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VIDEO GAMBLING DEVICES

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INTRODUCTION

In Las Vegas and Atlantic City, where gambling is legal, gamblers stand for hours in front of video screens. They deposit their money, play a game of chance, and hope to collect a big payout. Yet in states where gambling is illegal, similar scenes occur in taverns, pool halls, and truck stops, the only difference being that the payout comes from a cash register, rather than the machine. During the past decade, illegal video gambling has blossomed into a multi-million dollar industry. The industry's rise has been accompanied by a dramatic increase in gambling addiction, public corruption, and a surge in organized criminal activity.

State control over the video gambling industry has, for the most part, been unsuccessful. In many states, existing gambling statutes are antiquated and do not apply to video gambling devices. Federal controls, meanwhile, are of limited utility. Even states with up-to-date gambling statutes have failed to control the proliferation of video gambling devices, for three basic reasons. First, law enforcement officials have ignored problems arising from video gambling, largely because of the relatively small amount of money wagered on any one bet. In some cases, moreover, bribery of local officials has led to lax enforcement of antigambling laws. Third, and most important, video gambling devices are difficult to differentiate from legal, amusement-only video games.

Part I of this Article provides necessary background by tracing the history of gambling machines since their introduction in the late nineteenth century. Part II discusses the rise of video gambling devices. Part III then explores the problems associated with the de-

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vices and reviews enforcement proceedings undertaken by the federal government and certain states. Part IV provides suggestions for attacking video gambling in the form of a model statute. The statute may be of particular interest to those states that have not yet taken steps to control this problem or which are hindered by antiquated statutes.

I. AN INTRODUCTION TO GAMBLING AND GAMBLING DEVICES

A. *Gambling Defined*

The word "gambling" is derived from the Middle English word "*gamen*"—to amuse oneself.¹ Gambling is traditionally said to consist of three elements: consideration, chance, and reward—all of which must be present to constitute gambling.²

Consideration is often the easiest element to prove. Consideration is the stake, wager, or bet that gamblers risk losing if they are unsuccessful. With a traditional slot machine, for example, consideration is the coin that the gambler inserts into the machine before pulling the arm that sets the reels in motion.³

The element of chance is more difficult to establish. The Supreme Court of Montana, for instance, has decided that poker is a game of skill, "with one player pitting his skills and talents against those of the other players,"⁴ while the Supreme Court of Ohio has held that it is a game of chance.⁵ This direct contradiction obvi-

1. G. GEIS, NOT THE LAW'S BUSINESS 224 (1972).

2. *State v. One "Jack and Jill" Pinball Mach.*, 224 S.W.2d 854, 860 (Mo. Ct. App. 1949).

3. Compare privately conducted sweepstakes, where rules generally provide that "no purchase is necessary." Since these sweepstakes are based on random drawings and offer valuable prizes, the elements of chance and reward are present. If a purchase were required, that purchase could constitute consideration, and the sweepstakes would be an illegal gambling operation under the laws of most states. See *State v. Bussiere*, 155 Me. 331, 154 A.2d 702 (1959) (supermarket "Goodwill Cash Night" held not an illegal lottery because there was no fee required to participate); *State v. Eames*, 87 N.H. 477, 183 A. 590 (1936) (movie theatre "bank night" found not an illegal lottery because purchase of movie ticket not required to participate in the drawing). But see *Lucky Calendar Co. v. Cohen*, 19 N.J. 399, 117 A.2d 487 (1955) (consideration found in requiring participants to fill out a form and deposit it at supermarket), *aff'd on reh'g*, 20 N.J. 451, 120 A.2d 107 (1956); *Knox Industries Corp. v. State ex rel. Scarland*, 258 P.2d 910 (Okla. 1953) (consideration found in requiring participants to visit sponsor's store). See generally NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEPT OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976 396-97 (1977) [hereinafter DEVELOPMENTS].

4. *Gallatin County v. D & R Music & Vending, Inc.*, 208 Mont. 138, 141, 676 P.2d 779, 781 (1984).

5. *Mills-Jennings of Ohio, Inc. v. Department of Liquor Control*, 70 Ohio St. 2d 95, 435 N.E.2d 407, 409 (1982). Interestingly, both the Ohio and the Montana deci-

ously reflects less on the comparative abilities of citizens of the two states than on the difficulty involved in labeling a particular endeavor as being dependent upon either chance or skill. As the Superior Court of Pennsylvania has noted:

A peculiar combination of luck and skill is the *sine qua non* of almost all games common to modern life. It is hard to imagine a competition or a contest which does not depend in part on serendipity. It cannot be disputed that football, baseball and golf require substantial skill, training and finesse, yet the result of each game turns in part upon luck or chance.⁶

Courts and commentators have adopted various tests to distinguish games of skill from games of chance.⁷ The English rule is that any degree of skill will remove a game from the prohibited classification of lottery.⁸ A well-known test in the United States asks whether the outcome of a game is largely determined by chance.⁹ Regardless of the test used, complex issues of proof will undoubtedly arise when attempting to define and distinguish between chance and skill.

In addition to the blurry distinction between games of chance and games of skill, the label "chance" itself is somewhat misleading. For instance, if the city of Chicago sponsors a ten-kilometer run, charging an entry fee and offering prizes to winners in various age categories, it is clearly operating a contest of skill, not chance. Although there is consideration (the entry fee) and a reward (prizes to the winners), the element of chance is not present. Thus, the city

sions ultimately held that video poker was illegal. See *supra* text accompanying notes 78-80.

6. *Commonwealth v. One Electro-Sport Draw Poker Mach.*, 297 Pa. Super. 54, 60, 443 A.2d 295, 298 (1981), *rev'd*, 502 Pa. 186, 465 A.2d 973 (1983); see also G. GEIS, *supra* note 1, at 224 ("All human behavior, however, is predicated on a calculated risk that it will bring about a desired result, and most all human behavior entails an estimate that is based on something less than all the relevant information necessary for an accurate choice. Making no choice—that is, remaining passive—is in itself a choice, and it too involves certain consequences of variable likelihood."). When all element of chance is taken out of any endeavor, it ceases to be a "game."

7. See, e.g., I.N. ROSE, *GAMBLING AND THE LAW* 80-81 (1986) (setting forth the following seven characteristics of a game of skill: (1) A skillful player can continue to play until he has won all that is at risk; (2) Skill can be learned from experience, therefore play improves with experience; (3) Skill games require a knowledge of probabilities; (4) Skill games require psychological skill; (5) Player participation changes the result; (6) Skill can be learned from reading; and (7) Community opinion as to the nature of the game). This analysis, however, focuses on card games to such an extent that it is of limited use in analyzing video gambling.

8. *Id.* at 80.

9. See, e.g., *Wnek Vending & Amusements Co. v. City of Buffalo*, 107 Misc. 2d 353, 363, 434 N.Y.S.2d 608, 616 (NY. Sup. Ct. 1980); *Commonwealth v. One Elec. Poker Game Mach.*, 502 Pa. 186, 195, 465 A.2d 973, 978 (1983).

is not sponsoring a gambling operation. However, suppose two spectators place a side bet on who will win. Is the side bet gambling? The contest itself is dependent upon skill. Yet, if a person wagers on a "future contingent event not under his control or influence,"¹⁰ the element of chance is present. The side bet would therefore be illegal under traditional gambling laws, which permit awards to skillful players, but prohibit awards based on chance or awards given to noncontestants in a game of skill.¹¹ Hence, although a football game's outcome is decided by the skill of the players, it is nonetheless illegal to place a bet on the outcome.¹²

The final element of gambling is reward. Typically, reward is easy to prove: the wager would never have been made if not for the hope of receiving a reward. Does a free replay on a pinball or video machine constitute a reward? The modern view is that it does not. However, when games are equipped so that free replays represent something else, such as a right to receive cash, the element of reward is present and the game is properly categorized as a gambling device.

B. *The Early History of Gambling Machines*

Vending machines, the forerunners of coin-operated gambling devices, first appeared in the United States in the early nineteenth century.¹³ For pennies or nickels, vending machines delivered candy, weighed people, told fortunes, or played music.¹⁴ By the beginning of the twentieth century, however, entrepreneurs realized that great profits could be made by converting vending machines

10. N.Y. PENAL LAW § 225.00 (McKinney 1980) [practice commentary]; see *State v. Brown*, 221 N.C. 301, 306, 20 S.E.2d 286, 290-91 (1942); N.D. CENT. CODE § 12.1-28-01 (1985).

11. Thus, gambling can take place on a coin-operated machine, even if that machine is not a gambling device. For instance, a business could set up a legitimate pinball tournament with entry fees and prizes to the winners. If the pinball games being played were based on skill, the tournament would not constitute a gambling operation. However, if spectators placed bets on who would win, their activity would constitute gambling. The reason for the distinction between games of chance and games of skill is not readily apparent. One possible justification is that professional gamblers reap their profits from gambling on games of chance, not games of skill. See DEVELOPMENTS, *supra* note 3, at 381.

12. Some states have enacted legislation to close any loopholes left by the skill versus chance distinction. See, e.g., Act of Mar. 27, 1947, 1947 Ga. Laws 1139. See generally DEVELOPMENTS, *supra* note 3, at 755-56 n.58.

13. King, *The Rise and Decline of Coin-Machine Gambling*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 199 (1964).

14. *Id.*

into gambling devices. The conversion was made by adding an element of chance and the promise of cash payouts.¹⁵

Charles Fey, a San Francisco inventor, developed the first slot machine in 1887.¹⁶ Fey's original machine, the Liberty Bell, had three wheels carrying lithographed pictures of hearts, diamonds, spades, bells, horseshoes, and a star.¹⁷ The machine was operated by placing a nickel in a slot and pulling a handle. The wheels would spin and, depending on how they stopped, the gambler would lose the nickel or win between ten cents and one dollar.¹⁸ These machines later came to be known as one-armed bandits. Despite the inauspicious name, the machines were soon so popular that by 1910 they could be found in every city and nearly every hamlet in the country.¹⁹

The one-armed bandits clearly exhibited all three elements of gambling: the coin inserted by the player amounted to consideration, the spinning wheels rendered a result based on chance, and the winning gambler received a reward when coins fell into the receptacle. The design of these early machines thus made it easy to prove that they were designed solely for gambling purposes.

Despite efforts by local police departments and state legislators to prohibit gambling within their jurisdictions,²⁰ many gambling operators prospered from the introduction of the slot machine. For the most part, law enforcement authorities had little concern for "small time" nickel and dime gambling. Moreover, it was often difficult to distinguish between gambling devices and legitimate vending machines. Some operators even had "arrangements" with local authorities to ignore the illegal devices altogether.²¹ Most interest-

15. *Id.* ("No other machine was ever invented from which the profits derived were so fabulous on so small an investment, and with so little effort.") (quoting Anonymous, *Slot Machines and Pinball Games*, 269 ANNALS 62 (1950)).

16. J. SCARNE, SCARNE'S NEW COMPLETE GUIDE TO GAMBLING 430 (1961).

17. *Id.* at 435. Fey used pictures on the reels because many gamblers of that time were illiterate. I.N. ROSE, *supra* note 7, at 83.

18. J. SCARNE, *supra* note 16, at 432.

19. *Id.* at 436. The popularity of these devices did not diminish over time. A 1939 Gallup poll indicated that one out of three adults occasionally played the slots. DEVELOPMENTS, *supra* note 3, at 187.

20. See King, *supra* note 13, at 200; see, e.g., Act of Mar. 24, 1909, ch. 210, § 1, 1909 Nev. Laws 307-08 (outlawing the playing, maintaining or keeping of slot machines); Act of May 7, 1907, ch. 140, § 1, 1907 N.J. Laws 375 (declaring the possession of a slot machine to be a criminal offense).

21. King, *supra* note 13, at 200 ("Once established in a populous territory the slots could pull enough tribute from their patronage to satisfy all who had their palms out—and still leave handsome profits."). Bribing officials to overlook gambling violations was already a well-established procedure by the late 1800s. See COMMISSION ON THE

ing, however, were the ways in which gambling operators disguised or modified their machines in order to stay one step ahead of the legislature's definition of gambling devices.²²

Modification of the machines was prompted by legislation outlawing traditional slot machines. Slot machine manufacturers would create and market new devices that technically did not fall within the existing legal definition of gambling devices. In response, legislators passed new laws aimed at covering the new devices. Thus, the manufacturers and lawmakers played a game of "leap frog," with new legislation continually being directed at recently modified gambling devices.²³

In one early attempt to avoid the reach of gambling statutes, machines were modified so as to dispense tokens, rather than cash to a successful player.²⁴ The tokens could then be exchanged for cash. Such machines, however, were soon outlawed in most states.²⁵ Another early tactic was to dispense a small mint candy or piece of chewing gum each time the gambling machine was played. Use of the candy, it was argued, effectively converted a slot machine into a legitimate vending machine because the player received *some* consideration for each coin.²⁶ Other variations included machines

REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA 169 (1976) [hereinafter GAMBLING IN AMERICA]; DEVELOPMENTS, *supra* note 3, at 181.

22. See King, *supra* note 13, at 200.

23. As one court noted:

In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions.

City of Moberly v. Deskin, 169 Mo. App. 672, 678, 155 S.W. 842, 844 (1913).

24. See, e.g., Davies v. Mills Novelty Co., 70 F.2d 424 (8th Cir.1934) (machine held not a gambling device because tokens had no value); Mills Novelty Co. v. Farrell, 64 F.2d 476 (2d Cir. 1933) (same).

25. Note, *Pinball Machines Which Award Free Games as Gambling Devices*, 11 Wyo. L.J. 163 (1956-57).

26. See State v. Apodaca, 32 N.M. 80, 81-82, 251 P. 389, 389 (1926) ("The appellant contends that the player operating the machine in question is not engaged in a game of chance, because, while he enjoys the possibility of winning, there is no chance of loss, since, for each nickel deposited, he is sure to obtain value in chewing gum."); Boynton v. Ellis, 57 F.2d 665 (10th Cir. 1932) (court found machine to be a gambling device); White v. Hesse, 48 F.2d 1018 (D.C. Cir. 1931) (owner not entitled to enjoin enforcement of gambling statute); Nelson v. State, 37 Okla. Crim. 90, 256 P. 939 (1927)

that paid off in cigars, golf balls, and, during World War II, ration tokens.²⁷

While the authorities ultimately succeeded in eliminating these "disguised" machines, machine operators realized great profit in the interim. As soon as authorities took action to close them down, slot machine operators would customarily apply to the local courts for injunctions against seizure.²⁸ The operators would then flood the territory with the targeted devices while their lawyers fought all the

(machine held a gambling device). In an advance on this basic premise, some machines delivered mints or gum in color coded wrappers, which were keyed to the payoff. *See, e.g., Ad-Lee Co. v. Meyer*, 294 Pa. 498, 144 A. 540 (1928); Drzazga, *Gambling and the Law—Slot Machines*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 114, 116 (1952). Another attempt to evade the reach of the gambling statutes involved a machine that merely indicated how much the player had won. To receive the winnings, another coin had to be deposited. With this system, the operator could argue that there was no element of chance since the value received for each coin was determined before it was inserted. *See United States v. Wilson*, 475 F.2d 108 (9th Cir. 1973) (held, over strong dissent, to be a violation of federal gambling device legislation, 15 U.S.C. §§ 1171, 1172); *Gardner v. Daugherty*, 10 F.2d 373 (E.D. Mich. 1925) (found to be gambling devices); *Commonwealth v. McClintock*, 257 Mass. 431, 154 N.E. 264 (1926); *Zaft v. Milton*, 96 N.J. Eq. 576, 126 A. 29 (1924); *State v. Apodaca*, 32 N.M. 80, 251 P. 389 (1926); *Nelson v. State*, 37 Okla. Crim. 90, 256 P. 939 (1927) (combining the mint vending feature with this feature).

27. *See, e.g., Ex parte Williams*, 87 P. 565, 7 Cal. Unrep. 301 (1906) (cigars and tobacco); *Sparks v. State*, 48 Ga. App. 498, 173 S.E. 216 (1934) (cigarettes); *State v. Rand*, 238 Iowa 250, 255, 25 N.W.2d 800, 803 (1947) (ration tokens); *Ex parte Pierotti*, 43 Nev. 243, 184 P. 209 (1919) (drinks and cigars). Other machines were manufactured with no slot to accept coins. The player paid the operator directly, and the operator would then activate the machine. This modification was designed to defeat the application of statutes which specified "coin operated" machines. *See, e.g., Hannifin v. United States*, 248 F.2d 173 (9th Cir. 1957) (held not a gambling device); *United States v. Three Gambling Devices Known as Jokers*, 161 F. Supp. 5 (W.D. Pa. 1957) (held not a gambling device), *aff'd*, 254 F.2d 395 (3d Cir. 1958). Finally, some manufacturers installed various mechanisms which appeared to tie the reward to some degree of skill. *See, e.g., Boies v. Bartell*, 82 Ariz. 217, 310 P.2d 834 (1957) ("claw and digger machine" in which mechanism must be struck by ball and plunger in order to remove prize adjudged not to be game of skill); *Robey v. Mantell*, 157 Md. 690, 1 A.2d 82 (1938); *Hoke v. Lawson*, 175 Md. 246, 1 A.2d 77 (1938) (various types of slot machines rigged to require player to hit target with ball and plunger in order to begin game, collect winnings or both); *State v. Paul*, 43 N.J. Super. 396, 128 A.2d 737 (1957) (pin-ball machine in which ball may fall through holes before reaching flippers found predominantly game of chance); *Adams v. Antonio*, 88 S.W.2d 503 (Tex. Civ. App. 1935) (marble machine in which player's only control over machine is how far back initial plunger is drawn found essentially game of chance). Of course, if the device actually did reward skill, it would not be a gambling device under the traditional analysis. *See, e.g., Rouse v. Sisson*, 190 Miss. 276, 199 So. 777 (1941) (machine that rewarded those who correctly answered questions posed by the machine held not a gambling device); *D'Orio v. Jacobs*, 151 Wash. 297, 275 P. 563 (1929) (game board that required player to solve a "checker problem" held a game of skill, not a gambling device).

28. King, *supra* note 13, at 200.

way through the appellate process.²⁹ Presumably, the profit derived during the course of litigation more than offset the loss incurred once the devices were ultimately confiscated.

C. *Experiments with Legalization*

During the 1930s and 40s, most states were actively trying to rid themselves of slot machines. Florida and Maryland, however, experimented with legalization. Florida, like other states, was adversely affected by the Great Depression. Adding to those problems were two major hurricanes which hit the Miami-Fort Lauderdale area in 1928, generating adverse publicity and discouraging tourism.³⁰ In addition, the Florida Constitution prohibited a state income tax, thus making it difficult to raise needed state funds.³¹ Faced with these problems, the state established in 1931 a regulated system of licensed pari-mutuel betting.³² In 1935, the legislature also provided counties with a local option to operate slot machines.³³ A Florida court summarized the result of this experiment:

Within two years the operation of slot machines in Florida had become so obnoxious to the citizens of this State that the people of a great majority of the counties in the State had voted overwhelmingly to prohibit the operation of all slot machine[s] The opposition to slot machines was the direct result of the baneful and destructive effect which the operation of those machines had had upon the morals of the people of Florida of all ages and classes. It is a matter of common knowledge, of which we must take judicial cognizance, that the lure to play the slot machine had become so great as to undermine the morals of many and lead to the commission of or the indulgence in vices and crime to procure the coins with which to play the machines.³⁴

Florida ended its experiment in 1937, once again outlawing slot machines.³⁵

Maryland also experimented with the legalization of slot machines after World War II.³⁶ The result was "an orgy of corruption

29. *Id.*

30. See DEVELOPMENTS, *supra* note 3, at 290.

31. FLA. CONST. art. 7, § 5; see commentary to the 1968 revision.

32. DEVELOPMENTS, *supra* note 3, at 291; see Act of 1931, ch. 14,832 (No. 194), 1931 Fla. Laws 679-90 (dog and horse racing); Act of 1935, ch. 17074 (No. 303), 1935 Fla. Laws 684-88 (vol. 1) (jai alai).

33. Act of June 10, 1935, ch. 17,257 (No. 486), 1935 Fla. Laws 1085-89 (vol. 1).

34. *Eccles v. Stone*, 134 Fla. 113, 120, 183 So. 628, 631 (1938).

35. Act of May 29, 1937, ch. 18,143 (No. 437), 1937 Fla. Laws 909-12 (vol. 1).

36. See Act of May 6, 1943, ch. 321, 1943 Md. Laws 348-49; DEVELOPMENTS, *supra* note 3, at 297. As in Florida, legalization was a response to an economic downturn and resulting financial crisis in various parts of the state.

in the state."³⁷ In addition, revenues to the state were far less than originally envisioned.³⁸ In 1963, after a long-fought battle, opponents of the slot machines finally succeeded in implementing a five-year phase-out program.³⁹

D. *The Rise of the Pinball Machine*

According to one commentator, slot machine gambling might not have survived World War II if not for the rise of a wholly new form of entertainment—the pinball machine.⁴⁰ First marketed around 1930, early pinball machines were nothing more than glass covered labyrinths (constructed of nails or "pins") into which a player could propel steel balls. Numbered holes, into which the steel balls rolled, provided the player with his or her score. With the advent of electrification, they evolved into the pinball machine still popular today, with an illuminated backboard, ringing bells, flashing lights, and bright colors.

Early pinball machines were designed solely for amusement purposes. In 1935, however, pinball manufacturers added a new feature that ultimately would be seized upon by gambling operators—the free replay.⁴¹ If a player achieved a sufficiently high score, the machine would permit the player to play one or more additional games without depositing another coin.

With the proliferation of the free replay, however, a new controversy arose as to whether free replays transformed pinball machines into gambling devices. Pinball machines clearly exhibited the elements of consideration and chance. Thus, if the free replay was considered a "reward," all of the traditional elements of gambling would be present.

State courts were widely split on the issue of whether free replays constituted a reward.⁴² While this divergence may be attributed to differences in state statutes, there was also a more

37. DEVELOPMENTS, *supra* note 3, at 297.

38. *Id.* at 298.

39. Act of Apr. 30, 1963, ch. 617, 1963 Md. Laws 1346-47.

40. King, *supra* note 13, at 201.

41. *Id.*

42. Compare *id.* ("Most courts, confronted with the question whether a free game thus awarded was . . . a 'thing of value', found in the negative . . .") with Comment, *Gambling Today via the "Free Replay" Pinball Machine*, 42 MAR. L. REV. 98, 109-10 (1958) ("the greater number of states are inclined to follow the view that a 'thing of value' does include the free replay") and Note, *supra* note 25, at 165-66 ("The majority of courts seem . . . to hold that amusement in the form of a free game has value."). The federal rule, however, has long been that free replays do not constitute a reward. See *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97, 99 (D.C. Cir. 1944).

fundamental difference in perception between those courts that viewed a free replay as a reward⁴³ and those that did not.⁴⁴ The courts that viewed free replays as a reward often expressed concern over the difference in the return that could be received from each coin.⁴⁵ Some of these courts even speculated that free replays might foster the gambling spirit.⁴⁶ Courts taking the contrary position viewed the value of the free replay as de minimis, or merely as part of the play given for the initial coin.⁴⁷ Ultimately, free replays became an accepted standard, and were no longer of great concern to law enforcement agencies.

Gambling operators exploited the free replay feature by adding knock-off switches and meters to amusement-only pinball machines. With the advent of knock-off switches and meters, pinball machines clearly crossed over the gambling threshold. Under this system, the number of free replays is registered on the machine. When the player wants to "cash-in," he or she goes to the proprietor. The size of the payout will depend on the number of replays registered on the machine. The proprietor then flips the knock-off switch, which erases the free replays from the machine. The meter records the number of free replays that have been erased or "knocked off." The machine owner/operator, on a regularly sched-

43. See, e.g., *Boynton v. Ellis*, 57 F.2d 665 (10th Cir. 1932) (applying Kansas law); *Ross v. Goodwin*, 40 F.2d 535 (D. N.H. 1930) (applying New Hampshire law); *Holliday v. Governor of State of South Carolina*, 78 F. Supp. 918 (W.D.S.C.) (applying South Carolina law), *aff'd*, 335 U.S. 803 (1948); *Baedar v. Caldwell*, 156 Neb. 489, 56 N.W.2d 706 (1953); *Giomi v. Chase*, 47 N.M. 22, 132 P.2d 715 (1942); *People v. Gravenhorst*, 32 N.Y.S.2d 760 (Ct. of Special Sessions 1942); *Alexander v. Hunnicutt*, 196 S.C. 364, 13 S.E.2d 630 (1941); *Broadus v. State*, 141 Tex. Crim. 512, 150 S.W.2d 247 (1941); *State v. Bally Beach Club Pinball Mach.*, 119 Vt. 123, 119 A.2d 876 (1956). Some courts found that pinball machines were gambling devices, even when no free replay was awarded. See, e.g., *Stanley v. State*, 194 Ark. 483, 107 S.W.2d 532 (1937).

44. See, e.g., *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944); *Davies v. Mills Novelty Co.*, 70 F.2d 424 (8th Cir. 1934) (Nebraska law); *Mills Novelty Co. v. Farrell*, 64 F.2d 476 (2d Cir. 1933) (Connecticut law); *State v. Waite*, 156 Kan. 143, 131 P.2d 708 (1942); *State v. One "Jack and Jill" Pinball Mach.*, 224 S.W.2d 854 (Mo. App. 1949); *In re Wigton*, 151 Pa. Super. 337, 30 A.2d 352 (1943).

45. See, e.g., *Alexander v. Hunnicutt*, 196 S.C. 364, 369-70, 13 S.E.2d 630, 632 (1941) (in which the court seemed to confuse the issue of skill versus chance with the issue of reward, and held that since different players earn different point totals for their nickel, that in itself is a reward and the machine is a gambling device, even though it did not award free replays).

46. See, e.g., *Baedar v. Caldwell*, 156 Neb. 489, 495, 56 N.W.2d 706, 710 (1953) ("Anything affording necessary lure to indulge the gambling instinct and appeal to the gambling propensities of man is a gambling device."); *People v. Cerniglia*, 11 N.Y.S.2d 5, 7 (City Magis. Ct. 1939) (free replays are "an incentive that fosters the gambling spirit").

47. See, e.g., *State v. Waite*, 156 Kan. 143, 131 P.2d 708 (1942).

uled trip to the location, checks the meter and, from the money in the machine coin box, reimburses the proprietor for all payouts made.⁴⁸ Any remaining profits in the coin box are then split between the proprietor and the operator. The operator and the proprietor are thus left in the same position as if the machine itself had made payments to the successful player.⁴⁹

Although knock-off switches and meters succeeded in transforming pinball machines into gambling devices, the stakes involved were very limited. It was not long, however, before inventive gambling operators found a way around this limitation—the multiple coin slot. The multiple coin slot allowed the player to deposit more than one coin at a time. As a result, a player's payout would increase proportionally to the number of coins deposited. Alternatively, if the player had accumulated several "free replays," he or she could play more than one of them at a time.⁵⁰ With this addition, the player could be playing a "nickel" machine, but still have the chance to win over sixty dollars on a single play.⁵¹ On today's "quarter" machines, the gambler can win up to one thousand dollars.⁵²

48. To understand fully the operation of knock-off switches and meters, it is helpful to understand the normal business arrangement for operators of pinball machines and gambling devices. The proprietor at the location of the machines does not typically own the machines. Rather, the machines are owned by an operator who places them in locations where the public has access to them. The proceeds are then split with the location owner on an agreed upon basis (often 50-50). When payouts were made directly from the machines, the operator would make a weekly or monthly trip to the location, service the machine, and split the take with the location owner. As the authorities began prohibiting machines that made direct payoffs, however, and the location owners paid successful gamblers from their cash registers, gambling operators needed a new accounting system. Knock-off switches and meters provided that system. Except for serving as an accounting system, knock-off switches and meters serve no useful purpose. *People v. One Mach. Known as "Circus Days,"* 23 Ill. App. 2d 480, 489-91, 163 N.E.2d 223, 228 (1960); see also *State v. 158 Gaming Devices*, 59 Md. App. 44, 57-58, 474 A.2d 545, 552 (1984), *aff'd in part, rev'd in part*, 303 Md. 404, 499 A.2d 940 (1985).

49. R. KING, *GAMBLING AND ORGANIZED CRIME* 47 (1969).

50. In fact, dozens, or even hundreds of coins or replays could be wagered on a single game. King, *supra* note 13, at 202.

51. R. KING, *supra* note 49, at 48.

52. A sergeant in the Dallas vice squad was quoted as saying that since these machines allow the patron to wager up to \$20 per hand, it is easy to lose \$300 to \$400 in an hour's time. *Illegal Use of Video Gambling Machines: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 2d Sess. 11 (1984) [hereinafter *Hearing*]. If a gambler plays quickly, he can lose \$600 in an hour. *Id.* at 21 (testimony of William L. Holmes, Special Agent, Federal Bureau of Investigation).

II. VIDEO GAMBLING

By the mid-1960s slot machine and pinball gambling were in decline, primarily as a result of new legislation and educated enforcement authorities.⁵³ In fact, by 1976, the Commission on the Review of the National Policy Toward Gambling found that illegal slot machines had been "virtually eliminated."⁵⁴ However, in the late 1970s, a new market developed that revived this seemingly moribund form of gambling.

In 1977 Atari, Inc. introduced its first generation of video games.⁵⁵ Like the early pinball games, they were skill games, requiring hand-eye coordination, and were intended for entertainment purposes only.

It was not long, however, before gambling operators began to realize the full potential of the electronic video technology. Manufacturers quickly began producing relatively inexpensive, easy to maintain, and highly portable video gambling devices.⁵⁶ As the movement gained momentum, several new manufacturers entered into the field, and some established manufacturers converted from amusement-only devices to video gambling devices.⁵⁷

Video gambling devices are typically based on traditional games of chance such as poker, blackjack, craps, and horse racing. Like pinball machines adapted for gambling, video gambling machines accept multiple coins and are equipped with knock-off switches and meters.⁵⁸ Unlike amusement-only video games, however, the gambling devices are not dependent on any significant degree of skill; practice will not improve performance. In addition, very little entertainment value is derived from the game itself. Instead, the excitement of the game comes from the possibility of winning money.⁵⁹

53. King, *supra* note 13, at 207.

54. GAMBLING IN AMERICA, *supra* note 21, at 170.

55. Nulty, *Why The Craze Won't Quit*, FORTUNE, Nov. 15, 1982, at 114, 116; Note, *First Amendment Protection of Artistic Entertainment: Toward Reasonable Municipal Regulation of Video Games*, 36 VAND. L. REV. 1223, 1225 (1983).

56. *Hearing*, *supra* note 52, at 104 (prepared statement of the National Coin Machine Institute). These machines cost anywhere from \$1,400 to \$4,000. *Id.* at 22 (testimony of William L. Holmes, Special Agent, Federal Bureau of Investigation).

57. *Id.* at 104, 106 (prepared statement of the National Coin Machine Institute); see also *infra* notes 94-100 and accompanying text.

58. For a description of knock-off switches and meters, see *supra* notes 48-49 and accompanying text.

59. Many vendors of video gambling devices admit that the main appeal of these games is the chance of winning money. *Hearing*, *supra* note 52, at 10 (quoting *Newsday*, July 28, 1983).

Video gambling devices may be found not only in states with legalized gambling, but also in jurisdictions where gambling is illegal. In those jurisdictions, the machines do not make direct payouts. Instead, they are either built without a payout mechanism or old machines are modified by removing the payout mechanism. Thus, because the payout is not direct, they do not fall squarely within state statutes proscribing slot machines.⁶⁰ These video devices, which have been called "slot machines in sheep's clothing,"⁶¹ are known as "gray area" machines.⁶²

A. Characteristics of Gray Area Gambling Devices

A typical example of a gray area machine is video draw poker.⁶³ The player inserts between one and ten coins to begin play. The number of coins inserted registers on the machine and is displayed under the heading "credits" or "skill points." The player then wagers some or all of these credits.⁶⁴ As play begins, the machine displays five playing cards, as in a typical draw poker hand. The player usually has the option of discarding one or more cards which are then redealt by the machine. Depending on the cards displayed at the conclusion of play, the player either wins additional credits, or loses those that were bet. When a successful

60. Jackson Clarion Ledger, Jan. 31, 1988, at 11A, col. 1.

61. *Hearing, supra* note 52, at 20 (statement of Chairman Roth).

62. An industry publication reported that in 1983, 27% of the nation's operators admitted operating gray area machines. This figure was up threefold from 1982. *Embroiled in Gray Area*, PLAY METER, Feb. 1, 1985 at 42. A Dallas distributor reported that 7 out of 10 machines he sold were card games. The matter had become of such concern nationwide that on October 1, 1984, the United States Senate Permanent Subcommittee on Investigations conducted a hearing to explore the problem. *Hearing, supra* note 52. More recently, video gambling has been identified as a "craze" which accounts for up to 80% of the profit in some casinos. *America's Gambling Fever*, Business Week, April 24, 1989, at 112, 114.

63. Other typical gray area machines are associated with craps, blackjack, and horse racing. Some manufacturers have attempted to disguise the appearance of the game, while retaining all of the original characteristics of play. Thus, in a game known as "Dwarf's Den," the images of five dwarfs consisting of four different color groups numbered from one to thirteen are displayed. Depending upon how the images interrelate at the end of play (such as if two or more are of the same number), the player wins and receives additional credits, or loses the credits previously wagered. The play is exactly the same as video poker. *Hearing, supra* note 52, at 17 (testimony of William L. Holmes, Special Agent, Federal Bureau of Investigation). This "disguise," however, was successful and, due to the wording of an Ohio statute, this game was found not to be a gambling device. *Id.* at 22.

64. The machine does not differentiate between coins inserted and credits which have been won on previous plays. *Hearing, supra* note 52, at 16 (testimony of William L. Holmes, Special Agent, Federal Bureau of Investigation).

player is ready to quit, he or she will be paid off for the accumulated credits.

Knock-off switches and meters are almost always found on gray area video gambling devices,⁶⁵ and except for gambling purposes, there is no reasonable use for these features.⁶⁶ Because these features transform entertainment-only machines into gambling devices, any video machine so equipped should be considered a gambling device per se.⁶⁷

Another feature on gray area devices specifically designed for gambling is a power interrupt circuit. These circuits are activated when a power failure occurs, serving to preserve the number of credits the gambler has earned. Casinos in Atlantic City are required to equip their video poker machines with power interrupt circuits.⁶⁸ Since any loss on a normal amusement-only game would be minimal, however, such machines are usually not equipped with power interrupt circuits.⁶⁹

Gray area gambling devices also accept multiple coins.⁷⁰ This allows the player to increase the stakes on a given bet. In contrast,

65. Although knock-off switches are not usually visible, at least one court has noted that a "credit display meter" which does not differentiate between replays won and those paid for is indicative of a gambling device. This display meter is visible and is typically found on devices equipped with knock-off switches. See *United States v. Sixteen Elec. Gambling Devices*, 603 F. Supp. 32, 33 (D. Haw. 1984).

66. *Hearing, supra* note 52, at 64 (prepared statement of William L. Holmes, Special Agent, Federal Bureau of Investigation); see also *People v. One Mach. Known as "Circus Days,"* 23 Ill. App. 2d 480, 489-91, 163 N.E.2d 223, 228 (1960); *State v. 158 Gaming Devices*, 59 Md. App. 44, 57-58, 474 A.2d 545, 552 (1984), *aff'd in part, rev'd in part*, 304 Md. 404, 499 A.2d 940 (1985). An amusement device does not require a knock-off meter. It uses only a simple meter to record coins accepted by the device, which is used by the operator to determine whether anyone has tampered with the coin box, rather than for an illegitimate purpose. See *id.* at 57-58, 474 A.2d at 552.

67. See *People v. One Mach. Known as "Circus Days,"* 23 Ill. App. 2d 480, 489-91, 163 N.E.2d 223, 227-29 (1960). Recently, gambling machine manufacturers have attempted to disguise knock-off switches by integrating them into the circuitry of the machine so that they can only be located by programming the machine in a certain way. See *Hearing, supra* note 52, at 19 (testimony of William L. Holmes, Special Agent, Federal Bureau of Investigation). A less effective means of disguising the true nature of these gray area machines is to post a sign which says "For Amusement Only." As others have noted, these signs never appear on true amusement-only devices. *Id.* at 110 (letter from Millie McCarthy, President, New York State Coin Machine Association, Inc. to Bruce Selcraig, U.S. Senate Permanent Subcommittee on Investigations (Sept. 21, 1984)).

68. See N.J. STAT. ANN. § 5:12-100(h) (West 1988).

69. *Hearing, supra* note 52, at 64 (prepared statement of William L. Holmes, Special Agent, Federal Bureau of Investigation).

70. Some amusement-only games accept multiple coins, but usually no more than two or four times the amount required for a single play. This is to allow additional players to compete against one another. In exchange for the additional coins, the

the first coin deposited into an amusement-only machine buys everything that the game has to offer—the enjoyment inherent in the playing of the game.

Another feature distinguishing an amusement-only game from a gambling machine is the length of play time. The play on gray area machines is always quick; actual playing time on gambling devices may be only a matter of seconds.⁷¹ The importance is in winning or losing.⁷² In contrast, with amusement-only games, playing the game itself is important; these games are generally designed to be played for one to four minutes. In fact, an exceptionally skillful player can play for hours.⁷³

Gray area gambling devices also offer a great number of skill points or credits for free replays—far more than amusement-only games offer. For instance, in an amusement-only pinball game a skillful player might earn one, two, or three free replays. However, a player who stakes eight coins on a poker machine play and obtains a royal flush can possibly win a return of 4,000 credits.⁷⁴

Although courts and law enforcement authorities have had difficulty in distinguishing gray area machines from amusement-only video machines, the distinguishing features described above are not hard to recognize.⁷⁵ After all, gambling machines must necessarily attract gamblers to the machine. If the machines were not easy to distinguish, fewer profits would be gained.

amusement-only device provides additional games. Gray area machines, however, accept additional coins which are all wagered on a single play by one person.

71. *Hearing, supra* note 52, at 68 (prepared statement of William L. Holmes, Special Agent, Federal Bureau of Investigation). The time of play on a video draw poker gambling device may appear to be extended, due to the player's time in deciding which cards to discard. However, except for any minor delays on the player's part, play itself is very fast. An additional characteristic of video gambling devices is the retention ratio switch. See *infra* note 70 and accompanying text.

72. See *Beets v. Commonwealth*, 437 S.W.2d 496, 498–99 (Ky. 1969) (involving a pinball-type gambling device, about which testimony was given to the effect that the excessive number of replays could not be played off in 20 hours); see also *A.B. Long Music Co. v. Commonwealth*, 429 S.W.2d 391 (Ky. 1968).

73. *Hearing, supra* note 52, at 20 (testimony of William L. Holmes, Special Agent, Federal Bureau of Investigation).

74. *Id.* at 21 (testimony of William L. Holmes, Special Agent, Federal Bureau of Investigation).

75. R. KING, *supra* note 49, at 48 (referring to the difference between amusement-only pinball machines and gambling pinball machines). But see Bilek & Ganz, *The Pinball Problem—Alternative Solutions*, 56 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 432, 434 (1965) ("Only a detailed inspection of the working parts inside the machinery shell reveals the true nature of a pinball machine."). The Bilek and Ganz article was severely criticized in King, *The Pinball Problem in Illinois—An Overdue Solution*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 17 (1966).

B. *The Chance Factor*

Because chance is one of the three traditional elements of gambling it is a necessary characteristic of gray area devices. Unlike other characteristics, however, chance is not always easy to identify. Thus, courts are often left searching for features which indicate the presence of chance. One such feature is a switch which allows the operator to set the "retention ratio" or "house percentage." This switch predetermines how much of the money deposited into the machine will be paid back to the players and how much will be retained. The ability to control the pay-out feature clearly shows that the machine is based on chance, not skill. If skillful players were being rewarded, the operator would have little or no control over how often a player could win.⁷⁶

Other courts looking for the element of chance have delved into an analysis of whether video poker games exactly simulate the game of draw poker. These courts then evaluate the video machine under statutes designed to control poker card games.⁷⁷ In Ohio, for instance, a statute defines "Game of Chance" as including poker.⁷⁸ The Supreme Court of Ohio determined that video poker machines exactly simulate the game of poker and therefore constitute games of chance.⁷⁹ In Montana, by contrast, the Supreme Court found that video poker lacked the skills involved in real poker (e.g., bluffing, raising, and folding) and therefore did not fall within the statutory exception permitting poker—as a game of skill—to be played in the state.⁸⁰

76. Dealers and operators of video gambling devices are well acquainted with such features. A recent brochure distributed by a video gambling device manufacturer advertised a game called Hi-Lo Double Up Joker Poker Deluxe. Among the features listed in the brochure are: "Superfast playing action . . . On-Screen and mechanical accounting . . . Battery backup protection . . . Compatible with ticket vendor . . . Compatible with token vendor . . . Adjustable percentage . . . Single coin limit option." Each of these features indicates the machine's adaptability to gambling purposes. S. M. S. Manufacturing Corporation brochure (copy on file at UCLA Law Review office).

77. See *United States v. Sixteen Elec. Gambling Devices*, 603 F. Supp. 32, 33 (D. Haw. 1984).

78. OHIO REV. CODE ANN. § 2915.01(D) (Anderson 1987).

79. *Mills-Jennings of Ohio, Inc. v. Department of Liquor Control*, 70 Ohio St. 2d 95, 97-98, 435 N.E.2d 407, 408 (1982); see also *Yasin v. Byrne*, 121 Ill. App. 3d 167, 171, 459 N.E.2d 320, 323 (1984) (video poker "exactly simulates the card game of draw poker").

80. *Gallatin County v. D & R Music & Vending, Inc.*, 208 Mont. 138, 141-42, 676 P.2d 779, 781 (1984); see MONT. CODE ANN. § 23-5-311(2) (1987). Without looking at any specific state statute, it is not hard to see that video poker machines (and other related gambling devices) do not depend upon the same skills that real poker does. Real poker involves five "skill" features: (1) knowledge of the game's mathematics, (2)

Despite the difficult and confusing analysis employed by courts, if the elements of consideration and reward are established, the element of chance should be deemed present. This is evident when one considers Atlantic City, Nevada, and other areas outside of the United States where video gambling devices have become important revenue generators to casinos and other gambling operators.⁸¹ In order to be profitable to the casinos, these games *must* be based on chance. If skilled gamblers could win regularly, the casinos would begin to lose money, and the machines would soon be removed from the gambling floor. Casinos simply cannot afford to reward skill.⁸² Therefore, if consideration and reward are present, the element of chance must predominate over any degree of skill.⁸³

money management, (3) psychological deception, (4) card memory and analysis, and (5) betting courage. Video poker, however, does not involve the "skills" of holding, folding, bluffing or raising. In fact, the only "skill" that can work to the gambler's advantage on a video poker machine is the knowledge of the game's mathematics. The game is based on the luck of the draw—clearly a matter of chance. *Hearing, supra* note 52, at 70 (prepared statement of William L. Holmes, Special Agent, Federal Bureau of Investigation). As such, at least four state supreme courts have ruled that video poker is a game of chance, not skill. *Games Management, Inc. v. Owens*, 233 Kan. 444, 449, 662 P.2d 260, 264 (1983); *Gallatin County v. D & R Music & Vending, Inc.*, 208 Mont. 138, 141-42, 676 P.2d 779, 781 (1984); *Mills-Jennings of Ohio v. Department of Liquor Control*, 70 Ohio St. 2d 95, 97, 435 N.E.2d 407, 409 (1982); *Commonwealth v. Two Elec. Poker Game Machs.*, 502 Pa. 186, 197, 465 A.2d 973, 977-78 (1983).

81. In 1981, slot machines (including video gambling devices) produced 42.7 percent of all gaming revenue in Nevada and 43 percent of all gaming revenue in Atlantic City. *Hearing, supra* note 52, at 51 (prepared statement of William L. Holmes, Special Agent, Federal Bureau of Investigation, citing a survey conducted by *Public Gaming Magazine*).

82. King, *supra* note 13, at 201. Las Vegas once encountered a group of gamblers who had found a method to win on slot machines. By timing the period between when the wheels stopped spinning and when the lever should be pulled, these gamblers learned to win with regularity. The entire Nevada slot machine business dropped dramatically. J. SCARNE, *supra* note 16, at 451-54. In 1948, slot revenues were \$700 million; by 1949, revenues were down to \$200 million. *Id.* at 454. A slot machine manufacturer's representative was quoted as saying "if we don't find an answer to this . . . gimmick fast, slot machines are doomed." *Id.* at 453. Fortunately for Las Vegas, an answer was found in the form of a random timing device. The point is that no gambling device can survive if gamblers can win with regularity. Therefore, video gambling devices cannot let players win regularly, no matter what degree of skill they have.

83. When casino gambling is based upon a contest which truly involves a game of skill, such as sports betting, the casinos make their profit by finding a slice of profit in the odds. For instance, the gamblers on each side of a sporting event might have to bet six dollars in the hope of winning five. If bets are placed equally on each team, the casino stands to profit by almost 17 percent. See *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 95 n.121 (D.C. Cir.) (en banc) (Wilkey, J., dissenting) ("In all games of chance in which theoretically the factor of human control is not present, e.g., roulette, dice, the fall of cards, the risk of a given event occurring or not occurring can be calculated with mathematical certainty. In those games in which human or animal skill is presumed to predominate, e.g., football, basketball, horse racing, the facts as to

C. Reasons for Concern

It is very difficult to provide an accurate estimate of the amount of illegal gambling activity in the United States.⁸⁴ However, by all estimates the amount of money involved in illegal gambling on gray area video machines is very significant.⁸⁵ Despite the proliferation of gray area devices, some commentators have suggested that gambling, as a "victimless crime," should not be of great concern to the authorities.⁸⁶ Nevertheless, two main areas of concern have evolved relating to gambling on coin-operated devices: the spread of organized crime and associated public corruption, and the rise in the number of chronic gamblers.

1. Organized Crime and Video Gambling

Organized crime⁸⁷ controls much of the coin machine gambling in the United States.⁸⁸ Coin-operated gambling devices are

the physical conditions and mental attitude of the contestants are avidly sought by the professional risk-assessors; it is on the basis of known facts that the initial odds are fixed.") (emphasis in original), *cert. denied*, E.I. duPont de Nemours Co. v. Environmental Protection Agency, 426 U.S. 941 (1976); see also Report of the ABA Committee on Organized Crime in Interstate Commerce, reprinted in 77 ABA ANNUAL REPT. 332 (1952) ("If professional gambling were a 'fair gamble' for the public, it would hold no lure for the promoter.").

84. See Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 998 n.338 (1978); GAMBLING IN AMERICA, *supra* note 21, at 63-65 ("The Commission believes that neither this nor any other survey is able to measure accurately the specific dollar level of an illegal activity.").

85. See *infra* notes 92-93 and accompanying text.

86. See, e.g., G. GEIS, *supra* note 1, at 224-50.

87. The term "organized crime" has many meanings. See Blakey & Kurland, *supra* note 84, at 960 n.147; DEVELOPMENTS, *supra* note 3, at 110 n.77. The Commission on the Review of the National Policy Toward Gambling associated it with the Mafia or La Cosa Nostra. See GAMBLING IN AMERICA, *supra* note 21, at 171. In this Article, "organized crime" refers to large-scale operations which use force, bribery, and intimidation to conduct their unlawful activities, regardless of any ethnic, racial, or other distinguishing features.

88. These criminal operations originally gained prominence in the United States during Prohibition. R. KING, *supra* note 49, at 24; see also GAMBLING IN AMERICA, *supra* note 21, at 170. Although it is often reported that organized crime is a product of Prohibition, organized gambling syndicates existed prior to Prohibition. These syndicates used their gambling profits to move into bootlegging where they gained more notoriety. See DEVELOPMENTS, *supra* note 3, at 185-87, 349-51. They gradually expanded their areas of influence into extortion, prostitution, corruption of public officials, organized labor, and, finally, illegal gambling. See *id.* at 351; R. KING, *supra* note 49, at 24. By 1931, it was estimated that revenues from illegal gambling were approximately \$500 million per year. *Id.* With the repeal of the eighteenth amendment in 1933, organized crime syndicates found themselves depending primarily on the proceeds of gambling to hold their empires together. *Id.* at 25. In 1961, U.S. Attorney General Robert F. Kennedy testified that profits from illegal gambling were huge and

particularly well suited to organized crime's purposes. Gambling, as a "victimless crime," does not provoke the type of adverse reactions that lead to strict enforcement of state laws.⁸⁹ Moreover, placing the machines in otherwise legitimate businesses has the effect of discouraging enforcement by authorities, shielding the true criminals behind the operation, and perhaps giving the organization a foothold in otherwise legitimate businesses.⁹⁰ Organized crime's "muscle" can be used to obtain advantageous placements of machines, discourage competition, and corrupt public officials charged with enforcing antigambling laws.⁹¹

Profits from coin-operated machines are staggering. Testimony before a congressional subcommittee suggested that video gambling brings its operators an annual profit of \$15 billion.⁹² A single gray

were the primary source of the funds which financed organized crime. *Legislation Relating to Organized Crime: Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, and H.R. 7039 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 87th Cong., 1st Sess.* 11 (1961). In 1977, the National Institute of Law Enforcement and Criminal Justice estimated that organized crime controlled half of all the illegal gambling in the northeastern section of the United States. DEVELOPMENTS, *supra* note 3, at 123, 740-41, citing TASK FORCE ON LEGALIZED GAMBLING, EASY MONEY (1974).

89. DEVELOPMENTS, *supra* note 3, at 742.

90. See MAFIA U.S.A. 360 (N. Gage ed. 1972). Organized crime's efforts to infiltrate legitimate businesses was one of the main concerns which prompted enactment of the Organized Crime Control Act of 1970. Title IX of the Act is known as the Racketeer Influenced and Corrupt Organizations Act (RICO). See Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 778 (1988).

91. King, *supra* note 13, at 203 ("coin devices . . . which automatically extract large profits from the patronage attracted by someone else's enterprise, lend themselves uniquely to 'muscle' tactics in placing machines and protecting routes and territories." (footnote omitted)); R. KING, *supra* note 49, at 29 ("wherever gamblers operate there is always some degree of official corruption") (emphasis in original); see also HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, PROHIBITING THE TRANSPORTATION OF GAMBLING DEVICES IN INTERSTATE COMMERCE, H.R. REP. NO. 1828, 87th Cong., 2d Sess., reprinted in 1962 U.S. CODE CONG. & ADMIN. NEWS 3809, 3816-18. In addition, the confusion surrounding the laws relating to gambling devices makes enforcement difficult. See *supra* notes 23-52 and accompanying text. When the authorities finally do begin to prohibit the devices in any one area, the organization can simply move on to new territories. For instance, in the mid-1960s, when several states had begun to prohibit gambling, pinball machines, and other coin-operated gambling devices, see *supra* notes 53-54 and accompanying text, organized crime began shipping many machines to England, where the gambling laws were more relaxed. See MAFIA U.S.A. 131 (N. Gage ed. 1972).

92. *Hearing, supra* note 52, at 101 (prepared statement of Stephen Hochman, President, New York State Coin Machine Association). This figure is subject to dispute. See *Hearing, supra* note 52, at 112-15 (letter of Eugene Martin Christiansen); I.N. ROSE, *supra* note 7, at 86.

area machine can generate profits anywhere from \$2,000 to \$5,000 per month.⁹³

Operators of gray area machines were careful to build their empire slowly. The first gray area machines were placed in "out of the way or questionable locations."⁹⁴ Enforcement of antigambling laws in these locations was sparse, with many authorities taking the position that their resources were better used to protect the public from violent crimes.⁹⁵ In addition, bribery of public officials may have also contributed to the lack of enforcement.⁹⁶

Lack of police enforcement led to the proliferation of gray area machines. Operators who did not supply or service the machines soon felt pressure to do so.⁹⁷ They found themselves faced with a no-win alternative: they could either see their businesses progressively destroyed by illicit invasions of their markets, or they could become criminals themselves.⁹⁸ Under these conditions many legitimate operators decided to enter the gray area.⁹⁹ Seizing upon the opportunity, organized crime managed to set up a few large-scale coin machine distributorships.¹⁰⁰

Where the video industries are controlled by organized crime, the results are obvious. Organized crime uses its "muscle" to drive out competitors and increase its power. This muscle includes cases of arson and death threats in Tennessee and California and car bombings in Connecticut and Pennsylvania.¹⁰¹ Criminal operators drive their competition out of business and coerce proprietors to install their machines.¹⁰² Muscle, however, is not always needed to convince operators to install gray area machines. An obviously disgruntled truck stop operator testified before the Congressional Permanent Subcommittee on Investigations that five confiscated video

93. *Hearing, supra* note 52, at 40 (testimony of Angelo J. Aponte, Commissioner, Department of Consumer Affairs, New York City); *id.* at 110 (letter from Millie McCarthy, President, New York State Coin Machine Association, Inc.).

94. *Id.* at 110 (letter from Millie McCarthy, President, New York State Coin Machine Association, Inc.).

95. *Id.* at 106 (prepared statement of the National Coin Machine Institute).

96. *Id.* at 110 (letter from Millie McCarthy, President, New York State Coin Machine Association, Inc.).

97. *Id.* at 110-11.

98. *Id.* at 106 (prepared statement of the National Coin Machine Institute).

99. *Id.* at 110-11 (letter from Millie McCarthy, President, New York State Coin Machine Association, Inc.).

100. *Id.* at 111.

101. *Id.* at 102 (prepared statement of Stephen Hochman, President, New York State Coin Machine Association); *see also id.* at 106 (prepared statement of the National Coin Machine Institute).

102. *Id.* at 106 (prepared statement of the National Coin Machine Institute).

poker machines at his truck stop had brought in over \$100,000 per year to his business.¹⁰³ Some small businesses count on the income from the machines to pay for their expenses and overhead.¹⁰⁴

Efforts to rid the coin machine industry of organized crime have been of great concern since at least 1957.¹⁰⁵ The profits from the machines can easily be used to finance other criminal activity, such as drug trafficking and loan sharking.¹⁰⁶ As Senator McClellan stated in 1969:

We must recognize, too, that La Cosa Nostra's control of gambling ravishes the entire society, not merely the gamblers, since the \$6 or \$7 billion profit organized gambling operators earn each year bankrolls not only the Mafia drug trade, but organized crime's infiltration of legitimate business and other activities, and this is one of the Nation's most serious criminal justice and economic problems.¹⁰⁷

The huge profits from gray area machines also create an enormous potential for public corruption.¹⁰⁸ Charles H. Morin, Chairman of the Commission on the Review of the National Policy Toward Gambling, has concluded that gambling "contributes more than any other single enterprise to police corruption . . . and to the well-being of the Nation's criminals."¹⁰⁹ In the mid-1970s, it was

103. *Id.* at 27-28 (indicating that the operator saw no difference between video gambling devices and a state run lottery).

104. *Id.*; see also *id.* at 38-39 (testimony of Angelo J. Aponte, Commissioner of Consumer Affairs, New York City).

105. *Id.* at 110 (letter from Millie McCarthy, President, New York State Coin Machine Association, Inc.).

106. *Id.* at 13 (opening statement of Chairman Roth).

107. *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292, 91st Cong., 1st Sess. 87 (1970); see also DEVELOPMENTS, supra note 3, at 606; Hearing, supra note 52, at 12 (quoting the Washington Post, Sept. 22, 1984). Law enforcement officials in Allegheny County, Pennsylvania quoted organized crime figure Charles Killington as saying that money from coin-operated gambling machines contributed in large measure to finance organized crime killings and to fund expanding drug operations. *Id.* at 102 (prepared statement of Stephen Hochman, President, New York State Coin Machine Association).*

108. *Hearing, supra note 52, at 13* (opening statement of Chairman Roth); see also 115 CONG. REC. 10,736 (1969) (remarks of Senator Hruska) ("It is not pleasant to contemplate, but we cannot blind ourselves to the distasteful fact that some bribery and bribery attempts of law enforcement officials at all levels have been characteristic of the presence of organized crime."); *Hearing, supra note 52, at 106* (prepared statement of the National Coin Machine Institute) ("fertile ground for official corruption").

109. GAMBLING IN AMERICA, *supra* note 21, at ix; see also *id.* at 35 ("Repeatedly, investigations of police departments have found gambling . . . to be a prime source of systematic corruption.").

estimated that payoffs to law enforcement officials from gambling activities alone was as high as \$500 million per year.¹¹⁰

In Philadelphia, for example, at least seven police officers were convicted and sixteen others indicted on charges of accepting payoffs to permit gambling operators to continue their operations without harassment.¹¹¹ More recently, state and federal authorities seized over seventy illegal gambling devices from twenty-six locations in Mississippi.¹¹² In addition, at least one former Mississippi county sheriff pleaded guilty to accepting payments totaling \$48,000 in exchange for not enforcing prohibitions against gray area machines.¹¹³ Although judges and prosecutors are also susceptible to bribery, police remain the most likely target for corrupting influences.¹¹⁴

One final contributing factor to the success of organized crime is the public's perception of gambling as a "victimless crime."¹¹⁵ Since public demand for police services focuses primarily on violent crimes and crimes to property,¹¹⁶ judges and prosecutors tend to treat gambling violations lightly.¹¹⁷ Moreover, since some forms of

110. See DEVELOPMENTS, *supra* note 3, at 741 n.17.

111. *Hearing, supra* note 52, at 4-5 (reprinting N.Y. Times, Aug. 9, 1984). In fact, police in Philadelphia, at least in the past, extorted so much money from gambling operators that payoffs to winning gamblers had to be reduced. DEVELOPMENTS, *supra* note 3, at 126. Philadelphia Police Commissioner Gregore Sambor estimated that video poker generated \$4 million each week for organized crime forces in Philadelphia. *Hearing, supra* note 52, at 3 (reprinting Philadelphia Daily News, Sept. 7, 1984). This profit, according to an indictment, permitted about \$350,000 in payments to be paid to 16 police officers over 3 1/2 years. *Id.* at 6 (reprinting Philadelphia Inquirer, July 14, 1984).

112. Jackson Clarion-Ledger, June 10, 1988, at 4B, col. 5.

113. Jackson Clarion-Ledger, June 16, 1988, at 2B, col. 1; see also Memphis Commercial Appeal, Nov. 7, 1988, at B1, col. 1 (county sheriff from Arkansas convicted of extortion and racketeering for accepting bribes from gambling machine operators).

114. GAMBLING IN AMERICA, *supra* note 21, at 41. A 1972 commission investigating corruption in the New York City police department found corruption to be at its most sophisticated among plainclothesmen assigned to enforce gambling laws. The policemen could expect to receive between \$300 and \$1,500 per month. *Id.*

115. See generally MAFIA U.S.A. 269-319 (N. Gage ed. 1972).

116. See GAMBLING IN AMERICA, *supra* note 21, at 41; *Hearing, supra* note 52, at 106 (prepared statement of the National Coin Machine Institute).

117. A 1971 New York State legislative committee found that an arrested gambler faced only a 2% chance of going to jail, and even then, the sentence would be light. *Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control, and Effect on Society* (1971), cited in DEVELOPMENTS, *supra* note 3, at 197. This treatment has not gone unnoticed by the police. A substantial majority of the delegates to the 1975 National Conference of the Fraternal Order of Police agreed that prosecutors would rather not be bothered with gambling cases, and that judges usually give light fines and/or suspended sentences in gambling cases. GAMBLING IN AMERICA, *supra* note 21, at 55 n.30; see also *id.* at 46-47 (light sentences for gambling convictions);

gambling are legal, while other similar forms are not, the public perceives gambling as a relatively minor crime.

2. Social Consequences of Gray Area Gambling

Experts have estimated that there are between six and ten million compulsive gamblers in the United States.¹¹⁸ By encouraging new segments of society, including children,¹¹⁹ to gamble, gray area machines have had a dramatic effect on the number of compulsive gamblers. Until approximately 1980, the typical description of a compulsive gambler who attended Gambler's Anonymous was a middle-aged, middle class, white male—usually a businessman or a professional.¹²⁰ Now, however, poker machine addicts include teenagers, retired people, women, and people from all vocations and professions.¹²¹ Previous studies showed a typical pattern of ten to fifteen years of compulsive gambling before a person "hit bottom."¹²² With poker machine addicts, however, this period is reduced to as little as a few months.¹²³

Profile of Organized Crime: Great Lakes Region: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 98th Cong., 2d Sess. 191 (1984) (testimony of Leonard Gilmen, U.S. Attorney, Detroit, Mich.) ("Judges consider gambling not a serious crime; a victimless crime and the sentences that we have seen and I have been involved in law enforcement for 16 years now, have been probation or suspended sentences or small fines.").

118. *Hearing, supra* note 52, at 94 (prepared statement of Valerie C. Lorenz, Ph.D). In 1976, Gambler's Anonymous estimated that there were between six and nine million compulsive gamblers in the United States. GAMBLING IN AMERICA, *supra* note 21, at 72; *see also* G. GEIS, *supra* note 1, at 245 (placing the estimate at 10 million).

119. *Hearing, supra* note 52, at 38–39 (testimony of Angelo J. Aponte, Commissioner of Consumer Affairs, New York City).

120. *Id.* at 97 (prepared statement of Valerie C. Lorenz, Ph.D). This description is generally in accord with the patterns found by the Commission on the Review of the National Policy Toward Gambling. The Commission found that more males bet than females, more whites bet than non-whites, higher income groups tend to bet more than low income groups, and participation rises uniformly with education. However, the Commission also found that these generalizations change sharply when considering only illegal betting. GAMBLING IN AMERICA, *supra* note 21, at 58.

121. *Hearing, supra* note 52, at 97 (prepared statement of Valerie C. Lorenz, Ph.D.).

122. *Id.*

123. *Id.* A survey of 15 poker machine addicts revealed that their ages ranged from 21 to 50 (mean age 35); their annual income ranged from under \$10,000 to over \$80,000 (mean income \$26,000); and they had lost from \$2,000 to \$300,000 on gambling. To support their habit, 11 wrote bad checks, 5 forged checks, 4 forged signatures on loans or credit cards, 3 embezzled, 3 dealt in stolen goods, 3 filed false insurance claims or other reports, 2 loansharked, 1 became a bookie, and 1 became a bag man and numbers runner. Two gamblers were arrested as a result of these crimes and three were fired. *Id.* at 100 (11 gamblers had committed 2 or more types of the listed crimes, accounting for the total of over 15).

While the question of "legislated morality" is beyond the scope of this Article,¹²⁴ it must be noted that video gambling devices seem to amplify problems traditionally associated with gambling. The ease and repetition of play on slot machines has caused many authorities, including the British government, to take note of their possible contribution to addictive gambling.¹²⁵ Given the compelling state and the federal interest in attempting to curb gambling, it is clear that video gambling devices are an important target against which antigambling laws should be directed.

III. THE CURRENT LEGAL STANDARDS

Gray area machines may be regulated both by federal and state law. The relevant federal statute, commonly known as the Johnson Act, prohibits transportation of gambling devices across state lines¹²⁶ unless the device is expressly exempted by state statute.¹²⁷ In contrast, most state statutes focus on the machines themselves, and provide for confiscation and additional criminal penalties if the device falls within the state's definition of gambling devices.¹²⁸

A. Federal Regulation

Although regulation and control of gambling operations is a matter traditionally left to the states,¹²⁹ Congress has passed numerous federal statutes relating to the control and taxation of gambling.¹³⁰ Most of this federal legislation has been enacted since

124. See, e.g., G. GEIS, *supra* note 1, at 224.

125. See GAMBLING IN AMERICA, *supra* note 21, at 103.

126. 15 U.S.C. §§ 1171-1178 (1982).

127. 15 U.S.C. § 1172 (1982); see also NEV. REV. STAT. § 463.410 (1987) (exempting Nevada from the Johnson Act).

128. See, e.g., ILL. REV. STAT. ch. 38 para. 28-5 (1987) (confiscation and destruction).

129. GAMBLING IN AMERICA, *supra* note 21, at 7, 35.

130. See 8 U.S.C. §§ 1101(f)(5), 1182 (1987) (federal government can exclude aliens convicted of gambling); 12 U.S.C. §§ 25a, 339, 1730c, 1829a (1978) (national banks, state member banks, federally insured savings and loans, and federally insured non-member banks may not participate in lotteries); 15 U.S.C. §§ 3001-3007 (1982) (federal regulation of interstate off-track betting); 18 U.S.C. § 224 (1969) (sports bribery a federal crime); 18 U.S.C. §§ 1081-1083 (1979) (federal crime to set up a gambling ship); 18 U.S.C. § 1084 (1979) (federal crime to use a wire communication facility to transmit interstate gambling information); 18 U.S.C. §§ 1301-1307 (1979) (federal crime to use interstate mails to promote or participate in a lottery); 18 U.S.C. § 1511 (1979) (illegal to conspire to obstruct a state investigation into illegal gambling business); 18 U.S.C. §§ 1951-1955 (1979) (illegal to travel or use any facility in interstate commerce with the intent to carry on any business enterprise involving gambling); 18 U.S.C. §§ 1961-1968 (1979) (illegal to operate, control, or acquire an enterprise through a pattern of racketeering activity, which may be established by showing at least two predicate offenses,

1950,¹³¹ when the Senate established the Special Senate Committee to Investigate Organized Crime in Interstate Commerce. Commonly known as the Kefauver Committee,¹³² its purpose was:

to make a full and complete study and investigation to determine whether organized crime utilizes the facilities of interstate commerce or whether it operates otherwise through the avenues of interstate commerce to promote any transactions which violate Federal law or the law of the State in which such transactions might occur.¹³³

At the beginning of the Committee's investigation, Attorney General McGrath stated that the Justice Department had no evidence that a "national crime syndicate" existed.¹³⁴ After more than 600 witnesses testified at numerous public hearings, however, it became clear that criminal organizations were involved in numerous activities, including illegal gambling.¹³⁵

such as gambling, within ten years); 18 U.S.C. § 2516 (1979) (allowing the Federal Bureau of Investigation to apply for a wiretap for a suspected violator of the federal gambling laws); 20 U.S.C. § 107a (1976) (Supp. 1988) (allowing the blind, only, to sell lottery tickets on federal land); 25 U.S.C. § 1747 (1983) (Florida's anti-gambling laws apply to land transferred from Florida to the United States for the use and benefit of the Miccosukee Indian Tribe); 26 U.S.C. §§ 61, 165(d) (1988) (gambling winnings are taxable); 26 U.S.C. § 513 (1988) (allowing charities to run bingo games without losing their not-for-profit status); 26 U.S.C. §§ 1441, 3402(q) (1988) (tax withholdings on certain gambling winnings); 26 U.S.C. §§ 4401-4424, 4901, 4902, 4904-4906, 6419 (1988) (special taxes on the business of gambling); 29 U.S.C. § 1813 (1982) (Secretary of Agriculture can refuse to issue a certificate to a farm labor contractor who has been convicted of gambling); 39 U.S.C. § 3005 (1978) (giving the Postal Service the authority to intercept and return lottery mail).

131. Except for certain provisions of the Communications Act extending antilottery statutes to cover radio broadcasting in 1934 (see 18 U.S.C. § 1304 (1979)), Congress enacted no federal legislation between 1895 and 1948 that directly affected gambling. See Blakey & Kurland, *supra* note 84, at 958 n.138; DEVELOPMENTS, *supra* note 3, at 557.

132. The Committee originated with S. RES. 202, 81st Cong., 2d Sess. (1950). See DEVELOPMENTS, *supra* note 3, at 562 n.60.

133. S. REP. NO. 307, 82d Cong., 1st Sess. 20 (1951).

134. Wilson, *The Kefauver Committee, 1950*, reprinted in 5 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974 3450 (A. Schlesinger, Jr. & R. Burns eds. 1975). As late as 1959, F.B.I. Director J. Edgar Hoover still denied the existence of a national crime syndicate. *MAFIA* U.S.A. 127 (N. Gage ed. 1972).

135. See GAMBLING IN AMERICA, *supra* note 21, at 170 ("Revelations produced by the Kefauver investigation in 1950 and the McClellan hearings in 1963-64 focused national attention on the outrageous criminal activities of the underworld and stimulated more vigorous attempts at reform."); see also DEVELOPMENTS, *supra* note 3, at 466 ("Indeed, it was not until the early 1950s, when the Kefauver Committee held its hearings, that the nation became aware of the threat that organized crime presented to Nevada and to the nation at large.").

As a "direct outgrowth"¹³⁶ of the Kefauver Committee's investigation and reports,¹³⁷ Congress passed the Johnson Act.¹³⁸ Aimed at "nationwide crime syndicates," the Act limited the interstate transportation of gambling devices and required elaborate reporting and registration measures.¹³⁹ The Act's purpose was to "support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting use of channels of interstate or foreign commerce for the shipment of such machines or devices into such States."¹⁴⁰ Since the legislation was designed to support, not supplant, local gambling policies,¹⁴¹ a provision was included to allow states to exempt themselves from the Act's coverage.¹⁴²

136. DEVELOPMENTS, *supra* note 3, at 564 n.63; see H.R. REP. NO. 2769, 81st Cong., 2d Sess., reprinted in 1950 U.S. CONG. CODE & ADMIN. NEWS 4240, 4243.

137. S. REP. NO. 2370, 81st Cong., 2d Sess. (1950); S. REP. NO. 141, 82d Cong., 1st Sess. (1951); S. REP. NO. 307, 82d Cong., 1st Sess. (1951); S. REP. NO. 725, 82d Cong., 1st Sess. (1951).

138. Johnson Act, ch. 1194, 64 Stat. 1134 (1951) (codified as amended at 15 U.S.C. §§ 1171-1178 (1982)).

139. Johnson Act, ch. 1194, § 3, 64 Stat. 1135 (1951) (codified as amended at 15 U.S.C. § 1173 (1982)).

140. H.R. REP. NO. 2769, 81st Cong., 2d Sess., reprinted in 1950 U.S. CODE CONG. SERV. 4240; see Johnson Act, ch. 1194, § 2, 64 Stat. 1134, 1135 (1951) (codified as amended at 15 U.S.C. § 1172 (1982)).

141. See 1950 U.S. CODE CONG. SERV. at 4244; *Hearings Before the House Comm. on Interstate and Foreign Commerce on S. 3357 and H.R. 6736*, 81st Cong., 2d Sess. 37 (1950) (statement of Herzel H. E. Plaine, Office of the Assistant, Solicitor General, Dept. of Justice); see also DEVELOPMENTS, *supra* note 3, at 564-66 n.68.

142. See Johnson Act, ch. 1194, § 2, 64 Stat. 1134 (1951) (codified as amended at 15 U.S.C. § 1172 (1982)), which contained the following proviso:

Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: *Provided, further*, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

See also NEV. REV. STAT. § 463.410 (1986) (exempting Nevada from § 2 of the Johnson Act). Realistically, however, the federal legislation may well have had a direct impact on local gambling policies in states where certain gambling devices were considered lawful. Prior to the passage of this federal legislation, gambling devices could be imported and used in those states. After the Johnson Act, however, state legislatures had to affirmatively approve particular gambling devices in order to fall within the Act's exemption. This, in effect, would require the legislators to vote in favor of the "sin" of gambling. Many legislators are understandably reluctant to commit their approval of

The Johnson Act also described and defined the term "gambling devices."¹⁴³ In the original Senate bill, "gambling devices" were defined as:

any machine or mechanical device or parts thereof, designed or adapted for gambling or any use by which the user as a result of the application of any element of chance may become entitled to receive, directly or indirectly, anything of value.¹⁴⁴

The House, however, concerned that this definition was overly broad and might include amusement-only pinball machines as well as traditional slot machines, narrowed the definition in committee.¹⁴⁵ The definition of "gambling devices" ultimately adopted in 1951 included the traditional one-armed bandit slot machine, other coin-operated slot machines, and subassemblies or essential parts of either of the two types of machines.¹⁴⁶

Although the Johnson Act appeared to be well suited for attacking the problems traditionally associated with gambling devices,¹⁴⁷ three major problems quickly emerged. First, due to the limited role of the federal government in controlling matters tradi-

gambling devices to a recorded vote. See Blakey & Kurland, *supra* note 84, at 962-63 n.159.

143. Johnson Act, ch. 1194, § 1, 64 Stat. 1134 (1951) (codified as amended at 15 U.S.C. § 1171 (1982)).

144. S. REP. NO. 3357, 81st Cong., 2d Sess., § 1 (1950); see H.R. REP. NO. 2769, 81st Cong., 2d Sess. 6-7, reprinted in 1950 U.S. CODE CONG. SERV. 4240, 4245.

145. H.R. REP. NO. 2769, 81st Cong., 2d Sess., reprinted in 1950 U.S. CODE CONG. SERV. at 4245-46.

146. (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property;
or
(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

Johnson Act, ch. 1194, § 1, 64 Stat. 1134 (1951) (codified as amended at 15 U.S.C. § 1171 (1982)). See H.R. REP. NO. 2769, 81st Cong., 2d Sess., reprinted in 1950 U.S. CODE CONG. SERV. 4240, 4246.

147. The congressional committee reported that it favored the Johnson Act on the basis of two primary considerations:

- (1) . . . Nation-wide syndicates appear to derive substantial revenues from the operation of slot machines and similar gambling devices, and appear to put these revenues into other illegal enterprises with the resulting increase in crimes committed and corruption of public officials, all of which endanger our society; and

tionally left to the states, the Johnson Act did not apply to purely intrastate activities.¹⁴⁸ Second, and more damaging to the entire scheme of the Johnson Act, the Act's registration requirements for manufacturers and dealers of gambling devices were invalidated by the courts.¹⁴⁹ Third, the definition contained in the original Act was sufficiently narrow to allow manufacturers to design gambling devices that did not fall within its coverage.¹⁵⁰

The Johnson Act was riddled with inherent limitations and flaws. The Kefauver Committee, even before it disbanded, recommended expanding coverage of the Johnson Act to attack more effectively criminal profits from gambling machines.¹⁵¹ Eleven years later, in conjunction with Attorney General Robert F. Kennedy's attack on organized crime,¹⁵² the Gambling Devices Act of 1962

(2) slot machines and similar gambling devices appear to offer an opportunity for a particularly vicious form of gambling which "does not give the sucker (many of whom incidentally are juveniles) a decent break."

H.R. REP. NO. 2769, 81st Cong., 2d Sess., reprinted in 1950 U.S. CODE CONG. SERV. 4240, 4244-45.

148. See *United States v. Braun*, 119 F. Supp. 646, 647 (S.D. Ga.), *aff'd sub nom. United States v. Five Gambling Devices*, 346 U.S. 441 (1953); *United States v. Denmark*, 119 F. Supp. 647, 649-50 (S.D. Ga.), *aff'd sub nom. United States v. Five Gambling Devices*, 346 U.S. 441 (1953); *United States v. Five Gambling Devices*, 119 F. Supp. 641, 644 (N.D. Ga. 1952), *aff'd*, 346 U.S. 441 (1953).

149. Section 3 of the Act originally required manufacturers and dealers to file monthly records of sales and deliveries and to register annually with the Attorney General. See Johnson Act, ch. 1194, § 3, 64 Stat. 1135 (1951) (codified as amended at 15 U.S.C. § 1173 (1982)). However, in *United States v. Five Gambling Devices*, 346 U.S. 441, the Supreme Court held that the Johnson Act applied only to unlawful interstate shipments of gambling devices. *Id.* at 452. Thus, section 3 of the Act in effect required dealers to file a monthly report of activity that had already been declared illegal. This requirement clearly violated the fifth amendment privilege against self-incrimination, and was accordingly declared unconstitutional. *United States v. Ansani*, 138 F. Supp. 451, 453-54 (N.D. Ill. 1955), *aff'd*, 240 F.2d 216 (7th Cir.), *cert. denied*, 353 U.S. 936 (1957).

150. See *Lion Mfg. Corp. v. Kennedy*, 330 F.2d 833, 835 (D.C. Cir. 1964): [T]he major thrust of the 1951 Act [was directed] to the then familiar and widely prevalent slot machine, or "one armed bandit," as it is ruefully referred to by those addicted to the unequal sport it offers. The use of this language is quite understandable since, at the time, the traditional "slot machine" constituted the primary problem to be dealt with. Congress, however, failed to reckon with human ingenuity. New devices were developed which, although perhaps outside the definition in the Act, perpetuated the evils giving rise to the initial legislative concern.

See also *supra* notes 23-52 and accompanying text.

151. See S. REP. NO. 307, 82d Cong., 1st Sess. 14 (1951); see also King, *supra* note 13, at 204-05 (discussing the limited usefulness of the original Johnson Act).

152. See Blakey & Kurland, *supra* note 84, at 964-77. Concerning the original Johnson Act, Attorney General Kennedy testified that:

was passed.¹⁵³ The 1962 act amended the Johnson Act by expanding the definition of "gambling devices" to cover:

- (1) any so-called "slot machine" . . . or
- (2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and
 - (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or
 - (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.¹⁵⁴

In addition to the definitional changes, gambling device registration and filing requirements were substantially modified,¹⁵⁵ and a new forfeiture provision required the confiscation of any device found to be in violation of the Act.¹⁵⁶ A narrow exemption permitted the use of amusement-only coin-operated machines.¹⁵⁷

The modified Johnson Act proved more effective than its predecessor. Courts accepted the broad definition of "gambling devices"

Ten years of experience in enforcement of this act shows that there are serious flaws and loopholes, and that a major revision is necessary.

The Johnson Act now covers a machine which has a drum or wheel with symbols thereon, oranges, cherries, plums, and here and there a jackpot. This is the "one-arm bandit." The Johnson Act describes the operation of this machine as having some element of chance which may deliver or entitle the player to receive money or property. It further describes a machine which is coin operated and, of course, the machine covered by the act. . . . The existing definition will not extend to a machine in current use which is in every practical respect a "one-arm bandit," even to the extent of its physical appearance. The machine I refer to is called a "point maker." On its face is a glass on which are painted the traditional slot machine symbols which I mentioned. Behind the glass are [sic] a series of lights which flash on and off until one remains in each column. The machine registers free games which can be played off or paid off. This machine has been contrived by the gamblers to evade the provisions of the Johnson Act. Because it has no drum or wheel, is not coin operated, and does not deliver any money directly to the player, it is not covered by the act.

S. REP. NO. 645, 87th Cong., 1st Sess. 2 (1961).

153. Pub. L. No. 87-840, 76 Stat. 1075 (1962) (codified in 15 U.S.C. §§ 1171-1174 (1982)). Congress passed the 1962 amendments after the House Committee on Interstate and Foreign Commerce conducted hearings and submitted a report that considered the impact of syndicated crime on the coin machine industry. See H.R. Rep. No. 1828, 87th Cong., 2d Sess. 6, reprinted in 1962 U.S. CODE CONG. & ADMIN. NEWS 3809, 3811-12, 3816.

154. 15 U.S.C. § 1171(a) (1982).

155. See 15 U.S.C. § 1173 (1982).

156. 15 U.S.C. § 1177 (1982).

157. 15 U.S.C. § 1178 (1982).

and applied it to numerous types of machines,¹⁵⁸ including the modern day video gambling machines.¹⁵⁹ The Act itself has survived several attacks on its constitutionality,¹⁶⁰ and its registration provisions have been upheld against intrastate activities where the court can find an interstate effect.¹⁶¹

B. State Laws

Most state laws are aimed at restricting or eliminating devices upon which gambling takes place; they are not intended to affect

158. See, e.g., *United States v. Wilson*, 475 F.2d 108 (9th Cir. 1973) ("Bonanza" machine which dispensed coupons redeemable for cash); *United States v. Various Gambling Devices*, 368 F. Supp. 661 (N.D. Miss. 1973) (free replay pinball machine that was legal under state law); *United States v. 11 Star-Pack Cigarette Merchandiser Machs.*, 248 F. Supp. 933 (E.D. Pa. 1966) (device attached to cigarette vending machine that periodically rewarded customers with a free pack of cigarettes).

159. See *United States v. 137 Draw Poker-Type Machs. and Six Slot Machs.*, 606 F. Supp. 747, 753 (N.D. Ohio 1984), *aff'd*, 765 F.2d 147 (6th Cir. 1985); *United States v. Sixteen Elec. Gambling Devices*, 603 F. Supp. 32, 34 (D. Haw. 1984).

160. See, e.g., *United States v. H. M. Branson Distrib. Co.*, 398 F.2d 929, 933-34 (6th Cir. 1968) (section 1177 not unconstitutionally vague or ambiguous); *United States v. Five Gambling Devices*, 346 F. Supp. 999, 1002-03 (W.D. La. 1972) (section 1177 forfeiture does not violate due process).

161. *United States v. Five Gambling Devices*, 346 F. Supp. 999, 1003-04 (W.D. La. 1972). Moreover, if the machines have been involved in interstate commerce, they are subject to confiscation, unless the state into which they have been shipped has enacted a law specifically exempting itself from the federal statute. 15 U.S.C. § 1172 (1982); see also NEV. REV. STAT. § 463.410 (1986) (exempting Nevada from the Johnson Act). Assuming the state in question has not exempted itself, the issue of interstate shipment should not be difficult to determine. The federal scheme requires every manufacturer of a gambling device to "number serialim each such gambling device manufactured by him and permanently affix on each such device . . . such number, his name, and . . . any trade name under which he does business, and the date of manufacture of such device." 15 U.S.C. § 1173(b)(1) (1982). Each manufacturer must also be registered with the Attorney General. *Id.* § 1173(a)(1). Accordingly, by checking the machine for its manufacturer, it should be easy to determine whether the machine has been imported into the state, and therefore whether it is subject to confiscation. Application of the current Johnson Act is not difficult. Even good faith on the part of a purchaser would have no bearing on the issue of forfeiture in an *in rem* action against the machines under 15 U.S.C. § 1177. See *United States v. 137 Draw Poker-Type Mach. and Six Slot Machs.*, 606 F. Supp. 747, 755 (N.D. Ohio 1984), *aff'd*, 765 F.2d 147 (6th Cir. 1985). If the machine did not have the proper information affixed to it, that too would constitute a violation, subjecting the machine to forfeiture. 15 U.S.C. § 1173(e)(1) (1982). Assuming that the machine was manufactured in one state and is now located in another, the prosecution should be entitled to a summary judgment, holding that the machine has been involved in interstate commerce and is subject to confiscation. See *United States v. 137 Draw Poker-Type Mach. and Six Slot Machs.*, 606 F. Supp. 747, 755 (N.D. Ohio 1984). Even if the machine was manufactured in the same state in which it is now located, it may still be subject to confiscation if the owner or operator of the machine is in any way involved in interstate commerce and has failed to register with the Attorney General. 15 U.S.C. §§ 1173(a)(1), 1177 (1982). Accordingly, the federal statute can be effectively used by most states to control video gambling devices.

vending machines or true amusement-only games.¹⁶² General antigambling laws could be used to prohibit gambling devices, but prosecutions under them would require proof that gambling had actually taken place on the device. This proof is difficult to obtain because coin-operated gambling devices are designed effectively to disguise the fact that the machines are used for gambling. Modern gambling device manufacturers are able to avoid the reach of even the more detailed statutes by making slight modifications to their machines. Accordingly, state legislation should permit law enforcement authorities to seize those devices which are designed solely for gambling purposes, even if there is no eyewitness proof that gambling has actually occurred.¹⁶³

1. Problems of Scope

Surprisingly, one of the most common problems with legislation directed against coin-operated gambling devices is the breadth of the language employed.¹⁶⁴ Legislators, intent on including in the definition of "gambling devices" all items associated with gambling have rendered specific statutory prohibitions of little use. For instance, several states define "gambling devices" as "any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of unlawful gambling."¹⁶⁵ These statutes would appear to make items such as a deck of cards, dice, or even a coin

162. See DEVELOPMENTS, *supra* note 3, at 95 ("these devices logically appear to fall within the scope of the general gaming and gambling house statutes").

163. The extensive manhours required to gather eyewitness evidence has prevented many authorities from pursuing gambling violations. *Profile of Organized Crime: Great Lakes Region: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 2d Sess. 191 (1984) (testimony of Leonard Gilman, U.S. Attorney, Detroit, Mich.) ("In the recent past . . . we have given a very low priority to gambling cases. This is because gambling cases are very difficult to investigate. They are time-consuming. They involve hours and hours of agent manpower and tremendous resources and the return you get has been . . . insignificant.").

164. This is in contrast to the traditional problem associated with gambling legislation, that of being too specific. See, e.g., ABA Comm. on Organized Crime in Interstate Commerce (1952), reprinted in 77 ABA ANNUAL REPT. 319, 333 (1952) ("one of the major pitfalls of existing gambling legislation [is] too great particularization of the evils sought to be prohibited").

165. ALASKA STAT. § 11.66.280(3) (1983); see also ALA. CODE § 13A-12-20(5) (1975); COLO. REV. STAT. § 18-10-102(3) (1986); HAW. REV. STAT. § 712-1220(5) (1985); ME. REV. STAT. ANN. tit. 17-A § 952(5) (1964); MO. ANN. STAT. § 572.010(5) (Vernon 1979); NEB. REV. STAT. § 28-1101(5) (Supp. 1988); N.J. REV. STAT. § 2C:37-1(e) (1982); N.Y. [PENAL] LAW § 225.00(7) (McKinney 1980); N.D. CENT. CODE § 12.1-28-01(3) (Supp. 1987); OR. REV. STAT. § 167.117(5) (Supp. 1988); WYO. STAT. § 6-7-101(a)(iv) (1988).

illegal because any of these items is "usable in the playing phases of unlawful gambling."

Other states have made slight variations to the "used or usable" standard, narrowing the definition, but not completely correcting the problem of overinclusiveness. Arkansas, for instance, prohibits any device "adapted, devised, or designed for the purpose of playing any game of chance, or at which any money or property may be won or lost."¹⁶⁶ While this definition applies only to devices designed for the purpose of gambling, it too is overinclusive. The Arkansas statute would seem to take coins out of the prohibited classification, since they are not "adapted, devised, or designed" for the purpose of playing a game of chance. However, the definition still appears to include dice, cards, and other items that may have legitimate uses unrelated to gambling.¹⁶⁷

The problem with overly broad state statutes is that they are effective only when there is other evidence that the prohibited devices have been used for gambling purposes.¹⁶⁸ When such independent evidence exists, however, the state is then free to rely upon its general antigambling statute; there is no need to resort to a statute specifically designed to attack gambling devices. The net result is that overinclusive statutes add very little to the existing arsenal of weapons a state may employ to combat gambling devices.

At the other end of the spectrum, some state legislation is overly narrow. The Illinois statute, for example, refers to a "gambling device which is incapable of lawful use."¹⁶⁹ If Illinois literally applied this standard, few if any convictions would occur; it is difficult to imagine a product which could not be used in *some* lawful manner. In practice, however, the statute has been applied to gambling devices per se. In other words, the statute may be applied to traditional slot machines and less traditional gray area video devices even when there is no independent evidence that gambling has

166. ARK. STAT. ANN. § 5-66-104 (1987); *see also* IOWA CODE § 725.9(3) (Supp. 1988); UTAH CODE ANN. § 76-10-1101(4) (1978).

167. *See* OHIO REV. CODE ANN. § 2915.01(F)(3) (Baldwin 1987) (specifically listing playing cards and dice as "gambling devices").

168. *See, e.g.,* Monte Carlo Parties, Ltd. v. Webb, 253 Ga. 508, 322 S.E.2d 246, 249 (1984) (roulette wheels, blackjack tables, baccarat tables and shoes, craps tables, wheels of fortune, over-and-under tables, chuck-a-luck tables, bang tables, poker tables, and various other gambling props held not subject to confiscation because there was no evidence that they had been used for gambling); *cf.* State Dep't of Revenue v. Grooms Music Co., 721 P.2d 1225, 1227 (Colo. Ct. App. 1986) (video game held subject to confiscation based on factual holding that it had been used for gambling).

169. ILL. ANN. STAT. ch. 38, para. 28-5(a) (Smith-Hurd 1977 & Supp. 1989).

taken place.¹⁷⁰ Thus, since machines such as video card games equipped with knock-off switches and meters are per se gambling devices, the Illinois statute permits these video machines to be confiscated without proof of actual gambling. When independent evidence of gambling activity exists, video machines, or even cards and dice, may be confiscated under the state's general antigambling legislation.¹⁷¹

The Illinois statute, with its narrow definition of gambling devices, can be more effective in controlling coin-operated gambling devices than an overly broad statute. Broad gambling device statutes that require independent evidence of gambling in order to confiscate the machines are of little aid to the authorities. However, a narrowly drawn definition that provides authorities with a basis for labeling devices as gambling devices per se can be a very effective means of combatting illegal video gambling.¹⁷² Legislators should thus focus on drafting a definition of gambling devices that will allow authorities to seize the device in question without needing independent evidence of gambling activity.

2. Specific Definitional Problems

As noted earlier, one of the problems with many state statutes is that they were drafted with older devices in mind. Advances in the gambling devices industry have essentially rendered these statutes useless in combatting modern video gambling devices. By examining specific problems associated with older statutes, however, state legislatures can put together a statutory scheme that avoids common pitfalls and incorporates useful definitions. The original slot machine, for example, was equipped with reels which spun when the arm or lever was pulled.¹⁷³ Although modern video gambling devices do not rely on reels, at least two state statutes define gambling devices as having an "essential part," which is a "drum or reel."¹⁷⁴

170. *But see* *Yasin v. Byrne*, 121 Ill. App. 3d 167, 459 N.E.2d 320 (1984) (video poker machine held not to be a gambling device because it was found to be a game of skill and apparently because no evidence was introduced as to knock-off switches and meters).

171. *See* ILL. ANN. STAT. ch. 38, paras. 28-1, 28-2(a), 28-5(b) (Smith-Hurd 1977 & Supp. 1989).

172. Illinois, unfortunately, has not put its statute to its best use. *See Yasin v. Byrne*, 121 Ill. App. 3d 167, 459 N.E.2d 320 (1984); *cf.* 82 Op. Ill. Att'y Gen. 52 (1982) (stating that such machines are illegal under Illinois law).

173. *See supra* notes 16-19 and accompanying text.

174. *See* MASS. GEN. LAWS ANN. ch. 271, § 5A (West Supp. 1988); MICH. COMP. LAWS ANN. § 750.303(3) (West Supp. 1988) (regarding antique slot machines).

Another problem found in several state statutes is the requirement that a device physically "eject" the reward before it can be considered a gambling device.¹⁷⁵ As discussed above, a device that is equipped with a knock-off switch and meter operates in the very same manner as the traditional one-armed bandit slot machine, but does not "eject" anything.¹⁷⁶ Indeed, the whole purpose of knock-off switches and meters is to defeat statutes with "ejection" requirements. Obviously, these devices, whether they eject a reward or record a reward on a knock-off meter, are gambling devices. Thus, the machines should be treated in the same manner and be regulated by the same statute. Equal treatment can easily be accomplished by language in the statute which refers not to ejection of the reward, but rather to the player's entitlement to receive a reward.¹⁷⁷

Still other state statutes continue to define gambling devices as being operated by inserting a coin (or other consideration) to begin play.¹⁷⁸ As gambling operators recognized long ago, such provisions can be defeated by having the player pay his consideration directly to the operator of the machine.¹⁷⁹ Thus, the North Dakota legislature, obviously aware of the possibility of an "operator operated" machine, added to its definition of "coin-operated gaming device" those devices which are similar to slot machines, but which "operate[] without the insertion of a coin, token, or similar object."¹⁸⁰

State legislatures are still unclear as to how to treat free replays. While some state statutes appear to prohibit free replays, even on amusement-only games,¹⁸¹ other states have specifically excluded games that offer free replays from their definition of gam-

175. ALA. CODE § 13A-12-20(10) (1975) (defining slot machines); MO. ANN. STAT. § 572.010(11) (Vernon 1979); N.Y. [PENAL] LAW § 225.00(8) (McKinney 1980 & Supp. 1989).

176. See *supra* notes 48-49 and accompanying text.

177. See, e.g., WASH. REV. CODE ANN. § 9.46.0241(1) (1988) (referring to the player obtaining "a right to money, credits, deposits or other things of value").

178. See FLA. STAT. ANN. § 849.16 (West Supp. 1989) (defining gambling machines or devices); MO. ANN. STAT. § 572.010(11) (Vernon 1979) (defining slot machines); N.Y. [PENAL] LAW § 225.00(7-a) (McKinney Supp. 1989); N.C. GEN. STAT. § 14-306 (1987) (defining a slot machine or device); OR. REV. STAT. § 167.117(12) (Supp. 1988) (defining slot machines).

179. See *Hannifin v. United States*, 248 F.2d 173 (9th Cir. 1957); *United States v. Three Gambling Devices Known as Jokers*, 161 F. Supp. 5 (W.D. Pa. 1957), *aff'd per curiam*, 254 F.2d 395 (3d Cir. 1958).

180. N.D. CENT. CODE § 12.1-28-02(5)(a) (1985).

181. See GA. CODE ANN. § 16-12-20 (1988); IDAHO CODE § 18-3810 (1987 & Supp. 1989); IOWA CODE § 725.9 (West Supp. 1989); OHIO REV. CODE ANN. § 2915.01(F)(3) (Baldwin 1988).

bling devices.¹⁸² The problem with the latter statutes is that they do not discriminate between games that offer only free replays and those that, in addition to offering free replays, are equipped with a knock-off switch and meter. While all the machines fall within the statutory exception, those in the latter group clearly are gambling devices.¹⁸³ Other states have attempted to approach the problem by placing a limit on the number of free replays that may be awarded by an amusement-only device.¹⁸⁴ This solution not only limits the magnitude of the award that can be won by a successful gambler, but also has the advantage of permitting amusement-only games to offer replays without falling within the definition of gambling devices. Most of these statutes provide that free replays may be awarded only if the machine permits them to be discharged only by the player playing the game one time for each free replay awarded.¹⁸⁵ Hence, any machine equipped with a knock-off switch will not fall within the exception, and will be considered a gambling device. Moreover, by requiring that all free replays be played off one at a time, the statutes defeat the multiple-coin feature common in gambling devices;¹⁸⁶ the consideration (or bet) on any one play is limited to the value of one play of the game.¹⁸⁷

182. MISS. CODE ANN. § 97-33-7 (1973 & Supp. 1988); OR. REV. STAT. § 167.117(5) (Supp. 1988); S.C. CODE ANN. § 16-19-60 (Law. Co-op. Supp. 1988); S.D. CODIFIED LAWS ANN. § 22-25-13 (1988); W. VA. CODE § 61-10-1 (1989).

183. Recent efforts by the Mississippi Attorney General to rid his state of video gambling devices were curtailed when a state judge ruled that these machines, which purportedly offer only free replays, fell within the exemption contained in that state's statute. Jackson Clarion-Ledger, Sept. 7, 1988, at 1, col. 5; see *State v. Langan*, 293 Or. 654, 656, 652 P.2d 800, 802 (1982); see also *supra* notes 48-49 and accompanying text.

184. ARK. STAT. ANN. § 5-66-111 (1987) (25 replay limit; applies to pinball games equipped with "flippers"); FLA. STAT. ANN. § 849.161 (West Supp. 1989) (15 replay limit); MICH. COMP. ANN. LAWS § 750.303(2) (West Supp. 1989) (15 replay limit); TENN. CODE ANN. § 39-6-601(4)(A) (1982) (15 replay limit); see *Automatic Music & Vending Corp. v. Liquor Control Comm'n*, 426 Mich. 452, 459-61, 396 N.W.2d 204, 207-08 (1986) (limit on number of free replays held constitutional), *appeal dismissed*, 481 U.S. 1009 (1987).

185. See FLA. STAT. ANN. § 849.161(1) (West Supp. 1989); MICH. COMP. LAWS ANN. § 750.303(2) (West Supp. 1989); NEB. REV. STAT. § 28-1107 (Supp. 1988); TENN. CODE ANN. § 39-6-601(4)(B) (1982).

186. See *supra* note 70 and accompanying text.

187. Arkansas has attempted to attack the multiple coin problem by providing that if a device is designed "so that more than one (1) coin can be inserted so as to give the player additional odds in making a high score or winning additional free games," the device is unlawful. ARK. STAT. ANN. § 5-66-111 (1987). Arkansas is attempting to distinguish those machines that permit large amounts to be wagered from amusement-only games. However, the statute may be flawed. If a gambling device permits the gambler to deposit additional coins, the addition may only increase the stakes, without changing the payout ratio or "giving the player additional odds." See *Hearing, supra* note 52, at 18 (testimony of William L. Holmes, Special Agent, Federal Bureau of In-

Several states have taken other steps which should be helpful to law enforcement authorities in controlling illegal gambling devices. Both Minnesota and Montana have adopted statutes that specifically attack video gambling devices.¹⁸⁸ Other states have drafted gambling device legislation that eschews an inquiry into whether the reward depends on chance or skill.¹⁸⁹ Since any machine that offers a reward must be based on chance in order to be profitable to the operator,¹⁹⁰ these statutes simplify the identification of gambling devices, without encompassing amusement-only or vending machines. Thus, under these statutes, police should have less difficulty detecting gambling devices.¹⁹¹

IV. SUGGESTED REVISIONS

The proliferation of video gambling devices will be significantly curbed if state statutory schemes are brought up-to-date, and if law enforcement authorities are educated as to the workings of gambling devices. The first step in this process is a thorough review by legislators of the existing statutory controls in their individual states.¹⁹² Care should be taken, however, to review the entire statutory scheme of gambling controls. Problems with gambling laws often develop when new sections are simply added to existing laws, instead of repealing the outdated provisions and replacing them with the new provisions.¹⁹³ The legislature must also take care to assure that due process violations are not encountered. Thus, the owner of the machine must be provided with sufficient notice and an opportunity to be heard prior to destruction of any devices.¹⁹⁴

State legislators should focus on two aspects of their statutory scheme. The first substantive gambling provision in state statutes

vestigations). The Arkansas provision would not be effective against this type of machine.

188. MINN. STAT. ANN. § 349.50 (West Supp. 1989); MONT. CODE ANN. § 23-5-601 (1987).

189. NEV. REV. STAT. § 463.0155 (1987); N.J. REV. STAT. § 2C:37-1(f) (West 1982) (defining slot machines); OKLA. STAT. ANN. tit. 21, § 964 (West Supp. 1989).

190. See *supra* notes 81-83 and accompanying text.

191. The Tennessee pinball statute goes so far as to describe the operation of a knock-off switch. TENN. CODE ANN. § 39-6-631 (1982). Although this section does not directly apply to video gambling devices, Tennessee's general definition of a gambling device seems to encompass the concept of a knock-off switch and meter. See TENN. CODE ANN. § 39-6-601 (1982).

192. This is not always an easy task. Reform in some states has been delayed by lobbying efforts on behalf of the coin machine operators. See Mitchell, *Lobbying Beats Video Bills*, Jackson Clarion-Ledger, Feb. 2, 1988, at 6A, col. 1.

193. DEVELOPMENTS, *supra* note 3, at 804.

194. See, e.g., *State v. Durst*, 235 Kan. 62, 678 P.2d 1126 (1984).

should relate to items actually used for gambling purposes. This section should provide for confiscation of any devices, equipment, paraphernalia or other items which have actually been used for gambling purposes.¹⁹⁵ Under this provision, a deck of cards, dice, or even an amusement-only video device might be subject to confiscation, but only if it actually had been used for gambling purposes. No item could be confiscated under this provision without independent evidence that gambling had taken place.

A separate section on *per se* gambling devices should be included in the legislation. Under a *per se* section, the authorities should be able to confiscate these devices, even though there is no evidence that actual gambling has taken place. Since video gambling devices are so easily disguised, such a provision is an absolute prerequisite to any realistic effort to control them.

The definition of a "gambling device" is at the heart of any legislative intent to attack video gambling devices. A suggested format for a model statutory definition might therefore provide as follows:

"Gambling device" means (1) any article, device or mechanism by the operation of which a right to money, credits, deposits or other things of value may be created in return for a consideration; (2) any article, device, mechanism, furniture, fixture, construction, game card, or installation designed primarily for use in connection with professional gambling; and (3) any subassembly or essential part designed or intended for use in connection with any such article, device, mechanism, furniture, fixture, construction, game card or installation as described in subsections (1) and (2) above.

Provided, however, that the provisions of this section shall not extend to coin-operated or automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform return in value or services to each operator thereof and in which there is no element of chance.

Provided further that the provisions of this section shall not apply to any coin-operated game or device designed and manufactured for bona fide amusement purposes only, which may entitle the player to replay the game at no additional cost if the game or device:

(a) Accumulates and reacts to no more than fifteen (15) free replays;

195. See, e.g., CONN. GEN. STAT. ANN. § 53-278(c) (West 1985) (providing for confiscation of items "used in connection with professional gambling," as well as confiscation of certain other items).

(b) Does not increase the number of free replays available to a successful player based upon additional consideration paid by the player;

(c) Discharges accumulated free replays only by reactivating the game or device for one (1) additional play per player for each accumulated free replay; and

(d) Makes no permanent record, directly or indirectly, of free replays that have been awarded by the machine. This subsection does not apply to a meter which only indicates to the player how many free replays he has accumulated, up to the maximum of fifteen.¹⁹⁶

This model statute avoids many of the pitfalls typically found in state statutes. There is no requirement that the consideration be inserted into or the reward ejected from the device itself. Further, the statute is not confined by definitions based on older forms of gambling devices. The statute also eliminates the skill versus chance distinction.

The suggested model also effectively controls devices equipped with knock-off switches and meters, without prohibiting amusement-only video games and free replay pinball machines. The model statute reduces the amount that could be won on a gambling machine at any one time by limiting the number of free replays. Moreover, by limiting the way in which free replays can be discharged, it prevents large bets from being placed on the machine. Under the model statute, the *only* way that free replays may be removed from the machine is by playing them off, one at a time. A knock-off switch, which erases all of the credits or replays at one time, would be illegal.¹⁹⁷

The proposed statute is neither over- nor underinclusive. Although there is a broad provision relating to items "designed primarily for use in connection with professional gambling," this section relates to items such as roulette wheels, poker tables, and craps tables. The model statute does not suffer from the same problems encountered by many current state statutes by referring to items "usable in the playing phases of any gambling activity."

There will, of course, be some necessary support provisions, relating to confiscation and procedures for hearings. Most states

196. This model is based in large part on TENN. CODE ANN. § 39-6-601(4) (1982) and W. VA. CODE § 61-10-1 (1989).

197. It is likely that video gambling devices will be made so that free replays will be erased if the machine is unplugged. Those in the industry will, no doubt, have a justification for this feature. While the direct application of this provision of the proposed statute might be thereby avoided, if the device has a meter to record discharged games, the feature would still be prohibited under the proposed statute.

already have adequate legislation on those matters. With the suggested statute at the heart of the state's gambling legislation, law enforcement authorities can wage an effective battle to rid the state of video gambling devices. All that should be required for effective implementation of the new statute is education of the police as to the working of the devices, and a basic understanding of the law by the prosecutors.

CONCLUSION

Video gambling poses a significant problem to states across the nation. Vast amounts of money are wagered annually, which fund other criminal activities, including drug operations. Public corruption also flows from this illegal activity, undermining faith in state government and public officials. This form of gambling is particularly invidious because of its addictive nature and its attractiveness to young people.¹⁹⁸

Federal legislation already in existence can be used to control the devices in some states. The primary responsibility, nonetheless, rests with effective state control. A careful and educated examination of state gambling statutes should be undertaken on a state-by-state basis. Old legislation must be replaced by a statutory scheme that takes modern technology into consideration. Once an updated statutory scheme is in place, effective control of the problem will depend upon the initiative and determination of law enforcement authorities, and the seriousness of judges and prosecutors. Failure to recognize the importance of this problem will further the growth of organized crime, and contribute to the corrosive effects of compulsive gambling.

198. See *America's Gambling Fever*, Business Week, April 24, 1989, at 112, 113 ("New video versions of slot machines and card games . . . are captivating younger players raised in the video age.").