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Case Notes

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CASE NOTES

Administrative Law—Immigration—Attorney General's Refusal of Discretionary Relief in Deportation Proceeding Not Subject to Judicial Review.—Petitioner, an alien, entered the United States on a seaman's visa and remained illegally for ten years. At consequent deportation proceedings, he conceded his deportability, but requested discretionary relief from the Attorney General under the hardship provision of Section 244(a)(5) of the Immigration and Nationality Act.¹ The Attorney General, denying this application on the ground that petitioner did not meet the statutory requirements, was upheld by the Board of Immigration Appeals. Petitioner then sought review of the Attorney General's decision pursuant to Section 106 of the Immigration and Nationality Act² which provides for review of final orders of deportation by the courts of appeals. The Court of Appeals for the Second Circuit, sitting en banc, held in a five to four decision that judicial review under section 106 was limited to *final orders of deportation* and did not extend to discretionary orders withholding or suspending such action. *Foti v. Immigration & Naturalization Service*, 308 F.2d 779 (2d Cir. 1962).

Prior to the enactment of section 106, Congress had curtailed judicial participation in immigration affairs to a great extent.³ Complete exclusion of the courts was impossible, however, since the detained alien's right to the writ of habeas corpus provided some relief.⁴ The passage of the Administrative

1. 66 Stat. 163 (1952), as amended, 8 U.S.C. §§ 1101-503 (1958) (Supp. III, 1959-1961). Section 244(a)(5) provides "the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who . . . is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence." 66 Stat. 215-16 (1952), 8 U.S.C. § 1254(a)(5) (1958). The provision relating to the spouse, parent or child was not applicable in the instant case since the alien's family remained in Italy.

2. 75 Stat. 651 (1961), 8 U.S.C. § 1105a (Supp. III, 1959-1961).

3. Congress has acted in immigration matters on the assumption that political control over our borders is the only important consideration. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 5-6 (1952). The courts have acquiesced in this congressional assumption. See *Carlson v. Landon*, 342 U.S. 524 (1952); *Fong Yue Ting v. United States*, 149 U.S. 693, 705-16 (1893).

4. Deportation procedure requires issuance and execution of the order. Execution involves custody to the extent that the Immigration and Naturalization Service must restrain the alien long enough to expel him. This detention makes available the writ of habeas corpus. See *Ekiu v. United States*, 142 U.S. 651 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *United States v. Jung Ah Lung*, 124 U.S. 621 (1883). The writ's scope of inquiry was first strictly limited. See Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 424-26 (1958). Gradually, however, the writ came to be used as a limited form of review, testing whether the statute had been correctly construed, whether there was any evidence to support the order, and whether the hearing was fair. See Gordon, *Judicial Review of Exclusion and Deportation*, 31 Interpreter Release 74, 76-78

Procedure Act⁵ and the Immigration and Nationality Act of 1952⁶ gave renewed vigor to the role of the judiciary. The Supreme Court construed these statutes to permit judicial review in deportation and exclusion cases,⁷ thus overriding the objections of the Immigration and Naturalization Service which considered its activities exempt from the Administrative Procedure Act's provisions.⁸ This extension of judicial power by the Court provided the stimulus for the present congressional attempt to regulate its utilization.⁹ The result was the passage of a bill¹⁰ which for the first time contained a statutory scheme for the review of immigration proceedings.¹¹ Its explicit goal was to prevent the use of the courts merely to delay the execution of deportation and exclusion orders.¹² Section 106 rejected direct review of *exclusion* orders by re-establishing habeas corpus as the only method of court participa-

(1954). The scope of the writ became quite broad during the period of the Immigration and Nationality Act of 1917 because review of deportation orders under that statute was denied. *Heikkila v. Barber*, 345 U.S. 229 (1953). The act provided that in every case where an alien is ordered to be deported from the United States under the provisions of this act, or of any law or treaty, the decision of the Attorney General shall be final. 39 Stat. 889 (1917), as amended, 54 Stat. 1238 (1940). The word "final" had long been interpreted as precluding any type of judicial review except habeas corpus. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50 (1955).

5. 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1958).

6. 66 Stat. 163 (1952), as amended, 8 U.S.C. §§ 1101-503 (1958) (Supp. III, 1959-1961).

7. *Brownell v. Tom We Shung*, 352 U.S. 180 (1956); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955). In *Pedreiro*, the Court stated "it is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the . . . word 'final' in the . . . Act as referring to finality in the administrative procedure rather than as cutting off the right of judicial review. . . ." 349 U.S. at 51. The court in reaching its decision also relied on legislative history which indicated that the Administrative Procedure Act was applicable to deportation cases. *Id.* at 52.

8. The Service took the position that the hearing provisions of the Administrative Procedure Act were not available since hearings in immigration proceedings were required not by statute, but merely by judicial interpretation. H.R. Rep. No. 2140, 80th Cong., 2d Sess. 6 (1948). It contended further that the review provisions of the Administrative Procedure Act do not apply because the Immigration and Nationality Act of 1917 precluded review for the purposes of the former. See note 6 *supra*.

9. After the *Pedreiro* decision, two such bills were introduced. H.R. 9182, 84th Cong., 2d Sess. (1956); S. 3169, 84th Cong., 2d Sess. (1956). Other bills on the subject were introduced, culminating in a bill the provisions of which were virtually identical with H.R. 187, 87th Cong., 1st Sess. (1961) wherein the review provisions of § 106 of the Immigration and Nationality Act originated. See H.R. Rep. 13311, 85th Cong., 2d Sess. (1958).

10. 75 Stat. 650 (1961), 8 U.S.C. §§ 1101-05a (Supp. III, 1959-1961).

11. 75 Stat. 651-53 (1961), 8 U.S.C. § 1105a (Supp. III, 1959-1961).

12. The section originated as a separate House bill. See H.R. No. 565, 87th Cong., 1st Sess. (1961). This urgency of prevention of judicial review was reflected on virtually every page of the report.

tion.¹³ Congress, however, expressly accepted direct court review of *deportation* orders, but severely limited its availability.¹⁴

Despite this concession in section 106,¹⁵ the problem remained just how far the courts might go in their examination. The Court of Appeals for the Seventh Circuit construed this section as authorizing perusal of discretionary matters, reasoning that such matters were ancillary to the final order.¹⁶ The Seventh Circuit's decision was, in principle, at odds with pre-section 106 interpretations of Section 244(a) of the Immigration and Nationality Act¹⁷ under which determinations were not reviewable unless the denial of the exercise of discretion was insufficient on its face.¹⁸ In *Jay v. Boyd*,¹⁹ the Supreme Court stated that "discretionary determination on an application for suspension . . . is . . . not a matter of right under any circumstances, but . . . is in all cases a matter of grace."²⁰ The Court compared the proceeding

13. 75 Stat. 652 (1961), 8 U.S.C. § 1105a(b) (Supp. III, 1959-1961). This had the effect of rejecting the decision in *Brownell v. Tom We Shung*, 352 U.S. 180 (1956), wherein the Court held that an excluded alien might obtain judicial review of an exclusion order. *Id.* at 181.

14. 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a) (Supp. III, 1959-1961). An alien who is found deportable may bring a petition for review. 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a)(1) (Supp. III, 1959-1961). The use of the term "petition for review" seems to be an attempt to avoid repetitious suits and to create uniformity. See H.R. Rep. 565, 87th Cong., 1st Sess. (1961). This must be done within six months of the date of the final deportation order. 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a)(1) (Supp. III, 1959-1961). A deportation order is deemed final when all administrative remedies have been exhausted. 105 Cong. Rec. 12728 (1959) (remarks of Representative Lindsey). It was also stated that "final" meant after a determination of suspension or a withholding of deportation. *Ibid.* The review may be brought in the court of appeals for the circuit in which the alien resides or where the deportation order originated. The action may not be brought in a district court. 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a)(2) (Supp. III, 1959-1961). For a thorough and more comprehensive historical development of immigration and naturalization legislation see Comment, 71 *Yale L.J.* 760 (1962).

15. 75 Stat. 651 (1961), 8 U.S.C. § 1105a (Supp. III, 1959-1961).

16. *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962); *Roumeliotis v. Immigration and Naturalization Service*, 304 F.2d 453 (7th Cir. 1962).

17. 66 Stat. 214 (1952), 8 U.S.C. § 1254(a) (1958).

18. *Wolf v. Boyd*, 238 F.2d 249, 254 (9th Cir. 1957). See *Jay v. Boyd*, 351 U.S. 345 (1956); *Schoeler v. Immigration and Naturalization Service*, 305 F.2d 461 (2d Cir. 1962); *Dentico v. Immigration and Naturalization Service*, 303 F.2d 137 (2d Cir. 1962); *Milutin v. Bouchard*, 299 F.2d 50 (3d Cir. 1962); *Diminich v. Esparfy*, 299 F.2d 244 (2d Cir. 1961); *United States ex rel. Hintopoulos v. Shaughnessy*, 233 F.2d 705 (2d Cir. 1956), *aff'd*, 353 U.S. 72 (1957); *United States ex rel. Leong Choy Moon v. Shaughnessy*, 218 F.2d 316 (2d Cir. 1954); *United States ex rel. Dolenz v. Shaughnessy*, 205 F.2d 392 (2d Cir. 1953). See also *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950).

19. 351 U.S. 345 (1956).

20. *Id.* at 354.

to a denial of parole and suggested that the former is no more reviewable than the latter.²¹ This reasoning was uniformly accepted.²²

In the instant case, the court saw nothing in section 106²³ which enlarged the scope of review as it previously existed under section 244(a).²⁴ It concluded that the procedure for determination by the Attorney General of discretionary relief was quite different from that for determining deportability as outlined in section 242(b).²⁵ The court pointed out that the withholding and suspension provisions²⁶ outlined no method, "let alone requiring use of the procedure prescribed by § 242(b), to which the 1961 judicial review amendment is keyed."²⁷ On the contrary, the majority found evidence precluding direct review in section 106(a)(4)²⁸ which provides that the judicial review "shall be determined solely upon the administrative record upon which the deportation order is based. . . ."²⁹ Yet, in suspension and withholding proceedings the Attorney General may exercise his discretion based on facts not found in the administrative record.³⁰ Hence, the court concluded "if orders withholding or denying suspension . . . have been made reviewable by § 106(a), the standard of review must now be that provided in § 106(a)(4). . . ."³¹ Since the review procedure set forth in section 106(a)(4) conflicts with the procedure for discretionary relief, the court reasoned that direct review of the latter was not contemplated by Congress.³²

In dissenting, Judge Clark contended that when section 106 was enacted by

21. *Id.* at 354-55.

22. See note 18 *supra*.

23. 75 Stat. 651 (1961), 8 U.S.C. § 1105a (Supp. III, 1959-1961).

24. 66 Stat. 214 (1952), 8 U.S.C. § 1254(a) (1958).

25. 66 Stat. 209 (1952), as amended, 8 U.S.C. § 1252(b) (1958). In *Milutin v. Boucard*, 299 F.2d 50 (3d Cir. 1962), the court stated "the statute and regulations are clearly protective of the rights of . . . [one] who, it is claimed, is subject to being deported. . . . The procedure outlined for a determination by the Attorney General . . . whether the alien, though subject to deportation, shall have the order . . . withheld, is a different matter." *Id.* at 51.

26. 66 Stat. 214 (1952), 8 U.S.C. § 1254(a) (1958).

27. 308 F.2d at 782.

28. 75 Stat. 651 (1961), 8 U.S.C. § 1105a (Supp. III, 1959-1961).

29. *Ibid.*

30. *Jay v. Boyd*, 351 U.S. 345, 357-58 (1956); *Diminich v. Esperdy*, 299 F.2d 244, 248 (2d Cir. 1961), cert. denied, 369 U.S. 840 (1962); *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392, 395 (2d Cir. 1953).

31. 308 F.2d at 787.

32. *Ibid.* The majority also raised the provisions of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958), which exempted from judicial review an action which "is by law committed to agency discretion." They concluded that it seemed "unlikely that Congress meant to require that a decision resting in executive grace, as to which the scope of any review [of discretionary relief] is so narrow, must be initially reviewed by a court of three judges—a form of review of administrative action normally applied solely to 'quasi-judicial' agency determinations made on a record available for the court's inspection" 308 F.2d at 782.

Congress, it knew that the Attorney General had vested his dispensing powers under section 244³³ in the same special inquiry officer who, under section 242(b),³⁴ was to conduct proceedings to determine deportability. Congress, therefore, must have intended to include any determination made by this officer against the alien among orders made subject to review in the courts of appeals.³⁵ This construction, Judge Clark maintained, effectuates the legislative intent "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens. . . ." ³⁶ Further, he argued that the word "final," as used in the act necessarily includes discretionary action by the Attorney General and, therefore, such action would be within the purview of section 106 which grants judicial review to all *final orders of deportation*.³⁷

The majority's interpretation is more persuasive. The limited review procedure of section 106(a)(4)³⁸ conflicts with the broad basis used by the special inquiry officer in a determination of a section 244(a)(5)³⁹ petition, thus making review impractical and unwieldy. Further, since nothing in section 106⁴⁰ enlarges the previous scope of review of the Immigration and Nationality Act of 1952,⁴¹ the courts advocating independent review of discretionary

33. 8 C.F.R. § 244.1 (Supp. 1962) provides that "pursuant to Part 242 of this chapter and section 244 of the Act, a special inquiry officer in his discretion may authorize the suspension of an alien's deportation. . . ." Section 242.8(a) authorized special inquiry officers "to determine deportability and to make decisions including orders of deportation as provided by section 242(b) of the act . . ." and to exercise a variety of other powers. 8 C.F.R. § 242.8(a) (Supp. 1962).

34. 66 Stat. 209 (1952), as amended, 8 U.S.C. § 1252(b) (1958).

35. The majority rejected this theory saying "it would be rather novel that an administrative regulation [8 C.F.R. § 244.1 (Supp. 1962)] could bring something within the jurisdiction of the courts of appeals which was not covered by the language that Congress used and which, having given today, the Attorney General can take away tomorrow. . . ." *Foti v. Immigration and Naturalization Service*, 303 F.2d at 785.

36. H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), 2 U.S. Code Cong. & Ad. News 2966 (1961). The majority contended that such construction would not in fact "create a single, separate, statutory form of review," for § 106(a)(5) of the Immigration and Nationality Act, 75 Stat. 651 (1952), 8 U.S.C. § 1105a(5) (Supp. III, 1959-1961), provides one exception which requires transfer of the proceedings from the court of appeals to a district court when a genuine issue of United States nationality is presented.

37. During the House of Representative's debate on H.R. 2807, 86th Cong., 1st Sess. (1959), Representative Walter, author of the bill and co-author of the Immigration and Nationality Act of 1952 and the Administrative Procedure Act of 1946 agreed, as did the committee reporter, Representative Moore, with a statement made by Representative Lindsay: "[I]f there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final." 105 Cong. Rec. 12728 (1959).

38. 75 Stat. 651 (1961), 8 U.S.C. § 1105a (Supp. III, 1959-1961).

39. 66 Stat. 215-16 (1952), 8 U.S.C. § 1254(a)(5) (1958).

40. 75 Stat. 651 (1961), 8 U.S.C. § 1105a (Supp. III, 1959-1961). See notes 29 & 30 supra and accompanying text.

41. 66 Stat. 214 (1952), 8 U.S.C. § 1254(a) (1958). The courts, in construing this section, held discretionary immigration determinations not reviewable. See note 18 supra.

immigration determinations⁴² appear to be without statutory authority. A liberal construction of section 106⁴³ would conflict with the legislative intent and create delay in execution of an order specifically sought to be expeditious.⁴⁴

Constitutional Law—Federal Censorship—Revised Standard for Obscenity.—Petitioners were publishers of three magazines¹ which consisted of photographs of nude and semi-nude male models. Accompanying each photo was the name of the model and the name and address of the photographer. Suspecting the materials to be nonmailable under Section 1461 of the United States Code,² the local postmaster withheld delivery. At an official Post Office hearing the magazines were adjudged obscene, and on appeal the ruling was affirmed on the ground that the matter tended to arouse the prurient interest of the average homosexual.³ Mr. Justice Harlan, speaking for a divided Supreme Court,⁴ reversed, holding that the materials failed to meet the requirement

42. *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962); *Roumeliotis v. Immigration and Naturalization Service*, 304 F.2d 453 (7th Cir. 1962).

43. 75 Stat. 651 (1961), 8 U.S.C. § 1105a (Supp. III, 1959-1961).

44. See H.R. No. 565, 87th Cong., 1st Sess. (1961).

1. MANual, Trim and Grecian Guild Pictorial.

2. 18 U.S.C. § 1461 (1958) provides in part: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and . . . every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

3. *Manual Enterprises, Inc. v. Day*, 289 F.2d 455 (D.C. Cir. 1961).

4. Mr. Justice Stewart joined in the opinion of the Court and Mr. Justice Black concurred in the result. Mr. Justice Douglas and Mr. Chief Justice Warren joined in Mr. Justice Brennan's concurring opinion. Addressing himself to the question of whether under § 1461, a part of the Criminal Code, the Postmaster General is authorized to censor obscenity at the administrative level without recourse first to judicial determination of same, Mr. Justice Brennan concluded that the postal authorities acted *ultra vires* in that "Congress has not, in § 1461, authorized the Postmaster General to employ any process of his own to close the mails to matter which, in his view, falls within the ban of that section. 'The provisions . . . would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the

of being patently offensive so as to violate "the national standard of decency."⁵ *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488 (1962).

The problem of governmental censorship, and particularly that of determining an adequate standard for judging the obscene, is not a recent one.⁶ But, although cases date back to 1663,⁷ the formulation of a norm was uniformly avoided⁸ until 1867, when Lord Cockburn, in *Regina v. Hicklin*,⁹ pronounced the following test:

[W]hether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.¹⁰

This standard allows a work to be judged by the reading of an isolated passage, takes no notice of any artistic or scientific value the material may possess and considers the motive of the author immaterial.

In 1873, an omnibus federal anti-obscenity law was passed, which included the postal provisions now known as section 1461.¹¹ In quick succession the courts confirmed the constitutionality of these provisions¹² and implemented them by quoting verbatim the *Hicklin* test as the proper one for determining

country.'" *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 519 (1962). Mr. Justice Clark, dissenting, characterized § 1461 as a clear congressional mandate authorizing "the Postmaster General through administrative process to close the mails to matter included within its proscriptions." *Id.* at 520. Justices White and Frankfurter took no part in the decision.

5. Regarding the alleged violation of the advertising provisions of § 1461, Mr. Justice Harlan held that the Government failed to sustain its burden of proof in that it had not proved scienter on the part of the publishers of the admittedly obscene materials which were being offered for sale. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 492-95. In his dissent, Mr. Justice Clark thought the element of scienter was "immaterial" in a civil proceeding, and even under the assumption of its necessity, felt that "the undisputed facts . . . compel as a matter of law" the conclusion that it had been established. *Id.* at 526.

6. For excellent discussions of the myriad problems involved, see Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 49-121 (1960); Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. Pa. L. Rev. 214 (1957).

7. *Sir Charles Sydlyes Case*, 1 Keble 620, 83 Eng. Rep. 1146 (K.B. 1663). This case actually dealt with indecent exposure and trespass vi et armis: the defendant stood naked on a balcony and tossed bottles at the populace below.

8. *Rex v. Curl*, 2 Strange 788, 93 Eng. Rep. 849 (K.B. 1727). Early American cases did likewise. See, e.g., *Knowles v. State*, 3 Day 103 (Conn. 1803); *Commonwealth v. Holmes*, 17 Mass. (16 Tyng) 335 (1821); *State v. Appling*, 25 Mo. 315 (1857); *Commonwealth v. Sharpless*, 2 S. & R. 91 (Pa. 1815).

9. L.R. 3 Q.B. 360 (1868).

10. *Id.* at 371.

11. 19 Stat. 90 (1876). See Paul & Schwartz, *supra* note 6, at 217-18.

12. In *Ex parte Jackson*, 96 U.S. 727 (1877), a case in which the issue concerned the power of Congress to regulate the mails, the Court, in sweeping dicta, passed on the constitutionality of the forerunner of § 1461 stating "the only question for our determination relates to the constitutionality of the act; and of that we have no doubt." *Id.* at 737.

what was obscene.¹³ Uniformly applied for more than half a century to the extent of becoming so widely accepted that even those who personally opposed it felt compelled to adhere,¹⁴ it was not until the 1930's that any alteration was attempted.

*United States v. Dennett*¹⁵ reversed the conviction of a woman for the sale of a pamphlet designed for children and dealing with a frank portrayal of the facts of life. Finding it to be "an accurate exposition of the relevant facts of the sex side of life [phrased] in decent language and in manifestly serious and disinterested spirit,"¹⁶ the court declared that the pamphlet was not obscene since

any incidental tendency to arouse sex impulses . . . is apart from and subordinate to its main effect The direct aim and the net result is to promote understanding and self-control.¹⁷

Three years later, when called upon to decide the acceptability of Joyce's *Ulysses*,¹⁸ the judiciary again emphasized this "net result" test. The trial court conceded that while the book contained a "recurrent emergence of the theme of sex,"¹⁹ it displayed nowhere "the leer of the sensualist."²⁰ Judge Woolsey held the book was not obscene since, when read in its entirety, it did not tend to "excite sexual impulses or lustful thoughts"²¹ for the normal person. On appeal, while characterizing the work as "sincere, truthful, relevant to the

13. *United States v. Bennett*, 24 Fed. Cas. 1093, 1102 (No. 14571) (C.C.S.D.N.Y. 1879).

14. *Dunlop v. United States*, 165 U.S. 486 (1897); *Rosen v. United States*, 161 U.S. 29 (1896); *Burton v. United States*, 142 Fed. 57 (8th Cir. 1906); *United States v. Smith*, 45 Fed. 476 (E.D. Wis. 1891); *United States v. Clarke*, 38 Fed. 732 (E.D. Mo. 1889); *United States v. Wightman*, 29 Fed. 636 (W.D. Pa. 1886); *United States v. Bebout*, 28 Fed. 522 (N.D. Ohio 1886); *United States v. Britton*, 17 Fed. 731 (S.D. Ohio 1883). Indeed, Judge Learned Hand was almost apologetic for expressing disapproval of the test. "I hope it is not improper for me to say that the rule as laid down . . . does not seem to me to answer to the understanding and morality of the present time [I]t seems hardly likely that we are even to-day . . . content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few I scarcely think that they [the public at large] would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" *United States v. Kennerly*, 209 Fed. 120-21 (S.D.N.Y. 1913).

15. 39 F.2d 564 (2d Cir. 1930).

16. *Id.* at 569.

17. *Ibid.*

18. *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd* sub nom. *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934). The case involved a construction of § 305(a) of the Tariff Act of 1930, which forbids the importation of any "obscene" book. 46 Stat. 688, as amended, 19 U.S.C. § 1305 (a) (1958).

19. 5 F. Supp. at 184.

20. *Id.* at 183.

21. *Id.* at 185.

subject, and executed with real art,"²² the court recognized it to be "in not a few spots . . . blasphemous, and obscene,"²³ but nevertheless adhered to the lower court's ruling declaring, "the question in each case is whether a publication taken as a whole has a libidinous effect,"²⁴ and "the proper test of whether a given book is obscene is its dominant effect."²⁵ In view of subsequent developments, it should be noted that both courts first arrived at a determination that the book was not "pornographic." Two years later, in *United States v. Levine*,²⁶ the scope of the test was given further refinement:

[W]hat counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. . . . The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits²⁷

In 1940, *Parmelee v. United States*,²⁸ pointed out the established precept that nudity is not obscene per se, and, hence, employing the test formulated in *Ulysses*, found the challenged nudist photographs unobjectionable, since they were used "to accompany an honest, sincere, scientific and educational study and exposition of a sociological phenomenon. . . ." ²⁹ Similarly, in *Walker v. Popenoe*,³⁰ the court held a booklet which contained a frank discussion of the function of the sex organs was not obscene and noted its "purely educational purpose and . . . uniformly decent language."³¹

These decisions display a definite pattern regarding the evolution of a new test for obscenity. A work must be judged in its entirety in light of its dominant theme and its effect upon the average likely reader.³²

In 1957, the Supreme Court, in *Roth v. United States*,³³ first passed upon

22. 72 F.2d at 706.

23. Id. at 707.

24. Ibid.

25. Id. at 708.

26. 83 F.2d 156 (2d Cir. 1936).

27. Id. at 157-58.

28. 113 F.2d 729 (D.C. Cir. 1940).

29. Id. at 735.

30. 149 F.2d 511 (D.C. Cir. 1945).

31. Id. at 512.

32. In addition to the Levine ruling, there are many decisions which have limited the application of the test for obscenity to a publication's most probable readership. See, e.g., *One, Inc. v. Olesen*, 241 F.2d 772, 775 (9th Cir. 1957), rev'd per curiam, 355 U.S. 371 (1958) ("effect . . . upon the reader"); *Parmelee v. United States*, 113 F.2d 729, 731 (D.C. Cir. 1940) ("all those whom it is likely to reach"); *United States v. Dennett*, 39 F.2d 564, 568 (2d Cir. 1930) ("those into whose hands the publication might fall"); *United States v. Two Obscene Books*, 99 F. Supp. 760, 762 (N.D. Cal. 1951), aff'd sub nom. *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953) ("those whose minds are open to such influences and into whose hands [the material] may fall . . ."); *United States v. Goldstein*, 73 F. Supp. 875, 877 (D.N.J. 1947) ("those into whose hands the publication might fall").

33. 354 U.S. 476 (1957).

this test. Ironically, the decision did not concern itself with the issue of the obscenity of the material involved. Mr. Justice Brennan announced the dispositive question to be "whether obscenity is utterance within the area of protected speech and press."³⁴ However, in holding that the first amendment was not violated by section 1461, "applied according to the proper standard for judging obscenity,"³⁵ the Court necessarily took up the issue of an appropriate test. In essence, it approved the standard set down in *Ulysses*, stating the norm to be:

[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.³⁶

Echoing *Levine*,³⁷ Mr. Justice Brennan emphasized that the effect of the material must be judged by the reaction "not upon any particular class, but upon all those whom it is likely to reach."³⁸ Significantly, he justified the finding that obscenity was without the pale of a constitutionally protected "utterance" by characterizing, and thus further defining it, as that which is "utterly without redeeming social importance."³⁹

Mr. Justice Harlan, in voting to reverse the conviction of Roth, expressed concern over the "disarming generalizations"⁴⁰ of the majority, and warned of "the very real danger of a deadening uniformity which can result from nation-wide federal censorship. . . ."⁴¹ He also made a statement which casts light on his decision in the instant case:

I do not think that the federal statute can be constitutionally construed to reach other than . . . "hard-core" pornography.⁴²

Several lower court decisions followed the *Roth* determination. In *United States v. 31 Photographs*,⁴³ a district court held certain "erotic"⁴⁴ photographs and books sought to be imported by the Institute for Sex Research of the University of Indiana not to be obscene. The Institute filed affidavits to the effect that the materials would be kept under security and made accessible only to scholars engaged in serious research. The court, confronted with construing the words "average person," stated:

34. 354 U.S. at 481.

35. *Id.* at 492.

36. See notes 26 & 27 *supra* and accompanying text.

37. 354 U.S. at 489.

38. *Id.* at 490.

39. *Id.* at 484.

40. *Id.* at 496 (concurring opinion).

41. *Id.* at 506. Mr. Justice Harlan does not seem to disapprove of censorship as a matter of principle. Indeed, he appears to sanction it on the local level in the interest of "social experimentation." *Id.* at 503-06.

42. *Id.* at 507.

43. 156 F. Supp. 350 (S.D.N.Y. 1957). For a provocative discussion of the implications of the court's holding see Note, 34 *Ind. L.J.* 426 (1959).

44. 156 F. Supp. at 352.

To whose prurient interest must the work appeal? While the rule is often stated in terms of the appeal of the material to the "average person," . . . it must be borne in mind that the cases applying the standard in this manner do so in regard to material which is to be distributed to the public at large. I believe, however, that the more inclusive statement of the definition is that which judges the material by its appeal to "all those whom it is likely to reach." Viewed in this light, the "average man" test is but a particular application of the rule, often found in the cases only because the cases often deal with material which is distributed to the public at large.⁴⁵

*Grove Press, Inc. v. Christenberry*⁴⁶ called for a determination as to the alleged obscenity of the unexpurgated edition of *Lady Chatterley's Lover*. Both the district and circuit courts found little difficulty in finding the novel not to be obscene within the *Roth* formula. Both decisions are replete with evidence of the publisher's good faith and the work's literary merit.⁴⁷ Using Mr. Justice Brennan's phraseology, the district court pointed out that the *Roth* test is broad enough so that in order to be adjudged obscene, the dominant theme which appeals to prurient interest "must so predominate as to submerge any ideas of 'redeeming social importance'" ⁴⁸ So construed, the question of the adequacy of the *Roth* standard was raised by the Supreme Court in the present case. It is submitted that the Court's decision represents a sharp deviation from the established trend of case law. The circuit court's construction of "average person" as average likely recipient rather than the public at large (regarding material circulated among homosexuals exclusively) is in accord with virtually every case in point.⁴⁹

45. *Id.* at 354-55. It should be noted in this connection that the studies of the American Law Institute, upon which Mr. Justice Harlan appears to rely heavily in the instant case, sets forth, in the very section which he cites, that class in terms of whose reaction the material is to be judged: "Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience." Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957).

46. 175 F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

47. 175 F. Supp. at 497-503; 276 F.2d at 437-38.

48. 175 F. Supp. at 499. During the term following the *Roth* decision, the Supreme Court reversed two circuit court findings simply by citing *Roth*. In *One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957), *rev'd per curiam*, 355 U.S. 371 (1958) the issue involved the circulation of a publication designed for homosexuals. In the other case, *Sunshine Book Co. v. Summerfield*, 249 F.2d 114 (D.C. Cir. 1957), *rev'd per curiam*, 355 U.S. 372 (1958), the question arose as to the mailing of two pseudo-scientific nudist magazines. While some commentators saw in these reversals a possible deviation from the *Roth* test, there is ample evidence that no such change in the standard was necessary to justify the reversals. *One, Inc.* cites several "approved definitions," all of which have a *Hicklin* gloss and emphasize objectionable segments without discussing the publication's theme. 241 F.2d at 775-78. *Sunshine Book Co.* contains a vigorous dissent based on disapproval of the test employed by the majority which it claims is not the *Roth* formula. 249 F.2d at 120-23. Cf. *Lockhart & McClure*, *supra* note 6, at 32-39; Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. Chi. L. Rev. 279, 309-13 (1959).

49. See notes 32 & 45 *supra* and accompanying text.

Mr. Justice Harlan acknowledged that the magazines in question would appeal to the prurient interests of homosexuals and that they would be read "almost entirely" by these sexual deviates.⁵⁰ However, he ignored this finding and did not pass upon the circuit court's construction of "average person." He considered it unnecessary since he found the average person test was not the sole determinant of obscenity. Section 1461 condemns material irrespective of its effect. It demands also that it be patently offensive on its face "so as to affront current community standards of decency."⁵¹ Since the provision is part of a federal statute, "the relevant 'community' in terms of whose standards of decency the issue must be judged"⁵² is the nation. Hence, the proper test emerges as: Whether the challenged material is so offensive on its face as to violate the national standard of decency. Mr. Justice Harlan contended that without such a test "the American public [would be] in jeopardy of being denied access to many worthwhile works in literature, science, or art."⁵³ He also noted that "only in the unusual instance where . . . the 'prurient interest' appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive."⁵⁴ It is submitted that these words clearly indicate that the test traditionally reserved for judging materials distributed to the public at large is now to be imposed upon those circulated only among a limited class. As a result, material which admittedly is designed to arouse erotic sexual response in homosexuals will no longer be censored unless it can be shown that the material will also stimulate the prurient interests of the public at large to whom it is not distributed.

In so eradicating the distinction between tests based upon distribution, Mr. Justice Harlan appears to be vindicating his own belief that the federal government can only proscribe hard-core pornography,⁵⁵ and simultaneously defining and establishing the same as the universal test for adjudging the obscene. Such a position conflicts with the established trend in case law which repeatedly censored obscenity, classified as such, distinct from hard-core pornography which was often characterized as the most extreme form of obscenity.⁵⁶

By establishing a universally applicable "national standard of decency" test, Mr. Justice Harlan has taken issue with Mr. Justice Brennan's description of obscenity as that which is "utterly without redeeming social importance."⁵⁷

50. 370 U.S. at 481.

51. *Id.* at 482.

52. *Id.* at 488.

53. *Id.* at 487.

54. *Id.* at 486.

55. See note 42 *supra* and accompanying text.

56. The term "hard-core pornography" appears to remain a term of art. Aside from referring to it as either "dirt for dirt's sake," *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S.D.N.Y. 1933), or as "dirt for money's sake," *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 692 (1959) (concurring opinion), it remains judicially undefined.

57. See note 39 *supra* and accompanying text.

No longer need a questionable publication possess any literary or scientific merit to escape condemnation. Contrary to the entire line of cases which culminated in the test set forth in *Roth*, unless it can be shown that the material affronts the national standard of decency, a work designed to appeal to the erotic impulses of deviates will avoid proscription.

Is there any necessity for such a revised standard? Under the tests laid down in *Ulysses* and *Roth*, neither the novels of Joyce and Lawrence, nor the "erotic" materials used in Indiana University's research were adjudged obscene. At the same time many publications circulated to disturb the weak and the sick were denied access to the public. The flexible "average person" test, construed as average likely recipient, proved to be a workable instrument for the equitable enforcement of federal censorship. The "national standard of decency" test, however, cannot help but have an inhibitory effect. Strictly construed, it may create a situation whereby failure to enforce section 1461 will amount to its repeal.

Constitutional Law—Full Faith and Credit Need Not Be Accorded to a Final Foreign Administrative Tax Determination.—Defendant, a former resident of Philadelphia, operated a parking lot business there from 1954 to 1959. During this time, he was subject to a local tax¹ of ten per cent upon the monthly receipts collected by parking lot operators. During the years 1954 to 1959, the defendant made the payments as prescribed. An audit revealed, however, that his actual gross receipts exceeded the amount which he reported. Accordingly, the municipality made an assessment in 1958 of approximately five thousand dollars, covering the four year period, and sent notice to the defendant. From the receipt of such notice, a period of sixty days² was allowed by the ordinance within which a petition for review of the assessment might be brought. The defendant neither petitioned for a review nor paid the assessment,³ but left Philadelphia and moved to New York.

In an action by the foreign municipality to enforce the tax assessment, the New York Supreme Court dismissed the complaint because of lack of jurisdiction of the subject matter. This decision was affirmed by both the appellate division⁴ and the court of appeals,⁵ the latter holding that New York courts might decline to sit on a tax controversy between another state and its former citizens, since to entertain such a dispute "would be an intrusion into the public

1. Philadelphia Code of Gen. Ordinances ch. 19-1200 (1956).

2. Philadelphia Code of Gen. Ordinances ch. 19-1702 (1956).

3. The defendant, not having availed himself of the appeal provision, made this administrative determination a final adjudication of his liability. See *City of Philadelphia v. Bobman Dep't Store Co.*, 189 Pa. Super. 72, 149 A.2d 518 (1959).

4. *City of Philadelphia v. Cohen*, 15 App. Div. 2d 464, 222 N.Y.S.2d 226 (1st Dep't 1961) (memorandum decision).

5. *City of Philadelphia v. Cohen*, 11 N.Y.2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188, cert. denied, 371 U.S. 934 (1962).

affairs of another State. . . ."⁶ *City of Philadelphia v. Cohen*, 11 N.Y.2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188, cert. denied, 371 U.S. 934 (1962).

Assuming that the municipal taxing ordinance was a "public act" and that defendant's liability had become "perfect and complete,"⁷ the court of appeals nevertheless concluded that "no case law anywhere requires the courts of New York to entertain this suit . . . by compulsion of 'Full Faith and Credit'. . . ."⁸ Chief Judge Desmond, writing for the majority, found that the question of whether full faith and credit must be accorded by one state to the nonjudicial tax assessments of another was of first impression for any state court of last resort or any federal appellate court. Thus with no authoritative statement of the law regarding this constitutional issue, the majority determined that the public policy of New York forbade its courts from acting

as collectors of taxes for another State . . . [since] for our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State. . . .⁹

In his dissent, Judge Fuld agreed that full faith and credit did not require New York to entertain a suit which would involve the adjudication and resolution of an individual's tax obligation under foreign laws, but opposed the result reached by the majority on the ground that plaintiff's suit was not based upon "the underlying tax liability, but [upon] a final administrative determination that has, in essence, the same force and effect as a judgment."¹⁰ Thus, since this determination was *res judicata* as to the defendant's liability, it should be accorded the same full faith and credit as a judgment.

Under the reasoning of the United States Supreme Court in *Milwaukee County v. White Co.*,¹¹ where a defendant's tax liability has been reduced to a judgment in the taxing state, such a judgment is entitled to full faith and credit in a foreign forum since the original cause of action, though based upon tax liability, merges with the judgment. Like any other judgment, therefore, it can be attacked when sought to be enforced in a foreign forum, only if subject to attack in the state which entered it.¹² Recognition of such a judgment by a foreign court, therefore, would not involve any investigation into, or application of, the foreign revenue laws.

Article IV, Section 1 of the Constitution provides that:

6. *Id.* at 406, 184 N.E.2d at 169, 230 N.Y.S.2d at 191.

7. *Id.* at 405, 184 N.E.2d at 169, 230 N.Y.S.2d at 191.

8. *Id.* at 406, 184 N.E.2d at 169, 230 N.Y.S.2d at 191.

9. *Ibid.*

10. *Id.* at 407, 184 N.E.2d at 170, 230 N.Y.S.2d at 193.

11. 296 U.S. 268 (1935). See also other obligations to pay money arising under the laws of foreign forums, which must be given full faith and credit: *Broderick v. Rosner*, 294 U.S. 629 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932); *Converse v. Hamilton*, 224 U.S. 243 (1912).

12. 296 U.S. 268 (1935). "Recovery upon . . . [the judgment] can be resisted only on the grounds that the court which rendered it was without jurisdiction. . . ." *Id.* at 275.

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.¹³

Underlying the full faith and credit clause is "the strong unifying principle . . . looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states. . . ."¹⁴ Under the power bestowed upon it by this clause,¹⁵ Congress has included acts and records of nonjudicial nature as well as judicial within the scope of full faith and credit.¹⁶ Although neither the constitutional requirement nor federal legislation gives the statutes of one state extraterritorial effect,¹⁷ full faith and credit does require recognition by a state of *obligations* imposed and *rights* conferred,¹⁸ which have been judicially determined by foreign forums pursuant to foreign statutes. Full faith and credit requires a state to accept judicial determinations of foreign courts as conclusive on the merits¹⁹ where such foreign judgments are sued on or asserted as defenses. Whether decisions rendered by foreign *administrative boards* pursuant to taxing statutes of foreign states would be "reduced to judgment" within the rule of *Milwaukee County* has never been specifically decided.

In *Broderick v. Rosner*,²⁰ however, the Supreme Court held that an administrative assessment made by the Superintendent of Banks of New York was entitled to full faith and credit in New Jersey. The Court emphasized the finality of the foreign determination, even though only administrative in nature. It stated:

The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause.²¹

Likewise, *Magnolia Petroleum Co. v. Hunt*²² held that foreign workmen's

13. U.S. Const. art. IV, § 1.

14. *Hughes v. Fetter*, 341 U.S. 609, 612 (1951).

15. "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.

16. 28 U.S.C. §§ 1738-39 (1958).

17. *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493, 502 (1939).

18. *Hughes v. Fetter*, 341 U.S. 609 (1951); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Broderick v. Rosner*, 294 U.S. 629 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932). Note, however, that the full faith and credit clause does not apply to: foreign penal laws, *Huntington v. Attrill*, 146 U.S. 657 (1892); foreign statutes of limitation, *Tennessee Coal, Iron & R.R. v. George*, 233 U.S. 354, 356 (1914); nor to foreign statutes which effect the determination of property rights of the res located in another state, *Olmsted v. Olmsted*, 216 U.S. 386, 388 (1910).

19. Therefore, the full faith and credit clause does not allow the state into which the foreign forum's judgment is brought to re-examine it on the merits, *Hanley v. Donoghue*, 116 U.S. 1, 4 (1885), even if the court rendering the judgment committed error in construing its own forum's statutes, *Fauntleroy v. Lum*, 210 U.S. 230 (1903).

20. 294 U.S. 629 (1935).

21. *Id.* at 644.

22. 320 U.S. 430 (1943).

compensation awards—also administrative in nature—were entitled to full faith and credit in the state of the forum. As *Milwaukee County*²³ had held that there was nothing inherent in the tax nature of a foreign judgment that precluded the according of full faith and credit by a forum, so did *Rosner* and *Hunt* intimate that the foreign determinations should not be denied full faith and credit merely because they were *administrative*. The logical synthesis of the principles set out in *Milwaukee County*, *Hunt* and *Rosner*, therefore, would seem to indicate that the final tax determination of a foreign state should be accorded full faith and credit even though such a determination is *administrative*. A Massachusetts federal district court, apparently recognizing the validity of this reasoning, held in *City of New York v. Shapiro*²⁴ that an administrative determination of tax liability is entitled to full faith and credit, because

administrative determinations, if they create in their home state new obligations, and if those new obligations are enforceable by independent suit or by process equally effective, can be sued upon in a sister state.²⁵

Since the instant administrative determination was final,²⁶ it satisfied the requirement of *res judicata*. In refusing to recognize the judgment merely because it was administrative, the New York Court of Appeals has determined the issue on the somewhat arbitrary basis that “no case law [authority] anywhere requires the courts of New York to entertain this suit . . . by compulsion of ‘Full Faith and Credit’. . . .”²⁷ Certainly, the rationales of *Milwaukee County*, *Hunt* and *Rosner* as crystallized in *Shapiro* would indicate a different result.

Finding no constitutional mandate to recognize the Philadelphia tax assessment, the instant court found that New York public policy forbade “suits to collect the taxes of other States,”²⁸ since to entertain such suits would involve “an intrusion into the public affairs of another State.”²⁹ In 1962, the New York legislature enacted Article 25 of the State Tax Law, extending recognition by New York to “liabilities for taxes lawfully imposed by any other state . . . which extends a like comity to this state. . . .”³⁰ To the extent that this statute extends recognition on the basis of reciprocity, it is in derogation of the settled New York public policy which forbids “intrusion into the public

23. See note 11 *supra* and accompanying text.

24. 129 F. Supp. 149 (D. Mass. 1954). In this case the treasurer of New York City made an administrative determination of tax liability, against two Massachusetts residents, on use and business taxes for conducting a business in New York. The court noted that since the defendants had not availed themselves of the review procedure available under the N.Y. Civ. Prac. Act, the administrative determination had become “a final, binding, and new obligation.” *Id.* at 153.

25. *Id.* at 154.

26. See note 3 *supra*.

27. 11 N.Y.2d at 406, 184 N.E.2d at 169, 230 N.Y.S.2d at 191.

28. *Id.* at 404, 184 N.E.2d at 168, 230 N.Y.S.2d at 190.

29. See note 27 *supra*.

30. N.Y. Sess. Laws 1962, ch. 677, § 902, at 2180.

affairs of another State. . . ."³¹ It is arguable that the legislature has, in effect, rejected "intrusion" as a basis for New York public policy altogether and substituted "reciprocity." The instant court stated that "the Legislature has given us new, strong evidence of our State's public policy. . . ."³² More accurately, perhaps the legislature has formulated a new public policy.

Other courts, where the taxing state had a reciprocity statute, have recognized foreign tax assessments on the basis of comity.³³ In *Oklahoma v. Neely*,³⁴ for example, one state maintained an action for taxes due in the courts of a sister state against residents of the sister state. Both states had reciprocity statutes similar to New York's.³⁵ While granting judgment for plaintiff, the court noted that the plaintiff could have maintained the action *even if reciprocity did not exist* between the two states,³⁶ and that the purpose of the forum's reciprocity statute was merely to take advantage of other state's statute of the same nature.³⁷ The Supreme Court of Illinois, in *City of Detroit v. Gould*,³⁸ recently reached, in an identical factual situation, a result contrary to the instant decision solely on the basis of comity. *Gould*, however, was not based upon reciprocity since there was no reciprocity statute.

In holding that New York has no obligation under the full faith and credit clause merely because the question was never specifically decided, the instant court admitted that the question was subject to final determination³⁹ by the Supreme Court. The question left open in *Milwaukee County*⁴⁰ demands timely resolution in order that the pressing uncertainty facing many local taxing authorities be resolved.

Constitutional Law—Power of Congressional Committee To Investigate an Interstate Compact Denied Due to Lack of Grant of Specific Authority.—Appellant, the executive director of the Port of New York Authority,¹ was subpoenaed to appear and produce certain records before a subcommittee

31. See note 27 *supra*.

32. *Ibid*.

33. State ex rel. Okla. Tax Comm'n v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919 (Mo. Ct. App. 1946); Lafoon v. Kerner, 138 N.C. 281, 50 S.E. 654 (1905).

34. 225 Ark. 230, 282 S.W.2d 150 (1955).

35. See note 30 *supra*.

36. 225 Ark. at 232, 282 S.W.2d at 151.

37. *Id.* at 234, 282 S.W.2d at 152.

38. 12 Ill. 2d 297, 146 N.E.2d 61 (1957).

39. See petition for certiorari filed, 31 U.S.L. Week 3119 (U.S. Oct. 2, 1962).

40. The issue was whether the full faith and credit clause should apply to a foreign forum's tax statutes and also to administrative determinations which are *res judicata* as to assessed taxes thereunder.

1. The Port of New York Authority is a corporate bi-state agency of New Jersey and New York. It was created in 1921 by a compact between the two states with the consent of Congress to deal with the planning and development of terminal and transportation facilities and to improve and protect the commerce of the port district.

of the House Judiciary Committee. Following appellant's appearance and refusal to produce all of the records requested,² the House of Representatives voted to cite him for contempt.³ He was subsequently charged by information and convicted of criminal contempt of Congress in the district court.⁴ The court of appeals, in reversing the conviction, held that the subcommittee's investigative authority was exhausted by the information actually tendered by the appellant and that the documents refused to the subcommittee were outside of the jurisdictional authority vested in the House Judiciary Committee. *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir.), cert. denied, 371 U.S. 902 (1962).

In holding that the subcommittee had exceeded its delegated powers, the court of appeals construed its grant of authority narrowly in an express effort to avoid the constitutional questions involved.⁵ The district court, interpreting the same authorizing resolutions, reached a contrary conclusion and held that it was clear

from the language, context, and floor discussion preceding passage of the June 1 resolution that it authorized an investigation of much greater depth than defendant argues. . . . [And that] the resolution itself is unqualified. . . .⁶

Having decided that the subcommittee was acting within its grant of authority, the court went on to resolve the other issues involved. The more important ones, from a constitutional point of view, were whether the committee had a proper legislative purpose in conducting the inquiry and whether the subject matter of the inquiry was pertinent. Both of these questions were resolved in favor of the Government.⁷

The court of appeals found that the applicable resolutions had given the subcommittee authority "to conduct full and complete investigations and studies relating to . . . the activities and operations of interstate compacts."⁸

2. Mr. Tobin did produce Port Authority bylaws, organization manuals, rules and regulations, annual financial reports, and minutes of meetings of its Board of Commissioners. He also furnished additional un subpoenaed material and offered to answer any questions about the Authority on oral examination. However, he did not produce certain internal documents including financial and management reports, agenda of meetings, staff reports, and other communications pertaining to dealings and policies of the Authority in the fields of construction, insurance, public relations, real estate, revenue bonds and rail transportation. *United States v. Tobin*, 195 F. Supp. 588, 592 (D.D.C. 1961).

3. *Tobin v. United States*, 306 F.2d 270, 272 (D.C. Cir.), cert. denied, 371 U.S. 902 (1962).

4. *United States v. Tobin*, 195 F. Supp. 588 (D.D.C. 1961).

5. *Tobin v. United States*, 306 F.2d at 276 (D.C. Cir. 1962).

6. 195 F. Supp. at 599.

7. *Id.* at 600-08.

8. 306 F.2d at 275. "The Legislative Reorganization Act of 1946 granted to the Judiciary Committee authority over nineteen subjects, including 'interstate compacts generally.' 60 Stat. 812, 826-27; Rule XI (1). In 1959, the Committee was given subpoena power to conduct 'full and complete investigations and studies relating to [certain stated matters] coming within the jurisdiction of the Committee.' H.R. Res. 27, 86th Cong., 1st Sess. (1959). As this last grant of authority did not encompass interstate compacts, it was amended on June 1, 1960, to include 'the activities and operations of interstate compacts.' H.R. Res.

It construed them narrowly because of the allegation of criminal liability present in the case.⁹ Curiously enough, it cited as support for its position one of the identical arguments raised by the district court—the floor discussion preceding passage of the resolution. The court of appeals was “impressed by the absence of any truly enlightening or informative floor discussion,”¹⁰ while the district court alluded directly to a specific statement made by a member of the rules committee to the effect

“that the committee does not expect to use or abuse this power through a great many investigations but, instead, go look into one particular State’s compact [*sic*] where, under present laws and under the compact, there is no control or knowledge of just how a great many public funds are being expended.”¹¹

The latter statement is not inconsistent with the view taken by the court of appeals. It interpreted the authorizing resolutions

to mean that the Judiciary Committee was empowered to conduct an investigation calling for documents relating to *actual* “activities and operations” of the authority rather than for all of the administrative communications, internal memoranda, and other intra-Authority documents demanded by the subpoena in question. . . . The information refused to the Subcommittee related only to the *why* of Authority activity. . . .¹²

Thus, when Congressman Brown spoke of the lack of knowledge of “just *how* a great many public funds are being expended,”¹³ he could well have been emphasizing the need for more information as to *what* the Port Authority was doing. Documents spelling out *how* the public funds were being expended and *what* activities and operations the Port Authority was engaged in were never denied to the subcommittee.¹⁴ This interpretation seems the more logical of the two; especially in view of the argument raised by the court of appeals that such a unique congressional investigation would certainly have received more explicit authorization if, in fact, it was intended.¹⁵ Congress had never before in its entire investigative history conducted such an extensive inquiry into an interstate compact agency. Had such unprecedented probes in depth been contemplated, it seems likely that Congress would have stipulated more specifically just how far the subcommittee could have proceeded. It was, in fact, given no authorization other than the general resolutions which were applicable to *all* investigations into interstate compacts. At the time the House passed the June

530, 86th Cong., 2d Sess. (1960). Putting these resolutions of authority together, we find that the Committee was given jurisdiction over ‘interstate compacts generally,’ and the power ‘to conduct full and complete investigations and studies relating to . . . the activities and operations of interstate compacts.’”

9. *Id.* at 274.

10. *Id.* at 275 n.9.

11. 195 F. Supp. at 599.

12. 306 F.2d at 275-76.

13. 195 F. Supp. at 599. (Emphasis added.) See also text accompanying note 11 *supra*.

14. 306 F.2d at 276.

15. *Id.* at 275.

1, 1960 resolution, its members were not even aware of the subcommittee's intent to subpoena internal documents.¹⁶ It seems apparent then that Congress anticipated a general investigation under the general powers rather than a specific and detailed inquiry. On the basis of such facts, the court's analysis was sound, even aside from the criminal question involved. Had proper authorization been found, and no doubt it will be delegated specifically before the next investigation of this type, the court would have been faced squarely with the constitutional questions involved.

In dictum, unhampered by the presence of criminal charges, the court found appellant's argument that the committee had no proper legislative purpose "not unpersuasive."¹⁷ The argument was based on the theory that Congress has no right under the compact clause of the Constitution to alter, amend, or repeal its previous consent to interstate compacts. Congress had specifically reserved this power to itself upon granting consent to the compact in question,¹⁸ but such reservation could hardly effectuate a power not otherwise found either expressly or impliedly in the Constitution. There was no dispute here as to the lack of express delegation. The issue then was whether such power could properly be implied from that portion of the Constitution dealing with interstate compacts, the "compact clause."¹⁹ It states only that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . ." ²⁰ Appellant contended that this clause was to be construed literally in that Congress' only power with regard to interstate compacts was a review power, *i.e.*, to either grant or withhold consent, but nothing more.

Prior to the enactment of the Constitution, the use of compacts was already widespread and was assumed to be a proper exercise of state power.²¹ It was frequently utilized as a means of solving boundary disputes.²² In 1837, the Supreme Court, in referring to this compact power, said:

It is a right equally belonging to the states of this Union, unless it has been surrendered, under the constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognised by the constitution and guarded in its exercise by a *single limitation* or restriction, requiring the consent of congress.²³

16. The June 1, 1960 resolution, H.R. Res. 530, 86th Cong., 2d Sess. (1960), was introduced May 17, 1960. There is no indication in the Congressional Record of that date or of June 1, 1960, that the House had been informed that a demand would be made for internal files of the Port Authority.

17. 306 F.2d at 274.

18. This is a standard provision which is one of several normally included by Congress in every consent act passed for interstate compacts. See discussion in Leach, *The Federal Government and Interstate Compacts*, 29 *Fordham L. Rev.* 421, 428 (1961).

19. U.S. Const. art. I, § 10, cl. 3.

20. *Ibid.*

21. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938).

22. See Frankfurter & Landis, *The Compact Clause of the Constitution—A Study In Interstate Adjustments*, 34 *Yale L.J.* 685 (1925).

23. *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209 (1837). (Emphasis added.)

This would seem to imply that the Constitution recognized the rights of states to create their own compacts subject only to a review by Congress. This same single limitation was discussed the following year with the Supreme Court pointing out that

there can be but two tribunals under the constitution who can act on the boundaries of states, the legislative or the judicial power; *the former is limited, in express terms, to assent or dissent*, where a compact or agreement is referred to them by the states . . .²⁴

and further holding that

if congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the *sole limitation* imposed by the constitution, when given, left the states as they were before. . . .²⁵

A later case seems to offer even stronger evidence that Congress is to act as a reviewing body only and not as a regulator or overseer of interstate compact activity. In *Virginia v. Tennessee*²⁶ the Court recognized that not all compacts had to be submitted for consent. It was held that the requirement of consent was only

directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.²⁷

Thus, Congress apparently has only one function with respect to compacts; to screen them before they become operative so that they do not adversely affect the political balance of the Union. If any other function had been intended, then submission of *all* interstate compacts would, no doubt, have been required.

Admittedly the earlier cases all involved boundary disputes rather than operational interstate agencies. In fact, it was not until after World War I that states began using compacts to establish operational administrative agencies.²⁸ If anything, however, this should serve only to enhance appellant's argument. The boundary settlement was the typical compact usage envisioned by the compact clause. It had existed as a common means of solving disputes between the colonies and the Crown, between the colonies and the Confederation of States, and between the several colonies themselves.²⁹ Thus, in all likelihood, the compact clause was specifically designed with the boundary compact most prominently in mind. It would seem logical, then, that the framers of the Constitution were concerned only with initial congressional screening as a

24. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838). (Emphasis added.)

25. *Id.* at 725. (Emphasis added.)

26. 148 U.S. 503 (1893).

27. *Id.* at 519.

28. Zimmermann & Wendell, *The Interstate Compact Since 1925* (1951). See also the brief historical development in Leach, *supra* note 18.

29. Frankfurter & Landis, *supra* note 22.

means of preserving the national balance of power in the face of major shifts in territorial boundaries. The fact that many years later Congress adopted the practice of inserting a reservation of a right to alter, amend, or repeal could not give rise to a power if it had never previously existed.

Further evidence that Congress was to be restricted to consent powers only can be found in the Constitution itself, in the clause immediately preceding the compact clause.³⁰ Like the compact clause, it too prohibited certain state activity, *e.g.*, imposition of import and export duties without the consent of Congress, but here it expressly added "and all such Laws shall be subject to the Revision and Controul of the Congress."³¹ If the power of "revision and control" was also to extend to the compact clause, the very next clause in sequence, why then were these all-important words omitted? The most logical answer is that the Constitution was specifically intended to restrict congressional compact activity to the granting or withholding of consent.

Appellant would appear correct, therefore, when he asserted that the very consent of Congress rendered the compact irrevocable, since its effect was to remove the constitutional ban against the formation of interstate compacts, thus restoring to the states the inherent sovereignty they enjoyed prior to the Constitution. If this be true, then the question of pertinency of subject matter would become academic, since the inquiry itself must fail for lack of proper legislative purpose.

Even assuming, however, that the committee had been acting under proper authorization and that Congress did have the right to alter, amend, or repeal its original consent, appellee's case would still be questionable, since the contempt citation was based upon a refusal to surrender documents which had no pertinency to the subject matter of the inquiry.

The district court referred to the subject matter as an effort "to determine whether and to what extent Federal interests were being affected."³² Could not such inquiry be satisfied without resort to myriad memoranda representing the thought processes and policy formulations behind the operations of the Authority? If indeed the Port Authority is a burden on interstate commerce, would not this become evident from objective observation of its public activities and operations and their effects on interstate commerce, rather than from an examination of the internal communications of staff members? There is no question of alleged price fixing here as in the antitrust cases which requires submission of internal corporate communications and financial books and records as evidence of conspiracy. If factually there were no question but that a certain activity of the Authority in no way affected, let alone hampered, inter-

30. U.S. Const. art. I, § 10, cl. 2.

31. In its entirety it reads "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." U.S. Const. art. I, § 10, cl. 2.

32. 195 F. Supp. at 603.

state commerce, would the adverse thinking of a staff member convert that activity into a violation? It would hardly seem so, yet this appears to represent the thinking of the subcommittee, extended to its logical conclusion.

The district court seemed to find sufficient pertinency in the single fact that many Port Authority activities affect the national interest. For example, in discussing the need for communications relating to the negotiation, execution, and performance of construction contracts, the court said:

The explanation clearly relates the request to the subjects under inquiry: most Authority construction projects involve facilities such as airports, bridges and tunnels, that have an important relationship to interstate commerce and national defense.³³

But this is also true of the operations of every State Highway Department, even though their contracts and the negotiations preceding them are matters solely of state concern. The Supreme Court has consistently held that Congress cannot supersede the states in the control of the internal management of their state agencies.³⁴ Thus, the mere presence of federal interest would not appear to be a sufficient standard against which to measure the pertinency of specific memoranda. A leading authority on interstate compacts has written that such an analysis

ignores the fact that agencies established by interstate compacts are administrative units of the states and have long been regarded as such. . . . Compact agencies are legally no different than an ordinary department or agency of state government.³⁵

Double Jeopardy—Acquittal of Federal Crime Does Not Bar Subsequent Trial in State Court for State Criminal Offense Arising out of Same Act.—Defendant was indicted in the United States District Court for the Eastern District of New York for obstructing the movement of certain merchandise in international commerce.¹ Before commencement of the trial in the district court, he was also indicted in Kings County Court on four counts² arising out of the same transaction as that upon which the federal indictment was based.³ Upon a judgment of acquittal in the federal proceeding, the

33. *Id.* at 604.

34. *United States v. Bekins*, 304 U.S. 27, 51 (1933); *Ashton v. Cameron County Water Improvement Dist. No. One*, 298 U.S. 513, 528 (1936); *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 337 (1935).

35. *Leach*, *supra* note 18.

1. 62 Stat. 793 (1948), 18 U.S.C. § 1951 (1953).

2. The four counts were robbery in the first degree, grand larceny in the first degree, assault in the second degree, and kidnapping. The dissenting opinion was concerned only with the first three counts. See *People v. Lo Cicero*, 17 App. Div. 2d 31, 36, 230 N.Y.S.2d 384, 389 (2d Dep't 1962).

3. The indictment in the state court contained the added count of kidnapping. This charge was based on evidence that in order to facilitate the disposition of the hijacked truck by an accomplice, defendant drove the victimized driver about New York for some time before releasing him.

Kings County indictment was dismissed on defendant's motion.⁴ On appeal, the appellate division reversed on the ground that the acquittal in the federal court was not a bar to a subsequent prosecution in New York, even though the act involved in the state prosecution was the same as that involved in the federal prosecution.⁵ *People v. Lo Cicero*, 17 App. Div. 2d 31, 230 N.Y.S.2d 384 (2d Dep't 1962).

Successive state prosecutions for the same offense are barred by the New York State Constitution,⁶ while protection against successive federal prosecutions for the same offense is guaranteed by the double jeopardy clause of the United States Constitution.⁷ These provisions against double jeopardy, however, are inapplicable when a single act violates both state and federal criminal laws.⁸ Since each sovereignty may determine what shall constitute an offense against its peace and dignity, each may exercise its sovereign right to prescribe punishments for what it has made an offense.⁹

Although there is no constitutional bar, New York, in Section 33 of the Penal Law, bars prosecutions where an offense has been committed in another "state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof," and where in that "state or country" defendant has been acquitted or convicted in a prosecution "founded upon the act or omission . . . [for] which he is upon trial [in New York]." Section 139 of the Code of Criminal Procedure provides that

when an act charged as a crime is within the jurisdiction of another state, territory or country as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment . . . in this state.

In *People v. Mangano*,¹⁰ the appellate division applied these sections to bar an indictment for petty larceny where the defendant had been previously tried

4. Defendant relied upon § 33 of the N.Y. Pen. Law and § 139 of the N.Y. Code of Crim. Proc. *People v. De Sisto*, 27 Misc. 2d 217, 214 N.Y.S.2d 858 (Kings County Ct. 1961).

5. The court was unanimously of the opinion that with respect to the kidnapping count not contained in the federal indictment, the motion to dismiss was erroneously granted. However, with regard to the other three counts, two judges voted for the approval of the dismissal. See note 2 *supra*.

6. N.Y. Const. art. 1, § 6.

7. U.S. Const. amend. V. Note this amendment applies only to successive federal prosecutions and is inapplicable to state prosecutions. *Palko v. Connecticut*, 302 U.S. 319, 322 (1937); *United States v. Lanza*, 260 U.S. 377, 382 (1922); see also *Hoag v. New Jersey*, 356 U.S. 464, 467-68 (1958); *Adamson v. California*, 332 U.S. 46, 52-53 (1947). But see *Adamson v. California*, 332 U.S. at 87 (dissenting opinion).

8. See *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *United States v. Lanza*, 260 U.S. 377 (1922); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847).

9. 17 App. Div. 2d at 32, 230 N.Y.S.2d at 386. See *United States v. Lanza*, 260 U.S. 377, 382 (1922). See note 7 *supra*.

10. 269 App. Div. 954, 57 N.Y.S.2d 891 (2d Dep't 1945) (memorandum decision), *aff'd mem.*, *People v. Mignogna*, 296 N.Y. 1011, 73 N.E.2d 583 (1947), modifying *People v. Mignogna*, 54 N.Y.S.2d 233 (Queens County Ct. 1945).

in the federal court for the same crime. Justice Beldock, writing for the majority, distinguished *Mangano* on the ground that there the prosecution had conceded that the petty larceny indictment would be barred, and thus the dismissal of the count was not before the court of appeals when it affirmed the judgment.¹¹

Whether or not *Mangano* actually decided the question, other New York courts in applying sections 33 and 139 have held that a federal trial would not bar the subsequent New York trial.¹² Note, however, that these decisions were based solely on the ground that the "same offense" was not in issue in the prior federal trial.¹³ The instant case was the first to hold that a New York prosecution following a federal prosecution for the same offense is not barred on the ground that prior *federal* prosecutions were not intended to constitute a defense under Section 33 of the Penal Law and Section 139 of the Code of Criminal Procedure. Having resolved the case on this basis, it was unnecessary for the court to consider whether, in fact, the defendant had been acquitted of the "same offense" in the prior federal proceeding.

The majority reasoned that the general statement of New York policy as set forth in Section 28 of the Penal Law controlled. Section 28 provides that an act punishable in New York "is not less so because it is also punishable

11. 17 App. Div. 2d at 34, 230 N.Y.S.2d at 387-88.

12. *People v. Adamchesky*, 184 Misc. 769, 55 N.Y.S.2d 90 (Ct. Gen. Sess. 1945); *People v. Arnstein*, 128 Misc. 176, 218 N.Y. Supp. 633 (Ct. Gen. Sess. 1926). However, it seems that Adamchesky would have reached a different verdict had the indictments been the same in both trials as in the instant case.

13. "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Morey v. Commonwealth*, 103 Mass. (12 Browne) 433, 434 (1871). New York courts have been heavily influenced by the interpretation of the "same offense" doctrine as set out in *Commonwealth v. Roby*, 29 Mass. (12 Pick.) 496 (1832). This rule states that "it is not necessary that the charges in the two indictments should be precisely the same; it is sufficient if an acquittal from the offense charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree." *Id.* at 504. *People v. Spitzer*, 148 Misc. 97, 266 N.Y. Supp. 522 (Sup. Ct. 1933) and *People v. Parker*, 175 Misc. 776, 25 N.Y.S.2d 247 (Kings County Ct. 1941) both involved decisions concerning the application of § 139 of the N.Y. Code of Crim. Proc. and § 33 of the N.Y. Pen. Law. These cases found that as between a conspiracy and the substantive crime, trial of one would bar trial of the other under the "same offense" doctrine. It is submitted that if this were so then the courts would be giving more weight to the federal decisions than to the decisions of our own New York courts, since in New York the substantive crime has clearly been distinguished from the conspiracy. See *People v. Tavormina*, 257 N.Y. 84, 177 N.E. 317 (1931); *People v. Taft*, 174 Misc. 1033, 22 N.Y.S.2d 484 (Sup. Ct. 1940). See also *People ex rel. Hart v. Truesdell*, 260 App. Div. 834, 22 N.Y.S.2d 825 (2d Dep't 1940) (memorandum decision).

under the laws of another state, government or country, unless the contrary is expressly declared. . . ." Such contrary declaration might have been found either in Section 33 of the Penal Law or in Section 139 of the Code of Criminal Procedure. But, since only New York prosecutions following prosecutions by "another state, territory or country" in section 139 and "another state or country" in section 33 were barred by those sections, the court reasoned that prior *federal* prosecutions for the same offense were governed by the general rule of section 28, rather than the exceptions stated in sections 33 and 139.¹⁴ The majority reasoned that the absence of the word "government" from sections 33 and 139 was not a legislative oversight but the manifestation of a legislative intention to exclude prior federal proceedings from the statutory bar to subsequent New York prosecutions.¹⁵

The court distinguished *People ex rel. Liss v. Superintendent of Women's Prison*¹⁶ on the ground that there a prosecution for a violation of Public Health Law Section 445¹⁷ was *expressly* barred where there had been a previous prosecution under the federal narcotics laws. The prior federal proceeding was a bar in *Liss* only because of the peculiar statute (which expressly declared a prior federal trial to be a bar) involved there.¹⁸

The majority also dismissed defendant's argument based upon collateral estoppel. This doctrine bars subsequent litigation of questions actually or necessarily litigated in a prior action.¹⁹ If, for example, the former acquittal was clearly based on the defendant's absence from the scene of the crime, such a determination would be foreclosed from question in a subsequent prosecution.²⁰ But when it is impossible to determine on what ground an acquittal was based, the doctrine of collateral estoppel would not bar a subsequent trial for a crime, the elements of which may have been similar or identical to the first offense.²¹

Before the doctrine may be applied, it must be shown that an issue "has been in fact litigated and necessarily adjudicated in a prior criminal case . . ."²²

14. 17 App. Div. 2d at 33, 230 N.Y.S.2d at 386-87.

15. The basis of this reasoning was the fact that the original draft of the Field Commission of 1864 contained the word "government." However, when finally enacted "government" was omitted, indicating to the majority an intent to exclude federal government prosecutions from the provisions of the present § 139 of the N.Y. Code of Crim. Proc. 17 App. Div. 2d at 33-34, 230 N.Y.S.2d at 387.

16. 282 N.Y. 115, 25 N.E.2d 869 (1940), reversing 257 App. Div. 865, 13 N.Y.S.2d 787 (2d Dep't 1939) (memorandum decision).

17. Now N.Y. Pub. Health Law § 3354(3).

18. 17 App. Div. 2d at 34, 230 N.Y.S.2d at 387.

19. See 2 Freeman, Judgments § 648 (5th ed. 1925); Restatement, Judgments § 68 (1942).

20. See *Harris v. State*, 193 Ga. 109, 17 S.E.2d 573 (1941); *People v. Grzesczak*, 77 Misc. 202, 137 N.Y. Supp. 538 (Nassau County Ct. 1912); cf. *Sealfon v. United States*, 332 U.S. 575 (1948).

21. See, e.g., *State v. Barton*, 5 Wash. 2d 234, 105 P.2d 63 (1940); *People v. Rodgers*, 184 App. Div. 461, 171 N.Y. Supp. 451 (1st Dep't 1918), aff'd mem., 226 N.Y. 671, 123 N.E. 882 (1919).

22. 17 App. Div. 2d at 35, 230 N.Y.S.2d at 389.

between the identical parties. Although the doctrine would not be applicable in the instant case because the prosecuting party in the former trial was the United States while in the second proceeding it was the People of New York, the majority found the doctrine inapplicable for the further reason that defendant had not shown whether the issue of identity had been resolved in his favor because there was insufficient proof of identity in the previous trial or merely because of an erroneous charge.²³

In his dissent, Justice Christ reasoned that the holding in *Liss*—when considered in conjunction with sections 33 and 139—dictated a more liberal result in the instant case. He found the result reached by the majority to undermine the traditional aversion to double jeopardy expressed by the New York legislature.²⁴

No difference in reason is pointed out as to why a trial in a foreign country or a sister State should be given greater effect, as to double jeopardy, than one in a United States court.²⁵

The dissent's reasoning would appear to have the stronger support in prior New York decisions dealing with prior federal prosecutions. Certainly sections 33 and 139 have never before been held inapplicable to prior prosecutions *for the reason that they were federal*.²⁶ On the contrary, all previous New York decisions implied that a prior federal prosecution would constitute a bar under these sections so long as proof of the "same offense" was given.²⁷

In the absence of any explicit declaration by the court of appeals concerning the applicability of sections 33 and 139 to prior federal trials, the question of their applicability will remain uncertain. Since, in the past, New York decisions have impliedly rejected the reasoning of the instant case,²⁸ it is uncertain whether the rationale of the majority will be accepted in the future. Even if the majority correctly determined that the intention of the legislature was to exclude prior federal prosecutions from the statutory bar, the court's reasoning is quite questionable. The mere absence of the word "government" might, for example, be attributed to any number of reasons including the "streamlining" of the bill as it appeared in the draft of the Field Commission of 1864.²⁹ Certainly, it is doubtful whether the legislature intended to make an exception for the arbitrary reason that a prior conviction or acquittal was *federal*.

If, as the majority reasoned, the legislature *intentionally* excluded federal proceedings as a bar to subsequent New York indictments, such an omission could logically have its basis only in the consideration that there is an inherent difference between federal crimes and local crimes—the difference between state

23. *Id.* at 35, 230 N.Y.S.2d at 388-89. Defendant would have the burden of showing the issues decided in the federal court. He should have introduced the record of that trial.

24. *Id.* at 37, 230 N.Y.S.2d at 390 (dissenting opinion).

25. *Id.* at 36, 230 N.Y.S.2d at 390 (dissenting opinion).

26. See notes 12 & 13 *supra* and accompanying text.

27. *Ibid.*

28. *Ibid.*

29. See note 15 *supra*.

and federal sovereignties. Such an inherent difference between state and federal penal provisions might perhaps be based upon the broad distinction between all federal legislation and state legislation—that the former must be predicated upon specific constitutional grant or purpose, while the latter is independent of specific grants. The Constitution serves not to vest but rather to limit state legislative power. Despite the diversity in purpose or source of authority for the enactment, however, federal and state penal laws do overlap in many areas. Absent any express statement of policy restricting the extent of sections 33 or 139, it is submitted that they should be liberally construed to bar New York prosecutions where there has been a prior prosecution by the federal government. Since these sections are designed to supplement the double jeopardy protection guaranteed by the New York State Constitution, they should not be arbitrarily restricted because of the distinction between the nature and purpose of federal legislation vis-à-vis that of state legislation.

Labor—Federal Courts Lack Jurisdiction To Grant Specific Performance of Agreement Not To Strike—Petitioner, employer, sought, pursuant to Section 301 of the Taft-Hartley Act,¹ to enjoin the defendant union and its officers from further breaching the no-strike clause contained in their collective bargaining agreement.² The petition alleged that the union, on nine occasions, had engaged in work stoppages and strikes in violation of this contract. The union moved for dismissal on the ground that injunctive relief in a labor dispute was barred by Section 4 of the Norris-La Guardia Act.³ The union's motion was granted⁴ and this determination was subsequently affirmed by the Court of Appeals for the Seventh Circuit.⁵ On certiorari, the Supreme Court held that there was nothing in the language or legislative history of Section 301 of the Taft-Hartley Act which repealed the Norris-La Guardia Act so as to authorize federal courts to enjoin strikes which constitute a breach of a collective bargaining agreement. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962).

Section 4 of the Norris-La Guardia Act specifically denied federal courts jurisdiction to enjoin strikes precipitated by a labor dispute.⁶ The subsequently

1. Labor Management Relations Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

2. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962). The union had agreed that there should be "no strikes or work stoppages . . . for any cause which is or may be the subject of a grievance." 370 U.S. at 197.

3. 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958).

4. *Sinclair Ref. Co. v. Atkinson*, 187 F. Supp. 225 (N.D. Ind. 1960).

5. *Sinclair Ref. Co. v. Atkinson*, 290 F.2d 312 (7th Cir. 1961).

6. Section 4 of the Norris-La Guardia Act provides that: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . . (a) Ceasing or refusing to perform any work or to remain in any relation of employment. . . ." 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958). Section 13(c) of the act defines a "labor dispute" in the following broad language: "[A]ny controversy concerning terms or conditions of em-

enacted Section 301 of the Taft-Hartley Act, however, gave federal courts jurisdiction to entertain suits between employers and unions for violations of collective bargaining agreements.⁷ The obvious overlap of these two statutes, when a promise not to strike is made part of a labor contract, has created a problem of interpretation for courts.

Although in the passage of the Taft-Hartley Act certain minor inroads were made upon the broad interdict of section 4,⁸ it is clear that Congress expressly rejected a proposed direct repeal of its application to collective bargaining.⁹ Adhering to this legislative history, the majority of federal courts have refused to find in section 301 an avenue for specific performance of no-strike clauses.¹⁰ Doubt was cast on the propriety of such decisions, however, by two opinions of the Supreme Court. In *Textile Workers Union v. Lincoln Mills*,¹¹ in affirming a lower court decree forcing a reluctant employer to arbitrate, the Court said it saw "no justification in policy for restricting § 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes

ployment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1958). The only exception to the broad prohibition of § 4 is found in § 7. Nevertheless, § 7 only requires the federal courts to issue injunctions in violent labor disputes. 47 Stat. 71 (1932), 29 U.S.C. § 107 (1958).

7. Section 301(a) of the Taft-Hartley Act reads as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

8. Sections 10(h) and 208(b) authorize injunctions to be obtained at the suit of the National Labor Relations Board and the Attorney General respectively. 61 Stat. 149, 155 (1947), 29 U.S.C. §§ 160(h), 178(b) (1958). Furthermore, only § 302(e), dealing with the responsibilities of union representatives, expressly allows an injunctive remedy in favor of a private litigant. 61 Stat. 158 (1947), 29 U.S.C. § 186(e) (1958).

9. The legislative history of § 301 reveals that both houses agreed initially to allow federal courts to enjoin breaches of collective bargaining agreements. The House bill provided that the anti-injunctive laws "shall not have any application in respect of either party . . ." to such agreements. H.R. 3020, 80th Cong., 1st Sess. § 8(b)(5) (1947). Both these provisions, however, were stricken in joint conference, with the epithet that these suits "be left to the usual processes of the law" and not to the National Labor Relations Board. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41-42 (1947).

10. *A. H. Bull S.S. Co. v. Seafarers' Int'l Union*, 250 F.2d 326 (2d Cir. 1957), cert. denied, 355 U.S. 932 (1958); *W. L. Mead, Inc. v. International Bhd. of Teamsters*, 217 F.2d 6 (1st Cir. 1954); *Alcoa S.S. Co. v. McMahon*, 81 F. Supp. 541 (S.D.N.Y. 1948), aff'd per curiam, 173 F.2d 567 (2d Cir.), cert. denied, 338 U.S. 821 (1949). But see *Teamsters Union v. Yellow Transit Freight Lines, Inc.*, 282 F.2d 345 (10th Cir. 1960), rev'd per curiam, 370 U.S. 711 (1962); *Johnson & Johnson v. Textile Workers Union*, 184 F. Supp. 359 (D.N.J. 1960); *American Smelting & Ref. Co. v. Tacoma Smeltermen's Union Local 25*, 175 F. Supp. 750 (W.D. Wash. 1959).

11. 353 U.S. 448 (1957).

to the . . . [Norris-La Guardia] Act."¹² It viewed the enforcement of the employer's agreement to arbitrate as the *quid pro quo* for labor's no-strike agreement.¹³ In so deciding, the Court necessarily relegated Section 7 of the Norris-La Guardia Act to a position inferior to section 301. In the second case, *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*,¹⁴ interpreting the Railway Labor Act which provides for compulsory arbitration of minor disputes,¹⁵ the Court held that section 4 did not bar the enjoining of a strike caused by such a dispute. It reasoned that to decide otherwise, would be to effectively deprive the arbitrator of his congressionally intended jurisdiction,¹⁶ and thus, to preserve the obvious purpose of both acts, it was the Court's duty to seek an accommodation between the two.¹⁷

Reading these two cases as an indication of the Supreme Court's willingness to adopt the concept of accommodation to section 301 suits, the Court of Appeals for the Tenth Circuit, in *Teamsters Union v. Yellow Transit Freight Lines, Inc.*,¹⁸ declared that in cases involving agreements not to strike, the anti-injunctive law had been impliedly repealed. The court argued that the guarantee of congressional intent demanded that a distinction be made between the utilization of an injunctive decree for the negative purpose of subverting union activities from that of affirmatively preserving a contract freely negotiated by the parties.¹⁹ It is to be noted that in arriving at its conclusion the court ignored not only the legislative history of section 301, but also refused to follow two apposite holdings by the Courts of Appeals for the First and Second Circuits.²⁰

12. *Id.* at 458.

13. *Id.* at 455.

14. 353 U.S. 30 (1957).

15. The Railway Labor Act authorizes either side to submit a "minor dispute" to the Adjustment Board whose awards "shall be final and binding upon both parties to the dispute. . . ." 48 Stat. 1191 (1934), 45 U.S.C. § 153 (1958).

16. 353 U.S. at 39. However, the Norris-La Guardia Act has been held to prohibit the issuance of an injunction in a railway labor case involving "major disputes." *Brotherhood of R.R. Trainmen v. Toledo, P. & W.R.R.*, 321 U.S. 50 (1944). It should be noted that the responsibility of "major disputes" is entrusted to the National Mediation Board, whose power in these disputes is limited to mediation. See *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960).

17. 353 U.S. at 40. Similarly, there is much the same conflict between the blanket anti-injunction provisions of the Norris-La Guardia Act and § 301 of the Taft-Hartley Act. However, an injunction is not available under *Chicago River* unless one of the parties has submitted the dispute to the Adjustment Board. *Manion v. Kansas City Terminal Ry.*, 353 U.S. 927 (1957) (*per curiam*).

18. 282 F.2d 345 (10th Cir. 1960), *rev'd per curiam*, 370 U.S. 711 (1962).

19. 282 F.2d at 349-50. In addition, this court interpreted *Lincoln Mills* as conferring on the federal courts a very broad jurisdiction in suits brought under § 301—one that embraced an injunctive remedy for breach of a no-strike clause in a labor dispute. 282 F.2d at 349.

20. These two courts denied specific performance of a no-strike clause on the ground that § 301 did not repeal by implication the anti-injunction provisions of the Norris-

In the instant case, the Court completely rejected the result reached in *Teamsters* despite the fact that the Justices would appear to be sympathetic towards the underlying policy of the decision, *i.e.*, to deprive the employer of an injunction is to weaken substantially his bargaining power and thereby frustrate the national labor policy designed to foster peaceful bilateral negotiation.²¹ The Court, however, felt section 301's history was so overpowering that any other decision would be a serious infringement upon the legislative prerogative and, therefore, this was not a proper area for judicial inventiveness.²² The accommodation found in *Chicago River*, the majority argued, could not be extended to the present situation, since there the union by striking was disregarding an affirmative statutory duty to arbitrate which supplied a reasonable substitute for the protection afforded by section 4.²³ *Lincoln Mills*, the Court continued, by granting a *mandatory* injunction to arbitrate did not preclude the type of activity the Norris-La Guardia Act was specifically designed to safeguard, *i.e.*, strikes or work stoppages,²⁴ and thus could not be considered precedent for the type of relief sought by petitioner.

The dissent in the case at bar readily admitted the correctness of the majority's view that section 301 did not repeal section 4 but proffered the solution that the language and the legislative history of section 301 are at best ambiguous and just as easily lend themselves to judicial accommodation as not.²⁵ Mr. Justice Brennan saw in the instant situation the same nexus between the anti-injunctive law and its substitute as that which prompted the decision in *Chicago River*, particularly since the union freely assented to settlement by arbitration.²⁶

The dissent raised another problem which is compounded by the majority's

La Guardia Act. See *A. H. Bull S.S. Co. v. Seafarers' Int'l Union*, 250 F.2d 326 (2d Cir. 1957); *W. L. Mead, Inc. v. International Bhd. of Teamsters*, 217 F.2d 6 (1st Cir. 1954).

21. "[W]hatever might be said about the merits of this argument, [that injunctions against peaceful strikes are necessary to make the arbitration process effective] Congress has rejected it. In doing so, it set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration and it is not this Court's business to review the wisdom of that decision." 370 U.S. at 213.

22. *Id.* at 214-15.

23. 370 U.S. at 211.

24. See 47 Stat. 70 (1932), 29 U.S.C. §§ 102, 104 (1958).

25. The dissent compares the legislative history of § 303 of the Taft-Hartley Act with that of § 301. Section 303 initially provided for injunctive relief in suits resulting from certain concerted employee activities. As a result of opposition, the section, as finally enacted, provided for damages only. The dissent argues that Congress was content to rely upon the courts to resolve conflicts between § 301 and § 4, otherwise, "Congress would have used language confining § 301 to damage remedies . . . if such had been the intention." 370 U.S. at 223.

26. 370 U.S. at 219 (dissenting opinion). See Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 255 (1958). See also Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 645-46 (1959); Rice, *A Paradox of Our National Labor Law*, 34 Marq. L. Rev. 233, 235-37 (1951); Stewart, *No-Strike Clauses in the Federal Courts*, 59 Mich. L. Rev. 673, 683 (1961).

decision, that is, its effect upon state court remedies. The Supreme Court, in *Lincoln Mills*, interpreted section 301 as not only conferring jurisdiction on the federal courts in the field of collective bargaining²⁷ but also as creating a federal substantive law in this area.²⁸ In the leading state decision on the subject, *McCarroll v. Los Angeles County Dist. Council of Carpenters*,²⁹ the court recognized that state law had been pre-empted by federal, but in asserting a literal reading of Section 4 of the Norris-La Guardia Act,³⁰ it concluded that the statute did not deprive state courts of their discretionary power to give specific performance of contracts not to strike. Mr. Justice Brennan noted that the logical result of such a situation is to make state courts the favored tribunal for the aggrieved employer, thereby defeating the *Lincoln Mills*' goal of uniformity in settling labor disputes.³¹ Of course, the entire dilemma might be obviated by the union's right to have the action removed to a federal court.³² However, there is some doubt whether this escape exists where the original petition merely seeks to enjoin a strike.³³

Perhaps an even more significant issue left unresolved by the present case is the jurisdiction of a district court to enforce an injunction ordered pursuant to a properly invoked arbitration proceeding. Notwithstanding New York's "little Norris-La Guardia Act,"³⁴ it was held in *Ruppert v. Egelhofer*,³⁵ that for the

27. See note 7 supra.

28. The Court in *Lincoln Mills* declared that "substantive law to apply in suits under § 301(a) is federal law. . . . [And] federal interpretation of the federal law will govern, not state law. . . . but state law if compatible with the purpose of § 301, may be resorted to. . . ." 353 U.S. at 456-57. Although the language in *Lincoln Mills* is merely suggestive, the courts have concluded on the basis of this language that federal jurisdiction was not intended to be exclusive. *Minkoff v. Scranton Frocks, Inc.*, 172 F. Supp. 870 (S.D.N.Y. 1959); *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958). See Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 59 Colum. L. Rev. 269, 280 (1959).

29. 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958).

30. "No court of the United States shall have jurisdiction to issue any . . . injunction . . . involving . . . any labor dispute. . . ." 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958).

31. 370 U.S. at 226 (dissenting opinion).

32. "[A]ny civil action brought in a State court of which the district courts . . . have original jurisdiction, may be removed by the defendant . . . to the district court of the United States. . . ." 28 U.S.C. § 1441 (1958).

33. "The commentators are not uniform on whether a case can be removed from a state court which has jurisdiction. *Castle & Cooke Terminals, Ltd. v. Local 137, ILU*, 110 F. Supp. 247, 250 (D. Hawaii 1953) suggests that no right of removal to the federal courts would exist. See also, *In re INS, King Features*, 41 LRRM 2639, holding that an employer's proceeding to vacate an arbitration award in favor of a union is not removable by the union to the federal district court under the federal removal statute." Kramer, *Arbitration Under the Taft-Hartley Act*, 11 N.Y.U. Conference on Labor 255, 266 n.4 (1958). See also *National Dairy Prods. Corp. v. Heffernan*, 195 F. Supp. 153 (E.D.N.Y. 1961); *Home Bldg. Corp. v. Carpenters Dist. Council*, 53 F. Supp. 804 (W.D. Mo. 1943).

34. See N.Y. Civ. Prac. Act § 876(a).

35. 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

state court to stand behind such an award was permissible, even conceding the fact that it could not, on its own initiative, accomplish the same end.³⁶ It is impossible to speculate what the outcome would be if the Supreme Court were faced with the identical circumstance. If *Ruppert* were followed, it would undoubtedly put "the federal courts back into the business of enjoining strikes . . .,"³⁷ an eventuality to which the Court appears totally opposed.

Although apparently sound, the decision in the instant case serves merely to close one avenue of approach. To achieve the desired result of an enforceable no-strike clause, the employer may possibly, as *McCarroll* teaches, proceed in a favorable state forum if circumstances allow. As an alternative, however, at the outset, he may include such a clause in a valid contract to arbitrate, and upon a favorable arbitration determination move to confirm in the state court.³⁸

Negligence—State Held Not Liable for Suicide of Sane Prisoner in Custody.—Decedent was arrested for the murder of his wife and while in custody he jumped from a second story window, fracturing his ankle. He was ordered committed to a state hospital for a determination of his mental capacity to stand trial. The sheriff notified the hospital authorities that he and the district attorney felt that the prisoner had suicidal tendencies and for this reason offered to post a constant guard over him. After the offer was declined by the hospital with the explanation that its staff was capable of adequate supervision, decedent strangled himself in his hospital room with an "ace" bandage which had been placed on his ankle by order of a staff doctor. Decedent's administrator brought suit against the state for negligence. At the trial, a report of two psychiatrists was introduced which concluded that decedent had been mentally capable of understanding the charges against him and of defending himself in court. A third psychiatrist testified that decedent was sane when examined. The court of claims found for the plaintiff but the appellate division reversed, holding that the decedent was sane and, therefore, the state was not liable for his suicide. *Gioia v. State*, 16 App. Div. 2d 354, 228 N.Y.S.2d 127 (4th Dep't 1962).

In addition to the question of the state's liability for the suicide, the court considered the measure of damages which would have been applied had the alleged negligence been proved. On this issue it concluded, without recourse to authority, that a post-mortem inquiry into decedent's guilt or innocence

36. Furthermore, the court declared that "arbitration is voluntary and there is no reason why unions and employers should deny such powers to the special tribunals they themselves create." *Id.* at 582, 148 N.E.2d at 131, 170 N.Y.S.2d at 783. This decision, however, was based on the language of the contract providing for speedy arbitration. Notwithstanding the fact that the contract did not expressly give the arbitrator the power to grant injunctive relief, the court concluded such power was inferred; otherwise, the purpose of the contract could never be achieved.

37. 370 U.S. at 214.

38. See, e.g., *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

of the murder charge would be too speculative in determining his life expectancy and the loss of future earnings.¹

Concerning the damages recoverable for wrongful death, the New York Decedent Estate Law provides:

The damages awarded to the plaintiff may be such a sum as the . . . court . . . deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought.²

The apportioning of damages for wrongful death involves a good deal of speculation in any case. The problem presented in the instant situation has never arisen previously and in formulating the law applicable to the point in issue the appellate division merely applied common sense. The very idea of trying to determine in a civil suit the criminal culpability of a decedent goes beyond the bounds of plausibility.

The exact limits of judicial speculation concerning the value of a life cannot be specifically determined. When the decedent is insane at the time of death, the courts will inquire into the possibility of recovery in calculating the economic value of the lost life and will attempt to fix a speculative value on such life accordingly.³ Conversely, it has been held that where the decedent was hopelessly insane no pecuniary value could be put on his life.⁴ However, as stated in the instant case, to go beyond this standard would be to destroy the principles of certainty in the law of damages.

In reaching its decision that the state could not be held liable for the death of decedent, the present court noted that in all cases allowing recovery in similar circumstances the decedent was insane and, therefore, his death was the result of a nonvolitional act.⁵ Hence, the appellate division reiterated the principle that insanity cannot be presumed from the mere fact of suicide. Based on the testimony of decedent's psychiatrist, it was concluded that the act in question was that of a sane man; a calculated effort to escape punishment for his crime. The court thereby reasoned that the circumstances were the same as if decedent had hanged himself in an ordinary jail. The decision hinged on the question of decedent's mental state and, since he was found sane, recovery was denied according to the principle *volenti non fit injuria*.⁶

1. *Gioia v. State*, 16 App. Div. 2d 354, 356, 228 N.Y.S.2d 127, 130 (4th Dep't 1962) (dictum).

2. N.Y. Deced. Est. Law § 132.

3. *Dow v. State*, 183 Misc. 674, 50 N.Y.S.2d 342 (Ct. Cl. 1944); *Spataro v. State*, 166 Misc. 418, 3 N.Y.S.2d 737 (Ct. Cl. 1937).

4. *St. Pierre v. State*, 272 App. Div. 973, 71 N.Y.S.2d 608 (3d Dep't 1947); *Slater v. State*, 192 Misc. 826, 82 N.Y.S.2d 313 (Ct. Cl. 1948).

5. In support of this proposition the court cited *Hirsh v. State*, 8 N.Y.2d 125, 168 N.E.2d 372, 202 N.Y.S.2d 296 (1960). However, in that case the question at issue was the reasonable care of the state authorities. In the instant case, the inadequate surveillance of the staff was admitted by the court. 16 App. Div. 2d at 356, 228 N.Y.S.2d at 130. Moreover, in *Hirsh* no particular importance was attached to the mental condition of the decedent.

6. 16 App. Div. 2d at 357-58, 228 N.Y.S.2d at 131-32.

On the other hand, in dissenting, Presiding Justice Williams found ample evidence of decedent's suicidal tendencies which should have put the hospital authorities on notice. Thus, Justice Williams seemed to base the liability of the state not so much on decedent's general mental condition, but on the foreseeability of his suicide.⁷

With regard to the presumption of sanity, it is an accepted rule that every man is presumed sane until that presumption is overthrown by clear and satisfactory proof.⁸ Furthermore, it has been held in New York that the mere fact of suicide will not rebut the presumption of sanity since "experience has shown that self-destruction is often perpetrated by the sane."⁹ However, this view does not seem to be universal, as evidenced by a holding of the United States Supreme Court, that "in making out . . . [his] proof, the plaintiff is entitled to the benefit of the presumption that a sane man would not commit suicide. . . ."¹⁰ Between these extremes is the position of Dean Wigmore, who states that "no single act can be of itself decisive; while, on the other hand, any act whatever may be significant to some extent."¹¹ Thus:

Suicide is generally conceded to be a circumstances [sic] from which (with others) insanity may be inferred . . . but it ought not to create a presumption or shift the duty of producing evidence, though the judicial language is here sometimes ambiguous.¹²

This would seem to be a proper statement of the law, and one which is not incompatible with the New York view.¹³

In the principal case, the court adopted a negative attitude on this point. Despite the fact that the suicide of the decedent raises no presumption, is it then within the spirit of the applicable law to pass over it? It would seem that a proper view would be to consider the suicide as a factor tending towards a determination of insanity even though inconclusive in itself. In this way the entire behavior pattern of the decedent might have been considered and a more accurate conclusion reached.

As previously indicated, the majority in the instant case based its decision upon the question of decedent's sanity and equated his position to that of a

7. *Id.* at 361, 228 N.Y.S.2d at 134 (dissenting opinion).

8. *Banker v. Banker*, 63 N.Y. 409 (1875); *Meekins v. Kinsella*, 152 App. Div. 32, 136 N.Y. Supp. 806 (1st Dep't 1912); *Angelo v. Angelo*, 28 Misc. 2d 1018, 220 N.Y.S.2d 744 (Sup. Ct. 1961).

9. *Weed v. Mutual Benefit Life Ins. Co.*, 70 N.Y. 561, 564 (1877). *Accord*, *In re Levine's Estate*, 198 N.Y.S.2d 89 (Surr. Ct. 1960).

10. *Connecticut Mut. Life Ins. Co. v. Akens*, 150 U.S. 463, 475 (1893).

11. 2 Wigmore, *Evidence* § 228, at 9 (3d ed. 1940).

12. 9 Wigmore, *Evidence* § 2500(c), at 359 (3d ed. 1940).

13. See *Roche v. Nason*, 185 N.Y. 128, 77 N.E. 1007 (1905) where the court stated: "Mental derangement cannot be predicated solely upon the circumstance that he killed himself. Insanity is not inferable from the mere act of suicide. . . . Nor does the fact that a man has taken his own life, alone and of itself and in the absence of any other evidence as to his mental condition, warrant the deduction that his mind was unsound at the time of the suicidal act. . . ." *Id.* at 137, 77 N.E. at 1009.

prisoner in any jail.¹⁴ However, every prisoner in jail is not sent to a mental hospital for observation. The New York Code of Criminal Procedure provides that a court may order a sanity examination for a defendant "if . . . there is *reasonable ground* for believing that such defendant is in such state of . . . insanity that he is incapable of understanding the charge . . . or of making his defense. . . ."¹⁵ Furthermore, with respect to such action a New York court has stated:

[It] should not be instituted impulsively, and only after due deliberation and consideration, when the court has adequate reason to believe that a defendant is in such a state of mind, etc., is there justification for making an order instituting such a procedure.¹⁶

Thus it can be seen that under the New York penal system a defendant is not sent for observation without good reason to believe that he is in some way mentally unbalanced.

Concerning the question of an institution's liability for the suicide of a patient the general rule is that a hospital must exercise such due care as the patient's known mental condition requires.¹⁷ It has been held that the most important single factor in determining liability is whether the hospital authorities could have anticipated under the circumstances that the patient might harm himself. A hospital is under a duty to protect its inmates from the known or reasonably ascertainable danger of suicide. Thus it would seem that the governing circumstance is the foreseeability of the act of the inmate.¹⁸ In the cases granting recovery, the suicide could reasonably have been anticipated.¹⁹ On the other hand, where there was no warning as to the propensities of the decedent, the state or the hospital has been absolved from liability.²⁰

In one case, the decedent hanged himself while still in the admission ward of a mental institution. While finding that the decedent was mentally disturbed, the court held for the state since there was no indication of suicidal tendencies and the authorities had not had a reasonable time within which to examine

14. 16 App. Div. 2d at 357, 228 N.Y.S.2d at 130.

15. N.Y. Code Crim. Proc. § 658. (Emphasis added.)

16. *People v. Pershaec*, 172 Misc. 324, 331, 15 N.Y.S.2d 215, 224 (N.Y. County Ct. 1939).

17. See *Daley v. State*, 273 App. Div. 552, 78 N.Y.S.2d 584 (3d Dep't 1948), *aff'd mem.*, 298 N.Y. 880, 84 N.E.2d 801 (1949).

18. See *Dimitroff v. State*, 171 Misc. 635, 13 N.Y.S.2d 458 (Ct. Cl. 1939). For an enlightening discussion of the application of the doctrine of foreseeability to hospital suicide cases, see *Perr*, *Suicide Responsibility of Hospital and Psychiatrist*, 9 *Clev.-Mar. L. Rev.* 427 (1960).

19. E.g., *Martindale v. State*, 269 N.Y. 554, 199 N.E. 667 (1935); *Wilson v. State*, 14 App. Div. 2d 976, 221 N.Y.S.2d 354 (3d Dep't 1961) (memorandum decision); *Daley v. State*, *supra* note 17; *Dow v. State*, *supra* note 3; *Dimitroff v. State*, *supra* note 18.

20. E.g., *Estate of Maury v. State*, 15 Misc. 2d 1007, 183 N.Y.S.2d 272 (Ct. Cl. 1959); *Lewis v. State*, 1 Misc. 2d 1078, 152 N.Y.S.2d 161 (Ct. Cl. 1956); *Fowler v. State*, 192 Misc. 15, 78 N.Y.S.2d 860 (Ct. Cl. 1948); *Brigante v. State*, 33 N.Y.S.2d 354 (Ct. Cl. 1942).

the patient.²¹ On a similar theory, the state was absolved from liability for the suicide of a manic depressive who had attempted suicide in the past. The court reasoned that since the decedent had been improving prior to the incident, it was not foreseeable that he would take his own life.²² An interesting situation arose in a case where a mother with no history of mental irregularity, while in an advanced state of pregnancy, suffered a sudden attack of intrapartum psychosis and leaped from a hospital window to her death. The court of appeals found for her estate, holding that the issue was a question of reasonable care for the jury to decide.²³ Judge Desmond, in a dissent in which Judge Fuld concurred, reasoned that the defendant hospital should not be held liable for this one-in-a-million occurrence, since it was totally unforeseeable.²⁴

The doctrine of foreseeability seems to have application in other states.²⁵ This concept was asserted most firmly in an early Missouri decision.²⁶ There, the court held that the plaintiff did not have to prove decedent's insanity before he could recover. It stated that defendant's awareness of decedent's suicidal tendencies was all-important and that the test to determine liability is the foreseeability of suicide regardless of sanity.²⁷

Thus it appears that the determining factor of liability should be the foreseeability of the suicide rather than the mere question of decedent's sanity. In the principal case, the court overlooked this factor, especially in view of the notice which the hospital had from the sheriff.

In determining the sanity of the decedent, the majority of the instant court laid great stress on the testimony of the psychiatrist who examined him.²⁸ However, nowhere in the report of this testimony was there any reference to the "suicidal tendencies" of the decedent or his lack thereof which, as we have seen, should be the determinative factor in ascertaining whether the institution is liable.

The appellate division was not impressed by decedent's hospital records and death certificate since no evidence was introduced "to show that these conclusory statements were based upon the knowledge of any factual circumstances

21. *Lewis v. State*, supra note 20.

22. *Fowler v. State*, supra note 20.

23. *Santos v. Unity Hosp.*, 301 N.Y. 153, 93 N.E.2d 574 (1950).

24. *Id.* at 156, 93 N.E.2d at 576. Conversely, in the dissent in the *Hirsh* case, supra note 5, at 128, 168 N.E.2d at 373, 202 N.Y.S.2d at 298, Judge Froessel, in arguing for recovery for the death of decedent, placed great weight on the foreseeability of the suicide because of the previous attempts of the decedent. However, the majority in that case denied recovery on entirely different grounds. See note 5 supra.

25. See, e.g., *Stallman v. Robinson*, 364 Mo. 275, 260 S.W.2d 743 (1953); *Mosedahl v. St. Luke's Hosp. Ass'n*, 194 Minn. 198, 259 N.W. 819 (1935).

26. *Smith v. Simpson*, 221 Mo. App. 550, 288 S.W. 69 (1926).

27. *Id.* at 556-57, 288 S.W. at 72. Concerning the state's responsibility for patients in its mental institutions, a New York court has stated: "Progressive government accepts the responsibilities that the modern democratic State owes to the individuals in its society. It is now well established that the wards of the Empire State must have adequate care and supervision." *Dow v. State*, supra note 3, at 675, 50 N.Y.S.2d at 343.

28. 16 App. Div. 2d at 360, 228 N.Y.S.2d at 133.

supporting the conclusion.²⁹ On the other hand, the dissent placed great weight on these records, especially the death certificate which gave the cause of death as strangulation "while temporarily insane." In so doing, Justice Williams pointed out that such certificate is presumptive evidence of the facts alleged therein.³⁰ He therefore concluded that these records constituted ample basis for the decision of the court of claims.³¹

On the issue of the weight which should be given to the death certificate of a decedent, the New York Civil Practice Act provides:

Where a public officer is required or authorized . . . to make a certificate or an affidavit . . . to a fact ascertained by him, in the course of his official duty . . . the certificate or affidavit . . . is *presumptive* evidence of the facts therein alleged. . . .³²

In the same spirit, the New York Public Health Law provides:

Any copy of the record of a . . . death . . . shall be *prima facie evidence* of the facts therein stated in all courts . . . and in all actions, proceedings . . . or otherwise. . . .³³

Moreover, such a certificate has been held to be presumptive evidence that one decedent died by suicide³⁴ and another from poison.³⁵ In one wrongful death action the court stated that the fact that the death certificate gave a cause of death which did not controvert the contention of the plaintiff, would place upon the defendant the necessity of coming forward with evidence that the decedent did not die in a manner claimed by the plaintiff.³⁶

Granted that these cases all concern the single fact of cause of death, yet the analogy to the principal case can be seen. Furthermore, the words of the statutes are all-inclusive, embracing every fact stated in the certificate.³⁷ Therefore, due to the existence of this presumption and the fact that in wrongful death actions the burden of proof as to the contributory fault of the decedent is upon the defendant,³⁸ it is submitted that the evidence in the principal case was sufficient to have justified the appellate division in upholding the decision of the court of claims.

Trade Regulation—Robinson-Patman Act—Defense of Meeting Competition Available to Seller Charged With Price Discrimination Although Seller Obtained New Customers.—Petitioner, Sunshine Biscuits, Inc., sought

29. *Ibid.*

30. In support of this proposition Justice Williams cited the following: N.Y. Civ. Prac. Act § 367; N.Y. Pub. Health Law § 4103; *Brownrigg v. Boston & Albany R.R.*, 8 App. Div. 2d 140, 141, 185 N.Y.S.2d 977, 979 (1st Dep't 1959) (*per curiam*).

31. 16 App. Div. 2d at 361, 228 N.Y.S.2d at 134.

32. N.Y. Civ. Prac. Act § 367. (Emphasis added.)

33. N.Y. Pub. Health Law § 4103. (Emphasis added.)

34. *Scott v. Empire State Degree of Honor*, 204 App. Div. 530, 198 N.Y. Supp. 535 (4th Dep't 1923).

35. *Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940).

36. *Brownrigg v. Boston & Albany R.R.*, *supra* note 30.

37. See notes 32 & 33 *supra* and accompanying text.

38. N.Y. Deced. Est. Law § 131.

to set aside a cease and desist order of the Federal Trade Commission¹ charging it with discriminating in price among its customers in violation of Section 2(a) of the Robinson-Patman Act.² The Commission's order resulted from Sunshine's granting to certain large grocery and drug chains in Cleveland, Ohio, volume and cash discounts which were not offered to their competitors. Petitioner admitted a prima facie price violation, but asserted the statutory defense that its lower price was made in good faith to meet a competitor's price.³ The Commission specifically objected to "a number of instances . . . [where Sunshine] offered discounts matching those granted by competitors to their customers *and was thus able to obtain new customers.*"⁴ With one member dissenting, it decided that the defense was limited to situations where discounts are granted defensively *to retain* old customers, and did not include instances in which new customers are attracted by aggressive price reductions. On review, the court of appeals set aside the Commission's order and held that the "gaining of new customers" test would be practically unworkable and would stifle competition for new customers, thus fostering monopoly and defeating the purpose of the act. *Sunshine Biscuits, Inc. v. FTC*, 306 F.2d 48 (7th Cir. 1962).⁵

Congress' main concern in drafting the original Section 2 of the Clayton Act⁶ was with predatory practices of industrial giants whose selective price reductions were too often effective in eliminating smaller competitors.⁷ The competition sought to be protected was that between rival sellers, *i.e.*, primary

1. *Sunshine Biscuits, Inc.*, 3 Trade Reg. Rep. ¶ 15469 (FTC Orders) (1961).

2. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958) (Supp. III, 1959-1961).

3. 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958) (Supp. III, 1959-1961).

4. *Sunshine Biscuits, Inc.*, 3 Trade Reg. Rep. ¶ 15469, at 20344-45 (FTC Orders) (1961). (Emphasis added.)

5. The Federal Trade Commission, on Nov. 23, 1962, issued a statement explaining its reasons for not seeking Supreme Court review of the Seventh Circuit's decision in the instant case. The Commission emphasized that its decision not to seek Supreme Court review does not reflect a change of position by the Commission on the question of law involved. Since the court of appeals based its decision on statutory interpretation, without reaching the factual question of whether the purchasers granted the lower prices were old customers or new customers of Sunshine Biscuits, the Commission believed review of the case would not be appropriate. 5 Trade Reg. Rep. ¶ 50166 (Comment-CCH Analysis) (Nov. 23, 1962). The Commission's determination leaves unresolved the conflict of decisions between the Second and Seventh Circuits. See *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674 (2d Cir.), cert. denied, 361 U.S. 826 (1959); and notes 28 & 29 *infra* and accompanying text.

6. 38 Stat. 730 (1914).

7. Section 2 of the Clayton Act was designed to deal with the "common practice of great and powerful combinations . . . to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made." H.R. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914).

line competition. The Robinson-Patman amendments to the Clayton Act⁸ were designed to meet economic problems of a different nature; more particularly, those resulting from the growth of chain stores and the anticompetitive effects of their often coercive buying power.⁹ In this latter instance, the competition affected was that among competing buyers, *i.e.*, secondary line competition—the situation in the instant case.

The present section 2(a) provides that “it shall be unlawful for any person . . . to discriminate in price between different purchasers . . . where the effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure . . . competition. . . .”¹⁰ Although counsel supporting a section 2(a) complaint must establish both discrimination in price and the requisite competitive effect, this burden amounts to no more than demonstrating a price differential¹¹ and a reasonable *possibility* of injury to competition.¹² In a primary line case, the burden of proving possible injury often entails extensive market surveys,¹³ whereas a secondary line injury is suggested by the mere fact of a price difference among competing customers.¹⁴

Once confronted with a *prima facie* violation, the act provides that a seller may “justify” his otherwise illegal price discrimination by proving any of three statutory defenses,¹⁵ one of which is that the discrimination “was made in good faith to meet an equally low price of a competitor. . . .”¹⁶ These “justifications”

8. 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958) (Supp. III, 1959-1961).

9. “This bill is designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant . . . from exploitation by his chain competitor.” 79 Cong. Rec. pt. 8, at 9078 (1935) (remarks of Representative Patman). Despite its inadequacies, the original Clayton Act provided some protection against competitive injury among buyers. See *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929); *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763 (7th Cir. 1930), cert. denied, 282 U.S. 899 (1931).

10. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958) (Supp. III, 1959-1961).

11. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 546-53 (1960).

12. *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 742 (1945).

13. See, e.g., *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957); *General Motors Corp.*, 50 F.T.C. 54 (1953).

14. See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); see generally Note, 74 *Harv. L. Rev.* 1597 (1961).

15. The three defenses enumerated in §§ 2(a) and 2(b) are: (1) the meeting in good faith of an equally low price of a competitor, (2) a price reduction making allowance for cost savings, and (3) a reduction in response to changing market conditions, such as those involving seasonal, perishable or obsolescent products. Although admittedly available, these defenses are rarely employed successfully. See Comment, 29 *U. Chi. L. Rev.* 355 n.1 (1962). Although the Attorney General's National Committee to Study the Antitrust Laws noted that “not a single seller in a recorded case to date [1955] has succeeded in finally justifying a challenged discrimination by recourse to Section 2(b)'s ‘meeting competition’ defense” (Att’y Gen. Nat’l Comm. Antitrust Rep. 181 (1955)), the defense has since been used with success. See, e.g., *Sun Oil Co. v. FTC*, 294 F.2d 465 (5th Cir. 1961), cert. granted, 368 U.S. 984 (1962); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956).

16. 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958) (Supp. III, 1959-1961). Sec-

represent an acknowledgement by Congress that price discrimination must be permitted in certain instances lest the act precipitate widespread price conspiracies, and perhaps cause the same detrimental effects it was designed to prevent.¹⁷

In *Standard Oil Co. v. FTC*,¹⁸ the Supreme Court held that the defense of meeting competition was a complete and absolute one, *irrespective* of actual or potential injury to competition or its tendency to create a monopoly.¹⁹ Generally, however, the defense has been limited to cases where the price met reasonably *appears* to be a lawful one,²⁰ where the discrimination is truly responsive to an actual competitive situation,²¹ and where in good faith the seller seeks "to meet, but not to beat" his competitor's price.²² The burden of proving this is, of course, on the seller.²³

The issue in the instant case was whether the defense is available to a seller who makes discriminatory price reductions and thereby obtains new customers. The hearing examiner apparently conceded that the defense may be employed only where there is an "essentially defensive" price discrimination, and after reviewing evidence of the cutthroat competitive conditions in Sunshine's Cleveland market, concluded that Sunshine's action was basically defensive, and, hence, permissible. The Commission disagreed and held that the market

tion 2(b) in pertinent part provides: "That nothing herein contained shall prevent a seller [from] rebutting the prima-facie case thus made by showing that his lower price . . . to any purchaser . . . was made in good faith to meet an equally low price of a competitor . . ."

17. A Symposium on the Robinson-Patman Act, 49 Nw. U.L. Rev. 196, 262 (1954). See also Att'y Gen. Nat'l Comm. Antitrust Rep. 181 (1955) where it is stated that: "For a seller constrained by law to reduce prices to some only at the cost of reducing prices to all may well end by reducing them to none." (Emphasis omitted.)

18. 340 U.S. 231 (1951).

19. *Id.* at 241.

20. Where a competitor's price is clearly unlawful, as in industry-wide collusive pricing, the defense of meeting competition is no justification. *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753-54 (1945); *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945). But the practical difficulty of a seller's inquiry into the legality of a competitor's price has been acknowledged, and in meeting prices, whether lawful or not, "it will be sufficient . . . if respondent did not know their legal status, or should not have known it." *E. Edlmann & Co.*, 51 F.T.C. 978, 996 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958).

21. The cases prohibiting the adoption of collusive pricing systems are also appropriate authority in this instance. See note 20 *supra*. But the "responsive to an actual price" requirement, rather than involved with legality of price, is intended to limit the scope of the defense to individual competitive situations as opposed to matching a competitor's entire pricing system, or to meet future competition. See, e.g., *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945).

22. In *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951) the Supreme Court stated that the defense was "limited to a price reduction made to meet in good faith an equally low price of a competitor" and did not permit "reductions which undercut the 'lower price' of a competitor." *Id.* at 241-42.

23. *General Foods Corp.*, 50 F.T.C. 885, 890 (1954).

conditions had no bearing on the issue. Since the defense presupposes competition, the Commission ruled that it was not available in situations in which Sunshine "was not faced with loss of a customer and did not lower its price to retain a customer . . . [because] its actions were not defensive. . . ." ²⁴

To support its limitation on the scope of the defense, the Commission relied on *Standard Oil Co. v. FTC*²⁵ and *Standard Motor Prods., Inc. v. FTC*.²⁶ In *Standard Oil*, a case involving price favoritism to retail jobbers who frequently sold directly to the public in competition with Standard's regular retailers, the Supreme Court alluded to the defensive nature of "meeting competition" and stated that the core of the defense "consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price."²⁷ *Standard Motor* concerned an industry-wide discriminatory pricing pattern which encouraged the formation of joint purchasing groups among distributors. The Court of Appeals for the Second Circuit, in rejecting Standard Motor's proof of the absence of injury to individual distributors, re-emphasized that the requisite proof of injury is satisfied by showing a mere possibility of injury to competition in general. The court, therefore, denied a valid meeting competition defense, relying in part on *Standard Oil*, because "petitioner [had] gained many new customers,"²⁸ and the defense was available "only if . . . [the price discrimination was] used defensively to hold customers rather than to gain new ones."²⁹

Commissioner Elman, in a vigorous dissent in the instant case, asserted that neither the statute itself nor prior decisions required a distinction between "aggressive" and "defensive" price reductions, and that the distinction is practically unworkable and economically unsound.³⁰ He questioned the feasibility of the Commission's standard, asking how long an "old" customer retains his classification after he discontinues his purchases, and when he becomes a "new" customer "and hence unapproachable because Section 2(b) no longer applies. . . ." ³¹ He concluded that it would be almost impossible to make this distinction with such clarity and consistency as would provide businessmen with reasonable guidelines concerning what they may or may not lawfully do.³² To enforce the statute without imposing an undue burden on the parties, Commissioner Elman would, therefore, require the hearing examiner to give greater consideration to the *good faith* meeting of a *lawful* price.³³

In the instant case, the Court of Appeals for the Seventh Circuit distinguished on factual grounds both *Standard Oil* and *Standard Motor*, and adopted the

24. *Sunshine Biscuits, Inc.*, 3 Trade Reg. Rep. ¶ 15469, at 20346 (FTC Orders) (1961).

25. 340 U.S. 231.

26. 265 F.2d 674 (2d Cir.), cert. denied, 361 U.S. 826 (1959).

27. 340 U.S. at 242. (Emphasis added.)

28. 265 F.2d at 677.

29. *Ibid.*

30. *Sunshine Biscuits, Inc.*, 3 Trade Reg. Rep. ¶ 15469, at 20347 (FTC Orders) (1961).

31. *Ibid.*

32. *Ibid.*

33. *Id.* at 20350.

dissenting Commissioner's contention that the "gaining of new customers" test was unworkable and economically unsound.³⁴ It pointed out that the issue in *Standard Oil* was whether "meeting competition" was an absolute defense, or merely procedural, and that the question of gaining customers was not before the Supreme Court. Although "gaining customers" was an issue in *Standard Motor*, the present court noted that it was merely incidental. Furthermore, there the court relied solely on dictum in *Standard Oil*.³⁵ Finally, the court summarily dismissed the Robinson-Patman Act's legislative history as inconclusive,³⁶ and focused on the plain meaning of "purchaser" within the context of section 2(b), stating that "no connotation of the term is justified that would limit its meaning to those purchasers who had been customers of the seller before his lowering of prices to meeting those of a competitor."³⁷

A survey of commentators indicates near unanimity in condemning the Commission's refusal to permit the gaining of customers under the defense of meeting competition.³⁸ One authority impliedly agrees with Commissioner Elman's dissenting opinion which rejected the distinction between "aggressive" and "defensive" price reductions.³⁹ However, on close examination he seems to agree more with the hearing examiner's view that "meeting competition" must be genuinely defensive in nature, and that depending upon the competitive situation, incidental customer gains may be permissible within the context of an essentially defensive maneuver.⁴⁰ Thus, he maintains that "the controversy over this issue may be due to an oversimplified equation of gaining customers with commercial aggression. . . ."⁴¹

In the instant case, both the court of appeals and the dissenting opinion of the Commission specifically refer to the discussion of *Standard Oil* in the Report of the Attorney General's National Committee to Study the Antitrust Laws. The Report states that

Standard Oil does not confine the "good faith" proviso solely to *defensive* reductions to retain an *existing* customer. The Supreme Court . . . did not promulgate a general doctrine surrounding each seller with a protected circle of customers which may be exploited without fear of a rival's price attacks.⁴²

This and other similar statements⁴³ indicate an apparent disregard of the

34. 306 F.2d at 52.

35. *Id.* at 51.

36. *Ibid.*

37. 306 F.2d at 51-52.

38. Rowe, *Price Discrimination Under the Robinson-Patman Act 247 (1962)*; Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 *Record of N.Y.C.B.A.* 411, 425-26 (1962); Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 *Nw. U.L. Rev.* 173, 178 (1962); Comment, 29 *U. Chi. L. Rev.* 355, 357-58 n.8 (1962); 75 *Harv. L. Rev.* 1235, 1236-37 (1962).

39. Rowe, *supra* note 38, at 247.

40. *Ibid.*

41. *Ibid.*

42. Att'y Gen. Nat'l Comm. Antitrust Rep. 184 (1955).

43. See, e.g., Comment, 29 *U. Chi. L. Rev.* 355 (1962) where, in reference to the instant

distinction between the effect of gaining new customers in the primary line injury case and the same situation in the secondary line case. They seem to suggest that the mere gaining of a new customer through price discrimination would amount to a *prima facie* primary line violation. But as already noted, a distinction is made in the proof of injury, *i.e.*, more extensive evidence is required to show a primary line injury.⁴⁴ Consequently, evidence that a seller made no *significant* increase in his share of the market would seemingly indicate an absence of injury to primary line competition, an essential element of a section 2(a) violation, and thus eliminate the need for reliance upon the defense.

This reasoning does not apply to a secondary line injury as in the instant case. Sunshine Biscuits' maintaining, or even decreasing, of its percentage share of the market does not mean that there may not be injury to the competitive positions of those customers against whom Sunshine discriminated. Sunshine's gaining of customers by discriminating in price would not amount to a primary line violation so long as Sunshine made no *significant* gain in its share of the market, whereas *any* customer gains accomplished by price discriminations would indicate injury to secondary line competitors. In short, the distinction between primary and secondary line injuries makes difficult the application of one general rule.

Standard Oil involved an alleged secondary line injury, and perhaps the Supreme Court's dictum restricting "meeting competition" solely to retaining customers should be understood to apply only to such cases. In *Balian Ice Cream Co. v. Arden Farms Co.*,⁴⁵ a primary line case, this restriction was not applied. There the district court held the defense of meeting competition was available where customers were gained by sellers "confronted with diminishing sales in an endeavor to keep their customers *or gain others*."⁴⁶ Without indicating that primary line cases are relied upon for authority, it has been commented that "*all* the decisions which acknowledge that a seller's area-wide price differential *may* be justifiable under Section 2(b) must presuppose that new customers as well as old accounts can be swayed by the seller's blanket price reduction"⁴⁷ and that the "justification should be acceptable if it realistically maintains or restores the seller's market share. . . ."⁴⁸

Standard Oil's dictum invites speculation on the proper interpretation of the defense in a secondary line situation. It is submitted that "meeting competition" in a secondary line case should be available only in an "essentially defensive" situation; without this limitation the scope of the defense would be so broad as to write out section 2(a). The survival, or perhaps better, the protection of

case, it was stated that "since it is possible to gain new customers and still do no more than hold one's share of the market, such a distinction ["new customer-old customer"] seems ill-advised." *Id.* at 357-58 n.8.

44. See notes 13 & 14 *supra* and accompanying text.

45. 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956).

46. 104 F. Supp. at 800. (Emphasis added.)

47. Rowe, *supra* note 38, at 247.

48. *Ibid.*

small business is an integral phase of "maintaining competition," and limiting the meeting competition defense to retention of customers tends to achieve that goal. The possible beneficial effects to competition on the seller or primary level which the unrestricted defense might work should not be determinative. Only if in practice the Commission's "new customer—old customer" distinction had proved unworkable, as Commissioner Elman and the court suggested it must, should it have been abandoned, and reliance placed on the hearing examiner's determination of a seller's good faith in his price discrimination.⁴⁹

Warranty—Statute of Limitations—Cause of Action for Breach of Implied Warranty Accrues at Time of Sale.—Plaintiff, a utilities company, purchased four generating sets from defendant in 1946, for use at plaintiff's plant in Vermont.¹ In 1955, more than six years after delivery and installation at its plant, but less than six years after the generators ceased to perform at full capacity, plaintiff brought suit for breach of the express and implied warranties of suitability that the generators would be capable of continuous operation at full capacity for a period of thirty years.² The defendant interposed the statute of limitations as a defense.³ The supreme court dismissed the complaint⁴ and the appellate division affirmed.⁵ In a four to three decision—

49. But a ruling on a seller's "good faith" is a difficult, if not impossible, determination to make. Dean, *Managerial Economics* 53 (1951).

1. The Vermont contract was negotiated in 1946. A cause of action based on a breach of warranty in relation to this contract was first commenced in an amended complaint more than six years after the sale. Plaintiff also purchased generators from the defendant for its plant in Arizona in 1948. In November, 1949, plaintiff sued the defendant in the United States District Court for the Southern District of New York for breach of warranty in connection with the Arizona sale. While the action was pending, the parties negotiated a settlement agreement in May 1950, wherein the plaintiff waived all past, present and future claims against the defendant, and the federal court action was discontinued. In 1954, plaintiff again instituted proceedings against the defendant with regard to the 1948 sale. The New York Court of Appeals held that the plaintiff's action was barred by the settlement agreement. The waiver, however, did not apply to the Vermont contract of 1946. *Citizens Util. Co. v. American Locomotive Co.*, 11 N.Y.2d 463, 414, 184 N.E.2d 171, 173, 230 N.Y.S.2d 194, 196 (1962).

2. N.Y. Pers. Prop. Law § 96(1) provides that "where the buyer . . . makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment . . . there is an implied warranty that the goods shall be reasonably fit for such purpose."

3. N.Y. Civ. Prac. Act § 48(1) provides in substance that an action based on a contract, whether express or implied, must be commenced within six years after the cause of action accrues. The Uniform Commercial Code § 2-725(1), adopted by New York and effective on September 27, 1964, has reduced the period in which to bring such an action based on sales contracts to four years.

4. *Citizens Util. Co. v. American Locomotive Co.* (Sup. Ct.), N.Y.L.J., June 16, 1960, p. 12, col. 3.

5. *Citizens Util. Co. v. American Locomotive Co.*, 15 App. Div. 2d 473, 222 N.Y.S.2d 246 (1st Dep't 1961) (per curiam). Justice Rabin, in his dissent, was of the opinion that

in which the majority was divided three-to-one as to the controlling principle—the New York Court of Appeals affirmed.⁶ Three judges⁷ found that the action for breach of an implied warranty of future durability was barred by the six year statute of limitations which commenced to run at the time of the sale. Judge Froessel,⁸ however, concurring with the majority in the dismissal of the action, based his affirmance upon his interpretation of the contract as excluding the existence of any implied warranties. Three dissenting judges,⁹ reasoning that the warranty was prospective in nature and, therefore, could not be deemed to have been breached until the future performance to which it related failed, found that the action was not barred by the statute of limitations. *Citizens Util. Co. v. American Locomotive Co.*, 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962).

In construing the warranty as relating solely to the present condition of the generators, Chief Judge Desmond applied what he put forth as the established New York rule, that a cause of action for breach of warranty of fitness and suitability accrues only at the time of the sale,¹⁰ and that such an action is barred after six years by the statute of limitations:

A warranty express or implied that a machine is so built that it should last 30 years is a warranty of present characteristics, design and condition and should not be stretched by implication into a specific promise enforceable at the end of 30 years.¹¹

This reasoning was based on the rule formulated in the early case of *Allen v. Todd*¹² and more recently reiterated in *Liberty Mut. Ins. Co. v. Sheila-Lynn, Inc.*,¹³ that an implied warranty of fitness relates to the *existing* or *present* con-

at least one of the warranties was such that its breach might not be discovered for a long time and, therefore, it should be construed as prospective. Consequently, the rule that the statute of limitations begins to run against an action for breach of warranty at the time of the sale was not applicable. *Id.* at 477, 222 N.Y.S.2d at 251.

6. *Citizens Util. Co. v. American Locomotive Co.*, 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962).

7. Chief Judge Desmond wrote the opinion for three of the majority which included Judges Dye and Van Voorhis.

8. Judge Froessel voted for affirmance on the ground that under the terms of the contract, it was expressly agreed that the seller "shall have no liability upon warranties express or implied with respect to workmanship or material other than as [in the contract] provided." The parties further agreed that "the contract as so accepted and approved shall become in all respects the sole agreement between the parties with respect to the machinery forming the subject matter thereof." 11 N.Y.2d at 417-18, 184 N.E.2d at 175, 230 N.Y.S.2d at 199 (concurring opinion).

9. Judge Fuld wrote the dissenting opinion in which Judges Burke and Foster concurred.

10. See, e.g., *Liberty Mut. Ins. Co. v. Sheila-Lynn, Inc.*, 185 Misc. 689, 57 N.Y.S.2d 707 (App. T. 1945), *aff'd*, 270 App. Div. 835, 61 N.Y.S.2d 373 (1st Dep't 1946).

11. 11 N.Y.2d at 417, 184 N.E.2d at 174, 230 N.Y.S.2d at 198.

12. 6 Lans. 222 (4th Dep't 1872). *Contra*, *Firth v. Richter*, 49 Cal. App. 545, 196 Pac. 277 (Dist. Ct. App. 1920); *Ingalls v. Angell*, 76 Wash. 692, 137 Pac. 309 (1913).

13. 185 Misc. 689, 57 N.Y.S.2d 707 (App. T. 1945), *aff'd*, 270 App. Div. 835, 61 N.Y.S.2d 373 (1st Dep't 1946). *Accord*, *Outwater v. Miller*, 215 N.Y.S.2d 838 (Sup. Ct. 1961).

dition of the goods and, therefore, may be breached *only at the time of the sale* or at the time of delivery.¹⁴

The problem in the instant case, however, concerned not only the applicable rule of law with respect to prospective warranties but also an *interpretation* of the contract. Since three judges of the majority determined that a warranty of fitness relates *only* to present facts, they bypassed the question of whether *any* warranty is *necessarily* limited to the present condition of the goods. The dissenting opinion determined that even a warranty of fitness is not so limited.¹⁵

Although the distinction between a present and a prospective warranty is theoretically clear,¹⁶ its application to specific facts has been uncertain in New York.¹⁷ *Todd* involved the sale of fruit trees in which the seller at the time of delivery told the plaintiff that the trees were twenty-ounce apple trees. Several years later, the trees bore fruit, but not of the variety described. In an action for breach of an implied warranty, the court held the warranty to be a present one and, therefore, breached at the time of sale.¹⁸ Consequently, the action was barred by the statute of limitations.¹⁹ *Todd* indicated, however, that the question of when a breach occurs depends entirely on the nature of the warranty, *i.e.*, whether it is present or prospective. If it is present, then any breach must occur at the time of the sale.²⁰ On the other hand, if it is prospective, the breach *must* occur in the future, and the statute of limitations would not commence to run until the happening or failure of the event to which it relates.²¹

Outside New York, varying tests have been advanced to determine when a warranty is prospective. One view is that an implied warranty is prospective if, first, it relates to the *future* state of the goods and, second, if it appears that the buyer may discover the breach only when some future facts come into existence.²² Although, in such a case, the seller's statement may pertain to the *present* as well as the future condition, such implied warranties are nevertheless prospective in character.²³ A recent Texas decision adopted the more liberal rule that the statute of limitations commences on a breach of an implied warranty of suitability *only after the buyer discovers or should have*

14. The courts use the terms "at the time of sale" and "at the time of delivery" to avoid the misunderstanding that some future time is not intended.

15. 11 N.Y.2d at 419, 184 N.E.2d at 176, 230 N.Y.S.2d at 200.

16. See *Allen v. Todd*, 6 Lans. 222, 224 (4th Dep't 1872).

17. There is dictum in *Allen v. Todd*, supra note 16, to the effect that an implied warranty may be prospective. Although the court held the warranty there to be present, it is not clear on precisely what grounds this result was reached. *Todd* went no further on appeal. Apparently, a definitive ruling on the question of whether an implied warranty of suitability and fitness for the buyer's purpose can extend to performance in the future, *i.e.*, a prospective warranty, has never been given by the court of appeals.

18. 6 Lans. 222 (4th Dep't 1872).

19. *Ibid.*

20. *Id.* at 224.

21. *Ibid.*

22. *E.g.*, *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P.2d 897 (1961).

23. *E.g.*, *Kennard & Sons Carpet Co. v. Dornan*, 64 Mo. App. 17 (1895).

reasonably discovered the breach.²⁴ Although such warranties are not characterized as "prospective," the rule which governs in fraud cases (that the statute begins to run from the time the breach should reasonably have been discovered) is applied analogously.²⁵

In *Woodworth v. Rice Bros.*,²⁶ New York recognized that an *express* warranty may be prospective. There the court of appeals affirmed an appellate division holding that a seller's representation that a certain variety of trees would bear a specific fruit was a prospective warranty since it looked towards a *specific* future act. It was not breached until the trees failed to bear the particular fruit at the time warranted.²⁷ Although *Woodworth* and most other cases which found warranties to be prospective involved *express* representations by the seller,²⁸ there would appear to be no inherent contradiction between a warranty of future performance or durability and a warranty which is *implied*. Consequently, there is no valid reason for denying at least the possibility of an *implied* warranty that looks towards *future performance*.

Both the *Todd* and *Woodworth* cases recognized that a warranty, express or implied, is not necessarily limited to the *present* condition of the goods. Although Chief Judge Desmond did not expressly deny the possibility of a prospective warranty, his language suggests that *Todd* represented a New York rule which did not recognize prospective warranties at all.²⁹ While *Todd* and *Woodworth* appear to be inconsistent on their facts, neither decision categorically said that there can be no prospective warranty in New York. On the contrary, both cases recognized the possibility of a prospective warranty. Neither decision—as Chief Judge Desmond implied—foreclosed the possibility of such a warranty merely because the promise for the future was in some way related to the *present characteristics* of the goods.³⁰

Chief Judge Desmond stated *the New York law was settled* that a warranty

24. *Puretex Lemon Juice, Inc. v. S. Riekes & Sons, Inc.*, 351 S.W.2d 119 (Tex. Civ. App. 1961).

25. *Id.* at 121-22.

26. 110 Misc. 158, 179 N.Y. Supp. 722 (Sup. Ct.), *aff'd mem.*, 193 App. Div. 971, 184 N.Y. Supp. 958 (4th Dep't 1920), *aff'd mem.*, 233 N.Y. 577, 135 N.E. 925 (1922).

27. 110 Misc. at 161-62, 179 N.Y. Supp. at 724.

28. E.g., *Southern Cal. Enterprises v. D. N. & E. Walter & Co.*, 78 Cal. App. 2d 750, 178 P.2d 785 (Dist. Ct. App. 1947). See generally 2 *Frumer & Friedman, Products Liability* § 40.01(2) (1961).

29. 11 N.Y.2d at 416, 184 N.E.2d at 174, 230 N.Y.S.2d at 198.

30. *Todd*, at least, recognized the possibility of a prospective warranty by distinguishing such a warranty on the ground that it relates to a future event, even though the court in *Todd* found that the warranty there was present. Following this distinction, *Woodworth* found an express representation that trees would bear a specific fruit to be prospective, thus reaching a result different from *Todd* on substantially the same facts. In the light of the factual similarity between *Todd* and *Woodworth*, any distinction between those cases would seem superficial at best. *Woodworth* attempted to distinguish *Todd* on the ground that the warranty in the latter case looked towards the nature of the trees rather than the type of fruit they would bear. Such a distinction, however, would not seem feasible in most situations.

of quality is *present* in nature—thus suggesting that *Woodworth* had been overruled *sub silentio*. Even if this is so, it does not follow that such a warranty may not be accompanied by an additional understanding that the product will perform according to a *fixed standard in the future*. In considering this problem, Professor Williston has observed that:

what is in terms a promise for the future may also involve a representation as to the present. This should not deprive the buyer . . . of the full statutory period after the promise is actually broken in the future.³¹

In his dissenting opinion, Judge Fuld disagreed with the Chief Judge's reasoning on the ground that there were facts sufficient to show the possibility of an implied promise as to the future performance of the generators. He based this premise upon the nature of the goods and the purpose for which they were purchased.³² Unless the generators had a life span of thirty years and would operate for that length of time as warranted, they would not be "fit" for the plaintiff's purpose.³³ Thus, the dissenting opinion viewed Section 96 of the New York Personal Property Law as permitting an implied warranty that was prospective in character.³⁴ As Judge Fuld reasoned, the mere fact that the warranty also related to the present condition of the generators was not in itself sufficient to deny its prospective character.³⁵ The dissenting opinion thus suggested that a warranty might be both present and prospective concurrently, since one of these characteristics need not, in every case, be repugnant to the other. Judge Fuld cited decisions of other jurisdictions which had recognized prospective warranties both express and implied. *Aced v. Hobbs-Sesack Plumbing Co.*,³⁶ for example, held that an implied warranty might be prospective even "though accompanied by a representation as to present condition."³⁷ Applying the rationale of *Aced*, Judge Fuld concluded that the possibility of a prospective warranty could not be denied in the case at bar even though it related to the present condition of the generators and was implied.³⁸

Writing for three judges of the majority, Chief Judge Desmond recognized an "element of unfairness" in requiring the plaintiff to sue within six years after the purchase, when plaintiff's purpose required a durability of greater than six years and the machines were built to last no longer than that period. But in attributing such unfairness to the New York rule "which makes all limitations . . . run from breach and not from discovery,"³⁹ the Chief Judge seemed to beg the fundamental question as to when the breach actually occurred.

31. 1 Williston, Sales § 212a (rev. ed. 1948).

32. 11 N.Y.2d at 419-21, 184 N.E.2d at 176-77, 230 N.Y.S.2d at 201-02.

33. *Id.* at 421, 184 N.E.2d at 177, 230 N.Y.S.2d at 202.

34. *Ibid.*

35. *Id.* at 419, 184 N.E.2d at 176, 230 N.Y.S.2d at 201.

36. 55 Cal. 2d 573, 360 P.2d 897 (1961).

37. *Id.* at 583-84, 360 P.2d at 903.

38. 11 N.Y.2d at 419, 184 N.E.2d at 176, 230 N.Y.S.2d at 201.

39. *Id.* at 417, 184 N.E.2d at 175, 230 N.Y.S.2d at 199.

The opinion of three judges of the majority would seem to abolish any possibility of a prospective warranty in New York, and, in effect, limit every warranty of quality, suitability or durability to the statutory duration of six years. Such a restriction not only would effect a hardship with respect to the length of time within which an action might be brought, but would deny *any* right to redress whenever the truth of the warranty might not be ascertained within the statutory period.⁴⁰

Although it is axiomatic that limitations run from the time of the breach rather than from its discovery,⁴¹ the determination of when a breach does occur is a judicial function which, in the instant case, part of the court abdicated.

Perhaps fortunately, by its peculiar division, the instant court has left that question open. While no mechanistic test—other than the intention of the parties—might be established to determine the prospective character of a warranty, the courts should find a prospective warranty in the proper circumstances. Although the Uniform Commercial Code provides that a breach of warranty occurs when the tender of delivery is made,⁴² it recognizes that a warranty may be prospective if it “explicitly extends to future performance of the goods,”⁴³ and, therefore, the action accrues only “when the breach is or should have been discovered.”⁴⁴ The court of appeals will undoubtedly be asked to define the circumstances in which such a warranty will arise. It is to be hoped that it will not leave the question in its present unclarified state. If New York is unwilling to hold that certain warranties may run for the *lifetime* of a product, it might, at least, formulate a standard which would give a buyer a *reasonable* time within which to ascertain the truthfulness of a warranty which may be breached only in the distant future. Such a rule would be consistent with reason and justice. When a warranty, express or implied, clearly relates to a *future* event, or it is within the contemplation of the parties that it have future effect, is it not more reasonable to follow the general rule which allows parties to enter into contracts the performance of which may not be fulfilled until some time in the future? It is both illogical and unjust to hold that the parties to a sale may not warrant as to the future performance of the goods, and that conditions subsequent may not be the very essence of a warranty.

40. See *Kakargo v. Grange Silo Co.*, 11 App. Div. 2d 796, 204 N.Y.S.2d 1010 (2d Dep't) (memorandum decision), motion for leave to appeal denied, 8 N.Y.2d 711, 170 N.E.2d 834, 208 N.Y.S.2d 1026 (1960).

41. In *Allen v. Todd*, 6 Lans. 222 (4th Dep't 1872), the court said: “Inability to ascertain the quality or condition of property warranted to be, at the time of the sale, a particular quality or in a certain condition, has never been allowed to change the rule as to the time when a right of action for a breach of the warranty occurs.” *Id.* at 224. The N.Y. Uniform Commercial Code § 2-725(2) (eff. Sept. 27, 1964) has codified this rule by providing that “a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.”

42. N.Y. Uniform Commercial Code § 2-725(2) (eff. Sept. 27, 1964).

43. *Ibid.*

44. *Ibid.*