



9-1-1963

## Recent Decisions: Possession of Narcotics -- Felony or Misdemeanor -- Arrest Without a Warrant

Patrick G. Cullen

Robert J. Noe

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

### Recommended Citation

Patrick G. Cullen & Robert J. Noe, *Recent Decisions: Possession of Narcotics -- Felony or Misdemeanor -- Arrest Without a Warrant*, 38 Notre Dame L. Rev. 751 (1963).

Available at: <http://scholarship.law.nd.edu/ndlr/vol38/iss6/11>

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## RECENT DECISIONS

**POSSESSION OF NARCOTICS — FELONY OR MISDEMEANOR — ARREST WITHOUT A WARRANT.**—After being convicted for the unlawful possession of narcotics, defendant appealed contending that heroin, taken from him after his arrest without a warrant, was wrongfully admitted into evidence. *Held*: Reversed and remanded. Possession of narcotics is a misdemeanor in Maryland, and without a warrant a police officer may arrest for a misdemeanor only if it is committed in his presence, that is, “where his senses afford him knowledge that such is the fact.”<sup>1</sup> This arrest was based on information received over the police radio, and not on observations made by the officer, and thus was unlawful. Since the arrest was unlawful, the search pursuant thereto was unreasonable, and therefore the heroin should not have been admitted into evidence. *Stanley v. State*, 230 Md. 188, 186 A.2d 478 (1962).

By way of marked contrast to the *Stanley* decision is a recent Pennsylvania case, *Commonwealth v. Pittman*, 200 Pa. Super. 1, 186 A.2d 418 (1962), which demonstrates what might be termed the majority approach in these cases. In that state possession of narcotics is a felony; and since an arrest without a warrant for a felony is justified when there is probable cause that such an offense has been committed, the Pennsylvania court held legal an arrest without a warrant based on an “informant’s tip.” The arrest being legal, the court concluded that the narcotics seized pursuant thereto should have been admitted into evidence.

Both of these cases involved possession of narcotics, an informant as the initial cause of the police action and an arrest without a warrant, followed by a search of the accused and seizure of the narcotics.<sup>2</sup> The common issue was the admissibility into evidence of the narcotics; but the crucial question related to the validity of the arrests themselves as the admissibility of the narcotics depended on their validity,<sup>3</sup> and the arrests could not be justified by what the subsequent searches disclosed.<sup>4</sup>

It was Shakespeare who observed

What’s in a name? That which we call a rose,  
By any other name would smell as sweet.<sup>5</sup>

According to Shakespeare, the decisions in the *Stanley* and *Pittman* cases would not be affected by the fact that the *Stanley* case involved a misdemeanor, while the *Pittman* case involved a felony. Since both cases involved possession of narcotics, a crime which by any name would be equally offensive to society, the decision should be the same. But because a misdemeanor was involved in one case and a felony in the other, the arrest without a warrant was illegal in the *Stanley* case and legal in the *Pittman* case; and the seized drugs were excluded from evidence in the former and admitted in the latter. In other words, whether a crime is labeled a felony or misdemeanor determines the rules as to arrests without a warrant.

The rules governing arrests without a warrant were succinctly stated by the Supreme Court in *Carroll v. United States*:<sup>6</sup>

The usual rule is that a police officer may arrest without warrant one believed by the officer upon *reasonable cause* to have been guilty of a *felony*,

1 *Stanley v. State*, 230 Md. 188, 186 A.2d 478, 481 (1962).

2 The question as to the necessity for a search warrant raised in *Trupiano v. United States*, 334 U.S. 699 (1948) and *United States v. Rabinowitz*, 339 U.S. 56 (1950) is not here discussed. Likewise not discussed is the situation resulting from an unreasonable search pursuant to a lawful arrest.

3 *Rios v. United States*, 364 U.S. 253 (1960).

4 *Id.* at 261-62; *Henry v. United States*, 361 U.S. 98 (1959).

5 *ROMEO AND JULIET*, Act II, Sc. 2, Line 43.

6 267 U.S. 132 (1925).

and that he may arrest without a warrant one guilty of a *misdemeanor if committed in his presence.*<sup>7</sup>

This distinction between misdemeanors and felonies has long been in the law,<sup>8</sup> and, as evidenced by the *Stanley* and *Pittman* cases, police officers must have knowledge of its practical effects. Before the officer makes an arrest without a warrant he must first know whether the offense is a felony or a misdemeanor, and secondly, depending on which is involved, he must know whether he has "reasonable cause" to make an arrest or whether the offense is being committed "in his presence." Existing legislation in the field of narcotics control does little to assist the arresting officer in either of these determinations.

Forty-seven states and the District of Columbia have adopted the Uniform Narcotic Drug Act,<sup>9</sup> indicating the universal concern over the problem of narcotics addiction.<sup>10</sup> But for some reason, the Commissioners on Uniform State Laws left to the individual states the task of determining the grade of the offense and the appropriate penalty for a violation of the act.<sup>11</sup> The result is that there are almost as many differing penalty provisions as there are states.<sup>12</sup> The criticism here lodged, however, is not based on the fact that the penalties vary so widely,<sup>13</sup> but is rather based on the fact that most states do not explicitly label possession of narcotics as either a felony or a misdemeanor and that they allow their widely varying penalty provisions, coupled with other statutes, to determine this all important fact. For example, the general penalty provision in Illinois states that "whoever violates this Act by possessing . . . any narcotic drug shall be . . . imprisoned

7 *Id.* at 156. (Emphasis added.)

8 See DAHL AND BOYLE, ARREST, SEARCH AND SEIZURE 16-39 (1961); SMITH, ARREST, SEARCH AND SEIZURE 7-24 (1959); 4 WHARTON, CRIMINAL LAW AND PROCEDURE §§ 1595-1597 (12th ed. 1957).

9 9B UNIFORM LAWS ANNO 62 (Supp. 1962). California, New Hampshire and Pennsylvania have not adopted the Act though they have similar legislation concerning the possession of narcotics. Pennsylvania has recently adopted the "Drug, Device and Cosmetic Act" which is similar to the Uniform Narcotic Drug Act. PA. STAT. ANN. tit. 35, §§780-1 to 780-30 (Supp. 1962).

10 See generally, ELDRIDGE, NARCOTICS AND THE LAW (1962); BROWN, THE ENIGMA OF DRUG ADDICTION (1961).

11 UNIFORM NARCOTIC DRUG ACT § 20.

12 ALA. CODE tit. 22, § 255 (b) (1940); ALASKA COMP. LAWS ANN. § 4-3-20 (Supp. 1958); ARIZ. REV. STAT. ANN. § 36-1020 (1956); ARK. STAT. ANN. § 82-1020 (Supp. 1961); CAL. HEALTH & SAFETY § 11500; COLO. REV. STAT. ANN. § 48-6-20 (1953); CONN. GEN. STAT. REV. 19-265 (Supp. 1962); DEL. CODE ANN. tit. 16 § 4722 (Supp. 1962); D.C. CODE ANN. § 33-423 (1961); FLA. STAT. ANN. § 398.22 (1960); GA. CODE ANN. § 42-9917 (1957); HAWAII REV. LAWS § 52-14 (1955); IDAHO CODE ANN. § 37-2320 (1961); ILL. ANN. STAT. ch. 38, § 22-40 (Smith-Hurd Supp. 1962); IND. ANN. STAT. § 10-3538(C) (Supp. 1962); IOWA CODE ANN. § 204.22(1) (Supp. 1962); KY. REV. STAT. ANN. § 218.210(2)(a) (1955); LA. REV. STAT. § 40:981(4) (Supp. 1961); ME. REV. STAT. ANN. ch. 68, § 51 (1954); MD. ANN. CODE art. 27, § 300 (1957); MASS. ANN. LAWS ch. 94, § 217E (Supp. 1961); MICH. STAT. ANN. § 18.1123 (1957); MINN. STAT. ANN. § 618.21 (Supp. 1962); MISS. CODE ANN. § 6866 (Supp. 1960); MO. ANN. STAT. § 195.200(1)(1) (1959); MONT. REV. CODES ANN. § 54.125 (1947); NEB. REV. STAT. § 28-470 (1943); NEV. REV. STAT. § 453.210 (1961); N.H. REV. STAT. ANN. § 318:49 (Supp. 1961); N.J. STAT. ANN. § 24:18-47 (Supp. 1962); N.M. STAT. ANN. § 54-7-15 (1953); N.Y. PEN. LAWS § 1751-a; N.C. GEN. STAT. § 90-111 (1957); N.D. CENT. CODE ANN. § 19-03-02 (Supp. 1961); OHIO REV. CODE ANN. § 3719.99(c) (Page Supp. 1962); OKLA. STAT. ANN. tit. 63, § 420 (Supp. 1962); ORE. REV. STAT. § 474.990 (1961); PA. STAT. ANN. tit. 35, § 780-20(c) (Supp. 1962); R.I. GEN. LAWS § 21-28-31 (Supp. 1962); S.C. CODE ANN. § 32-1493 (1962); S.D. CODE § 22.9920 (1939); TENN. CODE ANN. § 52-1322 (Supp. 1962); TEX. PEN. CODE ANN. art. 726d (1961); UTAH CODE ANN. § 58-13a-44 (Supp. 1961); VT. STAT. ANN. tit. 18, § 4161 (1959); VA. CODE ANN. § 54-516 (1950); WASH. REV. CODE ANN. § 69.33.410 (1962); W.VA. CODE ANN. § 1385(23) (1961); WIS. STAT. ANN. § 161.28 (Supp. 1962); WYO. STAT. ANN. § 35-369 (1957). For a state by state comparison of the various penalties for the different narcotics violations, see ELDRIDGE, NARCOTICS AND THE LAW 149-87 (1962).

13 *E.g.*, in New York, mere possession of narcotics is a misdemeanor punishable by a fine not to exceed \$500 and/or imprisonment not exceeding one year. N.Y. PEN. CODE § 1751-a. The same offense in North Dakota is a felony and carries a maximum penalty of a fine of \$10,000 and/or imprisonment for 99 years. N.D. CENT. CODE § 19-03-02 (Supp. 1961).

in the penitentiary for a period of not less than 2 years or more than 10 years."<sup>14</sup> An entirely different section defines a felony as "an offense punishable with death or by imprisonment in the penitentiary."<sup>15</sup> Thus, by a two-step process it is learned that the unlawful possession of narcotics is a felony in Illinois. Granted, there are some states which, under their general penalty provisions, explicitly make any violation of the Uniform Narcotic Drug Act, not otherwise provided for, either a felony<sup>16</sup> or a misdemeanor,<sup>17</sup> but such states are the exception and not the rule.

In light of the fact that rules relevant to arrest without a warrant are inextricably intertwined with whether the offense is a felony or a misdemeanor, it is submitted that these "labels" should be explicitly used in the penalty provisions of the state Narcotic Drug Acts. An even better solution, however, would be to clearly set out in those Acts the rules as to arrests without a warrant. Following are some of the considerations leading to these suggestions:

(1) Drug addiction constitutes a grave and somewhat unique social problem.<sup>18</sup> Judging from the limited number of states which have adopted, in conjunction with narcotics legislation, specific legislation as to arrests without a warrant and searches and seizures,<sup>19</sup> it is probably fair to conclude that the legislators have not considered these problems at the same time and in the same context. Due to the fact that there are rarely, if ever, any complaining witnesses to crimes involving narcotics, police officers should be explicitly authorized to arrest without a warrant upon "probable cause."

(2) Not only have the legislators not considered the problem but, to varying degrees, they have complicated the task of the arresting officers. As has been already indicated, the length of the penalty often determines the grade of offense which in turn determines the rules pertaining to arrests without a warrant. The complications arise from the fact that different penalties are provided in some states depending on the type of narcotic involved,<sup>20</sup> the purpose for which the defendant possesses the drugs<sup>21</sup> and the number of his prior narcotics convictions.<sup>22</sup> Such differentiations as to penalty may well be justifiable from a standpoint of public policy, but they should not dictate, *in se*, the rules as to arrests without a warrant.

14 ILL. ANN. STAT. ch. 38, § 22-40 (Smith-Hurd Supp. 1962). (Emphasis added.)

15 ILL. ANN. STAT. ch. 38, § 2-7 (Smith-Hurd Crim. Code Supp. 1961). (Emphasis added.)

16 *E.g.*, Florida, Georgia, Kansas, Kentucky, Michigan, North Dakota, Pennsylvania and Tennessee. Mississippi, in revising its penalty section took a step backward in this regard for the previous legislation explicitly stated the crime to be a felony whereas the present legislation is silent on the point. See statutes cited note 12 *supra*.

17 New Jersey (high misdemeanor); New York (misdemeanor); see statutes cited note 12 *supra*.

18 One source, in distinguishing between narcotics offenses and other crimes, pointed out: Narcotic violations differ from other criminal activity in that law enforcement people must discover the crime, investigate it, and prepare the case, without any help from complaining witness or victim. When a burglar breaks into a house, the police are immediately notified. . . .

BROWN, THE ENIGMA OF DRUG ADDICTION 208 (1961).

19 D.C. CODE ANN. § 33-402(b) (1961); ILL. ANN. STAT. ch. 38, § 22-25 (Smith-Hurd 1961); MASS. ANN. LAWS ch. 94, § 213A (Supp. 1961); MONT. REV. CODES ANN. § 54-114 (1947); VT. STAT. ANN. tit. 18, § 571 (1959).

20 *E.g.*, CAL. HEALTH & SAFETY § 11500 (Supp. 1962) (possession of narcotic other than marijuana); and § 11530 (Supp. 1962) (possession of marijuana); MASS. ANN. LAWS ch. 94, § 217E (Supp. 1961) (general penalty provision) and § 212 (Supp. 1961) (penalty for possession of heroin).

21 *E.g.*, N.Y. PEN. LAWS § 1751-a (possession) and § 1752 (possession to administer to another); MASS. ANN. LAWS ch. 94, § 217E (Supp. 1961) (general penalty provision) and § 217B (Supp. 1961) (penalty for possession for sale).

22 *E.g.*, one found guilty of possessing narcotics in Michigan may be imprisoned not more than ten years for a first offense, not more than twenty years for a second offense and not less than twenty nor more than forty years for subsequent offenses. MICH. STAT. ANN. § 18.1123 (1957).

(3) Law enforcement officers are already working under a handicap in that they must satisfy the necessarily vague "reasonable cause" test in the case of an arrest without a warrant for a felony, and they must know if the crime is being committed "in their presence" in the case of misdemeanors.

"Reasonable cause" is said to exist when "the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed."<sup>23</sup> The case of *Wong Sun v. United States*<sup>24</sup> a recent 5-4 decision of the Supreme Court, shows that reasonable men can differ as to the application of that test. The issue there was whether information given by an addict after his arrest was sufficient to constitute probable cause for the arrest without a warrant of his supplier. Though the Court agreed that "tips" from reliable informers clearly constitute "reasonable cause,"<sup>25</sup> while anonymous "tips" do not,<sup>26</sup> the split came on the question of the reliability of this particular informer.<sup>27</sup>

Whether or not a given crime is being committed "in the officer's presence" is also a difficult question to determine.<sup>28</sup> In the *Stanley* case, the Maryland court stated that "a crime is committed in the presence of an officer where his senses afford him knowledge that such is the fact."<sup>29</sup> Following this, the court concluded that it was not sufficient that the officer had been alerted over his police radio to be on the lookout for the suspect's car. By way of comparison, a California court has held that a crime was committed "in the officer's presence" where he heard a bribe being offered over a two-way radio.<sup>30</sup>

Suffice it to say that the application of these two tests constitutes problem enough to law enforcement officers without the problem being compounded by making difficult the determination of which test to apply.

(4) The existing penalty provisions relating to possession of narcotics demonstrate careless legislative draftsmanship. Examples of this are contained in the statutes of Idaho and Washington. Idaho has on its statute books at the same time two general penalty provisions, one making any violation of the narcotic drug laws a felony and the other making it a misdemeanor.<sup>31</sup> Washington, while it has only one statute, is just as confusing, as the judge in his discretion may make the crime either a felony or a misdemeanor.<sup>32</sup> Draftsmanship such as this is easily corrected by one judicial decision; however, there should be no need for such a decision.

(5) The existing penalty provisions manifest within a given state inconsistent legislative reactions to the problem of narcotics violations. Maryland in particular is guilty of this inconsistency. On the one hand, the Maryland legislature has provided rather severe penalties for possession of narcotics,<sup>33</sup> but on the other

23 *Carroll v. United States*, 267 U.S. 132, 161 (1925).

24 83 Sup. Ct. 407 (1963).

25 *Jones v. United States*, 362 U.S. 257 (1960); *Draper v. United States*, 358 U.S. 307 (1959); *United States v. Cole*, 311 F.2d 500 (7th Cir. 1963); *Buford v. United States*, 308 F.2d 804 (5th Cir. 1962); *United States v. Smith*, 308 F.2d 657 (2nd Cir. 1962); *DePhillips v. United States*, 295 F.2d 477 (9th Cir. 1961).

26 *Contee v. United States*, 215 F.2d 324 (D.C. Cir. 1954); *Worthington v. United States*, 166 F.2d 577 (6th Cir. 1948); *United States v. Contrades*, 196 F. Supp. 803 (D. Haw. 1961).

27 *Wong Sun v. United States*, 83 S.Ct. 407 (1963).

28 *E.g.*, *United States v. Di Re*, 332 U.S. 581 (1948). *Copeland v. State*, 202 Miss. 58, 30 So. 2d 509 (1947).

29 *Stanley v. State*, 230 Md. 188, 186 A.2d 478, 480-81 (1962).

30 *People v. Burgess*, 170 Cal. App. 2d 36, 338 P.2d 524 (1959).

31 IDAHO CODE ANN. §§ 37-2320, 2322 (1961). The failure to repeal the misdemeanor provision has been termed a legislative oversight. *State v. Mayer*, 81 Idaho 111, 338 P.2d 270 (1959).

32 WASH. REV. CODE ANN. §§ 9.01.20, 69.33.410 (1962).

33 *E.g.*, a third offense carries a maximum fine of \$3,000 and twenty years' imprisonment. MD. ANNO. CODE art. 27 § 300 (1957).

hand, because the crime does not bear the label "felony," it is a misdemeanor.<sup>34</sup> Thus, even though law enforcement is made easier because of the severe penalty imposed for violations of the narcotic drug laws,<sup>35</sup> the task is made more difficult by requiring that the violation be committed in the officer's presence before he can arrest without a warrant.

In summation, all states have adopted legislation which punishes the crime of unlawful possession of narcotics. However, despite the fact that arrests without a warrant are the rule rather than the exception,<sup>36</sup> only a few of those states have given independent consideration to the correlative problems of arrest without a warrant and search and seizure pursuant thereto. At the Federal level, this situation is provided for in Title 26 of the United States Code as follows:

The . . . . agents, of the Bureau of Narcotics of the Department of the Treasury . . . . may . . . . (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation. . . .<sup>37</sup>

It is recommended that the various states should adopt similar legislation, making clear that the labels felony and misdemeanor no longer are relevant to the rules pertaining to arrest without a warrant for violations of the state Narcotic Drug Acts. Because such arrests are an important link in the chain of law enforcement, they should be the subject of separate legislative consideration, recommendation and statutory enactment in order to simplify the task of the arresting officers.

*Patrick G. Cullen*

<sup>34</sup> A crime is not a felony in Maryland unless the legislature says so or unless it was a felony at common law. *Bowser v. State*, 136 Md. 342, 110 Atl. 854 (1920); *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914). The bizarre results of this approach are discussed in 2 MD. L. REV. 284 (1938).

<sup>35</sup> It has been indicated that the cost of capsules of heroin in Baltimore is three times that in Washington, D.C., due to the fact that minimum penal sentences in Baltimore are greater than the maximum sentences in Washington, D.C. Comment, 62 YALE L.J. 751, 758 (1953).

<sup>36</sup> As to the necessity of such arrests without a warrant, see: BROWN, *THE ENIGMA OF DRUG ADDICTION* 205 (1961).

<sup>37</sup> 26 U.S.C. § 7607.

TELECOMMUNICATIONS — CRIMINAL LAW — SUSPENSION OF TELEPHONE SERVICE USED TO TRANSMIT GAMBLING INFORMATION. — The operators of Telephone News System, a Chicago organization which furnished horse racing results to telephone callers, were notified by the Illinois Bell Telephone Company and the American Telephone and Telegraph Company that their phone service and telegraph facilities were to be discontinued because they were receiving and transmitting gambling information in violation of the law. Telephone News System brought action in a federal district court to enjoin the discontinuances. Since both utilities were acting under the direction of the Department of Justice, the government intervened on the side of the defendant. The court found that the activities of the plaintiff did not violate § 1084 (a) of the federal gambling act,<sup>1</sup> but were contrary to the Illinois Criminal Code of 1961<sup>2</sup> and thus the federal government was entitled to invoke subsection (d) of its act.<sup>3</sup> Therefore Telephone News System was not entitled to the injunction. However, final determination of the matter was deferred pending the disposition by a three-judge court of plaintiff's claim that the federal statute is unconstitutional.<sup>4</sup> *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 210 F. Supp. 471 (N.D.Ill. 1962).

Little precedent was available to the court since both the federal and Illinois antigambling measures were passed in 1961. Thus the opinions in both *Telephone News System* and a companion case, *Kelly v. Illinois Bell Telephone Co.*,<sup>5</sup> were largely concerned with statutory interpretation. In *Kelly*, the publisher of a racing sheet was granted an injunction halting removal of the same services taken from Telephone News System. In this case the court found no violation of either federal or state law and thus held that 18 U.S.C. 1084 (d) was inapplicable.

The federal act is a partial result of a move by Attorney General Robert F. Kennedy to crack down on organized crime in the United States. Mr. Kennedy has been quoted as saying, "If we do not on a national scale attack organized criminals with weapons and techniques as effective as their own, they will destroy us."<sup>6</sup> After spending some time organizing his forces by breaking down a long-time habit of noncooperation between numerous federal police and investigative agencies,<sup>7</sup> the Attorney General requested more weapons for his arsenal; he asked that Congress pass seven statutes designed to make operation of interstate criminal operations a less tempting activity.<sup>8</sup>

One of the Attorney General's requests was for a more effective federal law against transmission of wagering information. This proposal, along with the other suggestions, was studied by the Senate Judiciary Committee and reported out by that group on July 24, 1961.<sup>9</sup> The bill was approved by Congress and was signed by the President on September 13, 1961.<sup>10</sup>

The wave of new legislation included the amendment of 18 U.S.C. 1081 to include a definition of "wire communication facility" and the addition of 18 U.S.C.

1 18 U.S.C. §§ 1081-84 (1961).

2 Ill. Ann. Stat. ch. 38 § 28-1 (a)(0) (Smith-Hurd 1961).

3 18 U.S.C. at 1084 (d):

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing or maintaining of such facility, . . .

4 28 U.S.C. §§ 2282, 2284 (1958). The statute was upheld in *Telephone News System Inc. v. Illinois Bell Telephone Company*, 220 F. Supp. 621 (N.D.Ill. 1963).

5 210 F. Supp. 456 (N.D.Ill. 1962).

6 107 Cong. Rec. 13275 (1961) (remarks of Senator Carroll).

7 N.Y. Times, July 23, 1961.

8 1961 U.S. Code Cong. and Admin. News 2631.

9 107 Cong. Rec. 13205 (1961).

10 *Id.* at 19294.

1084. The move put some teeth in chapter 50 — which previously had been usable only against gambling operations taking place aboard ships. There are four subsections to 18 U.S.C. 1084, two of which are penal in nature.

Subsection (a) prescribes a fine of up to \$10,000 or two years' imprisonment, or both, for the use of a wire communication facility by anyone engaged in the business of betting or wagering or the interstate transmission of bets, wagers, or information assisting in the placing of either; a communication entitling the recipient to receive money or credit as the result of betting or wagering; or for information assisting in the placement of bets or wagers.

On the other hand the sanction under 18 U.S.C. 1084 (d) is suspension of telephone and/or telegraph service. This, indeed, could be considered the more serious penalty of the two, for its application virtually means the termination of gambling operations. A factor which makes the subsection an even more potent anticrime tool is that it can be invoked by any federal, state or local law enforcement agency which deems the communicative equipment is being used contrary to federal, state or local law. Application of 18 U.S.C. 1084 (a) was refused in *Telephone News System* when the government, which was given the burden of proof despite its role of defendant-intervenor, was unable to establish that Telephone News System was "engaged in the business of betting or wagering,"<sup>11</sup> (emphasis added). The plaintiff merely took horse race results off the United Press International sports printer, transcribed them onto tapes and made the information available without charge to anyone calling its telephone number — which was serviced by seventy trunk lines. Neither the plaintiff nor any of its employees accepted bets or wagers.<sup>12</sup>

In an alternative attempt at making subsection (d) usable, the government tried to establish violation of a federal statute by urging that Telephone News System had caused Illinois Bell to act contrary to the provision of title 47.<sup>13</sup> However, the requirement that the violation be induced "willfully and knowingly" prevented application of the section.

Thus the federal authorities were forced to turn to the Illinois Criminal Code of 1961 to establish a violation. The new Illinois statute provides that a person engages in illegal gambling when he

knowingly transmits information as to wagers, betting odds or changes in betting odds by telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information.<sup>14</sup>

The court rejected the plaintiff's argument that by furnishing the names of horses finishing first, second and third as well as the price or odds paid on the winner it was not transmitting "information as to wagers, betting odds or changes in betting odds." Although commenting that legislative history on the state statute was somewhat sketchy, the court was aided in reaching its decision by statements of the Joint Committee which drafted the revised Illinois Criminal Code. That Committee's report states that the statutory intent was to make it an offense for someone "knowingly to transmit betting information over the telephone" and that the design was "to reach middlemen, agents and other participants in the gambling

11 18 U.S.C. § 1084 (a) (1961).

12 210 F. Supp. at 473.

13 Title 47 of the United States Code contains statutes regulating telegraphs, telephones, and radiotelegraphs. It provides that:

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful . . . or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than \$10,000 or by imprisonment for a term not exceeding one year, or both; . . . 48 Stat. 1100 (1934), 47 U.S.C. 501 (1962).

14 Ill. Ann. Stat. ch. 38 at § 28-1 (a) (10).

racket who might not technically qualify as offenders under other subsections of the article."<sup>15</sup>

The same phrase which prevented application of 18 U.S.C. 1084 (a) in *Telephone News System* rendered the subsection useless in *Kelly* also. Once again neither the publishers of "Illinois Sports News," nor their employees accepted bets or wagers — either by telephone or telegraph or otherwise. Moreover, the plaintiffs escaped the federal statute in another way by qualifying under the proviso for news reporting of sporting events contained in one of the two remaining subsections of 18 U.S.C. 1084.<sup>16</sup>

The government — including the failures in *Telephone News System* and *Kelly* — has been able to successfully apply 18 U.S.C. 1084 (a) only once in the four instances the subsection has been litigated. That was in *United States v. Yaquinta*,<sup>17</sup> where telephone facilities were used to transmit information on horse races from trackside to bookmakers. The principal area of controversy was whether or not the telephone facilities were interstate, since it was not disputed that those using them were "engaged in the business of betting or wagering."<sup>18</sup> As mentioned above, this is the statutory element which enabled persons involved in *Telephone News System* and *Kelly* to escape the federal provision.

Obviously illicit gambling is going to continue to be the chief source of revenue for organized crime<sup>19</sup> as long as the usefulness of subsection (a) is restricted by this clause limiting it to "anyone who is engaged in the business of betting or wagering." This was recognized prior to the *Kelly* and *Telephone News System* decisions. On March 28, 1961, Senator John McClellan, a member of the Permanent Subcommittee on Investigations, submitted an amendment to subsection (a) which,

15 210 F. Supp. at 476.

16 18 U.S.C. at 1084 (b):

Nothing in this subsection shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

The remaining subsection, (c), merely states that the federal government is not preempting the field of antigambling legislation.

The Illinois statute contains no such express proviso as is contained in subsection (b), but this fact worked to the disadvantage — not the advantage — of the government when it tried to prove a violation of the state law. The court refused to be convinced by the argument that the Illinois statute applies to any utilization of telephone, telegraph or other facilities for the transmission of such information. Instead the court concluded that its application must be limited to the transmission of the information to persons having some direct or indirect relation to gambling activities, saying otherwise it would be illegal to carry such information on an established news service or in a newspaper of general circulation. Although it might seem the plaintiff did have an indirect relationship to gambling, the court pointed out that there was no evidence introduced to show "Illinois Sports News" had been put to any illegal use.

17 204 F. Supp. 276 (N.D.W. Va. 1962). The fourth instance in which the statute reached the courts was *United States v. Bergland*, 209 F. Supp. 547 (E.D. Wis. 1962), in which it was ruled that 18 U.S.C. § 1084 could not be used against persons who employed radio and telephone facilities to transmit the results of Arkansas races to others who would place bets with Wisconsin bookmakers after knowing the results. The court's decision was based on the fact that the element of chance was not present and thus the defendants were not engaged in "gambling."

In *United States v. Smith*, 209 F. Supp. 907 (E.D. Ill. 1962), the defendant — who was charged with violating both 18 U.S.C. 1084 and 18 U.S.C. 1952 — filed a number of motions, including one to dismiss the indictment. He charged that 18 U.S.C. 1084 was unconstitutional because: (1) it sets up no ascertainable standard as to its meaning or as to persons within its scope, (2) it concerns a matter which is beyond the scope and authority of Congress, and (3) it violates the first amendment's guarantee of freedom of speech. The court rejected all three arguments and refused to dismiss the indictment.

18 Note 11 supra.

19 108 Cong. Rec. 4779 (1962) (remarks of Senator McClellan).

if enacted, would also prohibit the operation of a wire service for the purpose of disseminating information to places where off-the-track betting is not authorized by state law.<sup>20</sup> This amendment<sup>21</sup> recognizes the fact that the multimillion-dollar gambling operation is so large that the bookmakers themselves do not operate the wire services. Senator McClellan pointed out that "the operation of a wire service is a complete area of activity in itself."<sup>22</sup> Although the amendment was not acted upon by the 87th Congress, Senator McClellan has stated that it is his intention to reintroduce the measure.<sup>23</sup>

Illegal gambling is a big business in the United States. The Senate Committee on the Judiciary conducted hearings through which it discovered that gambling involves about 70,000 persons and a gross volume of \$7 billion annually.<sup>24</sup> The syndicates which control the bulk of this activity are of necessity interstate operations since illegal bookmaking depends on about 20 major racetracks throughout the country — and only a few of these are open at any one time.<sup>25</sup> Yet state laws have many times proved ineffective against gamblers who may live respectable lives in their home state — hundreds of miles away from the heart of their illicit operations.

Achievements such as the new Illinois law on gambling are commendable, but federal legislation is essential if organized crime is going to be met, and defeated, on its own battlefield — the nation in its entirety. Until the amendment submitted by Senator McClellan is adopted, decisions like those in *Telephone News System* and *Kelly* will continue to greatly restrict the usefulness of 18 U.S.C. 1084, leaving only its subsection (d) as a sanction against the all-important middleman in the gambling organization. The Department of Justice has determined that the huge profits obtained from illegal gambling are the primary source of funds financing the activities of organized crime.<sup>26</sup> And almost half of the gambling in this country revolves around betting on horse-race results.<sup>27</sup> It is felt that once 18 U.S.C. 1084 (a) is amended to eliminate the weakness which rendered it useless in *Telephone News System* and *Kelly* organized crime may well have to look elsewhere for operating revenue.

Robert J. Noe

---

20 *Id.* at 4781. Nevada is the only state in which off-the-track betting is legal.

21 S. 3081 (1962).

22 108 Cong. Rec. 4781 (1962) (remarks of Senator McClellan).

23 Letter from Senator McClellan to the Notre Dame Lawyer, March 13, 1963, on file in the Notre Dame Law Library.

24 107 Cong. Rec. 13900 (1961) (remarks of Senator Eastland).

25 *Id.* at 13901.

26 Note 19 *supra*.

27 108 Cong. Rec. 4781 (1962) (remarks of Senator McClellan).