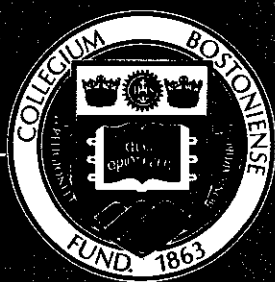


BOSTON COLLEGE LAW REVIEW

Vol. XXXIV No. 1



December 1992

ARTICLE

LOTTERIES, REVENUES AND SOCIAL COSTS: A HISTORICAL EXAMINATION OF STATE-SPONSORED GAMBLING

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LOTTERIES, REVENUES AND SOCIAL COSTS: A HISTORICAL EXAMINATION OF STATE- SPONSORED GAMBLING†

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The Lottery, with its weekly pay-out of enormous prizes, was the one public event to which the proles paid serious attention. It was probable that there were some millions of proles for whom the Lottery was the principal if not the only reason for remaining alive. It was their delight, their folly, their anodyne, their intellectual stimulant. Where the Lottery was concerned, even people who could barely read and write seemed capable of intricate calculations and staggering feats of memory. There was a whole tribe of men who made a living simply by selling systems, forecasts, and lucky amulets.

—George Orwell, 1984¹

I. INTRODUCTION

In 1948, when George Orwell penned his classic novel, *1984*, there were no legal lotteries in the United States. Today, thirty-three states and the District of Columbia promote and conduct official state lotteries.² These lotteries generate badly needed reve-

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¹ GEORGE ORWELL, 1984, at 73 (1949).

² Pauline Yoshihashi, *Luck is Running Out at Some Lotteries*, WALL ST. J., Feb. 12, 1991, at B1. See ARIZ. REV. STAT. ANN. §§ 5-501 to 5-525 (1989); CAL. GOV'T CODE §§ 8880-8880.71 (West Supp. 1991); COLO. REV. STAT. §§ 24-35-201 to 24-35-220 (1988); CONN. GEN. STAT. ANN. §§ 12-568 to 12-578 (West 1983); DEL. CODE ANN. tit. 29, §§ 4801-4825 (1983); D.C. CODE ANN. §§ 2-2501 to 2-2537 (1981); FLA. STAT. ANN. §§ 24.101-24.123 (West 1988); IDAHO CODE §§ 67-7401 to 67-7452 (1989); ILL. ANN. STAT. ch. 120, paras. 1151-1178 (Smith-Hurd 1991); IND. CODE ANN. §§ 4-30-1-1 to 4-30-1-19 (Burns 1990); IOWA CODE ANN. §§ 99E.1-99E.34 (West Supp. 1991); KAN. STAT. ANN. §§ 74-8701 to 74-8732 (Supp. 1990); LA. REV. STAT. ANN. §§ 9000-9081 (West Supp. 1990); ME. REV. STAT. ANN. tit. 8, §§ 371-387 (West Supp. 1990); MASS. GEN. LAWS ANN. ch. 10, §§ 22-30 (West 1986); MICH. COMP. LAWS ANN. §§ 432.1-432.37 (West 1978); MINN. STAT. ANN. §§ 349A.01-349A.10 (West

nues and stop the flow of money to neighboring states that have legal gambling. State involvement with gambling, however, runs counter to the anti-lottery provisions found in many state constitutions, anti-gambling statutes found in most state codes and the policies and concerns underlying all of these enactments.³ In addition, many experts are concerned that lotteries are played most often by those who can least afford to play—low-income people hoping for a quick solution to their financial woes. Nevertheless, the combination of an ever-increasing need for state funding and public resistance to new taxes inevitably increases pressure for more state-sponsored gambling.⁴

Two hundred years ago, government-sanctioned lotteries were common throughout America. Lacking a strong central government and burdened with a weak tax base, early Americans viewed lotteries as legitimate vehicles for raising revenue. Lottery proceeds were used to build cities, establish universities, and even to help finance the Revolutionary War. They were gradually abandoned throughout the 1800s as governments developed better forms of taxation. Lottery fraud became a concern, and social problems stemming from excessive gambling developed. In 1893, the Librarian of Congress wrote of "a general public conviction that lotteries are to be regarded, in direct proportion to their extension, as among the

1990); MO. ANN. STAT. §§ 313.200–313.350 (Vernon Supp. 1991); NEB. REV. STAT. §§ 9-301 to 9-355 (1987) (Pickle Card Lottery Act); NEB. REV. STAT. §§ 9-401 to 9-437 (1987) (Lottery and Raffle Act); NEB. REV. STAT. §§ 9-501 to 9-513 (1987) (Small Lottery and Raffle Act); NEB. REV. STAT. §§ 9-601 to 9-612 (1987) (County and City Lottery Act); N.H. REV. STAT. ANN. §§ 287-F:1 to 287-F:19 (1987); N.J. STAT. ANN. §§ 5:9-1 to 5:9-25 (West 1988); N.Y. TAX LAW §§ 34-1600 to 34-1606 (McKinney 1987); OHIO REV. CODE ANN. §§ 3770.01–3770.99 (Anderson 1988); OKLA. STAT. ANN. tit. 21, §§ 1051–1068 (West 1983); OR. REV. STAT. §§ 461.010–461.700 (1987); 72 PA. CONS. STAT. §§ 3761-1 to 3761-15 (Supp. 1991); R.I. GEN. LAWS §§ 42-61-1 to 42-61-17 (1988); S.D. CODIFIED LAWS ANN. §§ 42-7A-1 to 42-7A-55 (1991); VT. STAT. ANN. tit. 31, §§ 651–678 (1986); VA. CODE ANN. §§ 58.1-4000 to 58.1-4028 (Michie 1991); WASH. REV. CODE ANN. §§ 67.70.010–67.70.903 (West 1985); W. VA. CODE §§ 29-22-1 to 29-22-28 (1986); WIS. STAT. ANN. §§ 565.01–565.50 (West Supp. 1991).

³ Before the recent proliferation of state lotteries, 35 states had constitutional provisions prohibiting lotteries. NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, *THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776–1976*, at 678 (1977) [hereinafter *DEVELOPMENTS*]; e.g., ALA. CONST. art. IV, § 65 (prohibiting lotteries); ARK. CONST. art. 19, § 14 (same); GA. CONST. art. 1, § 2, ¶ 8 (same); NEV. CONST. art. 4, § 24 (same); N.D. CONST. art. XI, § 25 (same); S.C. CONST. art. XVII, § 7 (same); TENN. CONST. art. XI, § 5 (same); TX. CONST. art. III, § 47 (same); UT. CONST. art. VI, § 27 (same).

⁴ Yoshihashi, *supra* note 2, at B1. "Despite the slowdown in lottery growth, the games seem certain to spread. Resistance to lotteries has succumbed to a need for revenue even in [conservative areas]." *Id.*

most dangerous and prolific sources of human misery."⁵ Soon thereafter, federal legislation brought an end to the last remaining legal American lottery.

From the late-1800s until 1964, lotteries were prohibited throughout America. These prohibitions were based on a perception that lotteries greatly contributed to personal downfall and societal decay, as well as concerns about fraud in operation. Lotteries have become legal and grown in popularity over the past two decades, however. As a result, America has seen a dramatic increase in the number of problem gamblers and in the problems typically associated with gambling, such as criminal activity and compulsive gambling.

This paper traces the history of gambling regulations and state sponsorship of gambling, examines the social effects of modern lotteries, and concludes that although lotteries have been generally successful in raising revenue, the cost has been shouldered by the impoverished, people prone to compulsive behavior, children and victims of gambling-related crimes. Contemporary lawmakers have not considered these effects, perhaps because they were not obvious at the time that lotteries were being reintroduced to America. Now they can no longer be ignored. This paper offers suggestions for minimizing these adverse effects while maintaining lotteries as viable sources of revenue.

II. A HISTORY OF GAMBLING AND GAMBLING REGULATION

People have been gambling since the dawn of recorded history. For almost as long, society has recognized that there are costs associated with gambling.⁶ Throughout history, governments have

⁵ A.R. SPOFFORD, *LOTTERIES IN AMERICAN HISTORY*, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 194-95 (1893) (Annual Report of the American Historical Society).

⁶ 1 ANDREW STEINMETZ, *THE GAMING TABLE: ITS VOTARIES AND VICTIMS* 1-2 (Patterson Smith Pub. Co. 1969) (1870).

It is said that the Goddess of Fortune, once sporting near the shady pool of Olympus, was met by the gay and captivating God of War, who soon allured her to his arms. They were united; but the matrimony was not holy, and the result of the union was a misfeatured child named Gaming. From the moment of her birth this wayward thing could only be pleased by cards, dice, or counters.

She was not without fascinations, and many were her admirers. As she grew up she was courted by all the gay and extravagant of both sexes, for she was of neither sex, and yet combining the attractions of each. At length, however, being mostly beset by men of the sword, she formed an unnatural union with one of them, and gave birth to twins—one called DUELLING, and the other a grim and hideous monster named SUICIDE. These became their moth-

been torn between a desire to tap gambling's enormous potential as a source of revenue and a fear of its associated social ills. This conflict has resulted in cycles of governmental promotion and sponsorship of gambling and periods of complete prohibition. Any meaningful examination of state-sponsored lotteries must begin by examining this long history.⁷

A. The Definitions

The word *gambling* is derived from the Middle English word *gamen*—to amuse oneself.⁸ Gambling consists of three elements: consideration, chance and reward.⁹ A typical lottery, which involves the sale of chances to win a prize based on a random drawing, clearly involves all three elements.¹⁰ Consideration is found in the cost of the ticket.¹¹ Numbers are then randomly selected, rendering a result based on chance, not skill.¹² The reward is the prize that the lucky ticketholder hopes to win.¹³ It is interesting to note that

er's darlings, nursed by her with constant care and tenderness, and her perpetual companions.

Id.

⁷ I. NELSON ROSE, *GAMBLING AND THE LAW* 300-01 (1986).

⁸ GILBERT GEIS, *NOT THE LAW'S BUSINESS? AN EXAMINATION OF HOMOSEXUALITY, ABORTION, PROSTITUTION, NARCOTICS, AND GAMBLING IN THE UNITED STATES* 224 (1972). The word *lot* is believed to be Teutonic in origin, derived from the word *hleut*, which referred to a pebble or bean used to settle disputes. GEORGE SULLIVAN, *BY CHANCE A WINNER: THE HISTORY OF LOTTERIES* 4 (1972).

⁹ GEIS, *supra* note 8, at 224; Ronald J. Rychlak, *Video Gambling Devices*, 37 *UCLA L. REV.* 555, 556 (1990). See also Kavanagh, *Montana Comes to the Rescue*, *FANTASY BASEBALL*, Mar. 1992, at 18 (arguing that fantasy baseball, also known under the registered trade name of *Rotisserie Baseball*, should not be considered an illegal gambling game because it does not satisfy the chance element).

¹⁰ *FCC v. American Broadcasting Co.*, 347 U.S. 284, 290 n.8 (1954) (citing *Stone v. Mississippi*, 101 U.S. 814 (1879)).

¹¹ *Yellow-Stone Kit v. State*, 7 So. 338, 339 (Ala. 1890); Rychlak, *supra* note 9, at 556 n.3. See also *infra* note 14. Where there is no fee, and no purchase is required to participate, a drawing does not constitute a lottery.

¹² Lotteries are perhaps the best example of pure gambling, because there is no element of skill involved. When skill is introduced into the game, it ceases to be a lottery. See *State v. Coats*, 74 P.2d 1102, 1106 (Or. 1938). Although a lottery is a form of gambling, not all gambling involves lotteries. *State ex rel. Gabalac v. New Universal Congregation of Living Souls*, 379 N.E.2d 242, 244 (Ohio 1977) (constitutional ban on lotteries did not bar all forms of gambling). See also *Boasberg v. United States*, 60 F.2d 185, 186 (5th Cir. 1932) ("Gambling schemes where winning depends on skill or judgment are not like a lottery in which success is determined by pure chance and is thus specially attractive to the inexperienced and ignorant").

¹³ See *Horner v. United States*, 147 U.S. 449, 459-60 (1893) (reward component is satisfied even if ticket purchasers all receive prizes, as long as the prizes are differing in value).

almost every privately conducted sweepstakes provides that no purchase is necessary. Because 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 would constitute consideration, and the sweepstakes would be an illegal lottery under the laws of most states.¹⁴

B. The Regulation of Gambling

Some authorities have suggested that gambling is based upon a psychological stimulus inherent in human nature.¹⁵ Gambling activity has certainly been prevalent for a long time. Various games of chance existed among ancient Egyptians, Chinese, Japanese, Hebrews, Greeks, Romans and the early Germanic Tribes.¹⁶ A drawing found on the wall of a burial vault in Beni Hasan, Egypt (circa 2500 B.C.) shows a picture of a ball hidden under one of several cups, perhaps an early game of chance.¹⁷ Recent British excavations in

¹⁴ See *State v. Hundling*, 264 N.W. 608, 609-10 (Iowa 1936) (movie theater "bank night" found not to be an illegal lottery because purchase of a ticket to the movie was not required to participate in the drawing); *State v. Bussiere*, 154 A.2d 702, 706 (Me. 1959) (supermarket "Goodwill Cash Night" held not an illegal lottery because there was no fee required to participate). But see *State v. Dorau*, 198 A. 573, 577 (Conn. 1938) (movie theater "bank night" held an illegal lottery); *Lucky Calendar Co. v. Cohen*, 117 A.2d 487, 495 (N.J. 1955), *aff'd on reh'g*, 120 A.2d 107 (1956) (consideration found in requiring participants to fill out a form and deposit it at supermarket); *Knox Indus. Corp. v. State*, 258 P.2d 910, 914 (Okla. 1953) (consideration found in requiring participants to visit sponsor's store). See also generally Barnabas McHenry, *Mail Order Sweepstakes*, in *MAGAZINE PUBLISHING INDUS.* 133-74 (PLI 1973) (discussing federal lottery regulations).

Television game shows are not lotteries because no consideration is required of the participants. *FCC v. American Broadcasting Co.*, 347 U.S. 284, 293-94 (1954). Of course, it was later learned that many of these shows also lacked any degree of chance or skill. See HARRY CASTLEMAN & WALTER PODRAZIK, *WATCHING TV: FOUR DECADES OF AMERICAN TELEVISION* 125-26, 133-36 (1982) (discussing the game show scandal that rocked the television industry in the late 1950s).

¹⁵ JOHN ASHTON, *THE HISTORY OF GAMBLING IN ENGLAND* 2 (Patterson Smith Pub. Co. 1969) (1898). See also ROBERT CUSTER & HARRY MILT, *WHEN LUCK RUNS OUT: HELP FOR COMPULSIVE GAMBLERS AND THEIR FAMILIES* 22 (1985). Freud viewed gambling as a substitute for unresolved sexual conflicts and saw the pathological gambler as a neurotic in search of self-punishment. SIGMUND FREUD, *Dostoevsky and Parricide* (1928), in 21 *COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 190-94 (J. Strachey trans., 1961). For a general discussion of gambling's relationship with human behavior, see JOHN DOMBRINK & WILLIAM N. THOMPSON, *THE LAST RESORT: SUCCESS AND FAILURE IN CAMPAIGNS FOR CASINOS* 12-19 (1990).

¹⁶ ASHTON, *supra* note 15, at 3-12; CUSTER & MILT, *supra* note 15, at 22. Cf. DAVID LOUIS, 2201 *FASCINATING FACTS* 64 (1983) (claiming that Eskimos do not gamble). Nero has been identified as the "patron saint" of lotteries. B. CARRADINE, *THE LOUISIANA LOTTERY COMPANY EXAMINED AND EXPOSED* 1 (1889, reprinted ed. 1979).

¹⁷ MILBOURNE CHRISTOPHER, *THE ILLUSTRATED HISTORY OF MAGIC* 9-11 (1983) (suggesting that this may be an early magic trick).

London have uncovered the remnants of a 2,000-year-old dice game.¹⁸ In fact, some authorities have suggested that artifacts dating from the Stone Age were used for gambling.¹⁹

Governments have also been regulating gambling for a long time. Records from India indicate that in 321 B.C. there was a governmental department to regulate gambling, with a Superintendent of Public Games who supplied dice and collected a fee of five percent of the receipts.²⁰ In 1190, during the Crusades, Richard the First of England and Phillip of France jointly issued regulations to control gambling in the Christian Army.²¹ In 1388, King Richard II enacted legislation directing all laborers and serving men to abandon "hand and foot ball, coits, dice, throwing of stone keyles, and other such importune games," and concentrate on archery (presumably in preparation for war).²² In 1477, Edward IV added new games to the prohibited list,²³ but in 1494 Henry VII created an exception allowing the games to be played at Christmas time.²⁴ In the early 1500s there were several additional pronouncements relating to outlawed games,²⁵ but in 1541 King Henry VIII repealed

¹⁸ Donna Foote, *A Treasure Hunt in London*, NEWSWEEK, Aug. 1, 1988, at 49. Perhaps more interesting, "loaded" dice were found in the Pompeii excavation. E. BENSON PERKINS, *GAMBLING IN ENGLISH LIFE* 8 (1950); Howard J. Shaffer, *Conceptual Crises in the Addictions: The Role of Models in the Field of Compulsive Gambling*, in *COMPULSIVE GAMBLING: THEORY, RESEARCH AND PRACTICE* 5 (Howard J. Shaffer et al. eds., 1989).

¹⁹ GEIS, *supra* note 8, at 226.

²⁰ WIL DURANT, *OUR ORIENTAL HERITAGE* 444 (1954). See also Shaffer, *supra* note 18, at 9 ("Governments first attempted to control gambling as early as 300 B.C.").

²¹ This edict limited gambling based upon class distinction. Persons below the rank of knight were prohibited from playing any sort of game for money unless officers were present. Knights and clergymen could play for money, but were not permitted to lose more than 20 shillings per day, under penalty of 100 shillings. The two monarchs could play for any amount they pleased, but their attendants were restricted to the sum of 20 shillings. If a soldier violated these rules, he was to be stripped naked and whipped through the army for three days; sailors found in violation were keel-hauled for three days. JOHN GILLINGHAM, *RICHARD THE LIONHEART* 155 (1978); 2 *A HISTORY OF THE CRUSADES* 60 (Kenneth M. Setton ed., 1962); 3 SIR STEVEN RUNCIMAN, *A HISTORY OF THE CRUSADES: THE KINGDOM OF ACRE AND THE LATER CRUSADES* 40 (1954). See also Robert J. Urban, *Gambling Today Via the "Free Replay" Pinball Machine*, 42 MARQ. L. REV. 98, 98 n.8 (1958). For a description of gambling games that were popular with soldiers during the Crusades, see THOMAS A. ARCHER & CHARLES L. KINGSFORD, *THE CRUSADES: THE STORY OF THE LATIN KINGDOM OF JERUSALEM* 284-90 (1894).

²² 12 Rich. 2, ch. 6 (1388). This statute is written in an early form of Law French; the translated quotation is from *United States v. Dixon*, 25 F. Cas. 872, 874 (D.C. Cir. 1830) (discussing early English regulations). Laborers and servants who played such games were subject to six days' imprisonment. 11 Hen. 4, ch. 4 (1409).

²³ 17 Edw. 4, ch. 3 (1477); see *Dixon*, 25 F. Cas. at 874.

²⁴ 11 Hen. 7, ch. 2 (1494); see *Dixon*, 25 F. Cas. at 874-75.

²⁵ 27 Hen. 8, ch. 25 (1535); 3 Hen. 8, ch. 25 (1511); 19 Hen. 7, ch. 12 (1503).

the various earlier gambling laws and consolidated the law of gambling under a new comprehensive statute.²⁶

In 1603, the common law of gambling and the government's ability to regulate gambling were forever changed by the decision in the *Case of Monopolies*.²⁷ That case held that all games were legal unless expressly made illegal by the legislature.²⁸ This meant that a slight modification to a prohibited game would make the game legal until the legislature was able to respond. With so many ways to gamble, and the numerous modifications that could be made to games once they were declared illegal, it was no longer realistically possible to outlaw gambling.²⁹ Instead, subsequent legislation was directed at controlling fraud and limiting the amounts that could be wagered.

The Statute of Charles II,³⁰ enacted in 1661, did not purport to prohibit gambling itself, only fraudulent or excessive gambling.³¹ This Act, which was designed to protect "the younger sort" from "sundry, idle, loose, and disorderly Persons . . . to the Loss of their

²⁶ Entitled "An Acte for Mayntenance of Artyllarie and debarringe of unlawful Games," this statute sought to increase military preparedness and control debauchery by prohibiting laborers and servingmen from playing certain specified games, except at Christmastime while in their masters' houses. 33 Hen. 8, ch. 9 (1541); see *Dixon*, 25 F. Cas. at 874-75 (discussing this act).

²⁷ 11 Co. Rep. 84, 77 Eng. Rep. 1260 (1603) (holding that an exclusive grant to manufacture and import playing cards was invalid).

²⁸ *Id.* at 87, 77 Eng. Rep. at 1264.

²⁹ Therefore, gambling was a crime at common law only if "it fell within the provisions of a special statute, or when it was a nuisance, tended to immorality or breach of the peace, was against public policy, or was conducted by fraudulent means." *State v. One "Jack and Jill" Pinball Mach.*, 224 S.W.2d 854, 855 (Mo. App. 1949). Accord *Urban*, *supra* note 21, at 99.

Because all games were legal unless expressly declared illegal, the legislature had to outlaw games on a game by game basis. Thus, today the California Penal Code prohibits the playing of several games, including "stud-horse poker." CAL. PENAL CODE § 330 (West 1988). However, "no one alive today knows what that game is." *ROSE*, *supra* note 7, at 72. The modern version of bowling owes its ten-pin format to colonial regulations that prohibited the playing of "nine pins." *LOUIS*, *supra* note 16, at 69.

³⁰ 16 Car. 2, ch. 7 (1664). It was entitled "An Act against deceitful, disorderly, and excessive gaming." *Id.* § 1.

³¹ *Id.* Cheating has long been a primary reason for regulating gambling. See 1 *STEINMETZ*, *supra* note 6, at 73 ("cheating is a natural, if not a necessary, incident of gambling"); *Shaffer*, *supra* note 18, at 5 (cheating began about the same time that gambling was invented). Several magicians, including Harry Houdini, have used cheating at gambling as a theme upon which they have built their acts. See *JAMES RANDI & B. SUGAR, HOUDINI: HIS LIFE AND ART* 146 (1977); *JOHN SCARNE, SCARNE'S NEW COMPLETE GUIDE TO GAMBLING* xvii (First Fireside ed. 1986) ("How does one get to be the world's foremost authority on games and gambling? The answer is simple: you need to be a magician.").

precious Time and utter Ruin of their Estates and Fortunes,"³² provided that the victim of cheating or fraud in gaming could bring suit for recovery of three times the sum lost.³³ If the suit were successful, the Crown would take one-half of the amount recovered, and the victim would keep the other half.³⁴ If the victim did not sue within six months of the loss, then any person could sue in his or her place and recover the victim's share as a reward.³⁵ In addition, gambling debts secured on credit in excess of £100 were judicially unenforceable, and contracts relating to the payment of these debts were "utterly void of none effect."³⁶ Providing it was not fraudulent, however, gambling was permitted for any amount of ready money, and debts for less than £100 remained fully enforceable in court.

Although most gambling during this period was legal, albeit regulated, lotteries were recognized as a particularly dangerous form of gambling that merited special attention. In 1699, William III outlawed lotteries by statute, proscribing punishment for operating or participating in a lottery.³⁷ The preamble to that legislation stated:

Whereas several evil-disposed persons, for divers years last past, have set up many mischievous and unlawful games, called lotteries . . . in most of the eminent towns and places in England . . . and have thereby most unjustly and fraudulently got themselves great sums of money from the children and servants of several gentlemen, traders and merchants, and from other unwary persons, to the utter ruin and impoverishment of many families, and to the reproach of the English laws and government, by color of several patents or grants under the great seal of England . . . which said grants or patents are against the common good, trade, welfare and peace of his Majesty's kingdoms: for remedy whereof be it enacted, adjudged and declared. . . . That all such lotteries, and all other lotteries are common and public nuisances, and that all grants,

³² 16 Car. 2, ch. 7, § 1 (1664).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* These remedies are similar to those that were provided by the laws of ancient Rome. 1 STEINMETZ, *supra* note 6, at 413.

³⁶ 16 Car. 2, ch. 7.

³⁷ Wm. 3, ch. 17 (1699) (An act for suppressing of lotteries). This is one of few statutes to outlaw the purchasing of a lottery ticket. *Id.* § 3.

patents and licenses for such lotteries, are void and against law.³⁸

The act, however, expressly authorized two charitable lotteries to continue for the duration of their charters.³⁹ Other forms of gambling were unaffected by this prohibition.⁴⁰

Despite the various controls, regulated gambling between individuals remained quite popular. One commentator observed, "Unless one gambled freely it was quite impossible to be counted a gentleman, or, for that matter, a lady of fashion."⁴¹ Gambling among the British gentry, and the large transfers of property that accompanied it, disrupted England's land-based aristocracy.⁴² Accordingly, in 1710, Queen Anne signed the Statute of Anne in order to stabilize British society by preventing large transfers of wealth.⁴³ Under the Statute of Anne, "all Notes, Bills, Bonds, Judgments, Mortgages, or other Securities or Conveyances whatsoever" given in payment of gambling debts of £10 or more were deemed "void, frustrate, of none Effect to all Intents and Purposes."⁴⁴ In addition, the loser of any sum over £10 could sue within three months to recover the loss, and if the loser did not sue, anyone could sue the winner for three times the amount lost.⁴⁵ Persons convicted of fraud in gambling were subject to both forfeiture of five times the sum won and corporal punishment.⁴⁶

Even the restrictions imposed by the Statute of Anne did not curtail all gambling. Queen Anne, who personally enjoyed horse racing,⁴⁷ saw that the statute allowed for gambling in any of the

³⁸ *Id.* § 1.

³⁹ *Id.* §§ 4-5.

⁴⁰ See *supra* note 29 (all games legal unless declared illegal).

⁴¹ Cyril Hughes Hartmann, *Introduction to GAMES AND GAMESTERS OF THE RESTORATION* xi (F. Isaacs ed., reprinted ed. 1930) (referring to the court of Charles II, 1660-1685). See also 1 STEINMETZ, *supra* note 6, at 16 ("there was no European nation among which gambling did not constitute one of its polite and fashionable amusements—except the *Turks*").

⁴² DEVELOPMENTS, *supra* note 3, at 12, 15. See also 1 STEINMETZ, *supra* note 6, at 20 (quoting THE HARLEIAN MISCELLANY (1668)) ("some have played first all their money, then their rings, coach and horses . . . and then, such a farm; and last, perhaps a lordship"); *id.* at 78 (noting similar problems in France). Later, in the Old South of the United States, many plantations changed hands over poker games. HENRY CHAFETZ, *PLAY THE DEVIL: A HISTORY OF GAMBLING IN THE UNITED STATES FROM 1492 TO 1955*, at 188 (1960).

⁴³ ROSE, *supra* note 7, at 73 ("The Statute of Anne was passed to protect the landed gentry from the consequences of their own folly").

⁴⁴ 9 Anne, ch. 14, § 1 (1710).

⁴⁵ *Id.* § 2. One-half of the amount recovered went to the Crown. *Id.*

⁴⁶ *Id.* § 5.

⁴⁷ ASHTON, *supra* note 15, at 179; 2 STEINMETZ, *supra* note 6, at 353.

royal palaces during the residence of the Queen or her successors.⁴⁸ Additionally, the Statute of Anne did not affect gambling debts for less than £10, which remained fully enforceable in court.⁴⁹ Nonetheless, by making large gambling debts unenforceable,⁵⁰ the Statute of Anne had the desired effect of ending the large transfers of wealth and land that had taken place prior to its enactment.⁵¹ As the New World developed, the Statute of Anne, like other common law doctrines, became part of the law of every state.⁵²

III. THE DEVELOPMENT OF LOTTERIES

The first lotteries most likely originated as simple games conducted at festivals and parties for the amusement of the partici-

⁴⁸ 9 Anne, ch. 14, § 9.

⁴⁹ *Id.* § 2. Ten pounds was not an insubstantial amount in 1710. A common laborer at that time earned a salary of one shilling per day. DEVELOPMENTS, *supra* note 3, at 17 n.41. At 20 shillings per pound, the Statute of Anne permitted such a laborer to wager more than half a year's salary.

⁵⁰ This aspect of the Statute of Anne creates problems when investors pool their money to purchase a winning lottery ticket, but the holder of the winning ticket refuses to share the winnings. Claudia G. Catalano, Annotation, *Enforceability of Contract to Share Winnings from Legal Lottery Ticket*, 90 A.L.R. 4th 784 (1991).

⁵¹ Interestingly, until very recently, the portion of the Statute of Anne that prohibited suits to enforce gambling debts was still in force in Nevada, even though gambling was legal. Thus, if a losing gambler stopped payment on a check made payable to a Nevada casino, the casino could not enforce the debt in a Nevada court. *Corbin v. O'Keefe*, 484 P.2d 565, 566 (Nev. 1971) ("This court has refused to aid in the collection of gambling debts for nearly a century and we will not depart from those cases."); *Weisbrod v. Fremont Hotel*, 326 P.2d 1104, 1104 (Nev. 1958) ("In 1872 it was established as the law of this state that an action does not lie for the collection of money won in gambling."); *West Indies, Inc. v. First Nat'l Bank of Nev.*, 214 P.2d 144, 152 (Nev. 1950) ("Those portions of the Statute of Anne are in force which are applicable to our conditions and not in conflict with statutory law."). The legislature repealed this portion of the Statute of Anne in 1983 with the passage of NEV. REV. STAT. §§ 463.361-463.366 (1990). One might have expected the Nevada casinos to have forced this action much earlier, but not all casinos supported the repeal of the Statute of Anne because "[Opponents of repeal] fear[ed] the consequences of the publicity surrounding casino owners and collectors who will go hard after a man in his home state." JEROME H. SKOLNICK, *HOUSE OF CARDS: THE LEGALIZATION AND CONTROL OF CASINO GAMBLING* 80 (1978). Despite the recent change in Nevada law, other states might still refuse to enforce gambling debts owed to Nevada casinos. See *Resorts Int'l v. Agresta*, 569 F. Supp. 24, 26 (E.D. Va. 1983), *aff'd*, 725 F.2d 676 (4th Cir. 1984) (Atlantic City casino not permitted to collect on promissory note because gambling debts, even legal ones, are not collectable under Virginia law).

⁵² DEVELOPMENTS, *supra* note 3, at 64-65; ROSE, *supra* note 7, at 73; e.g., Act of Feb. 29, 1764, 1764 Ga. Col. Laws 15, as amended by Act of Mar. 25, 1765, 1765 Ga. Col. Laws 57 (Georgia enacting the Statute of Anne); Act of Feb. 27, 1821, ch. 18, § 2, 1821 Me. Laws 101-02 (Maine adopting the Statute of Anne); Act of Mar. 19, 1845, ch. 71, 1844 Mo. Laws 539 (Missouri adopting the Statute of Anne); Act of Mar. 9, 1774, 1774 N.Y. Col. Laws 19 (New York adopting the Statute of Anne); An Act for preventing of excessive and deceitful Gaming, Act of Feb. 1, 1727, 1727 Va. Acts, ch. VIII (Virginia adopting the Statute of Anne).

pants. The opportunity for profit was recognized first by private interests and later by governmental entities. As early as the sixteenth century, government-sponsored lotteries were common throughout Europe, and they have continued to be used by various governments ever since.

Lotteries are well suited to government control because their profitability is enhanced by monopoly power and wide coverage.⁵³ Lotteries are an especially attractive source of revenue in times of economic hardship because they have proved largely recession-proof.⁵⁴ The most important factor, of course, is that lotteries are far more popular than taxes.⁵⁵ As such, lotteries have been a popular means of raising revenue for centuries.

A. Early European Lotteries

The earliest known commercial lotteries were conducted by merchants hoping to dispose of excess stock.⁵⁶ For a small price, villagers could hope to win products that they might not otherwise be able to afford. During the sixteenth century, European governments began to recognize the potential for profit in state-run lotteries.⁵⁷ In the first half of the fifteenth century, Belgium held what was possibly the first lottery conducted for the public benefit.⁵⁸ Lotteries soon spread to Italy, France, England and the American colonies.⁵⁹ By the end of the eighteenth century, lotteries were

⁵³ DAVID WEINSTEIN & LILLIAN DEITCH, *THE IMPACT OF LEGALIZED GAMBLING: THE SOCIOECONOMIC CONSEQUENCES OF LOTTERIES AND OFF-TRACK BETTING* 7 (1974).

⁵⁴ "Even during the recession of 1980-81 lottery net revenues continued to grow at a 9.7 percent rate." John L. Mikesell & C. Kurt Zorn, *State Lotteries as Fiscal Savior or Fiscal Fraud: A Look at the Evidence*, 46 PUB. ADMIN. REV. 311, 314 (1986). Cf. DOMBRINK & THOMPSON, *supra* note 15, at 4 (the gaming industry is fairly recession-proof). But see Andrea Stone, *Lotteries pinched by recession*, USA TODAY, Jan. 6, 1992, at 1A (although overall revenues grew by 2.7 percent in fiscal 1991, 10 lotteries had "double digit drops"; the economy and competition with new forms of legalized gambling are identified as potential reasons); Yoshihashi, *supra* note 2, at B1 (suggesting that lotteries are not entirely recession-proof).

⁵⁵ A recent survey in Tennessee found that only 38% of the people favor or strongly favor imposition of a state income tax, while 73% favor or strongly favor institution of a state lottery. Richard Locker, *Support for Income Tax Plan Grows*, COM. APPEAL (Memphis, Tenn.), Nov. 3, 1991, at A1.

⁵⁶ ASHTON, *supra* note 15, at 222; 1 STEINMETZ, *supra* note 6, at 395; SULLIVAN, *supra* note 8, at 5; WEINSTEIN & DEITCH, *supra* note 53, at 7.

⁵⁷ WEINSTEIN & DEITCH, *supra* note 53, at 7.

⁵⁸ HARRY B. WEISS & GRACE H. WEISS, *THE EARLY LOTTERIES OF NEW JERSEY* 1 (1966). But see SULLIVAN, *supra* note 8, at 5 (suggesting that the first public lotteries were held in Italy).

⁵⁹ WEINSTEIN & DEITCH, *supra* note 53, at 86. Francis I of France established a governmental lottery in 1539, and Queen Elizabeth chartered one in 1566. SULLIVAN, *supra* note 8,

common in most Western countries,⁶⁰ though efforts to close them down, because they were believed to be social evils, took place as early as 1563.⁶¹

From 1709 until 1826, the English government conducted annual lotteries to raise revenue.⁶² These were so popular that they soon became a matter of concern.⁶³ English lotteries were attacked for "weakening the habits of industry," diminishing "permanent sources of the public revenue," encouraging other forms of gambling, and being "injurious, in the highest degree, to the morals of the people."⁶⁴ A select committee reported to Parliament in 1808:

In truth the foundation of the Lottery is so radically vicious that Your Committee feel convinced that, under no system of regulations which can be devised, will it be possible for Parliament to adopt it as an efficient source of revenue and at the same time divest it of all the Evils and Calamities of which it has hitherto proved so baneful a source. . . . Your committee find, that by the effects of the Lottery, even under its present restrictions, idleness, dissipation, and poverty are increased; the most sacred and confidential trusts are betrayed; domestic comfort is destroyed; madness often created; crimes, subjecting the perpetrators of them to punishment of death, are common; and even suicide is produced. . . .⁶⁵

Finally, in 1823, at about the same time that lotteries were beginning to be phased out in America,⁶⁶ England abolished lotteries in that country.⁶⁷

Despite anti-lottery movements in England and the United States, lotteries remained popular in several other European countries.⁶⁸ Notable winners of European lotteries include Voltaire, who,

at 5. See also 1 STEINMETZ, *supra* note 6, at 396 (the Pope established a lottery in Rome to raise money for the church).

⁶⁰ WEINSTEIN & DEITCH, *supra* note 53, at 86.

⁶¹ 1 STEINMETZ, *supra* note 6, at 396-97. See also *supra* notes 37-39 and accompanying text (discussing Wm. 3, ch. 17 (1699)).

⁶² 1 STEINMETZ, *supra* note 6, at 399-400; WEINSTEIN & DEITCH, *supra* note 53, at 8.

⁶³ I. TENEN, *THIS ENGLAND* 17-18 (1952). See also WEISS & WEISS, *supra* note 58, at 8 ("By 1800 the poorer classes of London had become lottery addicts.").

⁶⁴ ASHTON, *supra* note 15, at 239 (quoting an 1819 legislative act).

⁶⁵ PERKINS, *supra* note 18, at 13 (quoting the Select Committee report to Parliament).

⁶⁶ See *infra* notes 145-87 and accompanying text.

⁶⁷ Lotteries Act, 4 Geo. 4, ch. 60 (1823) (permitting the drawing of previously authorized lotteries to continue until 1826).

⁶⁸ Before modern lotteries were reintroduced in the United States, many Americans played the Irish Hospitals' Sweepstakes. See generally SCARNE, *supra* note 31, at 162-67 (noting

in addition to being a gifted philosopher and writer, was also a brilliant mathematician. He noted a miscalculation in the government's lottery plan, so he formed a syndicate that purchased every ticket. His share of the winnings gave him the independence to pursue his writing.⁶⁹ Similarly, French artist Claude Monet won 100,000 francs in the 1891 French National Lottery and was then able to completely devote himself to his art.⁷⁰

B. Early American Lotteries

The New World's first additions to the law of gambling were drafted by the Puritans.⁷¹ These regulations were designed to attack the unproductive use of time—idleness, not gambling in and of itself.⁷² While the Puritans did not view gambling as inherently evil, lots were forbidden because they had been invoked in the Scriptures to reveal God's will as to matters of great importance.⁷³ Using them

that promotion in the United States was difficult due to federal laws that restricted lottery schemes). For a description of modern foreign lotteries, see WEINSTEIN & DEITCH, *supra* note 53, at 87–94.

⁶⁹ ROBERT HENDRICKSON, *THE LITERARY LIFE AND OTHER CURIOSITIES* 54–55 (1981).

⁷⁰ *Id.* at 55.

⁷¹ DEVELOPMENTS, *supra* note 3, at 39–42.

⁷² Alfred N. King, *Public Gaming and Public Trust*, 12 CONN. L. REV. 740, 740 (1980) (quoting 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY 37 (1904) (1st ed. Boston 1631)) ("It is further ordered that noe pson howse holder or othr, shall spend his time idely or unpfitably under paine of such punishment as the court shall thinke meets to inflicte. . . ."). See Act of Feb. 29, 1764, 1764 Ga. Col. Laws 15, as amended by Act of Mar. 25, 1765, 1765 Ga. Col. Laws 57 (outlawing private lotteries, adopting the Statute of Anne, and noting the idleness occasioned by gambling); Act of Mar. 24, 1772, ch. MDXLII, 1772 N.Y. Col. Laws 674 (prohibiting unauthorized lotteries, declaring them a public nuisance, and noting that private lotteries have "occasioned Idleness"); Act of Nov. 7, 1769, ch. 17, 1769 Va. Col. Acts 7 (banning unauthorized lotteries and noting the idleness occasioned by gambling); An Act for the better securing the Paiment of Levies, and Restraint of vagrant and idle people; and for the more effectual Discovery and Prosecution of persons having Bastard Children; and for making better Provision for the Poor, 1727 Va. Acts ch. VII (condemning idleness).

Ben Franklin once received a letter questioning this idle waste of time. He replied:

I have indeed now and then a little compunction in reflecting that I spend time so idly; but another reflection comes to relieve me, whispering, "You know that the soul is immortal; why then should you be such a niggard of a little time, when you have a whole eternity before you?" So, being easily convinced, and, like other reasonable creatures, satisfied with small reason, when it is in favour of what I have a mind to, I shuffle the cards again, and begin another game.

Letter to Mrs. Mary Hewson, May 6, 1786, reprinted in 9 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 510, 512 (Albert H. Smyth ed., 1906) (emphasis in original).

⁷³ For example, following the death of Judas Iscariot, the apostles prayed and then cast lots to determine that Matthias, not Joseph, should be named as his successor. Acts 1:24 (King James). See also Numbers 26:55 (lots used to divide lands west of the Jordan among the tribes

for common sport would thus appear evil.⁷⁴ Where lots could be employed for the public good, however, colonists willingly did so.⁷⁵

Because the colonies had no central government, hence no power to tax, they were dependent on help from England.⁷⁶ In 1612, King James I chartered the Virginia Company of London to raise revenue for the benefit and support of the Jamestown settlement.⁷⁷ The company was authorized to conduct lotteries throughout England in order to raise money.⁷⁸ As one early American colonist noted, these lotteries were the "reall and substantiall food, by which Virginia hath been nourished."⁷⁹ That nourishment, however, came at the expense of the British, who purchased the tickets but did not benefit from the profits. Thus, they soon became a drain on the British economy.⁸⁰ When the Virginia Company's charter was revoked in 1624,⁸¹ the colonists turned to domestic lotteries.⁸²

of Israel); *Proverbs* 18:18 ("The lot causeth contentions to cease, and parteth between the mighty."); *Proverbs* 16:33 ("The lot is cast into the lap; but the whole disposing thereof is of the LORD."); *Jonah* 1:7 ("Come, and let us cast lots, that we may know for whose cause this evil is upon us. So they cast lots, and the lot fell upon Jonah."); cf. *Matthew* 27:35 ("And they crucified him, and parted his garments casting lots: that it might be fulfilled which was spoken by the prophet, They parted my garments among them, and upon my vesture did they cast lots.").

⁷⁴ CHAFETZ, *supra* note 42, at 14 (discussing this argument, and attributing it to clergyman and author Cotton Mather).

⁷⁵ Because the apostles had used lotteries, *supra* note 73, the Bible was sometimes cited as authorizing them for good causes. See JOHN SAMUEL EZELL, *FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA* 23 (1960).

⁷⁶ See DEVELOPMENTS, *supra* note 3, at 660.

⁷⁷ Virginia Charter of 1612, § XVI, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 37, 44 (W. Swindler ed., 1979) [hereinafter CONSTITUTIONS]. The Virginia Company of London was intended as a money-making endeavor for its shareholders; however, it dissolved in 1632 without ever having paid a dividend. CHARLES E. CARRINGTON, *THE BRITISH OVERSEAS: EXPLOITS OF A NATION OF SHOPKEEPERS* 22 (1950).

⁷⁸ SPOFFORD, *supra* note 5, at 173. These lotteries were promoted as Christian endeavors, and two of the first three winning tickets were held by Anglican churches. SULLIVAN, *supra* note 8, at 13.

⁷⁹ EZELL, *supra* note 75, at 8 (quoting a member of the Virginia Company).

⁸⁰ WEISS & WEISS, *supra* note 58, at 4 ("It did not take long for the [English] towns and cities to complain of the demoralization of business and industry by the competition of the lottery.").

⁸¹ Parliament objected to these lotteries because the Crown, not Parliament, had authorized them. SPOFFORD, *supra* note 5, at 174. They also suffered from corruption and infighting. SULLIVAN, *supra* note 8, at 13; CARRINGTON, *supra* note 79, at 22.

⁸² King, *supra* note 72, at 741. It has been suggested that most tickets in these early American lotteries were purchased by the gentry, who regarded participation in the lottery as a civic duty. *Id.*; SPOFFORD, *supra* note 5, at 174-75; WEISS & WEISS, *supra* note 58, at 11. The appeal to civic responsibility still is used in some lottery advertisements. The State of Missouri advertises on St. Louis Cardinal baseball radio broadcasts that "when you play, your money works for Missouri."

Between 1746 and the Civil War, American lotteries were authorized for such projects as the establishment or improvement of Harvard, Yale, Kings College (Columbia University), Princeton, Rutgers, Dartmouth, Rhode Island College (Brown University), the University of Pennsylvania, the University of North Carolina, and the University of Michigan, the benefit of the Masons, the fortification of New York City and Philadelphia, the construction of roads, hospitals, lighthouses and jails, the promotion of literature, the improvement of navigation on rivers, the development of industry, and even the construction of churches.⁸³ During this period, lotter-

⁸³ CHAFETZ, *supra* note 42, at 23; DEVELOPMENTS, *supra* note 3, at 137, 312-13, 662-63; DOMBRINK & THOMPSON, *supra* note 15, at 8; EZELL, *supra* note 75, at 34-35, 45, 108-10, 122, 144-45, 163, 166-68, 170-75; GEIS, *supra* note 8, at 226; SULLIVAN, *supra* note 8, at 16, 24-25, 34. Approximately 158 lotteries were chartered between 1744 and 1774. DEVELOPMENTS, *supra* note 3, at 662-63 (identifying the general nature of the benefited entities). See, e.g., Act of Mar. 27, 1819, 1819 Ill. Laws 310 (lottery to raise money for draining ponds and lakes in the Mississippi River bottom for health reasons); Act of Mar. 25, 1819, 1819 Ill. Laws 257 (\$10,000 for improving navigation on the Big Wabash River); Act of Nov. 23, 1810, ch. 3, § 1, 1810 Ind. Acts 105 (\$1,000 lottery for the benefit of Vincennes library); Act of Nov. 29, 1806, ch. 5, § 15, 1806 Ind. Acts 178, 183 (lottery for the benefit of Vincennes University); Act of Feb. 26, 1814, ch. CLXXVI, 1814 Mass. Acts 444 (extension of time for completion of lottery to raise money to build locks and canals in New Hampshire); Act of Mar. 14, 1806, 1806 Mass. Acts 151 (lottery to raise money to build and repair certain buildings at Harvard); Act of Nov. 21, 1788, ch. 4, 1778 Mass. Acts 719 (lottery to permit Harvard to buy a planetarium); Act of July 2, 1772, ch. 16, 1772 Mass. Province Acts 212 (lottery to build residence hall for Harvard); Act of June 14, 1794, ch. 1, 1794 Mass. Acts 405 (renewing the 1772 lottery); Act of Aug. 26, 1817, 2 Mich. Terr. Laws 104 (four lotteries to help found the University of Michigan); Act of Sept. 9, 1805, 1 Mich. Terr. Laws 67 (four lotteries to raise \$20,000 "for the promotion of literature, and the improvement of the city of Detroit"); Act of Apr. 7, 1806, 1806 N.Y. Laws 627, 630 (lotteries for establishment of a hospital and for the benefit of Union College); Act of Apr. 8, 1805, 1805 N.Y. Laws 233-35 (lottery for the "encouragement of literature" and for "improving the navigation between the villages of Troy and Waterford"); Act of Mar. 14, 1800, 1800 N.Y. Laws 469 (\$13,000 for improvement of navigation on the Hudson River); Act of Dec. 1, 1756, 1756 N.Y. Col. Laws 363 (erection of a new "Gaol" [jail] in New York City); Act of Apr. 8, 1748, ch. DCCCLX, 1748 N.Y. Col. Laws 277, as amended by Act of Oct. 28, 1748, ch. DCCCLXX, 1748 N.Y. Col. Laws 284 (lottery to raise £1,800 to fund a college for the advancement of learning); Act of Feb. 25, 1746, ch. DCCCXVII, 1746 N.Y. Col. Laws 269, as amended by Act of May 3, 1746, ch. DCCCXXIII, 1746 N.Y. Col. Laws 270 (fortification of New York City); Act of July 15, 1746, ch. DCCCXXX, 1746 N.Y. Col. Laws 271 (fixing the date of the drawing of a lottery for the benefit of the colony); Act of Dec. 6, 1746, ch. DCCXLI, 1746 N.Y. Col. Laws 273 (lottery for the establishment of Kings College, now known as Columbia University); Act of Oct. 1822, 1822 R.I. Pub. Laws 32 (lottery for the encouragement of domestic industry).

Columbia University's greatest benefit from the lottery may have come when New York chartered a drawing for its rival, Union College. See Act of Apr. 15, 1814, ch. CC, § L1, 1814 N.Y. Laws 250, 257 (lottery for benefit of Union College); Act of Apr. 13, 1814, 1814 N.Y. Laws 142, 143 (same); Act of Apr. 7, 1806, 1806 N.Y. Laws 627 (same); Act of Mar. 30, 1805, 1805 N.Y. Laws 109-11 (lottery for endowment of Union College). To appease Columbia, the state gave Columbia a 21-acre tract of land in the heart of Manhattan for a new

ies provided funds to 47 colleges, 300 lower schools and 200 church groups.⁸⁴

Privately conducted lotteries caused some merchants to complain about unfair competition,⁸⁵ and there were allegations of fraud and misrepresentation.⁸⁶ In response, most colonies adopted regulations that outlawed lotteries for personal profit.⁸⁷ These regulations stifled most vocal opposition to authorized lotteries, and lotteries prospered.⁸⁸ Lotteries for the public good were "looked upon as a kind of voluntary tax for paving streets, erecting wharves, buildings, etc., with a contingent profitable return for such subscribers as held the lucky numbers."⁸⁹ An advertisement in the *Pennsyl-*

campus. Act of Apr. 13, 1814, 1814 N.Y. Laws 142, 143. This included the property on which Rockefeller Center is now located, and is a principal source of Columbia's wealth. SULLIVAN, *supra* note 8, at 34. The lottery for Union College, meanwhile, turned out to be a fiasco, with the College receiving little or no benefit. *Id.* at 46. In fact, this lottery was one of the reasons that New York eventually prohibited all lotteries. *Id.*

⁸⁴ See HERBERT ASBURY, *SUCKER'S PROGRESS: AN INFORMAL HISTORY OF GAMBLING IN AMERICA FROM THE COLONIES TO CANFIELD* 77-78 (Patterson Smith Pub. Co. 1969) (1938); DEVELOPMENTS, *supra* note 3, at 140; DOMBRINK & THOMPSON, *supra* note 15, at 8.

⁸⁵ DEVELOPMENTS, *supra* note 3, at 77; SULLIVAN, *supra* note 8, at 20; WEINSTEIN & DEITCH, *supra* note 53, at 8. See Act of July 27, 1721, ch. 411, 1721 N.Y. Col. Laws 124 (outlawing private lotteries because of their impact on merchants and commerce).

⁸⁶ DEVELOPMENTS, *supra* note 3, at 52. See George Washington, 33 WRITINGS OF WASHINGTON 359 (J. Fitzpatrick ed., 1931) (1794 letter discussing a lottery that appears to be having such problems). As early as 1721, the New York Assembly passed a law to control fraud in the conducting of lotteries. Act of July 27, 1721, ch. 411, 1721 N.Y. Col. Laws 124 (outlawing private lotteries and noting fraud in past lotteries). See also Act of Nov. 25, 1747, ch. 856, 1747 N.Y. Col. Laws 227 (similar).

⁸⁷ WEINSTEIN & DEITCH, *supra* note 53, at 8; e.g., Act of Dec. 22, 1792, 1792 Md. Laws ch. 58 (act to prevent private lotteries); Act of June 30, 1828, 1828 Mich. Terr. Laws 56 (penalty for conducting private lottery increased to \$2000); Act of Apr. 7, 1806, 1806 N.Y. Laws 634-35 (authorizing prosecutions for violators of "An act to prevent private lotteries"); Act of Nov. 25, 1747, ch. DCCCLVI, 1747 N.Y. Col. Laws 277 (act to prevent private lotteries); Act of July 27, 1721, ch. 411, 1721 N.Y. Col. Laws 124 (banning all unauthorized lotteries). See also Washington, *supra* note 86, at 251 (letter discussing Washington's efforts to stop an unauthorized lottery). Some of the statutes taxed, but did not prohibit, lotteries. See, e.g., Act of Feb. 15, 1819, ch. 179, 1818 Md. Laws 14; cf. Act of Feb. 14, 1820, ch. 190, 1819 Md. Laws 15 (exempting a lottery from the taxation requirement).

The greater concern about controlling lotteries is evident in the authorizations, which spelled out duties and responsibilities with greater detail than the earlier authorizations. See, e.g., Act of Feb. 12, 1751, 1751 Acts and Laws of Mass. Bay 403-04 (great detail in the charter of the authorized lottery); Act of Sept. 24, 1767, ch. 12, 1767 N.H. Province Laws 482-83 (authorizing a lottery to raise money for the construction of a pier, but giving very specific instructions as to the control of the lottery). Cf. *supra* note 85 (citing several lottery authorizations that did little more than recite that the lottery was authorized). An important bit of constitutional law sprang from these early lottery regulations in the case of *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (asserting the Supreme Court's authority over issues involving a federal question).

⁸⁸ DEVELOPMENTS *supra* note 3, at 77; EZELL, *supra* note 75, at 28.

⁸⁹ SPOFFORD, *supra* note 5, at 175. See also *supra* note 80.

vania Gazette of February 22, 1759, promoted a lottery to raise money for a church, noting that the drawing was "solely for the promotion and honor of religion" and was in "imitation of many of their pious neighbors in this and adjacent provinces."⁹⁰

At the same time that American governmental entities were heavily dependent on public lotteries to generate revenue, they took special aim at the evils associated with private lotteries.⁹¹ The typical position taken by colonies/states from the mid-1700s (when all colonial governments except North Carolina and Maryland regulated lotteries),⁹² until the 1820s-30s was that regulated lotteries were tolerated (and perhaps encouraged) but that unauthorized lotteries were strictly prohibited.⁹³ By 1776, a lottery wheel existed "in every city and town large enough to boast of a courthouse and a jail."⁹⁴

Due to local influence, lotteries were conducted more often in some states than in others. For example, the Society of Friends (Quakers) had a longstanding moral objection to lotteries.⁹⁵ Accordingly, Pennsylvania, where the Quakers had political power, regulated lotteries more heavily than other states.⁹⁶ In 1748, Ben Franklin and other leading citizens of Philadelphia proposed a lottery to

⁹⁰ SPOFFORD, *supra* note 5, at 175.

⁹¹ See Act of Mar. 24, 1772, ch. MDXLII, 1772 N.Y. Col. Laws 674 (statute prohibiting unauthorized lotteries, declaring them a public nuisance, and noting that "many mischievous Consequences have been experienced from [private lotteries], which has proved highly prejudicial to Trade, has occasioned Idleness and Inattention to Business, been productive of Fraud and Imposition, and has given Birth to a dangerous Spirit of Gaming"); Act of June 13, 1772, ch. 208a, §§ 1, 2, 1 Del. Laws 504 (1797) (similar to the New York legislation); Act of Mar. 9, 1774, 1774 N.Y. Col. Laws 19 (reenacting the 1772 New York law, adopting the Statute of Anne, and authorizing grand juries to be employed in investigations).

⁹² EZELL, *supra* note 75, at 28.

⁹³ See DEVELOPMENTS, *supra* note 3, at 162 (noting New York's position); *id.* at 241 ("This system—banning all private lotteries while continuing to grant exceptions to state-run or chartered lotteries—became the standard for dealing with the lottery problem."); see also *People v. Charles*, 3 Denio 212 (N.Y. Sup. Ct. 1846) (criminal conviction for selling tickets in an unauthorized lottery); *People v. Sturdevant*, 23 Wend. 418 (N.Y. Sup. Ct. 1840) (same); Act of Nov. 7, 1769, ch. 17, 1769 Va. Col. Acts 7 (banning unauthorized lotteries); Act of Feb. 29, 1764, 1764 Ga. Col. Laws 15, as amended by Act of Mar. 25, 1765, 1765 Ga. Col. Laws 57 (outlawing private lotteries); Act of Sept. 13, 1762, No. 1041, 1762 S.C. Col. Acts 256-57 (banning unauthorized lotteries).

⁹⁴ CHAFETZ, *supra* note 42, at 25.

⁹⁵ SULLIVAN, *supra* note 8, at 19, 47-48; WEINSTEIN & DEITCH, *supra* note 53, at 8.

⁹⁶ COMM'N ON THE REVIEW OF THE NAT'L POLICY TOWARD GAMBLING, GAMBLING IN AMERICA 145 (1976) [hereinafter GAMBLING IN AMERICA]. In 1682, 1693, 1700 and 1705, Pennsylvania passed legislation outlawing lotteries, but the English sovereigns nullified it each time. EZELL, *supra* note 75, at 17-19; SULLIVAN, *supra* note 8, at 19. As the Quakers lost political power in Pennsylvania, that state began to authorize more lotteries. DEVELOPMENTS, *supra* note 3, at 74-75. One hundred and seventy-six lotteries were authorized in Pennsylvania from 1747 to 1833. SULLIVAN, *supra* note 8, at 46.

raise funds to build a battery on the Delaware River and furnish it with cannons.⁹⁷ Franklin had some doubts about whether he could get approval, given the strong Quaker influence in the area, but apparently he was more concerned about their opposition to warfare than to lotteries. He devised a plan:

[W]hen in our fire company we feared the success of our proposal in favour of the lottery, and I had said to my friend Mr. Syng, . . . "If we fail, let us move the purchase of a fire-engine with the money; the Quakers can have no objection to that; and then, if you nominate me and I you as a committee for that purpose, we will buy a great gun, which is certainly a *fire-engine*."⁹⁸

Franklin did not have to resort to this back-up plan. The lottery was approved and raised enough money to finance the battery and buy the cannons.⁹⁹ In contrast to Pennsylvania, Rhode Island granted lotteries to almost anyone who asked.¹⁰⁰

As tensions with England mounted in the 1760s and early 1770s, economic problems developed in the colonies, and lotteries were conducted less frequently. Colonists had little disposable income for lottery tickets, and because most lotteries announced the prizes before selling tickets, low ticket sales caused many lotteries to fail.¹⁰¹ Moreover, as England grew fearful of the colonies' autonomy, it prohibited many colonial lotteries.¹⁰² British concerns about lotteries were well founded; a national lottery¹⁰³ and several state

⁹⁷ SPOFFORD, *supra* note 5, at 175.

⁹⁸ BENJAMIN FRANKLIN, *AUTOBIOGRAPHY*, reprinted in 1 HARVARD CLASSICS 110 (Charles W. Eliot ed., 1909).

⁹⁹ *Id.*; SPOFFORD, *supra* note 5, at 175.

¹⁰⁰ EZELL, *supra* note 75, at 12; see, e.g., Act of Oct. 1822, 1822 R.I. Pub. Laws 32 (lottery for the encouragement of domestic industry); 1822 R.I. Pub. Laws 26 (June 1822) (authorizing a lottery for the Free-will Baptist Church in Smithfield).

¹⁰¹ EZELL, *supra* note 75, at 43-46. Today's large lotteries (like lotto) avoid such risks by making the prizes dependent upon the number of tickets sold.

¹⁰² *Id.* at 49-50; SULLIVAN, *supra* note 8, at 27. See also DEVELOPMENTS, *supra* note 3, at 139 n.93 (the British "vigorously used" New York's laws prohibiting unauthorized lotteries). The charters of some colonies provided that they were not subject to England's supervision; hence, they continued to authorize lotteries. *Id.* See Maryland Charter of 1632, reprinted in 4 CONSTITUTIONS, *supra* note 77, at 50; Rhode Island Charter of 1663, reprinted in 8 CONSTITUTIONS at 362; see also Act of Feb. 14, 1783, 1783 N.Y. Laws 523, 525 (pardoning most lottery offenders and preserving most pre-war lottery law).

¹⁰³ See *Horner v. United States*, 147 U.S. 449, 458 (1893) ("a small sum was raised in America during the Revolution by a lottery authorized by the Continental Congress"); CHAFETZ, *supra* note 42, at 25-26 (discussing the national lottery); SPOFFORD, *supra* note 5, at 182 (same).

lotteries¹⁰⁴ were eventually instituted to help fund the Revolutionary War.¹⁰⁵

New Jersey authorized approximately seventy lotteries for various purposes from 1727 to 1824.¹⁰⁶ One lottery, authorized in 1793 for the benefit of the Society for Establishing Useful Manufacturers, is worthy of note because it prompted Alexander Hamilton to prepare a two-page document entitled "Idea Concerning a Lottery."¹⁰⁷ In this document, Hamilton suggested simplicity of play, ticket sales to border states, low-priced tickets, a small number of large prizes, and many medium-sized prizes.¹⁰⁸ The operators of the 1793 lottery did not heed Hamilton's advice. The prices were high and the prizes were small.¹⁰⁹ The lottery ended as a failure.¹¹⁰

Many local lottery promotions had difficulty after the Revolutionary War, but the lottery business expanded rapidly by moving from local operations to state or nationwide productions.¹¹¹ Ticket brokers emerged, buying large blocks of tickets at a discount and reselling them throughout the country for a profit.¹¹² Brokers heavily promoted the lotteries with newspaper advertisements and handbills.¹¹³ They sold tickets on the installment plan, sold fractions of

¹⁰⁴ EZELL, *supra* note 75, at 64-68; SULLIVAN, *supra* note 8, at 30.

¹⁰⁵ Revolutionary era lotteries were not as successful in raising funds for the war effort as had been hoped. The failure may be attributed, at least in part, to an army's inability to wait for the completion of the long lottery process to get money for food and supplies. EZELL, *supra* note 75, at 63. Moreover, the colonists had not yet developed a spirit of national patriotism, thus the national lottery suffered. *Id.* Lotteries were important to the war effort, however, in that several projects on the home front were financed with lottery proceeds. *Id.* at 64 ("[P]etitions were being placed before legislatures for lotteries to finance schools and repair streets and bridges. The bulk of licenses during the war years were for lotteries of this sort. . . ."). See also *supra* note 85.

¹⁰⁶ WEISS & WEISS, *supra* note 58, at 67. Many of these were for the benefit of churches. *Id.*

¹⁰⁷ Alexander Hamilton, *Idea Concerning a Lottery*, in 13 THE PAPERS OF ALEXANDER HAMILTON 518-19 (Harold C. Syrett ed., 1987).

¹⁰⁸ *Id.* Hamilton had generally opposed lotteries. See *supra* note 97. Interestingly, these proposals are very similar to the strategies that were successfully applied to modern American lotteries after they met with some initial difficulty. WEINSTEIN & DEITCH, *supra* note 53, at 15. See *infra* note 236.

¹⁰⁹ EZELL, *supra* note 75, at 166.

¹¹⁰ *Id.*; 13 HAMILTON, *supra* note 107, at 520.

¹¹¹ WEINSTEIN & DEITCH, *supra* note 53, at 9.

¹¹² CHARLES T. CLOTFELTER & PHILLIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 36-37 (1989). See also EZELL, *supra* note 75, at 82. This was P.T. Barnum's first occupation. *Id.* at 84. George Mason made reference to a lottery broker as early as 1778. See 1 THE PAPERS OF GEORGE MASON 430 (Robert A. Rutland ed., 1970).

¹¹³ For examples of the advertisements, see EZELL, *supra* note 75, at 89-94; SULLIVAN, *supra* note 8, at 42-43.

tickets,¹¹⁴ and (sometimes illegally) sold out-of-state lottery tickets.¹¹⁵ In fact, brokers ultimately had complete control of and supervision over lotteries for the sponsoring parties.¹¹⁶

Colonial period licensing laws were unable to control the problems created by national brokerage, so states had to enact new regulations, which often included bonding and supervision of receipts.¹¹⁷ In time, brokers established interstate connections, merged, and a few companies were able to monopolize the market.¹¹⁸ Lottery ticket brokerage became America's first national marketing enterprise, and one of the first entities to use the telegraph.¹¹⁹ Much later, certain lottery brokerage houses moved into stocks and currency exchanges, ultimately evolving into banking enterprises, some of which remain prominent today.¹²⁰

Although regulations usually prohibited lotteries for personal profit,¹²¹ several lotteries were authorized for the benefit of insolvent debtors.¹²² In particular, owners of property that was too expensive for an individual buyer were sometimes permitted to dispose of their property by lottery, as a means of obtaining a fair return so that their debts could be paid.¹²³ The most famous such lottery was authorized to permit Thomas Jefferson to sell his lands around Monticello.¹²⁴

¹¹⁴ WEISS & WEISS, *supra* note 58, at 17.

¹¹⁵ EZELL, *supra* note 75, at 95, 97; WEINSTEIN & DEITCH, *supra* note 53, at 9 ("Most states outlawed sale of tickets from other states. However, these laws were widely disregarded and out-of-state tickets were advertised and available in every state.").

¹¹⁶ SULLIVAN, *supra* note 8, at 38. See also DEVELOPMENTS, *supra* note 3, at 167 (one lottery contracting company took over operation of nearly all legal lotteries in New York). Of course, as the national industry developed, the lottery lost its local character and its reputation as a voluntary way to support public projects was irreparably damaged. *Id.* at 81.

¹¹⁷ Brokers, managers and operators were all taxed (or made to pay fees). EZELL, *supra* note 75, at 98-99; accord WEINSTEIN & DEITCH, *supra* note 53, at 10 (discussing the bonding requirements); see, e.g., Act of Apr. 13, 1813, ch. CXCVIII, 1813 N.Y. Laws 315 (managers must be bonded, take an oath, and are prohibited from purchasing tickets in their own lottery); Act of Apr. 5, 1813, ch. CXXVIII, 1812 N.Y. Laws 204 (more regulations for lottery managers); see also *Brent v. Davis*, 23 U.S. (10 Wheat.) 395, 396, 398 (1925) (action on bond of lottery manager); Act of Feb. 14, 1783, 1783 N.Y. Laws 523, 525 (preserving most pre-Revolutionary War lottery law).

¹¹⁸ DEVELOPMENTS, *supra* note 3, at 80.

¹¹⁹ EZELL, *supra* note 75, at 82, 87.

¹²⁰ SULLIVAN, *supra* note 8, at 40 (tracing the foundations of the First National Bank of New York City and Chase Manhattan Corporation back to lottery brokers).

¹²¹ See *supra* note 89.

¹²² WEISS & WEISS, *supra* note 58, at 134.

¹²³ This procedure is still occasionally used in England. See Coles, *First Prize: a £110,000 4-bed home*, CAMBRIDGE [England] EVENING NEWS, July 17, 1991, at 22 (house sold by lottery).

¹²⁴ SPOFFORD, *supra* note 5, at 186. Jefferson had fallen on hard times and owed \$80,000

State-conducted lotteries prospered into the early years of the nineteenth century and played an important role in the westward expansion of the nation. America did not have a well-developed banking system or central government,¹²⁵ so lotteries were used to finance all types of public works which in later years would be financed by taxes or bond issues.¹²⁶ Marketing efforts were so successful and lotteries were so popular that in the early 1800s, twenty-four of the thirty-three states authorized lotteries for internal improvements,¹²⁷ and a drawing was held somewhere almost every day.¹²⁸

to his creditors. ASBURY, *supra* note 84, at 74. The lands surrounding Monticello were his most valuable assets, but he was unable to find an individual buyer willing or able to pay his asking price. Accordingly, he obtained permission to conduct a lottery. *Id.* Jefferson sought and obtained permission to sell chances in many states, sometimes obtaining preferential treatment. See An Act Relative to the Revenue of the State, 1826 La. Acts 234-36; 17 THE WRITINGS OF THOMAS JEFFERSON 450, 157-58 (Andrew A. Lipscomb ed., 1903) [hereinafter Lipscomb]. Because of this episode in his life, Jefferson is sometimes identified as a proponent of the lottery (see *infra* note 241), but this characterization is not necessarily true. See THOMAS JEFFERSON, WRITINGS 1222 (Merrill D. Peterson ed., 1984) (Jefferson refuses an offer to become a lottery agent, stating "having myself made it a rule never to engage in a lottery"); 2 THE PAPERS OF THOMAS JEFFERSON 560 (Julian P. Boyd ed., 1950) (Jefferson contributed to the revisions of Virginia law, including the prohibition of private lotteries). In fact, this whole episode clearly caused him great embarrassment. He wrote to James Madison, "You will have seen in the newspapers some proceedings in the Legislature which have cost me much mortification. . . ." SARAH N. RANDOLPH, THE DOMESTIC LIFE OF THOMAS JEFFERSON 411-12 (1958).

¹²⁵ See DOUGLAS C. NORTH, THE ECONOMIC GROWTH OF THE UNITED STATES 1790-1860, at 20 (1966) (noting the problems encountered due to the lack of a national government).

¹²⁶ EZELL, *supra* note 75, at 69; WEINSTEIN & DEITCH, *supra* note 53, at 9. From 1790 until the Civil War, lotteries were authorized for the benefit of approximately 50 colleges, 300 lower schools and 200 churches. *Id.* Washington, D.C. was also largely developed with funds generated by lotteries. See Clark v. Mayor of Washington, 25 U.S. (12 Wheat.) 40 (1927) (city of Washington held responsible to winner despite having turned operation of lottery over to corporation); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (discussing "An Act to incorporate the inhabitants of the City of Washington, in the District of Columbia" and a supplemental act which authorized a lottery to raise funds); Act of May 4, 1812, ch. 75, § 6, 2 Stat. 726 (authorizing lotteries to be conducted for the benefit of Washington, D.C., provided that the amount raised on any individual project did not exceed \$10,000 and that the President approved); 28 ANNALS OF CONG. 224, 1122 (1815) (consideration of a duty on lotteries to help fund the Washington, D.C. government). Congress finally outlawed lotteries in Washington, D.C. in 1842. Act of Aug. 31, 1842, ch. 282, 5 Stat. 578. See also Act of Apr. 29, 1878, ch. 68, 20 Stat. 39 (increasing the penalties for lottery operation in Washington, D.C.); Act of Mar. 3, 1901, ch. 854, §§ 8863-8869, 31 Stat. 1330-31 (combining various gambling and lottery prohibitions).

¹²⁷ EZELL, *supra* note 75, at 136. The states that did not participate were those in the far west, where sparse population centers may have made lotteries more difficult to conduct. *Id.*

¹²⁸ *Id.* at 99. See also ASBURY, *supra* note 84, at 76 ("By 1790 about two thousand legal Lotteries were in operation."); WEINSTEIN & DEITCH, *supra* note 53, at 9 (noting the existence of 160 lottery shops in New York and 200 lottery offices in Philadelphia).

1. Opposition in the 1800s

Until the early 1800s, there was little opposition to state-conducted lotteries. State regulation, including bonding of operators and supervision of receipts, quieted opponents.¹²⁹ Churches usually benefited from lotteries, so they were not quick to condemn.¹³⁰ As the country's dependency on lotteries increased, however, so did the opportunity for abuse. Serious lottery opposition began to mount in the early to mid-1800s as part of general social reform that included movements for temperance, peace, women's rights, educational reform, prison reform and abolition of slavery.¹³¹ As one authority has noted:

In 1842, Democrats swept to power because of their opposition to lotteries. The lotteries in turn were portrayed merely as an adjunct to a corrupt monopolistic banking system dominated by the wealthy Whig power elite. The great moral fervor of the 1830's produced many reform movements. . . . [A] class element [also] entered the picture. Lotteries, like corporations, made men wealthy without physical work. The poor, who worked hard for their fatback and beans, resented the state's approval of activities that made men wealthy without sweat. Thus, anti-lottery leaders were often enemies of all forms of speculation. . . .¹³²

Lottery opposition focused on two primary concerns: social problems, such as the impact that lotteries had on the morality and work ethic of the people, and fraudulent operation.

a. *Social Problems*

As the nation's financial institutions developed, and as state and federal governments became sufficiently stable and organized to collect taxes, the need for lotteries as a means of raising public

¹²⁹ See *supra* note 121.

¹³⁰ GAMBLING IN AMERICA, *supra* note 96, at 145; WEINSTEIN & DEITCH, *supra* note 53, at 8-9 ("The churches, aside from the Quakers, supported the system since they were among its prime beneficiaries."). Similar arrangements have been noted in modern-day Nevada. SKOLNICK, *supra* note 51, at 334-35.

¹³¹ CLOTFELTER & COOK, *supra* note 112, at 37; DEVELOPMENTS, *supra* note 3, at 269-70.

¹³² DEVELOPMENTS, *supra* note 3, at 269-70. Some authorities have suggested that games were prohibited or allowed depending on their appeal to various classes. DOMBRINK & THOMPSON, *supra* note 15, at 9.

funds diminished.¹³³ With the development of taxation and public bonds as revenue sources, the primary remaining justification for using lotteries was that they provided a popular form of entertainment.¹³⁴ That justification ignored the social problems associated with state-sponsored gambling.¹³⁵ Close examination of these problems led to a flood of lottery criticism.

When early nineteenth-century Americans closely examined lotteries and compared them to other forms of generating revenue, the perception that lotteries were a voluntary tax paid only by the willing was gradually replaced by a belief that they actually imposed a highly regressive levy.¹³⁶ The 1813 edition of the *Old Farmer's Almanac* cautioned that lotteries were the "path [that] leads down to the gloomy pits of ruin."¹³⁷ An influential 1814 novel, *The Wonderful Advantage of Adventuring in the Lottery*, written by Reverend Samuel Wood, dramatized the personal problems associated with the lottery.¹³⁸ The plot is essentially a morality play involving John Brown, who, against his wife's wishes, decides to play the lottery.¹³⁹ The lottery causes John to ignore and lose his job, turn to lying, lose his money, steal from his employer, consider suicide, fall in with the wrong crowd, turn to alcohol, take part in a highway robbery, and shoot and kill the victim.¹⁴⁰ John is ultimately sentenced to death, and grief kills his wife. The judge at the end of the trial states:

I have never sat upon this bench after the drawing of the Lottery, but I had reason to think it had provided the ruin of many of the unhappy culprits who appeared before me. I would earnestly exhort the crowds that hear

¹³³ WEINSTEIN & DEITCH, *supra* note 53, at 87. See DOUGLAS C. NORTH, *THE ECONOMIC GROWTH OF THE UNITED STATES 1790-1860*, at 62 (1966) ("the American economy of 1815 exhibited a marked contrast to the conditions of 1790").

¹³⁴ See DEVELOPMENTS, *supra* note 3, at 311.

¹³⁵ See, e.g., 1 STEINMETZ, *supra* note 6, at 401-03 (noting suicides due to early European lotteries and concluding that "the sum secured by the government was small when compared with the infinite mischief it occasioned").

¹³⁶ DEVELOPMENTS, *supra* note 3, at 86.

¹³⁷ EZELL, *supra* note 75, at 184. See also ASBURY, *supra* note 84, at 78 ("Public officials and thinking people generally began to realize about 1820 that the Lottery as an institution was rapidly becoming a monster which threatened to dwarf legitimate business and industry and transform America into a nation of petty gamblers.").

¹³⁸ REV. SAMUEL WOOD, *THE WONDERFUL ADVANTAGE OF ADVENTURING IN THE LOTTERY* (1814).

¹³⁹ *Id.* at 5-6. The wife cites the Bible as being opposed to lotteries and accuses them of being fraudulently operated. *Id.*

¹⁴⁰ *Id.* at 11-13.

me to abhor the thoughts of adventuring in it, and to fly from it as from a plague, which will destroy domestic happiness and inward peace, and bring upon them every kind of distress.¹⁴¹

John goes to his doom hoping that his fate will be a warning to others against playing the lottery.¹⁴² Popular publications gave similar cautions, referring to lotteries as "a vile tax on the needy and ignorant."¹⁴³ Even children's books cautioned against the lottery.¹⁴⁴

Lotteries were also blamed for larger-scale social ills. In 1818, the Society for the Prevention of Pauperism in the City of New York published a report on the principal causes of poverty. It listed these four causes, in order: alcohol, lotteries, pawnbrokers and "the many charitable institutions in the city."¹⁴⁵ A similar report on the city of Baltimore, issued three years later, listed alcohol, lotteries, prostitution and charitable institutions.¹⁴⁶ Not surprisingly, both New York and Maryland acted to place more controls on lotteries before 1920.¹⁴⁷

As lotteries fell from grace, several politicians and civic groups began to condemn them. The Governor of Massachusetts, in an 1833 message to the legislature, explained:

The influence of such schemes of deception to allure the laborious poor from the path of honest industry, and to cheat them of their hard earned wages, to entice the young and the unreflecting from their fidelity, and betray them into a violation of their trust, and the commission of heinous crimes, cannot be doubted, while the desolating and fatal effects upon the social relations of life, are scarcely less to be deplored.¹⁴⁸

An 1830 New York grand jury found that fifty-two lotteries per year (with prizes totalling \$9,270,000) were being conducted, and that this had a pernicious effect upon morals, "creating a spirit of gambling which was productive of idleness, vicious habits, and the

¹⁴¹ *Id.* at 22.

¹⁴² *Id.* at 23.

¹⁴³ ASBURY, *supra* note 84, at 78 (quoting NILES' WEEKLY REG., Feb. 12, 1831).

¹⁴⁴ WEISS & WEISS, *supra* note 58, at 18.

¹⁴⁵ CHAFETZ, *supra* note 42, at 186.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 187.

¹⁴⁸ Message from Governor Lincoln to the Senate and House of Representatives, Feb. 12, 1833, in ch. 24, 1833 Mass. Acts 332, 333.

ruin of credit and character."¹⁴⁹ This shift in perception foreshadowed the ultimate demise of the nineteenth-century state-sponsored lottery.¹⁵⁰

b. *Fraud*

At the same time that lotteries were being criticized for corrupting the morality of United States citizens, they also were charged with being fraudulently conducted.¹⁵¹ For example, Massachusetts outlawed lotteries after an investigatory committee discovered that \$886,439 worth of tickets had been sold in a lottery chartered for the purpose of raising \$16,000 to repair Plymouth Beach, but that after nine years only \$9,876 had been turned over to the project.¹⁵² New York Governor George Clinton, in his 1827 message to the legislature, revealed that several lottery operators had pocketed the proceeds without awarding any prizes.¹⁵³ Newspapers published exposes explaining how lotteries could be rigged and sometimes accusing operators of actually having fixed drawings or of having misappropriated funds.¹⁵⁴ At least one libel suit flowed

¹⁴⁹ SPOFFORD, *supra* note 5, at 181.

¹⁵⁰ A completely different concern may have added to the anti-lottery movement in the South. In 1800, Denmark Vesey, an exceptionally talented slave of great physical strength and fluent in six languages, won \$1,500 in a Charleston, South Carolina lottery. ASBURY, *supra* note 84, at 83. With his winnings, he was able to purchase his freedom from his master, a Charleston sea captain. *Id.* Vesey remained in the Charleston area, working as a carpenter and gaining influence among the black populace. *Id.* In 1822, he planned a revolt involving perhaps as many as 9,000 African-American people (slave and free) from the Charleston area. *Id.* The plan allegedly was to kill all of the white people and set fire to the city. ENCYCLOPEDIA OF SOUTHERN CULTURE 277 (Charles R. Wilson & William R. Ferris eds., 1989); EZELL, *supra* note 75, at 112 (discussing the plan). It was not successful, however, because the plan was revealed to the owners by a slave who had been asked to participate in the revolt. CHAFETZ, *supra* note 42, at 189-90.

¹⁵¹ A form of lottery permitted players who could not afford to buy a full ticket (or even a share of a ticket) to wager on the lottery for a matter of pennies. "Insurance" or "policy" created a great incentive for operators to see that heavily insured numbers were not winning numbers, and this led to fraud. See WEINSTEIN & DEITCH, *supra* note 53, at 10; SULLIVAN, *supra* note 8, at 49.

¹⁵² See Act of Feb. 28, 1812, ch. CXLVIII, 1812 Mass. Acts 306 (authorizing the lottery for the benefit of Plymouth Beach); Act of Jan. 29, 1822, ch. XLVI, 1822 Mass. Acts 411 (providing payment to members of the committee to investigate the lottery and identifying their date of appointment as Feb. 9, 1821). Act of June 16, 1821, ch. XXXI, 1821 Mass. Acts 372 (prohibited sale of more tickets in that lottery). This revelation led to the prohibition of all lotteries in Massachusetts. EZELL, *supra* note 75, at 192-93; SULLIVAN, *supra* note 8, at 45.

¹⁵³ ASBURY, *supra* note 84, at 80.

¹⁵⁴ See *id.* at 81 (quoting REPUBLICAN CHRON. (New York), Sept. 16, 1818); see also *infra* note 155. Newspapers had long accused lotteries of being operated unfairly. See ASHTON, *supra* note 15, at 236 (quoting THE [London] TIMES, July 22, 1795).

from such accusations.¹⁵⁵ The newspaper successfully defended by asserting and proving the truth of its accusations.¹⁵⁶ Several lottery cases reached the United States Supreme Court in the 1920s and 1930s, documenting more corruption and irregularity in the lottery industry.¹⁵⁷

These revelations of fraud provided momentum to the anti-lottery movement. In 1823, the Baptist General Convention condemned lotteries for the first time, and many local churches and newspapers also began voicing opposition.¹⁵⁸ The Presbyterian General Assembly condemned lotteries in 1830.¹⁵⁹ In 1834, Pennsylvania citizens founded the Pennsylvania Society for the Suppression of Lotteries.¹⁶⁰ In New York, the 1820s brought increased public concern over the lotteries, more regulation, and a constitutional amendment providing, "No lottery shall hereafter be authorized in this State; and the legislature shall pass laws to prevent the sale of all lottery tickets within this State, except in lotteries already provided by law."¹⁶¹ This was the first constitutional prohibition of

One modern sweepstakes drawing (which probably involved no fraud) is reminiscent of the fraudulent drawings of olden days. A Winn-Dixie supermarket in Beaufort, South Carolina, recently sponsored a drawing for a new car. On the day of the drawing, an official from the company asked an eight-year-old girl to come forth and draw the winning ticket. When it was read, the ticket contained the name of the girl's mother. Winn-Dixie refused to award the car to the child's mother and instead awarded it to someone else. Lotita Huckaby, *No-win situation: Contest official nixes daughter's pick of mother's name*, ISLAND PACKET (Hilton Head I, S.C.), Aug. 21, 1991, at 1-A (indicating that the family is contemplating legal action).

¹⁵⁵ See CHARLES N. BALDWIN, REPORT OF THE TRIAL OF CHARLES N. BALDWIN FOR LIBEL, IN PUBLISHING, IN THE REPUBLICAN CHRONICLE, CERTAIN CHARGES OF FRAUD AND SWINDLING IN THE MANAGEMENT OF LOTTERIES IN THE STATE OF NEW YORK (1818).

¹⁵⁶ *Id.*

¹⁵⁷ See generally *Shankland v. Corporation of Wash.*, 30 U.S. (5 Pet.) 390 (1831) (owner of partial interest in winning ticket denied recovery where holder of ticket had received prize); *Clark v. Corporation of Wash.*, 25 U.S. (12 Wheat.) 40 (1828) (action to recover from city on winning ticket); *Brent v. Davis*, 23 U.S. (10 Wheat.) 395, 402-05 (1825) (although the Court determined that managers' actions were "throughout, perfectly fair," the case involved irregularities in drawing winning slips, and the Court discussed similar irregularities in other lotteries; the Court also suggested that toleration of lotteries was a "questionable" policy); *Corporation of Wash. v. Young*, 23 U.S. (10 Wheat.) 406 (1825) (attempt by winner to collect from judgment-proof manager).

¹⁵⁸ EZELL, *supra* note 75, at 193-94. See WEINSTEIN & DEITCH, *supra* note 53, at 10 ("The churches were not leaders in the antilottery movement . . . it was only after they became aware of the shift in public opinion that they began to raise questions of morality.").

¹⁵⁹ WEISS & WEISS, *supra* note 58, at 19.

¹⁶⁰ SPOFFORD, *supra* note 5, at 177.

¹⁶¹ N.Y. CONST. art. VII, § 11 (1821), reprinted in 7 CONSTITUTIONS, *supra* note 77, at 188. See also Act of Mar. 15, 1822, ch. 71, 1822 N.Y. Laws 73-74 (prohibiting sale of tickets for unauthorized lotteries and sale of "insurance" on any lottery).

lotteries in the United States.¹⁶² Although, like many other early prohibitions, this amendment was largely ignored, the end of the lottery's heyday was in sight.

Over the next two decades most states enacted sweeping anti-gambling legislation,¹⁶³ often including constitutional amendments prohibiting lotteries.¹⁶⁴ By 1840, authorized lotteries decreased or were abolished altogether in most northern states.¹⁶⁵ Congress outlawed lotteries in Washington, D.C. in 1842.¹⁶⁶ By 1860, every state except Missouri,¹⁶⁷ Kentucky¹⁶⁸ and Delaware had enacted consti-

¹⁶² EZELL, *supra* note 75, at 190. New York had passed anti-lottery legislation as early as 1721. SPOFFORD, *supra* note 5, at 181.

¹⁶³ See, e.g., Act of June 14, 1832, 1832 Mich. Terr. Laws 15 (selling or advertising of private lottery tickets outlawed); Minn. Terr. Rev. Stat., ch. 105, §§ 1-2 (1851) (prohibiting lotteries); Act of Apr. 30, 1833, ch. 306, 1833 N.Y. Laws 484 (similar); see also Act of Dec. 23, 1830, 1830 Ga. Laws 201 (taxes on lotteries); Act of Feb. 26, 1835, 1834 Mo. Laws 56 (bond required of lottery managers for previously authorized lottery).

The mixed feelings toward lotteries during this period is reflected in the various legislative acts during 1840-41 in Maryland. On January 31, 1840, the legislature authorized a lottery to build a town hall in Easton. Act of Jan. 31, 1840, ch. 146, 1839 Md. Laws 13. On March 20, 1840, the legislature passed an act declaring that no further lotteries were to be authorized. Act of Mar. 20, 1840, ch. 31, 1839 Md. Laws 3. On March 9, 1841, the legislature passed a detailed act relating to the appointment of lottery commissioners. Act of Mar. 9, 1841, ch. 241, 1840 Md. Laws 18. The ban on lotteries, however, was ratified and confirmed on the next day. Act of Mar. 10, 1841, ch. 261, 1840 Md. Laws 20.

¹⁶⁴ GAMBLING IN AMERICA, *supra* note 96, at 145; e.g., ILL. CONST. art. III, § 35 (1848), reprinted in 3 CONSTITUTIONS, *supra* note 77, at 254 (prohibiting lotteries); IND. CONST. art. XV, § 8 (1851), reprinted in 3 CONSTITUTIONS at 391 (same); IOWA CONST. art. III, § 28 (1857), reprinted in 3 CONSTITUTIONS at 456 (same); MD. CONST. art. III, § 37 (1851), reprinted in 4 CONSTITUTIONS at 403 (same); MICH. CONST. art. XII, § 6 (1835), reprinted in 5 CONSTITUTIONS at 211 (same); N.Y. CONST. art. VII, § 11 (1821), reprinted in 7 CONSTITUTIONS at 188 (same); WIS. CONST. art. IV, § 24 (1848), reprinted in 10 CONSTITUTIONS at 424 (same). See also King, *supra* note 72, at 742 n.18 (identifying lottery prohibitions in the constitutions of several states admitted to the Union during this time period); *id.* at 742 (noting that many of the western states prohibited gambling only because it was a condition of statehood).

¹⁶⁵ GAMBLING IN AMERICA, *supra* note 96, at 145. See WEINSTEIN & DEITCH, *supra* note 53, at 10.

¹⁶⁶ Act of Aug. 31, 1842, ch. 282, 5 Stat. 578. See also Act of Apr. 29, 1878, ch. 68, 20 Stat. 39 (increasing the penalties for lottery operation in Washington, D.C.); Act of Mar. 3, 1901, ch. 854, §§ 8863-8869, 31 Stat. 1330-31 (combining various gambling and lottery prohibitions).

¹⁶⁷ Missouri of this time period had an interesting relationship with lotteries. In the early 1800s, the legislature authorized a few lotteries. E.g., Act of Feb. 9, 1833, ch. 61, 1832 Mo. Laws 82-83 (authorizing the St. Louis Sisters of Charity to raise money for a hospital by means of a lottery). In 1842, however, the legislature attempted to end all lottery activity in the state, by repealing all lottery authorizations. See *State v. Hawthorn*, 9 Mo. 230, 232 (1845) (concerning the Sisters of Charity lottery). The state supreme court held that this action violated the United States Constitution in that it impaired contractual obligations. *Id.* at 234. It was not until 1880 that the last lottery charter expired and the Missouri ban was finally enforced. See *State v. France*, 72 Mo. 41 (1880) (declaring that the franchise of the New Franklin lottery had expired).

¹⁶⁸ In 1878, Kentucky repealed all lottery grants that then existed in the state. Act of

tutional or statutory prohibitions against lotteries.¹⁶⁹ The attitude of the times is reflected in the following passage:

Although formerly permitted by law, and even encouraged, public opinion for nearly half a century almost everywhere in this and all civilized countries has recognized lotteries as fruitful sources of unmitigated mischief; as a cunning scheme by which crafty knaves plunder the silly and credulous; destructive of thrift and honest industry, and pandering to idleness and vice.¹⁷⁰

While the exact timing of these measures varied, "the pattern of charter, regulation, and then prohibition" was common to all states.¹⁷¹

2. Revival and the Louisiana Lottery

There was a brief revival of state-run lotteries in the 1860s. Expenses stemming from the Civil War and Reconstruction created a great need for funds to finance government projects, primarily

Mar. 30, 1878, ch. 689, 1877 Ky. Acts 78. The legislature, however, retained the right to authorize lotteries in the future. See Act of Apr. 27, 1880, ch. 1263, 1879 Ky. Acts 118 (prohibiting unauthorized lotteries).

¹⁶⁹ GAMBLING IN AMERICA, *supra* note 96, at 145; WEINSTEIN & DEITCH, *supra* note 53, at 10; e.g., N.J. CONST. art. IV, § 7, ¶ 2 (1844), reprinted in 6 CONSTITUTIONS, *supra* note 77, at 457 (banning lotteries); OHIO CONST. art. XV, § 6 (1851), reprinted in 7 CONSTITUTIONS at 571 (same); Act of Mar. 16, 1855, ch. 173, 1855 Me. Laws 199 (banning lotteries); Act of Mar. 31, 1860, tit. 5, §§ 52-54, 1860 Pa. Laws 396 (same); see also Dunn v. People, 40 Ill. 465 (1866) (enforcing Illinois' lottery statute); Long v. State, 22 A. 4 (Md. 1891) (gift enterprise not prohibited by Maryland's lottery statute); Ballock v. State, 20 A. 184 (Md. 1890) (enforcing Maryland's lottery statute); see generally Horner v. United States, 147 U.S. 449 (1893) (collecting several similar cases from the United States and England).

¹⁷⁰ United States v. Green, 19 D.C. (8 Mackey) 230, 241 (1890).

¹⁷¹ DEVELOPMENTS, *supra* note 3, at 273 n.6. At least one court later took note of the irony of the former dependence on lotteries and the later condemnation of them. In Commonwealth of Ky. v. Bassford, 6 Hill 446 (Sup. Ct. N.Y. 1844), the plaintiff sought to enforce an out-of-state lottery contract. The court rejected arguments that it should refrain from enforcing it on public policy grounds, saying:

[T]he policy of raising money by lottery for public purposes, such as for literary and benevolent institutions, continued to prevail in this state until 1833. . . . It would be rather ungracious for our courts, under these circumstances, to refuse to uphold the contract in question, within the rule of comity, on the ground that it was founded in moral turpitude.

Id. at 447. See also Hunt v. Knickerbacker, 5 Johns. 327 (Sup. Ct. N.Y. 1810) (refusing to enforce an action against an unauthorized lottery); 4 CONG. REC. 4263 (1876) (remarks of Mr. Whyte) (noting an inconsistency in having taxed lotteries during the Civil War, but now viewing them as immoral).

in Southern and Western states.¹⁷² Tickets, however, were sold throughout the country.¹⁷³ The brevity of this revival, in most states,¹⁷⁴ is illustrated by the facts underlying *Stone v. Mississippi*.¹⁷⁵ In 1867, the Mississippi legislature passed an act incorporating the Mississippi Agricultural and Manufacturing Aid Society and granting that corporation the right to conduct lotteries within the state for twenty-five years.¹⁷⁶ Two years later a new state constitution was adopted. The new constitution declared that "[t]he legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold."¹⁷⁷ Acting pursuant to this constitutional mandate, the 1870 legislature passed an act prohibiting all lotteries within the state.¹⁷⁸ When the state sought to prohibit any further drawings of the previously authorized lottery, the corporation argued that contractual rights granted by the 1867 statute could not be abrogated by a later state constitution or legislation.¹⁷⁹

The unanimous opinion of the United States Supreme Court acknowledged that a charter to a private corporation falls under the protection of the Contract Clause.¹⁸⁰ The Court, however, also noted that unless a valid contract was entered into there was nothing for the Contract Clause to protect.¹⁸¹ Thus, "[w]hether the alleged contract exists . . . or not, depends on the authority of the legislature to bind the State and the people of the State in that way."¹⁸² Although the pre-1869 constitution did not prohibit the legislature

¹⁷² GAMBLING IN AMERICA, *supra* note 96, at 145; WEINSTEIN & DEITCH, *supra* note 53, at 10.

¹⁷³ GAMBLING IN AMERICA, *supra* note 96, at 145.

¹⁷⁴ By 1878, only the Louisiana Lottery remained in force. DOMBRINK & THOMPSON, *supra* note 15, at 11.

¹⁷⁵ 101 U.S. 814 (1879).

¹⁷⁶ *Id.* at 814-15; Act of Feb. 16, 1867, ch. CCLVI, 1867 Miss. Laws 349.

¹⁷⁷ 101 U.S. at 815; Miss. CONST. art. XII, § 15 (1868), *reprinted in* 5 CONSTITUTIONS, *supra* note 77, at 389.

¹⁷⁸ 101 U.S. at 815 (citing "An Act Enforcing the Provisions of the Constitution of the State of Mississippi Prohibiting All Kinds of Lotteries within Said State").

¹⁷⁹ *Id.* at 816. *Cf.* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 624 (1819) (holding that a state's interference with a previously granted charter violates the Contract Clause of the Constitution); State v. Hawthorn, 9 Mo. 389 (1845) (revocation of a charter from a previously authorized lottery held to violate the Contract Clause of the Constitution).

¹⁸⁰ 101 U.S. at 815.

¹⁸¹ *Id.* at 817.

¹⁸² *Id.*

from granting the right to conduct lotteries, "[a]ll agree that the legislature cannot bargain away the police power of a State."¹⁸³ Without attempting to define the limits of the police power, the Court stated that all matters affecting the public health and public morals, including lotteries, were properly subject to regulation under state police powers.¹⁸⁴ Consequently, a contract by which the legislature purported to give up the right to regulate or prohibit a lottery was invalid and unenforceable.¹⁸⁵ As such, the lottery in question was prohibited by the new Mississippi constitution. By 1878, all states except Louisiana prohibited lotteries, either by statute or constitution.¹⁸⁶

The most notorious post-Civil War lottery was the Louisiana Lottery, also known as "The Serpent."¹⁸⁷ This lottery was chartered in 1868 for a period of twenty-five years.¹⁸⁸ According to the *New Orleans Times-Picayune*, it was "conceived in the miscegenation of reconstruction and born in inequity."¹⁸⁹ The first drawing was conducted on January 2, 1869.¹⁹⁰ By 1877, "tickets were sold in every state and territory in the nation."¹⁹¹ Because its books were kept secret,¹⁹² exact numbers are hard to ascertain; however, it has been estimated that at its height of popularity, the Louisiana Lottery was

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 818. The Court was clearly concerned about the problems associated with lotteries, not just gambling in general. *Id.* ("common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries") (quoting *Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850)).

¹⁸⁵ 101 U.S. at 821.

¹⁸⁶ WEINSTEIN & DEITCH, *supra* note 53, at 11.

¹⁸⁷ CHAFETZ, *supra* note 42, at 299. See also 21 CONG. REC. 8705-06 (1890) (remarks of Mr. Moore) ("this hydra-headed monster, which is demoralizing the young, the poor, and the needy throughout the country, as no other institution in America has ever done").

¹⁸⁸ An Act to Increase the Revenue of the State, and to Authorize the Incorporation and Establishment of the Louisiana Lottery Company, and to repeal certain Acts now in force, Act of Aug. 11, 1868, 1868 La. Acts 24. The Louisiana constitution was even amended to authorize the legislature to license the selling of lottery tickets. Compare LA. CONST. tit. VII, art. 116 (1864), reprinted in 4A CONSTITUTIONS, *supra* note 77, at 136 (permitting the legislature to authorize lotteries) with LA. CONST. tit. VI, art. 113 (1852), reprinted in 4A CONSTITUTIONS at 118 ("No lottery shall be authorized by this state."). The lottery was justified in the New Orleans press as being needed to generate revenue and to deter illegal gambling. EZELL, *supra* note 75, at 241. There was also a perceived need to prevent foreign lotteries from siphoning money out of the state. *Id.* at 243-44; CHAFETZ, *supra* note 42, at 299.

¹⁸⁹ CHAFETZ, *supra* note 42, at 300.

¹⁹⁰ EZELL, *supra* note 75, at 244.

¹⁹¹ CHAFETZ, *supra* note 42, at 300.

¹⁹² See *supra* note 187.

a nationwide monopoly making annual profits of up to \$13 million¹⁹³ and paying out more than \$3 million per year.¹⁹⁴

From the very beginning, the Louisiana Lottery was run by a New York gambling syndicate.¹⁹⁵ To lend an air of respectability, two former confederate generals, P.G.T. Beauregard and Jubal A. Early, were hired to oversee the drawings.¹⁹⁶ Because of the enormous amount of money the lottery brought into the state, and because the operators were able to use that money to control newspapers, banks, and public officials,¹⁹⁷ Louisiana lawmakers were unwilling or unable to close it down, despite some close debates.¹⁹⁸ Lottery officials also made generous donations to various state projects, garnering public support.¹⁹⁹ In 1879, lottery officials were able to obtain ratification of a constitutional amendment expressly authorizing the lottery to continue until 1895.²⁰⁰

¹⁹³ CHAFETZ, *supra* note 42, at 303.

¹⁹⁴ SULLIVAN, *supra* note 8, at 55. *But see* SPOFFORD, *supra* note 5, at 191 (citing the company's fiscal statement and suggesting that total revenue was about \$4 million per year and that profit amounted to less than \$1 million per year).

¹⁹⁵ EZELL, *supra* note 75, at 242-43. Nine days after the charter had been granted, the original directors transferred their right to a new board comprised of New York gamblers. *Id.* at 244. Many early gambling syndicates later grew to prominence during Prohibition. Rychlak, *supra* note 9, at 572 n.88.

¹⁹⁶ SULLIVAN, *supra* note 8, at 54. *See also* CHAFETZ, *supra* note 42, at 301 ("Whether each was paid \$10,000 or \$30,000 annually for one day's work a month is not certain, but either sum was good pay for out-of-work generals and worth it to the company.").

¹⁹⁷ CHAFETZ, *supra* note 42, at 301 (noting that the lottery always hired the best legal talent to fight efforts to close it down); DEVELOPMENTS, *supra* note 3, at 675; SULLIVAN, *supra* note 8, at 54 (reporting that \$300,000 was spent on bribes in the first nine years of the Louisiana lottery). Before employing someone to work for the lottery, operators required that they be recommended by two members of the legislature or other prominent persons. CHAFETZ, *supra* note 42, at 303.

¹⁹⁸ EZELL, *supra* note 75, at 245, 250-51 (discussing movements to shut it down, but noting that "[e]normous sums were spent bribing legislators"); *id.* at 256-59 (discussing the political maneuvering in a close 1890 legislative debate). *See also* CHAFETZ, *supra* note 42, at 301 (noting that "[t]hree times in 1879 the company fought for its life").

¹⁹⁹ One of the donations was a gift of \$350,000 to convert the Metairie race course into the Metairie Cemetery. Lottery promoter Charles Howard had been denied membership in the racing club. He donated the money, saying that he would rather see it as a resting place for the dead than as a place for living snobs. CHAFETZ, *supra* note 42, at 302. *See also* EZELL, *supra* note 75, at 254 (discussing other charitable donations); SULLIVAN, *supra* note 8, at 56 (same). Whenever there was a serious threat within Louisiana to shut the lottery down, its operators argued that it was enriching the state. *E.g.*, 21 CONG. REC. 8706 (1890) (remarks of Mr. Moore). In its last decade of operation, the Louisiana Lottery promised to pay \$1,250,000 to the state annually. *Id.* at 259; CHAFETZ, *supra* note 42, at 306.

²⁰⁰ LA. CONST. art. 167 (1879), reprinted in 4A CONSTITUTIONS, *supra* note 77, at 193 (authorizing the lottery until the year 1895, provided that \$40,000 annually was paid to the state for the benefit of the Charity Hospital in New Orleans). *See also* SPOFFORD, *supra* note 5, at 191 (discussing the debate and the amendment).

Although every other state prohibited lotteries, those prohibitions were generally unsuccessful in preventing people from playing the Louisiana Lottery.²⁰¹ Ninety-three percent of the lottery's gross revenue came from outside Louisiana.²⁰² A New York journalist, in 1872, wrote, "There is scarcely a street in the whole city, from Battery to Harlem Bridge, where the shops of the lottery dealers cannot be found."²⁰³ A New Orleans Methodist Pastor explained the magnitude of the Louisiana Lottery in 1889:

If asked to name the greatest agencies of immorality in the land, after mentioning Mormonism and Impurity and Intemperance, we would not have declared the giant evil until we had named the Louisiana State Lottery. Nor has it attained its full dimensions; every glance directed toward it shows it to be steadily growing.²⁰⁴

In fact, the Louisiana Lottery was so well known that "a winning ticket was accepted everywhere in the country as the equivalent of a certified check."²⁰⁵

Because the Louisiana legislature would not shut the lottery down, and other states were ineffective in their efforts to confine the effects within the Louisiana border, reformers, churches and newspapers all lobbied for federal intervention.²⁰⁶ President Harrison also urged Congress to act.²⁰⁷ After several false starts,²⁰⁸

²⁰¹ G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, CORNELL L. REV. 923, 931 (1978); 21 CONG. REC. 8706 (1890) (remarks of Mr. Moore) ("The States are powerless to extirpate the Louisiana lottery. They are powerless even to protect themselves from its insidious brigandage. They have exhausted their resources.").

²⁰² 21 CONG. REC. 8700 (remarks of Mr. Moore). Forty-five percent of the mail handled by the New Orleans post office was lottery-related. SULLIVAN, *supra* note 8, at 58; WEINSTEIN & DEITCH, *supra* note 53, at 11.

²⁰³ ASBURY, *supra* note 84, at 87 (quoting Edward Crapsey).

²⁰⁴ CARRADINE, *supra* note 16, at 4.

²⁰⁵ ASBURY, *supra* note 84, at 86.

²⁰⁶ DEVELOPMENTS, *supra* note 3, at 513 ("Scores of petitions begged for congressional eradication of the Louisiana Lottery"); Blakey & Kurland, *supra* note 201, at 931 n.25 (noting that the United States Post Office supported this action because lotteries had previously blamed the Post Office of having lost mail in order to avoid having to pay winners).

²⁰⁷ President Benjamin Harrison, *Message to Congress*, July 29, 1890, reprinted in 21 CONG. REC. 7916 (1890).

²⁰⁸ DEVELOPMENTS, *supra* note 3, at 676 ("Congressmen introduced several anti-lottery measures, initially more noteworthy for their quantity than quality."). See S. REP. NO. 1579, 51st Cong., 1st Sess. (1890) (focusing on banning lottery advertisements from newspapers); H.R. REP. NO. 787, 50th Cong., 1st Sess. (1888) (similar); S. REP. NO. 11, 49th Cong., 1st Sess. (1886) (similar); H.R. REP. NO. 2678, 49th Cong., 1st Sess. (1886) (similar); S. REP. NO. 233, 48th Cong., 1st Sess. (1884) (similar); H.R. REP. NO. 826, 48th Cong., 1st Sess. (1884) (letters and circulars). Those who opposed this legislation often raised states' rights arguments

Congress finally banned all lottery materials from the mails in 1890²⁰⁹ and banned all lottery materials from interstate commerce in 1895.²¹⁰ Shortly thereafter, the United States Supreme Court upheld both Acts,²¹¹ and reaffirmed the states' use of police powers

against this imposition of power by the federal government. *See* 19 CONG. REC. 1157 (1888) (Remarks of Mr. Compton); S. REP. NO. 233, 48th Cong., 1st Sess. 13-14 (1884) (minority report); *cf.* 19 CONG. REC. 1156 (1888) (Remarks of Mr. Glass) (rebutting an argument that restrictions on advertising would infringe on the First Amendment).

Congress had earlier prohibited postmasters from acting as lottery agents, Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238 (current version at 18 U.S.C. §§ 1303, 1307 (1982)), and banned lottery materials from the mail. Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194 (current version at 18 U.S.C. § 1302 (1982)). The Supreme Court upheld this legislation, but greatly restricted the Postmaster's authority to open mail, so the legislation was very difficult to enforce. *Ex Parte Jackson*, 96 U.S. 727 (1877). *See* Act of June 8, 1872, ch. 335, § 149, 17 Stat. 283, 302 (making only illegal lotteries subject to the regulations; the Louisiana Lottery, of course, was legal); Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (striking the word "illegal"); *cf.* *United States v. Dauphin*, 20 F. 625 (E.D. La. 1884) (under law then in effect, prosecution had to prove more than that the defendant sent the materials to the post office to be mailed; prosecution had to prove that defendant actually placed materials in the mail). An 1880 report by the Postmaster General identified numerous suspected lottery operations that were then using the mails. H.R. EXEC. DOC. NO. 22, 46th Cong., 2d Sess. 16-17 (1880) (entitled, "Letter from the Postmaster General in reply to a resolution of the House calling for information regarding the use of mails for lottery purposes").

²⁰⁹ Act of Sept. 19, 1890, ch. 908, 26 Stat. 465 (current version at 18 U.S.C. § 1302 (1982)). That Act provided, in pertinent part:

... nor shall any newspaper, circular, pamphlet, or publication containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part of or all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier.

Id. *See also* *Horner v. United States*, 147 U.S. 449 (1893) (upholding a conviction for sending Austrian lottery materials through the mail); *cf.* *FCC v. American Broadcasting Co.*, 347 U.S. 284, 293-94 (1954) (television and radio game show "give-aways" not prohibited by federal legislation restricting lotteries).

²¹⁰ Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (current version at 18 U.S.C. § 1301 (1982)). *See also* *Francis v. United States*, 188 U.S. 375, 379 (1903) (Harlan, J., dissenting) (quoting § 1 of this Act). This new legislation was needed because the operators of the Louisiana Lottery were continuing the business from Honduras by using carriers and avoiding the mails. 27 CONG. REC. 3013 (1895) (remarks of Mr. Broderick). These prohibitions created problems for modern state-run lotteries in the 1960s and early 1970s. *See infra* note 219.

²¹¹ *See generally* *Champion v. Ames*, 188 U.S. 321 (1903) (upholding the ban on lottery tickets from interstate commerce); *In re Rapier*, 143 U.S. 110, 134 (1892) (upholding the ban on lottery materials from the mails under the Postal Powers Clause of the Constitution, and finding such material "injurious to the people"). *But see generally* *Francis v. United States*, 188 U.S. 375 (1903) (no violation of legislation where defendant is trafficking in policy slips, as opposed to actual lottery tickets). The federal legislation marked an important turning point in the nation's approach to criminal activity. Historically, criminal matters were left to the state. However, with this legislation, the federal government began involving itself in criminal matters. WEINSTEIN & DEITCH, *supra* note 53, at 12. *See also* CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 460 (1922) (quoting a 1917 report to the American Bar

to control gambling.²¹² This effectively ended the Louisiana Lottery,²¹³ and government-sponsored gambling came to an end in the United States. In a few areas gambling was licensed and taxed,²¹⁴ but for the next sixty years no state was directly involved in the operation of a gambling enterprise, and lotteries were prohibited in most states by constitutional provisions.²¹⁵

IV. MODERN STATE-RUN LOTTERIES

From the turn of the century until the mid-1960s, there was little legalized gambling and no state-sponsored gambling in the United States.²¹⁶ Then, in 1964, more than a century after most states had banned all lotteries, New Hampshire reintroduced America to the state-run lottery.²¹⁷ New York followed by introducing a

Association that was highly critical of the expansion of Congress's powers and that referred to *Champion* as the "Pandora's box" of centralization).

²¹² *Marvin v. Trout*, 199 U.S. 212, 224 (1905). The opinion stated:

It is well settled that the police power of the state may be exerted to preserve and protect the public morals. It may regulate or prohibit any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the habits of those who follow it, or to encourage idleness instead of habits of industry. Whether gambling is demoralizing in its tendencies is no longer an open question. Gambling is injurious to the morals and welfare of the people, and it is not only within the scope of the state's power to suppress gambling in all its forms, but it is its duty to do so.

Id.

²¹³ *Ezell*, *supra* note 75, at 261. For a short while the Louisiana Lottery operators moved the business to Honduras, where it temporarily remained successful in selling tickets to United States citizens. 27 CONG. REC. 3013 (1895) (remarks of Rep. Broderick); 26 CONG. REC. 2356, 2357 (1894) (remarks of Mr. Pasco). Its ultimate demise, prompted by federal prosecution of its American agents, came in 1907. *Asbury*, *supra* note 84, at 86; *Chafetz*, *supra* note 42, at 308.

²¹⁴ By 1900, only three states (Maryland, Kentucky and New York) permitted wagering on horse races. *Dombrink & Thompson*, *supra* note 15, at 11.

²¹⁵ *Spoofford*, *supra* note 5, at 193, 195; e.g., FLA. CONST. art. V, § 20 (1868), *reprinted in* 2 CONSTITUTIONS, *supra* note 77, at 356 (prohibiting lotteries); IDAHO CONST. art. III, § 20 (1889), *reprinted in* 3 CONSTITUTIONS at 167 (same); MONT. CONST. art. XIX, § 2 (1889), *reprinted in* 6 CONSTITUTIONS at 105 (same); N.M. CONST. art. II, § 10 (1889), *reprinted in* 7 CONSTITUTIONS at 55 ("All lotteries or sale of lottery tickets are prohibited."); N.Y. CONST. art. I, § 9 (1897), *reprinted in* 7 CONSTITUTIONS at 235 (listing the prohibition of lotteries among basic "Bill of Rights" provisions); S.D. CONST. art. III, § 25 (1889), *reprinted in* 9 CONSTITUTIONS at 62 (same).

²¹⁶ See *Dombrink & Thompson*, *supra* note 15, at 11. A few states experimented with legalized slot machines during this period. See *Rychlak*, *supra* note 9, at 562-63 (discussing projects in Florida and Maryland).

²¹⁷ See N.H. REV. STAT. ANN. §§ 287-F:1 to 287-F:19 (1987) (New Hampshire's lottery legislation). In 1964, New Hampshire ranked lowest in the nation in the proportion of state revenues contributed to local needs, mainly due to its low level of support to schools, despite property taxes that "had been pushed to an oppressive level." *Weinstein & Deitch*, *supra*

lottery in 1967 and New Jersey introduced one in 1970.²¹⁸ These modern lotteries were not highly successful, however, until New Jersey developed a computer-based weekly game in 1971.²¹⁹ The success of the New Jersey game was attributed to more prizes, cheaper tickets, convenient sales and a large jackpot.²²⁰ By 1974, eleven states were on the lottery bandwagon.²²¹ Currently, lotteries are popular forms of generating revenue conducted in at least thirty-three states and the District of Columbia.²²² Several other states have parimutuel betting, casino gambling, riverboat gambling, or other forms of licensed or state-sponsored gambling.²²³ Gambling fever among state legislatures is high,²²⁴ and states with and without lotteries are considering new forms of gambling.²²⁵ It has been

note 53, at 14. When the Governor signed the lottery bill, which provided that all proceeds would go to support public schools, he stated that "constantly increasing demands for school facilities, at a time when our people are already carrying a cross of taxation unequalled in American history, make it our duty to initiate programs which will relieve this heavy burden on the people." *Id.*

²¹⁸ CLOTFELTER & COOK, *supra* note 112, at 3. See N.J. STAT. ANN. §§ 5:9-1 to 5:9-25 (West 1988); N.Y. TAX LAW §§ 34-1600 to 34-1606 (McKinney 1987) (State Lottery for Education, which replaced the earlier New York State Lottery); see also New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 991 (2d Cir. 1969) (discussing New York's adoption of the lottery in 1966-67), *cert. denied*, 396 U.S. 1061 (1970).

²¹⁹ Mikesell & Zorn, *supra* note 54, at 311. Accord DEVELOPMENTS, *supra* note 3, at 702-03; see also SULLIVAN, *supra* note 8, at 105 (noting the early problems encountered by the New York lottery). Some of the early problems stemmed from difficulty in complying with federal regulations that had been enacted to curb the Louisiana Lottery. *E.g.*, United States v. Fabrizio, 385 U.S. 263 (1966) (conviction for transporting New Hampshire lottery materials across state lines). In 1975, Congress resolved the confusion that these statutes had raised with modern lotteries, and states were free to operate without fear of federal intervention. See 18 U.S.C. § 1307 (Supp. 1991) (18 U.S.C. §§ 1301-1304 do not apply to state-sponsored lotteries).

²²⁰ DEVELOPMENTS, *supra* note 3, at 702-03. This is similar to the formula set forth by Alexander Hamilton almost 200 years earlier. See *supra* note 107. In 1975, New Jersey had another important innovation; it became the first state to use the "active" game in which the players select their own numbers instead of buying a card with numbers already on it. Richard K. Rein, *The Lottery Game*, MONEY, Nov. 1984, at 109.

²²¹ WEINSTEIN & DEITCH, *supra* note 53, at 16.

²²² See *supra* note 2. The United States is not alone. With at least 100 nations conducting lotteries, it is the "most widespread form of gambling." CLOTFELTER & COOK, *supra* note 112, at 21.

²²³ See DOMBRINK & THOMPSON, *supra* note 15, at 190-96 (discussing campaigns to establish gambling operations in Ohio, Iowa and South Dakota); Jerry Markon, *Shlenker: I'll have money in 2-3 weeks*, COM. APPEAL (Memphis, Tenn.), Apr. 2, 1991, at A1 (discussing the opening of riverboat gambling in Iowa).

²²⁴ ALAN J. KARCHER, LOTTERIES 28 (1989).

²²⁵ Markon, *supra* note 223, at A1 (quoting Iowa Gaming and Racing Commission Chairman L.C. Pike, who said that the gaming license authorizing riverboat gambling in Iowa "may be as important to Davenport as the Bill of Rights or the Magna Carta"). Illinois (with a lottery) and Mississippi (no lottery) are both experimenting with riverboat gambling. *Id.*

projected that nearly every state will have a lottery by the end of this decade.²²⁶

Those states that have lotteries actively promote and seek to improve them. Daily drawings (often two separate daily games)²²⁷ are supplemented with weekly or bi-weekly drawings offering a much larger payoff,²²⁸ and some states have banded together to offer even larger jackpot drawings.²²⁹ Subscriptions are sold so that people may play the same numbers for up to a year at a time without visiting a lottery ticket distributor.²³⁰ Instant lottery tickets are available to people who do not want to wait for a later drawing.²³¹ Some states have introduced a television "game show" component to their instant game.²³² One state even initiated a payroll withholding plan to encourage participation in the lottery.²³³ With recent advances in electronics and telecommunications, it is likely that lottery sales will soon reach inside the average home.²³⁴ Whatever the form of the

See also William T. O'Donnell, *A Chief Executive's Views on the Necessity for Comprehensive State Control and Regulation in the United States Gaming Industry*, 12 CONN. L. REV. 727, 729 (1980) ("legalized gaming, in its various forms, is now a significant part of the American leisure market and has almost limitless potential for growth").

²²⁶ H. Roy Kaplan, *State Lotteries: Should Government Be a Player?*, in COMPULSIVE GAMBLING, *supra* note 18, at 200.

²²⁷ See LEGIS. BUDGET AND FIN. COMM., PA. GEN. ASSEMBLY, REPORT ON A PERFORMANCE AUDIT OF THE PENNSYLVANIA STATE LOTTERY 55 (Sept. 1987) [hereinafter PA. REPORT] (discussing the potential profit in offering a three-digit drawing every day of the week).

²²⁸ *Id.* at 81 (identifying, in addition to the infinite variety of instant lottery tickets, "Super 7" (winner to select 7 of 80 numbers); "Lotto" (6 of 40); "Big 4" (four digits); and "The Daily Number" (three digits)). New York, in 1978, was the first state to adopt the lotto, which was already popular in Europe and Canada. Rein, *supra* note 220, at 110. The odds of being hit by lightning are better than the odds of winning at lotto. Irwin Ross, *Corporate Winners in the Lottery Boom*, FORTUNE, Sept. 3, 1984, at 23. See also 48 Hours: Lottery Fever 2 (CBS television broadcast, Apr. 27, 1989) (transcript on file with the author) [hereinafter 48 Hours] ("Someone once said if you buy a ticket on the lottery, your chances of winning the jackpot are just about the same as someone who didn't buy a ticket on the lottery."). The actual odds vary state by state, depending on the individual game. See PA. REPORT, *supra* note 227, at 98 (identifying the odds for all of the lotto games of the various states).

²²⁹ Kaplan, *supra* note 226, at 200 (discussing Lotto America, founded in 1988 by Rhode Island, Kansas, Oregon, Iowa, West Virginia and the District of Columbia).

²³⁰ KARCHER, *supra* note 224, at 69.

²³¹ CLOTFELTER & COOK, *supra* note 112, at 53-54. These instant games are continually modified to retain consumer appeal. *Id.* at 54.

²³² 48 Hours, *supra* note 228, at 3 (discussing California's television lottery show). Such shows have also been produced in both Illinois and Indiana. Unlike other television game shows, these games involve absolutely no element of skill. Thus they retain all elements of a lottery. See *supra* note 12.

²³³ DEVELOPMENTS, *supra* note 3, at 706 (citing N.Y. TIMES, Nov. 12, 1972, at 63). Michigan auto workers were offered this plan in 1972. *Id.*

²³⁴ PA. REPORT, *supra* note 227, at 26 (discussing the possibility of more interactive lottery

game may be,²³⁵ it is clear that gambling will continue to be an important part of the state political landscape well into the future.²³⁶

The truly remarkable aspect of this movement from universal prohibition and condemnation of all forms of gambling to state sponsorship of lotteries, is that it completely bypassed the logical step of legalized (but unsponsored) gambling. "[N]o compelling reason exists why the state should actually operate a lottery itself. The lottery could be privately owned, regulated, and taxed in the manner of a race track."²³⁷ Most states, however, went directly from total prohibition to operation and active promotion, without ever even pausing to examine the consequences.²³⁸ In several states,

games). See also KARCHER, *supra* note 224, at 67 ("If you want a glimpse of the future of lottery marketing, look no further than your television and telephone.").

²³⁵ One recent innovation is the video lottery. ROSE, *supra* note 7, at 2. This lottery is played on machines similar to video games, but the game is one of chance, not skill. See Rein, *supra* note 220, at 110. Because such games are attractive to children, some experts are concerned that the video lottery will encourage youngsters to gamble. *Illegal Use of Video Gambling Machines: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 2d Sess. 107-08 (1984) [hereinafter *Hearing*] (prepared statement of the National Coin Machine Institute); *id.* at 96-97 (prepared statement of Valerie C. Lorenz, Ph.D.). Such concerns prompted lawmakers in several states to oppose the video lottery. See N.J. STAT. ANN. § 5:9-7.1 (1988) (prohibiting video lottery); see also Yoshihashi, *supra* note 2, at B1 (noting that some people fear that video gambling blurs "the line between traditional lotto and 'hard' gambling"). Supporters, however, argue that the video lottery will help the state reach young urban professionals who do not play the lottery as often as other segments of society, and that placing them in bars will restrict access to adults. ROSS, *supra* note 228, at 25. See also PA. REPORT, *supra* note 227, at 25 ("the 25-55 years-old managerial-professional group . . . are not presently buying our product or do so infrequently"). But see KARCHER, *supra* note 224, at 69 ("Despite protestations that the so-called 'new generation' of lottery game, the video lottery, was designed for the yuppie market, it is clearly geared for the poor."). Evidence exists that people of different economic backgrounds do play different lottery games. Kaplan, *supra* note 226, at 193.

Video lotteries have been forecasted as "the growth industry of the nineties." ROSE, *supra* note 7, at 84 ("If you wanted to bet on a growth area in the field of legal gambling put your money on video lotteries."); Chris Welles, *America's Gambling Fever: Everybody Wants a Piece of the Action—But is it Good for Us?*, BUS. WK., Apr. 24, 1989, at 112, 118 (cover story).

²³⁶ See CLOTFELTER & COOK, *supra* note 112, at 9 ("in state after state the people have endorsed state-run lotteries in public referenda"); *id.* at 140 ("once in place, no lottery has yet been seriously challenged or threatened with termination"). Gambling interests have been willing to spend great sums to sway public opinion when there is a referendum. *Id.* at 141, 236 (lottery suppliers and convenience store chains work to support the lottery). Church groups, which tend to oppose gambling, rarely have the political clout to defeat movements toward gambling. CLOTFELTER & COOK, *supra* note 112, at 47. See also *id.* at 174 (noting how people of different faiths tend to have differing attitudes about gambling); DOMBRINK & THOMPSON, *supra* note 15, at 64 (same).

²³⁷ Mikesell & Zorn, *supra* note 54, at 320 n.18.

²³⁸ See, e.g., CAL. CONST. art. IV, § 19(a) ("The Legislature has no power to authorize

lottery legislation was introduced simultaneously with legislation to amend constitutional prohibitions on any form of lottery.²³⁹

Unlike years past, today's governmental entities do have alternative ways to raise revenue, painful though they may be. Thus, before deciding to rely on lotteries, policymakers should examine the effectiveness of modern state lotteries as a tool to raise revenue and balance that against any possible adverse side-effects from the lottery. This is especially important in light of the universal condemnation that resulted after these comparisons were made in the nineteenth century.

A. Goals for the Lottery

The primary reason that lotteries are conducted is to raise revenue without raising taxes. If not for this profit motive, states would not be involved in the promotion of gambling operations. There are, however, at least two secondary reasons for conducting a state lottery. Lotteries are sometimes enacted with the purpose of competing with illegal gambling enterprises. If the state can convince gamblers to bet with the state instead of with illegal operations, it might be able to cripple some criminal organizations. Additionally, some states have been forced to consider lotteries as a defensive measure to compete with neighboring states that conduct lotteries and arguably siphon money out of the state. Lotteries have met these goals with varying degrees of success.

1. Lotteries as Revenue Sources

The modern lottery exists to make money for the state.²⁴⁰ Lotteries are more popular sources of revenue than taxes because

lotteries and shall prohibit the sale of lottery tickets in the State." In 1984, however, a new provision was added, permitting the state to conduct a lottery. *Id.* § 19(d).

²³⁹ For instance, in 1972, Michigan introduced its lottery and at the same time amended its constitution, which had prohibited all lotteries. See Act of Aug. 1, 1972, 1972 Mich. Laws 468-72 (lottery legislation); 1972 Mich. Laws 1151 (amendment to Michigan constitution). Mississippi is currently considering an amendment to its constitution so that a state lottery may be instituted. Jay Eubank, *Odds are Fordice will veto bills legalizing gambling*, CLARION LEDGER (Jackson, Miss.), Jan. 24, 1992, at 1A.

²⁴⁰ CLOTFELTER & COOK, *supra* note 112, at 215. This was also the primary reason for their introduction in sixteenth-century Europe. Kaplan, *supra* note 226, at 187. But see DOMBRINK & THOMPSON, *supra* note 15, at 176 (suggesting that different motivations—personal liberty and the inability to enforce vice laws—had been dominant in the past).

lottery participation is voluntary.²⁴¹ A source of revenue should be predictable, inexpensive and easy to collect, and should not place a disproportionate burden on the poor. Lotteries have raised enormous amounts of money for needed state projects and have eased the burden on state taxpayers. Lotteries have not, however, been ideal sources of revenue.

Most states adopted lotteries based on the assumption that they would be significant sources of revenue. Lotteries have not had the major impact on state coffers that was originally envisioned,²⁴² however, and several states have recently seen lottery revenues level off or decline.²⁴³ Still, the total number of absolute dollars that states have raised by lottery is staggering. From inception in 1964, until January, 1987, the combined profit of the various state lotteries was \$21.3 billion.²⁴⁴ With several new states enacting lotteries, that figure should continue to grow at an accelerated rate. For that reason, it is unlikely that states will renounce the lottery. The questions that must be addressed relate to the source of lottery money.

Politicians speak of lotteries generating new money for the state. Lotteries, however, do not create money out of thin air. They only transfer funds from ticket purchasers to lucky winners and to

²⁴¹ Thomas Jefferson is often cited as having favored lotteries because he called it a tax "laid on the willing only." Lipscomb, *supra* note 124, at 450. But, at that time, Jefferson was lobbying for special treatment. He had not favored lotteries throughout most of his life. See *supra* note 124 and accompanying text.

²⁴² Mikesell & Zorn, *supra* note 54, at 314 ("the absolute revenue importance of the lottery is small"); Shelagh Donoghue & Sylvester Monroe, *The States Like the Odds*, TIME, July 10, 1989, at 19 ("State-sponsored gambling is nowhere near the bonanza for states it has been sold as."). See CLOTFELTER & COOK, *supra* note 112, at 29, 216 (in most states, profit from the lottery is roughly equivalent to a one-penny increase in the sales tax); DEVELOPMENTS, *supra* note 3, at 121 ("legalized gambling is not a panacea for the states' fiscal troubles"); DOMBRINK & THOMPSON, *supra* note 15, at 130 ("while the states [in the Northeast and Midwest] were willing to turn to gaming in the 1960s and 1970s, their financial problems persisted into the 1980s"); WEINSTEIN & DEITCH, *supra* note 53, at 3 ("Lotteries . . . are not likely to be significant sources of government revenue in relation to total revenues. They do, however, provide additional funds in circumstances where it is not politically feasible to increase taxes."). But see Rein, *supra* note 220, at 110 ("Officials in Illinois estimate they would have to raise the state income tax from 2.5% to 3% if the lottery faucet were suddenly shut off."); Ross, *supra* note 228, at 24 (Pennsylvania Secretary of Revenue believes that the lottery has allowed the state to avoid increasing personal income tax and has allowed the state to cut the corporate rate).

²⁴³ PA. REPORT, *supra* note 227, at 25; Stone, *supra* note 54, at 1A; Yoshihashi, *supra* note 2, at B1. See also ROSE, *supra* note 7, at 14-15 (discussing the common occurrence of lottery proceeds tailing off after the first few years of operation).

²⁴⁴ PA. REPORT, *supra* note 227, at 21.

the state.²⁴⁵ The state receives money from losing players, in most cases residents of that state.

One question never asked, and therefore never answered, is where this money is coming from. If the New York state lottery sells one billion dollars in tickets a year, and less than half of that amount is returned in the form of prizes, over half a billion dollars has been taken out of the economy. . . . Is it money that would have been spent on movies, or left in banks, or given to charity?²⁴⁶

Viewed as such, the lottery is little more than a tax that transfers the wealth from ticket buyers to the state. As a tax, lotteries are regressive²⁴⁷ and expensive to collect.²⁴⁸ Lottery revenues are also difficult to predict, which makes the budgeting process difficult.²⁴⁹ Thus, lotteries have been severely criticized as a form of revenue generating. Then-Governor of California, Ronald Reagan called lotteries "the very worst form of taxation."²⁵⁰

²⁴⁵ See CLOTFELTER & COOK, *supra* note 112, at 134 ("Some of the lottery's effects are baldly redistributive: many lose so that a few might win.").

²⁴⁶ ROSE, *supra* note 7, at 12. See also ANDREW A. ROONEY, AND MORE BY ANDY ROONEY 141 (1979) ("The man who blows twenty dollars at the [off-track betting] parlor doesn't have it to buy a new pair of sneakers for his son. What good does that do for the legitimate businessman who runs the shoe store or for the man's son?"); Mikesell & Zorn, *supra* note 54, at 318 ("it is not possible to argue that the lottery makes significant improvements in the economic position of lottery state residents").

²⁴⁷ GAMBLING IN AMERICA, *supra* note 96, at 687 (discussing the regressive nature of lotteries); WEINSTEIN & DEITCH, *supra* note 53, at 3 ("the lottery operates in the same manner as a regressive tax"); Blakey & Kurland, *supra* note 201, at 951 n.118 (modern lotteries tend to draw funds from those persons least able to afford losing money); Roger E. Brinner & Charles T. Clotfelter, *An Economic Appraisal of State Lotteries*, 28 NAT'L TAX J. 395, 402 (1975) (concluding that lotteries are regressive); Mikesell & Zorn, *supra* note 54, at 316 ("The regressivity of state lotteries has been demonstrated frequently and decisively."). But see Jerome F. Heavey, *The Incidence of State Lotteries: Some Empirical Evidence*, 51 TAXES 547, 547 (1973) (concluding that the Pennsylvania lottery was slightly progressive). For a general discussion of regressivity, see Peter H. Aranson & Roger LeRoy Miller, *Economic Aspects of Public Gaming*, 12 CONN. L. REV. 822, 836-38 (1980).

²⁴⁸ DEVELOPMENTS, *supra* note 3, at 687 ("Many economists believe the cost of raising one dollar by lottery is far higher than raising a dollar by almost any other form of tax"); ROSE, *supra* note 7, at 11 ("it costs one and one-half to two cents to collect a regular tax dollar as against 37 cents to collect a net lottery dollar"). See also CLOTFELTER & COOK, *supra* note 112, at 215-16 (similar). Typically, 50% of the money is paid to winners, 12% goes to cover lottery expenses and 38% is brought in as profits. *Id.*

It may not be fair, however, to compare the expense of collecting this "tax" with the costs of collecting other taxes, because as participants in the lottery business, the state is doing more than collecting a tax; it is running a business. *Id.* at 219.

²⁴⁹ See *infra* notes 266-69 and accompanying text.

²⁵⁰ Tom Goff, *Lottery Urged to Raise School Funds*, L.A. TIMES, Jan. 14, 1971, at 1. See also DEVELOPMENTS, *supra* note 3, at 686 ("On balance, [the lottery] has operated as a regressive,

Regressive taxes impose a disproportionate burden on people with lower incomes. Sales taxes are regressive because they are generally imposed as a flat percentage of all sales (certain goods sometimes being exempted). If a poor person and a wealthy person each buy the same product, the tax will take a bigger percentage of the poor person's income than it will take of the rich person's income; thus it will be regressive. The federal income tax, with different tax rates on different income levels is an example of a progressive (non-regressive) tax because it takes a greater percentage of larger incomes and a smaller percentage of lower incomes. Using this analysis, if a rich person and a poor person each buy the same number of lottery tickets, the "tax" (e.g., the state's profit) will be regressive. In fact, most studies indicate that the relatively affluent spend less money on the lottery than those lacking disposable income, rendering the lottery "doubly regressive."²⁵¹

Lottery supporters sometimes argue that because lotteries often are enacted in place of highly regressive "sin" taxes, their regressivity is not a serious drawback.²⁵² Recent studies indicate, however, that the regressivity of lotteries is significantly worse than the taxes that would replace them.²⁵³ Lottery supporters also suggest that because lottery proceeds are often "earmarked" to programs benefiting lower income people,²⁵⁴ the lottery's regressivity should not be viewed as a serious drawback.²⁵⁵ These programs, however, could

counterproductive, unpredictable, and inefficient tax."); ROONEY, *supra* note 246, at 141 ("for our government to promote and make money by taking it away from the weakest among us in a gambling operation is the lowest form of taxation"). Ironically, President Reagan's fiscal policy has been identified as one of the reasons for the proliferation of lotteries in the 1980s. KARCHER, *supra* note 224, at 27.

²⁵¹ DEVELOPMENTS, *supra* note 3, at 687. See *supra* note 247. The large jackpot game, lotto, tends to be slightly less regressive than the other games. KARCHER, *supra* note 224, at 41-42.

²⁵² CLOTFELTER & COOK, *supra* note 112, at 227; WEINSTEIN & DEITCH, *supra* note 53, at 84; Aranson & Miller, *supra* note 247, at 838. Unlike traditional "sin taxes," which raise revenue while reducing "sin," lotteries attempt to raise revenues by encouraging "sin." DEVELOPMENTS, *supra* note 3, at 733.

²⁵³ CLOTFELTER & COOK, *supra* note 112, at 226 ("it is quite clear that the implicit lottery tax is considerably more regressive than other widely used sources of revenue"); Kaplan, *supra* note 226, at 191-93 (comparing the regressivity of lotteries to a 60-90% state sales tax rate); Daniel B. Suits, *Economic Background for Gambling Policy*, 35 J. Soc. ISSUES 43, 60 (1979) (gambling revenues found more regressive than sales tax).

²⁵⁴ CLOTFELTER & COOK, *supra* note 112, at 163. See, e.g., CAL. GOV'T CODE § 8880.5 (West Supp. 1991) (earmarking funds for education); 72 PA. CONS. STAT. § 3761-2 (1989) (funds to be used to ease property tax burden on the elderly and to provide public transportation to the elderly); see also generally PA. REPORT, *supra* note 227, at 95 (identifying the uses to which lottery funds are put in various states). The New York lottery is even named the "State Lottery for Education." N.Y. TAX LAW § 34-1601 (McKinney 1987).

²⁵⁵ See KARCHER, *supra* note 224, at 97 (suggesting that earmarking funds to use in poorer

be funded through less regressive revenue-generating devices. As such, the regressive nature of lotteries is a serious concern.²⁵⁶

Earmarking itself is a questionable practice. Funneling lottery proceeds to certain programs, like education or environmental protection, helps the lottery garner support within the state. Earmarking, though, is "a promotional trick initiated by the long-discredited operators of the Louisiana Lottery."²⁵⁷ Although lotteries do add revenue to the general coffers, they usually fail to fulfill the promise of greatly benefiting the specific programs that receive earmarked proceeds, as lottery money is normally offset in the appropriation process.²⁵⁸ In some cases this process of replacing general revenue funds with lottery funds has reduced an earmarked program's overall budget, even though the lottery had been promoted as being for the benefit of that program.²⁵⁹ One study found that in four of seven states earmarking funds for education, spending per student declined (as compared to other states) after lottery funds were

neighborhoods reduces the regressivity); Ross, *supra* note 228, at 24 ("Pennsylvania offers the best argument that its lottery has no regressive effects, for the people who benefit from its profits mainly have low incomes.").

²⁵⁶ Moreover, there is a real question as to whether the earmarked proceeds benefit the identified programs. See *infra* notes 274-78, and accompanying text.

²⁵⁷ King, *supra* note 72, at 752; see *supra* notes 188-213 and accompanying text (discussing the Louisiana Lottery). The Louisiana Lottery was chartered for educational and charitable purposes. Act of Aug. 11, 1868, 1868 La. Acts 24 (authorizing the Louisiana Lottery).

²⁵⁸ WEINSTEIN & DEITCH, *supra* note 53, at 3 ("Earmarking of lottery revenues does not necessarily result in a net addition of funds to the designated areas of expenditures."); *id.* at 75 ("lottery revenues have not added to the educational expenditures but instead have had the effect of augmenting the total revenues available"). See also CLOTFELTER & COOK, *supra* note 112, at 227-28 ("it is unlikely that lottery revenues have much effect on the pattern of [state] expenditures"); Kaplan, *supra* note 226, at 189 ("Earmarking of lottery revenues . . . is often little more than budgetary shuffling").

[New Hampshire] harps on the theme that all profits go to education. But the lottery . . . has never paid more than 3 percent of the costs of New Hampshire schools, and some years less than 1 percent. New Hampshire still ranks 50th among the 50 states in state aid to education.

DEVELOPMENTS, *supra* note 3, at 695 (quoting ITHACA J., Dec. 9, 1975, at 15).

Earmarking does, however, have the effect of creating a constituency of lottery supporters. CLOTFELTER & COOK, *supra* note 112, at 166, 182-83 (beneficiaries of earmarked funds become defenders of the lottery); DEVELOPMENTS, *supra* note 3, at 709 (noting that politicians like lotteries because they create jobs that can be awarded to political supporters). See also PA. REPORT, *supra* note 227, at 33 ("When originally enacted, Pennsylvania's 'State Lottery Law' restricted program funding to financing of property relief for the elderly. . . . From that starting point, the array of senior citizen programs has grown to encompass 17 separate programs. . . ."); *id.* at 35 (projecting that over \$800 million per year will be raised by the lottery for these programs by the early 1990s).

²⁵⁹ Kaplan, *supra* note 226, at 191.

earmarked.²⁶⁰ Thus, lottery proceeds normally replace rather than supplement money directed toward the identified programs.²⁶¹

The appropriation offset problem is exemplified in a recent Minnesota incident. In November 1990, Minnesota voters approved a constitutional amendment dedicating forty percent of all lottery proceeds to an environmental and natural resources trust fund.²⁶² Originally, a Minnesota statute required that fifty percent of lottery revenues would go to the state's environmental trust fund, but when budgets grew tight, legislators tapped into the proceeds, cutting the environmental trust fund's percentage back to forty percent.²⁶³ Fear of further cuts led to this constitutional amendment. The legislature is now prohibited from raiding the fund, but it is unlikely that the legislature will add additional monies into the trust. Legislatures view lottery proceeds as assets that can be used wherever needed, despite promises that they will be dedicated for a certain use. This can cause serious problems for those agencies that rely on lottery income in their budgeting process.²⁶⁴ As such, generally it is best to direct lottery managers to maximize profits for the general coffers.²⁶⁵

²⁶⁰ *Id.* at 189-90 (California, Michigan, Ohio and New Jersey). Mississippi is currently considering a lottery for education. A recent political cartoon showed a teacher asking, "Okay, Jimmy. Tell me what you would have if you subtracted two from two." The student replied, "The total gross amount education will receive from gambling." OXFORD [Miss.] EAGLE, Jan. 29, 1992, at 4.

²⁶¹ Money earmarked one year can easily be sent to the general fund the next. Legislatures can always write provisions that have the appearance, though not the effect, of funneling money to specified projects. DEVELOPMENTS, *supra* note 3, at 698.

²⁶² 21 Env't Rep. (BNA) 1367 (Nov. 16, 1990). See MINN. CONST. art. 11, § 14. The fund receives the proceeds until the year 2001. *Id.*

²⁶³ 21 Env't Rep. at 1367. See MINN. STAT. § 349A.10(5) (1990) (environmental fund to receive 40% of lottery proceeds); see also DEVELOPMENTS, *supra* note 3, at 695 (New York legislature "raided" the funds earmarked for education when it faced a budget crisis in 1968).

²⁶⁴ California State School Chief Bill Hohig explained the problem in that state: The problem with the lottery has been is [sic], in one sense, there really isn't a lottery. . . . [T]hey just took \$500 million off of what we normally got from the state. We ended up with no extra money. People thought we had a lot of extra money, so it set us back politically when we had to make the argument, "You're starving the schools." Most districts were forced, because of lack of funds from Sacramento, to use lottery funds just to keep the regular program going.

48 Hours, *supra* note 228, at 8.

²⁶⁵ See, e.g., DEL. CODE ANN. tit. 29, § 4805(a) (1983) ("The lottery shall produce the maximum amount of net revenues for the state consistent with the general welfare of the people"); MICH. COMP. LAWS § 432.9 (1991) (same); N.J. STAT. ANN. § 12-573 (West 1988) (money transferred to general fund); R.I. GEN. LAWS ANN. § 42-61-15 (1990) (profits, after expenses of the lottery have been paid, go to the general revenue fund). But see King, *supra*

Lotteries also create difficulties in the budgeting process because the revenues tend to vary greatly from one year to the next.²⁶⁶ While projections typically assume that there will be a slight increase in revenue, lotteries do not always experience profit increases. In 1979-80, for instance, Massachusetts saw its lottery revenue drop by fifty percent.²⁶⁷ Because budgets are normally based on projected revenues, shortfalls create serious difficulties in the budget.²⁶⁸ For that reason, lottery funds should not be appropriated until they are received by the state treasury.²⁶⁹

Despite the problems with budgeting, earmarking, regressivity, and lower than expected revenues, lotteries do raise money without taxation. Thus, lotteries are successful in accomplishing their primary function. Accordingly, state lotteries and other forms of state-sponsored gambling are likely to remain popular with the states for the foreseeable future.

2. Competition with Illegal Gambling

A secondary purpose of state-sponsored gambling in some states is to compete with illegal gambling and organized crime.²⁷⁰ Organized crime gained prominence in the United States in the

note 72, at 752 (arguing that states should continue to earmark funds so that the people have a cost-benefit measure by which they can assess the value of lotteries, and suggesting that, if this is done, some states might decide to do away with the lottery).

²⁶⁶ Mikesell & Zorn, *supra* note 54, at 314 ("Clearly, a state cannot rely on its lottery to be a stable, reliable source of net revenue. Lottery revenue is affected by changing consumer preferences, introduction of new games, marketing efforts, competition from neighboring states' games and illegal games, and other factors outside the states' control."). See *id.* at 315 (table indicating yearly fluctuations ranging from a 50% decrease to a 98% increase in various state lottery revenues).

²⁶⁷ *Id.* at 314-15. See also Stone, *supra* note 54, at A1 (Arizona revenues down 20% in fiscal 1991, California revenues dropped 14%, and eight other states had declines of 10% or more).

²⁶⁸ DEVELOPMENTS, *supra* note 3, at 686-90; ROSE, *supra* note 7, at 11. See 48 Hours, *supra* note 228, at 8 (Los Angeles District Superintendent complaining about the variance in lottery revenues from year to year, and the resultant difficulty in budgeting).

²⁶⁹ KARCHER, *supra* note 224, at 100. Accord VA. CODE ANN. § 58.1-4022(D) (Michie 1991) ("Appropriation of lottery revenues shall be made only upon actual and audited collections as transfers to the general fund and shall in no event be predicated upon an estimation of such revenues.").

²⁷⁰ The term "organized crime" has many meanings. DEVELOPMENTS, *supra* note 3, at 110 n.77. The Commission on the Review of the National Policy Toward Gambling equated it with the Mafia or *La Cosa Nostra*. GAMBLING IN AMERICA, *supra* note 96, at 171. In this paper, "organized crime" refers to large-scale operations that use force, bribery and intimidation to conduct their unlawful activities, regardless of any ethnic, racial or other distinguishing features.

1920s as a product of Prohibition.²⁷¹ These criminal enterprises expanded their areas of influence into extortion, prostitution, public corruption, organized labor and gambling.²⁷² It is estimated that by 1931, revenues from illegal gambling were approximately \$500 million per year.²⁷³ With the repeal of the Eighteenth Amendment in 1933, crime syndicates found themselves depending primarily on the proceeds of gambling to hold their empires together.²⁷⁴

Even today, gambling is an important revenue source for organized crime.²⁷⁵ Current estimates of illegal gambling run as high as \$1 billion annually wagered in New York City alone,²⁷⁶ and \$100 billion wagered nationally.²⁷⁷ 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.²⁷⁸ If state lotteries were able to draw customers

²⁷¹ R. KING, *GAMBLING & ORGANIZED CRIME* 24 (1969). See also *GAMBLING IN AMERICA*, *supra* note 96, 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. Rychlak, *supra* note 9, at 572 n.88.

²⁷² DEVELOPMENTS, *supra* note 3, at 351; Rychlak, *supra* note 9, at 572 n.88.

²⁷³ KING, *supra* note 271, at 24.

²⁷⁴ *Id.* at 25. In 1961, Attorney General Robert Kennedy testified that "profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime." *Legislation Relating to Organized Crime: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary 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, 87th Cong., 1st Sess. 11* (1961). See also ROSE, *supra* note 7, at 172 ("Illegal gambling has traditionally been the major revenue source for organized crime; it is possible that drug money is now on top.").

²⁷⁵ See *Marshall v. Sawyer*, 365 F.2d 105 (1966) (upholding Nevada Gaming Commission's right to bar undesirable persons from casinos); *Nevada Tax Comm'n v. Hicks*, 310 P.2d 852, 854 (Nev. 1957) (expressing concern over possible infiltration of Nevada's legalized gambling by organized crime); Blakey & Kurland, *supra* note 201, at 1019 n.437 ("At various times Nevada was beset with . . . incidents of organized crime."); Jerome H. Skolnick & John Dombrink, *The Limits of Gaming Control*, 12 CONN. L. REV. 762 (1980) (discussing organized crime's role in legalized gambling). See also SKOLNICK, *supra* note 51, at 35-36 ("In the 1950s and 1960s, . . . former bootleggers openly ran [Las Vegas] hotel-casinos"); see generally *id.* at 111-19.

²⁷⁶ DOMBRINK & THOMPSON, *supra* note 15, at 99.

²⁷⁷ ROSE, *supra* note 7, at xiii. See DEVELOPMENTS, *supra* note 3, at 740 ("Estimates of the amount wagered annually through organized illegal operations vary greatly, but virtually all are in the billions of dollars."); LOUIS, *supra* note 16, at 67 ("The receipts from illegal gambling each year in the United States surpass the total revenues of America's seventy-five largest industrial organizations combined."). Of course, the exact amount of any illegal activity is very difficult to determine. Rychlak, *supra* note 9, at 572. The total amount spent on legal gambling each year in the United States exceeds \$147 billion. ROSE, *supra* note 7, at xiii.

²⁷⁸ DEVELOPMENTS, *supra* note 3, at 123, 741. More recent studies indicate that illegal gambling is not controlled by one huge syndicate, but rather, by several smaller organizations. CLOTFELTER & COOK, *supra* note 112, at 131.

from patrons of illegal games, the state could simultaneously raise revenue and fight crime.²⁷⁹ Accordingly, some states have identified the elimination of organized crime's control of illegal gambling as a goal of state-run lotteries.²⁸⁰

Lotteries have not been successful in competing with illegal gambling.²⁸¹ They have not eliminated underground games; it is unclear whether they have even made a dent.²⁸² One reason may be that lotteries are notorious for low payouts.²⁸³ They generally award only about 50 percent of the money wagered in prizes.²⁸⁴ By

²⁷⁹ DEVELOPMENTS, *supra* note 3, at 682.

²⁸⁰ E.g., 72 PA. CONS. STAT. § 3761-2 (Supp. 1991) (listing aiding the elderly and curbing illegal gambling as the lottery's purposes); PA. REPORT, *supra* note 227, at 79 (same); see also CLOTFELTER & COOK, *supra* note 112, at 131 (identifying this as a secondary purpose of state run lotteries); WEINSTEIN & DEITCH, *supra* note 53, at 153 (same); Lester B. Snyder, *Regulation of Legalized Gambling: An Inside View*, 12 CONN. L. REV. 665, 666 (1980) (same).

Lotteries also compete with legitimate businesses for the consumers' disposable income. While this may hurt some businesses, retail outlets that sell tickets profit from the commissions received (usually five or six percent) and from the increased traffic the lottery generates. CLOTFELTER & COOK, *supra* note 112, at 117, 128-30.

Organized crime's most popular game, "numbers," is a lottery. *Id.* at 18. An estimated \$5.6 billion is wagered annually on illegal numbers games. *Id.* at 19. See also N.Y. PENAL LAW § 225.00(11) (1989) (defining and prohibiting the numbers game). It operates like a daily lottery, with players selecting a three-digit number and a payout being made to those who have selected the winning combination. SCARNE, *supra* note 31, at 186-204. The daily lottery is modeled after the illegal numbers game. CLOTFELTER & COOK, *supra* note 112, at 56-59.

²⁸¹ DEVELOPMENTS, *supra* note 3, at 707 ("Patrons of illegal games apparently cannot be enticed in great numbers to play the government's game, so the government must create a gambler who will."). See 48 *Hours*, *supra* note 228, at 9-10 (Washington, D.C. Police Captain suggesting that the lottery may have damaged the illegal games, but that they are "still functioning and functioning well").

²⁸² CLOTFELTER & COOK, *supra* note 112, at 130-31 (legal lotteries have not affected most of the illegal games, but the evidence as to the effect on numbers is inconclusive); Kaplan, *supra* note 226, at 196-97 (mixed evidence); Ross, *supra* note 228, at 23 (evidence is inconclusive).

²⁸³ SCARNE, *supra* note 31, at 175 ("[S]tate-run lotteries have not hurt the illegal Numbers game, for a very good reason: the Numbers racket pays better odds than the state lotteries do.").

²⁸⁴ PA. REPORT, *supra* note 227, at 17 (identifying a range, from 45.4% in New York to 59.3% in Massachusetts, with an average of all lottery states at 50%); e.g., CAL. GOV'T CODE § 8880.63 (West Supp. 1991) (50% to be paid out as prizes); MINN. STAT. § 349A.10 (1990) (payback rate to gradually increase from 50% to 60%); 72 PA. CONS. STAT. § 3761-12 (Supp. 1991) (not less than 40% to be paid out in prize money); R.I. GEN. LAWS § 42-61-15(1) (1990) ("[P]ayments of prize awards to holders of winning lottery tickets shall be equal as nearly as is practicable, to forty-five percent (45%) of the total revenue accruing from the sale of lottery tickets."). See also SULLIVAN, *supra* note 8, at 115 (noting that the early New York lottery paid back only 30% of the money collected). Of course, "[f]or the poor soul who has never won, the tax rate remains at 100 percent." KARCHER, *supra* note 224, at 43. Typically, 12% of the money wagered goes to cover lottery expenses and 38% is brought in as profits. CLOTFELTER & COOK, *supra* note 112, at 246.

contrast, horseracing pays back an average of 81 percent, slot machines pay an average of 89 percent, sports bookmakers typically pay 95.5 percent, and casino table games pay an average of 97 percent.²⁸⁵ Even the illegal numbers game typically pays back 60–70 percent of the money bet.²⁸⁶ In addition to better odds, the illegal game offers several advantages: taxes are not withheld (and probably not paid);²⁸⁷ credit can be extended; bets may be placed in more varied amounts than the lottery allows; and large payoffs are not spread out over several years.²⁸⁸ As such, serious gamblers

²⁸⁵ CLOTFELTER & COOK, *supra* note 112, at 239; DEVELOPMENTS, *supra* note 3, at 692. See also Snyder, *supra* note 280, at 686 (table comparing lottery payout to other legalized gambling); Rein, *supra* note 220, at 109 (“[A] state pays back only about 50 cents in prize money for every dollar that it takes in. The stingiest slot machines in Las Vegas or Atlantic City pay close to 80 cents on the dollar. The blackjack tables pay back 95 cents to the players. And craps are even better.”).

²⁸⁶ CLOTFELTER & COOK, *supra* note 112, at 56; DEVELOPMENTS, *supra* note 3, at 692. This would seem to provide sufficient reason for the sophisticated gambler to opt for the illegal game. See Aranson & Miller, *supra* note 247, at 853 (arguing that the low payout rate of state lotteries serves to increase illegal gambling activity). But see CLOTFELTER & COOK, *supra* note 112, at 132 (suggesting that this conclusion does not factor in other concerns, such as the possibility of not being paid by the operator of the illegal game and the customary tip paid to the runner); ROSE, *supra* note 7, at 10 (similar); I. Nelson Rose, *The Legalization and Control of Casino Gambling*, 8 FORDHAM URB. L.J. 245, 257 (1980) (similar).

²⁸⁷ Gambling winnings are taxed by the federal government as income, including winnings from lotteries. 26 U.S.C. §§ 61, 74 (1988). Substantial lottery winnings are even subject to withholding. 26 U.S.C. § 3402(q)(3)(B) (1988). See also, e.g., MINN. STAT. § 290.92(29) (Supp. 1991) (withholding lottery winnings for state income taxation); *id.* § 349A.08 (prize money withheld if winner owes past due taxes). Winnings from illegal gambling, however, might never be reported and therefore never taxed. Snyder, *supra* note 280, at 673, 676 (“there is little voluntary compliance with the reporting and payment requirements”; “very few gambling winnings are in fact reported to the IRS”). This competitive disadvantage is so significant that the Commission on the National Policy Toward Gambling concluded, “Federal tax policies make effective competition with illegal bookmakers impossible.” GAMBLING IN AMERICA, *supra* note 96, at 4, 18. The solution that it suggested was that winnings from legal gambling, including lotteries, not be taxed. *Id.* at 15. See also WEINSTEIN & DEITCH, *supra* note 53, at 4 (“Federal taxation of gambling winnings inhibits efforts of the states to compete with tax-free illegal gambling.”). In 1973, a proposal to exclude lottery winnings from federal income taxation was introduced to Congress, with support from the Treasury Department and from the Internal Revenue Service, but was defeated. DEVELOPMENTS, *supra* note 3, at 726. Some states, however, have excluded lottery winnings from state income taxation. E.g., CAL. GOV’T CODE § 8880.68 (West Supp. 1991) (no state taxes on lottery ticket sales or on prize awards); DEL. CODE ANN. tit. 29, § 4817 (1983) (lottery winnings not taxed); MO. ANN. STAT. § 313.321 (Vernon Supp. 1991) (lottery winning exempt); N.H. REV. STAT. ANN. § 284:21-r (1990) (winnings from state-sanctioned gambling exempt from taxation); 72 PA. CONS. STAT. § 3761-13 (Supp. 1991) (lottery winnings exempt); R.I. GEN. LAWS § 42-61-17 (1990) (same).

²⁸⁸ CLOTFELTER & COOK, *supra* note 112, at 132. See Eugene M. Christiansen & Michael D. Shagan, *The New York Off-Track Betting Law: An Exercise in Selective Decriminalization*, 12 CONN. L. REV. 854, 864 (1980) (“unlike their legal counterparts, illegal bookmakers are able

may opt for illegal games, even though legal alternatives are offered.

A state lottery may actually encourage illegal game playing. First, state promotion of legal gambling removes any taint from the illegal games.²⁸⁹ Thus, people who would not have gambled illegally might be encouraged to do so.²⁹⁰ Moreover, the legal game makes it easier to operate the illegal game, in that illegal games can simply use the same numbers the state game uses (assuring players it is not rigged and making it easy for players to find out the winning number). The legal game also provides an easy way for the illegal operator to "lay-off" (thereby insuring against heavy losses) on a popular number.²⁹¹ Therefore, while the evidence is inconclusive, arguably lotteries have not displaced illegal gambling in most urban areas.²⁹²

3. Competition with Neighboring States

Some states are forced to consider lotteries as a defensive mechanism. If neighboring states conduct lotteries, and people cross state boundaries to purchase tickets, the state without a lottery may suffer adverse consequences without receiving the benefit of increased revenue.²⁹³ In fact, when New Hampshire introduced its lottery in

to offer the services of anonymity, the convenience of telephone betting, tax-free winnings, and betting on credit").

²⁸⁹ ROSE, *supra* note 7, at 10; Judith H. Hybels, *The Impact of Legalization on Illegal Gambling Participation*, 35 J. Soc. Issues 27, 35 (1979) (concluding that legal and illegal gambling are complementary and that gamblers do not substitute one for the other); Snyder, *supra* note 280, at 666 ("statistics indicate that those lured into legal gambling often extend their habit to illegal wagering as well").

²⁹⁰ Hybels, *supra* note 289, at 32.

²⁹¹ DEVELOPMENTS, *supra* note 3, at 732, 776. See also Ross, *supra* note 228, at 25 (operator of an illegal numbers game which used the numbers drawn in the state game complained when he noted irregularities in the Pennsylvania lottery drawing).

²⁹² WEINSTEIN & DEITCH, *supra* note 53, at 139 ("The daily lottery probably does not substitute closely enough for the illegal numbers game to attract a significant percentage of illegal bettors."). Perhaps the best that can be said of the lottery, in terms of reducing illegal gambling, is the following comment from the head of the New York Lottery:

We have no hard evidence that our lottery operation has hurt the illegal numbers racket. But at least we offer the opportunity to those of its patrons who might wish to divert their money to legal channels, for the public good, instead of lining the pocket of the criminal element.

DEVELOPMENTS, *supra* note 3, at 731 (quoting Ernest T. Bird, *State Lotteries—A Good Bet*, ST. GOV'T 25 (Winter 1972)). By contrast, off-track betting has "noticeably reduced the volume of illegal horse race betting." WEINSTEIN & DEITCH, *supra* note 53, at 4.

²⁹³ Mikesell & Zorn, *supra* note 54, at 311 ("[s]ome states implemented lotteries because of revenue they feared lost to their lottery neighbors"). Newspapers that print winning

1964, officials correctly anticipated that most of the revenue would come from ticket sales to residents of neighboring states.²⁹⁴ New Hampshire benefited by siphoning money from out-of-state purchasers to support in-state programs.²⁹⁵ Clearly, this was a detriment to New Hampshire's neighboring states. In such cases, a lottery must be considered as a defensive mechanism. As Kansas Governor John Carlin explained, "I've never backed a lottery before. But not having one when your neighbor has one is like tying one hand behind your back."²⁹⁶

The problem with enacting a lottery to combat a neighboring one is that a "cycle of escalation and retaliation begins—what you might call legal gambling wars."²⁹⁷ A "parasitic dependence on revenues from residents of other states may be initially attractive, [but] it can only lead to harsh competition between lottery states."²⁹⁸

Legal gambling begets more of the same in states that fear they will lose money if they do not devise new ways of wagering. Illinois, for example, operates a giant lottery that is believed to siphon much money out of neighboring states. But, fearful that some cash might eventually flow back to Iowa [due to riverboat gambling], Illinois House Democrats have recommended starting roulette, blackjack and dice games on twelve paddleboats cruising six rivers that flow through or past the state.²⁹⁹

numbers from lotteries in other states are evidence that this does happen. For instance, although Tennessee does not have a lottery, the Memphis paper regularly publishes winning numbers from lotteries in Florida, Illinois, Kentucky and Missouri. See, e.g., COM. APPEAL (Memphis, Tenn.), Nov. 3, 1991, at B4 (also listing a "900" number that provides the winning numbers in 33 states); see also Laura Coleman, *The Game of Lottery: Tennesseans play; Ky. fills its coffers*, COM. APPEAL (Memphis, Tenn.), Feb. 2, 1992, at A1 (discussing Tennessee residents playing the Kentucky lottery); 48 Hours, *supra* note 228, at 6–8 (Georgia residents purchasing tickets in Florida's lottery); OXFORD [Miss.] EAGLE, Apr. 16, 1991, at 3 (Associated Press story about a Mississippi woman arrested with 1,284 Florida lottery tickets, which she purchased on a weekly basis to resell in Mississippi). This is sometimes used as a selling point to gather lottery support within a state. See DEVELOPMENTS, *supra* note 3, at 683.

²⁹⁴ SULLIVAN, *supra* note 8, at 102 (indicating that this was the intent). In the first year of operation, 80% of New Hampshire's tickets were sold to non-residents. CLOTFELTER & COOK, *supra* note 112, at 143; ROSE, *supra* note 7, at 14.

²⁹⁵ New Hampshire's profits dropped dramatically when its neighboring states adopted lotteries. DEVELOPMENTS, *supra* note 3, at 700.

²⁹⁶ CLOTFELTER & COOK, *supra* note 112, at 150. See also DEVELOPMENTS, *supra* note 3, at 685 ("when nearby states also go into the lottery business, politicians must take a second look at their home markets").

²⁹⁷ ROSE, *supra* note 7, at 14.

²⁹⁸ King, *supra* note 72, at 752.

²⁹⁹ George S. Church, *You Bet Your Life: Pete Rose and the Great American Obsession*, TIME, July 10, 1989, at 16, 19.

Accordingly, attracting money from out-of-state sources has an attractive ring, but, like a pyramid scheme, such a plan will ultimately collapse. Nonetheless, with no better alternatives, lotteries continue to be the most reasonable short-term defense to a neighboring lottery. For this reason, lotteries are generally successful in attaining their third goal of stopping the drain of money from the home state to neighboring lottery states.

B. Social Problems Associated with the Modern Lottery

In order to reach well-reasoned decisions concerning modern state-run lotteries, the benefits derived by the state must be weighed against the adverse social consequences. Unlike the lotteries of the 1800s, today's lotteries are so tightly controlled that the risk of fraud is quite small.³⁰⁰ Problems associated with gambling's impact on individuals, however, may be more serious today than they were in the last century, due to heavy television advertising.³⁰¹

³⁰⁰ CLOTFELTER & COOK, *supra* note 112, at 48. See ROSE, *supra* note 7, at 20 ("There have been less than a half-dozen major scandals involving state lotteries in the last 20 years, fewer than the number of scandals related to the regulation of atomic plants."). But see KARCHER, *supra* note 224, at 49 (arguing that not enough money is spent regulating lotteries).

Modern lottery fraud cases have included situations in which people attempted to claim prizes with false or altered tickets, but the only serious case of fraud thus far uncovered involved a Pennsylvania drawing in 1981, where the perpetrators injected some of the ping-pong balls with liquid to make them heavier and less likely to be selected. Rein, *supra* note 220, at 114. The fraud (which involved the television lottery announcer) was quickly uncovered. Ross, *supra* note 228, at 25. The more typical problems associated with modern lotteries include: awarding the prize to the wrong winner, *Coleman v. State*, 258 N.W.2d 84 (Mich. App. 1977) (prize money returned to state); undisputed winner loses winning ticket, *Karafa v. New Jersey State Lottery Comm'n*, 324 A.2d 97 (N.J. 1974) (state need not pay); winning ticket turned in two days late, *Madara v. Commonwealth*, 323 A.2d 401 (Pa. C. 1974) (state need not pay); lottery sales agent failed to keep records required by the state, thereby disqualifying plaintiff from lottery, *Molina v. Games Mgmt. Servs.*, 449 N.E.2d 395 (N.Y. 1983) (state and agent found immune from suit); and presentation of stolen lottery tickets to collect prize, *State v. Kiminski*, 474 N.W.2d 385 (Minn. App. 1991) (upholding the possible imposition of a ten-year sentence for redemption of stolen tickets worth \$69).

Perhaps the most serious threat of fraud associated with today's lotteries comes from people who market products designed to help others select winning numbers. See *48 Hours*, *supra* note 228, at 11-14 (discussing computer programs, books, newspaper columns, photography of the "aura that comes out of people's fingertips," 1-900 telephone numbers, astrology charts and biorhythm charts, all of which are designed to provide the purchasers with winning numbers); Kaplan, *supra* note 226, at 199 (similar). Cf. JAMES RANDI, JAMES RANDI: PSYCHIC INVESTIGATOR (1991) (debunking several claims of special powers or abilities).

³⁰¹ It has been suggested that participation in legalized gambling can lead to the following adverse consequences:

1. Loss of interest in family and friends;
2. Abdication of familial support and other obligations resulting in marital breakdown, divorce, and nonsupport;

In conducting a lottery, states are marketing a product,³⁰² and many state agencies have adopted the attitude that, "[t]he success of a state lottery, like that of a private business, can be measured in terms of profitability."³⁰³

Lottery states have taken the position that they must continually promote the lottery to keep interest high.³⁰⁴ This promotion has changed the nature of gambling, the role of the state, and the relationship between the two. "There was a time when gambling had a taint, in Respectable America, anyway. At best, the government tolerated it. Today, the states are the casinos, the house. They don't just tolerate gambling anymore. Now, they downright encourage it."³⁰⁵

The aim of lottery promotion, of course, is to attract new "customers" and to encourage current players to spend more money on the lottery.³⁰⁶ This promotion has the effect, however, of en-

3. Loss of interest in work and advancement and a reduction in work productivity and self-improvement efforts;

4. Pauperization and involvement with usurious money lenders;

5. Increase in total gambling activity and increased participation in illegal gambling ventures;

6. Loss of interest and participation in religious and civic affairs;

7. Increase in property crimes, especially embezzlement of funds by gamblers in distress.

WEINSTEIN & DEITCH, *supra* note 53, at 133-34. Weinstein suggests that these results are unlikely to occur from lottery participation. *Id.* at 134. However, his projections were made at a time when lotteries and associated gambling problems were not yet widespread.

³⁰² CLOTFELTER & COOK, *supra* note 112, at 186; DEVELOPMENTS, *supra* note 3, at 699 ("states had to treat lottery players as consumers of a product"); O'Donnell, *supra* note 225, at 730 (noting that this type of governmental ownership of industries is "foreign to our American heritage").

³⁰³ PA. REPORT, *supra* note 227, at 20.

³⁰⁴ ROSE, *supra* note 7, at 15 ("after the first few months or years of success, every game begins to take in less and less money and to require more and more promotions"); WEINSTEIN & DEITCH, *supra* note 53, at 3 ("Stability of lottery revenues can be obtained only with constant promotion."). See also CLOTFELTER & COOK, *supra* note 112, at 114-15 (noting that interest drops after a game has been in place for a while, but suggesting that overall participation will generally continue to grow); SULLIVAN, *supra* note 8, at 103 (revenues in the New Hampshire lottery decreased in each of the first seven years). Part of the promotion includes carefully structuring the games to appeal to the widest possible segment of society. *Id.* at 239.

³⁰⁵ 48 HOURS, *supra* note 228, at 3-4. Accord CLOTFELTER & COOK, *supra* note 112, at 239 ("The lottery states have not simply become providers; they have become advocates, trying to persuade more of the public to spend more money more often."). Lottery officials argue that they are promoting a form of entertainment, not gambling. KARCHER, *supra* note 224, at 4-5. See also *id.* at 75.

³⁰⁶ DEVELOPMENTS, *supra* note 3, at 713 (advertising agencies "create consumers—gamblers—from persons who otherwise might never bet").

couraging new segments of society, including youngsters, to gamble and risk addiction to gambling.³⁰⁷ Although it varies from state to state, approximately 74 percent of all state advertisements are lottery promotions.³⁰⁸ In fact, lottery promotion has become so omnipresent that it may not be possible to separate the adverse effects that the lottery itself has had on society from the adverse effects caused by lottery promotion.

Lottery promotion is typically conducted by a state-employed advertising agency that places lottery advertisements everywhere from the corner store to baseball telecasts.³⁰⁹ These advertisements are aimed at swaying perceptions and enticing new gamblers and heavier play.³¹⁰ The advertisements convey the message that "gambling is not a vice but a normal form of entertainment."³¹¹ Recently great sums have been expended on advertising campaigns to dissuade drunk driving, drug abuse and high-risk AIDS behavior. At the same time, Congress has barred tobacco and liquor advertisements from television.³¹² "From seat belts to cigarettes, government has assumed a . . . proactive and protectionist posture."³¹³ Obviously, the government believes these advertisements have an impact on society. Yet, when it comes to gambling, the state spends money *encouraging* high-risk activity.³¹⁴

³⁰⁷ *Hearing*, *supra* note 251, at 38 (testimony of Angelo Aponte, New York City Commissioner of Consumer Affairs).

³⁰⁸ CLOTFELTER & COOK, *supra* note 112, at 201. This does not include broadcasts of drawings or news reports of large awards, because states usually do not pay for these forms of free advertising. *Id.* at 200. See Ross, *supra* note 228, at 25 ("A torrent of free advertising ensues every time a lottery creates another multimillionaire.").

³⁰⁹ See, e.g., PA. REPORT, *supra* note 227, at 45 n.1 (discussing Pennsylvania's advertising contract). For a description of some modern lottery advertisements, see CLOTFELTER & COOK, *supra* note 112, at 206-08; DEVELOPMENTS, *supra* note 3, at 716 & n.93 (noting that such advertising is not designed for the highest-paid and best-educated residents); see also CAL. GOV'T CODE § 8880.45 (West Supp. 1991) (3.5% of projected receipts to be spent on advertising); MINN. STAT. § 349A.10(3)(c) (1990) (2.75% of lottery gross revenue appropriated for advertising budget).

³¹⁰ See King, *supra* note 72, at 751 ("Like any other business, the lottery constantly attempts to expand sales and create new markets.").

³¹¹ Ricardo Chavira, *The Rise of Teenage Gambling*, TIME, Feb. 25, 1991, at 78 (quoting Valerie C. Lorenz, Ph.D., Director of the National Center for Pathological Gambling).

³¹² 27 U.S.C. § 205 (Supp. 1991) (alcohol restrictions); 15 U.S.C. § 4402 (Supp. 1991) (smokeless tobacco restrictions); 15 U.S.C. § 1335 (1982) (cigarette restrictions).

³¹³ Kaplan, *supra* note 226, at 200.

³¹⁴ See CLOTFELTER & COOK, *supra* note 112, at 243 ("sales job may be viewed as an education in values, teaching that gambling is a benign or even virtuous activity"); ROSE, *supra* note 7, at 16 ("The result is something unique in American culture. . . . You do not

To compound the problem, lottery advertisements are often misleading.³¹⁵ "One wonders how the government would respond to private industry's use of similar advertising techniques were it also in the lottery business."³¹⁶

[M]ost lotteries seldom advertise critical details of their operations. Not only are the odds of winning not clearly advertised, but prizes distributed over several years are not quoted in present value. Such marketing practices by a private firm would not be permitted. Whether state enterprise should operate at this ethical level is doubtful.³¹⁷

If the Federal Trade Commission applied to state lotteries the same regulations that apply to privately conducted sweepstakes, a dramatic shift in current industry practice would occur.³¹⁸

While it might not be possible to shield selected individuals or segments of society from lottery advertisements, advertisements should be accurate and counsel moderation.³¹⁹ All advertising agencies select target markets,³²⁰ but lawmakers should be especially concerned about people prone to compulsive behavior, children and the poor. Failure to pay special attention to these groups may "generate social costs exceeding benefits."³²¹

see the state advertising tooth paste, or even for people to brush their teeth. But you do see the state actively encouraging its citizens to gamble.").

³¹⁵ CLOTFELTER & COOK, *supra* note 112, at 208-10. *Accord* DEVELOPMENTS, *supra* note 3, at 693 (noting how advertisements can misrepresent the truth); *id.* at 718 (discussing misleading slogans).

³¹⁶ DEVELOPMENTS, *supra* note 3, at 718. *Cf.* Matter of Zang, 741 P.2d 267, 273 (Ariz. 1987) (misleading advertising by an attorney). *See* Champion & Champion, *Television Advertising: Professionalism's Dilemma*, 23 ST. MARY'S L.J. 331, 353-54 (discussing Zang).

³¹⁷ Mikesell & Zorn, *supra* note 54, at 316. *See* KARCHER, *supra* note 224, at 51-54 (arguing that the problem stems from the government's inability to serve as both a promoter of the lottery business and a watchdog for misleading advertisements); *id.* at 109-10 (same).

³¹⁸ CLOTFELTER & COOK, *supra* note 112, at 209.

³¹⁹ HOWARD COSELL, *WHAT'S WRONG WITH SPORTS* 152 (1991).

³²⁰ *See* CLOTFELTER & COOK, *supra* note 112, at 190-91 (lottery promotions target select groups).

³²¹ WEINSTEIN & DEITCH, *supra* note 53, at 5. *See also* CLOTFELTER & COOK, *supra* note 112, at 217 ("To the extent that the public comes to view the pursuit of a big jackpot as an easy avenue to wealth and substitutes lottery play for education, savings, and entrepreneurial efforts, the economy as a whole may suffer.").

1. Compulsive Gambling³²²

"The documented history of compulsive gambling is as old as the most ancient civilizations."³²³ It affects an estimated six to ten million people in the United States today,³²⁴ and it "almost always involves destructive behavior."³²⁵ The World Health Organization has recognized compulsive gambling as a disease,³²⁶ and the Amer-

³²² The view of gambling as a form of social pathology has been traced to Jeremy Bentham. SKOLNICK, *supra* note 51, at 15. Thirty to fifty percent of compulsive gamblers in Gamblers Anonymous report withdrawal symptoms when they stop gambling. Shaffer, *supra* note 18, at 7 (also noting similar behavior patterns among compulsive gamblers and narcotic addicts). See also Henry R. Lesieur, *The Compulsive Gambler's Spiral of Options and Involvement*, 42 PSYCHIATRY 79, 81 (1979) ("The acquisition of the chase philosophy [betting more to make up for losses] is the major contingent in becoming a compulsive gambler.") (emphasis in original).

The causes of compulsive gambling are difficult to identify, and problems associated with compulsive gambling are often overlooked because they are not easily specified and are not biological in nature. DOMBRINK & THOMPSON, *supra* note 15, at 12. However, a common dissociative-like state has been found to prevail among compulsive gamblers, alcoholics and compulsive overeaters. Durand F. Jacobs, *A General Theory of Addictions: Rationale for and Evidence Supporting a New Approach for Understanding and Treating Addictive Behaviors*, in COMPULSIVE GAMBLING, *supra* note 18, at 35.

³²³ Shaffer, *supra* note 18, at 9.

³²⁴ CUSTER & MILT, *supra* note 15, at 22, 35-36, 39-41; Shaffer, *supra* note 18, at 5 (putting the estimate between 3 and 12 million). But see SKOLNICK, *supra* note 51, at 20.

Gamblers Anonymous puts the number in the United States at 6 million, but the figure is hard to believe: the concept of compulsion as employed by that organization is so broad that it includes a large number of persons with all kinds of troubles. Or perhaps Gamblers Anonymous, like other organizations, seeks to upgrade its importance by exaggerating the problem.

Id. (footnote omitted).

³²⁵ Chavira, *supra* note 311, at 78. The impact on the compulsive gambler's family is also significant. Valerie C. Lorenz & Duane E. Shuttlesworth, *The Impact of Pathological Gambling on the Spouse of the Gambler*, 11 J. COMMUNITY PSYCHOL. 67, 69 (1983) (84% of the children and spouses considered themselves emotionally ill as a result of the experience; 78% of the spouses had threatened separation or divorce; 12% had attempted suicide; and 25% of the children had significant behavioral or adjustment problems); Joanna Franklin & Donald R. Thoms, *Clinical Observations of Family Members of Compulsive Gamblers*, in COMPULSIVE GAMBLING, *supra* note 18, at 135, 140-42 (severe emotional problems observed in children of compulsive gamblers).

³²⁶ CUSTER & MILT, *supra* note 15, at 36. But see SKOLNICK, *supra* note 51, at 15.

Unlike drugs, such as alcohol, heroin, tobacco, or cannabis, gambling cannot produce physiological effects in an individual. Even nonmarital sex can, however implausibly, be considered damaging to one's health: venereal disease being an obvious case in point. In contrast, gambling does not readily lend itself to analysis as a medical model of pathology. No one could possibly allege that it is linked with a high incidence of cancer, pulmonary disorder, or brain damage. Nor is gambling physiologically addicting. If a player suffers from withdrawal symptoms, these obviously must be entirely psychological. Still, a variety of apparently intelligent commentators persist in discussing gambling in terms of social and personal pathology.

Id.

ican Psychiatric Association has identified pathological gambling as a mental disorder.³²⁷ Several defendants have even asserted compulsive gambling as a type of insanity defense in criminal cases.³²⁸

If lotteries were doing no more than getting the compulsive gambler to bet with the state instead of a bookie, then there would be no net contribution to the problem of compulsive gambling from state operation of a lottery. Rather than merely providing compulsive gamblers with a legal alternative to the already existing forms of gambling,³²⁹ however, lotteries tend to encourage non-gamblers to begin gambling. This, of course, creates new potential problem gamblers. Experts suggest that four of every 100 people risk becoming compulsive gamblers.³³⁰ Legal gambling leads to an "inevitable increase" in that number.³³¹ Moreover, as lotteries have spread to more and more states, the problem has been compounded.³³² Thus,

³²⁷ AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 291 (3d ed. 1980) [hereinafter DSM-III]. The American Psychiatric Association ("APA") defines pathological gambling as "a chronic and progressive failure to resist impulses to gamble and gambling behavior that compromises, disrupts, or damages personal, family or vocational pursuits." *Id.*

³²⁸ *United States v. Torniero*, 735 F.2d 725, 734-35 (2d Cir. 1984) (rejecting the defense in this case, but noting that it might be available in other cases); *United States v. Gilliss*, 645 F.2d 1269, 1279 (8th Cir. 1981) (no error in failing to subpoena witness who would have testified as to gambling problems); *State v. Lafferty*, 456 A.2d 272 (Conn. 1983) (*per curiam*) (defendant acquitted on grounds of insanity). See also Milton E. Burglass, *Compulsive Gambling: Forensic Update and Commentary*, in COMPULSIVE GAMBLING, *supra* note 18, at 205, 209-20 (discussing the future of this defense).

³²⁹ See *supra* notes 281-88 and accompanying text (discussing the advantages of gambling with an illegal operation); see also DEVELOPMENTS, *supra* note 3, at 707. As Andy Rooney observed:

When these gambling bills were proposed before the state legislature, the argument for them was that people were going to gamble anyway so the state might as well take gambling away from the crime mob, run it honestly and make the profit itself. How come, I'd like to know, if people are going to do all this gambling naturally, the state has to buy radio and newspaper commercials to try to get them to gamble?

ROONEY, *supra* note 246, at 139-40.

³³⁰ 48 *Hours*, *supra* note 228, at 10.

³³¹ CUSTER & MILT, *supra* note 15, at 40 (emphasis added). Accord ROSE, *supra* note 7, at 11 ("[T]here will definitely be some individuals, hundreds or thousands, who will fall victim to compulsive gambling, loan sharks, prostitution, and theft."); Kaplan, *supra* note 226, at 195 ("there is general agreement among clinicians that the increased availability of legalized gambling is contributing to increased abuse"). See also A STUDY OF PROBLEM AND PATHOLOGICAL GAMBLING AMONG CITIZENS OF INDIANA ASSOCIATED WITH PARTICIPATION IN THE INDIANA STATE LOTTERY 21 (Nov. 1990) [hereinafter INDIANA SURVEY].

The irony of a state using legalized gambling to promote social good has been noted by comedians. "We have twelve bingo parlors in our town. All the proceeds go to fight gambling." MILTON BERLE, MILTON BERLE'S PRIVATE JOKE FILE 280 (1989).

³³² William R. Eadington, *Problem Gambling and Public Policy: Alternatives in Dealing with*

it is not surprising to find evidence of a recent increase in the number of problem gamblers throughout this country.³³³

It was once thought that lotteries would not lead to an increase in the number of compulsive gamblers because lotteries do not involve three key elements that appeal to serious gamblers: excitement, low odds and a sense of mastery.³³⁴ As states have tried to bolster sluggish ticket sales, however, they have modified the structure of the lottery, emphasizing these more dangerous elements. These gimmicks concern some clinicians.³³⁵ Moreover, lotteries expose so many people to gambling that the potential negative effect is enormous.³³⁶ "Economic losses from work absenteeism, bad debts, and crime [due to gambling problems] have been estimated at over \$34 billion annually to our society."³³⁷

Until about 1980, the typical description of a compulsive gambler who attended Gamblers Anonymous was a middle-aged, middle class, white male—usually a businessman or a professional.³³⁸ Gambling addicts now include teenagers, retirees, women, and people from all vocations and professions.³³⁹ This spread of gambling problems to new segments of society seems to be linked to the spread of state-sponsored gambling. In 1982, New Jersey established a hotline for people with gambling problems. In the first year, none of the calls were lottery related; by 1985, 12 percent of the calls were lottery related; and in 1987, 21 percent of the calls were lottery related.³⁴⁰ A recent study focusing on the Delaware lottery found that the incidence of pathological gambling increased by 94 percent

Problem Gamblers and Commercial Gambling, in *COMPULSIVE GAMBLING*, *supra* note 18, at 175. See also ROONEY, *supra* note 246, at 141 ("If blackjack was whiskey, I could become an alcoholic. I'm glad no casino is readily available to me because I need to be protected from myself.").

³³³ Durand F. Jacobs, *Illegal and Undocumented: A Review of Teenage Gambling and the Plight of Children of Problem Gamblers in America*, in *COMPULSIVE GAMBLING*, *supra* note 18, at 263 (noting an overall increase of 37% in the number of problem gamblers between 1975 and 1988); Henry R. Lesieur, *Current Research into Pathological Gambling and Gaps in the Literature*, in *COMPULSIVE GAMBLING*, *supra* note 18, at 226.

³³⁴ Kaplan, *supra* note 226, at 195.

³³⁵ *Id.*

³³⁶ *Id.* at 198.

³³⁷ *Id.* at 195.

³³⁸ *Hearing*, *supra* note 251, 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; however, the Commission also found that these generalizations change sharply when considering only illegal betting. *GAMBLING IN AMERICA*, *supra* note 96, at 58.

³³⁹ *Hearing*, *supra* note 251, at 94 (prepared statement of Valerie C. Lorenz, Ph.D.).

³⁴⁰ Kaplan, *supra* note 226, at 199.

after the daily lottery was introduced.³⁴¹ It is now thought that lottery players may comprise 9 percent of the compulsive gamblers in the country and that number may be increasing.³⁴² While the cause and effect relationship between lotteries and the spread of gambling problems to new segments of society is not certain, it is true that lottery players tend to differ "very little among demographic subgroups,"³⁴³ and that lotteries have a broader participation rate than any other form of commercial gambling.³⁴⁴

In 1990, the State of Indiana released a study focused on problem gambling associated with participation in that state's new lottery.³⁴⁵ The objectives of that study were to:

Identify the Demographic characteristics of Indiana residents who participate in the State Lottery; Determine the incidence of gambling addiction (pathological gambling) with regard to the Indiana State Lottery; and Identify attitudes of Indiana residents toward the lottery.³⁴⁶

That study revealed that approximately 60 percent of the adult population had played the lottery.³⁴⁷ Of that group, 9.34 percent (5.6 percent of the total population)³⁴⁸ were either problem, poten-

³⁴¹ PA. REPORT, *supra* note 227, at 74. See also ROSE, *supra* note 7, at 5 (graph comparing increases in lottery play to a general increase in gambling activity).

³⁴² Kaplan, *supra* note 226, at 199. "Members of Gamblers Anonymous have blamed the [Illinois State] lottery for contributing to the problems of compulsive gamblers." CLOTFELTER & COOK, *supra* note 112, at 7.

³⁴³ INDIANA SURVEY, *supra* note 331, at 31; Kaplan, *supra* note 226, at 197 ("large numbers of the general population play lotteries, and many elderly, youths, and housewives are among them"). See also CLOTFELTER & COOK, *supra* note 112, at 96-106 (detailing demographic breakdowns).

³⁴⁴ DEVELOPMENTS, *supra* note 3, at 721 n.10.

³⁴⁵ INDIANA SURVEY, *supra* note 331.

³⁴⁶ *Id.* at 8. California has also recently decided to undertake a similar study. CAL. GOV'T CODE § 8880.44 (West Supp. 1991).

³⁴⁷ INDIANA SURVEY, *supra* note 331, at 30. The median annual spending is between \$101 and \$300, but most people (91%) do not budget their money to play the lottery. *Id.* at 34. See also CLOTFELTER & COOK, *supra* note 112, at 24 (the typical household lottery expenditure, including households that do not participate, is \$240—more than is spent on prescription drugs, medical supplies and reading material).

³⁴⁸ INDIANA SURVEY, *supra* note 331, at 12, 39. The survey report understates these numbers by reporting only those percentages based on the total sample (1,015) rather than percentages based on those who report playing the lottery (610). See *id.* at 12 & tbl. 1. The impact that the Indiana lottery may have on this number is also underestimated. Studies indicate that there are distinct "stages" through which problem gamblers progress. JOHN PHILIP QUINN, GAMBLING AND GAMBLING DEVICES 27 (1912, reprinted ed. 1969) (identifying three stages of a gambler's life); Robert Custer, *Profile of the Pathological Gambler*, 45 J. CLINICAL PSYCHIATRY 35, 36-37 (1984); Lesieur, *supra* note 322, at 80-86. The Indiana lottery did not begin until October 13, 1989, and the Indiana Survey was conducted between July 15-23,

tial pathological, or probable pathological gamblers.³⁴⁹ As a result of these findings, it has been suggested that Indiana establish a Gamblers Anonymous program,³⁵⁰ that one or two programs specifically designed to treat pathological gamblers be established in the state,³⁵¹ and that other prevention strategies be considered.³⁵²

1990. INDIANA SURVEY, *supra* note 331, at 1, 5. As such, problems that might be caused or exacerbated by a lottery might not have been sufficiently developed to show up in this survey. These understatements have already created confusion in the press. See *Study of Gambling in Indiana Released*, LAFAYETTE [Ind.] LEADER, Dec. 6, 1990, at B1 ("there is a dearth of pathological gamblers in Indiana").

³⁴⁹ Various terms have been used in gambling literature to describe problem gambling, and a uniform language has not yet developed. Sharon A. Stein, *A Developmental Approach to Understanding Compulsive Gambling Behavior*, in COMPULSIVE GAMBLING, *supra* note 18, at 68. It has been argued by some in the mental health field that pathological gambling is a continuum, ranging from social gambling to suicide attempts. CLOTFELTER & COOK, *supra* note 112, at 125-26.

³⁵⁰ Gamblers Anonymous has been described as:

a group therapy technique that uses only ex-gamblers as helpers. It involves confession of misdeeds, acknowledgement of guilt and penance, and acceptance of personal responsibility. GA provides the gambler with a sponsor whose main task is to perform an audit of a gambler's finances, take total control of the gambler's income (transferring finances to the spouse or "significant other" of the gambler has been found untenable as this only encourages the enabling to continue), and provide for graduated payments to bookmakers and other creditors.

INDIANA SURVEY, *supra* note 331, at 43-44. For a description of a typical meeting, see Scodel, *Inspirational Group Therapy: A Study of Gamblers Anonymous*, 18 AM. J. PSYCHOTHERAPY 115, 115-17 (1964) (reporting on the author's eight-month investigation). There are now over 500 Gamblers Anonymous chapters in the United States and Canada. CLOTFELTER & COOK, *supra* note 112, at 124. There are also two related organizations, Gam-Anon for spouses and Gamateen for children of compulsive gamblers. ROSE, *supra* note 7, at 295.

³⁵¹ INDIANA SURVEY, *supra* note 331, at 44. "Outpatient treatment for pathological gamblers in addiction centers has generally mirrored the drug counseling abstinence disease model." *Id.* But see Stein, *supra* note 349, at 83 ("recovering gamblers cannot possibly cease all risk-taking behavior in the same way that alcoholics can completely stop drinking alcohol"); Norman E. Zinberg, *The Applicability of the Twelve-Step Model to Compulsive Intoxicant Use and Other Compulsive Behaviors*, in COMPULSIVE GAMBLING, *supra* note 18, at 91 (noting that the process is not completely compatible with the treatment of other addictions).

³⁵² INDIANA SURVEY, *supra* note 331, at 13, 45-47. Prevention strategies could include education on the evils of excessive lottery play through workshops or media campaigns. *Id.* at 45-46. Additionally, establishment of a "gambler's hotline" could help. *Id.* at 46 (discussing New Jersey's hotline, 1-800-GAMBLER). In Iowa, 0.5% of lottery proceeds are set aside to fund gambling treatment centers. IOWA CODE ANN. § 99E.10 (West Supp. 1990) (providing also that the first available \$750,000 is to be used to help fund gambling treatment programs). Special provisions for compulsive gamblers have also been established in the lottery states of Connecticut, Ohio, Maryland, New Jersey and New York. PA. REPORT, *supra* note 227, at 26, 76. Pennsylvania has also recently considered funding such a program with lottery proceeds. *Id.* at 75. Mental health professionals had previously suggested such programs be funded in this manner. Lorenz & Shuttlesworth, *supra* note 325, at 75 (noting that traditional mental health centers may not be able to deal with these problems). But see *supra* notes 257-61 and accompanying text (suggesting that earmarking lottery proceeds may not be the best way to fund programs).

In light of this evidence, it is reasonable to conclude that lotteries have contributed to the spread of the gambling habit and to the spread of problem gambling to new demographic groups. This negative effect must be weighed against the benefits of a state lottery.

2. Children

Although lottery states typically impose criminal sanctions on those who sell lottery tickets to children,³⁵³ a recent study found that 43 percent of the high school students in New Jersey played that state's lottery.³⁵⁴ Because teenagers are usually barred from casinos,³⁵⁵ the lottery is one of the most popular forms of teenage gambling.³⁵⁶ One study found an 11 percent increase in gambling among high school students after the lottery was introduced in California.³⁵⁷ Another recent study indicates that teenagers may be three times more likely than adults to become problem gamblers.³⁵⁸

Ten years ago teenage gambling did not appear to be a problem; today counselors report that 7 percent of their caseload involves teenage gamblers.³⁵⁹ The Executive Director of the National Council on Problem Gambling explained, "We have always seen compulsive gambling as a problem of older people. . . . Now we are finding that adolescent compulsive gambling is far more pervasive than we had thought."³⁶⁰ Because adolescent gambling was not considered a widespread problem until this past decade, there has been little research into teenage gambling.³⁶¹ Experts fear that current psychological profiles and analytical data may not work with

³⁵³ E.g., CAL. GOV'T CODE § 8880.52 (West Supp. 1991); MINN. STAT. § 349A.12 (1990); MO. ANN. STAT. § 313.280 (Vernon Supp. 1991); N.J. STAT. ANN. § 5:9-15 (1988); 72 PA. CONS. STAT. § 3761-10 (Supp. 1991); R.I. GEN. LAWS ANN. § 42-61-9 (1990). *But see, e.g.*, MINN. STAT. § 349A.08(3) (1990) (permitting minors to collect winnings); MO. ANN. STAT. § 313.295 (Vernon Supp. 1991) (similar); N.J. STAT. ANN. § 5:9-20 (1988) (similar).

³⁵⁴ PA. REPORT, *supra* note 227, at 74.

³⁵⁵ Each month, approximately 29,000 underage gamblers are ejected from Atlantic City casinos. Chavira, *supra* note 311, at 78. *See also* Jacobs, *supra* note 333, at 253 (discussing how casinos are attractive to high school students).

³⁵⁶ Chavira, *supra* note 311, at 78; Jacobs, *supra* note 322, at 252.

³⁵⁷ Kaplan, *supra* note 226, at 198. *Accord* CLOTFELTER & COOK, *supra* note 112, at 134.

³⁵⁸ Jacobs, *supra* note 333, at 281.

³⁵⁹ Chavira, *supra* note 311, at 78. *See also id.* at 78 ("Gambling Researchers say that of the estimated 8 million compulsive gamblers in America, fully 1 million are teenagers."); Jacobs, *supra* note 333, at 249 (reviewing the literature discussing this problem); *id.* at 263 ("teenage gambling was not yet conceptualized as an issue fifteen years ago").

³⁶⁰ Chavira, *supra* note 311, at 78 (quoting Jean Falzon).

³⁶¹ Jacobs, *supra* note 333, at 263-64.

teenage gamblers.³⁶² This creates additional problems for young gamblers because treatment centers for youthful gamblers are virtually nonexistent.³⁶³

One reason for the recent surge in teenage gambling may be active state promotion of legal gambling. Children are exposed to television advertising that glorifies participation in the lottery.³⁶⁴ As a result, lotteries may be teaching our children that success can be had without hard work or education.³⁶⁵

Even if children themselves are not gambling, they often suffer when family members gamble. Children of compulsive gamblers are prone to become problem gamblers.³⁶⁶ Moreover, compulsive gamblers may have difficulty being good parents.

The children of compulsive gamblers are caught in a process that reflects extremes in behavior by their parents. At times the gambler dotes on them; at other times he ignores them. . . . The children respond by feeling angry, hurt, lonely, guilty, abandoned, and rejected. They experience troubled teen years and run away from home, use drugs, become depressed, and experience psychosomatic illnesses.³⁶⁷

In addition, compulsive gamblers are often delinquent with child support payments, but spend excessive amounts of money gambling on the lottery.³⁶⁸

Society should be concerned about the message that is being conveyed to children. These lottery messages will not only affect individual children, they may eventually have serious repercussions throughout the society. This impact must be seriously considered as lawmakers debate the merits of state-sponsored gambling.

3. The Impact on Criminal Activity

Because legalized gambling leads to increased illegal gambling,³⁶⁹ state-sponsored lotteries inevitably increase crime. Legal-

³⁶² *Id.* at 257.

³⁶³ Chavira, *supra* note 311, at 78 (quoting Durand Jacobs).

³⁶⁴ CLOTFELTER & COOK, *supra* note 112, at 133.

³⁶⁵ KARCHER, *supra* note 224, at 78 (quoting CBS program *60 Minutes*) ("How can we teach kids that hard work is the way to success if they hear radio commercials paid for by their government suggesting that the way to get rich is to bet on a number?"); 48 *Hours*, *supra* note 228, at 8-9 (educator complaining that lottery promotions conflict with the basic message of education).

³⁶⁶ Jacobs, *supra* note 333, at 252, 259.

³⁶⁷ Lesieur, *supra* note 333, at 236. See also *supra* note 325 and accompanying text.

³⁶⁸ Kaplan, *supra* note 226, at 194.

³⁶⁹ See *supra* notes 289-92 and accompanying text.

ized gambling's impact on criminal behavior, however, is not limited to an increase in illegal gambling. Perhaps the most serious concern is that legal gambling creates problem gamblers, and problem gamblers often turn to more serious criminal activity to support their habits.³⁷⁰

Approximately 97 percent of incarcerated pathological gamblers and two-thirds of the unincarcerated pathological gamblers have admitted to engaging in illegal behavior to finance gambling or pay gambling related debts, and an estimated 30 percent of all current prison inmates are problem gamblers.³⁷¹ The gambler's criminal behavior is driven both by a need for money to replace lost money,³⁷² and by a fundamental shift in values that often accompanies a compulsive behavior pattern.³⁷³ The end result is criminal activity.

State sponsorship of gambling not only corrupts problem gamblers, it also sends a mixed signal as to the state's criminal code in general. As one commentator has noted, "Perhaps the most intense puzzlement was that of the ghetto numbers player who remained unclear about the difference between what he was doing surreptitiously and illegally in his neighborhood and what the State was encouraging all its residents to do openly."³⁷⁴ If the state is seen as hypocritical in outlawing certain activity while promoting virtually identical activity, the state will lose credibility and people may decide to disregard other parts of the state's criminal code.³⁷⁵ Encouragement of gambling by the state may thereby serve to undermine the fundamental obligation of protecting society from criminal activity.

³⁷⁰ Lesieur, *supra* note 322, at 83 (noting that this is especially true in relation to "borrowing" crimes such as loan fraud, check forgery, and embezzlement); Chavira, *supra* note 311, at 78 (problem gamblers turn to criminal activity). See also PERKINS, *supra* note 18, at 68; Lesieur, *supra* note 333, at 239 ("Ultimately, pathological gambling results in crime."); Shaffer, *supra* note 18, at 7 (noting "the resemblance between the crime patterns of compulsive gamblers and narcotic addicts"); 48 Hours, *supra* note 228, at 15 (problem gamblers who stole money to play the lottery).

³⁷¹ Lesieur, *supra* note 333, at 239.

³⁷² See Lorenz & Shuttlesworth, *supra* note 325, at 69 (99% of the family members of compulsive gamblers report financial problems related to the gambling).

³⁷³ PERKINS, *supra* note 18, at 69 ("gambling depreciates the personal character"); Lesieur, *supra* note 322, at 84-86.

³⁷⁴ GEIS, *supra* note 8, at 233. See also ROONEY, *supra* note 246, at 139 ("Right after the weather report there was a commercial, paid for by New York State taxpayers, saying what a good idea it was for everyone who wants to get rich to gamble on a numbers game, the New York State Lottery.")

³⁷⁵ DEVELOPMENTS, *supra* note 3, at 721. See generally G. Robert Blakey, *State Conducted Lotteries: History, Problems, and Promises*, 35 J. Soc. Issues 62 (1979) (arguing that state lotteries have failed to achieve their primary goals and have tarnished the image of state government).

4. Problems of Poverty

Because lotteries hold out the promise of quick riches, they are particularly appealing to those in dire economic straits. "The dream of financial security offered by lotteries and illegal numbers finds a special place in the subculture of poverty and despair that pervades the inner cities of our society."³⁷⁶

In general, persons in lower income groups have the most incentive to purchase lottery tickets. Leading routine lives for lack of money, they derive comparatively more benefit from the lottery's excitement and potential profits than do the affluent. Indeed, a "Massachusetts study showed that four out of five who could least afford to gamble purchased lottery tickets." Recent newspaper reports suggest that most lottery players are poor and middle-income persons. The Task Force on Legalized Gambling concluded that "legalization of gambling will produce relatively small amounts of revenue and *will raise it from the wrong people in the wrong way.*" Although contrary evidence exists, it appears that many of those who play the lottery are those who can least afford it.³⁷⁷

As such, it is not surprising to find that poor people tend to spend a disproportionate amount of their income purchasing lottery tickets.³⁷⁸

Recent studies indicate that lotteries are marketed more heavily in poor neighborhoods than elsewhere.³⁷⁹ The Delaware Council on Gambling Problems conducted a study in 1979 and found that there were no lottery machines in the highest income area of New Castle County; one machine for every 17,774 people in the upper-middle income areas; one machine for every 5,032 people in the lower-middle to middle working income areas; and one machine

³⁷⁶ Kaplan, *supra* note 226, at 196. See also *id.* at 197 (noting much lottery play by the elderly poor). This phenomenon creates a certain irony. "Some states have discovered perpetual motion. They give people welfare so that the people can invest the welfare check in the state lottery so the money that comes in can be sent out as welfare." BERLE, *supra* note 331, at 280. See also ROONEY, *supra* note 246, at 140 (making the same argument in a more serious tone).

³⁷⁷ DEVELOPMENTS, *supra* note 3, at 686 (footnotes omitted) (emphasis in original).

³⁷⁸ PA. REPORT, *supra* note 227, at 74. See generally *supra* notes 251-56 and accompanying text (discussing regressivity).

³⁷⁹ KARCHER, *supra* note 224, at 39-43 (noting studies of Maryland and New Jersey marketing practices).

for every 1,981 persons in the poorest income areas.³⁸⁰ Similar distributions have recently been noted elsewhere.³⁸¹ These numbers indicate that marketing efforts are not actively trying to offset the general regressive nature of the lottery.

Rather than trying to combat the regressive nature of lotteries, lottery promotions have exploited this feature by targeting relatively poorer lottery players.³⁸² Lottery advertisers often time their advertisements to come out on days when people have disposable income readily available, such as days when Social Security checks are released.³⁸³ Radio advertisements are concentrated on stations with formats that are popular with working class individuals.³⁸⁴ Billboards that are seen throughout the inner city do not exist in neighboring suburbs.³⁸⁵

Not long ago the Illinois Lottery had a campaign featuring billboards with the slogan, "How to go from — Street to Easy Street—Play the Illinois State Lottery."³⁸⁶ The blank was filled in with the street where the billboard was located. When one such billboard was placed in a section of Chicago where residents have little disposable income, community leaders were justifiably upset.³⁸⁷

A society that is truly interested in breaking the cycle of poverty would normally be expected to promote the traditional virtues of education, hard work, thrift and savings. Lottery promotions send the opposite message. In some cases, the contradiction is especially apparent. A recent television advertising campaign compared the Illinois lottery to an investment. The scene was a job site, and various workers were discussing their investments. One character

³⁸⁰ *Id.* at 58. Karcher suggests that this problem could be remedied by reallocating the placement of the machines. *Id.* at 106. This, however, would not get to the source of the problem. Poor people would end up standing in line for much longer periods of time, while machines in more affluent areas would go unused, creating a new level of discrimination. Machines are located in areas where demand is greatest.

³⁸¹ *Id.* at 58–60.

³⁸² See 1 STEINMETZ, *supra* note 6, at 406–07 ("These tempting offers of advertising speculators are a cruel addition to the miseries of misfortune.").

³⁸³ CLOTFELTER & COOK, *supra* note 112, at 203; KARCHER, *supra* note 224, at 79.

³⁸⁴ KARCHER, *supra* note 224, at 80; Kaplan, *supra* note 226, at 194.

³⁸⁵ KARCHER, *supra* note 224, at 80.

³⁸⁶ CLOTFELTER & COOK, *supra* note 112, at 8 (citing ILLINOIS ECON. AND FISCAL COMM'N, THE ILLINOIS STATE LOTTERY: A SPECIAL REPORT 41 (1986)). See also KARCHER, *supra* note 224, at 76 (discussing a similar Chicago billboard that said, "This could be your ticket out."); Kaplan, *supra* note 226, at 194 (similar).

³⁸⁷ See Priest Assails Lottery for "Preying on Poor," CHI. TRIB., May 25, 1986, at 3 (priest collected thousands of losing tickets "to show his parishioners that the lottery is not the route to Easy Street as lottery billboards proclaim"). The Illinois lottery was once boycotted for targeting poor black neighborhoods. CLOTFELTER & COOK, *supra* note 112, at 190, 222.

mentioned stocks; another suggested bonds. Then one began extolling the virtues of a high-risk, low investment, short-term venture with the possibility of a large return—a lottery ticket. This is hardly the type of economic advice that the state should be providing.³⁸⁸ The promise of great riches may provide a fantasy for those who can afford it, but the lottery is a poor vehicle to rely upon for financial security. Yet, too often lotteries are seen as a type of investment. It is particularly offensive for the state to promote such a viewpoint. The impact of a lottery on the poorer segments of society must be considered by lawmakers when they discuss lotteries.

V. A LOTTERY WITHOUT PROMOTIONS?

Because the problems associated with fraud have largely been resolved, the primary remaining objection to modern state-run lotteries is the impact that they have on individuals. If lottery advertisements magnify those problems, then the logical approach is to limit advertising, as it is unlikely that state-sponsored gambling will be abandoned as long as it raises revenue. States, however, have been reluctant to impose greater controls on advertising because of a fear that such controls would cut into profits. "[N]o state seems able to resist the pressure to promote heavily those games that it has come to rely upon for revenue."³⁸⁹ A state that is interested in the welfare of its citizens should, nonetheless, be willing to look beyond the bottom line. There is some recent indication of a desire to control advertisements, but two separate issues must be addressed: the restrictions themselves and the enforcement of those restrictions.³⁹⁰

A. Restrictions on Advertising

Most lottery states have statutory or administrative limitations on advertising.³⁹¹ For instance, it is not unusual to prohibit celebrity

³⁸⁸ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 49 (1849) ("There is not . . . a more certain proposition in mathematics, than the more [lottery] tickets you adventure on, the more likely you are a loser."). But see *Group Invests \$5 Million to Corner Lottery Market*, N.Y. TIMES, Feb. 25, 1992, at A1 (Australian investment group apparently successfully purchased tickets to cover most numbers in the Virginia lottery; lottery board to consider restrictions); see also *id.* at A9 (box suggesting that such a scheme could be successful in returning approximately 16% on the investment, as long as there is only one winning ticket in the drawing).

³⁸⁹ ROSE, *supra* note 7, at 19.

³⁹⁰ See CLOTFELTER & COOK, *supra* note 112, at 206 (noting such sentiment in the Virginia legislature).

³⁹¹ See, e.g., MINN. STAT. ANN. § 349A.09(2)(a) (West 1990); VA. CODE ANN. § 58.1-

endorsements, to prohibit the targeting of specific groups, to prohibit misstating odds, to prohibit the use of the picture of a political office holder in the promotion of a lottery, to prohibit comparing the lottery to an investment, and to prohibit the denigration of anyone who does not buy a lottery ticket.³⁹² It would be difficult, in fact, to find much opposition to such regulations in a political arena. Nonetheless, several lottery advertisers have engaged in many of these practices.³⁹³

Most states also require promoters to disclose the odds of winning a particular game.³⁹⁴ Lottery promoters may comply with the requirements of these regulations, but the print on most tickets is so small as to be almost indecipherable; billboards and signs in stores rarely post odds in legible script; and the disclaimers that follow television advertisements are only briefly listed and then only in fine print. Indeed, it may be in the lottery's best interest not to inform the public of the odds of winning.³⁹⁵ Moreover, with games like lotto, odds cannot be determined until all bets are in and the drawing is about to be held. Thus, these disclosures probably do not effectively carry the message that they are designed to convey. The rare, perhaps nonexistent, legislation that is needed is affirmative educational instruction about the lottery.

The most important step a state lottery could take in assuring that players are educated is to explain the odds, not in a brief disclaimer at the end of a lottery commercial, but with complete disclosure. The best forum for dissemination of such information would probably be in public service announcements that explain that a lottery ticket is a bet of one dollar to win fifty cents. Serious gamblers and educated lawyers may know the lottery's odds, but do ordinary citizens? Presumably, people who can afford to venture a small amount for entertainment purposes would still purchase tickets. People who think that they are making a fair bet, however, might realize that they are better off putting their money into a solid investment.

4022(E) (Michie 1991). Wisconsin law prohibits state funds from being spent promoting the lottery. WIS. STAT. ANN. §§ 565.32(1)-(2) (West Supp. 1991). One visiting Wisconsin would be surprised to learn of this law. While the state itself is prohibited from advertising the lottery, the Wisconsin lottery is well promoted. Advertisements (presumably paid for by retailers and vendors) appear regularly on television and in the other media.

³⁹² E.g., MINN. STAT. ANN. § 349A.09(2)(b) (West 1990).

³⁹³ See, e.g., *supra* notes 411-16 and accompanying text.

³⁹⁴ E.g., WIS. STAT. ANN. § 565.32(3) (West Supp. 1991).

³⁹⁵ See *supra* notes 304-07 and accompanying text.

Other matters that might be considered in controlling lottery advertising include whether "impulse purchases" should be encouraged at all lottery locations.³⁹⁶ Such promotions might make sense in higher income areas, but are they needed in the inner city? Most convenience stores make their profit not from the sale of lottery tickets, but rather from the business that is attracted to the store due to the lottery.³⁹⁷ Customers who enter the store to purchase lottery tickets will do so without checkout line promotions. On the other hand, persons in low-income neighborhoods who enter the store to make grocery purchases need not be encouraged to make additional lottery purchases. The loss to the store would probably not be so significant as to cause it to drop the lottery, but people who have little disposable income might refrain from making unneeded purchases.

Television advertising might be necessary, but it should be restricted to times and programs less likely to involve a young audience. Lotteries do not currently advertise on children's shows, but they do run promotions on sporting programs that attract a young viewing audience. The state should restrict such advertisements to a time slot after most children have gone to bed. This might help reduce the problem of youthful gambling in America.

Additionally, the state should disassociate itself from the lottery. Perhaps the lottery could simply be authorized and called something like "Social Services Lottery." Those states that have state liquor stores do not sell official state beer or whiskey. By distancing the state from the lottery, especially in advertisements, it might appear less like the state is encouraging gambling. This, in turn, might result in fewer serious gambling problems, especially for young, easily influenced children.

B. Enforcement

In general, states have not had difficulty agreeing on reasonable restrictions for lottery promotions. In the mid-1970s, the states operating lotteries formed the National Association of State Lotteries, which promulgated an Advertising Code of Ethics.³⁹⁸ That code

³⁹⁶ See Stone, *supra* note 54, at A1 (quoting a Washington, D.C. lottery official as saying, "Lottery sales are impulse buys.").

³⁹⁷ CLOTFELTER & COOK, *supra* note 112, at 128. The profit in the sale of lottery tickets does not justify selling them in convenience stores, but the traffic that the lottery brings into the store does. *Id.*

³⁹⁸ KARCHER, *supra* note 224, at 81-82 (reprinting the code in its entirety).

placed severe restrictions on the content of promotions and requires full disclosure of the odds of winning.³⁹⁹ Unfortunately, the code lacks any effective enforcement mechanism and "is honored only in its continuous breach."⁴⁰⁰

The problem with all lottery advertising restrictions has been in enforcement. One fairly common advertising limitation is illustrated by the following section of the Minnesota code. It provides:

(a) Advertising and promotional materials for the lottery adopted or published by the director must be consistent with the dignity of the state and may only:

(1) present information on how lottery games are played, prizes offered, where and how tickets may be purchased, when drawings are held, and odds on the games advertised;

(2) identify state programs supported by lottery net revenues;

(3) present the lottery as a form of entertainment; or

(4) state the winning numbers or identity of winners of lottery prizes.⁴⁰¹

This would appear to be a fairly strict regulation. Missouri once had similar regulations that required promotions to be for informational purposes only and not designed to encourage participation in the lottery.⁴⁰² The marketing people, however, were able to develop promotions arguably within these confines that were clearly directed at encouraging participation in the lottery.⁴⁰³ Moreover, when there was some concern that these restrictions were cutting into sales, the regulations were discarded.⁴⁰⁴

No matter how strong the regulations are, they serve no purpose if they are routinely ignored or if they are abandoned when-

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 82.

⁴⁰¹ MINN. STAT. ANN. § 349A.09(2)(a) (West 1990). See also VA. CODE ANN. § 58.1-4022(E) (Michie 1991) ("no funds shall be expended for the primary purpose of inducing persons to participate in the lottery"; "funds may be expended for the purposes of reasonably informing the public concerning [facts related to the lottery]"); WIS. STAT. ANN. § 565.32(1) (West Supp. 1991) ("The expenditure by the board or any other state agency of public funds or of revenue derived from lottery operations to engage in promotional advertising of the state lottery or any multistate lottery is prohibited."). Wisconsin retailers may advertise, however, provided that they make disclosures as to prize structure and odds. *Id.* § 565.32(2).

⁴⁰² CLOTFELTER & COOK, *supra* note 112, at 168, 211.

⁴⁰³ Radio advertisements ran a brief, almost humorous, disclaimer stating that the previous promotion was not designed to encourage play of the lottery.

⁴⁰⁴ CLOTFELTER & COOK, *supra* note 112, at 211, 244.

ever they seem to conflict with profit maximization. For effective enforcement, there must be oversight and someone to determine whether a particular promotion violates the statutory or regulatory standards. Minnesota, for instance, prohibits lottery advertising that targets specific economic classes, implies the lottery is a financial investment, uses state officials in promotions, misrepresents the odds, or unduly praises a ticket purchaser.⁴⁰⁵

These regulations are all for the good, but the agency is both the wolf and the watchdog. The same entity empowered to prosecute will construe ambiguous language. What does it mean to specifically target a group, and how is that subjected to proof? All lotteries, by their very nature, exhort the public to bet and present themselves as a potential means for relieving financial difficulties. It is unlikely that the construction placed on regulatory language by a state agency (especially one charged with maximizing lottery proceeds) will be the same one that a neutral judge would apply. Without some legitimate form of neutral oversight, these provisions are almost certain to be violated.

A governmental entity encounters this problem anytime it makes rules for its own guidance. If there is no one to prosecute, and the law is left to the construction of the agency, the provisions are meaningless. The answer to this enforcement problem is to create a cause of action for citizen suits, similar to those found in many federal environmental statutes.⁴⁰⁶

If similar state legislation authorized citizen suits in cases of lottery advertising abuses, regulations could finally be enforced. If an advertising campaign violates state regulations, citizens could bring suit to force compliance. A judge would then determine the meaning of the restrictions and the factual basis of the charge.⁴⁰⁷ This would lead to increased costs in defending suits, but that in itself would be a strong incentive for states to abide by the regulations. Moreover, if states continue to follow the standard path of

⁴⁰⁵ MINN. STAT. ANN. § 349A.09(2)(b) (West 1990).

⁴⁰⁶ 42 U.S.C. § 7604(a) (Supp. 1991) (Clean Air Act). *See also* 33 U.S.C. § 1365(a) (Supp. 1991) (Clean Water Act citizen suit provision); 16 U.S.C. § 1540(g) (1985) (Endangered Species Act citizen suit provision); 30 U.S.C. § 1270(a) (1986) (Surface Mining Control Act citizen suit provision); 42 U.S.C. § 300j-8(a) (Supp. 1991) (Public Health Service Act citizen suit provision); 42 U.S.C. § 9659(a) (Supp. 1991) (Comprehensive Environmental Response, Compensation, and Liability Act citizen suit provision); 42 U.S.C. § 6972(a) (Supp. 1991) (Solid Waste Disposal Act citizen suit provision); 15 U.S.C. § 2620 (1982) (Toxic Substance Control Act provision for citizen's petitions).

⁴⁰⁷ Of course, because most state judges do not have a lifetime tenure, they are not as free to disregard the political climate as a federal judge would be.

hiring outside firms to conduct the advertising campaign,⁴⁰⁸ any liability should be structured to fall on that firm. The intent of this liability system is not to have advertising firms pay large damage awards (indeed, the typical relief would presumably be injunctive), but to force promoters to follow advertising regulations.⁴⁰⁹

If states can muster the internal fortitude to enact and enforce strict advertising regulations, many of the social problems associated with lotteries will be lessened. These regulations will, to a certain extent, work against maximization of lottery revenues; but the lottery will still have a large number of players.⁴¹⁰

Consider the state that has adopted a lottery as a defensive measure against its neighbor. By offering an in-state game, even one that is not well promoted, the state provides its citizens with a chance to wager at a much more convenient location. It is unlikely that citizens would go far out of their way to play the lottery, even if the neighboring state broadcasts its advertisements into the home state. Players will still cross state boundaries when jackpots reach extremely high levels, but the same result will occur when the large jackpot is in-state because those jackpots are sufficiently newsworthy to be promoted, not only through advertising, but also through the news media.⁴¹¹

The success of the lottery cannot be seen strictly in terms of dollars and cents. If money is raised at the expense of children, the impoverished, and those suffering from a disease (compulsive gambling), then the revenues cannot justify the cost. This conclusion is clear when one considers the additional social costs of increased crime. Federal law formerly restricted mailing or broadcasting any information about lotteries.⁴¹² A return to strict enforcement of advertising regulations would curtail many of the serious abuses

⁴⁰⁸ See PA. REPORT, *supra* note 227, at 45 n.1 (discussing Pennsylvania's advertising contract).

⁴⁰⁹ Arguably, the advertising firm is already at risk. Under current law, it might be possible for a group such as Gamblers Anonymous to bring a third-party beneficiary action against an advertising company that is in violation of state restrictions. See *Organization of Minority Vendors, Inc. v. Illinois Cent. Gulf R.R.*, 579 F. Supp. 574 (N.D. Ill. 1983) (minority business vendors granted third-party beneficiary status in suit claiming that defendant breached federal funding agreements by failing to hire 15% minority businesses).

⁴¹⁰ CLOTFELTER & COOK, *supra* note 112, at 240.

⁴¹¹ See *New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219, 223 (3d Cir. 1974), *vacated and remanded*, 420 U.S. 371 (1975) (calling the winning number "hot news"); *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990, 999 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970) (federal ban on broadcast of lottery information does not apply to news reports).

⁴¹² See *supra* note 219.

and thereby reduce the severity of the lottery's adverse social consequences.

VI. CONCLUSION

Lotteries have been successful in accomplishing their primary goal of raising revenue for the state without taxes. For that reason alone, they are likely to remain part of the political landscape for years to come. They appear not to have been as successful in accomplishing their secondary goal of running illegal operations out of business, though the evidence is not conclusive. As for the third goal, defending against the drain caused by neighboring state lotteries, an in-state lottery still provides the best defense, despite the potential problems associated with a spiral of increased legalized gambling.

The benefits of state-sponsored gambling come at a cost, the brunt of which is borne by people prone to compulsive behavior, children and the impoverished. If a society is concerned about the well-being of all its citizens, it should be willing to protect those who are susceptible to problems that spring from lottery promotion. It is one thing for a state to condone and tax gambling. It is a completely different matter for the state to promote gambling actively. By teaching people that the lottery is a good thing, the state contributes to compulsive behavior, adversely affects the perceptions of the young, and causes people to spend money they cannot afford. Lotteries also contribute to the nation's ever-growing crime problem.

Serious attention must be devoted to minimizing the adverse social consequences flowing from state-sponsored gambling. One of the first steps should be to place severe restrictions on lottery advertising. At the minimum: 1) advertisements should not be misleading; 2) advertisements should not compare the lottery to secure financial investments; 3) advertisers should not target low-income markets, and; 4) television advertising should be restricted to time slots where children are less likely to be watching. These regulations should be strictly enforced with citizen suits and judicial determinations.

On the spending side, states should refrain from the temptation to earmark proceeds to specific programs. Rather, all proceeds should be transferred to the general fund to be allocated by the legislature. Appropriation of the funds should not take place until the money has actually been received and accounted; it should not

be based on projected revenue. The legislature should recognize its obligation to provide funding for treatment centers for gambling problems, including the special problems children encounter. States should also invest in public service announcements that explain the lottery's odds and caution about the dangers of excessive gambling on the lottery.

The two primary reasons for the downfall of early American lotteries were uncontrollable fraud and the adverse effects that lotteries had on individuals and society. Modern lotteries have essentially eliminated the risk of fraud, but because of television advertising, the effect on individuals and on society is greater today than it was in the 1800s. By responsibly handling the lottery's promotion and taking steps to provide an adequate support system, the state can receive the benefits of additional revenue while reducing the impact of any possible adverse social consequences. By ignoring these problems, the state truly is gambling with the future.