Louisiana Law Review

Volume 38 | Number 4
Summer 1978

Home Rule and Local Ordinances Defining Gambling

James Joseph Sullivan

Another advantage of a precisely worded set of guidelines would be that they would take the focus of the courts away from the fitness of the parties and place it where it should be, on the best interest of the child. This would also prevent the petitioning parent from being forced to prove the other's unfitness. Louisiana courts should also follow the lead taken by other courts in further employing the services of experts in the field of human behavior in order to determine more realistically what is in fact the child's best interest.[67]

Furthermore, the guidelines would resolve the bickering[68] between the circuits involving the application of the maternal preference and the double burden rules. Although the conflict may simply be a matter of semantics, as one judge has suggested,[69] its final determination would permit the courts to deal more completely with each individual child's best interest, with no need to take sides in a controversy over jurisprudential interpretation.

Decisions concerning child custody are perhaps the most difficult that a judge must make.[70] However, the job should not be made easier by mechanically applied formulas which sacrifice the best interest of the child to judicial economy. With so much at stake, the courts can ill afford to make decisions based on out-of-date presumptions and inflexible rules.

Samuel N. Poole, Jr.

HOME RULE AND LOCAL ORDINANCES DEFINING GAMBLING

Defendant was convicted in Shreveport city court of violating a mu-

67. "[I]t seems clear that the trend particularly among the more enlightened courts is to ignore the rigid absolutes and legalisms of the past and adhere with increasing frequency to the trend toward reliance on the social scientists and expert testimony of psychologists, psychiatrists, social investigators and other experts in the field of human behavior." Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 68 (1972).

68. There are no signs that the circuits are coming closer to an agreement concerning the use of the double burden rule. In fact, the very opposite seems to be the state of affairs at this time. *See* Languirand v. Languirand, 350 So. 2d 973 (La. App. 2d Cir. 1977).

69. Bushnell v. Bushnell, 348 So. 2d at 1322 (Domengeaux, J., dissenting).

70. "[A] judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." B. BOTEIN, TRIAL JUDGE 273 (1952).

nicipal gambling ordinance[1] enacted under the authority of the city's home rule charter.[2] Unlike the state gambling statute, Criminal Code article 90,[3] which defines "gambling" to include only certain conduct when conducted "as a business," the Shreveport ordinance defined "gambling" to include certain social activities which would not be classified as a business. Defendant appealed to the district court, which reversed the conviction and held the ordinance unconstitutional. Upon the city's direct appeal,[4] the Louisiana Supreme Court affirmed the district court's judgment and *held* the ordinance unconstitutional under article XII, section 6 of the Louisiana Constitution, which the court interpreted as giving the legislature sole authority to define gambling.[5] *City of Shreveport v. Kaufman*, 353 So. 2d 995 (La. 1977).

Traditionally, municipal corporations were viewed as being mere "creatures of the state" which could exercise only such powers as the legislature bestowed upon them.[6] Under this view, municipalities had little or no local autonomy to deal with increasingly complex and diverse problems, often forcing them to seek enabling legislation to carry out necessary functions not previously authorized by the legislature. The concept of "home rule" developed in response to this problem: its objective is to give municipalities more freedom of action to deal with local problems by delegating broad authority to the home rule unit in a constitutional or legislative grant of power.[7] However, the increased powers of home rule units do not amount to complete autonomy, since no such powers can be inconsistent with general laws or the constitution.[8]

---

1. SHREVEPORT, LA., ORDINANCES ch. 21, art. I, §§ 21-30.

2. SHREVEPORT CITY CHARTER § 2.04 provides the following:

> In addition to the powers granted by other sections of this plan of government, the city shall have power: . . . . (d) To make all necessary regulations for the prevention and prohibition of gaming for money or property, by any method or device . . . .

3. LA. R.S. 14:90 (1950): "Gambling is the intentional conducting, or directly assisting the conducting, *as a business*, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit." (Emphasis added).

4. LA. CONST. art. V, § 5(D)(1) provides for a direct appeal to the Supreme Court from a district court if "a law or ordinance has been declared unconstitutional."

5. LA. CONST. art. XII, § 6: "Neither the state nor any of its political subdivisions shall conduct a lottery. Gambling shall be defined by and suppressed by the legislature."

6. This concept is often referred to as "Dillon's Rule," based upon an opinion written by Judge John F. Dillon of the Iowa Supreme Court in 1868. In *City of Clinton v. Cedar Rapids and Missouri River R.R.*, 24 Iowa 455 (1868), Judge Dillon noted: "Municipal corporations owe their origin to, and derive their powers . . . from, the legislature . . . . They are, so to phrase it, the mere *tenants at will* of the legislature." *Id.* at 475 (emphasis in original).

7. *See* J. FORDHAM, LOCAL GOVERNMENT LAW 70-71 (rev. ed. 1975).

8. "Any municipal control or prescribing of offenses must conform to, and not conflict

The Louisiana Constitution of 1921 provided that the constitution and the general laws of this state were paramount and that any attempted exercise of power by a municipality, home rule or otherwise, could not be inconsistent or in conflict therewith.[9] It also established a grant for home rule in New Orleans,[10] and mandated the legislature to provide procedures whereby other municipalities could frame home rule charters.[11] Other specific grants for home rule were periodically established by constitutional amendment. The City of Shreveport was granted authority to adopt a home rule charter by a 1948 amendment,[12] and the Shreveport City Charter was adopted and became effective on November 14, 1950. Thus, after that date, Shreveport exercised home rule local autonomy subject to the restrictions of article XIV, section 40(d) of the constitution of 1921.

Prior to the constitution of 1974, the Louisiana courts adopted a "strict constructionist" approach to the consistency requirement and often struck down municipal ordinances for being in conflict with general laws, even though the matters involved appeared local in nature.[13] This restriction of home rule was contrary to its original objectives. Ac-

---

with, the constitution, statutes and public policy of the state. This is, of course, a corollary of the cardinal requisite governing an ordinance that it must conform to the state constitution, statutes, and public policy in order to be valid." 6 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 23.07 (rev. ed. 1969).

9. La. Const. art. XIV, § 40(d) (1921): "The provisions of this constitution and of any general laws passed by the legislature shall be paramount and no municipality shall exercise any power or authority which is inconsistent and in conflict therewith. Subject to the foregoing restrictions every municipality shall have, in addition to the powers expressly conferred upon it, the additional right and authority to adopt and enforce local police, sanitary and similar regulations, and to do and perform all other acts pertaining to its local affairs, property and government which are necessary or proper in the legitimate exercise of its corporate powers and municipal functions."

10. La. Const. art. XIV, § 22 (1921).

11. La. Const. art. XIV, § 40(c) (1921).

12. La. Const. art. XIV, § 37 (1921), *proposed by* 1948 La. Acts, No. 529. The others were the City of Baton Rouge [art. XIV, § 3(a), *proposed by* 1946 La. Acts, No. 319], Jefferson Parish [art. XIV, § 3(c), *proposed by* 1956 La. Acts, No. 631], and Saint Bernard Parish [art. XIV, § 3(e), *proposed by* 1966 La. Acts, No. 573]. In addition, sections 3(d) and 3(g) provided for further procedures for the framing of other new home rule charters.

13. *See* Bradford v. City of Shreveport, 305 So. 2d 487 (La. 1974), in which Shreveport was held to have no authority "to regulate overtime pay for policemen to the exclusion of state law." The *Bradford* case is no longer the law under the constitution of 1974, since pay for policemen and firemen has been held to be a matter of local "structure and organization" [Letellier v. Parish of Jefferson, 254 La. 1067, 229 So. 2d 101 (1969); La Fleur v. City of Baton Rouge, 124 So. 2d 374 (La. App. 1st Cir. 1960)], which is strictly a local concern for any local governmental subdivision operating under a home rule charter, under article VI, § 6, and is thus within the authority of Shreveport's home rule charter.

cording to one delegate to the Constitutional Convention of 1973, it was the "designed purpose" of the drafters of article VI of the 1974 constitution to remedy this problem of legislative dominance.[14]

Article VI replaced the intricate detail of article XIV of the constitution of 1921.[15] It allows home rule units existing at the time of the adoption of the 1974 constitution to retain the powers they had under the 1921 constitution, except for those inconsistent with the 1974 constitution.[16] Such units are also allowed to exercise any powers which are granted to non-home rule subdivisions, if their home rule charters permit.[17] The powers granted to non-home rule units include those which are "necessary, requisite, or proper" to the management of the unit's local affairs, provided that such new powers are approved by the electorate of the individual unit, and are not denied by the unit's charter or by general law.[18] Thus, article VI replaced the "strict constructionist" theory and the principle of legislative dominance with a broad theory of local governmental power.[19] However, article VI cannot be said to have gone so far as to "create separate city-states," inasmuch as the exercise of local governmental substantive powers must be consistent with the constitution and is subject to legislative control through general laws.[20] This balance between state and local governmental authority was an objective sought by the drafters of article VI.[21]

In the instant case, the supreme court recognized the broad change in philosophy concerning local governmental powers under article VI and the grant of broad residual powers to local governmental subdivisions.[22] However, in holding the Shreveport ordinance unconstitutional, the court emphasized the requirement of consistency with the

14. Kean, *Local Government and Home Rule*, 21 LOY. L. REV. 63, 66 (1975).

15. *See* City of Shreveport v. Kaufman, 353 So. 2d 995, 996 (La. 1977).

16. La. Const. art. VI, § 4: "Every home rule charter or plan of government existing or adopted when this constitution is adopted shall remain in effect and may be amended, modified, or repealed as provided therein. Except as inconsistent with this constitution, each local governmental subdivision which has adopted such a home rule charter or plan of government shall retain the powers, functions, and duties in effect when this constitution is adopted. If its charter permits, each of them also shall have the right to powers and functions granted to other local governmental subdivisions."

17. *Id.*

18. LA. CONST. art. VI, § 7(A).

19. Kean, *supra* note 14, at 66: "The old strict constructionist theory is . . . replaced by one which recognizes that so long as the Legislature does not deny a power, local government possesses it, thereby rendering any further enabling legislation unnecessary."

20. *Id.*

21. *Id.*

22. 353 So. 2d at 996-97.

constitution. The court interpreted article XII, section 6 as empowering the legislature alone to define gambling, and concluded that any attempt by a local governmental unit to prohibit conduct which is not prohibited by the legislature's definition of gambling is inconsistent with that article's grant of authority.[23] A local governmental subdivision may, however, punish the offense of gambling as defined by the legislature in Criminal Code article 90.[24]

In a dissenting opinion,[25] Chief Justice Sanders objected to the court's reliance upon article XII, section 6 as the source of the ordinance's inconsistency with the constitution since he felt that the article is merely an editorial revision of article XIX, section 8 of the 1921 constitution, "which admittedly did not bar municipal definition and suppression of gambling."[26] The Chief Justice also read the language in the debates of the Constitutional Convention of 1973 to indicate that the new provision was not intended to change the municipal power to define and regulate gambling.[27] He would thus have upheld the ordinance in the instant case.[28]

Although Shreveport is a home rule municipality, the language used by the majority in pronouncing its decision refers not just to home rule subdivisions, but to local governments generally. The effect of this deci-

23. *Id.* at 997.

24. *Id.*

25. *Id.* at 998.

26. *Id.* Article XIX, section 8 of the 1921 constitution provided that "[g]ambling is a vice and the Legislature shall pass laws to suppress it." LA. R.S. 33:4851.1 (Supp. 1952) allowed certain municipalities to define gambling but not others. See the text of this section in note 29, *infra*. *City of New Orleans v. Stone*, 221 La. 133, 58 So. 2d 736 (1952), discussed at notes 38-42 *infra*, allowed New Orleans to define gambling differently from LA. R.S. 14:90. The *Stone* case was limited to New Orleans, however, and the cities of Shreveport and Baton Rouge were excluded from LA. R.S. 33:4851.1 since those cities have a population of over 100,000. Thus, Shreveport and Baton Rouge appear to have been the only municipalities in Louisiana prior to the 1974 constitution which were not authorized to define gambling in a local ordinance. However, it is unclear whether the reasoning for the exclusions is based upon inconsistency with article XIX, section 8, or upon the requirement of consistency with general law.

27. Chief Justice Sanders reasoned that, since the "general thrust" of the 1974 constitution was to strengthen municipal home rule, the delegates would have used specific language if they had "intended to divest municipalities of substantial powers." 353 So. 2d at 999. However, it appears that the city of Shreveport did not have the power to define gambling prior to the 1974 constitution and thus could not be said to have been "divested" of such power therein. See note 26, *supra*.

28. 353 So. 2d at 999. Again, however, this conclusion is based upon the assumption that Shreveport had the power to define gambling prior to the 1974 constitution, which appears not to have been the case. See note 26, *supra*.

sion is to preclude all local governmental subdivisions in Louisiana from defining gambling differently from the legislature's definition in Criminal Code article 90. Before this decision, all municipalities in the state with populations of one hundred thousand or less were empowered by statute to define gambling in any way they saw fit.[29] The instant case effectively renders that statute unconstitutional.[30]

In its analysis, the majority assumed that no general law would prohibit Shreveport from enacting the ordinance in question and addressed the problem in terms of inconsistency with the constitution. However, at least in regard to the Shreveport ordinance itself, the majority could have reached the same result through an analysis of Louisiana jurisprudence concerning conflicts between general laws and local ordinances.[31] Much of the case law in Louisiana dealing with this issue predates the constitution of 1974, but the rationale employed in such cases could have been applied in the instant case. It is settled law in Louisiana that a municipality may regulate gambling as an incident of its police power.[32] Municipalities may never, however, prohibit activities expressly authorized by the legislature,[33] nor may municipalities act at all in an area which the legislature has expressly pre-empted.[34] Since Criminal Code article 90 neither expressly authorizes non-commercial gambling nor expressly pre-empts all regulation of gambling, the issue in the instant case,

29. LA. R.S. 33:4851.1 (Supp. 1952): "All municipalities in the state of Lousiana having a population of one hundred thousand inhabitants or less are hereby authorized and empowered to pass laws prohibiting within said municipalities gambling or games of chance for money or for value in any form whatsoever, and to define what shall constitute gambling and to provide penalties for the violation of any laws passed under the power hereby delegated."

30. Although the majority opinion does not discuss this point, Chief Justice Sanders in his dissent points out that this is an effect of the instant decision. 353 So. 2d at 999. LA. CONST. art. XIV, § 18 dictates that any prior law which is inconsistent with the provisions of the 1974 constitution ceases to be effective upon the constitution's effective date; thus, in the instant case, since LA. R.S. 33:4851.1 would frustrate the exclusive grant of article XII, section 6, to the legislature to define gambling, it became ineffective upon the constitution's effective date.

31. *See* Kean, *supra* note 14, at 70-71, for a discussion of when general law denies powers to local units. The discussion assumes that where the general law is expressly "considered supreme," it should be a policy determination whether a general law should be understood to deny any conflicting enactment by a municipality. In the instant case, the state gambling statute would have to be found implicitly to deny authority to municipalities to enact conflicting ordinances. Considering the ultimate determination of the court in the instant case, such an implicit denial would probably have been found.

32. Fernandez v. Alford, 203 La. 111, 13 So. 2d 483 (1943).

33. Ozone Import Co. v. Millet, 329 So. 2d 476 (La. App. 4th Cir. 1976).

34. City of New Orleans v. Walker, 327 So. 2d 386 (La. 1976).

under the rationale of prior jurisprudence, would thus have been whether article 90 impliedly prohibits conflicting municipal enactments.

The question whether an attempt by a municipality to prohibit non-commercial gambling conflicts with article 90 was faced in *City of Alexandria v. Lacombe*,[35] which dealt with an Alexandria ordinance prohibiting non-commercial activity. The Louisiana Supreme Court held the ordinance to be invalid, stating that "it can hardly be said that there is no conflict" between the ordinance, which prohibited non-commercial gambling, and article 90, which does not.[36] The court stated that the two provisions could not possibly be reconciled.[37] However, in the same year in *City of New Orleans v. Stone*,[38] the court upheld a New Orleans ordinance that prohibited non-commercial lotteries on the basis of the city's "sweeping police power" grant in its home rule charter.[39] Although these two cases are factually distinguishable because Alexandria is a "Lawrason Act"[40] city while New Orleans is a home rule city with a correspondingly different grant of authority, the rationales of the two cases are contradictory. Regardless of the source of a city's grant of power, under article XIV, section 40(d) of the constitution of 1921,[41] no municipality had the power to pass any ordinance inconsistent with any general law. To the extent that the New Orleans ordinance was in conflict with the state gambling statute, as it certainly was under the rationale of *Lacombe*, it should have been held invalid, regardless of how "sweeping" the grant of police power to New Orleans was under its charter. The *Lacombe* language which recognized the conflict between article 90 and the Alexandria ordinance would appear to be the better view of the law in this area, and would apply to the Shreveport ordinance.[42]

35. 220 La. 618, 57 So. 2d 206 (1952).

36. *Id.* at 629, 57 So. 2d at 209.

37. *Id.* 57 So. 2d at 210.

38. 221 La. 133, 58 So. 2d 736 (1952).

39. *Id.* at 140, 58 So. 2d at 738-39.

40. 1898 La. Acts, No. 136. Many of the provisions of the Act are retained in somewhat different form in certain sections of title 33 of the Louisiana Revised Statutes. The Act was a general legislative charter for any municipality incorporated after July 29, 1898, setting up the municipality's form of government and defining its powers and functions. *See* Peterman, *Comments on the Laws of Louisiana Affecting Municipalities. Foreword* to 19 LA. REV. STAT. ANN. (WEST) AT XXIX, XXIX-XXX (1950).

41. See note 9, *supra*, for the text of this section.

42. LA. R.S. 33:4851.1 (Supp. 1952) (see text in note 29, *supra*), was enacted by the legislature in response to the *Lacombe* case. For municipalities with a population of 100,000 or less, an ordinance like the one in the *Lacombe* case could no longer be said to be "in conflict" with general law inasmuch as a general law, section 4851.1, specifically authorized such an ordinance. However, this would not be the case for municipalities with a

Under the *Lacombe* rationale, the court in the instant case could have found the Shreveport ordinance to be in conflict with article 90 and thus invalid, since the general gambling law could be considered to deny implicitly the power to municipalities to enact ordinances in conflict with it.[43] Although under this analysis the Shreveport ordinance would be invalid, similar ordinances enacted by cities with a population of one hundred thousand or less would be valid, since the legislature's express authorization of such ordinances defeats any inference of pre-emption. Thus, the foregoing analysis would have failed to further the majority's policy determination that *no* municipality can define gambling differently from the legislature,[44] but it would have been of considerable value in clarifying Louisiana's theory of when municipal powers are denied by general law because of conflict therewith.[45]

In considering public policy it appears that the majority's rationale was the proper analysis, especially in light of the apparent intentions of the delegates to the Constitutional Convention of 1973 as reflected in their debates dealing with municipal powers generally[46] and article XII,

---

population of over 100,000, *i.e.* Shreveport, Baton Rouge, and New Orleans, since they are excluded from the grant of section 4851.1. Thus, the rationale of *Lacombe* should still be applicable to Shreveport and Baton Rouge. Despite the fact that the *Stone* rationale appears erroneous, New Orleans had power to enact inconsistent ordinances under *Stone's* authority prior to the constitution of 1974.

43. *See also* LA. CONST. art. VI, § 6(E), which allows new home rule units adopted under that section to exercise certain powers "not denied by general law."

44. However, it is certainly arguable that, even if LA. R.S. 33:4851.1 had not been effectively invalidated by the rationale in the instant case, it was unconstitutional anyway under LA. CONST. art. VI, § 3, which provides that the legislature may classify municipalities "according to population or on any other reasonable basis related to the purpose of the classification." It is difficult to see any reasonable purpose for distinguishing between municipalities of more than 100,000 population and those with a population of 100,000 or less, for the purposes of granting power to define gambling. In any case, LA. CONST. art. XIV, § 18 provides that any laws enacted prior to the 1974 constitution which are in conflict therewith became ineffective upon the effective date of the constitution. See note 30, *supra.*

45. *See* J. FORDHAM, *supra* note 7, at 87-94, for a brief discussion of some other states' dealings with the conflict issue. For a specific example of another state's treatment of the conflict issue as relates to gambling ordinances and statutes, *see* Birmingham v. Richard, 203 So. 2d 692 (Ala. App. 1967), wherein the court pronounced a Birmingham ordinance, which prohibited gambling in private, invalid as being inconsistent with the state statute that prohibited only public gambling. *See also* Kean, *supra* note 14, at 71, where the author notes that, under the 1974 constitution, new decisions may be necessary to determine when general laws deny local government power.

46. *See generally* STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS Sept. 19, 1973 at 71-77, 79-92; *id.* Sept. 20, 1973 at 3-78; *id.* Sept. 21,

section 6 in particular.[47] In regard to municipal powers, as set out in article VI, sections 4, 5(E), and 7(A), it is true, as the majority noted, that the new constitution confers much broader residual powers upon municipal units than they had previously enjoyed. However, the action of the delegates in deleting from the committee proposal a section which would have required these powers to be "construed liberally in favor" of such municipal units[48] evinces their intent to strike a balance between increased powers of municipalities, on the one hand, and state policymaking through general laws on the other.[49] Concerning article XII, section 6, it is clear from the debates that the delegates' concern was with "commercial" or "organized" gambling, as opposed to "social" gambling like private card games. In fact, several delegates seemed apprehensive that the provision might cover social gambling and sought assurances from proponents of various amendments that such was not the case.[50]

1973 at 11-75; *id.* Sept. 22, 1973 at 2-45; *id.* Sept. 25, 1973 at 2-59; *id.* Sept. 26, 1973 at 1-20 [hereinafter cited as PROCEEDINGS].

47. *See generally* PROCEEDINGS, *supra* note 46, Jan. 8, 1974 at 115-27; *id.* Jan. 9, 1974 at 2-31.

48. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1973 OF THE STATE OF LOUSIANA Sept. 25, 1973 at 4 [hereinafter cited as JOURNAL]. The entire section would have read, "Powers and functions of local governmental subdivisions shall be construed liberally in favor of such local governmental subdivisions."

49. As evidence of the convention's intent to limit the otherwise broad powers granted to municipal units, the convention repeatedly adopted amendments to certain sections of article VI which subjected those sections to consistency with the constitution. *See* JOURNAL, *supra* note 48, Sept. 21, 1973 at 4-6; *id.* Sept. 22, 1973 at 2; *id.* Sept. 25, 1973 at 2. Of course, any power exercised by a municipality is subject to the provisions of the constitution. The fact that the convention saw fit to include this language expressly is evidence of its intent to avoid any question about this fact.

50. PROCEEDINGS, *supra* note 46, Jan. 8, 1974, at 115-27. The next day, Delegate Gravel stated his belief that there was no effort on the part of any of the delegates to put language in the provision that, fairly interpreted, "would prevent . . . forms of gambling . . . that people engage in on a private basis." *Id.*, Jan. 9, 1974, at 24. In his dissent, Chief Justice Sanders quoted some of Delegate Gravel's language from the same day which, taken out of context, appeared to support the position that the convention did not wish to change a municipality's "right" to define gambling in a manner differently from the state gambling statute. 353 So. 2d at 999. However, a reading of the entire discussion makes it clear that the delegates were not concerned with municipal powers at that point: the discussion at that point centered around the question whether the provision as it read at that time, directing the legislature to define "commercial gambling," would allow the legislature to prohibit private gambling at some future date if it so desired. Mr. Gravel's response indicated that the legislature could prohibit private gambling if it desired, much as it could under the 1921 constitution and as some municipalities could under LA. R.S. 33:4851.1. PROCEEDINGS, *supra* note 46, Jan. 9, 1974 at 26-27.

Thus, the supreme court in the instant case has correctly limited municipal powers to the extent necessary to protect the state's policy of punishing as "gambling" only such conduct as constitutes commercial gambling. This is a sound policy because it may be unfair to punish a citizen for engaging in conduct which the legislature has seen fit not to prohibit. Furthermore, the result does not greatly impinge upon local governmental police power since municipalities may still enact gambling ordinances which are consistent with Criminal Code article 90. The decision in the instant case therefore promotes state policy without greatly burdening municipal powers, a "balanced" result which certainly appears consistent with the new philosophy of municipal powers under article VI of the 1974 constitution.

James Joseph Sullivan

BRINGING ORDER TO A DISORDERLY PLACE

Defendant was indicted for keeping a disorderly place[1] when police investigation indicated that his two lounges in Bossier City were habitually used for an "immoral sexual purpose." The investigation stemmed from allegations that the normal course of events in these lounges included "B-drinking and lewd dancing."[2] The Louisiana Supreme Court *held* Criminal Code article 104, forbidding the "intentional maintaining of a place to be habitually used . . . for any immoral sexual purpose,"[3] to be unconstitutionally vague. *State v. Defrances*, 351 So. 2d 133 (La. 1977).

The United States Supreme Court has interpreted the due process clause of the fourteenth amendment as guaranteeing individuals the right "to be informed as to what the State commands or forbids."[4] Due process requires that statutory language be sufficiently definite to give a person of ordinary intelligence "fair warning"[5] of what is prohibited, "so

1. LA. R.S. 14:104 (1950) provides in part: "Keeping a disorderly place is the intentional maintaining of a place to be used habitually for any illegal purpose or for any immoral sexual purpose."

2. State v. Defrances, 351 So. 2d 133, 134 (La. 1977).

3. LA. R.S. 14:104 (1950); See note 1, *supra*, for the text of this section.

4. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

5. United States v. Harriss, 347 U.S. 612, 617 (1953); American Communications