gambling, and deduct from the profits the expenses of salaries to operators, consultants, and rental of facilities. The remaining moneys were turned over to charities. Other organizations created themselves as charities.¹⁰³

⁹⁷ OHIO REV. CODE ANN. § 2915.01(C) (Page 1975).

⁹⁸ *Id.* § 2915.01(D).

⁹⁹ *Id.* §§ 2915.02, 2915.03, 2915.04.

¹⁰⁰ *Id.* § 2915.01(E).

¹⁰¹ See Committee Comments preceding OHIO REV. CODE ANN. § 2915.01 (Page 1975).

¹⁰² See OHIO REV. CODE ANN. § 2915.04 (Page 1975).

¹⁰³ <http://ideaexchange.uakron.edu/akronlawreview/vol10/iss4/5>

¹⁰³ Akron Beacon Journal, Mar. 6, 1975, at B-1.

The casinos primarily appeared in Summit County, although other counties expressed alarm that the operations were spreading to them.¹⁰⁴

This situation led to a challenge of the 1974 law's constitutionality in so far as it attempted to, and succeeded in, allowing organizations to conduct gambling, to pay individuals for their labor in connection therewith, and to turn over any remaining income to charities. Such "authorization", it was contended, violated Ohio's specific constitutional prohibition of all lotteries as that word had been expanded by judicial construction. When presented with the question, the Attorney General of Ohio noted that the express exemption of charitable and pleasure gambling was anomalous in light of Article XV, section six of the Ohio Constitution.¹⁰⁵ He opined, however, that because the state did not attempt to regulate such lotteries, the state did not actually authorize them, and that legislation short of authorization was constitutional. Since the determination of whether or not a gambling operation was charitable and thus noncriminal was crucial to the ability to prosecute offenders, the Attorney General offered the interpretation that "deduction of necessary expenses" meant that any unreasonable deduction which limited the net charitable contribution would take the operation out of the statutory exemption.¹⁰⁶ Large promoter's salaries and operational expenses would be suspect as excessive. Practical difficulties and the constitutional question, however, remained unsolved.

Suit on behalf of the State of Ohio was filed by Robert Campbell, Sheriff of Summit County, as relator, in January of 1975. The Court of Common Pleas, after examining the broad construction of the term "lotteries" in the Ohio Constitution, held the 1974 Criminal Code unconstitutional.

The Ohio Legislature provided an exclusion by granting permission for gambling conducted solely for the benefit of charity after a deduction for necessary expenses. However, in this Court's opinion the Assembly had no right or authority to do this, for such made an exception to the constitutional prohibition [of lotteries] and thereby

¹⁰⁴ *Id.*, Apr. 3, 1975, at A-6.

¹⁰⁵ [1975] OHIO ATTY. GEN. OP. No. 005.

¹⁰⁶ *Id.* at 2-21, citing *Summary of Technical Committee Comments to Amended Substitute House Bill 511—The New Ohio Criminal Code (1973)*: "If the expenses are unreasonable under the circumstances, they cannot be necessary." The necessity for ad hoc fact determination, which could only be made by a court upon extensive evidence, placed an obstacle of almost insuperable proportions before enforcement authorities, who had no means of determining the amenability of an operation to criminal prosecution on the basis of statutory standards of conduct. Not surprisingly, questionable charitable games flourished in this atmosphere. Akron Beacon Journal, Apr. 7, 1976, at F-8; *Lawmakers: Casino Gambling is Out*, Akron Beacon Journal, Mar. 31, 1976, at D-1.

attempted to regulate and qualify this constitutional amendment, which the Legislature had no right to do.¹⁰⁷

As a result of this decision, an effort to amend the Constitution to permit charitable gambling gained much force. Legislative attempts to curb abuses by regulating gambling operations were postponed until a vote on a constitutional amendment in the November 1975 general election clarified the status of charitable bingo. As finally presented to the electorate, the proposed amendment granted authority over charitable bingo to the General Assembly, rather than over charitable lotteries in general, as the House had proposed.¹⁰⁸

B. *Senate Bill 398*

Since the charitable bingo allowance in the Constitution was not self-executing, the General Assembly began drafting legislation which would also be capable of regulating the operations allowed to assure compliance with the law. The law, Amended Substitute Senate Bill 398, did not take effect until May 26, 1976. Meanwhile, the large gambling operations continued; the amount of vested interest in gambling was evident. Two games in the Akron area were netting an estimated \$1.2 million annually.¹⁰⁹ Senate Bill 398 was Ohio's first statute to license and regulate charitable bingo and to provide penalties for other nonauthorized gambling activities. This statutory scheme, in which current bingo legislation has its roots, will be analyzed in three segments: definitions, restrictions on money taken in and paid out, and licensing and regulatory provisions over charitable bingo.

The statute classified all gambling as criminal, then exempted charitable bingo and charity festivals from gambling as defined in section 2915.02.¹¹⁰ Charitable bingo was then defined as any bingo game conducted by a charitable organization which had obtained a bingo license pursuant to statute and which devoted the proceeds of the game to charitable purposes.¹¹¹ In one of the more elaborate definitional schemes, charitable organizations were defined as tax exempt religious, educational, veteran's, fraternal, service, nonprofit medical, volunteer rescue service, or volunteer firemen's organizations having obtained a federal tax exemption under sections 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), or 501(c)(19) of the

¹⁰⁷ State *ex rel.* Campbell v. Charities Unlimited, Inc., No. 75-1-278, at 6-7 (C.P. Summit County filed Jan. 31, 1975).

¹⁰⁸ H.J.R. No. 16 (1975).

¹⁰⁹ Akron Beacon Journal, May 4, 1976, at A-6.

¹¹⁰ OHIO REV. CODE ANN. § 2915.01 (E) (Baldwin 1976). All references to S. B. 398 are cited to *Baldwin's Legislative Service*. References to H. B. 1547, the current law, are cited to *Page Supp.* 1976.

Internal Revenue Code.¹¹² Each of these organizations was required to have been in existence for two years prior to applying for a license.¹¹³ Subsections I through P of section 2915.01 defined the eligible organizations more particularly, requiring, for instance, that religious organizations be nonprofit and conduct regular worship,¹¹⁴ and that educational organizations operate a school, academy, college, or university.¹¹⁵ Charitable purposes was defined indirectly as donations to organizations defined in the Internal Revenue Code subsections 509(a)(1), 509(a)(2), or 509(a)(3) when such organization was also either a governmental unit or a 501(c)(3) organization.¹¹⁶

Charitable organizations were authorized to obtain licenses and to play bingo, which was defined elaborately in subsection R of section 2915.01,¹¹⁷ in sessions not to exceed five continuous hours.¹¹⁸ Bingo games for amusement only were defined as those games in which the gross receipts¹¹⁹ were returned as prizes or otherwise redistributed, or games for which no participant paid consideration in order to play.¹²⁰ Since the gambling offenses still required that they be "conducted for profit,"¹²¹ no game for amusement only was criminally prohibited or licensed and regulated.

Charitable bingo games, required to be licensed, were made subject to certain monetary restrictions, violations of which constituted a criminal gambling offense.¹²² In Senate Bill 398, as in current legislation, gross receipts could be applied only to the paying of prizes, the charitable purposes listed in the license application, the purchasing and leasing of cards and equipment, the paying of security personnel,¹²³ advertising, and rental of the premises.¹²⁴ Prizes were restricted, as now, to a total of three thousand five hundred dollars (\$3,500.00) per session.¹²⁵ Rental of premises was required to be "not more than is customary and reasonable" for similar

¹¹² *Id.* § 2915.01(H).

¹¹³ This two year requirement was subject to a grandfather clause contained in OHIO REV. CODE ANN. § 2915.08 (A) (2) (Baldwin 1976).

¹¹⁴ OHIO REV. CODE ANN. § 2915.01 (I) (Baldwin 1976).

¹¹⁵ *Id.* § 2915.01(J).

¹¹⁶ *Id.* § 2915.01(Y).

¹¹⁷ See text accompanying notes 234-37 *infra*.

¹¹⁸ OHIO REV. CODE ANN. § 2915.01 (V) (Baldwin 1976).

¹¹⁹ *Id.* § 2915.01(W).

¹²⁰ *Id.* § 2915.12.

¹²¹ *Id.* §§ 2915.01 (E), 2915.02 (A)(2),(3).

¹²² *Id.* § 2915.01(G).

¹²³ *Id.* § 2915.01(X) defines such personnel as governmental enforcement officers or an individual who has successfully completed Ohio's statutorily regulated peace officer training course.

¹²⁴ *Id.* § 2915.09(A)(2).

¹²⁵ *Id.* § 2915.09(B)(5).

premises.¹²⁶ No restrictions were placed upon the amount of proceeds which would be spent in leasing equipment (although only licensed charitable organizations qualified as lessors),¹²⁷ in paying salaries to security personnel, or advertising, nor was any minimum for charitable donations established. Lest anyone be confused as to allowable expenses, payments to operators, consultants, and concessions were, and still are, explicitly prohibited.¹²⁸

The regulatory aspects of both Senate Bill 398 and the current statutory scheme can be classified as licensing, internal regulation of operations, record keeping, and enforcement methods. A number of the original provisions remain in today's law. Licenses are a prerequisite to being able to conduct bingo,¹²⁹ and must be renewed annually at a fifty dollar fee. The application form demands information as to the charitable status of the organization, its history, record, and associations which would establish that status, its tax exemption under the applicable sections of the Internal Revenue Code, a statement of charitable purposes for the proceeds, a statement as to any previous bingo licensing action taken toward it, and any other necessary and reasonable information which the Attorney General by rule might require.¹³⁰ Licensing procedures are laid out in the Ohio Administrative Procedure Act.¹³¹

Then as now, games cannot be conducted by a minor.¹³² Each "session," which cannot exceed five hours of continuous play, must end before midnight, and no organization may conduct more than two sessions in any seven-day period.¹³³ The bingo license must be displayed conspicuously on the premises where games are played.¹³⁴ Likewise, records must be maintained for at least three years from the bingo session to which they refer.¹³⁵ In such records, the organization must keep an itemized list of gross receipts from each session; an itemized list, exclusive of prizes, of all expenses, the name of the person paid, and a receipt therefor from a session; a list of all prizes awarded during a session, with names and addresses of winners of prizes which were worth one hundred dollars or more; an itemized list of charitable recipients, with names and addresses, of proceeds

¹²⁶ *Id.* § 2915.09(A)(3).

¹²⁷ *Id.* § 2915.09(A)(1).

¹²⁸ *Id.* §§ 2915.09(B)(1),(2),(3).

¹²⁹ *Id.* § 2915.07.

¹³⁰ *Id.* § 2915.08(A)(7).

¹³¹ *Id.* § 2915.08(B).

¹³² *Id.* § 2915.11.

¹³³ *Id.* §§ 2915.09(B)(4),(6).

¹³⁴ *Id.* § 2915.09(A)(4).

¹³⁵ *Id.* § 2915.10(A).

from each session, and the number of participants in a session.¹³⁶ No requirement or method for reporting on the items recorded has been established.

The Attorney General and any local law enforcement agency retain the power to investigate any licensed organization, its officers, trustees, agents, members, or employees, and to examine the accounts and records in order to ascertain if any violation of sections 2915.07 through 2915.11 has occurred. Upon reasonable grounds to believe a violation has occurred, local law enforcers can initiate court proceedings, provided that written notice of such action is given to the Attorney General.¹³⁷ Criminal penalties, originally provided, remain in effect.¹³⁸

Pursuant to section 2915.02(C), 501(c)(3) organizations were authorized to conduct, without criminal sanction, schemes of chance¹³⁹ of any kind, presumably other than bingo. In addition, games of chance,¹⁴⁰ except craps for money, roulette for money, and slot machines, could be conducted by 501(c)(3) charitable organizations at festivals conducted for four consecutive days or less not more than twice a year. In effect, casino gambling was legalized for certain charitable organizations — basically religious and educational organizations.

C. *Analysis of the Problems with Senate Bill 398*

After Amended Substitute Senate Bill 398 became law on May 26, 1976, problems with regulating charitable bingo persisted. Many of the most significant loopholes were pointed out to the legislators before the bill was passed and at this writing are being worked out by drafters of a third charitable bingo law.¹⁴¹ For instance, as Senate Bill 398 was being considered, the battle over the festivals of parish churches raged within the House of Representatives, with many representatives suggesting that only schemes of chance should be legalized for charitable play, and others pushing to allow churches to conduct any kind of casino gambling they wished if confined to festivals.

1. *Excepted Schemes and Games of Chance*

The final compromise, embodied in Senate Bill 398, did not give blanket approval to gambling at any time by any organization which qualified as a charity. However, it did allow 501 (c) (3) tax exempt organizations, pri-

¹³⁶ *Id.* § 2915.10(A)(1)-(5).

¹³⁷ *Id.* § 2915.10(B).

¹³⁸ *Id.* § 2915.09(C).

¹³⁹ *Id.* § 2915.01(C).

¹⁴⁰ *Id.* § 2915.01(D).

¹⁴¹ Substitute House Bill 72 is now pending in the House Governmental Affairs Committee.
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marily religious and educational groups under the Ohio definitions, to play any games of chance except roulette for money, craps for money, and slot machines at semi-annual four day long festivals.¹⁴² By a gross oversight, absolutely no restriction was placed upon the permitted disposition of proceeds from nonexcepted games of chance. The 501 (c) (3) organizations were not required to apply for licensing or subjected to any regulations. Thus, any storefront church, incorporated and tax exempt, could conduct casino gambling legally, and dispose of the proceeds by paying promoters and operators the great bulk of the gross profits. Since the loose Ohio gambling law, in effect from January 1974 until Senate Bill 398 took effect, had spawned a number of tax exempt charities whose major purpose was to conduct gaming, there were several questionable operations authorized to gamble without control or supervision.

In addition to legalizing gambling for these certain organizations, the Ohio law also permitted any scheme of chance to be played by a charitable organization which had obtained federal tax exempt status under 501 (c) (3).¹⁴³ Again, no restrictions on times or distribution of proceeds were included. No control mechanism was established, not even initial screening by the Attorney General to determine if the organization was a bona fide charity. Rather, the federal government's determination that an organization qualified for tax exempt status was relied upon to qualify that organization to promote schemes of chance in Ohio. No attempt to use criteria more suited to regulating gambling in Ohio was made; the state abdicated the responsibility for enabling organizations to conduct lotteries and other schemes of chance to a determination of the Internal Revenue Service that the criteria for exemption were met. Obtaining approval from the IRS did not prove difficult; any number of organizations were effectively licensed to conduct gambling in any manner they desired.¹⁴⁴ Certain organizations played forms of bingo-zingo which did not strictly conform to the specific definition contained in section 2915.01 (R).¹⁴⁵ Since they were then playing a scheme of chance other than bingo, they could operate without a license, pursuant to section 2915.02 (C). Thus, nonregulated games of near-bingo competed with regulated games and noncharitable purposes were more easily accomplished than charitable ones.

The General Assembly also exempted another form of gambling from the operation of both criminal prohibition and licensing and regulation.

¹⁴² OHIO REV. CODE ANN. § 2915.02 (C) (Baldwin 1976).

¹⁴³ *Id.*

¹⁴⁴ Interview with Susan E. Boyer, Assistant Prosecuting Attorney, Summit County, Jan. 14, 1977 [hereinafter cited as Boyer interview].

¹⁴⁵ For a discussion of "bingo-zingo" and the loopholes which arose from the Ohio definition of bingo, see text accompanying notes 234-37 *infra*.

Bingo for amusement only¹⁴⁶ was defined as either free bingo, *i.e.*, no charge was made on the participants at all, or bingo in which all monies received from participants were distributed as prizes. Since the section was written in the disjunctive, the usual interpretation was that fulfilling either criterion would remove one from illegality.

The City of Toledo Law Department, in an effort to suppress bingo for profit, required that both criteria be met by an operation: no charge could be made other than the amount anted to enter into a game, and the entire ante thus collected was to be returned in prizes after each game. In addition, amusement operators were required to keep records, open to enforcement officers for inspection, in order to continue their games.¹⁴⁷ Only by adding regulatory requirements and placing the burden of proving that no profits were made on the operators did Toledo manage to control the bingo games which the General Assembly had let loose throughout the state. In Summit County, large operations continued conducting games under the guise of amusement only; the inability of checking records or assessing intake versus prize output made policing such games a virtual impossibility. Thus, the one operation which did not even require that a charitable organization conduct it was left to the professionals to operate without being supervised or required to keep records proving their "free" nature.¹⁴⁸

Under Senate Bill 398, free bingo, schemes of chance conducted by 501 (c) (3) organizations, and certain games of chance played at semi-annual festivals of 501 (c) (3) organizations were allowed to exist without granting to local law enforcement agencies the concomitant ability to police them. Since the Ohio Constitution still prohibits all generic lotteries but the state lottery and charitable bingo, it seems reasonably clear that free bingo, festivals, and unregulated schemes are unconstitutional, and that any attempt to regulate them may be subject to successful attack.¹⁴⁹

2. Bingo Licensing Difficulties

A second problem generated by Senate Bill 398 was its failure to define adequately the organizations which could qualify for bingo licenses. Unlike most other states,¹⁵⁰ Ohio left bingo licensing to the broad rule-making dis-

¹⁴⁶ OHIO REV. CODE ANN. § 2915.12 (Baldwin 1976).

¹⁴⁷ Letter of Sheldon Rosen, Assistant Director of Law, City of Toledo, to Richard Cohen, Esq., Dec. 2, 1976.

¹⁴⁸ Boyer interview, *supra* note 144.

¹⁴⁹ See, *e.g.*, Kraus v. Cleveland, 89 Ohio App. 504, 96 N.E.2d 314 (1950); Nadlin v. Starick, 24 Ohio Op. 2d 272, 194 N.E.2d 81 (C.P. Montgomery County 1963). *Contra*, State *ex rel.* Gabalac v. The New Universal Congregation of Living Souls, No. 76-9-1960 (C.P. Summit County filed Sept. 1976), holding that casino gambling activities are not lotteries or prohibited, and can therefore be permitted by legislation.

cretion of the Attorney General. The law did not simply grant charitable organization status to "any tax exempt religious, educational, veteran's, fraternal, service, nonprofit medical, volunteer rescue service, or volunteer firemen's organization,"¹⁵¹ but defined "tax exempt" solely in terms of federal exemptions under sections 501 (c) (3), 501 (c) (4), 501 (c) (8), 501 (c) (10), or 501 (c) (19) under the Internal Revenue Code. Two additional requirements were that religious organizations gather in common membership for regular worship¹⁵² and that educational organizations operate a school, academy, college, or university,¹⁵³ neither standard appearing in subsection 501 (c) (3) itself. Despite these minor differences, the Attorney General refused to grant licenses to qualified tax exempt organizations. Although mere tax status did not suffice to meet the standards laid down in Chapter 2915, no standards or regulations were promulgated by the Attorney General to establish additional criteria for organizations to meet.¹⁵⁴ Practicing attorneys applying for licenses for their clients did not know what they were required to show in order to obtain a bingo license for their already tax exempt group.

A related difficulty arose from the fact that the tax exempt status was granted by the federal government when *net* earnings did not inure to individual benefit, whereas the Ohio statute requires that gross earnings less specially identified expenses be used for the charitable purpose.¹⁵⁵ Thus, an organization need not jeopardize its federal tax exempt status by remunerating operators;¹⁵⁶ nonrevocation of that status would be no guarantee of compliance with Ohio law, necessitating closer policing by Ohio than at first appeared necessary.

Federal tax exemptions to nonprofit organizations are liberally granted, with questions resolved in favor of exemption.¹⁵⁷ Ohio, on the other hand,

¹⁵¹ OHIO REV. CODE ANN. § 2915.01 (H) (Baldwin 1976).

¹⁵² *Id.* § 2915.01 (I).

¹⁵³ *Id.* § 2915.01 (J).

¹⁵⁴ Interview with William J. Brown, Attorney General, State of Ohio, Mar. 23, 1977 [hereinafter cited as Attorney General Interview]. Mr. Brown indicated that a 501 (c) exemption did not qualify an organization for a license, but also admitted that no criteria for differentiating between licensed (501) (c) organizations and nonlicensed 501 (c) organizations had been developed. The Attorney General's office simply made ad hoc, and apparently standardless, decisions.

¹⁵⁵ OHIO REV. CODE ANN. § 2915.09 (A) (2) (Baldwin 1976).

¹⁵⁶ *Cf. Anateus Lineal 1948, Inc. v. United States*, 366 F. Supp. 118 (W.D. Ark. 1973) (holding nontaxable the income received by a tax exempt medical research association from the sale of pathology services to hospitals and private physicians where income producing activity was "substantially related to tax exempt purpose." *Id.* at 127).

¹⁵⁷ *See, e.g., Scofield v. Rio Farms, Inc.*, 205 F.2d 68 (5th Cir. 1953); *C.F. Mueller Co. v. Comm'r*, 190 F.2d 120 (3d Cir. 1951); *Debs Memorial Radio Fund v. Comm'r*, 148 F.2d 948 (2d Cir. 1945); *American Institute for Economic Research v. United States*, 302 F.2d

strictly construes its own tax exemptions against the applicant.¹⁵⁸ Despite such strict construction, the Ohio Supreme Court recently determined that an "interdenominational" religious organization still could qualify as a "church" for the purpose of a sales tax exemption, even though it had no congregational regulations or discipline.¹⁵⁹ Thus, a somewhat liberal construction, even in a strictly defined area, is used for Ohio tax purposes, whereas the bingo law has been applied strictly by the Attorney General against exempt organizations. The resulting confusion is understandable. Adding to the turmoil was the original law's failure to specify whether organizations conducting bingo under the old Chapter 2915 not-for-profit exception were entitled to continue operations pending action on licensing applications.¹⁶⁰

3. *Proceeds*

The third set of problems in the law were those relating to the distribution of proceeds and the regulation thereof. Although equipment could only be leased from another charitable organization licensed to conduct bingo,¹⁶¹ no limitation on charges was created. Neither was there any regulation as to how the lessor could spend its proceeds. Presumably, both equipment and operators could be provided under the guise of leasing equipment for high prices.¹⁶² No violation of the law would have occurred, since section 2915.09 (B) (1) prohibited only the charitable organization which *conducted* the game from compensating operators. Since the charitable organization which did conduct the bingo game would be applying expenses only to the lease, not proceeds, neither lessor nor lessee would be acting criminally. In the absence of a duly promulgated rule forbidding such circumvention, the Attorney General would have difficulty claiming a violation for which he could fairly suspend or revoke a license. Since criminal statutes are to be construed strictly against violations,¹⁶³ punishment by an administrator of nonforbidden action would be arbitrary and unlawful.

¹⁵⁸ See, e.g., *In re American Legion*, 20 Ohio St. 2d 121, 254 N.E.2d 21 (1969), citing *In re American Legion*, 151 Ohio St. 404, 86 N.E.2d 467 (1949); *Zindorff v. Otterbein Press*, 138 Ohio St. 287, 34 N.E.2d 748 (1941).

¹⁵⁹ *Maumee Valley Broadcast Ass'n v. Porterfield*, 29 Ohio St. 2d 95, 279 N.E.2d 863 (1972).

¹⁶⁰ Most local prosecuting attorneys assumed such operations could not continue, according to Assistant Summit County Prosecutor Susan E. Boyer, Boyer interview, *supra* note 144. However, in Summit County the law was read to allow continuation of bingo pending action by the Attorney General's Office. This interpretation was rejected in *State ex rel. Gabalac v. The New Universal Congregation of Living Souls*, *supra* note 149. The result was to suspend operations of charities on whose applications the Attorney General had failed to act or had not yet had an opportunity to review. The statute, which established no time limitations within which a license was to be granted or denied, and its judicial interpretation which allowed an operator with application pending no recourse against delay, had the potential for abuse through arbitrary inaction.

¹⁶¹ OHIO REV. CODE ANN. § 2915.09 (A) (1) (Baldwin 1976).

¹⁶² Boyer interview, *supra* note 144.

¹⁶³ OHIO REV. CODE ANN. § 2901.04 (A) (Page 1975).

A charity could also decide to enter into the lessor business and free itself of the restrictions on use of proceeds while paying operators — who could be professionals — to run other games. Such a dual corporation could indeed be in the business of gambling with impunity. If the charity also rented out the hall to the licensed game, it could collect any rental rate it desired, and again not be subject to regulation of proceeds distribution.¹⁶⁴ In fact, a charity need not even be licensed to rent premises out. Thus, an organization could charge excessive amounts for rental, rent its hall almost constantly for separate five hour bingo sessions, provide and pay operators and other workers, and dispose of proceeds in any manner whatever. Even commercial lessors were restricted to only reasonable rates of rental, while being able to rent out to any number of charities with licenses. The money-making potential appeared to be great. Since it was not a crime to be paid to operate bingo, but only for the licensee to pay, operators could be paid by others without personal liability. This arrangement would encourage professionals to contract their services out; skimming could be relatively easy since the charity itself could be innocently duped into relying on the operators. Even if loss of license occurred in the improbable event of being discovered, the real culprit would remain untouched by the law.¹⁶⁵ Furthermore, no limit was placed on the amount spent on advertising,¹⁶⁶ but spending bingo receipts for consulting services was explicitly prohibited.¹⁶⁷

A problem related to use of proceeds is that the licensee-operators were required merely to keep records, subject to inspection by state or local officials. No reporting was mandated at all. Thus, a low-profile game operated by an apparently bona fide charity could remain free of supervision, and even routine audits would be entirely discretionary. With no central indexing, or supervision by the Attorney General, it would be difficult to discern that a certain charitable or commercial lessor was reaping huge profits from rentals. The Attorney General has engaged solely in licensing, leaving all enforcement and policing to local authorities.¹⁶⁸ The larger and more professional the operation, the less chance that questionably legal activities would be discovered.

¹⁶⁴ See OHIO REV. CODE ANN. § 2915.09 (A) (3) (Baldwin 1976).

¹⁶⁵ See, e.g., Akron Beacon Journal, Dec. 26, 1941, at A-6; Mar. 6, 1939, at 1, which reported that professional operators were rigging games and skimming off the profits of the church and club charitable games which they were running. In a January 1, 1977 article, a gambling expert commented on the high potential for corruption in the bingo games he visited, noting the lack of supervision as increasing this possibility.

¹⁶⁶ See OHIO REV. CODE ANN. § 2915.09 (A) (2) (Baldwin 1976).

¹⁶⁷ OHIO REV. CODE ANN. § 2915.09 (B) (2) (Baldwin 1976). For a discussion of Ohio's regulation of advertising and consulting fees and a comparison of regulatory practices in other states, see text accompanying notes 345-348 *infra*.

¹⁶⁸ Attorney General interview, *supra* note 154/5

The definition of charitable purpose — to which all proceeds minus legitimate expenses were to be given — was not clearly spelled out in Senate Bill 398. By implication, the uses to which an organization described in sections 509 (a) (1-3) of the Internal Revenue Code could put its funds were deemed charitable.¹⁶⁹ Those organizations are charities which are tax exempt by virtue of 501 (c) (3), and which qualify as (1) an organization to which contributions may be deducted from income taxation under Code Section 170 (b) (1) (A); (2) an organization which receives over one-third of its support from contributions, membership fees, and activities related to its charitable purpose, and less than one-third of its support from investment income and unrelated business activity income after taxation; or (3) an organization which is organized and operated exclusively to carry out the functions of, in connection with, a number (1) or (2) organization.¹⁷⁰ The requirement that only section 501 (c) (3) organizations or a governmental unit utilize the bingo proceeds created the anomalous result that licensed organizations, such as the VFW, could not use the proceeds for their own charitable purposes, but could give the proceeds to an unqualified 501 (c) (3) group like Little League Baseball. Thereby, a group excluded from operating a bingo game subject to the statutory restrictions on disposition of proceeds was one of the few organizations qualified to spend the proceeds free of regulation. If used to pay salaries¹⁷¹ of workers who also donated their services to the bingo game, payment of operators could be achieved without a criminal violation.

The General Assembly allowed certain organizations deemed sufficiently charitable to operate bingo, but found those same organizations non-charitable for proceeds use. At the same time, other organizations were not considered sufficiently charitable in nature to operate games, but were deemed sufficiently charitable to entitle them to use proceeds in any manner whatsoever. If, instead, the proceeds could be used by the licensee only, subject to strict record-keeping and restrictions, the purpose of the legislature might be better accomplished. At the least, confusion would be less rampant, and therefore policing and enforcement that much easier. On the other hand, if any organization could conduct bingo under close supervision, but was required to use its money only for restricted purposes or donate it to another group which was thereby required to report its distribution of the proceeds, the charitable intent would again be better served. As long as one end of the operation, either running the game or spending the proceeds, is exempt from

¹⁶⁹ OHIO REV. CODE ANN. § 2915.01 (Y) (Baldwin 1976).

¹⁷⁰ I.R.C. § 509 (a), as amended by Pub. L. 94-81, § 3 (a), Aug. 9, 1975, 89 Stat. 418.

¹⁷¹ See *Anateus Lineal 1948, Inc. v. United States*, 366 F. Supp. 118 (W.D. Ark. 1973), permitting a 501 (c) (3) organization to pay salaries to its employees from charitable donations without losing its tax exempt status.

supervision and/or regulation, the perceived evils which total nonregulation would allow to flourish still exist with impunity.

From this analysis, it is not difficult to see why prosecuting attorneys throughout the state of Ohio have been unable effectively to police bingo from the original law's inception. The writers will show that even now, with the licensed bingo games fairly well restricted in terms of statutory language, noncompliance is difficult to discern and certain crucial aspects are still left completely unregulated. As a result, there is no assurance that all bingo proceeds after reasonable expenses are devoted to charity.

D. *Analysis of Current Chapter 2915.*

The difficulties and loopholes in Senate Bill 398 were immediately apparent, and by December 6, 1976 Amended Substitute House Bill 1547 was enacted into law.

1. *Eliminating Loopholes*

The new law attempted to resolve certain problems already discussed. The proceeds, less only prize money, from nonregulated schemes of chance conducted by a 501 (c) (3) organization were required to be used by or given to a group described in 509 (a) (1-3) and either a governmental unit or a 501 (c) (3) organization itself. Since few, if any, 501 (c) (3) operators would fail to qualify to use proceeds, little of the problem was resolved. At any rate, once given to the qualified group, the proceeds could be used for any purpose whatsoever, including remuneration of operators. However, where kept by the organization itself, the use of the proceeds was reasonably well restricted, at least from paying operators and other professionals.¹⁷²

House Bill 1547 also redefined bingo to cover any game with the crucial characteristics,¹⁷³ thereby removing the problem of unlicensed "near-bingo" operations.¹⁷⁴ The new definition is, however, preposterously detailed.¹⁷⁵

Proceeds problems were also dealt with. A rental of premises was restricted to not more than two hundred fifty dollars per session, with the additional requirement that commercial lessors charge customary and reasonable rent.¹⁷⁶ Whereas charitable lessors remained unrestricted in the num-

¹⁷² See OHIO REV. CODE ANN. § 2915.02 (C) (Page Supp. 1976).

¹⁷³ *Id.* § 2915.01 (S).

¹⁷⁴ Letter from Lee C. Faulke, Montgomery County Prosecuting Attorney, to the writers.

¹⁷⁵ See OHIO REV. CODE ANN. §§ 2915.01 (S) (1) (a)-(d) - (2) (a)-(d) (Page Supp. 1976).

¹⁷⁶ OHIO REV. CODE ANN. § 2915.09 (A) (3) (Page Supp. 1976). Critics of the original law scoffed at the requirement that commercial rental rates simply be "not more than is customary and reasonable for premises that are similar in location, size and quality," noting that most locales contain few facilities adequate for bingo play, so there is little basis for price comparison. Akron Beacon Journal, June 27, 1976, at A-1.

ber of sessions for which they leased their hall, the commercial lessors were limited to leasing to only two charitable organizations, thereby making a maximum of one thousand dollars a week in rental income.¹⁷⁷ Charitable lessors were entitled to provide operators, concessions, equipment, and any other service; commercial lessors were not.¹⁷⁸

Some attempts to clarify charitable purposes for which proceeds could be spent were included in the bill, as well as more detailed record-keeping requirements on actual use of proceeds. The definition of "to use gross receipts for a charitable purpose" was expanded beyond the old definition¹⁷⁹ to include other purposes in a mass of verbiage which the writers can characterize only as nightmarish in complexity.

Proceeds can now be used by veteran's organizations chartered by Congress and tax exempt under 501 (c) (19),¹⁸⁰ for certain charitable purposes only. First, those purposes which are set forth in the Ohio tax exemption statute encompassing "[t]he relief of poverty, the improvement of health through the alleviation of illness, disease, or injury, the operation of a home for the aged, as defined in Section 5701.13 of the Revised Code, the promotion of education by an institution of learning which maintains a faculty of qualified instructors, teaches regular continuous courses of study, and confers a recognized diploma upon completion of a specified curriculum, or the promotion of education by an organization engaged in carrying on research in, or the dissemination of scientific and technical knowledge and information primarily for the public" are allowable.¹⁸¹ This definition of charitable purpose is somewhat more restricted than the definition set up by the common law in Ohio,¹⁸² which was most recently recognized in *Ohio Children's Society v. Porterfield*,¹⁸³ as being "socially admirable and serv[ing] as a positive force in an attempt to uplift the quality of life in our complex society."¹⁸⁴ The *Chil-*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* For a discussion of the dangers inherent in leasing personnel and services, see text accompanying notes 161-171 *infra*.

¹⁷⁹ OHIO REV. CODE ANN. § 2915.01 (Z) (Page Supp. 1976). Acceptable charitable purposes under Senate Bill 398 which were retained in the current law are donations to organizations holding 501 (c) (3) and 509 (a) (1), 509 (a) (2) or 509 (a) (3) tax status.

¹⁸⁰ Why the General Assembly did not merely say that proceeds may be used by veterans organizations which qualify as charitable organizations for the purposes of Chapter 2915 is somewhat of a mystery.

¹⁸¹ OHIO REV. CODE ANN. § 5739.02 (B) (12) (Page Supp. 1976).

¹⁸² *See, e.g.*, *Planned Parenthood Ass'n v. Comm'r*, 5 Ohio St. 2d 117, 214 N.E.2d 222 (1966) (good faith attempt to advance and benefit mankind in general); *Waddell v. YWCA*, 26 Ohio L. Abs. 367 (Ohio Ct. App. 1937), *aff'd*, 133 Ohio St. 601, 15 N.E.2d 140 (1938) (diffusion of knowledge, without reference to the poor, is aid to man who seeks to improve his condition).

¹⁸³ 26 Ohio St. 2d 30, 268 N.E.2d 585 (1971).

¹⁸⁴ *Id.* at 35, 268 N.E.2d at 588.

dren's Society Court held that the General Assembly intended the definitions in section 5739.02 (B) (12) to be narrowly construed, and thus, the court restricted charitable purposes to specifically delineated ones.¹⁸⁵ Under this reasoning, the charitable purposes to which veteran's organizations may contribute are more restricted than those to which 501 (c) (3) organizations may contribute. Thus, broad definitions such as any beneficial or salutary purpose would appear to control permissible uses of proceeds by those latter organizations.

Secondly, the veterans may award scholarships to institutions described in section 5739.02 (B) (12). Thirdly, proceeds may be donated to a governmental agency, or used for nonprofit youth activities, the promotion of patriotism, or disaster relief. It can be argued that these uses are contained within the broader common law definition of charitable purpose, and thus are *prima facie* lawful uses for any bingo proceeds.¹⁸⁶

In a third section, proceeds may be used by or transferred to fraternal organizations which have been in continuous existence for fifteen years in Ohio. Those organizations are required to use the funds exclusively for religious, charitable, scientific, literary or educational purposes, or to prevent cruelty to children or animals where such contribution would qualify for deduction under section 170 (c) of the Internal Revenue Code (a redundant requirement since only section 170 (c) (2) organizations, which are basically 501 (c) (3) organizations as well, will qualify). This restriction would again seem to imply that the 501 (c) (3) and 509 (a) organizations can use their proceeds in any manner that does not violate Ohio provisions, or the federal prohibitions of excessive individual salaries and the like.

Volunteer firemen can use the proceeds for the financial support of a volunteer fire department or company.

In summary, volunteer firemen, fraternal organizations, and veteran's organizations can use proceeds from bingo for specifically delineated charitable purposes; 501 (c) (3) organizations can still use the proceeds for any beneficial or salutary purpose if they also fit 509 (a) (1-3) descriptions. It is unclear what other organizations must do with their proceeds, but it appears that transfer to any of the four groups is contemplated.

The organizations which are licensed to run bingo and also are qualified to distribute proceeds, *i.e.*, one of the four groups defined above, must now keep a list of each purpose for which proceeds are used¹⁸⁷ in the required

¹⁸⁵ *Id.*

¹⁸⁶ Substitute House Bill 72, now pending before the Ohio House of Representatives, would authorize nonprofit youth athletic organizations as charitable organizations to obtain licenses for conducting bingo.

records. However, those organizations which cannot dispose of proceeds themselves but must transfer them to a designated group need not keep a detailed list. Neither must the recipient organization account for the disposal of the proceeds, unless the organization is a licensed 501 (c) (3)-509 (a) (1-3), veterans', fraternal, or volunteer firemen's organization.

2. *Additional Provisions*

The major additions, beyond problem-solving amendments, to the bingo law were in the nature of expanding the charitable organizations eligible to be licensed to conduct bingo. The most significant expansion was the inclusion of private senior citizen's organizations which are operated exclusively to provide recreational or social services to persons over fifty-five, if such organizations were tax exempt under 501 (c) (3).¹⁸⁸ Educational organizations are now eligible if they contribute to the support of a school or the like.¹⁸⁹ Similarly, service¹⁹⁰ and nonprofit medical organizations¹⁹¹ are eligible if they contribute to the support of service or medical institutions as well as if they operate such institutions. Chapters of national charitable organizations are eligible too.¹⁹²

The requirement of two years existence before eligibility for a license was modified. Volunteer rescue and fire organizations are now exempt¹⁹³ from the requirement; fraternal organizations must have been in existence in Ohio for five continuous years.¹⁹⁴

The new definition of bingo notwithstanding, all licensed bingo games are still required to be played in accord with the usual method of playing bingo.¹⁹⁵

3. *Remaining Problems with the Conduct of Bingo*

Despite constitutional doubts, probable abuse, and lobbying efforts of the Attorney General,¹⁹⁶ the festival loophole was left unclosed and unmodified when House Bill 1547 became the law of Ohio. Casino gambling operations continued to exist in certain Ohio cities,¹⁹⁷ and in Summit County a

¹⁸⁸ *Id.* § 2915.01 (Q).

¹⁸⁹ *Id.* § 2915.01 (J).

¹⁹⁰ *Id.* § 2915.01 (O).

¹⁹¹ *Id.* § 2915.01 (P).

¹⁹² *Id.* § 2915.08 (B).

¹⁹³ *Id.* § 2915.01 (H).

¹⁹⁴ *Id.* § 2915.01 (M).

¹⁹⁵ *Id.* § 2915.09 (A) (5).

¹⁹⁶ Attorney General interview, *supra* note 154.

¹⁹⁷ Boyer interview, *supra* note 144; interview with Louis E. Evans, Franklin County Senior Assistant Prosecuting Attorney, Apr. 11, 1977 (gambling operations threatened with enforcement of Section 2915.04 voluntarily ceased operation); interview with V. Lee Sinclair, Jr., Stark County Assistant Prosecuting Attorney, Apr. 11, 1977.

new scheme has appeared. Organizations have been formed for the purpose of conducting charitable festivals for eligible organizations throughout the state. Since there is no means of keeping cross-county records on the number of times a charity holds a festival and since there is no restriction on where such festivals may be held, such an organization can under present law obtain commissions from twenty-six charities to run two four-day festivals each, and can have a year-round casino gambling club, operating four days a week,¹⁹⁸ with no restrictions on expenses, salaries, or the like. This possibility has understandably caused concern in law enforcement circles, since it is virtually impossible to coordinate a successful prosecution when the law has set no standards which it can be proven an operator has violated.¹⁹⁹

Neither was free access to operation of schemes of chance eliminated by the new law. Instead, the use of proceeds from blatantly unconstitutional generic lotteries was regulated to some degree,²⁰⁰ although no means of determining proper use of proceeds was established and no records were required to be kept.

Amusement-only bingo was similarly untouched. The practical impossibility of ascertaining whether or not all the money taken in is redistributed in prizes has precluded prosecution of questionable operations.²⁰¹ Since no continuing record of the number of cards being played can be reasonably kept by a police investigation, and since no financial records are required to be kept by the game's operator, or disclosed without probable cause if they are kept, proof that all monies are not returned has been rendered extremely difficult. The mere requirement of record-keeping would have facilitated prosecution of profitmakers.²⁰² In addition, grave doubts as to the

¹⁹⁸ *Defender of the Game*, Akron Beacon Journal, Apr. 17, 1977, at 19 (magazine).

¹⁹⁹ Boyer interview, *supra* note 144.

²⁰⁰ Under INT. REV. CODE of 1954 § 509 (a) (2), proceeds could only amount to one-third of the financial support of the charity. OHIO REV. CODE ANN. § 2915.02 (C) (Page Supp. 1976).

²⁰¹ Boyer interview, *supra* note 144.

²⁰² Letter from Sheldon Rosen, *supra* note 147. It should be noted that Substitute House Bill 72, pending before the Ohio House of Representatives at this writing, still does not require that festival or amusement bingo operators be licensed, nor does it make clear that they must keep records and be subject to state and local inspections. However, the proposed law does include new restrictions for both activities. Festivals must be conducted on premises owned by the charitable organization or leased from a governmental unit. Proceeds after deduction of "reasonable and necessary" expenses must go to a governmental unit or a 501 (c) (3) organization which is also described in subsections 509 (a) (1), 509 (a) (2) or 509 (a) (3) of the Internal Revenue Code. It is further stipulated that operators and their assistants cannot receive any form of compensation, including tips, directly or indirectly.

Likewise, the proposed legislation would limit amusement bingo to groups of 50 players or less. Operators would similarly be forbidden from accepting any compensation, though their assistants would not be so restricted. No other game or scheme of chance and no charitable bingo game could be conducted on the premises within ten hours of an

constitutionality of these operations still exist. Charitable bingo alone was authorized by the 1975 Amendment to Ohio's Constitution.²⁰³ Whereas arguments overlooking the Ohio Court's historical interpretation of prohibited lotteries may sustain the constitutionality of the festival and scheme of chance loopholes, no rationalization can make amusement bingo equivalent to charitable bingo and thus constitutionally valid. Should the people of Ohio desire to legalize noncharitable bingo, the constitution should be amended to so provide.

The seemingly unbridled discretion of the Attorney General in processing license applications remains a significant problem. The licensing statute reads in specific language:

The attorney general *shall* license charitable organizations to conduct bingo games in conformance with Chapters 119 [The Ohio Administrative Procedure Act] and 2915 of the Revised Code. The attorney general shall refuse to grant a bingo license to any organization or revoke the license of any organization that fails to meet any requirement of sections 2915.07 to 2915.11 of the Revised Code.²⁰⁴

The statutory use of "shall" is interpreted as mandatory in nature by the Ohio Supreme Court.²⁰⁵ The reference to Chapter 119 of the Revised Code makes it clear that the licensing procedures must conform to notice and hearing requirements, as well as to the evidentiary requirements, of the Administrative Procedure Act. It is also clear that the statute mandates that the Attorney General license organizations according to the standards of Chapter 2915. In section 2915.08 (A) (7), the Attorney General is authorized to promulgate rules which can require other necessary and reasonable information in considering license applications. It may be inferred, then, that compliance with more than statutory requirements may be necessary to obtain a license. However, only if a rule requiring additional information is

amusement bingo game. So-called "instant bingo", in which participants purchase small lottery-style cards which may hold winning combinations of symbols, would thereby be banned from amusement games.

According to State Rep. Clifford Skeen, a co-sponsor, "instant bingo" is barred from both amusement and charitable bingo in the proposed law because it is difficult to keep records of its proceeds. Nonetheless, he indicates that licensing would not be required for either amusement bingo or festivals because the proposal's restrictions on the size of amusement games and proceeds distribution of festivals would in practice limit those activities to neighborhood or senior citizens' recreation and bona fide charities, respectively. Rep. Skeen stated that it was the legislative intent of the bill to extend record-keeping and state and local enforcement procedures to amusement bingo and festivals. However, record and enforcement sections still refer only to charitable organizations that conduct bingo. It appears that neither festivals nor amusement games would fall in that category. Interview with Rep. Clifford Skeen, May 21, 1977.

²⁰³ OHIO CONST. art. XV, § 6.

²⁰⁴ OHIO REV. CODE ANN. § 2915.08 (B) (Page Supp. 1976) (emphasis added).

²⁰⁵ *E.g.* Jacob v. Gurey, 42 Ohio St. 2d 45, 326 N.E.2d 672 (1975).

promulgated pursuant to Chapter 119 procedures can the Attorney General utilize that information to deny a license.

The Attorney General has promulgated no rules or regulations which add requirements for a license or more narrowly define a charitable organization beyond 501 (c) characteristics.²⁰⁶ On the other hand, the Attorney General acknowledged that licenses have been denied to organizations which fulfill the statutory requirements set out on the face of Chapter 2915.²⁰⁷ The Attorney General admitted to the writers that the substantive criteria which he uses to differentiate between eligible and ineligible organizations include such vague and arbitrary standards as not believing the organization is really a charity, not liking the persons whose names appear on the application (because they are convicted felons or the like), and other unspecified reasons.²⁰⁸ Surely, the factors which are indicative of a non bona fide charity could be codified into rules so that all applicants could be aware of the pitfalls and seek to establish their own legitimacy.

If indeed such arbitrary standards are applied and were to be promulgated as rules, it is questionable whether such rules would withstand constitutional scrutiny.²⁰⁹ If additional standards to those set forth in Chapter 2915 are being applied, without being promulgated as rules, then the statutory mandate to issue licenses according to only legislative or administrative standards has been violated.²¹⁰ The issuance of rules which incorporate reasonable criteria would give applicant organizations proper notice of the standards they would be held to. Should the Attorney General be unable to set objective standards, or delineate the factors contributing to his subjective judgment, the appearance, if not indeed the reality, of arbitrary and capricious action is so serious as to contravene due process of law.

Those applicants whose licenses are denied, however, have recourse in administrative appeal.²¹¹ Although every unfairness may not be remedied, it must be assumed that blatantly arbitrary determinations will be reversed or modified. Also, if substantial evidence does not support the reasons given for denial, a Court of Common Pleas can reverse the determination.²¹²

²⁰⁶ Attorney General interview, *supra* note 154.

²⁰⁷ *Id.* This statement was confirmed by several practicing attorneys who were unable to get their 501 (c) (3) religious or educational clients licenses.

²⁰⁸ *Id.*

²⁰⁹ See OHIO REV. CODE ANN. § 119.12 which provides in part:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.

²¹⁰ See OHIO REV. CODE ANN. § 2915.08 (B) (Page Supp. 1976).

²¹¹ OHIO REV. CODE ANN. § 119.06 (Page 1969).

²¹² *Id.* § 119.13.

Perhaps the more serious plight is that of the applicant whose license application is pending for months without any action being taken on it. In this case, the statute, in stipulating no time limit for license action, has allowed the Attorney General to postpone his statutory duty to make licensing decisions. Severe financial repercussions may result for the applicant charitable organization. Without a license, bingo cannot supply funds needed to support the charity itself and the charitable functions it performs in the community. Indeed, one Akron attorney reported that an Ohio religious organization has been on the verge of bankruptcy waiting ten months or longer with still no action being taken.²¹³ Charities which operated bingo legally prior to the enactment of Senate Bill 398 had already made bingo funds a part of their budget, and their activities were planned in reliance on the continued nature of that income. Thus, although the Attorney General's conduct can be characterized as official inaction, it is, in effect, a determination which is not appealable since it is not final.

Mandamus may be sought to force the Attorney General to exercise his discretion and to make a final, appealable decision, but such action is difficult, nonconclusive on the merits, and may bear the risk of being antagonistic.²¹⁴ At this writing, even after an order to reach a determination had been issued to the Attorney General, one applicant had waited for more than six weeks without receiving such a determination.²¹⁵

Some authority would indicate that at least in some cases the Attorney General has not used his power fairly, but has instead reached arbitrary decisions. There are reports of bona fide charities being unable to conduct games while other so-called "storefront churches" have been able to obtain licenses.²¹⁶ The writers make no judgment as to the good or bad faith of the Attorney General but merely submit that in the absence of more well-defined criteria, organizations which meet the statutory definition may be denied licenses when knowledge of extra requirements would have enabled them to establish their conformity to the licensor's satisfaction. Of the approximately nineteen hundred license applications received by the Attorney General's office, only nine hundred seventy-five to nine hundred eighty have been approved.²¹⁷ With determinations being made so selectively, meaning-

²¹³ Interview with Bruce W. Miller, Esq., Allison and Miller, Apr. 14, 1977.

²¹⁴ See generally Comment, *The Availability of Mandamus as a Vehicle for Administrative Review*, 9 AKRON L. REV. 713, 728-33 (1976).

²¹⁵ Interview with Bruce W. Miller, Esq., *supra* note 213.

²¹⁶ Evans interview, *supra* note 197.

²¹⁷ Attorney General interview, *supra* note 154. However, on June 1, 1977, the writers interviewed Bruce Rakay, Chief of the Charitable Foundation Section of the Attorney General's office. He estimated that of 1,600 applications, 1,100 have been granted. Neither Brown nor Rakay had any statistics on what action was taken on the remaining applications.

ful standards which rationally explain the basis for selectivity must be promulgated and applied, or the law could become a farcical exercise in whimsical decision-making.

Problems with distribution of proceeds also still exist under the current version of the law. The limits of acceptable expenditures and charges for equipment from charitable organizations are still not set out. In fact, the danger of renting equipment at high prices and being supplied with operators "free" of charge has virtually been codified in the amendment to section 2915.09 (A) (3). The new language makes it clear that charitable organizations may provide licensees with premises, operators, security personnel, concessions and/or concessions operators, equipment, and perhaps other services. With no limitation on equipment rental charges, large amounts of proceeds could be paid to the lessor charity, which could then pay operators and concessionaires for the very services the licensee is legally prohibited from compensating. Because only two hundred fifty dollars a session may be charged, it may be nonremunerative for a mere premises lessor to provide incidental services, necessitating that a second licensee, who can also rent equipment for the bingo session, be involved. However, no limits or restrictions on spending the rent received are imposed by the law.

Unlike the commercial lessor, the charitable lessor can effectively lease his building and full bingo paraphernalia as many times per week as he has lessees and hours.²¹⁸ Even with one session per day, the rent will be seventeen hundred and fifty dollars per week. With two five hour sessions each day thirty five hundred dollars can be earned. Should the lessor also charge for use of bingo equipment for each of those seven or fourteen sessions as well, it would not be difficult to make large amounts of money, to be disposed of in any way the lessor saw fit.

The anomaly of allowing some organizations to be licensed but not use the proceeds themselves still exists; neither veterans nor fraternal organization can do other than dispose of their proceeds to charitable, religious, educational, and the like, groups. Service organizations without 501 (c) (3) exemptions are likewise precluded from supporting their own operations but are required to donate all their proceeds to eligible recipients. The recipients, unencumbered by record-keeping, reporting, or even use restrictions, can then dispose of the proceeds without supervision. Theoretically, one charity could obtain a license and transfer the proceeds to a 501 (c) (3)-509 (a) "sister" organization. The second organization could then pay operators a

²¹⁸ Commercial lessors may only rent their premises to two licensees per week and are not allowed to furnish operators, security personnel, concessions, concession operators, or other services or equipment. Ohio Rev. Code Ann. § 2915.09 (A) (3) (Page Supp. 1976). 40

reasonable salary without violating federal law, and use the rest of the proceeds without restriction.

The existence of vested interests in bingo regulation in Ohio suggests that these loopholes will be found and used to the detriment of the legislative purpose and of the charities which carefully comply with the regulations. The problems cannot be solved by selective enforcement or by arbitrary licensing decisions without basis in the statutory scheme.

III COMPARATIVE LEGISLATION: BINGO REGULATION IN OTHER STATES

Ohio's current legislation regulating charitable bingo is similar in its basic provisions to legislation being adopted by a growing number of states at the behest of charitable organizations seeking additional sources of revenue.

Legislatures in California, Delaware, Florida, Illinois, Kansas, Michigan, New Jersey, New York and Virginia all have sought to exempt similar organizations from prosecution under state gambling statutes, provided they meet certain criteria, such as for licensing, allocation of proceeds, expenditures, conditions of play and game operation, and fulfillment of reporting requirements. The writers do not submit these legislative products as an exhaustive survey of current legislation. Rather, they are submitted as representative of different approaches to the regulation of charitable bingo and as a viable source of legislative drafting ideas which might help solve problems of administering the Ohio laws, if incorporated therein.

A. *Organizations Eligible To Conduct Bingo*

A basic determination of legislatures seeking to allow regulated charitable bingo has been deciding which types of organizations should be authorized to run and profit from the games and, no less difficult, defining those organizations in unambiguous language to facilitate administration of the law.

It was not without difficulty that the Ohio General Assembly defined "charitable organization" to include "any tax exempt religious, educational, veteran's, fraternal, service, nonprofit medical, volunteer rescue service, volunteer firemen's, or senior citizen's organization."²¹⁹ Early charitable bingo backers in Ohio had included youth athletic leagues and senior citizens' groups,²²⁰ both of which were excluded from the current law's prede-

²¹⁹ OHIO REV. CODE ANN. § 2915.01 (H) (Page Supp. 1976).

²²⁰ As reported in Akron Beacon Journal, March 27, 1975, at B-1, when the House Judiciary Committee had initial hearings on proposals to amend the Ohio Constitution to permit charitable bingo, cards and petitions from an estimated 2,000 to 3,000 Akron area residents were received. Prominent among them were pleas from the Goodyear Hot Stove League, Krumroy Senior Citizens Group and St. Bernard's Catholic Church.

cessor, which arose from Amended Senate Bill 398. Although senior citizens were included in the present law, Amended Substitute House Bill 1547, youth athletic organizations were not.²²¹ Even at this writing, there is an effort underway to amplify Ohio "charitable organizations" to include youth athletic organizations.²²²

Similar types of organizations to those currently licensed in Ohio are authorized to play charitable bingo in other states with minor variations. Illinois, for example, also allows labor organizations to hold licenses.²²³ Virginia will issue licenses to associations solely to maintain historic gardens.²²⁴ Kansas denies charitable bingo licenses to groups which deny membership to individuals based on race, color, or physical handicap.²²⁵ However, with the possible exceptions of California and Florida, which describe eligible groups broadly rather than breaking them down into types,²²⁶ few of the other states examined here allow as many types of charitable groups to conduct bingo as would Ohio under its proposed legislation.²²⁷

Perhaps more problematic for administrators of charitable bingo

²²¹ Although the House version of the bill included youth athletic organizations, the version which emerged from the Senate Judiciary Committee did not. Senate Judiciary Committee Chairman David L. Headley explained the intention of narrowing: "Any group you put into the bill automatically offers another possibility for abuse." Akron Beacon Journal, Sept. 17, 1976, at C-6.

²²² Substitute House Bill 72 incorporates these changes. Additionally, the bill expands licensing to veterans' groups not recognized by Congress. The current statute requires that veterans' organizations or associations must be incorporated by an act of Congress or be an auxiliary unit of such group. OHIO REV. CODE ANN. § 2915.01 (K) (Page Supp. 1976).

²²³ ILL. ANN. STAT. ch. 120, § 1101 (Smith-Hurd Supp. 1976).

²²⁴ VA. CODE § 18.2 - 335 (2)(iv) (Michie Supp. 1976).

²²⁵ KAN. STAT. § 79-4703 (c) (1976 Supp.).

²²⁶ California allows local governmental units to issue licenses to all organizations which are exempt from paying bank and corporate tax under Section 2370ld Revenue and Taxation Code and eligible to receive charitable contributions under I.R.C. § 170(c)(2). CAL. PENAL CODE § 326.5 (a) (West Supp. 1976). Florida simply allows play by "nonprofit or veteran's organizations engaged in charitable, civic, community, benevolent, religious or scholastic works or other similar activities." FLA. STAT. ANN. § 849.093 (West 1976).

²²⁷ Delaware will license volunteer fire companies, veterans' organizations, religious or charitable organizations, and fraternal societies complying with I.R.C. § 170 (DEL. CODE tit. 28, § 1102 (4) (Michie 1975); DEL. CONST. art. 2, § 17A (Michie 1975); Illinois, nonprofit religious, charitable, labor, fraternal, educational, and veterans' organizations (ILL. ANN. STAT. ch. 120, § 1101 (Smith-Hurd Supp. 1976); Kansas, nonprofit religious, charitable fraternal, education or veterans' organizations, (KAN. STAT. § 79-4703 (1976 Supp.)); Michigan, nonprofit religious, educational service, senior citizens, fraternal or veterans' organizations (Mich. COMP. LAWS ANN. § 432.103 (3)(61)); New Jersey, churches or religious congregations and religious organizations, veterans', charitable, educational, fraternal, civic and service, and senior citizens' organizations, volunteer first aid or rescue squads (N.J. STAT. ANN. § 5:8-25 (West Supp. 1976); New York, religious, charitable, educational, fraternal, civic or service, veterans' and volunteer firemen's organizations (N.Y. GEN. MUN. § 476 (4) (McKinney 1974)); Virginia, volunteer fire and rescue squads, war veterans' posts, fraternal societies under the lodge system, organizations with religious, charitable, scientific, literary, community, educational and garden-beautification purposes (VA. CODE

statutes than identifying authorized types of organizations is defining exactly which groups those categories are to include. Now considering its third version of the charitable bingo law since the Constitutional Amendment allowing charitable bingo was approved, effective November 5, 1975, the Ohio General Assembly has doggedly inserted additional language to clarify, and typically liberalize, requirements for belonging to an authorized bingo category.²²⁸ A proposal now pending to expand veterans' organizations to include those not chartered by Congress²²⁹ would simply conform Ohio's definition of veterans' organizations for bingo purposes to that used in other states.²³⁰

While three of the state legislatures surveyed have attempted, like Ohio, to define exactly what is meant by the organizations named in their statutes,²³¹ the others have been statutorily silent on specific definitions, deferring instead to regulatory agencies, local governing bodies, or the courts²³² to determine whether particular license candidates are "bona fide" representatives of the statutory categories. Five of the ten state legislatures considered here, in listing the organizations eligible for charitable bingo privileges, indicate by statute that these groups must be "bona fide."²³³ By contrast, Ohio, despite its extensive defining of qualified organizations, has failed to add that safeguard.

Perhaps the Ohio General Assembly's bent toward defining and re-defining to close loopholes can best be illustrated by its efforts to define the term "bingo" itself. While Florida and Virginia statutes do not even attempt to define the game, and few other states surveyed employ the broad

²²⁸ See text accompanying notes 188-94 *supra*.

²²⁹ See note 222 *supra*.

²³⁰ Of legislation surveyed for this study, only Michigan's charitable bingo legislation mentions Congressional authorization as a qualification for veterans' organizations. There, only branch organizations must be affiliated with congressionally authorized veterans' groups. Organizations of veterans within the state need not be so authorized to qualify for a bingo license. See MICH. COMP. LAWS ANN. § 432.103 (10) (West Supp. 1977).

²³¹ See KAN. STAT. § 79-4701 (1976 Supp.); MICH. COMP. LAWS ANN. § 432.103 (West Supp. 1976); VA. CODE §§ 18.2-335 (Michie Supp. 1976).

²³² The Supreme Court of Kansas, considering whether the State Secretary of Revenue should issue a bingo license to a private club organized for pleasure and applying for licensure as a "bona fide fraternal organization", looked to Black's Law Dictionary, Webster's Third New International Dictionary, and state common law, then promulgated its own definition of fraternal organizations to be used by the trial court on remand: "an organization with a representative form of government [which] either . . . operates under the lodge system with a ritualistic form of work; . . . is organized to promote the payment of life, sickness, accident, or other insurance benefits to its members; or . . . is organized to carry on some worthy civic or service purpose." State *ex rel* Sanborn v. Kalb, 218 Kan. 459, 466, 543 P.2d 872, 878 (1975).

²³³ See ILL. ANN. STAT. ch. 120, § 1101 (Smith-Hurd Supp. 1976); KAN. STAT. § 79-4703 (1976 Supp.); MICH. COMP. LAWS ANN. § 432.103 (6) (West Supp. 1977); N.J. STAT. ANN. Title 17:27 (West Supp. 1976); N.Y. CONST. art. 1, § 9 (McKinney Supp. 1976).

but brief definition "game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random,"²³⁴ Ohio legislators sought to leave nothing unsaid. The definition of bingo incorporated into the statute arising from Senate Bill 398 is a meticulous four-part description of the game, in which numbers of lines and spaces containing letters and numbers are detailed, as well as the operator's function in selecting one of 75 corresponding objects from a receptacle, so that he might call the game.²³⁵

When a slight variation called "zingo" appeared and added six objects to the receptacle to correspond with the free space, the extremely specific bingo definition no longer applied.²³⁶ Zingo contained more than the statutory 75 objects, and the objects corresponding with the free space did not carry letter-number designations. They were simply black objects. To expand the original bingo definition to accommodate games like zingo, and thereby forestall licensing evasion, drafters might have referred to "substantially similar games." Instead, they added an even longer addendum describing all the ways in which the game might be varied.²³⁷ As a result

²³⁴ See CAL. PENAL CODE § 326.5 (n) (West Supp. 1976); ILL. ANN. STAT. ch. 120, § 1101 (6) (Smith-Hurd Supp. 1976); MICH. COMP. LAWS ANN. § 432.102 (1) (West Supp. 1977); N.Y. CONST. art. 1 § 9 (2)(b) (McKinney Supp. 1976). *But see* KAN. STAT. § 79-4701 (a) for a detailed definition of "bingo", similar to Ohio's.

²³⁵ OHIO REV. CODE ANN. § 2915.01 (R) (Baldwin 1976), states:

"Bingo" means a game with all of the following characteristics: (1) The participants use bingo cards that are divided into twenty-five spaces arranged in five horizontal and five vertical rows of spaces, with each space, except the central space, being designated by a combination of a letter and a number and with the central space being designated as a free space; (2) The participants cover the spaces on the bingo cards that correspond to combinations of letters and numbers that are announced by a bingo game operator; (3) A bingo game operator announces combinations of letters and numbers that appear on objects that a bingo game operator selects by chance, either manually or mechanically, from a receptacle that contains seventy-five objects at the beginning of each game, each object marked by a different combination of a letter that corresponds to one of the seventy-five possible combinations of a letter and a number that can appear on the bingo cards; (4) The winner of the bingo game includes any participant who properly announces during the interval between the announcements of letters and numbers as described in division (R) (3) of this section, that a predetermined and preannounced pattern of spaces has been covered on a bingo card being used by the participant.

²³⁶ Akron Beacon Journal, Sept. 15, 1976, at F-5.

²³⁷ OHIO REV. CODE ANN. § 2915.01 (S) (2) (Page Supp. 1976) states:

(2) Any scheme or game other than a game as defined in division (S) (1) of this section with the following characteristics:

(a) The participants use cards, sheets, or other devices that are divided into spaces arranged in horizontal, vertical, or diagonal rows of spaces, with each space, except free spaces, being designated by a single letter, number, or symbol; by a combination of letters, numbers, or symbols; by a combination of a letter and a number, a letter and a symbol, or a number and a symbol; or by any combination of letters, numbers, and symbols, with some or none of the spaces being designated as a free, complimentary, or similar space;

(b) The participants cover the spaces on the cards, sheets, or devices that correspond to letters, numbers, symbols, or combinations of such that are announced by

of this remedial, loophole-closing drafting, the Ohio General Assembly has taken 458 words to describe the same game that legislators in California, Illinois, Michigan, and New York have summed up in less than forty.

Despite the differences in definitional substance and drafting techniques, surveyed states all specified that organizations eligible to conduct bingo games for charitable purposes be themselves nonprofit in character. However, Florida, New York, and Virginia statutes set no standard for determining what is nonprofit, and Illinois simply requires that an officer of the organization seeking a license submit a sworn statement as to its nonprofit character.²³⁸ Ohio joins California, Delaware, and Kansas in setting as a threshold requirement that applicants hold a specified tax status under the Internal Revenue Code.²³⁹ In order to meet the tax exempt threshold requirement under the Ohio statute, the applicant must be exempt from federal taxation under subsection 501 (c) (3),²⁴⁰ 501 (c) (4),²⁴¹ 501 (c) (8),²⁴² 501 (c) (10),²⁴³ or 501 (c) (19)²⁴⁴ of the Internal Revenue Code.

-
- a bingo game operator or otherwise transmitted to the participants;
 - (c) A bingo game operator announces, or otherwise transmits to the participants, letters, numbers, symbols, or any combination of such as set forth in division (S) (2) (a) of this section that appear on objects that a bingo game operator selects by chance that correspond to one of the possible letters, numbers, symbols, or combinations of such that can appear on the bingo cards, sheets, or devices;
 - (d) The winner of the bingo game is any participant who properly announces that a predetermined and preannounced pattern of spaces has been covered on a card, sheet, or device being used by the participant.

²³⁸ See ILL. ANN. STAT. ch. 120, § 1101 (1) (Smith-Hurd Supp. 1976).

²³⁹ OHIO REV. CODE ANN. § 2915.01 (H) (Page Supp. 1976).

²⁴⁰ I.R.C. § 501 (c) (3) exempts from federal taxation

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

²⁴¹ I.R.C. § 501 (c) (4) exempts from federal taxation

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

²⁴² I.R.C. § 501 (c) (8) exempts from federal taxation

Fraternal beneficiary societies, orders, or associations—(A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and (B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

²⁴³ I.R.C. § 501 (c) (10) exempts from federal taxation

Domestic fraternal societies, orders, or associations, operating under the lodge system — 45

In addition to subsection 501 (c) (4) and 501 (c) (8) utilized in the Ohio statute, the Kansas provision²⁴⁵ considers organizations to be nonprofit for bingo licensing purposes if they hold tax-exempt status under subsection 501 (c) (5),²⁴⁶ 501 (c) (6),²⁴⁷ and 501 (c) (7)²⁴⁸ of the Internal Revenue Code. Delaware looks to eligibility under subsection 170 of the Internal Revenue Code, governing charitable contributions generally, as prima facie evidence that an applicant is eligible for licensing,²⁴⁹ and California simply stipulates²⁵⁰ that charitable bingo games must benefit organizations exempted from payment of gift and corporation tax by Section 23701d of the state's Revenue and Taxation Code and to which a contribution or gift would be considered a charitable contribution under Section 170 (c) (2) of the Internal Revenue Code.²⁵¹ State standards for tax exemption exclusively pre-

- (A) the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and
- (B) which do not provide for the payment of life, sick, accident, or other benefits.

²⁴⁴ I.R.C. § 501 (c) (19) exempts from federal taxation

A post or organization of war veterans, or an auxiliary unit or society of, or a trust or foundation for, any such post organization—

- (A) organized in the United States or any of its possessions,
- (B) at least 75 percent of the members of which are war veterans and substantially all of the other members of which are individuals who are veterans (but not war veterans), or are cadets, or are spouses, widows, or widowers of war veterans or such individuals, and
- (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

²⁴⁵ KAN. STAT. § 79-4701 (g) (1976 Supp.).

²⁴⁶ I.R.C. § 501 (c) (5) exempts from federal taxation "labor, agricultural, or horticultural organizations."

²⁴⁷ I.R.C. § 501 (c) (6) exempts from federal taxation

Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

²⁴⁸ I.R.C. § 501 (c) (7) exempts from federal taxation: "Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder."

²⁴⁹ DEL. CODE tit. 28, § 1131 (c) (Michie 1975).

²⁵⁰ CAL. PENAL CODE § 326.5 (West Supp. 1976).

²⁵¹ I.R.C. § 170 (c) (2) defines charitable contribution as a contribution or gift to the use of

(2) A corporation, trust, or community chest, fund, or foundation—

- (A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, District of Columbia, or any possession of the United States;
- (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;
- (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and
- (D) which is not disqualified for tax exemption under section 501 (c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene

empt federal ones as licensing criteria in Michigan²⁵² and New Jersey.²⁵³

In addition to meeting certain tax exempt standards, it is common to require, as does Ohio's bingo legislation, that an organization have been in continuous existence for a specified number of years.²⁵⁴ In Ohio, the requirement is five years for fraternal organizations, even those which are affiliates of national or state organizations,²⁵⁵ and two years for all other charitable organizations, except for volunteer rescue or volunteer firemen's organizations, which have no durational requirement.²⁵⁶ It is stated in the law that the organization must have continued its existence "as such" for the required two years,²⁵⁷ presumably indicating that the charitable purposes for which it was formed have been fulfilled for that time. The Ohio law, however, has allowed applicant organizations time to build up their charitable-purpose dossiers. Not until two years after the effective date of Senate Bill 398 (May 26, 1976) must organizations include in their licensing applications a statement that they have been in continuous existence in the state for the required number of years preceding the date of application.²⁵⁸ None of the other states surveyed provide such dispensation.

Concern by Ohio legislators for carefully defining which organizations within the state may conduct which games is a reflection of the historical condemnation of gambling as immoral,²⁵⁹ and a popular fear in the state

in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

²⁵² MICH. COMP. LAWS ANN. § 432.103 (6) (West Supp. 1976) requires bona fide religious, educational, service, senior citizens, fraternal or veterans' organizations to have operated continuously for five years, or hold tax exempt status under MICH. COMP. LAWS ANN. §§ 206.1 - 206.499 (West Supp. 1977), to qualify for a bingo license.

²⁵³ For purposes of licensing, the New Jersey Legalized Game of Chance Commission has specified that a "qualified organization" must be incorporated or organized in New Jersey as a religious organization or an association not for pecuniary profit. N.J. ADMIN. CODE 13:47-1.1 (1973 Supp.).

²⁵⁴ Florida requires three years' existence (FLA. STAT. ANN. § 849.093 (1) (West 1976)); Illinois, five, unless the organization's national affiliate has been in existence for five years, in which case the time period is two years (ILL. ANN. STAT. ch. 120, § 1101 (Smith-Hurd Supp. 1976)); ILL. BINGO LICENSE AND TAX Rule 1 (A), (issued April, 1975); Kansas, five years, except for affiliates of national groups, which have no durational requirement (KAN. STAT. § 79-4703 (c) (1976 Supp.)); Michigan, five years, unless state tax exempt, as discussed in note 252, *supra* (MICH. COMP. LAWS ANN. § 432.103 (6) (West Supp. 1977)); New York, one year (N.Y. GEN. MUN. § 476 (4) McKinney 1974)); Virginia, two years (VA. CODE § 18.2-335 (2) (Michie Supp. 1976)); California, Delaware, and New Jersey codes specify no durational requirements.

²⁵⁵ OHIO REV. CODE ANN. § 2915.01 (M) (Page Supp. 1976).

²⁵⁶ *Id.* § 2915.01 (H) (Page Supp. 1976).

²⁵⁷ *Id.*

²⁵⁸ *Id.* § 2915.08 (A) (2) (Page Supp. 1976).

²⁵⁹ See text accompanying notes 15-20 *supra*.

currently that increasing the members of those eligible to conduct charitable bingo will somehow open wide the door to organized crime.²⁶⁰ A fundamental extension of statutorily defining which groups are eligible to conduct games in the state is (1) establishing a viable licensing procedure for those groups conducting games and, in some states, their commercial lessors and suppliers; (2) legislating restrictions on how their money may be disbursed for expenses and charitable purposes; and (3) devising a method of monitoring those expenditures.

B. *Licensing Procedures*

Among the ten states surveyed as to bingo procedures, three basic forms of license control emerge: (1) licensing by local government units solely or in conjunction with state licensing bodies; (2) licensing by specially-created state bingo commissions or standing departments within the state government; (3) licensing by a designated individual within the state government. California,²⁶¹ New Jersey,²⁶² New York,²⁶³ Virginia,²⁶⁴ and home rule counties in Florida²⁶⁵ use the first (local government) method. Utilizing the second (commission or department) method are Delaware, through

²⁶⁰ Editorials in the Akron Beacon Journal have repeatedly reflected the sentiment that "bingo must be watched closely to keep out organized crime". See Akron Beacon Journal, Mar. 14, 1976, at A-6 (advocating shut-down of "big bingo"); Akron Beacon Journal, Apr. 15, 1976, at A-6 (recommending that expansion of bingo-eligible groups be scrutinized); Akron Beacon Journal, July 4, 1976, at C-2 (demanding that loopholes in Amended House Bill 1547 be sealed). Also featured in the newspaper was a report from a Holyoke, Mass. bingo investigator who had posed as a gambler at Akron area games and found a high chance of cheating. Akron Beacon Journal, Jan. 1, 1977, at A-7.

²⁶¹ CAL. PENAL CODE § 326.5 (K) and (C) (West Supp. 1976) authorizes cities and/or counties to issue licenses and charge license fees as well as deposit in their general funds penalties up to \$10,000 collected for violation of the section. In California, the legislature is constitutionally authorized to allow cities and counties by ordinance to allow charitable bingo. CAL. CONST. art. 4, § 19.

²⁶² N.J. STAT. ANN. § 5:8-25 (West Supp. 1973) provides licensing by municipal governing bodies after voters have authorized charitable bingo by local referendum. Provisions for conduct of the election, including ballot forms and methods of resubmission and rescission are specified in N.J. STAT. ANN. § 5:8-43-49 (West 1973).

²⁶³ N.Y. GEN. MUN. §§ 477, 480 (McKinney 1974) provides local option for bingo with local licensing of bingo operators who hold an identification number from the State Bingo Control Commission. The identification number, however, has been held by the Supreme Court of Onondago County not to imply that applicants must undergo prescreening by the state. *Local 320 Club, Inc. v. Wackerle*, 24 Misc. 2d 679, 206 N.Y.S.2d 957 (1960). New York applicants who are turned down by local licensing officials may appeal to the state commission, pursuant to N.Y. GEN. MUN. § 493 (McKinney 1974). By contrast, the New Jersey Supreme Court has ruled in *Allendale Field & Stream Ass'n v. Legalized Games of Chance Comm'n*, 41 N.J. 209, 195 A.2d 620 (1963) that the state's Legalized Games of Chance Commission may refuse to issue an organization an initial registration number, thereby precluding its opportunity for consideration by the local governing body.

²⁶⁴ VA. CODE § 18.2-335 (Michie Supp. 1976).

²⁶⁵ Florida statute provides no requirement for state or local licensing. However, in *Jordan Chapel Freevill Baptist Church v. Dade County*, 334 So. 2d 661 (Fla. Ct. App. 1976), the Third District Court of Appeals of Florida ruled that a home rule county may require that operators and lessors of premises where bingo is to be played apply for a local permit.

the Bingo Control Commission;²⁶⁶ Illinois, through the Department of Revenue;²⁶⁷ and Michigan, through the Bureau of State Lottery.²⁶⁸ Only Ohio and Kansas use the third method, delegating the licensing function to a state officer, in Ohio, the Attorney General²⁶⁹ and in Kansas, the Secretary of Revenue.²⁷⁰ Unlike states which utilize local licensing bodies, those which solely utilize statewide licensing bodies do not require local voter approval before allowing bingo within individual political subdivisions. Rather, the state statutes have legalized charitable bingo statewide.

Ohio's decision to rely on the Attorney General instead of an existent department or a specialized commission was not reached without opposition. Governor James Rhodes, issuing a rare statement after he signed into law the original charitable bingo law (Amended Senate Bill 398), expressed reservations about the Attorney General as a licensing agent. His preference was the State Commerce Department.²⁷¹ Similarly, the North East Ohio Players' Association, representing bingo players and operators, suggested a twelve-member Bingo Control Commission to be appointed by the governor and composed of three bingo players, three licensed charitable operators, three legislators, and three at-large members.²⁷² An argument advanced for specialized licensing bodies is that they will have the facilities and interest to study problems of charitable bingo under existing law and issue rules and regulations accordingly. In Delaware the Bingo Control Commission is charged by statute with making a "continuous study and investigation" of the operation of the bingo licensing law in Delaware and in other states.²⁷³

There are stringent requirements for participation on New York's five-person State Bingo Control Commission. No member, officer, or employee is to hold any other public office or be employed by or have a pecuniary interest in any bingo leasing or supplying firm. Neither may Commission

²⁶⁶ Pursuant to DEL. CODE tit. 28, § 1120 (a) (Michie 1975), the Delaware Bingo Control Commission consists of five residents of the state appointed by the Governor with the consent of the state Senate. No more than three can belong to the same political party.

²⁶⁷ ILL. ANN. STAT. ch. 120, § 1101 (Smith-Hurd Supp. 1976) designates the Department of Revenue not only as the licensing agent in Illinois, but also as the collector of revenue to be generated from bingo games. Operators are required to submit ten percent of their gross proceeds to the state, as well as post a bond or other security as required of Illinois retailers under the state's Retailer's Occupation Tax Act, ILL. ANN. STAT. ch. 120, § 1103 (Smith-Hurd Supp. 1976).

²⁶⁸ MICH. COMP. LAWS ANN. § 432.105 (West Supp. 1977).

²⁶⁹ OHIO REV. CODE ANN. § 2915.08 (B) (Page Supp. 1976).

²⁷⁰ KAN. STAT. § 79-4703 (1976 Supp.) provides that the Secretary of Revenue shall issue the license on forms provided by the Attorney General.

²⁷¹ Akron Beacon Journal, May 27, 1976, at B-1, B-2.

²⁷² Akron Beacon Journal, Mar. 31, 1976, at D-1.

²⁷³ DEL. CODE tit. 28, § 1123 (Michie 1975).

members be officers or directors of organizations licensed to operate bingo, nor may they be engaged in any private enterprise which could be construed as a conflict of interest.²⁷⁴ Besides reviewing the effectiveness of bingo regulations binding on local licensing bodies, investigating possible bingo violations around the state and initiating prosecution, the Commission is charged with reviewing all licenses issued by local governing bodies with power to revoke local licenses which do not meet state qualifications.²⁷⁵

In Ohio, the Attorney General, like specialized bingo commissions, is authorized to issue additional rules for licensure.²⁷⁶ However, none have been promulgated at this writing.²⁷⁷

Jurisdictions which rely on local licensing may also require some initial state screening or provision for appeal to a state licensing body. New York, for example, allows appeal to the State Bingo Control Commission in case local licensing is denied.²⁷⁸ New Jersey simply requires that local governing bodies hold a hearing upon due notice to the applicant before refusing to issue a license.²⁷⁹ In Virginia, if applications are not acted upon within 30 days of the filing date, the licensing agency is deemed to have waived objection.²⁸⁰

In Ohio, denial of a license by the Attorney General is subject to appeal procedures pursuant to the Administrative Procedure Act. Unsuccessful administrative appeals can be pursued through the state courts.²⁸¹

Information required on bingo license applications is essentially the same among states surveyed as that required in Ohio, *i.e.*, the name of the applicant, verification of the organization's charitable character, location where the game will be conducted, along with a copy of the rental agreement if the premises are leased, notification of any previous applications, denials, suspension, or revocations, statement of the charitable purpose for the proceeds, and other "necessary and reasonable information" which the attorney general may by rule require.²⁸² As in other states surveyed, Ohio licenses are issued annually.

Delaware simply requires the applicant's name and address, together with "sufficient facts relating to its organization to enable the Commission

²⁷⁴ N.Y. EXEC. LAW § 433 (2) (McKinney 1972).

²⁷⁵ *Id.* § 435 (1).

²⁷⁶ OHIO REV. CODE ANN. § 2915.08 (A) (7) (Page Supp. 1976).

²⁷⁷ See text accompanying notes 204-17 *supra*.

²⁷⁸ See note 263 *supra*.

²⁷⁹ N.J. STAT. ANN. § 5:8-30 (West 1973).

²⁸⁰ VA. CODE § 18.2-335 (Michie Supp. 1976).

²⁸¹ See text accompanying note 212 *supra*.

²⁸² OHIO REV. CODE ANN. § 2915.08 (A) (7) (Page Supp. 1976).

to determine whether or not it is a bona fide organization eligible to conduct bingo"²⁸³ However, Delaware also requires applicants to designate an active member or members who will supervise the game.²⁸⁴ Michigan further requires that the organization specify on what day of the week it will conduct bingo.²⁸⁵ Unless a "special license" is issued, the organization must limit its games to that particular day. (Ohio limits charitable bingo to two five-hour sessions within a seven-day period,²⁸⁶ but does not issue licenses allowing play only on specified days.)

Perhaps the most significant variation in license applications is found in Illinois, where the charitable bingo statute specifies six categories of persons not eligible for any license under the Act. They are (1) convicted felons; (2) present or former professional gamblers or promoters; (3) persons "not of good moral character;" (4) a firm or corporation where such a person is active or employed; (5) an organization in which such a person is an officer, director or employee; (6) an organization where such a person is to help manage or operate a bingo game.²⁸⁷

Although only one type of charitable bingo license is authorized by statute in Ohio, other states, such as Illinois, New Jersey, Michigan and New York provide for special types of licenses for limited bingo play. In Illinois, organizations which are qualified for a regular bingo license, which costs a \$200 fee, but which do not wish to conduct the game on an ongoing basis may instead apply for a permit to conduct bingo at no more than two indoor or outdoor "festivals" a year for a maximum of five days each. Festival license fee is \$50.²⁸⁸

Similar to the Illinois festival license is Michigan's "special license" available for \$50 either to licensed organizations which wish to conduct bingo on days and at locations not specified in the regular \$100 annual license, or to unlicensed organizations which would meet regular licensing requirements and wish to conduct bingo for more than one day.²⁸⁹ On the same basis, unlicensed organizations may obtain one-day permits for \$5 and conduct their games just as those licensed organizations which hold special or regular permits, including Michigan's maximum daily prize of \$2,000 with a \$500 maximum prize per game.²⁹⁰ Unlicensed organizations

²⁸³ DEL. CODE tit. 28, § 1131 (a) (Michie Supp. 1976).

²⁸⁴ *Id.* § 1131 (b).

²⁸⁵ MICH. COMP. LAWS § 432.104 (d) (West Supp. 1977).

²⁸⁶ OHIO REV. CODE ANN. § 2915.09 (B) (4) (Page Supp. 1976).

²⁸⁷ ILL. ANN. STAT. ch. 120, § 1101 (7) (Smith-Hurd Supp. 1976).

²⁸⁸ *Id.* § 1101 (3).

²⁸⁹ MICH. COMP. LAWS ANN. § 432.107 (2) (West Supp. 1977).

²⁹⁰ *Id.* § 432.110 (4).

which would meet licensing requirements may obtain for \$10 a third type of license under which they may conduct no more than twelve bingo days of not more than 25 games each per year, provided that the prize for each game does not exceed \$10.²⁹¹

New Jersey allows municipal governments to issue without fee two-year licenses to senior citizens' associations or clubs which wish to conduct bingo solely for amusement. Such license holders cannot require participants to contribute anything "of value" for the opportunity to play. Only "bona fide active" members of the specially-licensed organizations can play, and prizes must be "nominal."²⁹² Likewise, New York provides for senior citizens' bingo played under similar conditions, provided the organization holds an identification number from the Bingo Control Commission.²⁹³ New York also provides for a "limited period bingo" license to conduct bingo for not more than seven of eight consecutive days in any one year at a festival, carnival, or bazaar. Organizations wishing to conduct limited period bingo must fulfill regular local licensing procedures, including a \$12.50 base license fee per "occasion,"²⁹⁴ plus the usual three percent of reported net proceeds which New York bingo operators must pay to the clerk of the municipality²⁹⁵ where the game is located for each "occasion."²⁹⁶ A licensed organization which chooses to conduct limited period bingo may not also engage during that year in the usual six days of bingo per calendar month allowed licensed bingo operators.²⁹⁷

In contrast, Ohio requires no licensing requirement for amusement - only bingo conducted by any operator, provided all the proceeds are returned to the players in prizes.²⁹⁸ Likewise, Ohio's so-called "festivals" provision²⁹⁹ permits unlicensed charitable organizations with a tax-exempt status under subsection 501 (c) (3) of the Internal Revenue Code of 1954³⁰⁰ to conduct

²⁹¹ *Id.* § 432.105 (5) (2).

²⁹² N.J. STAT. ANN. § 5:8-25.1 (West Supp. 1976).

²⁹³ N.Y. GEN. MUN. § 495-a (2) (c) (McKinney 1974). To receive an identification number, an organization must submit information including a copy of its charter and bylaws, number of members, whether regular meetings are held and when, any banks in which accounts are maintained, the office responsible for any bingo proceeds, a statement of organizational purposes for the past year, and intended uses of monies derived from the game. Bingo Control Comm'n Reg. 286.2.

²⁹⁴ N.Y. Bingo Control Comm'n Reg. 288.10.

²⁹⁵ *Id.* 297.3.

²⁹⁶ "Occasion" is a single gathering or session at which a series of up to 35 successive bingo games is played. In limited period bingo, there can be up to 60 games per session. N.Y. Bingo Control Comm'n Reg. 280.1 (d).

²⁹⁷ N.Y. Bingo Control Comm'n Reg. 280.1 (k).

²⁹⁸ OHIO REV. CODE ANN. § 2915.12 (Page Supp. 1976).

²⁹⁹ *Id.* § 2915.02 (C).

gambling without state screening, excluding only craps and roulette for money and slot machines, for a maximum of four consecutive days twice a year.³⁰¹

Besides providing alternative forms of licensing for operators of bingo games, some states also require that commercial lessors of bingo premises as well as suppliers of bingo equipment be specially licensed. In Ohio, both charitable and commercial lessors can charge no more than \$250 per session for renting a bingo hall. Commercial lessors may not lease their premises to more than two charitable organizations per week.³⁰² They need not register in any way with the state except that the organizations using their facilities must attach to their license applications a copy of their rental agreement.³⁰³

Other states legislating for commercial bingo and courts reviewing its operations have looked with a jaundiced eye toward commercial lessors. The New Jersey Supreme Court, upholding in 1956 a ruling by the Legalized Game of Chance Control Commission that all lessors must first be screened and registered, noted that

[t]he game [of bingo] is tolerable only when operated on a moderate scale . . . it is harmful when conducted as a commercial enterprise or as an end in itself, or when it grows to such a size that it is a significant factor in the economic or social life of the community. . . .³⁰⁴

Since 1957, New Jersey has charged the Commission by statute with screening "approved renters." To be approved, the New Jersey renter or owner of the premises must be certified as "of good moral character" and must not have been convicted of a crime.³⁰⁵ Approved renters must pay a one-time \$100 license fee in addition to \$5 for each occasion on which the licensed premises are used for bingo.³⁰⁶ Organizations licensed to conduct bingo need not undergo further screening or pay additional fees to lease bingo premises.

Even more stringent are New York's requirements for commercial lessors. There, an "authorized commercial lessor" must not be a person convicted of a crime unless he has received a pardon or certificate of good conduct; a present or former professional gambler or gambling promoter or one who "for other reasons is not of good moral character;" a public officer receiving direct or indirect consideration for bingo rentals, provided that the rental arrangement is for pecuniary profit; and finally, a firm or

³⁰¹ See text accompanying note 142 *supra*.

³⁰² OHIO REV. CODE ANN. § 2915.09 (A) (3) (Page Supp. 1976).

³⁰³ See text accompanying note 282 *supra*.

³⁰⁴ *Daughters of Miriam Home for Aged and Infirm v. Legalized Games of Chance Control Comm'n*, 42 N.J. Super. 405, 409, 126 A.2d 892, 894 (1956).

³⁰⁵ N.J. STAT. ANN. § 5:8 - 49.6 (West 1973).

³⁰⁶ N.J. STAT. ANN. § 5:8-49.7 (West 1973).

corporation in which one of the above persons or a person "married or related in the first degree to such a person" holds more than a ten percent proprietary, equitable, or credit interest, or where such a person is active or employed.³⁰⁷

Base license fee is ten dollars for all commercial lessors, over a maximum one-year period, but an additional fee is charged according to the aggregate rental fees to be charged. The additional fee ranges from \$5 for those charging an aggregate rental of from \$100 to \$499, to a \$5,000 fee for those whose establishments will bring in more than \$100,000 over the period, not to exceed one year, for which the local governing body is willing to issue a license.³⁰⁸ In 1973, the New York legislature amended the commercial lessors' provision to provide that such licenses be issued in cities of one million population or more only when the local governing body "shall find that there is a public need and that public advantage will be served by the issuance of such license."³⁰⁹ Legislative history indicates that the additional requirement was prompted by "the proliferation (in New York City) of commercial bingo halls and the consequent diversion of the net proceeds of bingo from the charitable, educational, scientific, health, religious, civic and patriotic undertakings sponsored by the authorized organization conducting bingo to and for the profit of such commercial lessors."³¹⁰

Other states have simply limited lessor privileges to those who hold regular bingo operator licenses. In California, a charitable organization may only conduct games on property which it owns or leases also for an office or for other organizational purposes besides conducting bingo games.³¹¹ Florida requires that bingo games be held on property owned by the non-profit organizations conducting the games or by the charity benefitting from the proceeds, or on property which one of those organizations lease fulltime for at least one year or on property owned or leased by another nonprofit organization qualified to conduct charitable bingo.³¹² That is, in Florida,

³⁰⁷ N.Y. GEN. MUN. § 476 (9) (McKinney 1974).

³⁰⁸ The complete extra-fee schedule for commercial lessors, as provided in N.Y. GEN. MUN. § 481 (1) (b) (McKinney 1974), is as follows:

aggregate rental of \$100 to \$499 . . .	\$5.00
aggregate rental of \$500 to \$999 . . .	\$25.00
aggregate rental of \$1,000 to \$2,499 . . .	\$50.00
aggregate rental of \$2,500 to \$4,999 . . .	\$125.00
aggregate rental of \$5,000 to \$9,999 . . .	\$250.00
aggregate rental of \$10,000 to \$49,999 . . .	\$500.00
aggregate rental of \$50,000 to \$100,000 . . .	\$2,500.00
aggregate rental in excess of \$100,000 . . .	\$5,000.00

³⁰⁹ N.Y. GEN. MUN. § 481 (1) (b) (McKinney 1974).

³¹⁰ 1973 N.Y. Laws, ch. 142, § 2.

³¹¹ CAL. PENAL CODE § 326.5 (F) (West Supp. 1976).

³¹² Fla. Stat. Ann. § 849.093 (8) (West 1976).

bingo premises may not be rented from a commercial lessor solely for bingo games. Illinois simply requires that licensed bingo operators only rent premises to conduct games from a licensed operator.³¹³ Virginia makes no provisions for scrutinizing lessors in its state regulations, which simply indicate that an organization with a bingo permit may "conduct games at its principal meeting place or any other site selected."³¹⁴ However, all Virginia permit-holders are subject to additional local regulation. Other states surveyed contain no controls for commercial lessors in their statutory provisions.

A third mode of licensing employed by some states, besides that of operators and lessors, is to license suppliers of bingo equipment. In Illinois, a person, firm, or corporation wishing to distribute or lease supplies, such as cards, boards, sheets, markers, and pads, must first obtain an annual license from the Director of Revenue. Fee for a supplier's license is the same as that for operating bingo games — \$200 — and applicants are subject to the same screening as to background and moral character as are bingo operator candidates.³¹⁵ Similarly, organizations licensed to play bingo in Michigan must lease or purchase their equipment only from suppliers who have been licensed by the Commissioner of State Lottery and paid a \$300 annual license fee.³¹⁶ Michigan's bingo operators pay a lower license fee of \$100.³¹⁷

New York has adopted stringent requirements for vendors and distributors.³¹⁸ They must either have themselves been licensed to conduct bingo games for the preceding twelve months, or have applied for a supplier's license with the State Bingo Control Commission. Included in the suppliers' license application must be the names and addresses of all officers, directors, shareholders or partners and the amount of gross receipts realized from the sale or distribution of bingo equipment to licensees during the last year. In a manner reminiscent of its sliding-scale fee schedule for commercial lessors, New York further requires that suppliers pay, in addition to a \$25 base license fee, a varying fee computed according to its gross sales during the preceding calendar or fiscal year. The added fees vary from \$10 for suppliers who grossed from \$1,000 to \$4,999, to \$1,000 for those who grossed more than \$100,000 in bingo supply sales.³¹⁹

³¹³ ILL. ANN. STAT. ch. 120, § 1102 (8) (Smith-Hurd Supp. 1976).

³¹⁴ VA. CODE § 18.2 - 335 (Michie Supp. 1976).

³¹⁵ ILL. ANN. STAT. ch. 120, § 1101 (7) (Smith-Hurd Supp. 1976).

³¹⁶ MICH. COMP. LAWS ANN. § 432.112 (12) (3) (West Supp. 1977).

³¹⁷ *Id.* § 432.105 (5) (1).

³¹⁸ N.Y. EXEC. LAW § 435 (2) (b) (McKinney 1972).

³¹⁹ *Id.*, requiring the following fees for vendors and distributors grossing these intermediate receipts:

gross sales of \$5,000 to \$19,000 . . . \$50.00

gross sales of \$20,000 to \$49,999 . . . \$200.00

gross sales of \$50,000 to \$100,000 . . . \$500.00

Also related to regulating supplies, the New York Commission has the power to establish a standard set of bingo cards and control how the cards are to be reproduced and distributed to licensees.³²⁰ It has done so in the case of "limited period bingo," specifying in its regulation, for example, that limited period bingo cards must be in pads of 20 to 25, each card having a serial or coding number, be in sealed cartons of 5,000 cards each, with each carton stamped to indicate the serial numbers of cards inside.³²¹

By contrast, Ohio simply requires that a charitable organization conducting a bingo game must itself own all of the equipment used to conduct a bingo game or lease it from another licensed operator. As discussed in Part II,³²² there is no statutory ceiling on the equipment rental fees that a charitable lessor may charge, and as a result, there is potential for abuse. Likewise, there is no state control over vendors from whom charitable organizations purchase their equipment.

C. Control Over Proceeds

With the same goal which state legislatures have hoped to achieve by licensing bingo operators, suppliers and commercial lessors — that is, maximizing the odds that only charitable purposes will reap the profits — lawmakers have typically enacted other safeguards to keep bingo receipts out of the hands of commercial enterprises.³²³ Common provisions in Ohio and other states surveyed include ceilings on maximum daily prizes, or pots; careful definition of what expenses may be deducted for services and promotional activities; restrictions upon authorized charitable purposes; and requirements for financial record-keeping.³²⁴

In an apparent attempt to reserve a maximum amount of the proceeds for charity and to equalize the competition among small and large-scale bingo operations, the legislatures of most surveyed states have adopted ceil-

³²⁰ N.Y. EXEC. LAWS § 435 (2) (c) (McKinney, 1972).

³²¹ N.Y. Bingo Control Comm. Reg. 296.45.

³²² See text accompanying notes 164-67 *supra*.

³²³ A second justification for stringent controls, as discussed in note 260 *supra*, is the fear that organized crime may take over charitable bingo. Whether this fear has become a reality in Ohio since charitable bingo was instituted is difficult to determine. However, Toledo Police Chief Corrin J. McGrath has estimated that in 1975, before the first charitable bingo statute was implemented, 22 of Toledo's 50 charitable bingo games were conducted by crime figures and their associates. He charged that of \$3.28 million grossed by the city's largest game, only \$25,000 went to charity. Akron Beacon Journal, Jan. 17, 1976, at B-1.

³²⁴ When Ohio legislative committees first considered proposed bingo legislation, resulting in Amended Senate Bill 398, there was some pressure by lobbyists to adopt virtually restriction-free, large-pot bingo. The Northeast Ohio Players Association, for example, suggested to the House Judiciary Committee that one-half the gross receipts of each game go for prizes, one-sixth for charity, and that all restrictions for paying workers, regulating hours of operation, and paying for advertising and renting halls be removed. Akron Beacon

ings on prize money to be paid per day or multi-game session of bingo, per game, or both. Ohio has no per-game maximum prize provisions and allows a \$3,500 maximum to be awarded in prizes per bingo session³²⁵—the largest per-session maximum allowed in any state surveyed. Because two sessions may be conducted per seven-day period,³²⁶ \$7,000 in prizes may be awarded by one organization in a week.

Of the nine other states surveyed, seven regulate both the daily and per-game prizes. Nearest to Ohio's \$3,500 pot is Illinois, with a \$2,250 daily maximum with a \$500 ceiling on each game.³²⁷ However, Illinois only allows one day of bingo play by an organization per seven-day week.³²⁸ Trailing in prizes are Michigan with a \$2,000 daily and \$500 per-game maximum;³²⁹ Kansas, \$1,750 daily maximum³³⁰ two days a week³³¹ and \$50 per regular game;³³² New York,³³³ New Jersey,³³⁴ and Delaware³³⁵ all allowing \$1,000 daily maximums including \$250 per single game. Florida allows only \$25 per game and \$100 a day in prizes.³³⁶ California allows a maximum of \$250 per game, with no set daily maximum,³³⁷ and Virginia has legislated no prize maximum.

Besides regulating the amount of money which can be paid out in prize money, charitable bingo statutes typically enumerate what other expenses may be deducted from the gross receipts before proceeds are turned over to charity. Ohio's provision is specific. Receipts may only be spent for prizes, charitable purposes listed in the licensee's application, purchasing or leasing bingo cards and "other equipment" used to conduct the game, hiring security personnel, advertising the game, and renting the premises.³³⁸ Like other states surveyed, Ohio specifically prohibits using proceeds to pay operators,³³⁹ although no provision is made that operators be active

³²⁵ OHIO REV. CODE ANN. § 2915.09 (B) (5) (Page Supp. 1976).

³²⁶ *Id.* § 2915.09 (B) (4).

³²⁷ ILL. ANN. STAT. ch. 120, § 1102 (4) (Smith-Hurd Supp. 1976).

³²⁸ *Id.*

³²⁹ MICH. COMP. LAWS ANN. § 432.110 (4) (West Supp. 1977).

³³⁰ KAN. STAT. § 79-4706 (d) (1976 Supp.).

³³¹ *Id.*, § 79-4706 (h).

³³² *Id.* §§ 79-4706 (e), (f) create regular and jackpot games in Kansas, with \$50 and \$500 maximum pots, respectively. Of the 25 games allowed in a day of bingo, a maximum of five may be billed as jackpot games.

³³³ N.Y. GEN. MUN. § 481 (a) (McKinney 1974).

³³⁴ N.J. STAT. ANN. § 5:8-27 (West 1973).

³³⁵ DEL. CODE tit. 28, § 1132 (b) (Michie 1975).

³³⁶ FLA. STAT. ANN. § 849.093 (5) (West 1976).

³³⁷ CAL. PENAL CODE § 326.5 (m) (West Supp. 1976).

³³⁸ OHIO REV. CODE ANN. § 2915.09 (A) (2) (Page Supp. 1976).

³³⁹ *Id.* § 2915.09 (B) (1), § 2915.01 (U).

members of the licensee organization, as statutes in other surveyed states require. Ohio has also incorporated broad language banning consulting fees for "any services performed in relation to the bingo game."³⁴⁰ This provision, in conjunction with the language enumerating proper expenses,³⁴¹ would appear to disallow in Ohio some services, such as accounting and bookkeeping, which are permitted in other states.³⁴² The only individuals statutorily authorized to be paid for services in Ohio are security personnel, who are carefully defined to include only sheriffs and marshals, and their deputies, township constables, members of local police departments, or those who have completed a state peace officer's training course.³⁴³

It also does not appear, based on the same statutory provisions, that attorney's fees may be paid out of gross receipts from charitable bingo games. The Superior Court of New Jersey, Appellate Division, considering a challenge to a ruling by the New Jersey Legalized Games of Chance Control Commission that attorney's fees could not be paid from bingo receipts, upheld the Commission and noted:

The right to pay such fees and costs may not be implied where the Legislature has specifically designated the only persons who may be paid and the only services which may be paid for.³⁴⁴

The court went on to note that the ruling did not deprive the bingo licensee from pursuing an appeal of a Commission ruling or exercising its right to counsel because other funds from the licensee's ongoing treasury could be used.³⁴⁵

It is less clear whether consulting fees for advertising are allowed by Ohio's statute, since advertising expenses, unlike bookkeeping or legal consultation, are specifically allowed. Other states, such as Delaware, New Jersey, New York, and Virginia, specifically restrict advertising of charitable bingo games. New Jersey and New York restrictions are nearly identical in forbidding advertisement of the location, time, or prizes offered in any bingo game by means of newspapers, radio, television, sound trucks, billboards, posters, or handbills. Only signs on licensed first-aid rescue squad

³⁴⁰ *Id.* § 2915.09 (B) (2).

³⁴¹ *Id.* § 2915.09 (A) (2).

³⁴² Both New Jersey and New York allow reasonable expenditures for bookkeepers or accountants, pursuant to N.J. STAT. ANN. § 5:8-34 (West Supp. 1976) and N.Y. Bingo Control Commission Reg. 296.7. The Commission considers, in the foregoing rule, the following fees for such services to be reasonable: \$5 per occasion for preparing a financial statement of bingo operations; \$15 per month to prepare the statutorily-required bookkeeping system; \$5 per month for supervising the bookkeeping system without making entries.

³⁴³ OHIO REV. CODE ANN. § 2915.01 (Y) (Page Supp. 1976).

³⁴⁴ *Conley's Anemia Blood and Research Foundation v. Legalized Games of Chance Control Comm'n*, 78 N.J. Super. 128, 142, 187 A.2d 731, 738 (1965).

or volunteer fire vehicles are allowed, as well as a sixty-square foot sign on the premises.³⁴⁶ Delaware law contains the same prohibitions, except that no exception is made for signs on emergency vehicles, and the on-premises display sign may not exceed twelve square feet.³⁴⁷ In a restriction apparently motivated more by aesthetic than economic considerations, Virginia prohibits only exterior advertising signs on the premises where games are conducted.³⁴⁸

Ohio's decision to allow unrestricted advertising expense was not reached without opposition. The original version of Senate Bill 398 had outlawed advertising. The bill's sponsor, Senator Charles L. Butts, justified his advertising ban on three grounds: (1) maximum proceeds should go to charity rather than promotional expenses; (2) heavy advertising of rival games would foster undesirable competition among sponsoring organizations; and (3) an advertising budget would allow friends of bingo operators to "skim" off bingo receipts.³⁴⁹

Two states, Kansas and Illinois, not only authorize but require still another expense to be deducted from gross receipts: the percentage to be returned to the state as revenue. In Illinois, operators must return ten percent of their gross receipts to the state, to be equally divided between the Mental Health Fund and the Common School Fund.³⁵⁰ In Kansas, two percent of the gross receipts are forwarded annually to the Director of Taxation, who returns them to the cities and counties where they originated to help defray local enforcement costs of the state bingo law.³⁵¹

Finally, unlike their sister states with rigid restrictions on where bingo receipts may be directed, both Michigan and Delaware have drafted broad catch-all language into their bingo statutes, which might justify any number of additional unforeseen expenses by bingo licensees. Michigan allows the Commissioner of State Lottery to provide by rule for "other reasonable expenses incurred by the licensee, not inconsistent with the Act."³⁵² Michigan also allows for janitorial services.³⁵³ Likewise, Delaware broadly allows expenditures for "items of reasonable amount for merchandise furnished or services rendered which is reasonably necessary for the conduct of the game."³⁵⁴

³⁴⁶ See N.J. STAT. ANN. § 5:8-36 (West 1973); N.Y. GEN. MUN. § 490 (McKinney 1974).

³⁴⁷ DEL. CODE tit. 28, § 1139 (i) (Michie 1975).

³⁴⁸ VA. CODE § 18.2-335 (Michie Supp. 1976).

³⁴⁹ Akron Beacon Journal, Feb. 18, 1976, at B-1, B-3.

³⁵⁰ ILL. ANN. STAT. ch. 120, § 1103 (Smith-Hurd Supp. 1976).

³⁵¹ KAN. STAT. § 79-4704 (1976 Supp.).

³⁵² MICH. COMP. LAWS ANN. § 432.109 (F) (West Supp. 1977).

³⁵³ *Id.*

³⁵⁴ DEL. CODE tit. 28, § 1139 (f) (Michie 1975).

The final purpose for which charitable bingo expenditures are authorized is, of course, the allocation for the charity itself. None of the states surveyed, including Ohio, mandate that any minimum percentage of the gross receipts go to charity. The percentage of receipts which has found its way into the coffers of the charity for which funds are supposedly being solicited has in some cases been surprisingly low.³⁵⁵

Ohio's current method of determining authorized charitable purposes for which funds may be directed has already been discussed extensively.³⁵⁶ Basically, four categories of charitable organizations may receive bingo funds in Ohio: (1) organizations which hold tax exempt status under subsection 501 (c) (3) of the Internal Revenue Code or are governmental units, and meet the description of private foundations contained in subsections 509 (a) (1), 509 (a) (2), or 509 (a) (3) of the Internal Revenue Code; (2) veteran's organizations, for specified charitable purposes, scholarships, nonprofit youth activities, promotion of patriotism or disaster relief; (3) fraternal organizations for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals where such contributions would qualify as charitable income tax deductions under subsection 170 of the Internal Revenue Code,³⁵⁷ and (4) volunteer firemen's organizations. By contrast, four states, Delaware, Kansas, Michigan, and New York, specify that bingo receipts remaining after authorized fees and expenses must go to lawful purposes of the sponsoring organizations, or licensees.³⁵⁸

The New York Bingo Control Commission, however, specifies further four categories of possible lawful purposes, including lessening "burdens borne by government" and initiating public works or maintaining public structures, in addition to the customary goals of benefitting the needy through religion, education and physical well-being.³⁵⁹ The New York definition goes on to note that the broad language of its purposes is not intended to authorize expenditure of funds for acquiring, maintaining, or improving portions of buildings which are not specifically related to the enumerated

³⁵⁵ Of \$183,000 raised in bingo games over three months by the Hi-Fi Club, to benefit United Cerebral Palsy Association of Stark County, Ohio, a reported four percent actually went to the authorized charitable purpose. Akron Beacon Journal, Apr. 8, 1977, at 1. Similarly, Toledo Police Chief Corrin J. McGrath has stated of the \$2.38 million grossed by that city's largest game in 1975, \$25,000, or slightly more than one percent, went to the charity for which it was organized. Akron Beacon Journal, Jan. 17, 1976, at B-1.

³⁵⁶ See text accompanying notes 172-87 *supra*.

³⁵⁷ OHIO REV. CODE ANN. § 2915.01 (Z) (Page Supp. 1976).

³⁵⁸ See DEL. CONST. art. 2, § 17 (A) (Michie 1975); KAN. STAT. § 79-4706 (a) (1976 Supp.); MICH COMP. LAWS ANN. § 432.109 (9) (West Supp. 1977); N.Y. Bingo Control Comm'n Reg. 280.1 (h).

³⁵⁹ N.Y. Bingo Control Comm'n Reg. 280.1 (h) (2), (3).

lawful purposes.³⁶⁰ A similar definition of "authorized purpose" has been adopted by the New Jersey Legalized Games of Chance Control Commission.³⁶¹ California relies on federal and state revenue standards for tax-exempt charitable giving,³⁶² and Florida, with perhaps the broadest language of all, simply specifies that bingo proceeds be directed to "charitable, civic, community, benevolent, religious or scholastic works or similar activities."³⁶³

D. Record-Keeping

The only indication of whether expenditures including charitable donations have been properly directed is found in records maintained by bingo operators. Three states — Florida, Virginia, and California — specify no formal record-keeping procedures in their bingo statutes. Of those surveyed states which do, only Ohio requires merely that ongoing records be maintained for a set period of time and made subject to state or local inspections. Other states additionally require that ongoing records must be filed with the state or local authorities at regular intervals or a specified number of days after each bingo game.

Ohio's provision³⁶⁴ simply requires that records of each bingo session must be maintained for three years from the date of the session and must include an itemized list of gross receipts, as well as itemized lists of all expenses, including names and addresses of persons winning prizes over \$100 and the name of each person such as suppliers and lessors to whom expenses are paid, with a receipt attached. A list of charitable recipients must also be maintained, as well as a count on the number of persons attending the session.

There is no requirement in Ohio that the bingo session records be filed regularly with the state. Rather, the Attorney General and local law enforcement officials are authorized to examine the licensee's accounts and records to determine whether a violation of the charitable bingo statute has occurred.³⁶⁵

Besides being subject to state or local inspection, records of bingo games in New York, New Jersey, and Delaware must be filed quickly after each game. In Delaware a report similar to Ohio's ongoing records must be filed with the Bingo Control Commission within 15 days after the conclusion of any game.³⁶⁶ In New Jersey, the deadline is also 15 days to file

³⁶⁰ *Id.* 280.1 (h) (4).

³⁶¹ N.J. ADMIN. CODE Rule 47-1.1.

³⁶² See note 226 *supra*.

³⁶³ FLA. STAT. ANN. § 849.093 (1) (West 1976).

³⁶⁴ OHIO REV. CODE ANN. § 2915.10 (A) (Page Supp. 1976).

³⁶⁵ *Id.* § 2915.10 (B) (Page Supp. 1976).

³⁶⁶ DEL. CODE tit. 28, § 4140 (Michie 1975).

a statement with the clerk of the municipality where the game's operator is licensed.³⁶⁷

New York's filing requirements³⁶⁸ are extensive. Within seven days after each bingo occasion, operators must file a financial statement with the state Bingo Control Commission, and a copy must be filed with the clerk of the municipality where the operator is licensed. If no game is held on a date when an operator is authorized to conduct one, a report to that effect must still be filed. Failing to file or filing incorrectly can result in the suspension of a license and refusal to issue further licenses. New York's commission further provides in its regulations that because noncharitable expenditures from bingo funds are to be discouraged, and such expenses taken where possible from an organization's general fund, the general fund books must be open to inspection before noncharitable purposes can be met with bingo funds. A special bingo account is also required by the commission, with deposits made "intact" and no later than the next business day following a game.

In Illinois and Kansas, annual financial reports by bingo operators must accompany statements filed with state revenue departments to calculate the amount of gross receipts payable in state taxes each year.³⁶⁹ Ten percent of the gross receipts go to the state in Illinois, and two percent in Kansas. As in Ohio, Illinois operators must keep records on file for three years, during which time they are subject to state inspection.³⁷⁰ Interestingly, Kansas, while requiring annual reports, does not provide by statute for spot inspections of financial records by state officials.

Michigan requires operators to maintain records for a one-year period, during which time they are open to inspection. Also, the Commissioner of State Lottery is authorized to request an audit of a licensee's bingo-related records by the state auditor general or a certified public accounting firm. In addition, annual reports are required to be filed with the commissioner.³⁷¹

IV. SUGGESTED LEGISLATIVE STRATEGIES

INTRODUCTION

An examination of Ohio's history in bingo regulation and its current law regulating charitable bingo compared to that of other states reveals five fundamental problem areas to date unsolved by the General Assembly.

³⁶⁷ N.J. STAT. ANN. § 5:8-37 (West Supp. 1976).

³⁶⁸ N.Y. Bingo Control Comm'n Regs. 297.1-.17.

³⁶⁹ See ILL. ANN. STAT. ch. 120, § 1103 (Smith-Hurd Supp. 1976).

³⁷⁰ *Id.* § 1104.

³⁷¹ MICH. COMP. LAWS ANN. § 432.114 (West Supp. 1977).

Undercutting the intent of the current law by precluding its effective enforcement are these deficiencies: (1) absence of an efficient administrative system for reviewing license applications; (2) absence of effective state control over commercial lessors, equipment suppliers and game operators; (3) absence of a broad, flexible statutory definition of qualified charitable organizations which can conduct bingo games and receive their proceeds; (4) absence of any licensing and reporting requirement for amusement bingo and festivals, as well as state constitutional problems with their existence; and finally, (5) absence of regular reporting requirements for license-holders.

In the following five-part section, each problem area is approached and proposals offered for its resolution. In brief, the writers propose (1) that a separate Office for Bingo Control be created within the State Lottery Commission to issue licenses and promulgate rules; (2) that commercial lessors, equipment sales operations and game operators be licensed, and additional enforcement costs financed through a percentage of gross receipts; (3) that qualified charitable organizations be broadly defined in terms of tax status and bona fide character with expansion of specific charitable categories left up to the rule-making authority of the Office for Bingo Control, and licensed organizations use bingo proceeds for their own charitable purposes; (4) that amusement bingo and festival operations be licensed and regulated if they are found to be constitutional; and finally, (5) that license-holders be required to report regularly as to financial receipts and expenditures to the Office.

A. *Office of Bingo Control*

When looking at the current bingo statutes, their immediate predecessors, and suggested replacements,³⁷² one notes that the legislature has continually increased the number and kinds of charitable organizations eligible for bingo licenses. The current bill being considered by the Ohio House, Substitute House Bill 72, would extend privileges to veterans' organizations which are not chartered by Congress if they are posts of a national organization and have been in continuous existence in Ohio for twenty years³⁷³ and to youth athletic organizations.³⁷⁴ Coupled with the existing total exemption from regulation for amusement-only bingo games,³⁷⁵ these expansions indicate that the legislature is primarily concerned not with the identity of those

³⁷² The General Assembly had four bills in committee as of April 1, 1977, *i.e.*, H.B. 72, H.B. 83, H.B. 143, and S.B. 104, of which H.B. 72 is now being considered by the House Governmental Affairs Committee.

³⁷³ H.B. 72, § 2915.01 (K).

³⁷⁴ H.B. 72, § 2915.01 (BB).

who conduct bingo but with assuring that proceed-producing operations are conducted by bona fide charitable organizations which contribute funds to appropriate charitable purposes.

With this in mind, the writers propose that the General Assembly establish an Office for Bingo Control which would operate under the State Lottery Commission. This independent office would administer the bingo law and monitor the purposes for which proceeds are utilized. All bingo³⁷⁶ or legalized gaming³⁷⁷ in the state would be subject to the scrutiny of the office; irregularities would be discovered by periodic monitoring and remedied by means of license revocation or suspension and criminal sanctions where warranted.

The State Lottery Commission is now composed of five members appointed by the Governor with the advice and consent of the Senate. Only three members may be from the same political party. Removal is by the Governor for malfeasance or nonfeasance in office, with public hearing provided upon request, and the Governor's charges and findings thereon must be filed with the Secretary of State.³⁷⁸ The Commission is statutorily charged with the power to promulgate rules and conditions for the administration of the state lottery. Monthly meetings with the Director of the Lottery are required, and a written record of proceedings is kept. This record is sent to the Governor, the President Pro Tempore and the Minority Leader of the Senate, and the Speaker of the House of Representatives. A monthly report of revenues and expenses is required. An annual financial report, together with recommendations for necessary legislation, must be submitted to the Governor and the General Assembly. The Commission is also charged with the duty of continuously examining the lottery to identify defects or abuses, and is authorized to commission comparative studies of state-run lotteries.³⁷⁹

In order to conduct studies and investigations, the Commission is empowered to hold public hearings to which interested parties are given actual or constructive notice. The Commission is authorized to take testimony under oath, to issue subpoenas compelling the attendance of witnesses and the production of documents and accounts, and to enforce subpoenas by

³⁷⁶ Both charitable bingo and free bingo, assuming the General Assembly continued to elect to allow the latter, would be subject to licensing and regulation, although under schemes which would differ in relation to the distinctions inherent in proceed-producing and not-for-profit games.

³⁷⁷ Festivals would be legal only if the sponsoring organization obtained a permit therefor. The strong lobbying for festivals makes it unlikely that they will be made illegal.

³⁷⁸ OHIO REV. CODE ANN. § 3770.01 (Page Supp. 1976). A ten thousand dollar bond is also required of each appointee. Terms are for four years, and are staggered.

³⁷⁹ OHIO REV. CODE ANN. § 3770.03 (G) (Page Supp. 1976).

an action brought by the local county prosecuting attorney in the Court of Common Pleas.³⁸⁰

The authors submit that this Commission, already formed and operating, is the proper regulatory body for bingo. The experience in administering a legalized lottery, subject to some of the same dangers of abuse as legalized bingo, should aid in smooth administration of the bingo scheme. The Commission's powers would need to be expanded. An enabling clause for promulgating rules and conditions under which bingo may be conducted should be added to present section 3770.03 of the Ohio Revised Code. Rules would be developed from the statutory requirements for licensing and conducting games.³⁸¹ Such rule-making power would be exercised pursuant to the Ohio Administrative Procedure Act. Aside from the statutory standards for licensing, the Commission would be required to make rules to contribute to the efficient and economical operation and administration of bingo, consonant with the public interest. An annual report and accounting to the Governor and Assembly would include a separate section relating to bingo administration. Suggestions for legislation would be solicited in this area as well.

Such a scheme would assure that the responsible executives and legislators would be apprised of the situation regarding bingo. The expertise of an Office designed to monitor the bingo system and suggest necessary corrective measures would be critical to the reasoned development of the bingo law. Before recommendations for legislation were made, investigations and hearings, including studies of legislation from other states which has or has not been effective in solving the problem being dealt with, would be conducted. Thus, some measure of thoughtful consideration of effects would be assured before action was taken. Presumably, the action, less subject to political and interest group pressure, would be more realistic and would withstand the test of time better than that instituted on an ad hoc basis by the General Assembly.

For those difficulties which are not of widespread significance and which do not require a policy decision of sufficient magnitude to warrant legislative action, the Commission's rule-making power would offer the solution. Thus, should it become necessary to enumerate purposes to which

³⁸⁰ OHIO REV. CODE ANN. § 3770.04 (Page Supp. 1976).

³⁸¹ Cf. OHIO REV. CODE ANN. § 3770.03 (G) (Page Supp. 1976). By analogy to the State Racing Commission, which supervises the conduct of thoroughbred, quarterhorse, and harness horse racing meetings and the parimutuel betting system, the Office of Bingo Control could be authorized to "prescribe the rules, regulations, and conditions under which [bingo] can be conducted, and may issue, deny, suspend, diminish, or revoke permits to conduct [bingo] . . . as is in the public interest for purposes of maintaining proper control over [bingo operations]." OHIO REV. CODE ANN. § 3769.03 (Page Supp. 1976).

proceeds could or could not be applied, for instance, building a recreation room for an organization, the Commission would be empowered to do so. Thereby, questions regarding details could be speedily resolved. If it were discovered that certain "educational" organizations were not bona fide charities, a requirement of a regular course of study could be added by rule if such an element were found to be a factor distinguishing appropriate organizations from inappropriate ones. In addition, should it be found necessary to establish licensing fees for suppliers based upon their volume of sales,³⁸² a schedule could be adopted after study and hearings indicated its proper composition. The authors do not contemplate extensive need for rule-making; however, the experience of other states has indicated that the rule-making power, used with discretion, is often the most effective way of combatting problems which arise during the administration of bingo regulatory schemes.³⁸³ To require action by the full General Assembly under such circumstances would be inefficient and possibly ineffective.

The Governor should be authorized to appoint a director of the Office of Bingo Control, much as he is now authorized to appoint a state lottery director.³⁸⁴ This director would be charged with managing the licensing, regulatory, and investigatory functions of the Office. In effect, the director would be the executive arm of the Commission relative to the bingo law, and would be responsible for keeping the office records and enforcing compliance with the Commission's rules and orders. The Commission itself would be available to aggrieved license applicants or licensees as the administrative appellate body.³⁸⁵

The director would be authorized to employ three assistants: one responsible for issuing individual licenses to operators, lessors and suppliers;³⁸⁶ a second charged with issuing and renewing permits to conduct games to charitable organizations; and the third authorized to compile and cross-reference all statistics relating to the expenditure of proceeds, the volume of business done by each supplier, lessor, and operator, and other statistics deemed necessary to effective supervision, and to receive and investigate complaints regarding all licensees and permit holders. If, and only if, it were deemed necessary by the Commission, additional staff for processing license and renewal applications, supervising licensees, and investigating complaints or irregular practices could be retained by the Office.

It is submitted that the appointment of assistants to consider and act

³⁸² See text accompanying note 319 *supra*.

³⁸³ See text accompanying notes 272-78 *supra*.

³⁸⁴ OHIO REV. CODE ANN. § 3770.02 (Page Supp. 1976).

³⁸⁵ Cf. OHIO REV. CODE ANN. § 4301.03 (Page 1973) (Liquor Control Commission).

³⁸⁶ See text accompanying notes 404-08 *infra*.

upon special license applications will permit more knowledgeable and considered decisions to be made respecting issuance and renewal. Each assistant would be better equipped to review the financial reporting forms applicable to the licensees he supervises and to detect irregularities therein. Merely having personnel commissioned so to act should serve as a deterrent to licensees. Smoother administration, wrought from familiarity with the field and with the licensees and applicants he is designated to serve, should result. The establishment of an office to receive and investigate complaints should aid in checking abuses from running crooked games to "skimming" off the top, which will in turn protect participants and serve the public goal of distributing proceeds for charitable purposes.³⁸⁷

The rule-making power of the Commission could be limited to promulgating regulations concerning:

(1) The qualifications for individual licensees of good character, non-criminal background, and the like, as defined in the statutory licensing section;³⁸⁸

(2) The standards of eligibility for charitable organizations, including consideration of such factors as income needed and expected from operating bingo, other sources of income, annual expenditures, anticipated uses of bingo income, reputation for community and charitable nature;

(3) The information to be provided on license applications and session and annual financial reports, together with information and/or books to which the Commission can exercise access rights;³⁸⁹

(4) The reasonable means and expense of advertising³⁹⁰ and remunerating accountants;³⁹¹

(5) Permissible allocations of proceeds, including, but not limited to, expenditures for maintaining, remodeling, or building facilities for bingo,

³⁸⁷ For a comparable agency duty already established in Ohio, compare the Ohio State Ethics Commission, created in Chapter 102 of the Ohio Revised Code. Section 102.06 outlines the commission's power to receive and investigate formal complaints and informal charges.

³⁸⁸ See text accompanying notes 404-08, 425 *infra*.

³⁸⁹ See OHIO REV. CODE ANN. §§ 2915.08 (A), 2915.10 (A), 2915.10 (B) (Page Supp. 1976).

³⁹⁰ Cf. OHIO REV. CODE ANN. § 4301.03 (E) (Page 1973), (which authorizes the Liquor Control Commission to promulgate rules regarding advertising); § 119.061 (Page 1969) (expressly limiting the rule-making powers of any agency so that "no agency may make rules which would limit or restrict the right of any person to advertise.") Thus, any regulations would have to be carefully drafted so as to provide means of supervision, which would probably be relatively effective in curtailing abuse of the ability to advertise by spending large amounts of proceeds thereon, without restricting the right to advertise *per se*.

³⁹¹ For a discussion of rules relative to compensation of accountants in New Jersey and New York, see note 342, *supra*.

and organizations eligible to receive donations;³⁹²

(6) Allowable games and schemes of chance to be played at festivals;³⁹³

(7) Amounts for licensing and renewal fees which cover the cost of administration.³⁹⁴

The writers would suggest that the General Assembly continue to make basic decisions as to what constitutes allowable expenses by charitable bingo conductors.³⁹⁵

B. *Licensing Lessors, Suppliers, and Game Operators*

It is apparent that Ohio, in choosing only to license sponsoring or-

³⁹² See H.B. No. 72, § 2915.01 (Z), § 2915.09 (A) (2), 112th General Assembly (1977-78), (which amendments are now being considered by the House Governmental Affairs Committee). Section 2915.01 (Z), as amended, would permit proceeds to be "used by a charitable organization for any charitable activity conducted by the organization." The authors submit that this standard implicitly broadens the charitable purpose definition of "any beneficial or salutary purpose." See *Ohio Children's Soc'y Inc. v. Porterfield*, 26 Ohio St. 2d 30, 268 N.E.2d 585 (1971); *Planned Parenthood Ass'n v. Comm'r*, 5 Ohio St. 2d 117, 214 N.E.2d 222 (1966). Should this be true, regulations could be promulgated to define when donations were serving charity. For instance, if spent for an activity incidental to a recognized charitable purpose, e.g., broadcasting religious messages by a church, (*Mau-mee Valley Broadcasting Assn. v. Porterfield*, 29 Ohio St. 2d 95, 279 N.E.2d 863 (1972) (tax exemption held permissible)) or printing church and community publications (*Zindor v. Otterbein Press*, 138 Ohio St. 287, 34 N.E.2d 748 (1941) (insufficient charitable purpose because of quasi-commercial nature)) rules could be established as guidelines to determine whether or not charity received the proceeds. In *Galvin v. Masonic Toledo Trust*, 34 Ohio St. 2d 157, 296 N.E.2d 542 (1973), the court determined that if the statutory rule for exemption permitted activities incidental to charitable purposes (e.g., commercial leasing), a charity could safely engage in such activities. Proper incidental activities could be defined by rule to minimize any vagueness in the standard. See OHIO REV. CODE ANN. § 5709.121 (Page Supp. 1976).

³⁹³ As previously discussed, note 142 *supra*, only roulette for money, craps for money, and slot machines are forbidden at festivals. OHIO REV. CODE ANN. § 2915.02 (C) (Page Supp. 1976). The writers submit that a comprehensive listing of games which are permissible would prevent the kinds of abuses now possible, (e.g., playing games similar in all but one respect to those prohibited, thereby circumventing the statutory purpose). This suggestion is analogous to the manner in which the bingo definition loophole, which resulted in variations such as "zingo" being legally permissible for nonlicensed organizations to conduct, was eventually closed. Charitable organizations could play only bingo as defined in section 2915.01 (S) (1), and all similar games were made illegal.

³⁹⁴ See KAN. STAT. § 79-4704 (Supp. 1976); OHIO REV. CODE ANN. § 3769.08 (Page Supp. 1976).

³⁹⁵ The following allowable expenses are recommended:

- (1) equipment rental from a licensed organization, at a rate not exceeding fifty dollars per session (or less or more as the legislature determines is a sufficient, reasonable rate);
- (2) paying prizes not to exceed thirty-five hundred dollars per session, nor one-hundred and fifty dollars per game;
- (3) purchasing bingo cards from a licensed supplier at a reasonable rate;
- (4) hiring security personnel;
- (5) advertising the game according to rules adopted by the commission;
- (6) renting premises for reasonable rates not to exceed two hundred and fifty dollars per session;
- (7) compensating a certified public accountant at reasonable rates, set by the Commission if necessary, for record keeping services.

ganizations in its charitable bingo legislation, has abdicated its responsibility for effective regulation in three major areas of potential abuse. Unlicensed and therefore only indirectly regulated under the Ohio law are (1) commercial lessors of bingo halls; (2) commercial retailers and distributors of bingo supplies; and (3) individuals who personally operate the games.

New York, with some 20 years' experience in bingo control,³⁹⁶ has found commercial lessor and supplier licensing a necessity for effective regulation.³⁹⁷ Likewise, New Jersey has found lessor control a necessity. Tight commercial controls are exercised in conjunction with an underlying philosophy that a maximum percentage of gross receipts should go to charity and that the potential for that allocation is greater when commercial interests are stifled or regulated.³⁹⁸

Ohio's legislative philosophy in this area appears not to be a desire to remove commercial interests entirely, as in Illinois where commercial lessors are outlawed.³⁹⁹ Rather, Ohio has accepted the existence of commercial lessors and attempted to regulate them by statute.⁴⁰⁰ Commercial suppliers of bingo equipment, however, go unregulated in any way in the area of equipment sales.

As discussed earlier,⁴⁰¹ commercial lessors in Ohio must charge reasonable rent compared to the rate for premises similar in location, size and quality, and the rent cannot exceed \$250 per bingo session. Commercial lessors are also prohibited from providing operators, security personnel, concessions or concession operators, bingo equipment, or other type of service or equipment, and cannot lease their hall to more than two charitable organizations per week. Nothing in the law, however, prohibits the commercial lessor from striking up arrangements with also-unlicensed suppliers to provide a better price on bingo cards to those who rent his hall, nor does the law prohibit the supplier from being a business associate of the lessor or perhaps a member of his family.

At first glance, it appears that the Ohio law provides that bingo

³⁹⁶ New York's bingo legislation was passed in 1957 after a threat in 1955 by the New York City Police Commissioner that bingo games would be considered a violation of the state's gambling laws until the section prohibiting bingo was repealed. *See* J. Goldstein, *Police Discretion not to Invoke the Criminal Process: Low Visibility in the Administration of Justice*, 69 *YALE L.J.* 543 n.95 (1960).

³⁹⁷ *See* N.Y. EXEC. LAW § 435 2(b) (McKinney 1972).

³⁹⁸ *See* N.J. STAT. ANN. § 5:8-26 (West 1973), interpreted in *Daughters of Miriam Home for Aged and Infirm v. Legalized Games of Chance Comm'n*, 42 N.J. Super. 405, 126 A.2d 892 (1956).

³⁹⁹ ILL. ANN. STAT. ch. 120, § 1102 (8) (Smith-Hurd Supp. 1976).

⁴⁰⁰ OHIO REV. CODE ANN. § 2915.09 (A) (3) (Page Supp. 1976).

⁴⁰¹ *See* text accompanying note 176 *supra*.

equipment be obtained only from other licensed charitable organizations. However, what the statute actually requires is that the charitable organization conducting the game own or lease its equipment from other licensees. There is no restriction upon where a charitable organization must purchase its equipment if it wishes to own, rather than lease, it.

Equipment, undefined in the statute, apparently applies to that whole range of paraphernalia, *i.e.*, cards, covers, the receptacle from which the balls are drawn, which are necessary to run a bingo game. At one point, the statute refers to "bingo cards and other equipment."⁴⁰² When these items are purchased, there is no provision for controlling at the supply source whether the cards are printed fairly, as to distribution of numbers, letters and symbols, or whether the balls in the receptacle are properly weighted. Neither is there any provision in the Ohio law for patrolling these mechanical operations on the premises. Nor is there any provision that the cost of supplies must be reasonable.

Other provisions in the charitable bingo statute would indicate that there is legislative concern in Ohio, as in New York and New Jersey, that a maximum percentage of the proceeds actually find its way to charity. The law is specific, for example, in enumerating which noncharitable expenses may be deducted from gross receipts.⁴⁰³ The word bingo itself has been redefined to absurdity in an attempt to include a broad range of similar games which share bingo regulations. It would appear consistent with legislative policy, then, to police more effectively two areas, leasing and supplies, where there is potential for monopolizing supply sources, increasing noncharitable expenses, or even throwing the pots to game insiders who hold rigged cards.

Licensing suppliers and lessors would reduce the potential for abuse. The process could be handled annually through the Office of Bingo Control, which could set standards for issuance. By rule it could be established that applicants with a previous record of gambling offenses could not hold either supplier or lessor licenses, and applications could provide further screening. Lessor candidates, for example, might be asked for a list of premises they make available for bingo lessees.⁴⁰⁴ They might also be asked to list any firms in which they or their family members have an interest and which furnish any type of bingo equipment. Cost of a lessor license might be a flat fee, not to exceed the cost of a charitable organization's

⁴⁰² OHIO REV. CODE ANN. § 2915.09 (A) (2) (Page Supp. 1976).

⁴⁰³ *Id.*

⁴⁰⁴ Although Ohio law limits to two organizations the number of lessees for a single commercial premises, there is no limit on how many bingo halls one lessor might choose to rent out. Ohio Rev. Code Ann. § 2915.09 (A) (3) (Page Supp. 1976).

bingo permit, or it might be on a sliding scale, as in New York,⁴⁰⁵ depending on how much annual gross rental is realized from bingo hall rentals. By licensing and regulating lessors, criminal sanctions as well as suspension or revocation of licenses could result from violations. By making it a violation to rent a hall to an unlicensed organization, the state would have one more way of assuring that bingo games are conducted only by licensees.

Suppliers could be similarly regulated by Commission rule and application screening. The state, through applications, could maintain an information bank on their gross annual sales, their customers, and their prices, and refuse to grant licenses where there is an interlocking ownership between supply firms and commercial lessor operations or where a previous gambling offender holds an interest in the supply firm. Furthermore, the supplies themselves could be controlled by requiring that all licensed suppliers produce cards, for example, in uniform format with their license number or other identifying mark on each card. A bingo player who suspected cheating in the game itself would then have a supplier number or mark to report to the Office when he registered a complaint. Suppliers, like lessors, could face license suspension or revocation if they sold supplies to organizations which are not licensed. The amount of the license fee, as for commercial lessors, could be made a flat fee not to exceed that of permit holders or could depend on the firm's annual gross sales.

A third area which bears watching and therefore licensing is that of the individuals who operate the game. Ohio, unlike most other states surveyed, does not require that the operator be a member of the sponsoring organization. It is simply stipulated that he serve without remuneration. The requirement of active membership for a specified time period, perhaps a year, would seem to prevent the sort of abuse where an expert operator volunteers his services but unbeknownst to the sponsoring organization, skillfully throws the games to his friends planted in the audience, who share the pot with him.

As Ohio law stands now, "operators" broadly includes those who collect money, hand out bingo cards and covers, select the combinations of letters and numbers from the receptacle, distribute prizes and serve refreshments.⁴⁰⁶ It would not seem unreasonable to require active membership for all those "operators" who are involved in the game process. It would not seem necessary for those who merely serve refreshments.

⁴⁰⁵ See text accompanying note 308 *supra*.

⁴⁰⁶ Ohio Rev. Code Ann. § 2915.01 (U) (Page Supp. 1976).

An additional safeguard would be to require individual operator licenses for those who collect the money, hand out the cards and draw the letters and numbers from the receptacle. The fee could be minimal, perhaps \$5 per person, but would serve as a screening device to prevent former gambling offenders from running the game. Licensed operators could be issued identification badges by the state, so that participants could readily ascertain when unlicensed operators were involved in the game's outcome.

If individual operator licensure appears politically unfeasible for legislative passage, an alternative would be to require that each permit candidate submit a list of operators for screening, who would be solely in charge of running its games. Badges might also be issued to operators under the permit system.

Although additional licensing revenue would be generated by requiring licenses for lessors, suppliers and individual operators, it would be naive to assume that by licensing more participants in the bingo system at current rates, revenue would be generated beyond the costs of administering the more extensive program. The first question is whether attempting to raise funds to help defray the cost of local enforcement, as in Kansas,⁴⁰⁷ would be desirable, or whether it would be a beneficial public policy goal to divert some quantum of bingo funds to serve designated public purposes, as in Illinois.⁴⁰⁸

As indicated, it would appear to be Ohio's legislative philosophy that a maximum percentage of gross receipts should go to charity. Particular legislative attention has been focused on which charities should benefit from the funds. To divert funds from these private charitable purposes into public school or mental health programs, as in Illinois, would seem to subvert the local legislative purpose and, even if a worthy goal, would probably not be feasible for legislative passage. On the other hand, a funds diversion for local enforcement would appear to be not only a worthy but a popular goal which should be pursued by the legislature. Better enforcement would bolster the legislative purpose of the bingo law by helping to assure that the monies intended for charity actually went to charity.

Assuming that using bingo revenues for enforcement were found appropriate, two alternative sources of revenue would be available. One would be to raise the cost of licensure beyond the cost of administering the licensing program itself. The other alternative would be to levy a tax on the gross receipts of bingo games.

⁴⁰⁷ KAN. STAT. § 79-4703 (1976 Supp.).

⁴⁰⁸ ILL. ANN. STAT. CH. 120, § 1101 (77) (Smith-Hurd Supp. 1976).

Ohio's license fee of \$50 is relatively low. Although Kansas charges a miniscule \$25 for the privilege of conducting charitable bingo games,⁴⁰⁹ Illinois' fee is \$200⁴¹⁰ and Michigan's \$100.⁴¹¹ In New York, cost of licensing can be far higher for commercial lessors and suppliers with high annual gross rentals and sales.⁴¹² Although an across-the-board increase in license fees for permit holders and other possible licensees might be triggered to cover increased costs of administration, it does not appear that any underlying purpose of the current law would be served by charging higher license fees to commercial participants than to charitable ones. Ohio legislators have not sought to penalize commercial participants through any current provision in the law except arguably by precluding their furnishing supplies and personnel and by limiting them to renting one premises to two licensees per week.⁴¹³ Commercial sales of bingo equipment go virtually unregulated. Therefore, there would not appear to be justification, at least on the basis of existing law, for charging commercial participants higher license fees simply because of their commercial identity.

A higher fee for all licensees, to benefit local enforcement, could be justified on the general rationale that better enforcement would mean better implementation of the law's intent, *i.e.*, assuring more proceeds for charity. However, a flat fee raise would have the disadvantage of affecting equally those licensees who generate a modest bingo income and those with larger pots, larger crowds, and larger profits.

For that reason, taking a percentage of the gross receipts, as is the practice in Kansas and Illinois,⁴¹⁴ would appear to be the more equitable revenue-raising device. Besides apportioning the burden fairly among licensees, the receipts would tend to return more enforcement funds to those communities with bigger enforcement problems. By contrast, a flat license fee raise would return as much revenue to a community with, for example, 15 small games as the one with 15 highly competitive, large-pot games with many players and therefore a higher potential for player complaints which must be investigated.

⁴⁰⁹ KAN. STAT. § 79-4703 (1976 Supp.).

⁴¹⁰ ILL. ANN. STAT. ch. 120, § 1101 (7) (Smith-Hurd 1976).

⁴¹¹ MICH. COMP. LAWS ANN. § 432.105 (1) (West Supp. 1977).

⁴¹² See text accompanying notes 308-10, 318-19 *supra*.

⁴¹³ However, one lessor can rent an unlimited number of premises, and it would be reasonable to assume that the two-lessee-per premises provision in OHIO REV. CODE ANN. § 2915.09 (A) (3) (Page Supp. 1976) seeks to prevent the commercial construction of halls for bingo purposes only, thereby equalizing the commercial lessor and the charitable lessor, who presumably uses his premises for other charitable purposes as well.

C. *Permits For Charitable Organizations*

The initial requirement for licensing under the present Ohio law is the determination of whether or not an organization is charitable. The General Assembly has already defined a number of kinds of organizations which satisfy the "charitable" requirement, primarily requiring that a 501 (c) exemption of a specified kind be attained before licensing. As previously discussed,⁴¹⁵ individual state policy must determine which charitable organizations will be permitted to play bingo. Yet, other states protect themselves from having to grant licenses or permits to organizations which have simply attained the applicable federal tax exempt status by placing an additional qualification of "bona fide" upon the charity.⁴¹⁶ This criterion enables the licensing body to examine the history of the organization, investigate whether or not its sole projected source of income will be from bingo, and whether or not its "charitable purposes" have any intimate connection with the organization itself or are merely "adopted" to justify operating a bingo game. When these factors and standards are further incorporated into the statute itself as considerations by which the determination of eligibility can be reached, the opportunities for both administrative and organizational abuses are limited. Furthermore, these factors can be used to guide the fashioning of more specific rules by the Commission, should they be necessary, thereby creating relatively objective standards against which an application can be measured. Bona fide charities, presumably the ones which the General Assembly intends to be licensed, would be protected by these standards against the arbitrary use of unguided discretion in the issuance of licenses.

Accepting those categories of eligible organizations now statutorily defined in section 2915.01 (H) through (Q) of the Ohio Revised Code, the authors submit that the Commission would be better able to make the determination that a new kind of organization falls within the statutory purpose than is the General Assembly, which must amend the law each time a strong lobby persuades legislators that an additional category of organizations should be granted eligibility. Thus, the definition of charitable organizations should simply be drafted to encompass those bona fide charities, tax exempt under the relevant 501 (c) provision,⁴¹⁷ which include religious, educational, volunteer firemen's, senior citizens', and other specific organizations. However, the eligibility need not be limited to the named types of groups, but

⁴¹⁵ See text accompanying notes 219-60 *supra*.

⁴¹⁶ See text accompanying notes 231-33 *supra*.

⁴¹⁷ Ohio could retain the categories now accepted: I.R.C. §§ 501 (c) (3), 501 (c) (4), 501 (c) (8), 501 (c) (10), and 501 (c) (19). OHIO REV. CODE ANN. § 2915.01 (H)

could be expanded by duly promulgated rule to encompass other properly tax exempt organizations which meet certain standards of community service or beneficial purpose. The flexibility to be gained thereby will eliminate the constant recourse to the legislature for special legislation enabling a certain organization to qualify for licensing.⁴¹⁸ Instead, qualification will be left to the Commission, which by rule can set the necessary guidelines to be met before and after licensing. Any challenge that the Commission exceeded its statutory authority in licensing certain types of organizations could be adjudicated by the courts under settled procedures.⁴¹⁹

When the legislature defines the types of charities eligible for licensing, it should do so in conjunction with determining the purposes to which proceeds may be lawfully devoted. The eligible types of organizations should be permitted, or basically required, to spend proceeds on the charitable purposes which they serve. Thus, although the legislation can prohibit fraternal organizations from refurbishing their meeting rooms should it so desire, those organizations would be required to use the proceeds to support a needy institution which it had been contributing to as an organizational purpose. The purpose behind this restriction is to keep control over the way in which funds are used so as to assure that the legislative purpose is achieved. All records and financial reports would indicate the manner in which proceeds were used, whereas currently the records can indicate that organization Y received proceeds, but no indication of ultimate use survives. On the other hand, requiring bingo operations to spend and account for their own proceeds provides maximum monitoring of funds. That is, Organization Y, if unlicensed, is untouched by the threat of license revocation or suspension and hence has no incentive for using the funds it receives from the licensee for a bona fide charitable purpose.

By requiring each organization to qualify for licensing by being an organization which directly achieves charitable purposes with the proceeds, an additional safeguard for meeting the legislative policy is created. The expenditures of each licensee will be subject to review by the Office of Bingo Control and local law enforcement authorities. License renewal would depend upon having met the statutory and regulatory standards. It is suggested that the statutory standard of charitable purpose should reflect the common law definition of charity serving a beneficial physical, social, spiritual, or

⁴¹⁸ For example, Little Leagues, YMCA's, and others could demonstrate their adherence to statutory purposes and prove the proper tax exemption to the Office. The Commission could then delineate standards by which to measure eligibility of these organizations and grant licenses to play bingo as regulated and use proceeds for statutorily permissible purposes.

educational purpose in the society.⁴²⁰ Absolute prohibitions against spending receipts for paying operators and consultants should be retained in the statute. In addition, any other policy determinations of undesirable uses, such as maintaining facilities not exclusively or incidentally for charitable purposes,⁴²¹ should be codified by the legislature. Interpretative rules could then be left to the Commission to formulate. If abuses are detected, such as building halls for noncharitable purposes, rules squelching such practices could be formulated. Then guidelines as to acceptable purposes would exist. No charitable organization could lose its license for wrongful allocation unless the expenditures clearly violated a statute or rule. Renewals could be conditioned on not spending proceeds in a way the Commission determined to be objectionable;⁴²² such a finding should then be incorporated as a regulation from which all charities could take guidance. The twin goals of fulfilling public policy as embodied in the Constitutional Amendment and the legislative regulatory scheme and of treating all applicants and licensees fairly would be the guidelines to which the office would be held.

The license application would require, by statute, specific information which the licensee would be placed under a continuing duty to update, since licenses would be conditioned on meeting the applicant's representations. The information would include:

- (1) name and post office address;
- (2) statement that the applicant is a charitable organization which has been in existence for the requisite statutory period; in general, two years;
- (3) the location at which the bingo game will be operated, whether or not such location is owned or leased, and a copy of the rental agreement if leased (lessor's permit number);
- (4) statement of previous history, record, and association sufficient to establish the applicant's charitable status, and a copy of the Internal Revenue Service determination letter of appropriate 501 (c) status;
- (5) statement whether any previous licensing action, including denial or revocation, has occurred;
- (6) statement of the charitable purposes for which the proceeds will be used,⁴²³ including the names, addresses, and key personnel of (unrelated) organizations to which proceeds shall be donated;

⁴²⁰ See *Ohio Children's Soc'y, Inc. v. Porterfield*, 26 Ohio St. 2d 30, 268 N.E.2d 585 (1971).

⁴²¹ See OHIO REV. CODE ANN. §§ 5709.07, 5709.12, 5709.121 (Page 1973).

⁴²² See OHIO REV. CODE ANN. § 3769.06 (Page Supp. 1976).

⁴²³ Cf. OHIO REV. CODE ANN. § 2915.08 (A) (1)-(6) (Page Supp. 1976), which specifies items which a license application must contain.

- (7) list of the operators who will work the sessions,⁴²⁴ and the organization official responsible for all such workers, including permit number or statement of application;
- (8) statement of the applicant's ownership of bingo equipment, the cost thereof, and any lessees of such equipment, or the lessor's name and address, including a copy of the rental agreement;
- (9) names of the licensed suppliers of bingo paraphernalia;
- (10) name of accountant, together with indication of his proper certification;
- (11) the total annual income of the organization for the last two years, indicating the amount received from sources other than bingo, festivals, or other non-related business ventures of the organization;
- (12) dates on which bingo sessions will be run, with times of operation, each week;
- (13) for first time applicants, an estimate of the number of players and gross receipts expected each session; for renewal applicants, the average number of participants, gross receipts and returned charitable proceeds per session;
- (14) the names of the directors, officers, and other officials in the organization;
- (15) other necessary and reasonable information which the Office by rule may require.

Licenses issued would be made conditional upon conducting the sessions at the location within the application, purchasing and renting all necessary materials from suppliers and lessors indicated, operating only at those days and times the Office prescribes (usually those included in the application), the named operators conducting the game, and spending the money as indicated. Variances could be sought for good reason, and would not be refused without cause. If necessary, a hearing to establish the rationale for change could be requested by the licensee. Renewal would be conditioned upon adherence to the conditions, regulations, and statutes. An annual audit of required reports would also be conducted by the renewal officer, in conjunction with the complaint officer if necessary. Failure to renew or the decision to deny a license would be for good cause only, the parameters of which would be found in the statute and rules and regulations.⁴²⁵ The

⁴²⁴ See OHIO REV. CODE ANN. § 3770.05 (Page Supp. 1976), where a sales agent cannot be solely in the business of selling lottery tickets.

⁴²⁵ Cf. OHIO REV. CODE ANN. § 3770.05 (C) (Page Supp. 1976), wherein the Director of the State Lottery Commission can refuse, suspend, or revoke the agent license of a corporation if a director, officer or controlling shareholder has been convicted of a crime involving moral turpitude, fraud, or misrepresentation in any connection, violating any rule, regulation, or order of the Commission, or engaging in gambling as a significant source of

Administrative Procedure Act would continue to govern all such determinations and appeals therefrom.

Those organizations already licensed would be assigned a number from one to twelve. This number would indicate the month in which renewal would be sought. New licensees would receive the number corresponding to the month in which their license is issued.⁴²⁶ By distributing the workload on renewal applications, the smallest number of state employees would be required, and the work should be relatively constant throughout the year, reducing waste and inefficiency. At the same time, more thorough examination of renewal applicants and annual reports would result. Thus, maximum supervision and monitoring would occur, with the probable consequence of better regulated, bona fide bingo operations.

In order to prevent the problems which currently arise because of administrative failure to act on license and renewal applications, a maximum deadline for action should be set, as with Virginia's thirty-day limitation, after which issuance is automatic.⁴²⁷ The authors submit that in light of the renewals being due within the month originally issued, a thirty day deadline for action on renewals should be established. Should the General Assembly think it wise to set a higher maximum time limit on initial applications, in order to give sufficient time for preliminary investigation of the applicant agency, a sixty day limit seems desirable. The two month period should be adequate, considering the cross-reference system to be established and the assistant in charge of investigating suspicious circumstances in tandem with the assistant responsible for licensing organizations. Furthermore, this short period should not be unduly burdensome to applicants, who are assured action within a relatively short time. The balance seems to serve the public interest in licensing only proper applicants as well as the interest in providing a source of revenue to apply to charitable purposes without penalizing an ongoing organization with unexcusably dilatory action.

Should the Office need more time in which to complete an investigation, an extension of up to twenty days could be granted by the Commission after a hearing in which the director and his assistant established to the Commission's satisfaction that they had been diligently acting upon the application. In addition, the Office must present good reason for needing the additional time to complete an investigation, detailing the basis for instituting

income. In addition, if any of these persons appear to be of experience, character, or general fitness such that granting a license would be inconsistent with the public interest, convenience, or trust, the Director may refuse the organization a license.

⁴²⁶ Compare the lottery sales agent licenses, which must be renewed each year within ten days of the anniversary of issuance. OHIO REV. CODE ANN. § 3770.05 (Page Supp. 1976).

such an in-depth study and the cause for suspecting that the organization will prove to be ineligible for licensing. It should be less difficult to obtain an extension of time in renewal proceedings, since the thirty day deadline might prove inadequate to permit a detailed audit of suspect accounts. In the case of a renewal, however, failure to act within the month will result in provisional permission to continue operations, pending final disposition. Should the Commission deem it warranted, local law enforcement officials could be notified of the status of the organization's license, in order that closer supervision would occur until final action was taken. Again, the purpose of enabling thorough supervision and control over charitable bingo will be served without causing undue hardship to an organization subject to vigorous examination.

If a license or renewal is denied, a statement of the reasons therefor shall be sent to the applicant. Appeal to the Commission can be made in accord with The Administrative Procedure Act. The record therefrom may be used as a basis for appeal to the courts of common pleas. Similarly, no license may be suspended or revoked on the recommendation of the Office without a full hearing before the Commission,⁴²⁸ again with the right of appeal to the courts. Depending upon the circumstances, primarily the seriousness of the misconduct alleged, the probability of final disposition for or against the licensee, and the degree of harm to be suffered by the licensee or the public, the Commission or court may stay the imposition of non-renewal, suspension, or revocation until such decision is final. Again, the provisions of Ohio's Administrative Procedure Act should control.

D. *Amusement Bingo and Festivals*

That amusement bingo and festivals have been a source of enforcement problems in Ohio has been illustrated.⁴²⁹ However, before proposing solutions through legislation or rule-making, a more fundamental issue must be raised: do current statutory provisions permitting and regulating amusement bingo and festivals violate the state constitution?

There are only two exemptions from the Ohio Constitution's absolute prohibition against lotteries. They are the state lottery and bingo in which the proceeds are applied to charitable purposes.⁴³⁰ Nonetheless, the current charitable bingo law indicates that its restrictions do not apply to schemes

⁴²⁸ Cf. OHIO REV. CODE ANN. § 3770.02 (Page Supp. 1976), which provides in part:

The director shall license lottery sales agents pursuant to section 3770.05 of the Revised Code, and when necessary recommend to the commission the suspension or revocation of any license so issued. The commission may on its own initiative revoke or suspend the license of any lottery sales agent when such action is deemed necessary.

⁴²⁹ See text accompanying notes 201-03 *supra*.

of chance and games of chance conducted by certain charitable organizations at their festivals. The statute then goes on to stipulate that festivals cannot be conducted for more than four consecutive days or more than twice a year.⁴³¹ Similarly, amusement only bingo is exempted by statute from criminal gambling sanctions.⁴³²

It would appear from Ohio case law that *schemes* of chance are forbidden by the state constitution, no matter who conducts them. The operative definition of lottery promulgated in *Stevens v. Cincinnati Times-Star Co.*,⁴³³ which is the narrowest definition Ohio courts have formulated,⁴³⁴ clearly states that all schemes held out to the public in which chance determined the winner are lotteries for constitutional purposes. Thus, those activities classified in the charitable bingo law as schemes of chance — pools, numbers games or “other schemes”⁴³⁵ — include the elements necessary to make them lotteries. That is, they are held out to the public, and chance determines the winner. For the state to recognize and regulate such schemes at a festival or elsewhere would appear to be patently unconstitutional. Therefore, no organization, whether charitable or not, should be authorized by statute to conduct schemes of chance other than bingo.

The status of games of chance, also included in the festival provision, is unclear. The earlier courts' refusal to reach constitutional determinations as to whether gaming devices in which the elements of consideration, chance, and prize were present were prohibited lotteries might seem to make it allowable to play such games. One Summit County Court of Common Pleas has recently so held.⁴³⁶ Thus, if festival games of chance are lawful, the writers submit that they should be subject to regulatory schemes to prevent what amounts to criminal gambling.

Amusement only bingo is also subject to grave constitutional doubts, since only charitable bingo is explicitly exempted from the state constitutional prohibition against lotteries. Only if one of the requisite elements of a lottery, *i.e.*, consideration, chance, or prize, is removed can free bingo be permissible. Under the current language of the statute, free bingo is either bingo in which all the money is returned in prizes or in which no money at

⁴³¹ OHIO REV. CODE ANN. § 2915.02 (C) (Page Supp. 1976).

⁴³² OHIO REV. CODE ANN. § 2915.12 (Page Supp. 1976).

⁴³³ 72 Ohio St. 112, 73 N.E. 1058 (1905).

⁴³⁴ See text accompanying notes 21-23 *supra*.

⁴³⁵ OHIO REV. CODE ANN. § 2915.01 (C) (Page Supp. 1976).

⁴³⁶ State *ex rel* Gabalac v. The New Universal Congregation of Living Souls, No. 76-9-1960 (C.P. Summit County filed Sept. 1976), now pending appeal in the Ninth District Court of Appeals.

all is taken.⁴³⁷ It is submitted that only if no consideration to play is taken at all, can free bingo meet constitutional standards. If gross receipts of any kind remain and they are not allocated for charity, then the questionable constitutionality remains. Should it be argued, however, that the consideration received is purposely limited to collecting enough money to provide prizes up to the statutory ceiling, pay the statutory two hundred and fifty dollar rent, compensate security personnel, and meet other allowable expenditures of charitable organizations with no proceeds remaining, then the authors suggest that the operation still be subject to licensing requirements and to reporting allocation of gross receipts. However, it should be noted that amusement only operations should be conducted only by eligible charitable organizations to meet constitutional standards, unless the requisites of consideration and/or prize are not present.

If the General Assembly should determine that amusement bingo is constitutional⁴³⁸ or if a constitutional amendment should add amusement bingo as an additional exception to the ban on lotteries, then amusement bingo would be amenable to regulation and all operations should be licensed by the Office of Bingo Control. Records and session reports should indicate that all gross receipts were returned as prizes. The burden of proving compliance should be placed upon the operation itself in order to retain its license.⁴³⁹ Additional rules that no operators or consultants could be paid at all, even from separate monies unconnected with bingo, should be enforced to eliminate the possibility of circumventing the law which prohibits paying any operator. Similarly, restrictions on building and equipment rentals should apply.

Likewise, if the constitutional problems with the festival provision were resolved and regulation therefore became lawful, then the writers would advocate that festival operators be required to apply for special permits to conduct games of chance on four specified dates.⁴⁴⁰ These permits would be issued only upon the applicant's establishing his 501 (c) (3) status. Location could be restricted to the grounds of the permit holder or to grounds

⁴³⁷ OHIO REV. CODE ANN. § 2915.12 (Page Supp. 1976). Despite the disjunctive language, at least one prosecuting attorney, in the City of Toledo's Law Department, has interpreted the statute to require that no money at all be paid by participants (except perhaps to ante into games), thus eliminating the element of consideration. Letter from Sheldon Rosen, Assistant Law Director, City of Toledo, to Richard A. Cohen, Esq., Dec. 2, 1976.

⁴³⁸ A conclusion with which the authors disagree, except under specified circumstances. If deemed unconstitutional, amusement bingo should be outlawed and enjoined throughout the state.

⁴³⁹ This is similar to the requirements the city of Toledo places upon its free bingo operators. Letter from Sheldon Rosen, Assistant Law Director City of Toledo, to Richard A. Cohen, Esq., Dec. 2, 1976.

⁴⁴⁰ Compare MICH. COMP. LAWS ANN. § 432.107 (2) (West Supp. 1977).

leased at a reasonable sum from a charitable organization in the vicinity. Equipment could be restricted so that only other charitable organizations could lease it out. Proceeds could not be used to pay operators or concessionaires; neither could the organization use separate monies to compensate these individuals. Accounting of all gross receipts, expenses, prizes awarded, and proceeds used for specific charitable purposes would have to be supplied to the Office. Failure to comply would result in fines or other criminal penalties. No further permit would be issued to non-complying organizations.

It should be clearly set out in the relevant statutes that not only may proceeds not be used to pay operators, or consultants, or to purchase, up to the limit, equipment⁴⁴¹ and space rentals, but also that no other monies may be used for these purposes. Payment where the statute prohibits it would be grounds for license revocation. In addition, criminal penalties should be established to punish those operators, consultants, suppliers, and lessors who receive compensation, or payment above statutory limits.

E. Reporting Requirements

A final area in which Ohio law should be changed to provide more effective enforcement of the charitable bingo statute is in the reporting requirements for charitable organizations operating the games. Currently, the statute requires only that organizations "maintain" for at least three years a record of each session's gross receipts, expenses, prizes, charitable recipients, and number of persons who participated in the session.⁴⁴³ There is no requirement that the reports ever be filed with regulatory officials on a current or an annual basis. It is simply stipulated that the Attorney General or any local law enforcement agency may examine the records for possible violations of the bingo statute.⁴⁴⁴ Most other states surveyed require either an annual report in conjunction with tabulation of revenues owed the state or a report filed with the state and/or local officials within one to two weeks each session, or both.⁴⁴⁵

Ohio would benefit by adopting such regular reporting requirements. If, as suggested, a percentage of gross receipts were taxed to help defray local enforcement costs, an annual report of gross receipts and expenses could be filed with the revenue tabulation. The information now required to be maintained should be included, as well as any additional information

⁴⁴¹ As with building rentals, the cost of equipment rental should be limited by statute to a reasonable figure which will compensate the lessor charitable licensee adequately. Such a fee could be set at fifty dollars a session, although investigation might disclose a more reasonable figure for the General Assembly to set.

⁴⁴³ OHIO REV. CODE ANN. § 2915.10 (A) (1-5) (Page Supp. 1976).

⁴⁴⁴ *Id.* § 2915.10 (B).

⁴⁴⁵ See text accompanying notes 364-71 *supra*.
<http://ideaexchange.uakron.edu/akronlawreview/vol10/iss4/5>

the Office of Bingo Control might by rule require. If no enforcement-revenue system were adopted by the legislature, the annual report could be filed by permit holders with their applications for license renewal.

Perhaps even more important to enforcement officials would be a dual requirement of current session reports to be filed with both local and state enforcers within seven days of each game. If current reports were filed routinely, then it would be possible for the local prosecutor's office, for example, to have a running record of funds disbursements for a questionable operation before making a formal request to inspect the books. In other words, the automatic availability of session records would give the prosecutor valuable lead time in investigating an operation before making his investigation formally known to the operators.

Still another statutory provision, allowing enforcement officials to inspect the bingo premises as well as the books on demand, is important in giving enforcers unquestioned authority either to investigate complaints that the game is being conducted unfairly or simply to spot-check operations periodically for their mechanical propriety. It might be argued that such authority is implied from the present law, through the authority to inspect books and records,⁴⁴⁶ but in other statutes it is specified. Ohio's parimutuel betting statute, for example, provides that premises may be inspected.⁴⁴⁷ Specific provision for inspecting bingo premises is also found in the laws of Delaware, Michigan, and New Jersey.⁴⁴⁸ Likewise, if reporting requirements are to be taken seriously, it would seem realistic for Ohio to follow New York and New Jersey's lead⁴⁴⁹ in allowing by statute the reasonable remuneration of bookkeepers or accountants, with the Office of Bingo Control having an option to set the range of what reasonable fees might be. As the Ohio statute stands now, it appears that bookkeepers or accountants, since their services are not enumerated as permissible, cannot be paid from gross receipts of bingo games.

CONCLUSION

Bingo is trapped in its history. The constitutional morass has contributed to this condition, as has the lingering concept of gambling as immoral and criminally corrupt. The result of this trap has been the legislature's inability to create a comprehensive regulatory scheme as well as an enforceable criminal law. Instead, ad hoc amendments to a muddled body of administra-

⁴⁴⁶ OHIO REV. CODE ANN. § 2915.10 (B) (Page Supp. 1976).

⁴⁴⁷ OHIO REV. CODE ANN. § 3769 (Page 1971). Substitute House Bill 72 proposes inspections of books, records, and premises of bingo operations.

⁴⁴⁸ See DEL. CODE tit. 28, § 1138 (b) (Michie 1975); MICH. COMP. LAWS ANN. § 432.114 (West Supp. 1977); N.J. STAT. ANN. § 5:8-30 (West 1973).

tive, regulatory, and criminal law have been offered to solve problems which have decade-old roots and which resist ad hoc solutions.

The primary legislative goal in Ohio now must be to create a regulatory scheme which can be administered throughout the state and which will provide for enforcement of clearly articulated and reasonable standards of conduct in operating bingo and allocating proceeds therefrom.

To that end, the writers have advocated that a separate Office of Bingo Control be instituted not only to issue licenses and monitor bingo operations but also to promulgate rules to meet the daily regulation and enforcement problems posed by any form of legalized gambling. In this way, it is hoped that many problems at last can be stemmed at the administrative level, and that the state legislature, now drafting its third charitable bingo law in less than two years, will be relieved of what has become an ongoing task of statutory revision.

As part of this regulatory scheme, the writers urge greater state control over the total bingo system by licensing commercial lessors, suppliers and bingo operators, as well as allowing bingo proceeds to be diverted only to the lawful charitable purposes of those charitable organizations which are licensed to conduct bingo. Regular annual financial reports, as well as current session reports, should be required of bingo operations.

Finally, it is urged that before further regulatory plans are devised for controversial amusement bingo and festival provisions, the legislature take a hard look at whether state recognition and regulation of these activities violate the state constitution's anti-lottery provision. If regulation is indeed constitutional and these activities are to continue with the legislature's blessing, then licensing and reporting requirements no less stringent than those for charitable bingo must be implemented.

Only by assuring that festivals and amusement bingo are not abused as loopholes to circumvent charitable bingo regulations and by more tightly regulating those operations which hold charitable bingo licenses can the intent of the charitable bingo statute be realized. Only then will bona fide charities be assured of maximum benefit from the games which are operated in their name.

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