Masthead Logo

DePaul Law Review

Volume 17
Issue 3 *Summer 1968*

Article 9

Lotteries - Suggested Reforms in Illinois

Michael Friedlander

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Michael Friedlander, *Lotteries - Suggested Reforms in Illinois*, 17 DePaul L. Rev. 555 (1968)
Available at: https://via.library.depaul.edu/law-review/vol17/iss3/9

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

COMMENT—LEGISLATION

LOTTERIES—SUGGESTED REFORMS IN ILLINOIS

The vast majority of jurisdictions, including Illinois, have constitutional provisions enunciating a fundamental public policy against lotteries.[1] Yet everyday one can observe their increased use by the business community in the promotion of such goods and services as groceries, movies, gasoline and clothing even though many of these seem to clearly fall within the prohibition of such lottery provisions. Illegal bingo games and raffles flourish and continue to provide charitable organizations with a substantial source of income. Recently, two eastern states were persuaded to legalize state-run lotteries in order to provide additional revenue for their educational systems. In short, despite the stated basic public policy against lotteries, they exist, legally and illegally, and may even be increasing in use. It is the purpose of this note to examine the lottery in terms of its definition and to analyze it in relation to the constitutional provisions designed to guard against lotteries, giving special emphasis to the relevant Illinois provision. Furthermore, this note will discuss the present day usage to which the lottery is put. By examining these usages in relation to the social, political, and legal principles applicable, conclusions will be drawn as to which usages, if any, should be legalized. Recommendations regarding the methods by which Illinois may realize desirable legalization of lotteries through the proposed Constitutional Convention will also be offered.

ELEMENTS OF A LOTTERY

It is necessary for a thorough comprehension of this subject to have an understanding of the definition of a lottery. Although courts have stated that it has no technical meaning in law distinct from its popular significance,[2] it has been defined by Illinois statute as:

> [A]ny scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win such prizes, whether such scheme or procedure is called a lottery, raffle, gift, sale or some other name.[3]

[1] Hanson, *The Validity of Not For Profit Lotteries*, 30 CHI.-KENT L. REV. 148, 149 (1951).

[2] People v. Jackson, 22 Ill. 2d 382, 176 N.E.2d 803 (1961), *cert. denied*, 368 U.S. 985 (1962).

[3] ILL. REV. STAT. ch. 38, § 28(2)(b) (1967).

As can be seen from this statute, which is similar to those of other states, there are three elements necessary for a lottery to exist: (1) the offering of a prize, (2) the distribution of that prize by chance, and (3) the giving of consideration for an opportunity to win the prize.[4]

The elements of prize and chance are easily ascertainable. The element of consideration, however, presents a much more difficult problem, and the courts are divided as to its meaning. One line of cases measures the presence or absence of consideration by the test used in contract law—a legal benefit to the promisor or a legal detriment to the promisee.[5] These jurisdictions have thus held that benefits flowing to the operator of the lottery scheme in the form of increased patronage, business, and profits is sufficient consideration to meet the requirement.[6] On the other hand, the Supreme Court of Illinois, in *People v. Eagle Food Centers, Inc.*, expressly rejected this theory.[7] Their view of consideration is that it must flow directly from one who is given the opportunity to win the prize, and that it must be in the form of money or other thing of value, and not mere physical inconvenience or detriment to the promisee.[8] Interestingly enough, there is a very small minority which has concluded that consideration is not even a necessary element, and that a lottery may arise by gift or otherwise, without any consideration.[9] The determination of whether a "form of lottery" is, in fact, construed to be a lottery is completely dependent upon the interpretation of the jurisdiction in which the lottery is conducted.[10]

CONSTITUTIONAL PROHIBITION OF LOTTERIES

Some constitutional provisions prohibiting lotteries are self-executing. They are so named because they are complete in themselves and become

[4] 54 C.J.S. *Lotteries* § 2 (1948).

[5] Furst v. A. & G. Amusement Co., 128 N.J.L. 311, 25 A.2d 892 (1942); Affiliated Enterprises, Inc. v. Waller, 40 Del. 28, 5 A.2d 257 (1939). *Contra*, Commonwealth v. Wall, 295 Mass. 70, 3 N.E.2d 28 (1936). It should be noted that Wisconsin has adopted this definition of consideration by statute. WIS. STAT. ANN. § 945.01(2)(b)(1) (Supp. 1967).

[6] Troy Amusement Co. v. Attenweiler, 64 Ohio App. 105 (1940), *aff'd*, 137 Ohio St. 460, 30 N.E.2d 799 (1940).

[7] 31 Ill. 2d 535, 202 N.E.2d 473 (1964).

[8] *Id.* at 540, 202 N.E.2d at 475. Prior to this decision, Illinois law had been that valuable consideration, as an element of a lottery, could consist of some right, interest, profit, or benefit accruing to one party, and it was immaterial whether one party sustained an actual pecuniary loss or the other an actual pecuniary benefit. People v. Schaeffer, 44 Ill. App. 2d 374, 194 N.E.2d 804 (1963).

[9] Lucky Calendar Co. v. Cohen, 19 N.J. 399, 117 A.2d 487 (1955); Herald Publishing Co. v. Bill, 142 Conn. 53, 111 A.2d 4 (1955).

[10] Interpretation in at least one state has been fixed by statute. *See* WIS. STAT. ANN. § 945.01(2)(b)(1) (Supp. 1967), which states consideration as, "anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. . . ."

operative without the aid of supplemental legislation.[11] Others merely enunciate a public policy against lotteries, but provide no means for such policy to be carried out, or only authorize and direct implementation by action of the legislature. The distinction between these two types of provisions is that the latter becomes operative only upon passage of appropriate criminal legislation, while the former is effective immediately.[12]

The problem with a constitutional clause which is not self-executing, but which directs the legislature to carry it into effect, is that it has only moral force without legislative assistance.[13] While the legislature cannot be compelled to enact implementing legislation which would enforce the prohibition, it is important to note that the legislature is prohibited from passing statutes authorizing lotteries without amendment of the constitutional provision itself.[14]

The Illinois constitutional provision is two-fold in character, as it deprives the legislature of the power to authorize lotteries, and requires the legislature to pass statutes making lotteries a criminal offense. It appears in the following language:

> The general assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state.[15]

The question as to whether this provision is self-executing is now moot, since the legislature has properly performed the duty imposed upon it, by enactment of an appropriate criminal statute.[16] This question would necessitate an answer, however, if the statute were repealed or amended. Then if the constitutional provision is deemed not to be self-executing, it would be without force and effect, and could be disobeyed without fear of penalty. As the section makes no rules for its enforcement nor fixes the nature of the punishment, rules of constitutional construction would apparently indicate that

[11] 16 C.J.S. *Constitutional Law* § 48 (1956).

[12] *Id.*

[13] This is because a court cannot issue a writ of mandamus against a legislative body or its officers to compel the performance of duties purely legislative in nature, even though the performance of that duty be required by law. *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1926); *Jones v. Winters*, 369 P.2d 135 (Okla. 1961). There are some writers who contend that the courts are not completely without power, as a court of equity may enjoin the conduct of lotteries on the ground that they amount to a public nuisance. *See* Baker, *An Equitable Remedy to Combat Gambling in Illinois*, 28 CHI.-KENT L. REV. 287 (1950).

[14] State *ex rel.* Evans v. Brotherhood of Friends, 41 Wash. 2d 133, 247 P.2d 787 (1952); State *ex rel.* Steen v. Murray, 144 Mont. 61, 394 P.2d 761 (1964); State v. Village of Garden City, 74 Idaho 513, 265 P.2d 328 (1953).

[15] ILL. CONST. art. 4, § 27.

[16] ILL. REV. STAT. ch. 38, § 28(1) (1965).

it would not be self-executing.[17] Of court this section could be rewritten so as to make it self-executing and thereby avoid the necessity of implementing and enforcing legislation. The elimination of this type of problem is seemingly within the intended purposes of a constitutional convention, and the re-writing of our provision to make it self-executing is recommended.

AREAS OF LOTTERY USE

Presently the lottery is being utilized in three areas, which, in varying degrees, have received legal recognition and acceptance. These areas are (1) the promotion of business, (2) the raising of revenue for governmental needs, and (3) the providing of funds for charitable or other worthy purposes. The following section will analyze each of these areas of use in order to determine the advantages of legalizing it.

Promotion of Business

Lotteries as a method of business promotion have long been opposed by public policy.[18] The primary rationale for this general condemnation is ethical and not economic, as it is regarded as contrary to sound morality that men should be tempted to seek "something for nothing" or for a very little. Such practice is also considered an unfair method of competition, for it encourages people to purchase goods not upon their merits, but rather upon the chance of securing something for nothing.[19] Nevertheless, the practice of using lotteries to stimulate business activity continues at an ever increasing rate. One cannot travel past a service station without seeing large bright signs advertising some sort of game or sweepstakes, nor enter a supermarket and not be confronted with a game card. Is such activity now privileged or is it that the law is not being properly enforced?

One of the earlier most often used schemes for advertising or promoting legitimate business, and one which is most conducive to illustrate the legal problem related thereto, is found in the "Bank Night" cases.[20] Generally, this scheme provides for "free" registration of any individual in a book maintained in a theater lobby, with each registrant receiving a permanent registration number. A drawing by chance is then held on a specified advertised night, with the holder of the drawn ticket number receiving a prize.[21]

[17] *Supra* note 11.

[18] PUBLIC REGULATION OF COMPETITIVE PRACTICES 138-40, quoted in Minter v. Federal Trade Commission, 102 F.2d 69, 72 (3d Cir. 1939).

[19] *Id.*

[20] *See* Annots., 103 A.L.R. 866 (1936) and 113 A.L.R. 1121 (1938).

[21] *Id.*

While the many cases differ because of the facts involved and the wording of the related statutes, the pertinent question in all of these cases, and the one which illustrates the problem in this area most acutely, is whether the necessary element of consideration is present in order to support a finding that the scheme is a lottery. In *State ex rel. Hunter v. Fox Beatrice Theater Corp.*, the court found that the registered buyers purchased considerably more with their money than the privilege of attending a motion picture. They held that the patrons made a contribution to the increased income of the theater owners and that this contribution was sufficient consideration to constitute a lottery.[22] Following the same basic reasoning, other courts concluded that such schemes attracted people to the theater who otherwise would not have attended, and that this profited the operator and supplied the needed consideration.[23] However, in *Roswell v. Jones*, which represents a contrary view, the court considered such a scheme as emanating no more harm than any other method of advertising, and certainly not one which would lead people to hazard their substance on a mere chance.[24] They concluded that "profit accruing remotely and indirectly to the person who gives the prize is not a substitute for the requirement that he who has the chance to win the prize must pay a valuable consideration therefore. . . ."[25]

The Illinois position seems to follow this latter view. In *People v. Eagle Food Centers, Inc.*, retail grocery stores distributed cardboard coins, some of which contained lucky numbers entitling the recipient to a prize. No purchase was necessary, and those purchasing did not pay anything over and above the amount normally required for the same merchandise, as food prices had not been raised nor had the quantity or quality of the food been lowered to compensate for the prize. The Illinois Supreme Court held that the element of consideration necessitates an actual passing of consideration from the participant, in the form of money or other thing of value, and without it there could be no lottery.[26] The court therefore found that no lottery existed in *Eagle Food*.

This problem of consideration is also very prevalent in the newer gasoline station lottery-type schemes, but these operators have attempted to remove their schemes from a lottery classification by distributing their tickets and

[22] 133 Neb. 392, 275 N.W. 605 (1937).

[23] Iris Amusement Corp. v. Kelly, 366 Ill. 256, 8 N.E.2d 648 (1937); United-Detroit Theater Corp. v. Colonial Theatrical Enterprise, 280 Mich. 425, 273 N.W. 756 (1937); State *ex rel.* Beck v. Fox Kansas Theater Co. 144 Kan. 687, 62 P.2d 929 (1936); State *ex rel.* Draper v. Lynch, 192 Okla. 497, 137 P.2d 949 (1943); Blackburn v. Ippolito, 156 So. 2d 550 (Fla. 1963).

[24] 41 N.M. 258, 67 P.2d 286 (1937).

[25] *Id.* at 265, 67 P.2d at 290. *See also* People v. Cardas, 137 Cal. App. 788, 28 P.2d 99 (1933).

[26] 31 Ill. 2d 535, 538, 202 N.E.2d 473, 475 (1964).

game forms to anyone requesting them without regard to purchase. For example, certain service station operators in California engaged in a give-away program as an advertising scheme to develop greater patronage. They gave tickets away to anyone requesting them, at and away from their stations, and with or without a purchase. However, some operators raised the price of gasoline one cent per gallon in order to finance the advertising program. When the local retailers association sought to prevent such a practice as a lottery and as an unfair method of competition, the Supreme Court of California ruled in favor of the service stations. Seemingly ignoring the fact that some operators had actually raised their prices, the court held that since one could participate and win without expending any money on any merchandise, there could be no passing of the valuable consideration necessary to make the scheme a lottery.[27] Thus, although many of those who made purchases did, indeed, pay actual consideration in the form of higher prices, the court chose to overlook this fact because one could receive the "chance" without a purchase, and this right was the decisive factor in removing the scheme from a lottery classification.

The Illinois courts have not yet been faced with a situation where the prices have been actually raised in order to offset the costs of the advertisement, for in *People v. Eagle Food Centers, Inc.*, those who did purchase were not required to pay anything in addition to the amount normally received for the same merchandise. The chance to win was free monetarily, although the participant did have to expend some physical effort in order to obtain the game cards. However, where the prices are raised, more than a "mere physical inconvenience or disadvantage to the promisee" results, and there is an actual passing of monetary consideration from some of the participants to the operator. The fact that one may participate without a purchase should not remove the scheme from a lottery classification–especially when considered in light of the increased prices which are paid by the majority. If the Illinois courts are faced with such a scheme, it is hoped that they are not misled by the element of consideration, which is so innocently cradled in this type of scheme.

Regardless of how the element of consideration is concealed, it seems that the more logical view is that if the operator receives a benefit in the form of increased patronage, business, and profit, this benefit should be sufficient to constitute the necessary consideration. Businessmen are not so philanthropic as to give away something for nothing.[28] Certainly if they did not expect their additional profits to offset the costs of the scheme, they

[27] California Gasoline Retailers v. Regal Petroleum Corporation of Fresno, Inc., 50 Cal. 2d 844, 330 P.2d 778 (1958). *Accord*, State v. Socony Mobil Oil Company, Inc., 386 S.W.2d 169 (Tex. 1964).

[28] Reda, *Lotteries as a Business Promotion*, 23 OHIO ST. L.J. 698, 707 (1962).

never would have undertaken it.[29] And the mere fact that "some" people could win without having themselves been detrimented certainly should not be the factor removing such a scheme from a lottery, for the greater proportion of participants do indeed pay actual consideration—usually in the form of increased prices.

For the above reasons, the use of lottery type schemes for the promotion of business has no apparent redeeming value so as to cause an exception in stated public policy and therefore should be prohibited in Illinois. Since the Illinois Supreme Court has chosen to strictly interpret the concept of consideration in such a way as to permit the above mentioned schemes, it is necessary for the legislature to act in order to prevent their increasingly widespread use.[30] One practical approach is to provide a definition of consideration as part of the constitutional prohibition itself, and thereby eliminate confusion as to its interpretation. A definition that includes anything which gives a commercial advantage to the promoter or a disadvantage to any participant would successfully rid the consumer of the ever increasing lottery for business promotion. Such a definition is highly recommended to a Constitutional Convention.

Raising of Public Revenue

Lotteries are also used as a source of public revenue. Such a use is not a new idea. As an important feature of early American economic development, it had tremendous popularity in the financing of roads, bridges, canals, and schools. In times of currency shortage and rapidly growing population, it provided an effective means of raising revenue which was well adapted to financing the high overhead requirements necessary for the early growth of our country.[31] However, by the middle 1800's, the combination of the financial drain on the economy and the increase of fraudulently-run lotteries led to great public indignation over its continued use. This, along with federal legislation forbidding the distribution of lottery materials through the mails, sounded the death of the lottery.[32] It was not until 1964, with the enactment of the New Hampshire sweepstakes, that the public revenue lottery was reborn. This, along with the New York State gambling lottery, begun in 1967, represent the only government-conducted gambling in the nation.[33]

[29] *Id.*

[30] Interestingly, this position was also expressed by the majority in the *Eagle Food* case, when they held that if the technical concepts of consideration applicable in the law of contracts are to apply, "the statute must read much plainer than it does and the remedy must come from the legislature rather than the courts." *Supra* note 7, at 540, 202 N.E.2d at 476.

[31] Rosen and Norton, *The Lottery as a Source of Public Revenue*, 44 TAXES 617 (1966).

[32] Blanche, *Lotteries Yesterday, Today, and Tommorow*, 269 ANNALS 71, 72-73 (1950).

[33] Chicago Sun-Times, Feb. 4, 1968, at 44, col. 1-3.

But with the advent of these two lotteries, the public is again questioning its benefit. It is thus necessary to analyze both the social and economic aspects of such lotteries, and to specifically examine the results in New Hampshire.

Sociologists often point out that over-indulgence in gambling occurs when the frequency of the opportunity for betting is high, the odds against losing are low, and availability of credit betting is present.[34] Relying upon this proposition, proponents of the lottery are quick to hold that the lottery is one form of gambling not conducive to immoderate gambling, because the above factors are not usually present to a degree likely to cause harm. In fact, some governments have established public revenue lotteries on the belief that they would channel the public's propensity to gamble into a form with the least adverse economic and social effect, while still providing financial aid to the social services.[35]

This view is successfully rebutted by others who hold that such a lottery would do little to decrease the enticement of other forms of illegal gambling. These other forms would attract the gambler because they usually contain an important entertainment element involving better participation, contrasted with the passive role of the bettor in lottery forms of gambling. For the same reasons, the legal forms of gambling such as pari-mutual horse racing and casino gambling would be unaffected.[36] This latter argument seems to have more merit. Although the lottery may not encourage over-indulgence in gambling, it seemingly would not reduce active participation in the other existing forms. In fact, it would simply provide another "pot" for the bettor's money. Another social disadvantage of the lottery as a form of raising revenue is that it discriminates against lower income groups, as they buy more than a proportionate share of the tickets sold. For instance, one Massachusetts study showed that four out of five of those who could least afford to gamble purchased the tickets.[37] On a social level, it therefore appears that the lottery is not favored as a source of public revenue.

Furthermore, the accepted body of economic analysis is also opposed to the use of lotteries as a source of revenue for the government.[38] This disfavor stems from three basic arguments. First, the lottery is a counter-cyclical

[34] ROYAL COMMISSION ON BETTING, LOTTERIES, AND GAMING 1951 REPORTS, at 58-60 (1951).

[35] *How to Run a Lottery*, 189 THE ECONOMIST 1164-65 (1958).

[36] Kinsey, *The Role of Lotteries in Public Finance*, 16 NAT'L. TAX J. 1 (1963). *See also* Concord Daily Monitor, Feb. 13, 1968, at 4, col. 3.

[37] Christian Science Monitor, June 3, 1965.

[38] The following economic analysis is based primarily on the works of Rosen and Norton, *supra* note 31 and Kinsey, *supra* note 36.

instrument.[39] This means that net revenue would be expected to increase during recessions and decrease during recoveries, because of a greater relative desire to gamble during periods of declining income and high unemployment. This is not a favorable economic result. Secondly, the cost of collection is very high due to large administrative costs resulting from the need to protect such a program from illegal gambling syndicate involvement.[40] Thirdly, the principle of allocative tax efficiency is violated. This principle holds that the marginal social costs of raising a unit of revenue by all taxes should be equal. Since the lottery necessitates charging a price in excess of both social and economic costs, the marginal conditions for efficiency in resource allocation are by-passed.[41]

The purpose of the New Hampshire sweepstakes was to provide substantial revenue for the educational system, and to stop burgeoning local property taxes. In other words, it was to increase revenue without increasing taxes. Unfortunately, neither goal has been accomplished. Property taxes have continued to spiral upward and have forced the state to again reconsider its present policy of having no state sales tax.[42] Furthermore, the lottery has failed to provide the added revenue anticipated by its sponsors. Originally forecasted to add some five million dollars annually to the state, it has fallen far short with the trend indicating that it will probably never reach that goal.[43]

Although the New Hampshire lottery has apparently failed for the economic reasons mentioned above, it is only fair to point out that it was also hampered by the state's small population and by very inhibitory federal provisions against lotteries.[44] Since New Hampshire has such a small population, the lottery had to be supported, for the most part, by sales to the residents of neighboring states. To complicate matters, such sales could only be made in New Hampshire, as the federal provisions provided strict penalties against anyone importing or transporting lottery tickets,[45] mailing tickets or related matter,[46] or broadcasting information related thereto[47] across state lines. Consequently, the out-of-state residents had to come into

[39] Rosen and Norton, *supra* note 31, at 624-25.

[40] Rosen and Norton, *supra* note 31, at 624-25.

[41] Rosen and Norton, *supra* note 31, at 624-25.

[42] Rosen and Norton, *supra* note 31, at 620-21.

[43] In 1964, its first year of operation, which was shortened because of legislative political haggling, it netted only a mere $2.7 million. The result of the following year was even less encouraging, as it produced only $2.4 million. NEWSWEEK, Oct. 3, 1966, at 24.

[44] *Id.*

[45] 18 U.S.C. § 1301 (1966).

[46] 18 U.S.C. § 1302 (1966).

[47] 18 U.S.C. § 1304 (1966).

New Hampshire in order to obtain their tickets, and it wasn't likely that many people would travel for the mere opportunity to purchase a lottery chance.

However, one cannot conclude that these federal regulations are inhibitory only to a small state, for they have also seriously hampered the sales of lottery tickets in New York. In operation only since 1967, the New York lottery was originally predicted to produce gross sales of 360 million dollars yearly, but has only resulted in an average sale of 5.5 million dollars a month since June of 1967.[48] As a result of the federal regulations, such simple tasks as notifying winners and conducting correspondence about the lottery have required unusual maneuvering, and have limited newspaper advertising to only non-mail editions.[49] Although this is not the only factor affecting the apparent failure of the lottery, it appears to be significant.

The lottery as a source of public revenue is rejected by the economic community, and it is disfavored by social scientists because of its discriminatory tendency against lower income groups and because of its encouragement of gambling in general. It has also proved a failure in the only two states to have employed it, due primarily to the very strict federal regulations designed to guard against all forms of lotteries and the unfavorable economic factors mentioned above. Furthermore, a government, with so many other methods of raising revenue at its disposal, should not have to resort to a gambling device for such purposes. For these reasons, it is recommended that Illinois continue its present policy of prohibiting this use of the lottery.

Raising Funds for Charitable Purposes

The third use to which the lottery is put is in the raising of funds for worthy or charitable purposes, and usually takes the form of raffles, bingo, or similar types of games. Generally, these fund raising schemes are let alone by police and prosecuting authorities, because it would be politically unwise to interfere with them.[50] Despite this general lack of enforcement, legislatures are reluctant to amend existing prohibitory provisions on the ground that lotteries are still morally and ethically wrong regardless of the form they take. It seems difficult to accept such reasoning, however, in light of statutes permitting pari-mutual gambling, which the legislatures were not reluctant to authorize,[51] and which the courts have held constitutional.[52] Surely pari-mutual horse racing is just as morally and ethically wrong as the lottery,

[48] *Supra* note 33.

[49] *Supra* note 33.

[50] Ploscowe, *The Law of Gambling*, 269 ANNALS 1, 5 (1950).

[51] ILL. REV. STAT. ch. 8, § 37(a) (1967).

[52] People v. Monroe, 349 Ill. 270, 182 N.E. 439 (1932).

and more so when compared to the good generated by the funds raised by a church, hospital, or fraternal organization. The lottery for charitable purposes is the most advantageous to have legalized.

If one agrees with the above position, the next step is to determine by what methods the legalization of the charitable lottery can be realized. One possible method is the enactment of legislation authorizing lotteries for charitable purposes and thereby drawing a distinction between commercial lotteries and those for a worthy purpose. However, would such legislation be in violation of the existing provision? Unquestionably, where a state's constitutional provision prohibiting lotteries is declared to be self-executing, the legislature may not contradict it by authorizing certain types of lotteries. This would be clearly unconstitutional.[53] However, where it is not self-executing, it seems that the legislature may draw a distinction between different types of lotteries. Such classification would not be unconstitutional provided it was not arbitrary or without a reasonable legal basis.[54]

Rather than be faced with the above question, another method would be to carefully word the criminal statutes so as not to include penalties against the operation of a lottery for charitable purposes. Ohio illustrates such a method. They implemented their constitutional provision by prescribing penalties only against an operator who was involved in a lottery scheme "for his own profit."[55] Upon a first viewing, one court concluded that so long as the game of chance was conducted by charitable groups and the profits were expended for charitable purposes, such games would not be for the operator's "own profit" and therefore no penalty could attach.[56] The court, by way of dictum, also held that such activity would do no harm and might do a great deal of good.[57] With respect to this method, it is important to note that all local statutes imposing criminal responsibility should also be removed or amended to correspond to the current policy of the state legislature, for the continuation of existing municipal ordinances could result in criminal liability to the operator of the charitable lottery based upon these ordinances despite the nonexistence of a state penalty.[58]

However, the best approach for Illinois might be to rewrite the existing

[53] *Supra* note 14.

[54] People *ex rel.* Curren v. Wood, 391 Ill. 237, 62 N.E.2d 809 (1945); United States v. Burnison, 339 U.S. 87 (1950).

[55] OHIO CONST. art. 15, § 6 and OHIO REV. CODE § 2915.12 (Supp. 1966).

[56] Jamestown Lions Club v. Smith, 45 Ohio Op. 157, 100 N.E.2d 540 (1951). *Accord*, Commonwealth v. O'Connell, 293 Mass. 459, 200 N.E. 269, 103 A.L.R. 872 (1936); State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940). *Contra*, State *ex rel.* Trampe v. Multerer, 234 Wis. 50, 289 N.W. 600 (1940).

[57] Jamestown Lions Club v. Smith, *supra* note 56, at 158, 100 N.E.2d at 542.

[58] Nadlin v. Starick, 24 Ohio Op. 2d 272, 194 N.E.2d 81 (1963).

constitutional provision and expressly exclude the charitable lottery from prohibition. This could be supplemented by the enactment of a separate licensing law which would authorize certain organizations to carry on charitable lotteries, provided that all net funds be used for worthy purposes. All organizations desiring to operate a lottery would have to be licensed under this law and detailed rules on qualifications would be set forth. Furthermore, a state commission could be created to supervise and enforce the administration of these laws. Through this plan, the public's desire for a legalized charitable lottery would be realized while concurrently providing a method for protection against unscrupulous operators. It is this plan which is recommended to the proposed Convention.[59]

CONCLUSION

The legalization of lotteries for the promotion of business should not be favored. Although such a scheme may not harm the purchaser to the same degree as he would be harmed by participation in other forms of lotteries, he is tempted to make purchases or perform acts which he would not have ordinarily performed. Furthermore, there is a substantial detriment to the owners of competing businesses who do not utilize such a promotional scheme. If business promotion lotteries are to be illegal, the best definition of consideration is to be found in the benefit-detriment theory of contract law. Regardless of whether the participant is to purchase the product or service at the regular or increased price, or merely to go to a certain designated place to register, the operator will receive some benefit. This benefit is the motivating factor behind the scheme. Therefore, this benefit, by itself, should provide the consideration necessary to make this scheme a lottery, and thereby illegal. It is recommended that the Convention enact a constitutional provision which would include a definition of consideration in accordance with the above.

The lottery as a source of public revenue, which is rejected by the economic community and social scientists and which has been a failure in the only states to have recently utilized it, has little in favor of its legalization. Although well adapted for raising revenue during our early economic development, it no longer provides an effective means for this purpose. Accordingly, it is recommended that Illinois continue its current policy of prohibiting this use of the lottery.

The only form of lottery the legalization of which appears to be advantageous is the one used to raise funds for charitable or worthy purposes. This use possesses the least social and economic costs while providing the most

[59] For an example of this system, see the plan in effect in New Jersey. N.J. STAT. ANN. § 5:8 (1959).