
Regulation of Gambling Devices in Interstate Commerce

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Recommended Citation

DePaul College of Law, *Regulation of Gambling Devices in Interstate Commerce*, 4 DePaul L. Rev. 256 (1955)

Available at: <https://via.library.depaul.edu/law-review/vol4/iss2/9>

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careful when advising his client to sign a statement which appears to be part of a civil tax liability, as this may later be used as the foundation for a criminal prosecution.

In conclusion, it is submitted that the net worth cases, taken as a whole, tend to weaken the position of the defendant, at least in this type of criminal prosecution. In this regard it should be noted that these cases have had their effect in general criminal law already in so far as the corroboration rule is concerned. Only time and subsequent cases will show how far the courts will be willing to allow this liberalization of the criminal law to be extended. It is hoped that it will not be too far.

REGULATION OF GAMBLING DEVICES IN INTERSTATE COMMERCE

On January 2, 1951, Congress passed "An Act to Prohibit Transportation of Gambling Devices in Interstate and Foreign Commerce."¹ This act, more popularly called the Johnson Act, was designed to close the channels of interstate commerce to slot machines and similar devices and, by so doing, to lessen appreciably the revenue accruing to nation-wide crime syndicates.² In addition, it was hoped that this legislation would assist state and local law officers in the enforcement of anti-gambling statutes.³ But in order to aid federal agencies in enforcing this prohibition,⁴ Congress imposed various restrictions and duties which have run afoul of the courts and have raised some interesting problems of constitutional law. As it shall be seen, the government has had some success and some failure in enforcing these restrictions and duties.

I

It was not the intent of Congress that all gaming devices were to be prohibited from interstate commerce. Specifically, it was stated that devices which are played purely for amusement were not to be included in the provisions of the act.⁵ The act is restricted to two types of gambling devices, one of which is the slot machine, while the other is that type of machine which is designed and manufactured to be operated by a coin and to deliver money or a prize as

¹ 64 Stat. 1134 (1951), 15 U.S.C.A. §§ 1171-1177 (Supp., 1954).

² Hearings on Legislation, House Report No. 2769, 81st Cong. 2nd Sess. (1950), 2 U.S. Code Congressional Service 4240.

³ *Ibid.*

⁴ This statute, being penal in character, provides for fines and/or imprisonment for violations, and for confiscation of any device used in violation of the act. 64 Stat. 1135 (1951), 15 U.S.C.A. §§ 1176-1177 (Supp., 1954).

⁵ Committee Amendments, House Report No. 2769, 81st Cong. 2nd Sess. (1950), 2 U.S. Code Congressional Service 4245.

the result of an application of an element of chance.⁶ In addition, it must be noted that subassemblies and essential parts of these machines are also included within the act.⁷ It can readily be seen that the common type of slot machine, activated by the insertion of a coin, operated by a lever, and equipped with a pay-off device, falls within the purview of the act. But some difficulty has been experienced by the government in sustaining prosecutions for shipping the devices commonly referred to as "Trade Boosters" or "Jokers." Although these devices differ from each other in some respects, basically they are the same insofar as they eliminate the necessity of inserting a coin in the machine in order to activate the device. The payoff receptacle is also unnecessary. The player pays an attendant, who pushes a button connected to the machine which in turn activates the mechanism; the player then pulls the handle for as many times as he has paid, and his winnings, if any, are registered on the box containing the activating button, or are noted by the attendant. The method is determined by the type of machine.

The "Trade Booster" has recently come under the scrutiny of a federal court.⁸ The defendants have been indicted on four counts, one count specifically alleging that the defendants knowingly caused to be shipped in interstate commerce this type of device.⁹ The court, in denying a motion to dismiss the indictment, ruled that this count stated an offense against the United States, without expressly stating that this device was a "subassembly or essential part" of a slot machine. As this device is necessary for the activation of the machine, it seems clear that it is a subassembly or essential part of a slot machine and, as such, falls under the act.

A previous case has held that a similar type of machine was not a gambling device within the purview of the act.¹⁰ In order to describe the machine with a

⁶ "As used in this chapter: (a) The term 'gambling device' means:

(1) any so-called 'slot machine' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; . . ." 64 Stat. 1134 (1951), 15 U.S.C.A. § 1171 (Supp., 1954).

⁷ ". . . or (3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device." *Ibid.*

⁸ *U.S. v. Ansani*, United States District Court for the Northern District of Illinois, E.D., 54 CR 556 (1955) (as yet an unreported case).

⁹ The trade booster itself is an electrical box which, when connected with a slot machine, allows an attendant to activate the machine by means of a button, thus eliminating the need for a coin slot.

¹⁰ *U.S. v. McManus*, United States District Court for the District of Wyoming, Criminal Action No. 6159 (1952) (an unreported case). However, this case seems to stand alone.

reasonable degree of accuracy, it is perhaps best to quote the description as supplied by the court:

A general outline of how it appeared to a mind unskilled in inventive genius saw it in physical outline as a structure similar to the ordinary and well-known "Slot Machine." It is equipped with a false row of slots at the top, which have no connection with the operation of the machine, and a representation of a payoff receptacle below, which is closed and has no operational connection with the machine proper. In other words, it is a machine not operated by or with payoff in coins. There is a handle, which when released, as subsequently described, will start circulating a drum with the ordinary insignia of slot machines thereon, representing different kinds of fruit or bells, etc. Above the revolving drum appears the name of the machine, "Joker," and indicating below the inscription, "For Amusement Only." On the front of the main device is placed a card describing the combinations which will win and the figures opposite which will be the reward of the different combinations. When the handle is pulled down the drum will revolve with the insignia thereon and continue as long as its operation is permitted through a controlling device. In itself the device, which is attempted to be described, is inoperative. It is, however, connected with what appears to be a control device separate and distinct, one from the other, except by an electrical connection. The control device has switches which make it possible to start the operation of the main portion of the device. When the proper connection is made the handle upon the principal device is released and upon which action the drum will revolve for as many times as the paid price will provide, until a so-called payoff comes, which is reflected in numbers electrically shown on the face of the control device. . . .¹¹

The court ruled that this device did not fall under the act because it did not reward a player as the result of the application of an element of chance, with any money or property, and because, as was demonstrated in open court, a drum without insignia could be substituted for a drum with insignia and the machine would still operate and pay off any number of plays won. It must be noted that Section 1 (A) (1) defining slot machines, and Section 1 (A) (2) defining other types of gambling machines, fundamentally differ. The "slot machine" section contains the added words "(B) by the operation of which a person *may become entitled* to receive . . . any money or property."¹² Subsection (2) does not have this added clause, and defines such other gambling devices as ". . . so that when operated *may deliver* . . . any money or property."¹³ Thus, in light of the language of the act, the court's ruling that this device does not reward the player with any money or property and thus is not a prohibited gambling device seems a bit strained. The description of the machine by the court clearly points out that the player's "winnings" are recorded. The language of the act also clearly points out that the "slot machines" need not deliver the winnings but only that the player become entitled to receive winnings. It is also fairly common for these "winnings," which are ostensibly to be taken in replays, to be paid off *sub rosa* in "money or property." In other words, the player of the machine may become "entitled to receive . . . any money or property." It

¹¹ *Ibid.*

¹² Emphasis added.

¹³ Emphasis added.

therefore seems that, whether or not a "slot machine" has a payoff device, as long as winnings are registered, the machine, and any essential part or subassembly of such a machine, is one which is prohibited in interstate commerce.¹⁴ And since the "Joker" is a subassembly and essential part of any slot machine with which it will be attached and operated, it follows that these devices must come under the act and be restrained from unrestricted transportation through the channels of interstate commerce.

The court also placed much emphasis on the fact that a substitution of a drum with no insignia for the drum with the insignia in no way impaired the operation of the machine;¹⁵ therefore, this machine did not have "an essential part of which is a drum or reel with insignia thereon." The logical conclusion of such a ruling is that no "slot machine" falls within the act, because the insignia in no way controls the juxtaposition of the reels in producing a winning combination. The insignia are there to inform the player that the drum has stopped at a position that will "pay off," and that such a "payoff" has been earned. It is difficult to visualize a slot machine with three blank reels, and it is much more difficult to visualize anyone playing it. This would be tantamount to playing poker with a professional gambler, using blank playing cards, in a game where, after the hand was played, he would inform you as to what cards you held in your hand. The logical construction of the word "essential" would seem to be: essential as a successful, attractive gambling device, rather than essential to its actual physical operation. To hold that insignia must be essential to its actual physical operation is to hold that the act has failed to reach any slot machine.¹⁶

Various other machines have been defined by the courts as gambling devices by reason of the language in Section 1 (A) (2).¹⁷ A so-called "digger machine," which had been altered from coin operation to lever operation, was held to be a gambling device on the grounds that alteration did not change the fact that the device was "designed and manufactured" to be coin operated.¹⁸ This same result was reached as to pin-ball machines on which the payoff devices had been

¹⁴ Legis. Hist. of Pub. L. 906, 1950 Cong. Service U.S.C.P. 4240, 4246—definition of gambling device to include ". . . [machines] not equipped to deliver money or property mechanically. The winnings, if any, indicated on the machine are usually paid over the counter by the owner of the premises on which the slot machine is located."

¹⁵ The term insignia in this sense refers to the markings on the reel of the machine, such as cherries, bells etc.

¹⁶ In addition, a state court, under a somewhat different statute, has found that "Jokers" or "Slotless" slot machines are gambling devices. *People v. One Device known as a "Joker" or "Slotless" Slot Machine*, 346 Ill. App. 562, 105 N.E. 2d 769 (1952), appeal transferred 410 Ill. 318, 102 N.E. 2d 122 (1951); Ill. Rev. Stat., (1953) c. 38, § 342.

¹⁷ "(a) The term 'gambling device' means— . . . (2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver as the result of the application of an element of chance, any money or property." 64 Stat. 1134 (1951), 15 U.S.C.A. § 1171(a) (2) (Supp., 1954).

¹⁸ *United States v. 24 Digger Machines*, 202 F. 2d 647 (C.A. 8th, 1953), cert. denied 345 U.S. 998 (1953), rehearing denied 346 U.S. 842 (1953).

removed.¹⁹ The court ruled that the government made out a prima facie case when it showed that such devices had been, before emasculation, used as gambling devices. The burden was then upon the claimant to prove that these machines were not "designed and manufactured" to deliver money or property. Thus, it would seem that as long as the machine was "designed and manufactured" to be coin operated and to deliver money or property, subsequent alteration of either mechanism will not alter the character of the machine as a gambling device. It has also been argued that coin operated devices which paid off mainly because of the skill of the player were not affected by the act. This contention was raised in relation to "digger machines." These machines are tall, rectangular boxes, the top half of which is glass in which, by manipulation of knobs outside the box, the player controls a claw or bucket suspended from a boom inside the box, and attempts to acquire various prizes on the floor of the box. The player cannot completely regulate where the boom will stop. Such lack of control was ruled as an "element of chance" and thus the machines were devices prohibited in interstate commerce.²⁰ As long as this "element of chance" existed, a machine which could return property when played was also ruled a gambling device, even though there was some amusement in operating the machine.²¹

II

Section 2²² is the act's *raison d'être*; for, as previously stated, the basic purpose of the act is to close the channels of interstate commerce to these machines.²³ It should also be noted that the framers were careful to include within the Act all possessions of the United States.²⁴ The provision which al-

¹⁹ *United States v. 19 Automatic Payoff Pin Ball Machines*, 113 F. Supp. 230 (W. D. La., 1953).

²⁰ *United States v. 24 Digger Machines*, 202 F. 2d 647 (C. A. 8th, 1953), cert. denied 345 U.S. 998 (1953), rehearing denied 346 U.S. 842 (1953); *United States v. 10, more or less, Digger Machines*, 109 F. Supp. 825 (E. D. Mo., 1952).

²¹ *United States v. Two (2) "Exhibit Rotary" Coin Operated Gambling Devices*, 107 F. Supp. 314 (W. D. Okla., 1952).

²² "It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section." 64 Stat. 1134 (1951), 15 U.S.C.A. § 1172 (Supp., 1954).

²³ Subordinate to this end, Congress also prohibited the manufacturing, repairing, selling, possessing, etc., of these machines in those areas which are under federal jurisdiction. 64 Stat. 1135 (1951), 15 U.S.C.A. § 1175 (Supp., 1954).

²⁴ "(b) the term 'State' includes Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam. (c) the term 'possession of the United States' means any possession of the United States which is not named in subsection (b) of this section." 64 Stat. 1134 (1951), 15 U.S.C.A. § 1171 (b) (c) (Supp., 1954).

lowed a state to exempt itself from this section was added by House amendment because states which allow gambling might desire to permit shipment of such devices into their borders.²⁵ This is in consonance with the avowed purpose of the Act; to assist only those states whose policy it is to outlaw such gambling devices.

That Congress has the power to prohibit interstate shipments in support of state policies has been repeatedly upheld.²⁶ Specifically, Congress's power to prohibit gambling devices from interstate commerce was upheld in the case of *Champion v. Ames*.²⁷ Therefore, the prohibition in the present statute is not open to serious question on this ground. However, some objections have been raised to the exemption provision on the grounds that the law lacks uniformity and is discriminatory, and that it is a prohibited delegation of legislative power. These objections have been overcome. One federal court in disposing of this argument ruled that, under the commerce power of Congress, there is no requirement of uniformity, and that, to impose such a limitation, would be to impose that which the Constitution does not. This same court also ruled that the exempting power of the state under the act was not an unconstitutional delegation of legislative powers.²⁸ Another district court ruling on this problem has held that the provision is not discriminatory, as all states have the right to avail themselves of this exemption provision; that the law is uniform since its application is nationwide; and that, as Congress has the power to prohibit entirely the shipment of gambling machines, it could do less and prescribe those conditions on which machines would be permitted to pass in interstate commerce.²⁹

Section 3 of the act has provoked the greatest controversy. As yet, the government has been unable to obtain convictions under this section when the defendants had failed to register and then failed to report sales which were intrastate. The section provides that all manufacturers of, and dealers in, gambling devices must register with the Attorney General and file a monthly inventory of sales. In addition, all such devices must be marked and numbered, or the components of such a gambling device must be marked and numbered, with a

²⁵ Committee Amendments, House Report No. 2769, 81st Cong., 2nd Sess. (1950) 2 U.S. Code Congressional Service, 4245, 4247.

²⁶ *Kentucky Whip and Collar Co. v. Illinois Central Railroad Co.*, 299 U.S. 334 (1937); *Clark Distilling Co. v. Western Maryland Railway*, 242 U.S. 311 (1917); *In re Rahrer*, 140 U.S. 545 (1891); *Rupert v. United States*, 181 Fed. 87 (C.A. 8th, 1910).

²⁷ 188 U.S. 321 (1902).

²⁸ *Nilva v. United States*, 212 F. 2d 115 (C.A. 8th, 1954).

²⁹ *United States v. 65 Slot Machines*, 102 F. Supp. 647 (W.D. Iowa, 1952). The court also ruled that the seizure of these machines did not deny claimants of their property without due process of law as there was no such property right in the machines which would prevent a state from outlawing them, or Congress from rendering them worthless by regulating their passage in interstate commerce.

common mark, as if they were an assembled machine.³⁰ The courts have defined "dealers" as those who buy and sell a commodity in the usual course of trade,³¹ or those who buy to sell again or with the intention to sell again.³² Thus, owners, users, and operators, who normally do not sell such machines, need not report sales or register with the Attorney General. But it has been successfully argued that the provisions of this section do not extend to those dealers whose sales are intrastate, since it is beyond the power of Congress to regulate such intrastate commerce as does not affect interstate commerce.³³ In addition this section has been attacked on the grounds that it is void because of uncertainty and vagueness,³⁴ because of the fact that the phrase, "in such district," has no meaning in the context of the section.³⁵ In two of these cases, the government indicted for failure to register and report sales;³⁶ another was a libel to forfeit gambling machines. In none of these cases did the machines move in interstate commerce. The indictments and libel were dismissed in the lower courts. On appeal to the Supreme Court, the cases were consolidated for hearing and the dismissals were affirmed,³⁷ three Justices ruling on the basis of statutory construction,³⁸ two Justices affirming on the grounds that the section is vague,³⁹

³⁰ 64 Stat. 1135 (1951), 15 U.S.C.A. § 1173 (Supp., 1954).

³¹ *United States v. 7 Slot Machines and Gambling Devices*, 119 F. Supp. 713 (N.D. Ga., 1953); *United States v. Gambling Devices*, 119 F. Supp. 641 (N.D. Ga., 1953); *Smith v. McGrath*, 103 F. Supp. 286 (D. Md., 1952).

³² *United States v. 200 Gambling Devices*, 103 F. Supp. 886 (E.D.La., 1952).

³³ *United States v. 7 Slot Machine and Gambling Devices*, 119 F. Supp. 713 (N.D.Ga., 1953); *United States v. Denmark*, 119 F. Supp. 647 (S.D.Ga., 1953); *United States v. Braun*, 119 F. Supp. 646 (S.D.Ga., 1953); *United States v. 5 Gambling Devices*, 119 F. Supp. 641 (N.D.Ga., 1952); *United States v. 15 Mills Blue Bell Gambling Machines*, 119 F. Supp. 74 (M.D.Ga., 1953), *aff'd* 346 U.S. 441 (1953); *United States v. 178 Gambling Devices*, 107 F. Supp. 394 (S.D.Ill., 1952).

³⁴ *United States v. Denmark*, 119 F. Supp. 647 (S.D.Ga., 1953); *United States v. 15 Mills Blue Bell Gambling Machines*, 119 F. Supp. 74 (M.D.Ga., 1953).

³⁵ Initially, when the Bill was submitted in the Senate, the registering was to be done with the Collector of Internal Revenue for each district in which the business was to be carried on. The phrase "in such district" referred back to this Collector's district. Later, the Attorney General was substituted for the Collector of Internal Revenue, but the phrase "in such district," although left without meaning, was not deleted. The Attorney General later issued an order attempting to clarify this ambiguity. See *U.S. v. Five Gambling Devices*, 346 U.S. 441, 445 (1953).

³⁶ *United States v. Denmark*, 119 F. Supp. 647 (S.D.Ga., 1953); *United States v. Braun*, 119 F. Supp. 646 (S.D.Ga., 1953).

³⁷ *United States v. Five Gambling Devices*, 346 U.S. 441 (1953).

³⁸ Justices Jackson, Frankfurter, and Minton, with Mr. Justice Jackson writing the opinion, stated:

"Against the background of our tradition and system of Government, we cannot say that the lower courts, which have held as a matter of statutory construction that this act does not reach intra-state matters, have not made a permissible interpretation." 346 U.S. 441, 450 (1953).

³⁹ Mr. Justices Black and Douglas, with Mr. Justice Black writing the opinion.

and four Justices dissenting on the grounds that the section is not an unconstitutional extension of federal power and is not that vague and uncertain as to render it void.⁴⁰

Justices Jackson, Frankfurter and Minton apparently base their opinion upon the fact that an interpretation of the statute to include the registering and reporting of intrastate sales raises a far-reaching question as to the extent of Congressional power over matters internal to the state. Therefore, they considered it proper to construe the section in a way in which the constitutional issue does not arise, i.e., that the requirements of registering and reporting only adhere to dealers shipping interstate. But this opinion also states that constitutional issues must be met if the statute leaves no reasonable alternative.⁴¹ It is difficult to see, by the words of the section, how any reasonable alternative exists. The section speaks in express terms of "every" manufacturer and dealer, and there seems to be nothing in the legislative history to indicate that anything but "every" manufacturer and dealer was meant. In addition, the section expressly states that all sales are to be reported. To hold that Congress would prohibit interstate sales, and then require that only those making the prohibited sales need register and report their sales would be limiting the section beyond reasonableness and beyond its express wording. Thus, it would seem, as the dissenting opinion and the two Justices in the concurring opinion hold, that the issue is raised squarely and must be answered.

That Congress has the power to regulate intrastate commerce when this is necessary and proper to the legitimate exercise of its granted power over interstate commerce is well established.⁴² But by this present statute, there is no attempt to regulate or prohibit the movement of these devices in intrastate commerce. The dissenting opinion vigorously points this out:

If Congress by Section 3 had sought to *regulate* local activity its power would no doubt be less clear. But here there is no attempt to regulate; all that is required is information in aid of enforcement of the conceded power to ban interstate transportation. The distinction is substantial.⁴³

The Supreme Court has previously upheld a somewhat similar provision for obtaining information to determine whether or not an employer is complying with provisions of the Fair Labor Standards Act.⁴⁴ This section provides that every employer subject to provisions of the act must keep records of the wages and hours of his employees, and must make them available to the administrator

⁴⁰ Chief Justice Warren and Justices Clark, Reed and Burton, with Mr. Justice Clark writing the opinion.

⁴¹ 346 U.S. 441, 448 (1953).

⁴² *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *United States v. Darby*, 312 U.S. 100 (1940); *The Shreveport Case*, 234 U.S. 342 (1914).

⁴³ 346 U.S. 441, 462 (1953).

⁴⁴ 52 Stat. 1060 (1938), 29 U.S.C.A. §§ 201-219 (Supp., 1954), as amended 63 Stat. 910 (1949), 29 U.S.C.A. §§ 201-262 (Supp., 1954).

as he shall prescribe or as shall be necessary.⁴⁶ The act also prescribes penalties for failure to conform to this provision.⁴⁶ The court, in upholding the constitutionality of these provisions, stated:

Since, as we have held, Congress may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record to show whether he has in fact complied with it. *The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end.*⁴⁷

Admittedly, the provision in question in *United States v. Darby*⁴⁸ was to assist the government in determining if the employer has complied with the law, whereas in the present statute, the reporting and registering provisions are aimed at assisting the government in enforcing the prohibitory section of the act. But the difference is not so substantial as to bring one within the power of Congress, and leave the latter without. In the words of the Court in the *Darby* Case, Congress "may choose the means reasonably adapted to the attainment of the permitted end."⁴⁹ That the prohibition of gambling devices in interstate commerce is a permitted end seems beyond serious question. Since the act makes no effort to regulate or prohibit intrastate shipments, it appears that Congress has not gone beyond those means permitted to it in order to effectuate a legitimate end.

However another objection presents itself in the form of the privilege against self-incrimination embodied in the Fifth Amendment. If all dealers are to report sales, does this include those who have made illegal shipments? And if so, does this not violate the privilege against self-incrimination and/or unreasonable search and seizure?⁵⁰

Judge Sullivan, sitting in the District Court for the Northern District of Illinois, recently ruled that the latter part of Section 3 of the act, requiring a monthly report of sales, is unconstitutional as violative of the privilege against self-incrimination.⁵¹ This ruling was handed down at a preliminary hearing on a motion to dismiss all counts of a four count indictment. However Judge Sullivan in dismissing the count stating a failure to report monthly sales, ruled that the first part of this section of the act creating the duty to register when beginning operations did not violate the privilege against self-incrimination, as this privilege has relation only to past acts and not to future acts which may or may not be committed.⁵² Some illumination on this problem might be cast by a

⁴⁶ 52 Stat. 1066 (1938), 29 U.S.C.A. §§ 201-219 (Supp., 1954).

⁴⁶ 52 Stat. 1068 (1938), § 15 (5), 29 U.S.C.A. 215 (a) (5) (Supp., 1954).

⁴⁷ *United States v. Darby*, 312 U.S. 100, 125 (1940) (emphasis added).

⁴⁸ *Ibid.* ⁴⁹ *Ibid.*, at 121.

⁵⁰ *Boyd v. United States*, 116 U.S. 616 (1885).

⁵¹ *United States v. Ansani*, United States District Court for the Northern District of Illinois, E.D., 54 CR 556 (1955) (as yet an unreported case).

⁵² *Ibid.* See also *United States v. Kahriger*, 345 U.S. 22 (1952).

past decision of the Court which held that documents that are required to be kept in order to evidence the compliance with valid regulations are "quasi-public documents" and beyond the privilege of self-incrimination.⁵³ However, that case would seem to be distinguished from the present statute in view of the fact that here there is an absolute prohibition which must be reported, and not, as in *United States v. Shapiro*,⁵⁴ a record kept of lawful transactions in order to determine whether lawful government regulations were followed. Although this problem was not in issue in *United States v. 5 Gambling Devices*,⁵⁵ one Justice indicated that the constitutional issue could be avoided by construing the section to mean that only legal shipments need be reported, i.e., shipments into states exempting themselves from the provisions of the act, and intrastate shipments.⁵⁶ Such a construction would substantially save that part of the section which was meant to assist the Attorney General in enforcing the prohibitory section, and would successfully circumvent a knotty constitutional problem. As interstate shipments to states that have not exempted themselves from the act are illegal, a construction which would hold that Congress did not intend them to be reported would not be unduly strained.⁵⁷

Justices Black and Douglas base their opinion as to vagueness upon the rule:

. . . A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.⁵⁸

But is the provision so vague as to prevent compliance by men of common intelligence? It provides for registration with the Attorney General, and it is quite clear that all sales must be reported. It is also clear as to when these sales must be reported. And it would seem that a man of common intelligence, attempting to comply with the law, would communicate with the Attorney General or a local District Attorney to clear up the fuzziness of the phrase, "in such district." The Attorney General had issued a regulation in an attempt to clarify the phrase, but Justices Black and Douglas were of the opinion that he had no power to clarify a statute void because of vagueness. This however presupposed that the provision was so vague as to be beyond clarification that would not amount to legislation by the Attorney General. The intent of the statute is

⁵³ *Shapiro v. United States*, 335 U.S. 1 (1947).

⁵⁴ *Ibid.*

⁵⁵ 346 U.S. 441 (1953).

⁵⁶ Mr. Justice Clark speaking in *United States v. 5 Gambling Devices*, 346 U.S. 441, 456 (1953).

⁵⁷ This seems to be born out by the manifested intent of the sponsors of the bill, a "crime conference" composed of leading law enforcement officers. The "crime conference" resolved to enforce federal prohibition of gambling devices in interstate commerce, and further, required *federal registration of all such machines sold within the states*, i.e., legal shipments (emphasis added); see *U.S. v. 5 Gambling Devices*, 346 U.S. 441, 455 (1953).

⁵⁸ *Ibid.*, at 453.

clear; the agency to which the reports are due is clear; it would seem that it would be within their province to clarify what amounts to a clerical error. As the dissenting opinion pungently points out:

No doubt the forgotten words in the act provide room for quibbling, and the lawyer who is looking for litigation, or whose client seeks to avoid compliance with the law, can paint a picture of uncertainty and frustrated effort to fathom the unfathomable intent of Congress. But to me it is certain that, with or without the regulations, a person honestly seeking to comply with this law would inevitably succeed without undue mental strain in determining the statute's import and without uncertainty as to his chances of remaining within the bounds of the law.⁶⁹

It must be remembered that the machines in question are not items of everyday use and commerce. Rather, their very existence and use has been a sore spot to local law enforcing agencies. A large majority of the states have outlawed their use and have now called upon the aid of the federal government. But to prohibit an act is one thing; to enforce this prohibition is another, especially when it can be safely said that a large number of persons who are associated with these outlawed devices are extremely adept at evading the law. Registration of manufacturers and reporting of at least legal sales would enable federal officers to determine more readily where these machines are and who is illegally transporting them. As this is not beyond the power of Congress, these provisions should not be struck down as an invasion of powers reserved to the states, but should be upheld as reasonable means to enforce a legitimate end. Then perhaps a long step will have been taken toward reducing the power of those criminal elements that depend on these machines for a large part of the revenue needed to finance their illegal operations.

⁶⁹ *Ibid.*, at 458.

RECOVERY FOR MENTAL SUFFERING UNACCOMPANIED BY PHYSICAL INJURY

INTRODUCTION

For approximately sixty years, the problem of whether or not recovery shall be accorded for mental suffering has been a perplexing one. The multiplicity of theories, exceptions, and distinctions has made the field one wherein the factual situations are all-important. At the very base of the problem is the doctrine of legal causation, which is, in itself, a cause of judicial confusion. This comment seeks to present a broad picture of the law in this area. Because of the importance of causation, it will be necessary to present many factual situations to illustrate just where the courts will find a basis to allow or refuse recovery.

The general rule is announced and followed in innumerable cases. The courts say that mental suffering caused by the negligent act of another is not compensable unaccompanied by a wrong which in itself constitutes a cause of ac-