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THE PINBALL PROBLEM IN ILLINOIS—AN OVERDUE SOLUTION

RUFUS KING

Mr. King is a member of the New York, Maryland and District of Columbia bars, practices in the District of Columbia and has been variously identified with criminal law and law enforcement—particularly in the field of gambling—since his service as legislative counsel to the Kefauver Committee in 1951. He has contributed numerous articles to leading law publications, including this *Journal*. See King, *The Rise and Decline Of Coin-Machine Gambling*, 55 J. CRIM. L., C. & P.S. 199 (1964).

The following article was written by Mr. King, at the invitation of the *Journal* editors, in response to the article published in the last issue, Bilek and Ganz, *The Pinball Problem—Alternative Solutions*, 56 J. CRIM. L., C. & P.S. 432(1965). In his article, Mr. King disputes the conclusions of the Bilek and Ganz article that gambling and amusement pinball devices are indistinguishable and that total prohibition of all such machines is the only effective way to curb their potential use for gambling, and traces recent legislative and judicial history in Illinois as illustrative of the difficulties encountered in dealing with the pinball problem.

In a recent issue of this *Journal*¹ two officials of Cook County² propound universal solutions for the "pinball problem" in three alternative draft statutes, one wiping out the industry altogether, one consisting of some three thousand words of fine print about licensing and inspection, and the third being a do-it-yourself revision of the second. All prior legislative drafting attempts in this area, the authors say, have failed. All regulatory measures aimed at letting the industry survive without their proposed inspectional provisions are, they conclude, doomed to failure.

Total prohibition of all pinball games appeals to these authors most because (1) it makes the legislative drafting "very simple," (2) it would impose "almost no burden" on the police, (3) it would only ruin those connected with the industry (unless they find something else to manufacture and sell)—and that, after all, is a disadvantage "almost entirely economic," and (4) nobody but "certain segments of our society" would be thereby deprived of any possible amusement benefits.

Let it be conceded at the outset that there is a "pinball problem" and that it is an aggravated problem in Illinois. Illinois is one of the last jurisdictions where gambling pinballs, successors to

the 'one-armed bandit,'³ still flourish openly.⁴ Cook County is one of the few metropolitan areas that has not done anything—at least not anything effective—about them.⁵ Let it be conceded also that the makers of *amusement* pinball games and those who distribute and operate them do not claim to benefit society on any gigantic scale; they merely provide, for a pittance, a few moments' spritely entertainment to those who patronize their machines—though in truth the products of this *amusement* industry look pretty good in the company of those who fill the airwaves with bland idiocy, purvey smut and trash to the quasi-literate, grind out C-minus titillation for the screen, and drench the American public with toxic substances like nicotine and ethyl alcohol.

If my readers hold the article I am discussing beside this one and expect an error-by-error refutation, they must face disappointment. If I under-

¹ Bilek and Ganz, *The Pinball Problem—Alternative Solutions*, 56 J. CRIM. L., C. & P.S. 432 (1965).

² Arthur J. Bilek is Chief of the Cook County (Chicago), Illinois Sheriff's Police Department; Alan S. Ganz served as Assistant State's Attorney from 1959 to 1961, and is now engaged in the private practice of law in Chicago.

³ King, *The Rise and Decline of Coin Machine Gambling*, 55 J. CRIM. L., C. & P.S. 199, 201-3 (1964).

⁴ Among these, Nevada alone is wholly saturated with coin-operated gaming; other states with more-or-less localized gambling pinball operations (and where the flourishing is more-or-less "open") are Maryland, Kentucky, Washington, Oregon, Louisiana, South Carolina and Tennessee—nearly all with long stories comparable to the one being unfolded here. See, e.g., King, *supra*, note 3, at 200, fn. 10, and note 32 *infra*.

⁵ Late in November, 1965, at the instigation of the Sheriff, the Board of Commissioners of Cook County passed a total-prohibition ordinance based on the City of Chicago's—whereupon no less an authority than co-author Bilek announced publicly that he knew of 167 "gambling type" pinball machines being operated in Cook County suburbs. Chicago Tribune, November 24, 1965. A campaign is now being carried on by the Sheriff's office to induce other incorporated municipalities to follow Cook County's lead.

took that, we would get only as far as the eighth word in the first line (pinball machines are not *electronic*, they are electro-mechanical), and progress thereafter would at a similar pace. Instead I shall try to dispel the Alice-in-Wonderland atmosphere these authors have created⁶—of indistinguishable “machinery shells,” and “honest lessors”⁷ dealing with “crooked lessees,” and searches a la *Henry v. United States*⁸ within the confines of a pinball light box—by describing briefly some of the controlling realities in this field.

First, all United States pinball machines are produced in the Chicago area, in Cook County, by a handful of manufacturers who make no secret of what they put into their products.

Second, one type of machine, produced by one company, is designed and manufactured for gambling operations, and despite protestations to the contrary, for nothing else.⁹

⁶ “Beware the Jabberwock, my son!
The jaws that bite, the claws that catch!
Beware the Jubjub bird, and shun
The frumious Bandersnatch!”

⁷ Ironically, if there is any significant tie between gambling pinball machines and organized crime [Cf., House Comm. on Interstate and Foreign Commerce, *Prohibiting the Transportation of Gambling Devices in Interstate Commerce*, H. Rep. No. 1828, 87th Cong., p. 16 (June, 1962)] it is at the level of the operator, i.e., the Bilek-Ganz “lessor” [See, e.g., Senate Select Comm. on Improper Activities in the Labor Management Field, *Investigations, etc., Hearings*, Part 47 (1959)]. The operator, not the location owner, is the organizer and promoter of gambling on the local scene, the putative briber of officials, and the man whose “territory” may be extended and protected by “muscle.” Yet Bilek and Ganz are touchingly solicitous about him: “The honest lessor saddled with a crooked lessee needs to be protected.” (Bilek and Ganz, *supra* note 1 at 438.) Their weird revocation-of-consent procedure (Id., pp. 438-9, 444), seemingly unprecedented in gambling-law draftsmanship, would let the operator elect whether he wanted his machines destroyed in the event they were seized, or whether he wanted to put them away until the “heat was off.” Cf., MODEL ANTI-GAMBLING ACT (Nat’l. Conf. of Commissioners on Uniform State Laws, 1952).

⁸ 361 U. S. 98 (1959), where FBI agents, stalking Henry for possessing stolen whisky, learned after they arrested him that what he really possessed was radios, and discovered some hours after that the radios were stolen. If the selection of this authority reflects careful scholarship by Bilek and Ganz, it does indeed illuminate their understanding of the “pinball problem,” for the controlling fact was that the agents made their observations “from a distance of some 300 feet” and could not determine anything about the size, number or contents of the cartons containing the radios. 361 U. S. 98, 99. For a recent and faultless application of the law of seizure in a gambling device (punch board) case, see *People v. McDonald*, 26 Ill. 2d 325, 186 N. E. 2d 303, (1962).

⁹ See, e.g., *United States v. Korpan*, 354 U. S. 271

Third, all other pinball machines now marketed by the industry are machines of types designed and manufactured merely to vend amusement, are incapable of being used to promote gambling,¹⁰ and have never been (in thirty years’ experience with them) so used.¹¹

Fourth, to convert an amusement pinball game into a gambling device is only possible in the sense that one could rebuild a moppet sports car into a ten-ton truck (and no such makeshift conversion has ever been encountered in the entire history of the industry).¹²

Fifth, a blind child could tell any gambling pinball machine now in common use unerringly from any contemporary amusement type by touch and sound alone—binocular federal agents¹³ and the normally endowed lawmakers and en-

(1957); *Singleton v. Mathis*, 284 F. 2d 616 (8th Cir. 1960); *United States v. Two Coin-Operated Pinball Machines*, 241 F. Supp. 57 (W. D. Ky., 1964); *United States v. One Bally “Barrel-O-Fun” Coin Operated Gambling Device*, 224 F. Supp. 794 (M. D. Pa., 1963); *United States v. Nine Gambling Devices*, 59-2 USTC ¶15,257 (S. D. Ill., 1957); *In re Three Pinball Machines*, 120 Pa. Super. 28, 192 A. 2d 240 (1963); *State v. Bally Beach Club Pinball Machine*, 119 A. 2d 876 (Vt., 1956).

¹⁰ Though they can, of course, be used for bets among players, competing in this sense with the U. S. Mint and the service it has long rendered to coin-flippers, coin-matchers, and coin-tossers. See, *Johnson v. Phinney*, 218 F. 2d 303, 308 (5th Cir. 1955). In one Cook County suburb (Skokie) amusement pinballs are currently the subject of a hue-and-cry on the testimony of a 15-year-old housebreaker whose confession was revealed (and quoted) to the press as follows: “85 per cent of [the loot] ‘I fed into pinball machines. I know guys that go into their mothers’ purses and take money for use in pinball machines,’ the boy told police. ‘These machines are often used for gambling, too. By gambling, I mean two boys play for a penny a point, so that if one person wins by 1,500 points, he wins by \$15.’” *Chicago Sun Times*, November 26, 1965. Cf. note 6 *supra*.

¹¹ Though amusement games have sometimes been held to violate gambling laws in the confusion that arose in the ‘thirties over the value of free games, as explained further in the text, *infra* at note 29. See Annot., 148 A.L.R. 879 (1944) and 89 A.L.R. 2d 815 (1963).

¹² The current “bingo” gambling machines, for example, contain approximately 7,000 feet of wiring, weigh around 400 pounds, and cost about \$1300; the circuits of a typical single-player amusement game are carried by 800 feet of wire, the game weighs around 300 pounds, and its cost is in the \$450 range. (On one point accuracy may be conceded to Bilek and Ganz: their prices are right).

¹³ The I.R.S. since 1941 under the gaming device stamp tax provisions of the Internal Revenue Code (26 U.S.C. 4461-2), and the FBI since enactment of the federal Gambling Devices Act of 1962 (15 U.S.C. 1171 ff.). See, e.g., T. Reg. 45.4462-1(b)(2), Rev. Ruls. 59-294, 60-102 and 61-28, and the federal cases collected at note 9 *supra*.

forcement agencies of most states¹⁴ have been making this distinction successfully for years.

So the trouble—the “pinball problem”—is not in the physical features of the machines at all. The trouble springs from the often confused, and sometimes conceivably cynically colored, arguments that have raged around the application of old-fashioned gambling laws to these relative newcomers in the coin-machine field. And that leads us back to the story of Illinois and its great urban county on the windy lakeshore.¹⁵

Coin-operated pinball games were first built in Chicago in the early depression days. Based on the Victorian parlor game of bagatelle, the first models gave seven balls for a penny, allowing the player to shoot onto an inclined plane with numbered receptacles (literally outlined with nails or “pins”). This game (the first ones cost less than \$20.00) caught the public fancy, along with midget golf, flagpole sitting, dance marathons and jigsaw puzzles.

While the new pinball industry thus thrived modestly, advancing into table models, electrically illuminated backboards, and greater complexity of play, the old slot machine manufacturers (also centered in Chicago) were falling upon harder and harder times. Despite the ingenuity of slot-machine designers, anything that applied pure chance for a wagered coin and paid out in cash or redeemable tokens was apt to be quickly pounced upon by local enforcement officers with an eye on the classic elements of gambling—consideration, chance and prize.¹⁶

In this era even some pinball games reached the market with coin-spewing cash payout adaptations. But they did not last long, for no court has ever been fully persuaded that the gravity-motivated descent of metal balls on a glass-covered inclined plane is devoid of chance (so, patently,

¹⁴ Excluding the eight states named in note 4 *supra*, and of course Illinois, about three-fourths of the rest (i.e., about 30) allow amusement pinball games without tolerating the gamblers. The remainder still have statutes or court rulings aimed variously at the free game *per se*, with the resulting confusion in enforcement explained further in the text, *infra* at note 29. See e.g., N. Y. PENAL CODE, §982.

¹⁵ Where, I am constrained to add as a further riposte, a different “physical feature” has demonstrably sometimes played a part: official eyes that will not see.

¹⁶ *Horner v. United States*, 147 U. S. 449, 461 ff. (1893); *Chambers v. Bachtel*, 55 F. 2d 851 (5th Cir. 1932); *Boynton v. Ellis*, 57 F. 2d 665 (10th Cir. 1932); *Boosalis v. Crawford* 99 F. 2d 374 (D.C. Cir. 1938). See, King, *supra*, note 3, at 199–201.

they incorporated the three elements of gambling in proscribed combination).¹⁷

However, in 1935 a Chicago pinball company came up with an *amusement* feature that opened new vistas for everyone. By a simple adaptation of the coin chute,¹⁸ a player who made a sufficient score could be allowed to set up another game without inserting another coin; by a further adaptation, high scores could be rewarded with even more free replays—any number, in fact. Here was something that added play incentive in the amusement models so their popularity zoomed; by luck and skill¹⁹ a player could extend the amusement he had purchased so he could actually go on playing, another game or a few more games,²⁰ at no additional cost. And note that this offends no traditional notion of gambling. When the player finishes, he is not enriched by a prize or pay-off. When he leaves the machine he has received what he bought, the amusement inherent in the play and nothing else (comparably, bowling sometimes gives an extra frame, baseball may provide some extra-innings, a golfer's nine includes an indeterminate number of strokes, etc.).²¹

But the Chicago gambling manufacturers found a way to make use of the free game device too. On *their* machines (including even converted one-armed bandits) the player could win large multiples of free games.²² If the sheriff came around, the player could stand there and play

¹⁷ See, *Johnson v. Phinney*, 218 F. 2d 303 (5th Cir. 1955); *U. S. v. 19 Automatic Pay Off Pinball Machines*, 113 F. Supp. 230 (W. D. La., 1953).

¹⁸ See, *Chicago Patent Corp. v. Genco, Inc.*, 124 F. 2d 725 (7th Cir. 1941).

¹⁹ In the early 'fifties the *amusement* industry added “flippers”—small pushbutton-controlled strikers on each side of the board to allow the player to prolong the play of each ball. These are now as characteristic of amusement games as the puck to hockey or the driver to golf. They would never be found on a gambling machine, where the aim is to get the subterfuge pinball play over as quickly as possible, unless the gambling designers someday adopt them for protective coloration.

²⁰ Amusement machines will award a maximum of two or three free replays in one game, and usually are built to accumulate 26 (which operators generally stop down to 10 or 15).

²¹ See, Moore J., dissenting in *State ex rel. Harmon v. Doe*, 255 Ia. 814, 123 N. W. 2d 400 (1963); *State v. Fitzpatrick*, 407 P. 2d 309 (Idaho, 1965).

²² Current “bingo” models offer up to 600 on one play and accumulate up to 999—imperatively necessary, incidentally, to provide what gamblers call the “big lick.” The lure of every successful gambling promotion is the chance of a long-shot win, e.g., the traditional “jackpot” of the one-armed bandit. Discovering this feature on the backboard of a gambling pinball machine (*cf.* note 20 *supra*) can scarcely be characterized as much of a visual feat.

them off—by the hundreds and by the hour if necessary.²³ But when the sheriff was not there, the location owner, partner in the operation with the machine owner, redeemed the games in cash, cleared the redeemed games from the machine by a circuit built into it for that purpose (which also recorded the number of games so cleared), and was later accurately reimbursed out of the proceeds when the owner opened the cash box and before the two divided the net profits.

The evolution of the gambling pinball machine, from “one-balls” to current “bingo” models, and other characteristic gambling features—the multiple coin adaptation, the “reflex unit,” the simplified pinball action, etc.—have been copiously described elsewhere. But it was above all this free-game-payout subterfuge that started two lines of pin-ball machines flowing out of the Chicago manufactories, gambling and amusement versions sometimes even coming alternately from the same plant. And it was this clear dichotomy that caused the industry to split bitterly in the mid-forties, with one segment striving to make a place for itself among legitimate coin vendors while the other (now a single company) continues to market increasingly sophisticated gambling models.²⁴

In 1895 the Illinois General Assembly made mechanical gambling devices contraband per se, in the following language:

Every clock, tape machine, slot machine or other machine or device for the reception of money on chance or upon the actions of which money is staked, hazarded, bet, won or lost is hereby declared a gambling device and shall be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found.²⁵

If this law embarrassed any of the manufacturers during the half-century heyday of the slot machine, when Chicago companies virtually monopolized production for the nation, there is no easily discoverable record of it. Apparently such ma-

chines, destined each year by the tens of thousands to other jurisdictions, were never “found” on loading docks by any “municipal or other local authority” of Cook County. [Parenthetically, a Cook County State’s Attorney *did* come alive in 1958, but he elected to enforce a World War I statute prohibiting possession of slot machines in any county having a military installation “of the first class,” and his seizures were knocked out because no one could say what had been meant by “first class.” *Hershey Mfg. Co. v. Adamowski*, 22 Ill. 2d 36, 174 N. E. 2d 200 (1961)²⁶].

Slot machines *operated* in the state fared less well.²⁷ And in 1942, pinball machines—of both the amusement and gambling varieties—ran into trouble. In that year the Supreme Court of Illinois held that under the 1895 statute a pinball game *merely awarding free replays* (i.e., whether it contained the pay-off subterfuge features or not) was a gambling device per se. *People v. One Pinball Machine*, 316 Ill. App. 161, 44 N. E. 2d 139.²⁸ In reaching this result the court followed a then-prevalent line of reasoning, manifestly aimed at the gambling machines, that a free replay has the monetary value of its original counterpart, and should therefore be regarded as the equivalent of a cash prize.²⁹

²⁶ A notable dissent was filed by Justices Hershey, Schaefer and Solfisburg, 174 N. E. 2d 200, 204.

²⁷ *Bobel v. People*, 173 Ill. 19, 50 N. E. 322 (1898); *Guarnera v. County of Lee*, 285 Ill. App. 238, 1 N. E. 2d 98 (1936); *Germania Club v. Chicago*, 32 Ill. App. 122, 74 N. E. 2d 29 (1947); *People v. One Slot Machine, etc.*, 344 Ill. App. 379, 100 N. E. 2d 788 (1951).

²⁸ Petition for leave to appeal denied, 321 Ill. App. XIII.

²⁹ *E. g.*, *Middlemas v. Strutz*, 71 N. D. 186, 299 N. W. 589 (1941); *Giomi v. Chase*, 97 N. M. 22, 132 P. 2d 715 (1942); *Steely v. Commonwealth*, 291 Ky. 554, 164 S. W. 2d 977 (1942). This free-game-equals-prize rationale has a few contemporary adherents even among courts whose opinions make it clear they fully understand the *real* gambling problem, e. g., *State ex rel. Harmon v. Doe and State v. Fitzpatrick*, *supra*, note 21 [refusing to overturn, respectively, *State v. Wiley*, 232 Iowa 443, 3 N. W. 2d 620 (1942) and *Thamart v. Moline*, 66 Idaho 110, 156 P. 2d 187 (1945)], and *State v. Pinball Machines*, 404 P. 2d 923 (Alaska Supreme Court No. 529, decided Aug. 19, 1965); *Farina v. Kelly*, 147 Conn. 444, 162 A. 2d 517 (1960). A stronger and clearer line of authority has developed (and generally law-enforcement policies have tended to be less confused) where the free game *per se* is accurately acknowledged as an amusement feature, e.g., *Washington Coin Machine Ass’n v. Callahan*, 142 F. 2d 97 (D. C. Cir. 1945), *Gayer v. Whelan*, 59 Cal. App. 2d 255, 138 P. 2d 763 (1943), *State v. Waite*, 156 Kan. 143, 131 P. 2d 708 (1942), *McNeice v. Minneapolis*, 250 Minn. 142, 84 N. W. 2d 232 (1957), and *Peachey v. Boswell*, 240 Ind. 604, 167 N. E. 2d

²³ The Court in *Turner v. United States*, 62-1 USTC ¶15,402 (D. Kan., 1962) observed that it would take 33 hours and 18 minutes to play 999 games—by a player who was lucky (?) enough not to win any more replays in the process.

²⁴ The Dec. 4, 1965, issue of the trade magazine *BILLBOARD* announces (p. 62) the marketing of “a new bingo-style game” *sub nomine* *Folies Bergeres*, which reportedly “has several mechanical refinements” but nonetheless “incorporates all features of former game *Beauty Beach*.”

²⁵ *Laws*, 1895, p. 156, §1.

So the Illinois pinball market remained more or less closed, at least, officially, for several years after World War II—though nobody bothered the Chicago manufacturers when they pulled down their war-production "E's" and resumed the building of pinball machines in both categories for shipment out of the state.

Then in 1953 the Illinois General Assembly amended the 1895 Act. This body keeps no journals from which legislative history and legislative intent can be ascertained,³⁰ but it is commonly understood that the lawmakers thought they were reopening the state to *amusement* games. The amendment was this:

A coin-in-the-slot-operated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof depend in part upon the skill of the player and which returns to the player thereof no coins, tokens or merchandise shall not be considered to be a gambling device within the meaning of this Act and any right of replay so obtained shall not represent a valuable thing within the meaning of this Act.³¹

The effect was to open the door much wider; *gambling* machines equipped with the free-game-payoff subterfuge otherwise fitted the above description, and of course they did not return to the player any "coins, tokens or merchandise."³²

If the legislature was confused about what it had

given, the gamblers had no doubt about what they got. Illinois reopened as a prime market for "bingo" machines, and in a 1957 test case the Supreme Court of Illinois—without attention to other obvious gambling features—affirmed that the then-current gambling prototype was legal. *People v. One Mechanical Device*, 11 Ill. 2d 151, 142 N. E. 2d 98.³³ In a subsequent test case, *People v. Twelve Pinball Machines*, Stephenson Co. No. 59-160, decided Jan. 11, 1960, the state adduced full proof of the gambling features of the "bingo" machines, and the court responded by condemning the machines and distinguishing the *One Mechanical Device* case.³⁴ But the gambling proprietors allowed their dozen machines to be destroyed rather than risk an appeal, and thus this test was aborted.³⁵

Meanwhile, efforts to tighten the statute were also being made in the General Assembly. In the 1959 session, following demonstrations of the two types of machines and their differing characteristics in both Houses,³⁶ a bill³⁷ was passed which would have outlawed gambling pinballs while still permitting the bona fide amusement varieties. Though the legislative action was by almost unanimity,³⁸ and no one in Springfield could have misunderstood what was at stake,³⁹ Governor Stratton killed the bill in a surprise veto, explaining:

"This Bill would distinguish between coin-operated amusement devices as to the manner

³³ Justices Davis, Schaefer and Hershey dissenting, 142 N. E. 2d 98, 101.

³⁴ The opinion in the Stephenson County cases is set forth in the *Brief of The Chicago Crime Commission as Amicus Curiae*, pp. 1a-9a, *White v. Ogilvie*, 51 Ill. App. 2d 181, 201 N. E. 2d 122 (First Dist., No. 49404, 1964) *q.v.*

³⁵ Similarly, machines were sacrificed to avoid a definitive result in the first I.R.S. test case after *Korban* (354 U. S. 271). U. S. v. *Nine Gambling Devices*, 59-2 USTC ¶15,257 (S. D. Ill., 1957).

³⁶ When the measure was reached on the agenda of the House Executive Committee the hearing was rendered "unofficial" by the signalled withdrawal of enough members to deplete the quorum. The maneuver did not escape public notice, e.g., "*Mystery Phone Call Halts Pinball Hearing*," *Chicago Daily News*, p. 1, June 18, 1959; "*Pinball Ban Blocked by Mystery Phone Call*," *Chicago American*, p. 1, June 18, 1959.

³⁷ 71st G. A., S. 700.

³⁸ In the Senate, 49 to 3; in the House, 118 to 1. As one editorial writer boldly ventured, "The opposition did not melt away until a rumor that certain pinball interests were prepared to spend \$50,000 to defeat the bill gained wide circulation in the state capital. Perhaps out of fear that they would be publicly linked with a suspected payoff, the foes of the measure gave up. . . ." *Chicago Sun Times*, Aug. 7, 1959.

³⁹ *Cf.*, e.g., notes 36 and 38 *supra*.

48, and where the free-game-payoff subterfuge is accurately identified and proscribed, e.g., *Hunter v. Mayr, etc., of Teaneck Twp.*, 128 N.J.L. 164, 24 A. 2d 553 (1942), *In re Sutton*, 148 Pa. Super. 101, 24 A. 2d 756 (1942), *People v. Gravenhorst*, 32 N. Y. S. 2d 760 (1942) and cases collected in note 9 *supra*.

³⁰ Simon, *The Illinois Legislature: A Study in Corruption*, Harper's, September, 1964, p. 73, 78.

³¹ Laws, 1953, p. 929, §1.

³² In Kentucky a strikingly similar amendment ("if such device itself does not pay off in money, tokens or merchandise or other prizes"), passed by the Kentucky legislature in 1950 [Laws, 1950, c. 145, K.R.S. §436.230 (5)] has just been replaced by a new statute (G.A. Reg. Sess., 1966, S.B. 104) sponsored by Governor Breathitt to end pinball gambling in that state, and which distinguishes between gambling devices and amusement games with exemplary clarity. This action evoked a congratulatory telegram from Attorney General Katzenbach (Feb. 16, 1966): "This kind of action which can interlock so closely with Federal legislation represents vividly the way state and Federal authorities can and must work hand in hand against gambling and organized crime." The Kentucky law will, hopefully, provide a fine model for other jurisdictions.

in which a replay is permitted, classifying one group as gambling devices and the other not. . . . The objects sought by this Bill can . . . be fully accomplished by local authorities without arbitrarily giving preference to one type of amusement device and banning a similar type."⁴⁰

In the 1961 session a similar bill⁴¹ passed the Senate, again by near unanimity,⁴² but was scuttled in the House in an amendment maneuver in the closing hours of a hectic session.⁴³

The 1961 session did, nonetheless, manage to enact a revision of the Illinois Criminal Code in toto, including a revised version of the 1895 Act, so that the applicable portions read (with the 1953 pinball amendment, also slightly revised) as follows:⁴⁴

§28-1. Gambling. [a] A person commits gambling when he:

. * * *

(3) Operates, keeps, owns, uses, purchases, exhibits, rents, sells, bargains for the sale or lease of, *manufactures* or distributes any gaming device; or . . .

* * *

[b] Participants in any of the following activities shall not be convicted of gambling:

(1) Agreements to . . . etc.

* * *

§28-2. Definitions. [a] A "gambling device" is any clock, tape machine, slot machine or other machine or device for the reception of money or other thing of value on chance or skill or upon the action of which money or other thing of value is staked, hazarded, bet, won or lost; or . . . A "gambling device" does not include:

(1) A coin-in-the-slot-operated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof

depend in part upon the skill of the player *and which returns to the player thereof no coins, tokens, or merchandise.* [Emphasis added.]

These revisions took effect January 1, 1962. Though the new Code specifically added a prohibition against "manufacture," this induced no hasty action against gambling manufacturers in the Cook County States Attorney's office;⁴⁵ but early in 1963 Chicago city police made a seizure (of slot machines)—only to be castigated, and have the seizure voided, because no one had taken the precaution of dissolving the injunctions left over from the *Hershey* case.⁴⁶

In this period a major change occurred in the federal pattern, affecting what was to happen next in the 1963 session of the Illinois General Assembly. The federal Johnson Act,⁴⁷ enacted in 1951 to prohibit the interstate transportation of coin-operated gambling devices, contained exactly the same loophole for free-game-payout-subterfuge pinball games as the Illinois law. The Johnson Act language was "deliver, as the result of the application of an element of chance, any money or property." (Obviously, machines which control payouts by means of free games do not *deliver* anything directly). This was corrected, in the federal Gaming Devices Act of 1962, enacted October 18, 1962,⁴⁸ to read, "by the operation of which a person *may become entitled to receive*, as the result of the application of an element of chance, any money or property." The new language was aimed expressly at the gambling-type pinball machine,⁴⁹ and has been subsequently so interpreted and applied.⁵⁰

The federal act made another significant clarification in 1962. The manufacture of machines destined for foreign jurisdictions or domestic jurisdictions where such machines are lawful, though requiring registration, was excluded from the general prohibitions of the federal law.⁵¹

Accordingly, when the 1963 session of the Illi-

⁴⁵ Which had earlier been goaded into action—but not much action—after a man caught tampering with a gambling pinball machine was turned over by local police to three hoodlums who almost beat him to death, e.g., "Survey Reveals Pinball Machines Flourish in Suburbs," Chicago American, p. 1, Sept. 17, 1961.

⁴⁶ Chicago Sun-Times, Feb. 10, 1963; Chicago Tribune, Feb. 18, 1963.

⁴⁷ Act of Jan. 2, 1951, 64 Stat. 1134, 15 U.S.C. §§1171 ff. See, King, *supra*, note 3, at 204-6.

⁴⁸ P. L. 87-840, 76 Stat. 1075, 15 U.S.C. §§1171 ff.

⁴⁹ See H. Rep. No. 1828, *supra*, note 7.

⁵⁰ U. S. v. Two Coin Operated Pinball Machines, 241 F. Supp. 57 (W. D. Ky., 1964).

⁵¹ 15 U.S.C. §§1171(d), 1172, 1173(a)(1)-(3).

⁴⁰ Chicago Tribune, July 25, 1959.

⁴¹ 72d G. A., S. 137, S. 138.

⁴² 33 to 2.

⁴³ Chicago Sun Times, June 27, 1961. Also: "The most concentrated deluge of mail within the memory of Illinois legislators, urging defeat of antipinball bills, is swamping the House post office. What most legislators don't know is that the manufacturer who stands to suffer from the legislation also has 'manufactured' most of the mail . . ." Chicago Daily News, June 2, 1961.

⁴⁴ Laws, 1961, pp. 1983, 2033-5.

nois General Assembly opened, with the new federal precedents, the confusion surrounding the status of manufacturers, and the structure of the newly-revised Illinois Code to preserve, the bill introduced again to curb gambling pinballs took a form slightly different from its predecessors. It merely substituted for the words "coins, tokens, or merchandise" (italicized in the quotation of the Illinois statute above) the words "money, property, or right to receive money or property," and in its final version it added an exemption in §28-1(b) *supra*, as follows:

(4) Manufacture of gambling devices, including the acquisition of essential parts therefor and the assembly thereof, for transportation in interstate or foreign commerce to any place outside this State when such transportation is not prohibited by any applicable Federal law.

Once again the measure⁵² passed both Houses with near-unanimity (though it was almost derailed by a surprise attack from the Cook County States Attorney, who denounced it publicly at the crucial last moment as "a legal paradox" and warned that it "could lead to wide-open gambling in Illinois");⁵³ and this time Governor Kerner signed it. The enacting signature was affixed July 9, 1963, and the measure was widely hailed as liberating Illinois at last from the gambling pinball operators and crimping the profits of "the syndicate."⁵⁴

But this was not the last word. On July 11—two days later—the Cook County Sheriff's Police made a spectacular raid on 67 premises, rounding up pinball machines by the truckload.⁵⁵ On July 24, in an action brought by one owner operating *one* machine in one location known as Ella's Grill, the Sheriff and his men were enjoined by a Superior Court judge. Ella had sworn that she knew of no pay-offs on this machine while it was in her grill.⁵⁶ The owner insisted that the \$250 federal

gaming device stamp obtained for the machine was irrelevant because he had purchased it under protest. Holding that the new amendment did not reach gambling-type pinball machines, the judge was quoted as saying to the prosecutor:

"I don't know how anyone could read that into the bill. If the legislature had wanted to pass a law as you interpret it, they would have put it in plain language. We must take the statute as it is. We cannot add or subtract."⁵⁷

Immediately following this order, leave was given Ella's attorney to join—i.e., to bring within the injunction—all other owners who had been affected by the seizure, some 50 additional parties operating 70 machines in other locations. But though extensive testimony was taken subsequently before a master,⁵⁸ none of these late-comers were ever examined to see what *they* might say about their operations.

The seized machines were returned, and gambling conditions in the County quickly returned to normalcy.⁵⁹ The State's Attorney appealed (on the record confined to the uncontradicted testimony of Ella and her cohorts). Dealing with the principal issue, whether "[returns a] *right* to money or property" in the Illinois amendment was intended to mean the same thing as "become *entitled* to receive . . . money or property" in the federal version, the State's brief offered this edifying argument:

"As a further corollary to the interpretation of the 1963 amendment, it is necessary to define and analyze the literal connotation of the term *right*. Contrary to the common misconception concerning that term, it is quite evident that the word *right* is one of the most ambiguous words in all of legal jurisprudence (Pound, *Jurisprudence*, Vol. 1, p. 56, 57). The broad and normal meaning of this word in its true sense, is a manifestation of a reasonable expectation involved in civilized life; a capacity of creating rather than an absolute creation or interest (Pound, *Jurisprudence*, Vol. 2, p. 56-57)."⁶⁰

⁵² 73rd G. A., H. 374 (with 27 sponsors) and S. 388 (with 4 sponsors).

⁵³ Chicago American, June 12, 1963. The vote in the Senate was 45 to 3; in the House there were no "nays." See note 38 *supra*.

⁵⁴ Chicago American, July 9, 1963 (editorial, July 10, 1963); Chicago Tribune, July 10, 1963; Chicago Daily News (editorial) July 11, 1963; Chicago Sun-Times (editorial) July 11, 1963.

⁵⁵ Chicago Tribune, July 12, 1963; Chicago Sun-Times, July 12, 1963.

⁵⁶ Though the operator admitted that in Ella's modest 10-stool establishment *this one machine produced profits of over \$4000 per year*—an average of \$11.00 per day from patrons who purportedly played it for amusement! See, *Brief of Chicago Crime Commis-*

sion As Amicus Curiae, supra, note 34, pp. 5-6 Cf., note 6 *supra*.

⁵⁷ Chicago Tribune, July 25, 1963.

⁵⁸ Chicago American, Sept. 13, 1963.

⁵⁹ For fiscal 1964 the Chicago I.R.S. office issued 178 federal gambling device tax stamps. I.R.S. records, showing the name and address of each \$250 stamp-tax applicant, are available to "any prosecuting officer of any State, county, or municipality" by specific direction of Congress. I.R.C., 1954 (26 U.S.C.) §6107. See, note 15 *supra*.

⁶⁰ *Brief of Defendant-Appellant in White v. Ogilvie*, note 34, *supra*, (p. 24). In the West edition of Pound

That the scholarly legacy of the great Dean (whose eternal rest must have been troubled by the redundancy of "legal jurisprudence" thus falsely attributed to him) might someday help enfranchise pinball gamblers in Illinois he doubtless never foresaw. But the State lost its appeal on this ground.⁶¹ *White v. Ogilvie*, 51 Ill. App. 2d 181, 201 N. E. 2d 122 (1964).

Mr. Justice Sullivan, for a unanimous Appellate Division bench, first observed:

Testimony was elicited from plaintiffs' witnesses showing that the machines were used only for amusement purposes. This testimony stands uncontradicted. No evidence was presented by the defendant to the effect that such machines were ever used for gambling purposes or that anything was ever staked, hazarded, bet, won or lost on their operation.⁶²

and thereafter concluded:

The Illinois act requires that a machine meeting all the other requirements of the exception to the statutory definition of a "gambling device" be one which returns to the player thereof no money or property or right to receive money or property. In order to remove it from the exception, the device must actually "return" money or property or the right thereto. It is not sufficient that the machine *may* be used to return the right to money or property. Assuming, *arguendo*, that a gambling debt was collectible in this state, a person playing one of these machines could not bring an action to collect anything for

replays he might have won. The machine itself gives the player the "right" to receive only replays. If the legislature wished to achieve the same results that the courts have held result from the language of the Federal Gaming Devices Act, they would have couched the 1963 amendment in language of similar import.⁶³ [Emphasis in original].

For what comfort it might be, the court acknowledged, "We have no doubt that machines of this type can be used for gambling purposes, and considering the construction of the machine it becomes obvious that the manufacturers had this in mind, as well as a use for amusement solely. However . . . the fact that they are also specially adaptable to use as gambling devices is irrelevant in the absence of any evidence proving such use."⁶⁴ In other words, the 1963 amendment was construed to be an absolute nullity,⁶⁵ and law enforcement officers were back where they started under the 1895 Act—able (and, it might also be noted, obliged) to seize a machine only if they actually happened to see a pay-off being made on it.⁶⁶

During this same period, pinball gambling operations had been seriously threatened by a rule of the Illinois Liquor Control Commission providing that purchase of a \$250 Federal Gaming Device Stamp for a licensed premises would be grounds for suspension or revocation. This rule was promptly challenged, and early in 1964 the Supreme Court of Illinois held it invalid, on the ground that (making no reference to the 1963 amendment of §28-2), "... it is the view in this jurisdiction that a pinball machine is not a gaming device per se since its use may be solely for entertainment purposes" and that the Commission was apparently drawing an irrebuttable presumption from purchase of such a stamp, instead of a rebuttable one.⁶⁷ *Shoot v. Illinois Liquor Control*

(1959), in *Volume IV* at p. 56, a general philosophical discussion of "a right" is commenced as follows:

"*Meaning of the term 'a right.'* There is no more ambiguous word in legal and juristic literature than the word right. In its most general sense it means a reasonable expectation involved in civilized life. As a noun, it has been used in five senses in the law books. . . ."

The treatise then qualifies and clarifies this introduction in some thirty-five pages of Hohfeldian erudition including, at p. 57 (also in *Volume IV*) the following:

"(3) A third use is to designate a capacity of creating, divesting or altering rights in the second sense and so of creating or altering duties. Here the proper term is 'power.'"

⁶¹ Ella's counsel, whose breeziness makes my tone in these pages sound like stuffy paraphrasing of the King James Version, rejoined, "If the Legislature did intend such an interpretation, then it should also change 'The Bill of Rights' to 'The Bill of Manifestations of reasonable expectations involved in Civilized life.'" *Brief and Argument for Plaintiffs-Appellees* in *White v. Ogilvie*, note 34, *supra* at 28.

⁶² 51 Ill. App. 2d 181, 184-5.

⁶³ *Id.* at 191.

⁶⁴ *Id.* at 188.

⁶⁵ *Cf.*, *Scofield v. Board of Education*, 411 Ill. 11, 103 N. E. 2d 640 (1952); *People ex rel. Serbin v. Calderwood*, 33 Ill. App. 541, 77 N. E. 2d 849 (1948).

⁶⁶ Sheriff's police seized 9 machines on this basis in Cook County in August, 1964. *Chicago Sun-Times*, Aug. 9, 1964. This was followed by an I.R.S. raid in which Treasury agents seized 41 more which they found operating without the current \$250 federal gaming device stamp. *Chicago Sun-Times*, Aug. 20, 1964; *Chicago Tribune*, Aug. 20, 1964.

⁶⁷ The Bilek-Ganz proposals ignore both the federal gaming-device stamp tax and the vulnerability of licensed premises to lose anything more than their right to keep pinball machines (for one year). Bilek and Ganz, note 1, *supra* at 444-5. The \$250 federal stamp must already be registered with local authori-

Commission, 30 Ill. 2d 570, 198 N. E. 2d 497 (1964).⁶⁸ The Appellate Court in *White v. Ogilvie* relied heavily on the text of *Shoot* to buttress its conclusion that the 1963 amendment had no prohibitory effects.⁶⁹

The Supreme Court of Illinois denied review of *White v. Ogilvie* on Sept. 11, 1964.⁷⁰ So the pinball gamblers were once more operating in the clear (and *always* in the black—revenues from these machines in Cook County alone, conservatively estimated from the number publicly listed as operating there at this writing, run in the range of \$175,000 per month).

But the action now shifts to a new quarter. In the fall of 1964, with an eye on the forthcoming 1965 legislative session, the Mayor of Chicago (in whose urban jurisdiction all pinballs have been banned since 1931)⁷¹ announced the formation of a blue-ribbon committee of public officials and civic leaders to work up a set of new anti-crime measures "designed to make a criminal's life in Illinois a little more miserable."⁷² Early in December, 1964, this committee approved work on fourteen draft bills, covering everything from wire-tapping to Molotov cocktails; and one of the fourteen was a revision of §28-2, in yet another attempt to reach the gambling pinballs.

The draftsmen assigned to this pinball bill were skillful lawyers, and what they produced was a rewording which would have made the applicable provisions of §28-2 read as follows:

Sec. 28-2. Definitions. (a) A "gambling device" is any clock, tape machine, slot machine or other machines or device for the reception of money or other thing of value on chance or skill or upon the action of which money or other thing of value is staked, hazarded, bet, won or lost; *any other machine or mechanical device designed and manufactured primarily for use in connection with gambling,*

ties [Ch. 38, §28-4, Ill. Rev. Stat. (1963) as amended by 74th G. A., H.B. 280 (1965)]; and tying it *effectively* to tavern licenses, etc.—which might even be done by a mere revision of the presumption in the Liquor Commission's rule—would be a long step. See, Gaynor, *Indirect Control of Organized Crime Through Liquor License Procedure*, 49 J. CRIM. L., C. & P. S. 65 (1958).

⁶⁸ Justice Schaefer dissenting, 30 Ill. 2d 570, 578, 198 N. E. 2d 497, 501.

⁶⁹ 50 Ill. App. 2d 181, 186-8.

⁷⁰ 30 Ill. 2d 628.

⁷¹ See, *Silfen v. Chicago*, 299 Ill. App. 117, 19 N. E. 2d 640 (1939); *Berman v. Prendergast*, 338 Ill. App. 580, 88 N. E. 2d 374 (1949); *Kitt v. Chicago*, 415 Ill. 246, 112 N. E. 2d 607 (1953).

⁷² *Chicago American*, Nov. 27, 1964.

and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or any mechanism, furniture, fixture, equipment or other device designed primarily for use in a gambling place. A "gambling device" does not include:

(1) *A coin in the slot operated mechanical device designed and manufactured to be played for amusement only, which may through the application of an element of skill reward the player with the right to replay such mechanical device at no additional cost, and provided that such mechanical device can accumulate no more than 15 free replays at one time, can be discharged of accumulated free replays only by reactivating the device for one additional play for each accumulated free replay, and makes no permanent record directly or indirectly of free replays so awarded. Notwithstanding any other provision of this subsection, any mechanical device classified by the United States as requiring a Federal Gaming Device Tax Stamp under the applicable provisions of the Internal Revenue Code shall be excluded from the exception contained in this subsection. [Emphasis added.]*

This language could scarcely have failed to hit the target, for it picked up the wording of the federal Gaming Devices Act verbatim (as the Court had recommended in *White v. Ogilvie*), added limitations directly upon the numbers of free replays allowed and how they could be cancelled,⁷³ and—as an extra precaution—tied the definition to the federal stamp tax.

But though the Mayor's other proposals were approved by his committee, sent to Springfield early in the 1965 session, and quickly started on their way through the legislative processes, the pinball draft never left Chicago. The Sheriff of Cook County (member ex-officio of the Mayor's committee) knocked it out of the package by insisting that he wanted to submit a measure of his own and needed time to study the situation before doing so.

And presto! Three months later, dated March

⁷³ See, note 22 *supra*.

28, 1965, the proposals which are the subject of the instant *Journal* article by Messrs. Bilek and Ganz made their appearance, then entitled "Proposed Legislation Concerning Pinball Machines" and presented as having been prepared for the Sheriff by the authors on behalf of the Cook County Sheriff's Police Department.

The biennial session of each General Assembly must conclude its business and adjourn finally not later than midnight on June 30 of each session year. Therefore it is small wonder that the Sheriff's proposal—the three thousand word version—was transmitted like lightning to Springfield, and was introduced in the House on June 9, 1965.⁷⁴ With it were three companion bills which, among other things, quietly took the whole subject out of the Illinois Criminal Code⁷⁵ and deprived all county and municipal jurisdictions of any further power to regulate pinball machines.⁷⁶

Even so, the anti-gambling forces nearly won. On June 27, 1965, one of the companion bills⁷⁷ was amended by unanimous House action and sent to the Senate incorporating exactly the Mayor's version of the amendments to §28-2, as set forth above. What followed was a cliff-hanger: the Sheriff's other bills were tabled and the Mayor's *good* version was shunted around on the

Senate calendar until five hours after the constitutional adjournment deadline. Then, at 7 a.m. on July 1, with the clock stopped and everyone slipping out to head for home, the bill fell victim of an impassioned plea from a spokesman for the Cook County delegation in the Senate. He explained to an emptying chamber that once again some "bad" pinball manufacturers were trying to hoodwink the Legislature into giving them an unwarranted advantage by outlawing the games of one misunderstood company whose products were amusement devices like all the rest—only perhaps a little more "sophisticated." On the tally, seventeen votes were recorded; nine senators were on hand to vote against the bill⁷⁸ and (of a total membership of fifty-eight) eight remained on hand to vote for it.

How could the Illinois "pinball problem" be solved? What would liberate the people of this great state from its gambling promoters? A sure-appearing solution would be enactment of the statutory text propounded by Mayor Daley—i.e., H. B. 2200 as it is set forth *supra* and as it nearly passed the 74th General Assembly.

But that cannot be undertaken until 1967. And if history does indeed tend to repeat itself, the odds on it are not perhaps the best of gambler's odds.

⁷⁸ Seven from Cook County.

⁷⁴ 74th G. A., H.B. 2197.

⁷⁵ 74th G. A., H.B. 2200.

⁷⁶ 74th G. A., H.B. 2198, H.B. 2199.

⁷⁷ H.B. 2200.