Notre Dame Law Review

Volume 43 | Issue 4 Article 6

1-1-1968

Case Comments

James E. Mackin

Daniel L. Hebert

William J. Hassing

Leo G. Stoff

CASE COMMENTS

FEDERAL INCOME TAXATION — ACCUMULATED EARNINGS TAX — TAX AVOIDANCE MUST BE THE DOMINANT PURPOSE FOR THE ACCUMULATION OF EARNINGS AND PROFITS BY A CORPORATION BEFORE THE ACCUMULATED EARNINGS TAX MAY BE IMPOSED. — The Donruss Company, a corporation owned by a sole shareholder, Donald Wiener, and engaged primarily in the manufacture and sale of bubble gum, accumulated earnings and profits in the amount of $3,318,023.71 for the fiscal years ending January 31, 1960 and January 31, 1961. The Commissioner of Internal Revenue subsequently assessed and collected from Donruss $35,152.91 in accumulated earnings taxes under sections 531-537 of the Internal Revenue Code of 1954. The Commissioner alleged that the taxpayer corporation had been availed of for the purpose of avoiding the income tax with respect to its shareholders. Donruss then brought an action for a refund in the United States District Court for the Western District of Tennessee contending that its accumulations were reasonable.[1] The jury, in answer to special interrogatories,[2] found that the earnings and profits of Donruss were accumulated beyond the reasonable needs of the corporation's business, but they also determined that such accumulations were not retained for the purpose of avoiding the income tax on its sole shareholder. Judgment was then entered for the plaintiff, and the Government appealed to the United States Court of Appeals for the Sixth Circuit, contending that the district court's instructions to the jury concerning the reasons why the taxpayer accumulated its earnings were confusing, erroneous, and prejudicial. The Government argued that the lower court had repeatedly stated[3] that for the penalty tax to be imposed on Donruss avoidance of taxes had to be *the* purpose for the accumulations, whereas, in fact, to sustain the imposition of the tax, the desire to avoid tax on the shareholders need only be *a* purpose for the accumulations. Though it failed to accept the Government's view that tax avoidance need only be *a* purpose, the court of appeals, in reversing and remanding,[4] *held*: sections 531-535 of the Internal Revenue Code cannot reasonably be construed to require that the purpose to avoid income tax be the sole purpose behind an accumulation before the additional tax may be imposed, but tax avoidance

1 Donruss Co. v. United States, 15 Am. Fed. Tax R.2d 896 (1965), *rev'd*, 384 F.2d 292 (6th Cir. 1967). Wiener testified that his corporation desired to purchase stock in its major distributor, Tom Huston Peanut Company, though he admitted the corporation had no fixed and definite plan to spend a certain amount of money for that purpose. Other reasons given for the accumulation of earnings and profits included the possibility of a depression or a war and Wiener's desire to follow in the footsteps of the Wrigley Chewing Gum Company. Brief for Appellant at 3-4, Donruss Co. v. United States, 384 F.2d 292 (6th Cir. 1967).

2 The interrogatories submitted were:

> 1. Did plaintiff corporation permit its earnings or profits for the following years to accumulate beyond the reasonable or reasonably anticipated needs of its business?
>
> 2. Were such accumulations retained by plaintiff corporation for the purpose of avoiding the income tax on its stockholder, Don Weiner [sic]? Donruss Co. v. United States, 15 Am. Fed. Tax R.2d 896, 904 (1965), *rev'd*, 384 F.2d 292 (6th Cir. 1967).

3 *See* Record at 151a, 153a, 154a, 157a, 168a, 169a, 170a.

4 The court agreed with the Government that the district judge's charge was ambiguous and might well have led the jury to believe that tax avoidance must be the sole purpose behind an accumulation.

must be the dominant, controlling, or impelling motive behind an accumulation in order to compel the imposition of the penalty tax.[5] *Donruss Company v. United States*, 384 F.2d 292 (6th Cir. 1967).

The accumulated earnings tax, now imposed by section 531 of the Internal Revenue Code of 1954,[6] has been included in our federal tax structure since the Revenue Act of 1921.[7] Prior to that time, income tax statutes (starting with the Tariff Act of 1913) imposed a direct tax on the shareholders if corporate earnings were unreasonably accumulated to avoid tax on the shareholders.[8] Using the threat of a substantial penalty tax, section 531 forces corporations to distribute appropriately their earnings and profits thereby preventing the corporate form from serving as a convenient means for the avoidance of normal shareholder taxation. Were it not for section 531, corporations could accumulate funds in the corporate accounts so that the shareholders would not receive any taxable dividends. At a later date, the shareholders could possibly take the funds out of the corporation at capital gains rates.[9]

Section 532 was the central point of discussion in *Donruss*. That section states:

> The accumulated earnings tax imposed by section 531 shall apply to every corporation (other than those described in Subsection (b)[10] *formed or availed of for the purpose of avoiding the income tax* with respect to its shareholders or the shareholders of any other corporation, by permitting earnings and profits to accumulate instead of being divided or distributed.[11] (Emphasis added.)

As a practical matter, the penalty tax imposed by section 531 is, in most instances, applicable only to closely held corporations since shareholder tax saving is not likely to be the motive for retention of earnings and profits where stock is widely held in relatively small lots.

The basic controversy essential to almost all section 531 cases is whether an accumulation of earnings and profits is for the reasonable needs of the business. The issue of the reasonableness of an accumulation is important for two

---

5 Having reached this conclusion, the court of appeals found it unnecessary to consider the arguments made by the Government in connection with: 1) its efforts to impeach the jury's verdict, and 2) the district court's denial of a request for a continuance.

6 INT. REV. CODE OF 1954, § 531 states:

> In addition to other taxes imposed by this chapter, there is hereby imposed for each taxable year on the accumulated taxable income (as defined in section 535) of every corporation described in section 532, an accumulated earnings tax equal to the sum of
>
> (1) 27½ percent of the accumulated taxable income not in excess of $100,000 plus
>
> (2) 38½ percent of the accumulated taxable income in excess of $100,000.

7 Revenue Act of 1921, § 220, 42 Stat. 247 (1921).

8 Revenue Act of 1918, § 220, 40 Stat. 1057 (1919); Revenue Act of 1916, § 3, 39 Stat. 758 (1916); Tariff & Revenue Act of 1913, § II(a)(2), 38 Stat. 166 (1913).

9 *See* Comment, 64 MICH. L. REV. 1135 (1966).

10 INT. REV. CODE OF 1954, § 532(b) reads:

> The accumulated earnings tax imposed by section 531 shall not apply to
>
> (1) a personal holding company (as defined in Section 542)
>
> (2) a foreign personal holding company (as defined in section 552), or
>
> (3) a corporation exempt from tax under subchapter F (section 501 and following).

11 INT. REV. CODE OF 1954, § 532(a).

reasons. First, section 533(a) attaches to an affirmative finding of an unreasonable accumulation a presumption that the purpose of shareholder tax avoidance exists. In the absence of a showing to the contrary by the taxpayer, this presumption is determinative of the purpose to avoid the tax. When business needs for the accumulation have been established, the Government has ordinarily conceded defeat; conversely, when the accumulation has been found unreasonable, taxpayers have ordinarily not exercised their right to rebut, by a preponderance of the evidence, the presumption established by this section.[12] Second, section 535(c) allows the taxpayer a credit against its accumulated taxable income for "such part of the earnings and profits for the taxable year as are retained for the reasonable needs of the business."[13]

Though the vast majority of accumulated earnings tax cases "have been won or lost on the battleground of reasonable business needs,"[14] the ultimate test of the applicability of section 531 is the existence of the tax avoidance purpose. The burden of showing the absence of the proscribed purpose rests, in all cases, on the taxpayer. Most often this burden will arise after a determination that the taxpayer has unreasonably accumulated earnings and profits. Although this determination, which under section 533[15] establishes the presumption of tax avoidance, is not usually overcome, the recent decision of *United States v. Duke Laboratories Incorporated*[16] shows that such a result is not impossible to attain. There the court of appeals affirmed a jury finding that, despite an unreasonable accumulation by the corporate taxpayer, the accumulated earnings tax could not be imposed since the purpose of tax avoidance was not present. The jury in *Donruss* reached a similar result, but, as the Government stated on appeal, there was reason to believe that the jurors were confused in their final determination.[17] In a case where no finding has been made as to the unreasonableness of the accumulation, the presumption under section 533 cannot be made, but the taxpayer must still show by a preponderance of the evidence that his purpose was not tax avoidance.[18] The *Donruss* court stated that if the proscribed purpose is present, the tax will be imposed even with the

12 B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS § 6.02, at 219 (2d ed. 1966).

13 INT. REV. CODE OF 1954, § 535(c)(1).

14 B. BITTKER & J. EUSTICE, *supra* note 12, at 219.

15 INT. REV. CODE OF 1954, § 533 states that such a showing of unreasonable accumulations shall be determinative of the tax avoidance purpose unless the corporate taxpayer can then prove to the contrary by a preponderance of the evidence.

16 337 F.2d 280 (2d Cir. 1964).

17 The Government's brief stated that after the verdict in favor of the taxpayer had been returned, the attorney for the Government was congratulated by one of the woman jurors on winning the case. She stated that the jurors were confused by the instructions of the court and thought the second interrogatory as to the purpose question was surplusage and not a part of the dispute between the parties. The clerk of the district court also stated that a male juror had told him, "We decided it in the Government's favor." Upon reading newspaper accounts of the taxpayer's victory, the male juror called the clerk and told him that the jurors had intended to decide in the Government's favor and that they had not understood the second interrogatory. Another juror called the clerk to make similar statements. Brief for Appellant at 6, 7, Donruss Co. v. United States, 384 F.2d 292 (6th Cir. 1967).

18 *See* Commissioner v. Young Motor Co., 316 F.2d 267, 271-72 (1st Cir. 1963). In such a case, it appears that the taxpayer may still offer evidence of reasonableness as the most persuasive evidence. *See* Comment, 54 CALIF. L. REV. 1050, 1067 (1966).

showing of reasonable accumulations.[19] However, the tax credit allowed by section 535 on those accumulations shown to be reasonable would seem to bail out any corporation accumulating such amounts for the tax avoidance purpose.[20]

Within the issue of tax avoidance purpose, the specific question presented by the *Donruss* case concerns the quantum of tax avoidance motive necessary to impose the penalty tax. Must the purpose to avoid taxes be the sole reason for the accumulation of earnings, the dominant reason for them, or merely one reason for their accumulation? The proper determination of this question is of the utmost importance since, if the taxpayer can be allowed to prove valid business reasons for his accumulations so as to render the purpose of tax avoidance incidental to them, he may effectively ward off the penalty tax; but if he must prove a complete absence of the proscribed purpose, his burden of proof will be most difficult and seemingly impossible in light of the determination of the unreasonableness of his accumulation and the invocation of the section 533 presumption.

The statutory language of section 532 presents no express direction as to how much purpose is required. From the Revenue Act of 1921 to the present Code provision, the substance of the language has remained unchanged — "formed or availed of for the purpose of avoiding the income tax with respect to its shareholders . . . ."[21] One fails to find any congressional comment on what the words "the purpose" are to mean. There has also been a noted lack of judicial concern over the question and those few courts that have selected one standard or test over another have often failed to articulate their rationale.

There has been no suggestion from the courts that have considered the question that the statute must be read to require that the purpose to avoid income tax be the "sole purpose" behind an accumulation before the tax can be imposed.[22] Such a standard would allow a taxpayer to defeat the Government's case by even the smallest showing of a legitimate business motive for his accumulations. The *Donruss* court recognized the more critical choice to be whether the Code sections require that tax avoidance be the "dominant purpose" behind the accumulation, or simply "a" reason for it.[23]

The pro-Internal Revenue "a" or "one purpose" test received Supreme Court support in 1943 from the language used by Justice Roberts in *Helvering v. Chicago Stock Yards Company*.[24] In upholding a finding by the Board of Tax Appeals that the Chicago Stock Yards Company had been availed of for the purpose of avoiding income tax, the Court stated:

> A corporate practice adopted for mere convenience or other reasons, and without tax significance when adopted, may have been continued with the additional motive of avoiding surtax on the stockholders. The Board's

19 Donruss Co. v. United States, 384 F.2d 292, 294 (6th Cir. 1967).
20 *See* Comment, *supra* note 18, at 1063. *See generally* 7 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 39.25 (Zimet rev. 1967).
21 INT. REV. CODE OF 1954, § 532(a).
22 Most recently in Henry Van Hummell, Inc. v. Commissioner, 364 F.2d 746, 750 (10th Cir. 1966), *cert. denied*, 386 U.S. 956 (1967) the court said: "We have held that the avoidance purpose need not be the sole purpose."
23 Donruss Co. v. United States, 384 F.2d 292, 296 (6th Cir. 1967).
24 318 U.S. 693 (1943).

> conclusion may justifiably have been reached in the view that, *whatever the motive when the practice of accumulation was adopted, the purpose of avoiding surtax induced, or aided in inducing, the continuance of the practice.*[25] (Emphasis added.)

The Second Circuit in the case of *Trico Products Corporation v. Commissioner*[26] relied on the above statement in *Chicago Stock Yards* and held that, despite evidence of the corporation's attempt to build up the book value of its stock and bolster its business position, the accumulation was unreasonable, and the tax should be imposed because the tax avoidance purpose need not be shown "to have been the dominant factor behind the accumulation."[27]

More recently, the Fifth Circuit in *Barrow Manufacturing Company v. Commissioner*[28] stated its adherence to the "one purpose" rule when, having found that the petitioner was availed of for the purpose of avoiding taxes, it said: "There was no error in failing to go further and find that that was the primary or dominant purpose of the accumulation."[29] The *Barrow* court reasoned that the utility of the presumption arising from the accumulation of earnings or profits beyond the reasonable needs of the business would be "destroyed if that presumption in turn is saddled with requirement of proof of 'the primary or dominant purpose' of the accumulation."[30]

The "dominant purpose" test was announced by the First Circuit in *Young Motor Company v. Commissioner*[31] where the court reversed the trial court's holding that section 531 will apply so long as the purpose of tax avoidance exists, even though accompanied by other legitimate business objectives. The First Circuit stated:

> The [tax] court discussed at some length that taxpayer, being controlled by Young, must be taken to have known that declaring dividends would increase Young's surtaxes—a proposition scarcely requiring argument. If knowledge of such a result is to be the test of purpose, then the only corporations that could safely accumulate income would be those having stockholders with substantial net losses. The statute does not say "a" purpose, but "the" purpose. The issue is not what are the necessary, and to that extent contemplated consequences of the accumulation, but what was the primary or dominant purpose which led to the decision. . . . The Tax Court's test was altogether too favorable to the government.[32]

Though the distinction between proving "a" purpose of tax avoidance and the "dominant" purpose is clear, and the advantage of the latter standard to the taxpayer readily apparent, the issue has become semantically complicated by the pronouncement from several circuits of a seemingly intermediary standard. The Tenth Circuit in *World Publishing Company v. United States*[33] said

25 *Id.* at 699.
26 137 F.2d 424 (2d Cir.), *cert. denied,* 320 U.S. 799 (1943).
27 *Id.* at 426.
28 294 F.2d 79 (5th Cir. 1961), *cert. denied,* 369 U.S. 817 (1962).
29 *Id.* at 82.
30 *Id.*
31 281 F.2d 488 (1st Cir. 1960).
32 *Id.* at 491.
33 169 F.2d 186 (10th Cir. 1948), *cert. denied,* 335 U.S. 911 (1949).

"such [tax avoidance] purpose need not be the sole purpose behind the accumulation. It is sufficient if it is one of the determining purposes."[34] Similarly, the Eighth Circuit in *Kerr-Cochran v. Commissioner*[35] cited both *World Publishing* and the Second Circuit's *Trico Products* decision for the proposition that the sole purpose of tax avoidance need not exist, but rather tax avoidance must be one of the determinating purposes.[36] Though these two decisions would seem to present only a semantic difference between the "dominant" and "determinating" purpose tests, two recent district court cases seem to have established a real distinction between the two standards. In *E-Z Sew Enterprises, Incorporated v. United States*[37] the court stated that "the forbidden purpose need not be the sole, primary or dominant purpose of the accumulation . . . but '[i]t is sufficient if it is *one* of the determining purposes.' "[38] In *Fenco, Incorporated v. United States*[39] the court found that the taxpayer had failed to prove that the avoidance of income tax was not its "determinating" purpose, and found, in fact, that it was its primary and dominant purpose.[40] The extent to which a jury considering an accumulated earnings tax case is likely to distinguish between a "determinating" and a "dominant" purpose is a question yet to be decided.

In opting for the "dominant purpose" standard, the *Donruss* court thoroughly reviewed the existing judicial constructions of the statute. Early in its consideration of the disputed authorities, the *Donruss* court discarded the "sole purpose" test as an unreasonable construction of the statute.[41] It recognized that the source of the "one purpose" theory rests with the previously quoted language of Justice Roberts in *Chicago Stock Yards* and proceeded to strike a blow at that theory by attacking its source:

> The Court's language clearly implies that the purpose to avoid income tax need not be the sole purpose behind an accumulation in order for the additional tax to be imposed. However, it would greatly strain the Court's remarks to conclude that on so employing the parenthetical phrase "or aided in inducing," it was considering the important question here posed, that is to say, whether the purpose to avoid income tax need be the dominant, controlling, or impelling purpose.[42]

In quoting extensively from the *Young Motor Company* decision, the *Donruss* court appears to rely heavily on the First Circuit as authority for the "dominant purpose" standard, though the court refused to rest its decision solely on the *Young* rationale that the statute reads "the" rather than "a" purpose. Rather, the court in *Donruss* offered analogies from two other instances "where motivation is the relevant consideration in determining the tax consequences

34 *Id.* at 189.
35 253 F.2d 121 (8th Cir. 1958).
36 *Id.* at 123.
37 260 F. Supp. 100 (E.D. Mich. 1966).
38 *Id.* at 120.
39 234 F. Supp. 317 (D. Md. 1964), *aff'd per curiam*, 348 F.2d 456 (4th Cir. 1965).
40 *Id.* at 326-27.
41 Donruss Co. v. United States, 384 F.2d 292, 296 (6th Cir. 1967).
42 *Id.* at 297.

of an individual's conduct."[43] One such instance is section 2035 of the Internal Revenue Code regarding the transfer of property in contemplation of death which has the effect of making such property includible in the gross estate of a decedent. Though the statutory language there provides no clear answer to the question of how much intent is decisive, the courts have held that the death motive must be the dominant, controlling, or impelling reason behind the transfer in order for it to be deemed a transfer in contemplation of death.[44] The second analogy is to the transfer of property as a gift, which under section 102(a) of the Code is not includible in the donee taxpayer's gross income. In construing this section of the Code, the Supreme Court stated in *Commissioner v. Duberstein*[45] that "the proper criterion . . . is one that inquires what the basic reason for his conduct was in fact — the dominant reason that explains his action in making the transfer."[46]

The adoption of the "dominant purpose" standard appears to be the most sensible solution to this perplexing problem. The *Chicago Stock Yards* language relied on by the "one purpose" advocates was not selected to announce the choice of a particular standard. Rather, it was used to show that the corporation involved, though formed and carrying on its accumulation policies long before the accumulated earnings tax was enacted and thus created without intent to avoid the tax, could subsequently be deemed guilty of tax avoidance.

The *Donruss* court did not answer the challenge offered by the Fifth Circuit in *Barrow Manufacturing* that the utility of the section 533 presumption of tax avoidance would be destroyed by requiring further proof that tax avoidance was the dominant purpose for the accumulation. The substance of such an argument appears weak. Section 533 seems to speak for itself in stating that a showing of an unreasonable accumulation "shall be determinative of the purpose to avoid the income tax . . . ."[47] If the key statutory words in section 532, "for the purpose of avoiding the income tax with respect to its shareholders,"[48] are interpreted to mean the dominant purpose, consistency of interpretation would require that the section 533 presumption establish the "dominant purpose" of tax avoidance. Such a presumption will then be determinative of the issue unless the taxpayer is able to rebut the presumption by showing tax avoidance was not his dominant purpose in accumulating.

Though the First Circuit in *Young Motor Company* may have had justification in reasoning that the words "the purpose" in section 532 were more favorable to the "dominant purpose" theory than the "one purpose" position, this rationale appears to be a rather tenuous touchstone. Actually, when one chooses between the "dominant" or "sole" purpose tests, the words "the purpose" would seem more favorable to the latter interpretation. The *Donruss* court wisely refused to rest its decision on the absence of the word "a" from the statute. Its reliance

43 *Id.*
44 Allen v. Trust Co., 326 U.S. 630, 636 (1946); City Bank Farmer's Trust Co. v. McGowan, 323 U.S. 594, 599 (1945); United States v. Wells, 283 U.S. 102, 118 (1931).
45 363 U.S. 278 (1960).
46 *Id.* at 286.
47 INT. REV. CODE OF 1954, § 533(a).
48 INT. REV. CODE OF 1954, § 532(a).

on the analogous judicial construction of the previously discussed gift and estate tax sections is most lucid, since in all three cases the underlying purpose of the statute is the prevention of tax avoidance. None of the statutes has set up an express requirement as to the quantum of proscribed purpose which must be present in order for the tax consequences to attach. The courts have been left to fashion this requirement as they please.

There are still other reasons for choosing the "dominant purpose" test over the other possible interpretations. One need only consider the changes in the 1954 Code to uncover the tenor of the times. The Senate report accompanying the bill introducing the 1954 Code[49] noted that the 1939 Code sections resulted in several undesirable consequences: 1) the Commissioner asserted deficiencies in many cases which were not adequately analyzed; 2) the Commissioner used the threat of the accumulated earnings tax to induce settlement of other issues; 3) the taxpayers were put to substantial expense and effort in proving that the accumulation was for the reasonable needs of the business; and 4) many small taxpayers yielded to a proposed deficiency rather than litigate their case under the existing rules.[50] To minimize the threat of unfair taxation of earnings accumulated for legitimate business purposes. Congress enacted two sections that have come to the aid of "accumulating corporations." Section 534 now permits the taxpayer to shift the burden of proof to the Commissioner on the issue of the reasonableness of the accumulation.[51] Section 535 insures that no tax will be imposed if earnings are not accumulated beyond the reasonable needs of the business.[52] As previously mentioned, this section would seem applicable whether or not the requisite tax avoidance purpose is present.[53] If the congressional purpose in enacting these sections was to alleviate former grievances of the taxpayer by allowing him safely to accumulate earnings for valid business reasons, it is consistent with this interest to establish the "dominant purpose" test as a further protection for the accumulating corporation.

Until recently, the court decisions have failed to articulate any policy considerations limiting the accumulated earnings tax that would be equivalent in importance to the anti-tax avoidance policy underlying the tax. Noting this fact, one commentator has stated that the threat of a section 531 deficiency and the expense in time and money spent in fighting that threat have been important factors inducing closely held corporations to sell out to public corporations.

> The shareholder-officers of a closely held business were aware that by selling a substantial percentage of their stock to the public, or to a public corporation, they achieved practical immunity from section 531.

49 S. REP. No. 1622, 83d Cong., 2d Sess. (1954).
50 *Id.* at 70.
51 Prior to this enactment, the taxpayer had the burden of proof on all issues with regard to the accumulated earnings tax.
52 Thus, if a portion of a corporation's undistributed earnings for the taxable year is accumulated for the reasonable needs of the business, the tax will only be imposed on the balance.
53 *See* note 20 *supra* and accompanying text.
54 Electric Regulator Corp. v. Commissioner, 336 F.2d 339 (2d Cir. 1964).

> In its 1964 Electric Regulator decision,(54) the Second Circuit took note of this effect of the accumulated earnings tax as a factor pushing closely held corporations into the arms of large public entities. In this respect, the court said, an arbitrary and unduly restrictive construction of the accumulated earnings tax would thwart the purposes of the antitrust laws.[55]

Considerations such as this lend further support to the "dominant purpose" test.

The *Donruss* case is a good example of the confusion that surrounds the two key issues — reasonableness of accumulation and tax avoidance purpose — in the typical accumulated earnings case. Most frequently, the emphasis at trial has been placed on the issue of reasonableness because of the presumption of tax avoidance available to the Government, the tax credit obtainable by the taxpayer, and the fact that the issue lends itself to a solution by reference to objective facts. But in all situations the final determinative of the tax — the tax avoidance purpose — must be established. The *Donruss* decision has brought to the forefront the issue of the amount of purpose necessary. In any solution of this question, two interests must be balanced — the close corporation's need to stimulate reinvestment free from the fear that all its accumulations are in jeopardy, and the Government's need to control actual tax avoidance schemes. The 1954 provisions of the Internal Revenue Code attempted to balance these interests; the "dominant purpose" test expounded in *Donruss* is consistent with this effort, and consonant with today's business realities.

James E. Mackin

LABOR LAW — COUNSEL FEES INCURRED BY AN INDIVIDUAL UNION MEMBER IN PURSUIT OF HIS RIGHTS HELD TO BE AN ALLOWABLE AWARD UNDER SECTION 102 OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT. — On June 24, 1963, Robert Gartner instituted a proceeding in the United States District Court for the Eastern District of Pennsylvania, naming as defendants the American Bakery and Confectionery Workers International Union, AFL-CIO, Local 492, Jack Soloner, the union's president, and Robert C. Brennan, the secretary-treasurer.[1] The litigation was a "result of the plaintiff's militancy in opposing what he consider[ed] the 'dictatorial' leadership of his Local Union,"[2] which militancy and its inevitable personality clashes had occasioned Gartner's being fined and suspended from the defendant union. When the Union International rejected Gartner's appeal for reinstatement, he turned to the courts for injunctive relief and also monetary damages in the form of counsel fees and other expenses incurred in the pursuit of his rights. He based his claim upon section 102 of the Labor-Management Reporting and Disclosure Act of 1959[3] [LMRDA or the Act] which provides for the enforcement of various

55 Ziegler, *The "New" Accumulated Earnings Tax: A Survey of Recent Developments*, 22 TAX. L. REV. 77, 121 (1966).

1 *See* Gartner v. Soloner, 220 F. Supp. 115 (E.D. Pa. 1963), *aff'd in part, rev'd in part*, 384 F.2d 348 (3d Cir. 1967).

2 *Id.* at 118.

3 29 U.S.C. §§ 401-531 (1964).

rights enumerated in the Act. The district court sustained his claims, finding the Union's action to be both an abridgment of the union member's right of free speech and assembly guaranteed in section 101(a)(2)[4] and a violation of the Act's prohibition of certain forms of intraunion discipline provided in section 609.[5] Thereupon, the district court issued a preliminary injunction ordering Gartner's reinstatement to full membership rights, pending a hearing. The court issued a permanent injunction in favor of Gartner on April 18, 1966. However, Gartner's prayer for money damages was rejected, the district judge concluding that counsel fees could not be awarded under section 102. Gartner then filed an appeal from this latter determination with the United States Court of Appeals for the Third Circuit. The circuit court, while affirming the balance of the district court's judgment, remanded the question of counsel fees. Speaking through Judge McLaughlin, Judge Nealon dissenting, the court of appeals *held:* the federal district courts have the discretionary power under section 102 of the LMRDA to award reasonable counsel fees to a union member or members who have in good faith, pursued their rights under title I of the Act. *Gartner v. Soloner,* 384 F.2d 348 (3d Cir. 1967).

The LMRDA was adopted in 1959 as a congressional recognition of the need for federal regulation in order to eliminate "breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct"[6] in labor unions. Instances of abuse found by congressional investigation, especially those conducted by Senator McClellan's Labor and Racketeering Committee, emphasized the need to protect rank-and-file union members against the tyranny of their own leaders.[7] Congress responded to this need by including in section 101[8] of the LMRDA an enumeration of the rights possessed by the rank-and-file union member. Section 101 includes a declaration of equal rights, a guarantee of freedom of speech and assembly, the regulation of dues and assessments, a provision for protection of a member's right to sue his union, and safeguards against improper disciplinary actions.

While each of these provisions provided fuel for a great deal of floor debate and outside comment in both Houses,[9] an equal amount of congressional controversy centered about the enforcement provision. Senator McClellan's original proposal gave the Secretary of Labor power to initiate complaints on behalf of aggrieved union members,[10] but many critics of this proposal feared that bureaucratic chaos would result from its adoption. Senator Kuchel proposed an amendment which "takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts."[11] His basic

4 29 U.S.C. § 411(a)(2) (1964).
5 29 U.S.C. § 529 (1964).
6 73 Stat. 519 (1959), 29 U.S.C. § 401(b) (1964).
7 Goldwater, *The Union Member as a Person,* 40 U. DET. L.J. 179, 186 (1962).
8 29 U.S.C. § 411 (1964).
9 *See* Hickey, *The Bill of Rights of Union Members,* 48 GEO. L.J. 226 (1959); O'Donoghue, *Protection of a Union Member's Right to Sue Under the Landrum-Griffin Act,* 14 CATHOLIC U.L. REV. 215 (1965).
10 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, vol. II, at 1102 [hereinafter cited as LEGISLATIVE HISTORY].
11 *Id.* at 1233 (remarks of Senator Clark commenting on the Kuchel proposal).

suggestion, with some modification, particularly the parenthetical insertion "including injunctions," was ultimately included as section 102 of the Act which reads in pertinent part:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. . . ."[12]

To formulate a general rule concerning the question of whether section 102's vague criterion of "appropriate" relief includes the recovery of counsel fees is a difficult task due to the relative dearth of cases which have dealt with the question and to the uniqueness of the situations presented in those few cases.[13] However, it appears that if any general rule can be evolved from previous federal decisions, it has been controverted by the court in *Gartner*. While Judge McLaughlin's premise that "[r]eimbursement for legal costs is proper only if the power to bestow such relief is invested in the courts under Section 102"[14] typifies the issue formulation of the previous cases, the broad result reached by the Third Circuit in *Gartner* is certainly untypical of the results of those earlier decisions which have either generally denied[15] or only cautiously allowed[16] such relief.

The cases denying such relief have turned to the legislative history of the Act for support. For example, the Federal District Court of Connecticut in *Vars v. International Brotherhood of Boilermakers*[17] felt that Congress had intentionally excluded such allowances. Great reliance was placed upon a dissenting House Report which pointed out that one of the serious inadequacies in the enforcement provision was the fact that an individual union member was apparently saddled with the burden of his own legal costs should he attempt to enforce his rights against union officers who have the resources of the union at their disposal.[18]

The Eastern District Court of Tennessee in *McCraw v. United Association of Journeymen and Apprentices of Plumbing*[19] was persuaded by remarks of Senator Goldwater[20] to conclude that the legislative history of the LMRDA militated against the recovery of counsel fees. The Sixth Circuit affirmed, find-

12 73 Stat. 523 (1959), 29 U.S.C. § 412 (1964).
13 For a list of these cases, see Annot., "Prevailing Union Member's Right To Recover Attorneys' Fees in Action Against Union or Union Officers," 9 A.L.R.3d 1045 (1966).
14 Gartner v. Soloner, 384 F.2d 348, 354 (3d Cir. 1967).
15 Cole v. Hall, 35 F.R.D. 4, 8 (E.D.N.Y. 1964); McCraw v. United Ass'n of Journeymen and Apprentices of Plumbing, 216 F. Supp. 655, 664 (E.D. Tenn. 1963), *aff'd*, 341 F.2d 705 (6th Cir. 1965); Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943 (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963) (issue of fees not mentioned on affirmance).
16 Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963).
17 215 F. Supp. 943 (D. Conn. 1963).
18 *Id.* at 952.
19 216 F. Supp. 655 (E.D. Tenn. 1963).
20 *Id.* at 664 n.3. The Senator's views are reported in LEGISLATIVE HISTORY, *supra* note 10, at 1280-93. In commenting on the Kennedy-Ervin bill (a forerunner to the enacted Landrum-Griffin bill) Senator Goldwater remarked: "Moreover, the bill does not grant him, even where successful in his suit, reasonable counsel fees or other costs." *Id.* at 1281.

ing "that no provision is made for the allowance of attorney's fees in an action under Section 101 or 102 of the Act . . . ."[21]

Again, in *Cole v. Hall*,[22] the Eastern District Court of New York found no basis for a claim of attorney fees under the LMRDA. While the court relied upon *Vars* and *McCraw*, it also found a congressional intent to omit such relief in title I actions because such allowances had been specifically provided for in other areas of the Act.[23]

In *Johnson v. Nelson*,[24] the Eighth Circuit allowed recovery of attorney fees that had been recommended by a Special Trial Board elected by the membership of the local union and approved by a vote of the union membership. While Judge McLaughlin would minimize the factual distinctions between *Gartner* and *Johnson*, his exuberant statement that the case "lends solid support to appellant's position"[25] should be tempered somewhat by the Eighth Circuit's warning that it was "by no means announcing a rule requiring payment of attorneys' fees to successful union member litigants in every Title I court proceeding — regardless of the circumstances."[26]

Undaunted by such seemingly formidable opposition, Judge McLaughlin set forth to make his own determination as to how "relief . . . as may be appropriate" should be interpreted so as best to effectuate the protection of the individual union member, the expressed objective of the LMRDA in general, and section 102 in particular. Representative Arends of Illinois once remarked that

> [t]he enactment of the Landrum-Griffin bill [LMRDA] will be a constructive step, *not just a meaningless gesture*, toward bringing democracy into the labor union movement. *It will provide protection* to the individual workingman in his individual rights.[27] (Emphasis added.)

The whole tenor of Judge McLaughlin's opinion is that these noble purposes of the Act must not be emasculated by forcing the prohibitive costs of attorney fees upon the rank-and-file wage earner who attempts to enforce his title I rights by a suit under section 102.

Considering the existing case law, Judge McLaughlin astutely observed: "It does not seem that to date the legislative intent in the LMRDA as to counsel fees has been closely examined, indeed the specific language of Section 102, if anything, has been unwarrantably circumscribed."[28] He found some supporting legislative history by going directly to the source, *i.e.*, the views of the sponsors of similar bills. He found cogent support in the remarks of Representative Elliott who submitted a bill to the House which, while it was not ultimately adopted, contained enforcement provisions practically the same as

21 McCraw v. United Ass'n of Journeymen and Apprentices of Plumbing, 341 F.2d 705, 710 (6th Cir. 1965).
22 35 F.R.D. 4 (E.D.N.Y. 1964).
23 *Id.* at 8. The court in *Cole* pointed to § 501(b) of the LMRDA, 29 U.S.C. § 501(b) (1964) (concerning actions for violations of fiduciary duties by union officers) as an example.
24 325 F.2d 646 (8th Cir. 1963).
25 Gartner v. Soloner, 384 F.2d 348, 351 (3d Cir. 1967).
26 Johnson v. Nelson, 325 F.2d 646, 654 (8th Cir. 1963).
27 LEGISLATIVE HISTORY, *supra* note 10, at 1634.
28 Gartner v. Soloner, 384 F.2d 348, 351 (3d Cir. 1967).

those ultimately included in the LMRDA.[29] Representative Elliott stated: "The court's jurisdiction '. . . to grant such other and further relief as may be appropriate' *gives it a wide latitude to grant relief according to the necessities of the case.*"[30] (Emphasis added.) Considering the Landrum-Griffin bill itself, Representative O'Hara of Michigan pointed out that "[t]hese rights are enforced effectively and fairly by civil actions in the Federal courts. In such suit the court can award money damages to compensate *any loss* suffered by a member through denial of any of the enumerated rights."[31] (Emphasis added.) While recoveries under section 102 have included only those directly and proximately resulting from violations of the Act,[32] Judge McLaughlin logically deduced that "the litigation costs borne by a union member who successfully asserts his rights under Title I is not collateral to but directly results from a violation of that member's rights by the union."[33]

The court in *Gartner* concluded from the purposely general language used that Congress was seeking to afford every protection to the individual union member. In light of this purpose, the majority felt that "the scope of authority under Section 102 and the flexibility with which that power may be exercised is practically unlimited in view of the courts legal and equitable jurisdiction."[34] To this end, Judge McLaughlin quoted with approval from the Fourth Circuit's decision in *Simmons v. Avisco, Local 713, Textile Workers Union*:[35]

> The parenthetic specification of the words "including injunctions" must have been designed to broaden the possible relief to include the equitable remedy, but it cannot be construed to dislodge other forms of relief such as the award of damages where appropriate. The "civil action" which the statute authorizes embraces legal as well as equitable remedies. There is no justification for a narrower construction.[36]

In dissent, Judge Nealon was convinced that the majority had stretched the language of section 102 beyond its true import. Proceeding from the premise that "[o]rdinarily, counsel fees are not recoverable as damages or taxable as costs,"[37] he agreed with the majority's position that such reimbursement is proper only if Congress has invested the courts with such power. Following the reasoning of *Cole v. Hall*,[38] he cited two examples in the LMRDA where Congress

---

29 "[H]e [the union member] 'may bring a civil action in any district court of the United States having jurisdiction . . . to prevent and restrain such violation . . . and the court shall have power to grant such other and further relief as may be appropriate.'" LEGISLATIVE HISTORY, *supra* note 10, at 1584.

30 LEGISLATIVE HISTORY, *supra* note 10, at 1584.

31 *Id.* at 1632.

32 Simmons v. Avisco, Local 713, Textile Workers Union, 350 F.2d 1012 (4th Cir. 1965) (mental anguish); Farowitz v. Associated Musicians, Local 802, 241 F. Supp. 895 (S.D.N.Y. 1965) (punitive damages); Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943, (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963) (strike benefits). *Cf.* Burris v. International Bhd. of Teamsters, 224 F. Supp. 277 (W.D.N.C. 1963) (punitive damages not allowed).

33 Gartner v. Soloner, 384 F.2d 348, 352 (3d Cir. 1967).

34 *Id.* at 354.

35 350 F.2d 1012 (4th Cir. 1965).

36 *Id.* at 1019.

37 Gartner v. Soloner, 384 F.2d 348, 356 (3d Cir. 1967) (dissenting opinion).

38 35 F.R.D. 4 (E.D.N.Y. 1964).

specifically authorized payment of counsel fees,[39] and he weighed the fact that similar language was not employed in the enforcement provision of title I. He emphasized the enforcement provisions of title II and title III of the LMRDA[40] in which the specific inclusion of counsel fees is conspicuously absent. He further maintained that the only reason for changing the original proposal of allowing the Secretary of Labor to bring the actions was a fear of bureaucratic chaos. He concluded that Congress never considered counsel fees as coming within the gambit of the remedies provided for by "such relief . . . as may be appropriate," but rather intended to carry over into the new provision only such relief as would have been possible had the Secretary initiated the action, it being his opinion that such reimbursement would not be available to the Secretary.[41]

Even in view of this short but pointed dissent, the fact remains that Judge McLaughlin has gathered impressive support for his assertion of an unlimited legal and equitable power to be exercised by the federal courts in administering section 102. More importantly, he met the question of whether the award of counsel fees is properly within the prerogative of even such an all-inclusive power. Addressing itself to this latter point in a similar context in *Fleischmann Distilling Corporation v. Maier Brewing Company*,[42] the United States Supreme Court recognized that limited exceptions have developed to ease the "American Rule" that counsel fees are not generally recoverable. The Court reiterated the point that such exceptions "have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result."[43] It is apparent that federal courts are free to use an assortment of tools in implementing the ancient maxims of equity and granting relief according to the necessities of each particular case. Justice Frankfurter once specified that "[a]llowance of such costs [counsel fees] in appropriate situations is part of the historic equity jurisdiction of the federal courts."[44]

Assessment of the impact of *Gartner* must be couched in terms of the urgency of the evil to be eradicated and the effects of the remedy urged. These elements will determine if the case of a union member seeking to vindicate his rights is indeed an "appropriate situation" where "overriding considerations of justice" compel the award of counsel fees. While the suggestion that such awards are inherently difficult to determine would seem spurious in view of the sophisticated methods for determining even the most subtle elements of tort damages, the fear that an expansion of the exceptions in one area might lead to the general practice of awarding counsel fees as an ordinary element of

39 LMRDA § 201(c), 29 U.S.C. § 431(c) (1964) (concerning violations of the reporting provisions of title II); LMRDA § 501(b), 29 U.S.C. § 501(b) (1964) (concerning violations of title V by shop stewards and union representatives).

40 LMRDA § 210, 29 U.S.C. § 440 (1964) (enforcement provision of title II); LMRDA § 304(a), 29 U.S.C. § 464(a) (1964) (enforcement provision of title III).

41 Gartner v. Soloner, 384 F.2d 348, 357 (3d Cir. 1967) (dissenting opinion).

42 386 U.S. 714 (1967).

43 *Id.* at 718.

44 Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939).

damage awards[45] deserves some comment. It was suggested in *Fleischmann* that such an expansion might have a deleterious effect quite opposite that perceived by the majority in *Gartner,* in that the possibility of being liable for another's attorney fees might discourage a person from defending or prosecuting a lawsuit asserting legitimate but uncertain claims.[46] While this fear might be realized were recovery of counsel fees to become a general rule, its particular relevance does not militate a contrary result in *Gartner.* First, the court in *Gartner* is dealing with a specific area — union-member relations — an area plagued with unique problems and possibilities of abuse. It is not advocating a general revamping of damage law, and the special questions arising in these cases would carry little precedental influence into other areas. Second, the court recognized the necessity of confining such relief to "appropriate" cases, rather than advocating a general rule in one direction or the other. The court in *Gartner* is merely acknowledging what it perceives to be its already existent equitable power.[47] Thus, it could be ventured that the effects of *Gartner* will be limited to similar circumstances and will not signal a realization of the fears of wholesale revision.

Concerning the urgency of the evil to be eradicated, Judge McLaughlin expressed a fear that "stark reality might slam the door in [the individual union member's] face when confronted with the insurmountable obstacle of prohibitive legal expenses."[48] While it cannot be denied that the individual union member faces many problems when pitted against the organized resources of a powerful union, it has been pointed out that most of the litigated cases are not lonely individual efforts, but are instead related to the power struggles between intraunion political factions.[49] Where such is the case, the burden of costs is eased by the pooling of resources and by the more ready accessibility of legal services. Even where the grievance being aired is primarily that of an individual, there is often an active opposition group within the union that will seize upon any substantial injustice as ammunition for its political guns.[50] Usually, such financial backing is publicly claimed by the faction, but discretion may at times dictate silence, with the result that the suit is maintained ostensibly by the individual. While discovery of such assistance might well lead a court to hold a particular case not to be an "appropriate" situation for the award of litigation costs, this same group activity might be seized upon as evidence of the abuses that accentuate the desirability of according relief as the particular circumstances demand. "The very fact that so few cases involve individuals unsupported by factional groups suggests that the lone member's rights go by default . . . ."[51]

---

45 For a brief critical analysis of this phenomenon and the so-called "English Rule," see Stoebuck, *Counsel Fees Included in Costs: A Logical Development,* 38 U. COLO. L. REV. 202 (1966). For a general treatment of the area, see C. MCCORMICK, DAMAGES, §§ 60-71 (1935).

46 Fleischmann v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967).

47 *See* note 44 *supra* and accompanying text.

48 Gartner v. Soloner, 384 F.2d 348, 355 (3d Cir. 1967).

49 *See* Summers, *The Law of Union Discipline: What the Courts Do in Fact,* 70 YALE L.J. 175, 220-24 (1960).

50 *See id.* at 222.

51 *Id.*

Another simple, straightforward problem is posed by the "stark reality" referred to by Judge McLaughlin. The relatively rare occurrence of substantial money damages in this type of case makes it impossible for most rank-and-file members to assure counsel that there will be any remuneration, win or lose. The end result found by one writer was that "many lawyers admitted that they would not take a case unless it was backed by a substantial group."[52] Thus, it appears that an aggrieved member, even where the likelihood of his claim prevailing is substantial, is required to sit on his claim or to align himself with the often radical and unsavory minority opposition groups. The assurances desired by counsel that their services will not be totally gratuitous is only a human reaction and once again emphasizes the necessity of relief particularized to the necessities of each case.

The fact that the individual suit seems to be the exception rather than the rule, the apparent availability of group support, and the inherent difficulty of ferreting out secret financial supporters should not conceal the obvious necessity for requiring a guilty union to indemnify a member who is forced into litigation to protect his guaranteed rights. The proper tools are available for confining allowance of fees to "appropriate" cases, thereby avoiding the danger of subsidizing radical elements. Failure to provide the member with practical access to the courts would not only frustrate the Act's purpose of granting additional rights to the union member, but would in fact deprive such members of many of the rights which they have traditionally exercised.[53] An unscrupulous union could vitiate the rights of dissidents, secure in the realization that such individual members would be unable to bear the burdens of litigation. Few union members have the wherewithal to make the heroic sacrifices that have previously been necessary to defeat a union's effort to deprive members of their fundamental rights. Recognizing how the union permeates the entire lives of the members, the Third Circuit in *Gartner v. Soloner* has taken a giant stride in relieving the member of such sacrifices by rendering the enforcement guarantees of section 102 more practically and readily available.

Daniel L. Hebert

FEDERAL TAXATION — COVENANTS NOT TO COMPETE — A PARTY TO AN AGREEMENT CAN CHALLENGE THE TAX CONSEQUENCES OF THE SPECIFIC ALLOCATIONS IN THE AGREEMENT ONLY BY ADDUCING PROOF THAT WOULD NEGATE THE AGREEMENT IN AN ACTION BETWEEN THE PARTIES.—The stockholders in the Butler County Loan Company solicited offers to purchase their stock in the business. On November 2, 1959, the Thrift Investment Corporation offered in writing to pay $374 per share for all the common stock and the stockholders' covenants not to compete in the Butler, Pennsylvania area. Three days later, Thrift forwarded to the president of the loan company copies of the proposed agreement of purchase and copies of the non-competition agreement. The proposed covenant not to compete contained a blank representing that part of the $374 per

52 *Id.*
53 *See* Hickey, *The Bill of Rights of Union Members*, 48 GEO. L.J. 226 (1959).

share which was to be allocated to the covenant. On November 16, after settling a dispute among themselves, the stockholders completed the purchase and non-competition agreements with Thrift in which Thrift allocated $222 per share to the contract for the sale of stock and $152 per share to the covenant not to compete. After these figures were inserted in the documents, some question was raised by the stockholders as to the tax treatment they would receive on the $152 per share allocated to the covenant. Thrift officials explained that the allocations were to Thrift's tax advantage.[1] Nevertheless, after consultation with their own attorney concerning the allocation, the stockholders signed the documents. Each stockholder reported the entire amount received by him from Thrift as proceeds from the sale of capital assets, rather than as ordinary income. The Commissioner of Internal Revenue asserted that that portion allocated to the covenant not to compete should be taxed as ordinary income and issued a notice of deficiency. The Tax Court, however, ruled in favor of the stockholders permitting that portion to be taxed at capital gains rates, rather than as ordinary income.[2] On the Commissioner's petitions for review, the United States Court of Appeals for the Third Circuit reversed the Tax Court and *held:* stockholders are held to the tax consequences of their agreement absent proof of the type that would negate the agreement in an action between the parties to the agreement and may not, absent a showing of fraud, undue influence or the like on the part of the other party, challenge the allocation for tax purposes. *Commissioner v. Danielson,* 378 F.2d 771 (3d Cir.), *cert. denied,* 389 U.S. 858 (1967).

Covenants not to compete have raised three major legal problems.[3] First, a covenant must be reasonable in order not to constitute an unlawful restraint on competition.

> Generally speaking, a contract to refrain from engaging in a particular business, where the restraint is limited as to time and space, is valid, but this rule is conditioned on the further rule that the stipulation must be ancillary to some lawful contract, such as vendor and vendee, and be reasonably necessary to protect the vendee in the enjoyment of the fruits of the contract.[4]

The reasonableness of the covenant in *Danielson* was not even questioned since it merely "restrained the stockholders from engaging in the small loan business around Butler, Pennsylvania for approximately six years."[5] Furthermore, the covenant was ancillary to the contract for the purchase of stock.

Second, a covenant must be severable from good will. This is because the

1 Thrift did not warn the stockholders that the allocated amount would be taxable as ordinary income, but Thrift did not state that the amount would be taxable at capital gains rates. Commissioner v. Danielson, 378 F.2d 771, 773 (3d Cir. 1967).

2 Danielson v. Commissioner, 44 T.C. 549 (1965), *vacated,* 378 F.2d 771 (3d Cir.), *cert. denied,* 389 U.S. 858 (1967).

3 *See generally* Queenan, *Taxation of Covenants Not to Compete in the Sale of a Business,* 4 B.C. IND. & COM. L. REV. 267 (1963).

4 Cox v. Helvering, 71 F.2d 987, 988 (D.C. Cir. 1934).

5 Commissioner v. Danielson, 378 F.2d 771, 773 (3d Cir. 1967).

consideration paid for good will is not amortizable by the buyer,[6] and the consideration received by the seller for good will is taxed at capital gains rates.[7] On the other hand, the consideration paid for a covenant not to compete is amortizable by the buyer[8] and is taxed as ordinary income to the seller.[9] Therefore, a covenant must be severable from good will in order for the buyer to be able to amortize the consideration paid for the covenant over the life of the covenant and for the seller to be required to report the consideration received for the covenant as ordinary income. Today, the courts generally follow the Second Circuit's statement in *Ullman v. Commissioner*[10] that:

> It is well established that an amount a purchaser pays to a seller for a covenant not to compete in connection with a sale of a business is ordinary income to the covenantor and an amortizable item for the covenantee unless the covenant is so closely related to a sale of good will that it fails to have any independent significance apart from merely assuring the effective transfer of that good will.[11] (Footnote omitted.)

The stockholders in *Danielson* did not raise the issue of severability, nor did they dispute the rule that money received for a severable covenant not to compete is ordinary income. Rather, the dispute in *Danielson* concerned the amount actually paid by Thrift and received by the stockholders for the covenant not to compete. This question constitutes the third major legal problem raised by covenants not to compete.

The majority in *Danielson* accepted the Tax Court's finding that "the covenants were not realistically bargained for by the parties and that the amounts allocated thereto by Thrift were in reality . . . part of the purchase price of the stock . . . ."[12] However, the majority did not allow the stockholders to alter the tax consequences of the allocation because

> the taxpayers had almost two weeks in which to investigate the tax consequences. Nevertheless, they entered into the agreement on the advice of their own counsel. The present record does not reveal that the taxpayers lacked a full understanding of the terms of the agreement or that the purchaser engaged in fraud, duress, or undue influence.[13]

The majority reached their decision by extending two leading circuit court cases.

---

6 Toledo Blade Co. v. Commissioner, 11 T.C. 1079 (1948), *aff'd*, 180 F.2d 357 (6th Cir.), *cert. denied*, 340 U.S. 811 (1950); J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 22.50 at 303 (Zimet Rev. 1966).

7 Commissioner v. Killian, 314 F.2d 852 (5th Cir. 1963).

8 Commissioner v. Gazette Tel. Co., 209 F.2d 926 (10th Cir. 1954).

9 Hamlin's Trust v. Commissioner, 209 F.2d 761 (10th Cir. 1954). *Accord*, Cox v. Helvering, 71 F.2d 987, 988 (D.C. Cir. 1934) where the court stated: "If [a person] refrains from exercising his skill and ability in a particular line for a definite period, what he receives in compensation . . . is income."

10 264 F.2d 305 (2d Cir. 1959).

11 *Id.* at 307-08. The first great legal battles over severability were fought in the 1940's. *See, e.g.*, Michaels v. Commissioner, 12 T.C. 17 (1949). The severability doctrine was criticized in Schulz v. Commissioner, 294 F.2d 52, 55-56 (9th Cir. 1961), was approved in Barran v. Commissioner, 334 F.2d 58, 63 (5th Cir. 1964), and was criticized again in Balthrope v. Commissioner, 356 F.2d 28, 31 (5th Cir. 1966).

12 Commissioner v. Danielson, 378 F.2d 771, 774 (3d Cir. 1967).

13 *Id.*

In the first of these cases, *Hamlin's Trust v. Commissioner,*[14] the Tenth Circuit held that: "While acting at arm's length and understandingly, the taxpayers agreed [upon an allocation between the stock and the covenant not to compete] . . . and are not at liberty to say that such was not the substance and reality of the transaction."[15] The majority in *Danielson* stated that: "We interpret the language of the *Hamlin's Trust* case as reflecting in substance the principle here espoused . . . ."[16] In the second leading circuit court case, *Ullman v. Commissioner,*[17] the Second Circuit held that "when the parties to a transaction . . . have specifically set out the covenants in the contract and have there given them an assigned value, strong proof must be adduced by them in order to overcome that declaration."[18] In interpreting *Ullman*, the majority judges in *Danielson* stated:

> [W]e are inclined to believe that the [*Ullman*] 'strong proof' rule would require that the taxpayer be held to his agreement absent proof of the type which would negate it in an action between the parties to the agreement. If our belief is unwarranted then we nevertheless conclude that a taxpayer who enters into a transaction of this type . . . may not, absent a showing of fraud, undue influence and the like on the part of the other party, challenge the allocation for tax purposes.[19]

In addition to this support from the two leading cases on the tax consequences of covenants not to compete, the majority reasoned that since the seller and buyer often bargain for tax consequences, an attack by the seller to get capital gains treatment or by the buyer to get amortization treatment would amount to an unfair unilateral reformation of the agreement.[20] Furthermore, "such attacks would nullify the reasonably predictable tax consequences of the agreement . . . ."[21] As the majority stated:

> Finally, this type of attack would cause the Commissioner considerable problems in the collection of taxes. The Commissioner would not be able to accept taxpayers' agreements at face value. He would be confronted with the necessity for litigation against both buyer and seller in order to collect taxes properly due.[22]

Because of the importance of the rule of law formulated in *Danielson,* the majority deemed it "appropriate to consider other cases which have been decided in this particular field."[23] The Ninth Circuit, after finding a covenant but no

14 209 F.2d 761 (10th Cir. 1954).
15 *Id.* at 765.
16 Commissioner v. Danielson, 378 F.2d 771, 777 (3d Cir. 1967).
17 264 F.2d 305 (2d Cir. 1959).
18 *Id.* at 308.
19 Commissioner v. Danielson, 378 F.2d 771, 777 (3d Cir. 1967).
20 *Id.* at 775.
21 *Id. Cf.* Schulz v. Commissioner, 294 F.2d 52 (9th Cir. 1961) where the court stated: The Commissioner should be slow in going beyond the values which the taxpayers state when . . . countervailing [tax] factors are present. Such a result gives certainty to the reasonable expectations of the parties and relieves the Commissioner of the impossible task of assigning fair values to good will and to covenants. *Id.* at 55 (dictum).
22 Commissioner v. Danielson, 378 F.2d 771, 775 (3d Cir. 1967).
23 *Id.*

allocation in *Annabelle Candy Company v. Commissioner*,[24] indicated that it would make an allocation if the parties intended to allocate a portion of the purchase price to the covenant. The court was willing to do this in order to give effect to the tax consequences which the parties contemplated. The buyer, however, failed to show the requisite intent. The *Danielson* majority distinguished *Annabelle Candy* on the ground that the taxpayer in that case was attempting to make, rather than attack, an allocation. Moreover, as the majority in *Danielson* pointed out, the Ninth Circuit in *Annabelle Candy* actually gave support to the *Danielson* rule when it stated that the absence of an allocation "is not conclusive on the parties as would be the case if there had been an express affirmance or disavowal in the agreement."[25]

The majority in *Danielson* also considered a case from its own circuit, *Levine v. Commissioner*.[26] In that case the court held:

> The evidence fully justifies the [Tax Court's] decision that the listing of the entire $35,000 for the covenant was never the true understanding of the parties. The agreement stated both good will and the corporate name among the assets being sold. . . . The Tax Court, confronted with the disparate views of the parties, did the best that could be done under all the facts and allowed half of the $35,000 to the covenant and half to good will.[27]

The *Danielson* majority stated that the court in *Levine*

> was apparently not confronted with the contention here advanced that the taxpayer should be held to the allocation set forth in the agreement because of the wording of the agreement itself. Rather, the Court in affirming concerned itself solely with the question of the propriety of the Tax Court's allocation as between good will and the covenant not to compete.[28]

In a 1961 case,[29] the Ninth Circuit followed *Hamlin's Trust* and refused to go behind a written specific allocation. The court stated that "in the absence of fraud it is not ordinarily open to the bargainers"[30] to question the resolutions of their agreement. During the same year, in *Schulz v. Commissioner*,[31] three other judges of the same circuit concurred in the *Ullman* "strong proof" test, but added: "However, we think that the covenant must have some independent basis in fact or some arguable relationship with business reality such that reasonable men, genuinely concerned with their economic future, might bargain for such an agreement."[32] The *Danielson* majority rightly distinguished *Schulz*

24 314 F.2d 1 (9th Cir. 1962). *See* Wilson Athletic Goods Mfg. Co. v. Commissioner, 222 F.2d 355 (7th Cir. 1955). In the *Wilson* case the parties made no specific allocation of consideration for a covenant not to compete. The buyer, however, entered $132,692 on his books for the covenant and amortized that amount. Reversing the Tax Court, the Seventh Circuit upheld the unilateral allocation.

25 Annabelle Candy Co. v. Commissioner, 314 F.2d 1, 7 (9th Cir. 1962) (dictum).

26 324 F.2d 298 (3d Cir. 1963).

27 *Id.* at 302.

28 Commissioner v. Danielson, 378 F.2d 771, 776 (3d Cir. 1967).

29 Rogers v. United States, 290 F.2d 501 (9th Cir. 1961).

30 *Id.*

31 294 F.2d 52 (9th Cir. 1961).

32 *Id.* at 55.

as involving an attack by the Commissioner rather than the taxpayer and proceeded to reject the "independent basis in fact or arguable relationship with business reality" requirement in specific allocation cases.[33]

The three judges dissenting in *Danielson* cited many cases for the proposition that substance rather than form is to be regarded in taxation cases. One of these cases, *Weiss v. Stearn*,[34] concerned a corporate reorganization plan rather than a covenant not to compete. According to the opinion of the United States Supreme Court,

> [q]uestions of taxation must be determined by viewing what was actually done, rather than the declared purpose of the participants; and when applying the provisions of the Sixteenth Amendment and income laws enacted thereunder we must regard matters of substance and not mere form."[35]

Since the covenants in *Danielson* were not realistically bargained for and the consideration allocated to the covenants was actually paid for the stock,[36] the dissenting judges would have allowed the stockholders to assert the substance of the agreement and thus be entitled to receive capital gains treatment on the entire consideration. The minority cited several cases, including *Weiss*, in which a taxpayer rather than the Commissioner asserted the "substance" rule.[37] Nevertheless, the majority believed that in this type of case the taxpayer should not be able to assert the rule since "to allow the Commissioner alone to pierce formal arrangements does not involve any disparity of treatment because taxpayers have it within their own control to choose in the first place whatever arrangements they care to make."[38]

The minority also believed that under the *Danielson* rule, "knowledgeable buyers will engage in questionable and sharp dealing to secure the advantages of such covenants . . . ."[39] Although the majority did not directly rebut this argument, its rebuttal is readily discernible. Any "questionable" dealing may be challenged under the *Danielson* rule as "fraud, duress, or undue influence,"[40] and the impact of "sharp" dealing can be lessened by having both parties well-advised by their counsel of the *Danielson* rule.

With case support for both the majority and the minority positions in *Danielson*, the policy reasons stated by the majority are decisive. The *Danielson* case illustrates how the Commissioner is "confronted with the necessity for

33 Commissioner v. Danielson, 378 F.2d 771, 777 (3d Cir. 1967). The court stated that evidence of an independent basis in fact or arguable relationship with business reality can have no independent significance in cases where the consideration is allocated by the parties in their agreement. It would be relevant, but not conclusive, evidence only if some attack is made on the written agreement by a party claiming that because of fraud, etc., it is not his conscious agreement. *Id.*

34 265 U.S. 242 (1924).

35 *Id.* at 254.

36 Commissioner v. Danielson, 378 F.2d 771, 774 (3d Cir. 1967).

37 Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 492-93 (1937); Landa v. Commissioner, 206 F.2d 431, 432 (D.C. Cir. 1953).

38 Commissioner v. Danielson, 378 F.2d 771, 775 (3d Cir. 1967).

39 *Id.* at 782 (dissenting opinion).

40 Commissioner v. Danielson, 378 F.2d 771, 774 (3d Cir. 1967).

litigation against both buyer and seller in order to collect taxes properly due."[41] The stockholders have tied up the Commissioner in litigation in which he has no real interest in the outcome. "Since amounts saved by one taxpayer are generally made up by the other, there is no appreciable loss of revenue."[42] If the stockholders had been successful in denying that the consideration allocated to the covenant was ordinary income, the Commissioner would then have probably attacked the amortization made by Thrift. As the *Danielson* court pointed out, "Thrift amortized that part of the payment which had been allocated to the covenant not to compete and the Commissioner has preserved his position with respect to that matter, presumably pending this determination."[43] Several other cases cited by the majority applied the *Ullman* "strong proof" rule and found such proof lacking.[44] These cases illustrate the success of the "strong proof" rule in preventing unilateral reformation of agreements. However, they are also examples of wasteful litigation in which "a party to an admittedly valid agreement [attempts] to use the tax laws to obtain relief from an unfavorable agreement."[45]

The Ninth Circuit case of *Yandell v. United States*[46] demonstrates a potential danger in post-*Ullman* cases that should be alleviated by the *Danielson* rule. In that case, the final contract contained a specific allocation for the covenant not to compete. Although both parties knew of the possible tax consequences of the allocation, the seller "was also advised by counsel that for tax purposes he would not necessarily be bound by the contract's recital as to the purpose of this payment."[47] Although the attorney was technically correct, the court held that the seller was bound. After *Danielson,* attorneys should advise their clients that they will almost surely be bound by any specific allocation. Rather than litigate, parties should negotiate. As a noted writer has observed:

> It is obvious that in this area both parties should be well advised, and should be aware of the tax consequences on each side, and that, in effect, the amount to be paid for the covenant not to compete is something to be bargained for by both parties, as well as the aggregate amount of payments under the contract.[48]

In *Danielson,* the majority judges carried the two leading cases on covenants not to compete to their logical conclusion and stated sound practical reasons for doing so. The rule announced should lead to greater certainty and less litigation in covenant not to compete cases without any sacrifice in substantial justice.

William J. Hassing

---

41 *Id.* at 775.
42 Schulz v. Commissioner, 294 F.2d 52, 55 (9th Cir. 1961).
43 Commissioner v. Danielson, 378 F.2d 771, 773 n.3 (3d Cir. 1967).
44 *See, e.g.,* Barran v. Commissioner, 334 F.2d 58 (5th Cir. 1964).
45 Commissioner v. Danielson, 378 F.2d 771, 775 (3d Cir. 1967).
46 315 F.2d 141 (9th Cir. 1963).
47 *Id.* at 142.
48 E. GRISWOLD, FEDERAL TAXATION 706 (6th ed. 1966).

CONSTITUTIONAL LAW — CRIMINAL LAW — VAGRANCY — NEW YORK VAGRANCY STATUTE OVERREACHES THE PROPER LIMITATIONS OF THE POLICE POWER AND VIOLATES THE DUE PROCESS OF LAW REQUIREMENTS OF THE FOURTEENTH AMENDMENT. — During three successive months in late 1964, Charles Fenster was arrested three times by the New York City police and charged under section 887(1) of the New York Code of Criminal Procedure[1] with being "a person who, not having visible means to maintain himself, lives without employment."[2] He was acquitted after each of the first two arrests. Conviction, however, could have resulted in imprisonment for up to six months on each charge.[3] After his third arrest, Fenster instituted prohibition proceedings pursuant to New York Civil Practice Law and Rules article 78 to keep the criminal court from hearing and determining the vagrancy charge on the ground that the vagrancy statute was unconstitutional. The New York Supreme Court denied his petition for a prohibition order,[4] and the appellate division affirmed.[5] The court of appeals refused to review the merits of Fenster's case because the remedy sought was discretionary and therefore improvident for the purposes of appeal.[6] He was acquitted on the third vagrancy charge in the criminal court.

Fenster then applied to a three-judge federal court in the Southern District of New York for a declaration of the statute's unconstitutionality. The district court abstained from exercising its jurisdiction on the ground that under New York law, Fenster had a remedy by way of a declaratory judgment.[7] The United States Supreme Court affirmed.[8] Then Fenster initiated an action in the New York Supreme Court by moving for a declaratory judgment declaring section 887(1) of the Code of Criminal Procedure unconstitutional. Special term denied his motion and dismissed the complaint.[9] The court of appeals heard a direct appeal from this order and by a five-to-two vote reversed the supreme court's dismissal and *held*: section 887(1), which defines vagrants as persons who, not having visible means to maintain themselves, live without employment, violates the due process clause of the fourteenth amendment and overreaches the proper limitations of the police power in that, *inter alia,* it unreasonably makes criminal and provides punishment for conduct of an individual that in no way impinges on the rights or interests of others. *Fenster v. Leary,* 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

Crimes are traditionally defined in terms of an act or a failure to act,[10] and it is usually stated that an act or failure to act is an essential element of a crime.[11] Nevertheless, our legal system contains "several crimes the essential

1 Ch. 20, tit. 2, § 1, [1827-28] N.Y. Revised Statutes 632 (repealed 1967).
2 *Id.*
3 *Id.* § 3, at 633.
4 Fenster v. Criminal Court, 46 Misc. 2d 179, 259 N.Y.S.2d 67 (Sup. Ct. 1965).
5 Fenster v. Criminal Court, 24 App. Div. 2d 840 (1965) (Mem.).
6 Fenster v. Criminal Court, 17 N.Y.2d 641, 216 N.E.2d 342, 269 N.Y.S.2d 139 (1966) (Mem.).
7 Fenster v. Leary, 264 F. Supp. 153 (S.D.N.Y. 1966).
8 Fenster v. Leary, 386 U.S. 10 (1967).
9 Fenster v. Leary, 53 Misc. 2d 774, 279 N.Y.S.2d 743 (1967).
10 "A crime may be generally defined as the commission or omission of an act which the law forbids or commands . . . ." J. MILLER, HANDBOOK OF CRIMINAL LAW 16 (1934).
11 E. DANGEL, CRIMINAL LAW 56 (1951); O. SNYDER, CRIMINAL JUSTICE 110 (1953).

element of which consists not in proscribed action or inaction, but in the accused's having a certain personal condition or being a person of a specified character."[12] Not only are such crimes well recognized by the courts,[13] but several states have created new crimes of this nature,[14] and many law enforcement officials and legal writers have demanded their extension.[15] Recently, however, as illustrated by *Fenster,* the courts have begun questioning the validity of penal statutes directed solely at status offenses.

Vagrancy legislation was born in the breakup of the feudal system when the vagrant was identified with the runaway serf.[16] These circumstances, coupled with the acute labor shortage due to the Black Death,[17] led to the Statute of Laborers of 1349-51 which required every able-bodied person to work at a fixed rate and confined the laboring population to stated places of abode.[18] "Wandering or vagrancy thus became a crime."[19] The common-law definition of a vagrant was "a person who wandered about from place to place, who had no lawful or visible means of support, and who did not work though able to do so."[20] The standard for determining vagrancy thus became the status of an individual rather than his actions.

In its classic sense, therefore, vagrancy encompassed the elements of idleness, instability, refusal to work, and a propensity to wander or roam. Today, however, the common-law offense of vagrancy has been enlarged by statute, and the elements of the crime vary widely from state to state.[21] As one author has noted:

> It is evident . . . that the legislatures, or city counsels in the case of ordinances, have taken a whole series of petty acts or events and authoritatively stated that not only is one who has engaged in the proscribed activity guilty of a substantive offense . . . but, in addition, repetitions of such conduct make him a vagrant, and amenable to an alternative charge.[22]

Although vagrancy statutes are no longer designed to force the idle to work or to decrease the cost of poor relief, they retain their traditional justification as a crime prevention tool. Anglo-American criminal law is historically

12 Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 HARV. L. REV. 1203 (1953).

13 *See, e.g.,* People v. Babb, 103 Cal. App. 2d 326, 229 P.2d 843 (1951); Commonwealth v. O'Brien, 179 Mass. 533, 61 N.E. 213 (1901) (Holmes, J.).

14 *E.g.,* Ch. 155, [1933] N.J. Acts 158th Sess. 394 (Gangster Act) [held unconstitutional in Lanzetta v. New Jersey, 306 U.S. 451 (1939)]; Ch. 896, § 1, [1936] N.Y. Laws 159th Sess. 2012 (Public Enemy Act) (repealed 1967).

15 *See, e.g.,* Sullivan, *The Public Enemy Act in New York,* 5 BROOKLYN L. REV. 62 (1935).

16 For a full discussion of the area, see Foote, *Vagrancy-Type Law & Its Administration,* 104 U. PA. L. REV. 603 (1956).

17 *See* 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 459-60 (1923).

18 For a summary of these statutes, see 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND, 203-06 (1883).

19 *Id.* at 267. "A man must work where he happened to be, and must take the wages offered him on the spot, and if he went about, even to look for work, he became a vagrant and was regarded as a criminal." *Id.*

20 Prince v. State, 36 Ala. App. 529, 59 So. 2d 878, 879 (1952).

21 Lacey, *supra* note 12, at 1207. *See* Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. REV. 102, 109-11 (1962) in which thirty types of vagrancy statutes are defined.

22 McClure, *Vagrants, Criminals and the Constitution,* 40 DENVER L.C.J. 314, 315-16 (1963).

unconcerned with the potential criminal per se,[23] but vagrancy legislation has always stood out as an exception to this doctrine. Indeed, modern courts and legislatures have quite openly conceded that vagrancy statutes are aimed at the potential criminal.[24] This concept received articulation in *District of Columvia v. Hunt*[25] where the court said:

> A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life. Hence the statute denounces and makes punishable being in a condition of vagrancy rather than . . . the particulars of conduct enumerated in the statute as evidencing or characterizing such condition.[26]

Serious constitutional attacks have been leveled at this concept of punishment based solely on the *possibility* of criminal conduct, but heretofore attack on this ground has not been successful. As the New Jersey Court of Appeals has commented: "To challenge the power of the state to prevent the commission of . . . crimes by legislation of this character, is to challenge its power to denounce and punish the crime itself."[27] Consequently, the view persists that a vagrant must be punished as a potential menace to the community.

This rationale has afforded the police an opportunity to misuse the vagrancy concept and, in fact, vagrancy laws have been used, *inter alia:* (1) to harass reputed criminals; (2) to justify an otherwise illegal arrest; (3) to arrest on suspicion; (4) to arrest for investigative purposes; (5) to round up a certain class of known criminals; (6) to imprison possible suicides and the mentally ill; and (7) to validate an otherwise illegal search.[28]

This type of police practice has been made possible by the comprehensive and vague wording of most modern vagrancy statutes, coupled with the amorphous nature of the crime itself. Yet, as indicated earlier, when attacked as vague or indefinite, vagrancy statutes have been consistently upheld as not violative of due process,[29] or as valid exercises of the state's police power.[30] This has prompted one commentator to remark that "the actual limits of vagrancy are set not in the statute but by practices of police and magistrates."[31]

People v. Craig[32] presents the typical fact situation in which resort is made to a vagrancy charge to legitimize an arrest. In that case, the police were able to justify an arrest without a warrant by reason of the commission of a misdemeanor (vagrancy) in their presence. The police admittedly had no other

23 *See* J. WAITE, CRIMINAL LAW IN ACTION 11-17 (1934).
24 *E.g., Ex parte* Karnstrom, 297 Mo. 384, 394, 249 S.W. 595, 597 (1923); State v. Gaynor, 119 N.J.L. 582, 587, 197 A. 360, 363 (1938); State v. Grenz, 26 Wash. 2d 764, 770-71, 175 P.2d 633, 638 (1946).
25 163 F.2d 833 (D.C. Cir. 1947).
26 *Id.* at 835-36.
27 Levine v. State, 110 N.J.L. 467, 470-71, 166 A. 300, 302 (1933).
28 Note, *An Over-Expanded Application of Vagrancy Statutes,* 1961 WASH. U.L.Q. 425, 425-26 n.2.
29 *See, e.g., In re* McCue, 7 Cal. App. 765, 766, 96 P. 110, 111 (1908) which held that the constitutional right of due process would not be given precedence over supervening considerations of public policy.
30 *See, e.g.,* City of New Orleans v. Postek, 180 La. 1047, 1058-59, 158 So. 553, 556 (1934).
31 Foote, *supra* note 16, at 603.
32 152 Cal. 42, 91 P. 997 (1907).

grounds for the arrest; they were, however, able to testify to past conduct which made the defendants vagrants. This case emphasizes that in status crimes, such as vagrancy, it is a condition that is being punished. The ramifications of this position are that an individual may be arrested repeatedly, with no new offenses involved, merely because at some prior time he has attained the status of a vagrant.

Many evidential problems arise concerning the issue of whether, in establishing the requisite condition of a person charged with vagrancy, evidence of reputation is sufficient for purposes of conviction, or whether proof of actual conduct should be required. Fortunately, few cases have upheld a conviction merely upon the strength of testimony as to the reputation of the defendant. As early as 1881, it was recognized that "[t]o introduce into the law the principle that a person can be punished for what other people say about him is to render all the constitutional safeguards of life, liberty, and property unavailing for his protection. . . ."[33] Any other principle would be foreign to traditional American concepts of justice and equity.

Finally, in the area of substantive differences, the most important distinction between status criminality and classic conduct criminality becomes manifest, *i.e.*, the concept of the "harm" involved. In the vagrancy concept, the proscribed harm is often difficult to ascertain because the concept itself is elusive, and because there is apparently no comprehensive definition of what it includes. One author discusses harm "in terms of deviation from public attitudes,"[34] a definition that necessarily presupposes at least a basic understanding of the attitudes and mores in society. So, if it could be established that the community believes that a dangerous condition exists within the vagrancy concept "in which the probability of still greater harm is substantially increased,"[35] then this attitude might justify a particular vagrancy statute. This has prompted one commentator to write: "If it can be demonstrated that the conduct enumerated as vagrant does lead to substantially greater harms, then perhaps society has a self-protective interest in punishing in its inception the conduct which leads to such greater harm."[36]

The vagueness of this proscribed harm and the manifold borderline uses employed by the police frequently subject this type of legislation to constitutional attack. Many constitutional arguments have been made on the ground that a particular vagrancy statute is void for vagueness and unduly restrictive of personal liberty. Both arguments stem from the due process clause of the fourteenth amendment which entitles a person to pursue his life as he sees fit, so long as he does not harm or interfere with others.[37] Proponents of this argu-

33 State v. Kartz, 13 R.I. 528, 531 (1881). *See also* People v. Belcastro, 356 Ill. 144, 190 N.E. 301 (1934); People v. Licavoli, 264 Mich. 643, 250 N.W. 520 (1933). *But see* World v. State, 50 Md. 49 (1878); Hirsch v. Cincinnati, 29 Ohio C. Dec. 613 (Ct. App. 1915).

34 J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 214 (2d ed. 1960).

35 *Id.* at 218.

36 McClure, *supra* note 22, at 324.

37 In Allgeyer v. Louisiana, 165 U.S. 578 (1897), it was stated:

> The liberty mentioned in that [fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and

ment contend that one of the essential personal liberties is the right to be peacefully and lawfully present in a public place.[38] When the vagrant has not interfered with anyone or any use, so that his conduct has not had any impact on anybody, then the right to be idle should be constitutionally protected as a fundamental right of the enjoyment of living.

Another constitutional objection frequently advanced in vagrancy cases is that the legislation denies the equal protection of the law guaranteed and demanded by the fourteenth amendment. It is stated that the typical vagrancy statute, as construed, requires poor people to find work, whereas persons who have means to support themselves are not so required. Therefore, under the vagrancy concept, there is a sharp discrimination based on the lack of the means of support. It is argued that such classification is unreasonable and arbitrary and thus violative of the equal protection clause.[39]

For the most part, these constitutional arguments have fallen on deaf ears. Even as recently as 1964, the District of Columbia Court of Appeals[40] upheld a vagrancy statute against the contention that the statutory language was vague and uncertain. The court stated that "all that is required is a reasonable degree of certainty"[41] in this regard. Furthermore, the court rejected the appellant's second contention that the statute makes criminal the status or condition of poverty and unemployment by stating, "No one can be convicted under the statute simply because he is poor or unemployed. Only those who lead an immoral or profligate life are condemned . . . ."[42]

In *Fenster*, a court actually accepted one of these constitutional objections as applied to the New York vagrancy statute. The New York Court of Appeals stated:

> We are in agreement with plaintiff that [the vagrancy statute] is unconstitutional, on the ground that it violates due process and constitutes an overreaching of the proper limitations of the police power in that it unreasonably makes criminal and provides punishment for conduct . . . which in no way impinges on the rights or interests of others . . . . *We do not reach any of the other arguments for invalidity urged by plaintiff.*[43] (Emphasis added.)

---

work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. *Id.* at 589.

38 Brief for Appellant at 13, Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

39 *Id.* at 14.

40 Hicks v. District of Columbia, 197 A.2d 154 (D.C. Ct. App. 1964), *cert. dismissed as improvidently granted,* 383 U.S. 252 (1966).

41 *Id.* at 155.

42 *Id. See also* Dominguez v. City and County of Denver, 147 Colo. 233, 363 P.2d 661 (1961) where the Supreme Court of Colorado held that the words "without a lawful business" in the vagrancy ordinance mean that the accused's conduct or the circumstances of his presence constitute an offense or the suggestion of an intent to commit an offense, and that the ordinance was sufficiently definite.

43 Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 428, 282 N.Y.S.2d 739, 742 (1967).

The New York court noted that initially there is a strong presumption of validity that attaches to statutes and that those who would challenge their constitutionality must establish invalidity beyond a reasonable doubt. But the court was quick to comment that "a statute whose effect is to curtail the liberty of individuals to live their lives as they would . . . must bear a reasonable relationship to, some proportion to, the alleged public good on account of which this restriction on individual liberty would be justified."[44]

The Attorney General of New York, in defense of the statute's constitutionality, cited various statements both from the New York Court of Appeals and from lower New York courts supporting vagrancy statutes as a valid exercise of the police power. His argument was that to prevent the coming into existence of a "class of able-bodied vagrants . . . [supporting] themselves by preying on society and thus [threatening] the public peace and security,"[45] and to "compel individuals to engage in some legitimate and gainful occupation from which they might maintain themselves, and thus remove the temptations to lead a life of crime or become public charges,"[46] the able-bodied poor should be made, under the sanctions of the criminal law, to accept available employment.[47]

Choosing not to treat potential thirteenth amendment problems or "equal protection" questions, the court limited itself to a more "fundamental" approach and held the statute to be

> defective on the ground that, whatever purpose and role it may or may not have served in an earlier day, and however valid or invalid may be the proposition that the able-bodied unemployed poor are a likely source of crime . . . it is obvious to all that the vagrancy laws have been abandoned by our governmental authorities as a means of "persuading" unemployed poor persons to seek work . . . .[48]

The court stated further that typically the only persons arrested and prosecuted today under our modern vagrancy laws fall into two categories. First, there are the alcoholic derelicts and other unfortunates whose only crime, if any, is against themselves. Indeed, their main offense usually consists in leaving their own environs and disturbing by their presence the more respected elements of our society. These poor souls are more properly objects of the welfare laws and public health programs than of the criminal law. The second group recognized by the court as subject to punishment under vagrancy statutes is the suspected criminals against whom the authorities do not have enough evidence to make a proper arrest or secure a conviction for the suspected crime. The court declared that the vagrancy concept must not be used as an administrative short cut to avoid the constitutional requirements of due process in the administration of criminal justice. Finally, the court recognized that certain

44 229 N.E.2d at 429, 282 N.Y.S.2d at 743.
45 People *ex rel.* Stolofsky v. Superintendent of State Institution, 259 N.Y. 115, 118, 181 N.E. 68, 69 (1932).
46 People v. Banwer, 22 N.Y.S.2d 566, 569 (Magis. Ct., Brooklyn, 1940).
47 Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 429, 282, N.Y.S.2d 739, 744 (1967).
48 229 N.E.2d at 429-30, 282 N.Y.S.2d at 744.

fairly recent cases have upheld similar statutes;[49] but it felt that the only rationale behind the New York law was an invalid one, *i.e.*, the facilitation of arrests and criminal prosecutions against those types of individuals described above.

The dissent would have sustained the statute's constitutionality as a valid exercise of the police power of the state. They argued that the state clearly has a legitimate interest in discouraging able-bodied men who are capable of working from becoming loafers and public charges. It has chosen to do this through criminal sanctions rather than social welfare. The latter approach may have more merit, but the dissent thought this to be a legislative rather than a judicial matter. "As long as the exercise of the State's police power bears a reasonable relationship to the ends sought to be accomplished, the constitutionality of the statute must be upheld."[50]

The problem presented by the use and abuse of vagrancy legislation is seldom acknowledged by our courts which seem content to question only the literal statutory violation and thereon judge the legality or illegality of the arrest. Judicial authority often sidesteps the issue of the misapplications of the vagrancy concept, thereby condoning abusive police conduct. This circumstance can be justified only by balancing the violation of personal liberties against the demand for effective law enforcement and concluding that the latter outweighs the former. But such a determination ignores the realities of the situation. To permit police powers to pre-empt the liberties guaranteed by the Constitution is to impose a critical threat to the preservation of basic human rights. Due process of law is a cherished concept, and it must apply equally to everyone. To permit the vagrancy laws to be utilized for purposes other than those for which they were enacted is to issue a license to law enforcement agencies to break the law. Such activity by law enforcement officials breeds lawlessness and disrespect of authority.[51] The time has come not only for striking down existing vagrancy laws, but for replacing them with just and meaningful legislation. In this light, one commentator has written:

> In these circumstances the time is surely at hand to modernize the vagrancy concept or, better yet, to abandon it altogether for statutes which will harmonize with notions of a decent, fair and just administration of criminal justice and which will at the same time make it possible for police departments to discharge their responsibilities in a straightforward manner

49 *See* Dominguez v. City & County of Denver, 147 Colo. 233, 363 P.2d 661 (1961); Hicks v. District of Columbia, 197 A.2d 154 (D.C. Ct. App. 1964), *cert. dismissed as improvidently granted*, 383 U.S. 252 (1966).

50 Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 431, 282 N.Y.S.2d 739, 746 (1967) (dissenting opinion).

51 Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438 (1928), said:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. *Id.* at 485.

> without the evasions and hypocrisies which so many of our procedural rules force upon them. This may be done by drafting legislation having to do with conduct rather than status, legislation which will describe the acts to be proscribed with precision and which will be free of the hazy penumbra of medieval ideas of social control characteristic of existing law.[52]

The decision in *Fenster* should provide the necessary impetus for making such legislation a reality in New York.

Leo G. Stoff, Jr.

LABOR LAW — SECTION 14(c) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT DOES NOT PERMIT STATE COURTS TO ASSUME JURISDICTION OVER A LABOR DISPUTE UNTIL THE NATIONAL LABOR RELATIONS BOARD HAS ACTUALLY DECLINED TO ACT. — Edmund Stryjewski and his wife operated a beer distributing concern in Philadelphia. Local Union No. 830, the collective bargaining representative for brewery and beer distributor drivers, helpers, and platform men in the Philadelphia area, had a collective bargaining agreement with certain importing distributors who supplied beer to so-called "D Distributors," such as Stryjewski.[1] The Union picketed Stryjewski's premises to advertise his nonunion status and to attempt to organize his employees. Because such picketing precluded his receipt of any beer supplies,[2] Stryjewski instituted a suit in the Court of Common Pleas of Philadelphia County, seeking both injunctive relief and monetary damages from the union. That court refused to issue the injunction since the matters at issue were arguably within the exclusive jurisdiction of the National Labor Relations Board. Stryjewski appealed, contending that the state court did have jurisdiction because: (1) his only employee was his son, and (2) his annual gross sales totaled only $230,000. However, the Pennsylvania Supreme Court affirmed the lower court and *held:* pending an actual declination to act by the National Labor Relations Board, a state court may not assume jurisdiction over a case that contains issues arguably within the exclusive jurisdiction of the National Labor Relations Board. *Stryjewski v. Local 830, Brewery & Beer Distributor Drivers, Helpers & Platform Men,* 233 A.2d 264 (Pa. 1967).

With its decision in *Stryjewski,* the Pennsylvania Supreme Court became involved in a thorny jurisdictional question concerning federal pre-emption in labor disputes. As the majority clearly pointed out, "it has been the intent of the Congress through its legislative enactments and of the United States Supreme Court through its pronouncements to fashion a labor policy which is *national*

52 Sherry, *Vagrants, Rogues and Vagabonds — Old Concepts in Need of Revision,* 48 CALIF. L. REV. 557, 567 (1960).

1 An "importing distributor" imports beer from outside the state and sells to "D Distributors" who sell either at wholesale or retail, but not to other distributors.

2 Under the collective bargaining agreement, all beer supplied by the importing distributors had to be delivered to their retail beer distributor customers, and no beer could be picked up at the platform of the importing distributors. Thus, the picketing of Stryjewski's premises precluded his receipt of any beer supplies from the importing distributors because the latter's union employees would not cross the picket lines to make deliveries.

in scope."[3] No one would take issue with such a statement, but the pursuit of uniformity did lead to a curious anomaly in the law. After the doctrine of federal pre-emption had been firmly entrenched by the Supreme Court in *Garner v. Teamsters Local 776*,[4] the Court in *Guss v. Utah Labor Relations Board*[5] and its companion cases[6] stamped its official imprimatur on the doctrine that the states were pre-empted from hearing a case arguably within the NLRB's jurisdiction even though the NLRB had expressly declined to take jurisdiction over the case.

As a result of this holding, both management and labor frequently found themselves in the celebrated "no man's land"[7] where rights existed without a remedy for their enforcement.[8] To alleviate this situation, Congress passed section 14(c) of the Labor-Management Reporting and Disclosure Act[9] of 1959 [LMRDA], which provides:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where . . . the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and assenting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.[10]

The interpretation of section 14(c) has been restricted by the Supreme Court's pronouncement in *San Diego Building Trades Council v. Garmon*[11] that

> [w]hen an activity is *arguably subject* to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[12] (Emphasis added.)

---

3 Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers, 233 A.2d 264, 266 (Pa. 1967).

4 346 U.S. 485 (1953).

5 353 U.S. 1 (1957).

6 Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957).

7 For an analysis of the subsequent development in this area, see Cohen, *Congress Clears the Labor No Man's Land: A Long-Awaited Solution Spawns a Host of New Problems,* 56 Nw. U.L. Rev. 333 (1961); Goldberg and Meiklejohn, *Title VII: Taft-Hartley Amendments, with Emphasis on the Legislative History,* 54 Nw. U.L. Rev. 747, 748-54 (1960); McCoid, *Notes on a "G-String": A Study of the "No Man's Land" of Labor Law,* 44 Minn. L. Rev. 205 (1959); Reilly, *Federal-State Jurisdiction,* 48 Geo. L.J. 304 (1959).

8 Stryjewski v. Teamsters Local 830, Brewery & Beer Distrib. Drivers, 233 A.2d 264, 266 (Pa. 1967).

9 29 U.S.C. § 164(c) (1964). For a particularly well written analysis of the various alternatives considered by Congress before enacting § 14(c), see Reilly, *supra* note 7, at 308-09.

10 73 Stat. 541-42 (1959), 29 U.S.C. § 164(c) (1964).

11 359 U.S. 236 (1959).

12 *Id.* at 245.

The majority in *Stryjewski* apparently applied the *Garmon* test strictly. Indeed, under the Taft-Hartley Act of 1947, "[t]he term 'employee' . . . shall not include any individual employed . . . by his parent."[13] Because Stryjewski's only employee was his son,[14] the *Stryjewski* court assumed *arguendo* that petitioner had no "employee" within the meaning of the Taft-Hartley Act. Thus, although the NLRB could not assert jurisdiction over the case, the court refused to act until the NLRB had actually declined to do so.[15]

In reaching its decision, the *Stryjewski* court noted that courts of other jurisdictions have adopted contrary views concerning whether an actual declination by the Board is necessary in every case.[16] In *Russell v. Electrical Workers Local 569*,[17] plaintiff contracted to perform certain electrical work on an apartment building and began work with a three-man, nonunion crew. In order to induce the building owner to cease doing business with the plaintiff, the defendant union instituted picketing at the job site. In an action for an injunction to restrain the picketing, the California Supreme Court stated that

> the jurisdiction exercised by the state courts pursuant to section 14(c) does not depend upon a showing that the board has, in fact, declined to act. Rather, we believe that the party seeking relief need only demonstrate, on the basis of published regulations and decisions of the board, that the case is one which the board would decline to hear.[18]

A case contrary to the view stated in *Russell* and relied upon by the *Stryjewski* court as a basis for its decision is *Colorado State Council of Carpenters v. District Court*.[19] In this case petitioners sought an injunction in the state court to restrain the defendant union from picketing a work project. In refusing to grant the injunction, the Supreme Court of Colorado stated that "state courts have no jurisdiction to enjoin peaceful picketing in the absence of a showing that the National Labor Relations Board has declined to accept jurisdiction over the controversy."[20] Justice Roberts, dissenting in *Stryjewski*, felt that the majority's reliance on *Colorado State Council of Carpenters* was misplaced since to him the quoted language did not mean that an *actual* declination by the NLRB is necessary in every case before a state court may assert jurisdiction.[21]

13 61 Stat. 137-38 (1947), 29 U.S.C. § 152(3) (1964).
14 Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers, 233 A.2d 264, 267 & n.7 (Pa. 1967).
15 *Id.* at 268.
16 *Id.* at 267.
17 48 Cal. Rptr. 702, 409 P.2d 926 (1966).
18 *Id.* However, since the plaintiff had failed to show that the Board would decline this case the Court ordered the complaint dismissed. A number of state courts have agreed with the *Russell* court in stating that they themselves should apply the jurisdictional standards of the Board in cases arising under § 14(c). *E.g.*, Local 227, Amalgamated Meat Cutters v. Fleischaker, 384 S.W.2d 68 (Ky. Ct. App. 1964); Giuliano v. Teamsters Local 830, 34 Pa. D. & C.2d 512 (Delaware County C.P. 1964). *Contra*, Barksdale & LeBlanc v. Electrical Workers Local 130, 143 So. 2d 770 (La. Ct. App. 1962). Scholarly opinion is also divided on the issue. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 262 (1959) supports the *Russell* holding, while Goldberg and Meiklejohn, *supra* note 7, at 753, would apparently support the *Stryjewski* court.
19 155 Colo. 54, 392 P.2d 601 (1964).
20 *Id.* at 56, 392 P.2d at 601-02.
21 Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers, 233 A.2d 264, 270-71 (Pa. 1967) (dissenting opinion).

And as both Justice Roberts[22] and *Russell*[23] pointed out, the petitioner in *Colorado State Council of Carpenters* did not actually demonstrate that the NLRB would decline jurisdiction.

The majority in *Stryjewski* felt that decisions of the United States Supreme Court cast little light on the issue at hand.[24] Justice Roberts was not as hesitant in interpretating Supreme Court pronouncements. He stressed the case of *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service, Incorporated*,[25] in which the union challenged successfully the jurisdiction of the Alabama Circuit Court over a suit brought to restrain peaceful picketing. The Court noted:

> Although a state court may assume jurisdiction over labor disputes over which the National Labor Relations Board has, but declines to assert, jurisdiction . . . there must be a proper determination of whether the case is actually one of those which the Board *will* decline to hear.[26] (Emphasis added.)

According to Justice Roberts, "[s]uch language certainly imparts an anticipatory flavor to 14(c)"[27] and does not demand an actual declination by the NLRB.

Lacking in guidance from the Supreme Court, the *Stryjewski* court, following what it considered to be the example of *Colorado State Council of Carpenters*, ultimately based its decision on the policy reason that a contrary holding could lead to chaos in the uniform administration of the national labor policy.[28] While Justice Roberts criticized the majority for its flippant attitude,[29] the majority's dedication to uniformity does find support in the fundamental purpose behind all federal labor legislation, the pronouncements of the Supreme Court,[30] and the view of some Congressmen.[31] Chief Justice Bell, also dissenting in *Stryjewski*, would not take issue with the policy objective of uniformity, but he contended that the national labor policy could not possibly be endangered by petitioner's little business.[32] In addition, he championed the idea that uni-

22 *Id.* at 271.
23 Russell v. Electrical Workers Local 569, 48 Cal. Rptr. 702, 705, 409 P.2d 926, 929 (1966).
24 Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers, 233 A.2d 264, 267 (Pa. 1967).
25 380 U.S. 255 (1965).
26 *Id.* at 256.
27 Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers, 233 A.2d 264, 270 (Pa. 1967) (dissenting opinion).
28 Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers, 233 A.2d 264, 268 (Pa. 1967).
29 *Id.* at 270 (dissenting opinion).
30 *E.g.*, Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co., 370 U.S. 173 (1962) where the Court reversed a state court's holding that petitioner was not a "labor organization," noting that

> as the national agency charged with the administration of federal labor law, the Board should be free in the first instance to consider the whole spectrum of possible approaches to the question . . . . Only the Board can knowledgeably weigh the effect of either choice upon the certainty and predictability of labor management relations, or assess the importance of simple administrative convenience in this area. *Id.* at 181.

31 *See, e.g.*, 105 CONG. REC. 17875-80 (1959) (remarks of Senator Morse).
32 Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers, 233 A.2d 264, 269 (Pa. 1967) (dissenting opinion).

formity should not be the exclusive goal of our national labor policy, for the "little fellow" should be protected from big business and big unions.[33]

The backbone of Justice Roberts' dissent lies in his view that the majority's holding perpetuates the very "no man's land" that Congress sought to abolish by section 14(c) of the LMRDA.[34] He argued that

> the majority has construed the language of 14(c) to require that the N.L.R.B. actually refuse jurisdiction in *each particular* case before the state judicial forum becomes available. Such a reading completely ignores the possibility that the board, wholly consistent with 14(c), may decline jurisdiction *prospectively* over an *entire class of cases* by its published rules and jurisdictional standards.[35]

Assuming that the NLRB may prospectively decline jurisdiction under section 14(c), Justice Roberts went on to apply the *Garmon* test to the facts in *Stryjewski* and concluded that "this matter is not even *arguably* within its [NLRB] jurisdiction."[36]

The approach taken by Justice Roberts seems to be sounder than that adopted by the majority. To begin with, the legislative history behind the enactment of section 14(c) would seem to bolster his position. On the heels of Supreme Court decisions[37] that created the "no man's land" in this area of labor relations, several bills were introduced into both Houses of the Eighty-fifth Congress in order to eliminate this jurisdictional vacuum.[38] The measure ultimately adopted was the product of a conference committee, and when the conference report was submitted, the only major attack came from Senator Morse. He expressed fears concerning difficulties that would arise if a state court were to make the first determination as to whether the Board would or would not take jurisdiction in a particular case,[39] and he ultimately concluded that the Board must decline jurisdiction in a "particular" case before a state court may assume jurisdiction.[40] In spite of such a conclusion, Senator Morse was one of only two senators who voted against Senate enactment of the conference bill.[41] Thus, he may have realized that his interpretation of section 14(c) was not entertained by the vast majority of his colleagues.

---

33 *Id.*
34 *Id.*
35 *Id.* at 270.
36 *Id.* at 271. Judge Roberts' conclusion is based on the following facts: 1) petitioner's only employee was his son, and so the National Labor Relations Act does not even apply, *see* notes 13-14 *supra* and accompanying text; 2) petitioner's annual gross volume of business was only $230,000, and the NLRB, according to its published standards, asserts jurisdiction over only those retail enterprises having a gross volume of business of at least $500,000 annually. 42 L.R.R.M. 97 (1959). Justice Roberts noted that, for jurisdictional purposes, Stryjewski's gross receipts should not be added to those of the importing distributor. Under Board policy, this would be a proper procedure if a secondary boycott were involved; such is not the case here, because the only picketing complained of occurred at petitioner's place of business. Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers, 233 A.2d 264, 272-73 (Pa. 1967) (dissenting opinion).
37 *See* notes 4-6 *supra* and accompanying text.
38 *See* Reilly, *supra* note 7, at 308-09 for a consideration of the subject matter of these bills.
39 105 CONG. REC. 17877-79 (1959).
40 *Id.* at 17877.
41 Reilly, *supra* note 7, at 309.

The language of section 14(c) itself seems to contemplate prospective rather than actual declination of jurisdiction by the NLRB. Indeed, the statute refers to declination "by rule of decision or *by published rules*"[42] (emphasis added), and this general rule-making power would accomplish little if it did not obviate the necessity for case-by-case jurisdictional declinations by the Board.[43]

Justice Roberts' reliance on *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service, Incorporated*[44] has already been noted,[45] and other decisions of the Supreme Court reveal that federal pre-emption in labor disputes is no longer the sacred doctrine that it once may have been.[46] Concerning the issue under consideration, there are Supreme Court decisions in addition to *Radio Broadcast* that support the conclusion that prospective denial by the NLRB may vest jurisdiction in state courts. In *Local 100, United Association of Journeymen v. Borden*,[47] respondent successfully sought damages in a state court for petitioner's refusal to refer him to a construction company. The Supreme Court reversed on the basis of *Garmon*, but noted that "the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance."[48] Such a statement conveys a prospective flavor and indicates that the majority in *Stryjewski* may have taken the wrong approach to the problem. Indeed, rather than considering whether or not the NLRB would assert jurisdiction, the *Stryjewski* majority considered whether or not a state court could act until the NLRB had actually declined to assert jurisdiction; such a process leads to an interpretation of section 14(c) not demanded under the *Garmon* rule.

Perhaps the strongest precedent in support of the *Stryjewski* holding is furnished by *Marine Engineers Beneficial Association v. Interlake Steamship Company*.[49] In that case a state court enjoined two picketing unions on the ground that they were not "labor organizations" within the contemplation of section 8(b) of the National Labor Relations Act. Again, the Supreme Court reversed on the basis of *Garmon*.

> It is the petitioners' contention that the issue to be determined in this case is not whether the state courts correctly decided their "labor organiza-

42 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1) (1964).

43 Russell v. Electrical Workers Local 569, 48 Cal. Rptr. 702, 704, 409 P.2d 926, 928 (1966). *See* Cohen, *supra* note 7, at 348; 80 HARV. L. REV. 1600, 1602 (1967).

44 380 U.S. 255 (1965).

45 *See* notes 26-27 *supra* and accompanying text.

46 Vaca v. Sipes, 386 U.S. 171, 179-80 (1967) contains an excellent summary of congressional and judicial exceptions to the doctrine of pre-emption. *E.g.*, Smith v. Evening News Ass'n, 371 U.S. 195 (1962) permits a suit in a state court for breach of a collective bargaining agreement regardless of the fact that the particular breach is also an unfair labor practice. Also state courts are not pre-empted where the activity regulated was merely a peripheral concern of the Labor Management Relations Act or touched an interest so deeply rooted in local feeling and responsibility that the Court could not infer that Congress had deprived the states of power to act. Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (malicious, libelous statements); International Union, UAW v. Russell, 356 U.S. 634 (1958) (violence); International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958) (wrongful expulsion from union membership).

47 373 U.S. 690 (1963).

48 *Id.* at 694.

49 370 U.S. 173 (1962).

> tion" status, but whether the state courts were free to finally decide that issue at all. . . . We agree.[50]

This language apparently supports the "wait and see" approach adopted by *Stryjewski* and *Colorado State Council of Carpenters*. However, the conclusion of the Court in *Marine Engineers* casts doubt on the strength of its "agreement":

> [W]e conclude that the task of determining what is a "labor organization" in the context of § 8(b) must *in any doubtful case* begin with the National Labor Relations Board, and that the only workable way to assure this result is for the courts to concede that a union is a "labor organization" for § 8(b) purposes whenever a *reasonably arguable case* is made to that effect.[51] (Emphasis added.)

It is clear from this language that the Court is simply restating the holding in *Garmon*. Hence, *Marine Engineers* does not support the conclusion that jurisdiction of a state court depends in all cases upon an actual declination of jurisdiction by the NLRB. Indeed, the converse of the above quoted statement is that state courts will have jurisdiction if, as in *Stryjewski*, the case is not doubtful and if a reasonable argument favorable to NLRB jurisdiction cannot be made.

George L. Burgett

CRIMINAL PROCEDURE — SEARCH AND SEIZURE — FIRST AMENDMENT — A SEARCH WARRANT MUST PARTICULARLY SPECIFY ANY OBSCENE MATERIAL TO BE SEIZED SO THAT THE COURT'S FUNCTION OF DETERMINING WHAT MATERIAL IS OBSCENE AND THEREFORE OUTSIDE THE PROTECTION OF THE FIRST AMENDMENT IS NOT DELEGATED TO POLICE OFFICERS. — On May 6, 1967, after being advised by an FBI agent and the New York State Police that Paul Rothenberg had in his possession several master reel films containing hard-core pornography, the Detective Sergeant of the Nassau County Police Department, upon his affidavit that Rothenberg was in possession of these films, obtained a search warrant. The warrant authorized the search of Rothenberg's residence and his two automobiles for "obscene, indecent and 'hard-core pornographic' pictures, photographs and motion picture films."[1] The affidavit stated that the detective's conclusions were based on reliable information including wire-tapped telephone conversations.[2] The ensuing search revealed over thirty reels of silent motion picture film, several of which were determined to be master reels. The officers seized the film cans without viewing the content of the film.[3]

Rothenberg was then charged with a violation of section 1141(1) of the

---

50 *Id.* at 177-78.
51 *Id.* at 182.

---

1 People v. Rothenberg, 20 N.Y.2d 35, 38, 228 N.E.2d 379, 380, 281 N.Y.S.2d 316, 317 (1967).
2 Brief for Appellant at 4-6, People v. Rothenberg, 20 N.Y.2d 35, 228 N.E.2d 379, 281 N.Y.S.2d 316 (1967).
3 People v. Rothenberg, 20 N.Y.2d 35, 40, 228 N.E.2d 379, 381, 281 N.Y.S.2d 316, 319 (1967) (dissenting opinion).

New York Penal Law[4] for having in his possession "with intent to sell, lend, distribute, show or transmute obscene, lewd, lascivious, filthy, indecent films, hard-core pornography, to wit: in excess of seven reels of movie films 'depicting acts of sexual intercourse and sodomy.' "[5] Rothberg's motion to suppress the evidence was denied before trial. He entered a plea of guilty and was convicted of a violation of section 1141(1). He received a sentence of six months in the county jail. The Appellate Term of the Supreme Court affirmed the judgment of the trial court, one judge dissenting on the ground that the terms of the search warrant did not meet the constitutional test requiring specific description.[6] The New York Court of Appeals reversed in a four-to-three decision written by Judge Van Voorhis. The court ordered a new trial to allow for a motion to suppress the seized films and *held:* a warrant for the search and seizure of obscene material must meet the standards of the fourth amendment by "particularly describing the . . . things to be seized,"[7] so that the enforcing officers are not allowed to make the purely judicial determination of whether the material is constitutionally protected as free speech under the first amendment. *People v. Rothenberg,* 20 N.Y.2d 35, 228 N.E.2d 379, 281 N.Y.S.2d 316 (1967).

In this country the safeguarding requirement that a search warrant particularly describe the things to be seized was one of the first protections sought.[8]

4 Ch. 736, § 1, [1958] New York Laws '(McKinney) 181st Sess. 855-56 (repealed Sept. 1, 1967) provides in part:

> A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with the intent to sell, lend, distribute, give away, show or transmute, or advertise in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting . . . photograph, motion picture film, . . . or in any manner manufactures, or prepares any such . . . photograph, motion picture film, . . . or causes . . . notice of any kind, giving information, directly or indirectly, stating . . . where, how, of whom, or by what means any . . . photograph, motion picture film . . . named in this section can be purchased, obtained or had . . . .
>
> Is guilty of a misdemeanor, and upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment, or be fined . . . . Ch. 40, art. 106, § 1141(3) [1909] N.Y. Consolidated Laws 132d Sess. 2678.

This statute has since been replaced by a draft offered by the New York State Commission on Revision of the Penal Law and Criminal Code. The new law was enacted in 1965 to become effective on September 1, 1967, as N.Y. PEN. LAW § 235.05 (McKinney 1967). It provides in part: "A person is guilty of obscenity when, knowing its content and character he: 1. Promotes, or possesses with intent to promote, any obscene material. . . ." The terms "obscenity," "material," and "promote" are specially defined at the beginning of N.Y. PEN. LAW § 235.00 (McKinney 1967). That section states:

> Any material or performance is "obscene" if (a) considered as a whole, its predominate appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value.

5 Brief for Appellant at 7, People v. Rothenberg, 20 N.Y.2d 35, 228 N.E.2d 379, 281 N.Y.S.2d 316 (1967).

6 People v. Rothenberg, 20 N.Y.2d 35, 38, 228 N.E.2d 379, 380, 281 N.Y.S.2d 316, 317 (1967).

7 U.S. CONST. amend. IV.

8 *See* Stanford v. Texas, 379 U.S. 476 (1965). Justice Stewart's opinion in this case traced the historical basis for the protection now guaranteed by the fourth amendment. Looking at the wording of the amendment he stated:

> These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever "be secure in their persons, houses, papers, and effects" from intrusion and seizure by

Today, this right is guaranteed by the fourth amendment and protected against state invasion by the due process clause of the fourteenth amendment.[9] The Supreme Court, discussing the history of the fourth amendment in *Stanford v. Texas*,[10] has recognized that a first amendment problem arises when a search warrant is obtained for an object which is a mode of communication. The Court stated:

> [W]hat this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.[11] (Citations omitted.)

However, those modes of communication which in a particular instance are judged "obscene" are not afforded first amendment protection.[12] In a leading Supreme Court obscenity case, *Roth v. United States*,[13] the Court clearly stated, "obscenity is not within the area of constitutionally protected speech or press."[14]

In order to understand fully the dispute in *Rothenberg*, it is necessary to mention two prior New York decisions, each dealing with different problems raised in the area of obscenity law. The first case, *People v. Richmond County News, Incorporated*,[15] concerned a section 1141 violation and established the current test for what material the New York courts consider obscene and therefore outside the protection of the first amendment. In this four-to-three decision, the New York Court of Appeals, after stating that it is "settled doctrine" that a state has the power to convict those who publish or sell obscene publications, declared that "the prohibitions of section 1141 of the Penal Law should apply only to what may properly be termed 'hard-core pornography.' "[16] The court

---

officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British Tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer." *Id.* at 481. *See also* Marcus v. Search Warrant, 367 U.S. 717, 724-29 (1961); Frank v. Maryland, 359 U.S. 360, 363-66 (1959).

9 Mapp v. Ohio, 367 U.S. 643 (1961).

10 379 U.S. 476 (1965).

11 *Id.* at 485.

12 *See* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (dictum).

13 354 U.S. 476 (1957).

14 *Id.* at 485.

15 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

16 *Id.* at 586, 175 N.E.2d at 685, 216 N.Y.S.2d at 375. The court in this case established a test for obscenity based on the definition of obscenity as set out in Roth v. United States, 354 U.S. 476 (1957). *See* text accompanying note 34 *infra*. Although recognizing that *Roth* allowed broad boundaries within which material could be constitutionally proscribed as obscene, the New York court read section 1141 as demanding a higher degree of obscenity than that set out in *Roth*. The dissent in *Richmond* pointed out that the court

explained that the character of the material that would come under this term is that which "focuses predominately upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification."[17] *People v. Matherson*,[18] a 1965 decision, dealt with the required specificity of a warrant for allegedly obscene materials. In this case a search warrant, couched in terms of authorizing the seizure of "indecent books and materials," was found by the court and even conceded by the state to be fatally defective as a general warrant.[19]

In throwing out the warrant, the *Matherson* court relied on two cases decided by the Supreme Court of the United States. The first, *Stanford v. Texas*,[20] involved a warrant that authorized the search and seizure of all "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas . . . ."[21] The Court unanimously held that this language was "constitutionally intolerable," in that it failed to describe with any particularity the things to be seized. This failure became even more fatal since the material seized was of the type protected by the first amendment.[22] The second case cited by *Matherson* was *Marcus v. Search Warrant*,[23] decided four years before *Stanford*. *Marcus* contains a lengthy historical account of the basis of the fourth amendment. The Court was quite disturbed that 180 different types of innocent publications had been withheld from the market for better than two months after having been seized under a warrant issued for "obscene . . . publications."

> We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. . . . The warrants gave the broadest discretion to the executing officers; they merely repeated

had adopted a stricter test than *Roth* required, stating: "Since we may constitutionally give vitality to the legislative enactment, why is it necessary for us to strain against the definition laid down by the highest court in the land . . . ." *Id.* at 592, 175 N.E.2d at 689, 216 N.Y.S.2d at 380 (1961) (dissenting opinion). For a decision that interpreted a state statute as broadly as *Roth* will allow, see Monfred v. Maryland, 226 Md. 312, 173 A.2d 173 (1961).

17 People v. Richmond County News, Inc., 9 N.Y.2d 578, 587, 175 N.E.2d 681, 686, 216 N.Y.S.2d 369, 376 (1961). This definition has been changed under the new statute in N.Y. PEN. LAW § 235.00 (McKinney 1967) effective September 1, 1967. Two commentators to the new statute remark that it adopts the federal standard and "is intended to be somewhat less stringent than the 'hard-core pornography' test of *Richmond County News*." Denzer and McQuillan, *Practice Commentary*, N.Y. PEN. LAW § 235.00, at 89 (McKinney 1967).

18 16 N.Y.2d 509, 208 N.E.2d 180, 260 N.Y.S.2d 448 (1965).

19 *Id.* at 511, 208 N.E.2d at 180, 260 N.Y.S.2d at 449. Although stating that the search warrant was defective, the court sustained the seizure of the evidence as incident to a lawful arrest.

20 379 U.S. 476 (1965).

21 *Id.* at 478-79.

22 This case aptly illustrates the degree of abuse of constitutional rights that an enthusiastic search and seizure may degenerate into. From the details of the case, it might be thought the search had taken place in the time of James Otis. *See* note 8 *supra*. Curiously enough, the warrant was issued under the authority of a Texas statute known as the "Suppression Act." Officers executing the warrant on Stanford's bookshop and residence searched for more than four hours and seized better than 2000 books. Although the officers did not find any records of the Communist Party, they did collect many of Stanford's personal documents including insurance policies, a marriage certificate, bills and receipts of his household and other personal correspondence. The "subversive" books seized included works by Jean Paul Sartre, Pope John XXIII, Karl Marx, and Mr. Justice Hugo L. Black. *Id.* at 479-80.

23 367 U.S. 717 (1961).

> the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted "obscene . . . publications."[24]

The Court further reasoned that in order to avoid wholesale suppression of constitutionally protected modes of communication, the procedure in both the issuance and the execution of a search warrant must contain greater safeguards when dealing with materials possibly protected by the first amendment.[25]

From this background, Judge Van Voorhis announced the holding in *Rothenberg* in a rather compact manner. First, he compared the terms of the concededly defective search warrant in *Matherson* with the one used against Rothenberg. He concluded that the warrant in *Rothenberg* was of the same generality as that in *Matherson,* thereby violating the specificity requirements of the fourth amendment. Judge Van Voorhis stated that "[t]he basic defect" of the warrant was its general language which "delegates to the police officer executing it the function of determining whether the material is obscene."[26] The court recognized that the problem of the requisite specificity for a warrant of this type is national in scope,[27] and that due to the first amendment implications, it presents problems quite separate from the general law concerning search and seizure. Basically, the court reasoned that the determination of what is to be protected by the first amendment is a matter of constitutional law and cannot be delegated to a police officer.[28] To bring this reasoning around full circle, the court suggested that if the Supreme Court has difficulty in determining what is or is not obscene, a police officer can hardly be expected to do so. Allowing each patrolman to decide what is obscene would give rise to as many standards of "obscenity" as there are patrolmen. To the contention that *Matherson* was distinguishable because the *Rothenberg* warrant contained the term "hard-core pornography," the majority answered that that term "is not enough to define specifically in a search warrant what the police are to look for and seize."[29]

Judge Burke, speaking for the dissent, would have affirmed the conviction. He argued that the requirement of specificity should be reasonably construed under the circumstances involved. Pointing out that all the police did was to seize the film cans, Judge Burke argued that the warrant could not be reasonably read as authorizing an officer to make a determination of whether the material was obscene.[30] Rather, the officers merely executed the warrant by seizing the films described therein, and the warrant could not have more accurately specified the material to be seized. The terms of the warrant were reasonable since the films mentioned in the affidavit had neither title nor serial number as books and

24 *Id.* at 731-32.
25 *Id.* at 731.
26 People v. Rothenberg, 20 N.Y.2d 35, 38, 228 N.E.2d 379, 380, 281 N.Y.S.2d 316, 317 (1967).
27. *Id.*
28 *Id.*
29 *Id.* at 39, 228 N.E.2d at 381, 281 N.Y.S.2d at 318.
30 *Id.* at 40, 228 N.E.2d at 381, 281 N.Y.S.2d at 319 (dissenting opinion).

films usually do. The requirements of reasonable specificity were, therefore, met by the language of the warrant.

The dissent supported its reasoning with the following statement by the Supreme Court in *United States v. Ventresca:*[31]

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.[32]

Judge Burke further reasoned that if the affidavit necessary to obtain a warrant should be read in such a common-sense fashion, the search warrant itself should be capable of the same interpretation by the police officer executing it. Finally, the dissent distinguished *Marcus* and *Stanford* on their facts.[33]

In the previously mentioned case of *Roth v. United States,* the Supreme Court established the now much quoted test for determining what constitutes obscenity — "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."[34] This broadly stated test was then left up to the individual states to apply. As pointed out above, the New York Court of Appeals in *Richmond County News* established that only "hard-core pornography" would not be protected and gave a rather extensive definition of what constituted that term.[35] In urging that Rothenberg's conviction be sustained, the state in their brief argued that the term "hard-core pornography" as used in the warrant, when coupled with the rather clear *Richmond* definition, should be specific enough to withstand constitutional attack and overcome the defective generality conceded in *Matherson.*[36] This argument is open to the objection, however, that the term "hard-core pornography" is no more definable than "obscenity."[37] Presumably the dissent recognized this definition problem since

31 380 U.S. 102 (1965).

32 People v. Rothenberg, 20 N.Y.2d 35, 40-41, 228 N.E.2d 379, 382, 281 N.Y.S.2d 316, 319 (1967), (dissenting opinion), *quoting from* United States v. Ventresca, 380 U.S. 102, 108 (1965).

33 People v. Rothenberg, 20 N.Y.2d 35, 41-42, 228 N.E.2d 379, 382, 281 N.Y.S.2d 316, 319-20 (1967) (dissenting opinion).

34 Roth v. United States 354 U.S. 476, 489 (1957). The state in arguing to affirm Rothenberg's conviction paraphrased this test as "the reaction of the average man applying contemporary community standards." Then they logically urged: "Certainly a police officer executing a search warrant is as capable of applying this standard as anyone else." Brief of Respondent at 5, People v. Rothenberg, 20 N.Y.2d 35, 228 N.E.2d 379, 281 N.Y.S.2d 316 (1967).

35 After giving the basic definition quoted earlier in the text, the court gave a concrete example of how the test is to be applied to a particular book. "[W]hile the magazine contains many stories or pictures which are aesthetically tasteless and without any redeeming social worth, none of them is pornographic. . . . [I]t contains nothing which smacks of sick and blatantly perverse sexuality." People v. Richmond County News, Inc., 9 N.Y.2d 578, 587, 175 N.E.2d 681, 686, 216 N.Y.S.2d 369, 376 (1961).

36 Brief for Respondent at 7, People v. Rothenberg, 20 N.Y.2d 35, 228 N.E.2d 379, 281 N.Y.S.2d 316 (1967).

37 An almost identical objection was raised by Chief Justice Warren in dissent several years before *Rothenberg.* He phrased it in the form of a question asking: "But who can

they ignored this line of reasoning and argued instead that the warrant was as specific as it could have been under the circumstances.[38]

The conflict in *Rothenberg* is based on what might be termed the trend found in the *Ventresca* Court's statement that "technical requirements of elaborate specificity . . . have no proper place in this area."[39] To supplement this approach, the dissent urged that modern, practical law enforcement requires a broader reading of obscenity search warrants because, as illustrated by the facts in *Rothenberg,* any greater degree of specificity would be an unreasonable demand.

With this reasonableness argument, the dissent intermixed an attempt to distinguish *Rothenberg* on its facts from other obscenity search and seizure cases. All that is given in the facts is that the officers went in and confiscated the film cans mentioned in the warrant. Answering the majority's point that the warrant delegated to the officers the function of deciding whether the material was obscene, the dissent retorted:

> There is no indication here that any such determination was made by the police officers upon execution of this warrant or that the warrant could reasonably be read as authorizing or directing them to make such a determination . . . . [they] would have had to set up a film projector.[40]

In the light of the above statement, the dissent does not appear to be calling for a liberal approach to the specificity requirements of a search warrant. In fact, they deplored some of the general abuses found in the search warrant area with which the majority would presumably agree. According to Judge Burke, a warrant ordering the setting up of a device to view the film before seizure "could not constitutionally be authorized."[41] He also deplored the broadness of the warrant and the indiscriminate confiscation in *Stanford,* and the conduct in *Marcus* where the officers took all the magazines which in their judgment were obscene.

It appears then that Judge Burke was torn between arguing this case on its facts and urging the adoption of a general rule favoring the nontechnical interpretation of search warrants with the result that he combined both ideas to support each other. On the other hand, two of Judge Van Voorhis's basic premises stand directly against the adoption of a rule allowing a common-sense interpretation of an obscenity warrant by an enforcing officer: first, that it is always up to the judge to determine what material is obscene, and second, that the "hard-core pornography" test laid down in the *Richmond* case was meant for the courts to use, not the police.

The dissent's view that a warrant be read in a common-sense fashion instead

---

define 'hardcore pornography' with any greater clarity than 'obscenity'?" Jacobellis v. Ohio, 378 U.S. 184, 201 (1964) (dissenting opinion).

38 People v. Rothenberg, 20 N.Y.2d 35, 40, 228 N.E.2d 379, 381-82, 281 N.Y.S.2d 316, 319 (1967) (dissenting opinion).

39 United States v. Ventresca, 380 U.S. 102, 108 (1965).

40 People v. Rothenberg, 20 N.Y.2d 35, 40, 228 N.E.2d 379, 381, 281 N.Y.S.2d 316, 319 (1967) (dissenting opinion).

41 *Id.*

of technically is of questionable value where a police officer is enforcing a search warrant for obscene material. *Ventresca,* which first announced that trend, can easily be distinguished in that its holding was more concerned with the existence of probable cause for the issuance of a warrant than with what was to be seized under it. This common-sense trend, although appealing to those who favor broader search warrants, should be limited to the area of establishing probable cause from the face of an affidavit, as was the case in *Ventresca.* The decision in *Rothenberg* provides one advantage to New York trial attorneys in that they can now be certain of the proposition that an added degree of specificity is necessary in a search warrant for obscene material. Unless a greater need is shown for letting down the protections of the first amendment, the magistrates issuing the warrants and the police enforcing them will be required to go through the troublesome procedure of establishing the obscenity of an article before the warrant is issued and then wording the warrant in exact and specific terms.

Finally Judge Burke's warning that "[a] grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting,"[42] should be considered. Interestingly, even in the majority's controlling case, *Matherson,* the court did not suppress the evidence obtained, but allowed it as incident to a valid arrest.[43] The New York Court of Appeals has decided at least one other obscenity case in the same manner[44] which may point to the truth of Judge Burke's warning. However, it is certainly possible that the judicial attitude evidenced by the majority in *Rothenberg* may in the future carry over into cases where allegedly obscene materials are seized incident to a valid arrest. The result could be that the police will only be able to seize incident to an arrest those materials that they could have adequately specified in a search warrant under the *Rothenberg* rule. Any other practice would be open to the majority's objection that it is the police themselves who are determining what is obscene. Indeed, the California Supreme Court in *Flack v. Municipal Court*[45] has gone even further and declared that, absent an emergency, an arresting officer may not search for or seize allegedly obscene materials incident to an arrest without first obtaining a search warrant for those materials. The court reasoned:

> It is incongruous to condemn, as vesting too abundant discretion in the enforcing officer, a search and seizure made on an overly broad warrant . . . while permitting officers an unfettered discretion in seizures effected without a warrant under the guise of being incident to arrest.[46] (Citations omitted.)

Although *Flack* and *Rothenberg* may be viewed as loopholes available to the "purveyors of smut," such a view fails to recognize that the protection of

42 *Id.* at 41, 228 N.E.2d at 382, 281 N.Y.S.2d at 319 (dissenting opinion), *quoting from* United States v. Ventresca, 380 U.S. 102, 108 (1965).
43 People v. Matherson, 16 N.Y.2d 509, 511, 208 N.E.2d 180, 260 N.Y.S.2d 448, 449 (1965).
44 People v. Peskin, 16 N.Y.2d 511, 208 N.E.2d 180, 260 N.Y.S.2d 449 (1965).
45 59 Cal. Rptr. 872, 429 P.2d 192 (1967).
46 429 P.2d at 199.

the first and fourth amendments is available to everyone, including those who deviate from the social norm. These amendments, by their very language, evidence a choice for the stringent procedures in law enforcement that the *Rothenberg* decision demands.

William C. Keck