

1965

Case Notes

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Recommended Citation

Case Notes, 34 Fordham L. Rev. 129 (1965).

Available at: <https://ir.lawnet.fordham.edu/flr/vol34/iss1/6>

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CASE NOTES

Constitutional Law—Constitutionality of Conscientious Objector Exemption From Military Service Upheld—Construction of the Test of Religious Training and Belief for Exemption.—In the three cases involved,¹ the parties claimed exemption from military service on the ground of conscientious objection as provided in the Universal Military Training and Service Act.² The claim of each was denied. Upon refusal to submit to induction into the armed forces, each party was indicted and convicted of violating the Universal Military Training and Service Act.³ The three cases were consolidated for argument and decision inasmuch as each challenged the constitutionality of the exemption clause.⁴ The United States Supreme Court held that the test of religious belief was not intended to be restricted to the conventional theism, but rather was to be interpreted broadly. *United States v. Seeger*, 380 U.S. 163 (1965).

Recognition of the existence of those who, through a reading of the Bible⁵ or otherwise,⁶ are conscientiously opposed to bearing arms in military service⁷ has been part of our national history since the Colonial Period.⁸ However, until the Selective Service Act of 1917,⁹ little was known of the conscientious

1. *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963), aff'd, 380 U.S. 163 (1965); *Peter v. United States*, 324 F.2d 173 (9th Cir. 1963), rev'd, 380 U.S. 163 (1965); *United States v. Seeger*, 216 F. Supp. 516 (S.D.N.Y. 1963), rev'd, 326 F.2d 846 (2d Cir. 1964), aff'd, 380 U.S. 163 (1965).

2. 62 Stat. 609 (1948), 50 U.S.C. App. § 456(j) (1958).

3. 62 Stat. 622 (1948), 50 U.S.C. App. § 462 (1958).

4. The Court notes, however, that the cases are factually different. *United States v. Seeger*, 380 U.S. 163, 165 (1965).

5. See, e.g., Exodus 20:13; Isaiah 2:4; 1 John 3:15; Matthew 5:38-48.

6. The conscientious objector is normally denominated as either religious, ethical, or political. See Mittlebeeler, *Law and the Conscientious Objector*, 20 Ore. L. Rev. 301, 305-07 (1941).

7. See generally Gray, *Character "Bad"—The Story of a Conscientious Objector* (1934); Sibley & Jacob, *Conscription of Conscience* (1952); Thomas, *The Conscientious Objector in America* (1923); Doty, *Central Committee of Conscientious Objectors, Bibliography of Conscientious Objection to War* (1954).

8. See generally *Macintosh v. United States*, 42 F.2d 845, 847-48 (2d Cir. 1930), rev'd on other grounds, 283 U.S. 605 (1931); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 266-67 (1934) (Cardozo, J., concurring). For a history of conscientious objector provisions in this country, see Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 Geo. L.J. 252, 256-63 (1963); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 412-29 (1952). "The religious objectors, as a group, have consistently been given some type of exemption or deferment from the operation of the draft laws. . . . The ethical objector has not generally been given any consideration. Neither the Legislature nor the Courts have felt any compassion for the position of the political objector." Russell, *supra* at 411. (Footnote omitted.) For a detailed study of conscientious objection, see Cornell, *The Conscientious Objector and the Law* (1943); Kellogg, *The Conscientious Objector* (1919); Wright, *Conscientious Objectors in the Civil War* (1931).

9. Act of May 18, 1917, ch. 15, 40 Stat. 76.

objector in this country.¹⁰ That act provided for exemption from combatant duty, but restricted its availability to those who showed membership in a recognized pacifist sect.¹¹ The stringency of this exemption requirement was somewhat ameliorated by Executive Order.¹²

The constitutionality of the 1917 Draft Act was questioned in the *Selective Draft Law Cases*.¹³ In declaring that act constitutional, the United States Supreme Court summarily dismissed the argument that the exemption clause was violative of the first amendment's establishment and free exercise clauses.¹⁴

The Burke-Wadsworth Conscription Bill¹⁵ was enacted prior to World War II as the Selective Training and Service Act of 1940.¹⁶ Although it broadened the statutory ground for conscientious objector exemption,¹⁷ it was the basis for much heated discussion.¹⁸ In 1943, Judge Augustus Hand, in *United States v. Kauten*,¹⁹ went beyond the issue in the case²⁰ to state that, under the 1940 exemption provision, the proper distinction to be made was between those who oppose a particular war and those who oppose war at all times and under any

10. Stone, *The Conscientious Objector*, 21 Colum. U.Q. 253 (1919).

11. Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78. For a list of religious organizations recognized as pacifist during World War I, see Note, 15 St. John's L. Rev. 235, 236 & n.20 (1941). The views of individual sects known as pacifist are discussed in Brooks & Leach, *Help Wanted! The Experiences of Some Quaker Conscientious Objectors* (1940); Hershberger, *The Mennonite Church in the Second World War* (1951); Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 So. Cal. L. Rev. 123 (1955).

12. Exec. Order No. 2823, March 20, 1918, which, while stipulating the noncombatant services to which objectors could be assigned, extended the exemption to include those who, although they were not members of recognized pacifist sects, possessed conscientious scruples against service in the armed forces.

13. 245 U.S. 366 (1918), 4 Iowa L. Bull. 122.

14. "[W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more." 245 U.S. at 389-90. Contra, Black, *The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism*, 11 B.U.L. Rev. 37 (1931).

15. S. 4164, H.R. 10132, 76th Cong., 3d Sess. (1940). For a discussion of the bill in its original form and its subsequent evolution, see Conklin, *supra* note 8, at 269-70.

16. 54 Stat. 885.

17. Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889. This act did not limit exemption to members of recognized pacifist sects, but rather extended it to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." *Ibid.* But see Cornell, *Exemption From the Draft: A Study in Civil Liberties*, 56 Yale L.J. 258, 267 (1947), where the 1940 act is criticized as inadequate, and the English system for such exemption is cited with approval. For the English law, see *The National Service Act*, 11 & 12 Geo. 6, c. 64, §§ 17-19 (1948).

18. See Hearings on S. 4164 Before the Senate Committee on Military Affairs, 76th Cong., 3d Sess. 1 (1940); Hearings on H.R. 10132 Before the House Committee on Military Affairs, 76th Cong., 3d Sess. 1 (1940).

19. 133 F.2d 703 (2d Cir. 1943).

20. Waite, Section 5(g) of the Selective Service Act, As Amended by the Court, 29 Minn. L. Rev. 22, 24-25 (1944).

form.²¹ His view was that only the latter was entitled to exemption.²² Subsequent Second Circuit cases reaffirmed this reasoning.²³

The broad construction applied to the 1940 exemption provision in the Second Circuit was not accepted in the Ninth Circuit, where, in *Berman v. United States*,²⁴ the court of appeals took a narrower view of the test. Noting the similarity, at least in principle, between the situations in the Second Circuit cases and in *Berman*, the court stated that it took "divergent views from those expressed in those cases."²⁵ Judge Stephens pointed out that the concept of deity was necessary in order that the objector's beliefs could be said to be religious and that "before one comes within the exemption provided in the Act, he must be opposed to war not only by reason of his religious belief but by reason of *religious training*."²⁶ Since the *Berman* decision, the explicit statutory requirement of "religious training" under the 1940 act has been overlooked both by Congress²⁷ and by the courts.

The *Berman* view of the "religious belief" requisite was adopted by Congress²⁸ when it enacted the Universal Military Training and Service Act in 1948.²⁹ In that act, Congress defined the troublesome phrase, "religious training and belief," as meaning "in this connection . . . an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."³⁰ This statutory clarification seemingly removed the problem of interpreting the test, but it makes no mention in its definition of the "religious training" requisite.

During the decade and a half following the 1948 Draft Act, the courts of the Second,³¹ Third,³² and Ninth³³ Circuits construed the statute in keeping

21. 133 F.2d at 708 (dictum).

22. Ibid. Judge Hand stated further that opposition to war at all times and under any form is an objection which "may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse." Ibid. Under *Kauten*, such objectors would have come within the exemption. But see Waite, *supra* note 20, at 26, where it is said that "some of us who wish this were the law are convinced—regretfully—that it is not." For his reasons for disagreeing with Judge Hand, see Waite, *supra* note 20, at 27-35. See Lane, "Conscientiously Opposed," "By Reason of Religious Training and Belief," As Used in the Selective Service and Training Act of 1940, 31 Geo. L.J. 60 (1942).

23. *United States ex rel. Reel v. Badt*, 141 F.2d 845 (2d Cir. 1944); *United States ex rel. Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943).

24. 156 F.2d 377 (9th Cir.), cert. denied, 329 U.S. 795 (1946).

25. Id. at 378.

26. Id. at 382.

27. See the definition of "religious training and belief" in the Universal Military Training and Service Act, 62 Stat. 609 (1948), 50 U.S.C. App. § 456(j) (1958).

28. S. Rep. No. 1268, 80th Cong., 2d Sess. 14 (1948).

29. 62 Stat. 604 (1948), as amended, 50 U.S.C. App. §§ 451-73 (1958).

30. 62 Stat. 613 (1948), 50 U.S.C. App. § 456(j) (1958).

31. *United States v. Bendik*, 220 F.2d 249 (2d Cir. 1955).

32. See *United States v. De Lime*, 223 F.2d 96 (3d Cir. 1955).

33. *Etcheverry v. United States*, 320 F.2d 873 (9th Cir.), cert. denied, 375 U.S. 930

with the criteria set down in *Berman*. In each of these cases, the constitutionality of the exemption clause was upheld.

However, the objectors had not yet surrendered in their assault upon the so-called "Supreme Being Clause" of the 1948 act. In the past three years, three cases³⁴ arose which culminated in the *Seeger* decision. Ironically, these cases emanated from the Second and Ninth Circuits, as did the "*Kauten* line" and *Berman*.

The final curtain was brought down on the trilogy of *Seeger*, *Jakobson* and *Peter* in the highest Court when Mr. Justice Clark, writing for the Court, held that the test under the exemption clause is "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption"³⁵ Thus, the United States Supreme Court, with one fell swoop of its judicial ax, gave a new ring to the word "religious" as it is to be viewed by the courts.³⁶ The Court's reinterpretation of this word was veiled in an outpouring of erudite quotations from Tillich and other "modern" theologians.³⁷

However, the Court had a purpose in radically redefining the term, for, in this way, it could avoid the issues raised by the recent first amendment cases³⁸ and, more especially, by *Torcaso v. Watkins*,³⁹ where, after stating that "neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion,'"⁴⁰ the Court noted that there are religions which are not predicated upon a conventional belief in God.⁴¹ In addition to the first amendment problems which would arise under the *Berman* view of the test, a problem would present itself as to the denial of due process which is guaranteed by the fifth amendment. In fact, the court of appeals in *Seeger* held that the exemption clause was violative of the due process guarantee in that it established an impermissible classification.⁴²

In a concurring opinion, Mr. Justice Douglas pointed out that, if the Court

(1963); *Clark v. United States*, 236 F.2d 13 (9th Cir.), cert. denied, 352 U.S. 882 (1956); *George v. United States*, 196 F.2d 445 (9th Cir.), cert. denied, 344 U.S. 843 (1952).

34. Cases cited note 1 supra.

35. 380 U.S. at 176.

36. In *United States v. Macintosh*, 283 U.S. 605 (1931), the Court used the traditional view of the word "religion": "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." *Id.* at 633-34 (Hughes, C. J., dissenting).

37. 380 U.S. at 180-83.

38. *School District of Abington v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

39. 367 U.S. 488 (1961) (Maryland notary public oath case). See Conklin, *supra* note 8, at 276-81.

40. 367 U.S. at 495.

41. *Id.* at 495 n.11, where the Court states that, among such religions, there are several in this country: Buddhism, Taoism, Ethical Culture, and Secular Humanism.

42. *United States v. Seeger*, 326 F.2d 846, 854 (2d Cir. 1964), 52 Geo. L.J. 618, 18 Rutgers L. Rev. 924.

had not interpreted the exemption clause as it did, there would have been difficulties in regard to both the first and fifth amendments.⁴³

It is a fundamental rule of the judicial process that a statute should be construed so as not to draw its constitutionality into question,⁴⁴ but one cannot in justice excuse the Court's failure to meet the real issue—the possible violation either of the free exercise or establishment clauses of the first amendment or of the due process guarantee of the fifth amendment.⁴⁵ The Court was careful to note, however, that none of the individuals involved were atheists and that it was not deciding that question.⁴⁶

The Court avoided the *Berman* problem by viewing the Senate report⁴⁷ on the 1948 act in such a way as to conclude that, "rather than citing *Berman* for what it said 'religious belief' was, Congress cited it for what 'religious belief' was not."⁴⁸ This line of reasoning on the part of Justice Clark is doubtful at best, and seems to be an expedient manner in which to dispose of a thorny problem of legislative intent.⁴⁹

Under the view of the *Seeger* test, the only statutorily excluded claims are those based upon (1) scruples which are essentially political, sociological or philosophical *and* are accompanied by a disavowal of religious belief as it is here defined by the Court,⁵⁰ and (2) a personal moral code which is the only basis for objection and has no relation whatsoever to a Supreme Being.⁵¹

The dubiety of the new test is not centered in the Court's positing of those who are explicitly excluded from exemption, but rather in the Court's acceptance of a novel, libertarian view of what constitutes religion. Thus, it now appears that any objection will earn for its proponent an exemption so long as it is neither insincere nor accompanied by a blatant disavowal of all "current" beliefs.⁵²

43. 380 U.S. at 188 (concurring opinion).

44. *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963); *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909).

45. See Carnahan, *Freedom of Conscience and Compulsory Military Service*, 13 *Buffalo L. Rev.* 463, 472-75 (1964); Donnici, *Governmental Encouragement of Religious Ideology: A Study of the Current Conscientious Objector Exemption From Military Service*, 13 *J. Pub. L.* 16 (1964).

46. 380 U.S. at 173-74.

47. S. Rep. No. 1268, 80th Cong., 2d Sess. 14 (1948).

48. 380 U.S. at 178.

49. *Id.* at 177-80. Justice Clark's argument that the 1948 act was intended as a "substantial re-enactment" of the 1940 act does not preclude, as he apparently claims, the adoption of the *Berman* test by Congress.

50. *Id.* at 173.

51. *Id.* at 186.

52. The nature of the extension of the test achieved in the instant case is indicated by its interpretation in *Fleming v. United States*, 344 F.2d 912, 915-16 (10th Cir. 1965), where it was stated that *Seeger* "clearly lays down the rule that before a conscientious objector classification may be denied on the ground that the applicant's beliefs are based upon 'political, sociological, or philosophical views or a merely personal moral code', those factors must be the sole basis of his claim for the classification."

The test has apparently become one only of sincerity,⁵³ and the only claimant who might fail to fit within the new test for exemption would be the atheistic iconoclast whose objections are purely political, sociological or philosophical, and are insincere.

Constitutional Law—Judge's and Prosecutor's Comments on Defendant's Failure To Testify Violate the Fifth Amendment.—Petitioner was convicted of murder in the first degree and sentenced to death. He did not testify at the trial on the issue of guilt, but he did testify at a separate trial on the issue of penalty.¹ The trial court charged the jury that a defendant has a constitutional right not to testify, but that the jury could take the failure of a defendant to deny or explain facts against him, which were within his knowledge, as tending to substantiate the truth of such evidence and as indicating that an unfavorable inference could reasonably be drawn therefrom.² It added, however, that the same was not true of evidence about which he had no knowledge. The jury was further instructed that a defendant's failure to testify about that which he did have knowledge did not create a presumption of guilt or alone create an inference of guilt or relieve the prosecution of its burden of proof.³ The California Supreme Court affirmed the conviction.⁴ The United States Supreme Court held that comment on failure of the accused to testify violated the self-incrimination clause of the fifth amendment, which was made applicable to the states by the fourteenth amendment. *Griffin v. California*, 380 U.S. 609 (1965).

In *Malloy v. Hogan*,⁵ decided last year, the Supreme Court ruled that the fifth amendment's protection against compulsory self-incrimination was applicable to the states through the due process clause of the fourteenth amendment.⁶

53. See Donnici, *supra* note 45, at 44; Smith & Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19 U. Pitt. L. Rev. 695 (1958).

1. Cal. Pen. Code § 190.1 provides for separate trials on the two issues.

2. Cal. Const. art. I, § 13 provides, in part: "No person shall be . . . compelled, in any criminal case, to be a witness against himself . . . but . . . whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Cal. Pen. Code § 1323 is substantially in accord. See generally 8 Wigmore, *Evidence* §§ 2250 (history of privilege against self-incrimination), 2272 (inference and comment) (McNaughton rev. ed. 1961). Five other states—Ohio, New Jersey, Iowa, Connecticut and New Mexico—also permit comment on the failure of an accused to testify. Ralston, *Comment and Inference Under the Fifth and Fourteenth Amendments*, 25 Ohio St. L.J. 578, 581-88 (1964).

3. *Griffin v. California*, 380 U.S. 609, 610 (1965).

4. *People v. Griffin*, 60 Cal. 2d 182, 383 P.2d 432 (1963).

5. 378 U.S. 1 (1964).

6. Mr. Justice Brennan, in delivering the opinion of the Court, said that the shift was a recognition of the fact that the American system of criminal prosecution is "accusatorial, not inquisitorial," with the fifth amendment's privilege as its essential mainstay; therefore, federal and state governments are compelled to establish guilt by evidence independently obtained

Although *Malloy* set the stage for the present decision, the seed of the issue, which had remained unsettled for nearly a century, had been planted in the latter part of the nineteenth century. In 1878, Congress passed an act which permitted a defendant in a criminal action to testify in his own defense if he so requested.⁷ His failure to so request was not to create any presumption against him.⁸ Fifteen years later, in *Wilson v. United States*,⁹ the Supreme Court held that, in a federal proceeding, comment on a defendant's failure to take the stand was prohibited, and that it was violation of the federal act for the prosecuting attorney to refer to the failure of the accused to take the stand.

When the same question was first taken to the United States Supreme Court in reference to a state proceeding, the Court, in *Twining v. New Jersey*,¹⁰

and not by the coerced testimony of the accused. Thus, the fourteenth amendment secures against state invasion the same privilege that the fifth amendment protects against federal invasion. *Id.* at 7-8. The *Malloy* decision, in effect, overruled earlier cases, such as *Adamson v. California*, 332 U.S. 46 (1947), and *Twining v. New Jersey*, 211 U.S. 78 (1908), which held that the fifth amendment was not applicable to the states through the fourteenth amendment and, thus, it was not obligatory for the Court to rule on whether the right to comment on the failure of an accused to testify was a violation of the fifth amendment. The Court, in *Adamson v. California*, *supra* at 55, did acknowledge that comment on the failure of an accused to testify is generally prohibited in American jurisdictions, but it held that the California law in no way violated the due process clause.

7. Act of March 16, 1878, ch. 37, 20 Stat. 30 (now 18 U.S.C. § 3481 (1964)). "[I]n the trial of all indictments, informations, complaints . . . in the United States courts . . . the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." In 1931, the American Law Institute and the American Bar Association adopted resolutions which stated that, when a defendant in a criminal trial does not testify, the prosecution and the court should be permitted to comment upon that fact. 9 ALI Proceedings 202-18 (1931); 56 A.B.A. Rep. 137-62 (1931). See Bruce, *The Right To Comment on the Failure of the Defendant To Testify*, 31 Mich. L. Rev. 226 (1932); Reeder, *Comment Upon Failure of Accused To Testify*, 31 Mich. L. Rev. 40 (1932).

8. Act of March 16, 1878, ch. 37, 20 Stat. 30 (now 18 U.S.C. § 3481 (1964)).

9. 149 U.S. 60 (1893). In his summation to the jury, the United States Attorney stated: "I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime . . ." *Id.* at 66. The court reasoned that, at common law, one accused of a crime could neither be compelled to testify against himself, nor was he permitted to testify in his own behalf. Because this rule often left circumstances which tended to incriminate the accused unexplained, Congress passed the act of 1878. However, the Court stated that the act was framed with due regard to those who might prefer not to take the stand, because "excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." *Ibid.* "To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it." *Id.* at 65. The *Wilson* decision was followed in *Bruno v. United States*, 308 U.S. 297 (1939).

10. 211 U.S. 78 (1908).

evaded ruling on the issue. The defendant claimed that the state statute permitting comment upon the failure of the accused to testify was a violation of either the privileges or immunities or the due process clause of the fourteenth amendment, and that the state statute violated the privilege against self-incrimination contained within the fifth amendment¹¹ which was applicable to the states through the fourteenth amendment. The Court dismissed this second argument.¹² In answering the defendant's first argument, the Court held that the privilege against self-incrimination was not "one of the fundamental rights of National citizenship, placed under National protection by the Fourteenth Amendment . . ."¹³ Furthermore, those fundamental rights which were protected against national action by the first eight amendments were not included in the "privileges and immunities of citizens of the United States" and, thus, not protected against state action by the fourteenth amendment. Nor was the protection against self-incrimination a part of "due process of law."¹⁴ Thus, the Court held that a state could violate the privilege of immunity from self-incrimination without ever deciding whether that privilege had actually been violated.

Mr. Justice Douglas, speaking for the Court in the present case, noted that, in *Wilson*, the Court rested its decision on an act of Congress and not on the fifth amendment.¹⁵ He stated, however, that, if "Fifth Amendment" was substituted for "Act" and for "statute," the spirit of the self-incrimination clause was reflected.¹⁶ Comment on the refusal of a defendant to testify was a remnant of the "inquisitorial system of criminal justice"¹⁷ which was outlawed by the fifth amendment.¹⁸ The Court thus rebutted the position that in the federal

11. U.S. Const. amend. V. provides, in part: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"

12. 211 U.S. at 97-99.

13. *Id.* at 93.

14. The Court noted that, when Congress submitted the amendments to the states, it treated the privilege of self-incrimination and the right of due process as exclusive of each other. Furthermore, the states themselves, except New Jersey and Iowa, in every case where the due process clause or its equivalent was included in their individual constitutions, thought it necessary to separately include the privilege clause. It was an irresistible inference to the Court that the constitution makers were of the opinion that, if the privilege was fundamental in any sense, it was not fundamental within the meaning of due process of law, nor an essential part of it. *Id.* at 110. In answer to the Court's argument, Mr. Justice Harlan, in his dissenting opinion, stated that immunity from self-incrimination was protected against state action not only by the privileges or immunities clause of the fourteenth amendment, but also by the due process clause. *Id.* at 117. "The privileges and immunities mentioned in the original Amendments, and universally regarded as our heritage of liberty from the common law, were thus secured to every citizen of the United States and placed beyond assault by any government, Federal or state, and due process of law, in all public proceedings affecting life, liberty or property, were enjoined equally upon the Nation and the States." *Id.* at 122.

15. 380 U.S. at 612.

16. *Id.* at 613-14.

17. *Id.* at 614, citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

18. *Id.* at 614. In his concurring opinion, Mr. Justice Harlan argued that comment by

courts the practice of refraining from comment was based on the construction of a federal statute and not on a construction of the Constitution. To permit comment, Mr. Justice Douglas reasoned, would be to impose a penalty for exercising a constitutional privilege and, thus, to make the assertion of that privilege costly.¹⁹ However, Mr. Justice Stewart, dissenting, noted that the Court failed to specify the penalty that the comment imposed upon the accused.²⁰

In light of the foregoing, it would appear that, if the Court reached its decision on the theory that the right to comment compelled a defendant to testify against himself, then its decision was a sound one. It is basic law that once a defendant takes the stand he waives his privilege against self-incrimination as to the crime charged and may be compelled to answer as any other witness.²¹ He will be subject to cross-examination on all matters relevant to the issue, on his credibility and character, and, under pretense of impeaching him as a witness, on all incidents of his life.²² It is merely a half-truth to say that there is not actual compulsion because the accused is free to choose between testifying and silence. In reality, the right to comment limits the option to either facing the prosecutor and confessing incriminating facts or remaining silent and letting the same facts be inferred by the jury and commented upon by the court and prosecution.²³ While the *Griffin* Court did not expound on this theory, Justice Stewart, nevertheless, replied to it by stating that the Court "stretches the concept of compulsion beyond all reasonable bounds,"²⁴ and that whatever compulsion does exist arises from the accused's election not to testify and not from any comment by the court or counsel.²⁵

Some authorities have suggested that a reform in the criminal law in regard to the cross-examination of the accused is a solution.²⁶ By restricting the areas into which the prosecutor may probe, it is thought that the defendant need no longer fear the witness stand. While, idealistically, the suggestion is an effective one, in reality, cross-examination is a matter of court procedure and, therefore,

prosecutors and judges on a defendant's failure to testify is barred by the fifth amendment, but he stated that the inevitable decision by the Court, given the decision in *Malloy*, "exemplifies the creeping paralysis with which this Court's recent adoption of the 'incorporation' doctrine is infecting the operation of the federal system." *Id.* at 616. In answer to the argument put forth in *Malloy* that it would be incongruous to have different standards in federal and state courts, Mr. Justice Harlan stated that incongruity is at the core of the federal system and that, under the Constitution, the separate governments are not congruent, nor are they intended to be. *Ibid.* Thus, he concluded, in attempting to eliminate the friction between state and federal judicial systems, the Court has not tried to harmonize with the states but has simply overridden them altogether. *Id.* at 617.

19. *Id.* at 614.

20. *Id.* at 620-21 (dissenting opinion).

21. Richardson, *Evidence* § 533 (Prince 9th ed. 1964); see *People v. Webster*, 139 N.Y. 73, 34 N.E. 730 (1893); 46 Mich. L. Rev. 372 (1948).

22. *People v. Webster*, *supra* note 21; see Comment, 34 Fordham L. Rev. 107 (1965).

23. See Dunmore, Comment on Failure of Accused To Testify, 26 Yale L.J. 464 (1917).

24. 380 U.S. at 620 (dissenting opinion).

25. *Ibid.*

26. Bruce, *supra* note 7, at 232; 46 Mich. L. Rev. 372, 381 (1948).

its reform could not be enforced upon the individual states. Furthermore, any reform in the cross-examination procedure which could relieve the accused of his fear of the witness stand would also, in effect, defeat the purpose of the procedure.²⁷

The instant Court dismissed the argument that an unfavorable inference from the refusal to testify is natural and irresistible,²⁸ by stating that there was a difference between what the jury may infer, given no help from the court, and what they may infer when the court formalizes the silence of the accused into evidence.²⁹

The question arises as to whether the Court implied that the jury could draw an unfavorable inference on its own.³⁰ It would appear that such an inference may be unfounded in many instances. As stated by the Court in *Wilson v. United States*:³¹

It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.³²

However, even assuming that an unfavorable inference is prohibited, it is doubtful whether the Court could *effectively* instruct the jury to disregard the inference. In accordance with this position, it has been stated that "it is well enough to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in process of nullifying his own reasoning powers is merely futile and tends toward confusion and a disrespect for the law's reasonableness."³³

27. The purposes of cross-examination are to induce the witness to alter his testimony and to impeach the witness. Richardson, Evidence §§ 502-03 (Prince 9th ed. 1964). It is contended that such a reform would greatly deter the impeachment function.

28. 380 U.S. at 614-15. See Bruce, *supra* note 7, at 231; Clapp, *Privilege Against Self-Incrimination*, 10 Rutgers L. Rev. 541, 556 (1956).

29. 380 U.S. at 614. Mr. Justice Stewart, in admitting that an inference is inevitable, expressed the view that comment on the failure to testify provided a means for articulating and controlling the inferences which would naturally be drawn by the jury from the defendant's failure to take the stand. Thus, it would be more advantageous to defendant to permit comment than to leave the jury to be guided by their "untutored instincts." *Id.* at 621.

In *Bruno v. United States*, 308 U.S. 287, 293 (1939), the Court noted that, "by legislating against the creation of any 'presumption' from a failure to testify, Congress could not have meant to legislate against the psychological operation of the jury's mind. It laid down canons of judicial administration for the trial judge to the extent that his instructions to the jury, certainly when appropriately invoked, might affect the behavior of jurors."

30. In New York, not only is the prosecutor prohibited from even alluding to the fact that the accused has failed to testify, but the court may charge the jurors that they are required to follow the dictates of the New York statute, which states that a defendant's failure to testify does not create a presumption against him. *Coleman v. Denno*, 223 F. Supp. 938 (S.D.N.Y. 1963), *aff'd*, 330 F.2d 441 (2d Cir. 1964); N.Y. Code Crim. Proc. § 393.

31. 149 U.S. 60 (1893).

32. *Id.* at 66, quoted with approval in 380 U.S. at 613. See note 9 *supra*.

33. 8 Wigmore, Evidence § 2272, at 436 (McNaughton rev. ed. 1961).

Constitutional Law—Parolee's Right to Fourth Amendment Protection Against Unreasonable Search and Seizure.—Defendant was arrested pursuant to an administrative warrant for violation of parole. The parole officer and two police officers conducted a two-and-one-half hour search of the defendant's apartment immediately following his arrest therein. As a result of the search, the officers found and seized narcotics hidden in defendant's bedroom. The defendant was indicted for felonious possession of narcotics. The pretrial motion to suppress the evidence was denied;¹ the appellate division affirmed defendant's conviction.² The court of appeals held that the defendant's constitutional rights had not been violated by the search and seizure. *People v. Randazzo*, 15 N.Y.2d 526, 202 N.E.2d 549, 254 N.Y.S.2d 99 (1964) (memorandum decision).

Though the defendant had contended that the search and seizure were unlawful since the "warrant merely authorized his arrest for associating with known criminals—that once he was apprehended the arresting officer had no right to make a search for contraband,"³ the trial court reasoned that "the entry into the defendant's apartment was with his consent and the search therein was incident to his lawful arrest for parole violation."⁴ The court stated that apparently the parole officer's procurement of the warrant for defendant's arrest was in response to information that defendant was associating with a convicted felon and was dealing in narcotics.⁵ However, the court failed to explain whether the erroneous portion of the defendant's contention was that the warrant *authorized* only an arrest for consorting with a known criminal, or that once the defendant was arrested the officer had no right to look for contraband. In other words, did the court find that the basis for the issuance of the warrant was suspicion of dealing in narcotics and, hence, that a search for narcotics was incident to the arrest? Or did the court find that, because of the defendant's status as a parolee, the subsequent search for contraband was incident to an

1. *People v. Randazzo*, 37 Misc. 2d 80, 234 N.Y.S.2d 740 (Sup. Ct. 1962).

2. *People v. Randazzo*, 20 App. Div. 2d 850, 248 N.Y.S.2d 203 (1st Dep't 1964) (memorandum decision).

3. 37 Misc. 2d at 81, 234 N.Y.S.2d at 742. The court of appeals' lone dissenter, Judge Fuld, agreed with defendant's contention: "[T]he Parole Officer was unquestionably empowered to arrest the defendant for a parole violation . . . but I doubt that the consequent 2½-hour search of his apartment can be considered 'incident' to an arrest based on a charge of consorting with a known criminal." 15 N.Y.2d at 528, 202 N.E.2d at 550, 254 N.Y.S.2d at 101. Chief Judge Desmond, however, concurred strictly on the basis that the search was incidental to the arrest. *Id.* at 527, 202 N.E.2d at 550, 254 N.Y.S.2d at 100.

4. 37 Misc. 2d at 81, 234 N.Y.S.2d at 742.

5. "It appeared that the parole officer had received information that Randazzo had consorted with a convicted felon, a narcotics violator, that Randazzo was suspected of being involved in the narcotics traffic . . . Based on this information, the parole officer obtained a parole warrant for Randazzo's arrest." *Id.* at 81, 234 N.Y.S.2d at 741.

Under the New York Correction Law, both knowledge of a parolee's violation of a condition of parole, i.e., association with a known criminal, and reasonable cause to believe he has lapsed into criminal behavior are independent grounds for issuance of a warrant for retaking a paroled prisoner. N.Y. Correc. Law § 216.

arrest for parole violation regardless of the basis for the issuance of the warrant?

The brevity of the opinion and the ambiguity in the language preclude a conclusive determination as to what the trial court actually found.⁶ Since a search for contraband would be incident to an arrest for breaching parole by dealing in narcotics, the only question which would arise is whether the search was too long or exploratory.⁷ However, if the sole basis for the issuance of the warrant was defendant's association with a known criminal, the search of the defendant's apartment would appear not to have been incident to the arrest⁸ and would, therefore, have been unreasonable. The resultant evidence would be inadmissible against the defendant unless the defendant first consented to the search.

In discussing the consent issue, the trial court stated that the defendant had signed a certificate of release on parole stipulating that he would permit his parole officer to visit his home and make "a search of his person or of his home."⁹ The stipulation in the certificate of release to which the court referred read as follows: "I will carry out the instructions of my parole officer, report as directed and permit him to visit me at my residence and place of employment."¹⁰ Since the stipulation does not mention the word "search," the trial judge either misread the certificate of release or interpreted the language as tantamount to consent. Such an interpretation is certainly at odds with the rule that such consent, or waiver of one's constitutional protection against unreasonable search and seizure, must be specific and unequivocal.¹¹

The court of appeals affirmed in a single sentence opinion: "Defendant-

6. That the court based its holding on the parolee's status may be implied from the following dictum: "No New York case has been referred to relating to the rights of a parolee to claim that upon his arrest for a parole violation that a search of his person or his home would constitute an unlawful search and a seizure of contraband made contemporaneously would violate his constitutional rights. It would seem that parolee's rights to claim that an unlawful search and seizure occurred, because of their particular status, are more circumscribed and limited than the rights of citizens not in such status. By accepting the privilege of parole, a prisoner consents to the broad supervisory and visitorial powers which his parole officer must exercise over his person and property until the time his sentence shall have expired or been terminated." 37 Misc. 2d at 82, 234 N.Y.S.2d at 742-43.

7. It is undisputed that a search may be made without a search warrant if incident to a lawful arrest. E.g., *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947). However, a general exploratory search for evidence of a crime is prohibited. *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

8. For a search to be incident to an arrest, the objects sought must be properly subject to seizure. See *Harris v. United States*, *supra* note 7, at 154. Such objects are: fruits of the crime; means by which the crime was committed; or weapons by which an escape could be effected. *Agnello v. United States*, 269 U.S. 20, 30 (1925).

9. 37 Misc. 2d at 81, 234 N.Y.S.2d at 741.

10. Certificate of Release on Parole, New York State Division of Parole.

11. *Judd v. United States*, 190 F.2d 649, 651 (D.C. Cir. 1951); *Karwicki v. United States*, 55 F.2d 225, 226 (4th Cir. 1932) (*per curiam*); *In the Matter of Remy Sportswear, Inc.*, 16 Misc. 2d 407, 411, 183 N.Y.S.2d 125, 130 (Ct. Gen. Sess. 1959).

appellant, as a parolee, was deprived of no constitutional rights by the search and seizure which was made under the circumstances of this case (*People ex rel. Natoli v. Lewis . . . Anderson v. Corall . . .*).¹² The use of the phrase "as a parolee" and the citation of two cases dealing with the rights and status of parolees appear to imply that the defendant's status "as a parolee" was a controlling factor in the case. Judge Fuld, in his dissent, reasoned that, if the search was not incident to the arrest, the holding constituted a complete and unjustified denial of all fourth amendment protection to parolees.¹³ There is no authority for such an absolute denial of fourth amendment rights. There seems to be, however, a satisfactory rationale for a *limitation* of such rights. In *Anderson v. Corall*,¹⁴ the Supreme Court decided that a parolee who violates his parole conditions is on the same footing as an escaped convict and is, therefore, not entitled to a reduction in his sentence for that period of time after the parole infraction.¹⁵ The Court, however, incidentally stated that, since the parolee remains subject to the warden's control and is in his legal custody, he is, in legal effect, imprisoned.¹⁶

While in the actual custody of the law, a convict obviously has no right to free association and travel, nor is he entitled to protection against search and seizure.¹⁷ Since a parolee has no right to parole,¹⁸ it follows that the State may restore only part of a convict's rights while withholding others. In *Hyser v.*

12. 15 N.Y.2d at 527, 202 N.E.2d at 550, 254 N.Y.S.2d at 100.

13. "I cannot believe that one's status as a parolee deprives him of all right to the protection of the Fourth Amendment. The beneficent purposes sought to be served by parole would, to a large extent, be destroyed if a parolee's home could be searched at any time, without probable or reasonable grounds . . ." *Id.* at 528, 202 N.E.2d at 550, 254 N.Y.S.2d at 100 (dissenting opinion).

14. 263 U.S. 193 (1923).

15. *Id.* at 196-97.

16. *Id.* at 196. In *People ex rel. Natoli v. Lewis*, which the Randazzo majority cited, the New York Court of Appeals stated that, according to § 213 of the New York Correction Law, the parolee was in the warden's legal custody, and although "he was not always within the institution walls . . . [H]e was always in constructive custody subject to be retaken and returned to actual custody." 287 N.Y. 478, 482, 41 N.E.2d 62, 64 (1942).

17. *Lanza v. New York*, 370 U.S. 139 (1962); cf. *Brown v. McGinnis*, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962), wherein the court stated: "While this section [N.Y. Correc. Law § 610] confers upon prison inmates the right to religious services, spiritual advice and ministration from some recognized clergyman, it also expressly authorizes the reasonable curtailment of such rights if such is necessary for the 'proper discipline and management of the institution.'" *Id.* at 535-36, 180 N.E.2d at 793, 225 N.Y.S.2d at 500.

18. "Parole is not a right, but a privilege, to be granted or withheld as discretion [of the Parole Board] may impel." *People ex rel. Cecere v. Jennings*, 250 N.Y. 239, 241, 165 N.E. 277, 278 (1928). A possible problem with equal protection of the law has been rendered moot by *Ughbanks v. Armstrong*, 208 U.S. 481, 487-88 (1908), wherein the Court stated: "As the State is thus providing for the granting of a favor [parole] to a convicted criminal confined within one of its prisons . . . it may in its discretion exclude such classes of persons [twice convicted felons] from participating in the favor as may to it seem fit." A more recent case directly on point is *State v. Thomas*, 224 La. 431, 69 So. 2d 738 (1953).

Reed,¹⁹ a federal court of appeals stated: "The United States cannot constitutionally impair a citizen's right to leave the District of Columbia or frequent pool halls, but it can do so to [parolees] . . . whose freedoms have been substantially abridged in accord with the requirements of due process."²⁰ The Supreme Court has also considered the restrictions placed upon a parolee. In *Jones v. Cunningham*,²¹ the Court held that the restraints upon a parolee's liberty were sufficient to invoke the writ of habeas corpus.²² The Court specifically referred to the parolee's inability to associate with known criminals and his confinement to a particular community.²³ It would appear that the Court impliedly assumed the validity of these restrictions. The Court, however, did not mention limitations on a parolee's fourth amendment protection. This was probably due to the fact that such protection is not ordinarily specifically restricted by the parole agreement.²⁴ If the Court does come to consider this issue, it is quite possible that it would uphold restrictions on fourth amendment rights as it apparently has on first and fifth amendment rights.²⁵ The Court could, however, distinguish these restrictions on the ground that a deprivation of fourth amendment protection could result in conviction of another crime, whereas limitations on the constitutional rights of association and travel could not.

Although none of the cases mentioned is entirely on point, it is possible to extract from them a general approbation of a partial limitation on parolees' protection against search and seizure.²⁶ It would seem, in fact, that Judge

19. 318 F.2d 225 (D.C. Cir. 1963).

20. *Id.* at 239 (dictum).

21. 371 U.S. 236 (1963).

22. *Id.* at 243.

23. "Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, [and] keep away from undesirable places . . ." *Id.* at 242.

24. N.Y. Correc. Law § 215 provides: "The board of parole in releasing a prisoner on parole shall specify in writing the conditions of his parole The board shall adopt general rules with regard to conditions of parole and their violation and may make special rules to govern particular cases. Such rules, both general and special, may include, among other things, a requirement that the parolee shall not leave the state without the consent of the board . . . that he shall contribute to the support of his dependents, that he shall make restitution for his crime . . . that he shall abandon evil associates and ways, that he shall carry out the instructions of his parole officer and in general so comport himself as such officers shall determine."

25. The right to associate freely with others, protected by the first amendment, and the right to travel, protected by the fifth amendment, were circumscribed in *Jones v. Cunningham*. See note 23 *supra* and accompanying text.

26. It is to be noted that, in *Jones v. Cunningham*, neither the right to freedom of association nor the right to travel was totally denied to the parolee, but rather was subjected to what the Court considered a reasonable limitation. It is possible that the same rationale will be applied to search and seizure.

Fuld would not take issue with such a conclusion.²⁷ He expressed fear, however, that the majority actually was holding that a parolee has *no* fourth amendment rights. Such a decision would not be based on any existing precedent, though the reason for the decision would be readily apparent. Undeniably, many paroled convicts return immediately to criminal activities. Realizing this, the authorities are loath to relax their previously unbridled discretion to search and seize. It is possible that the instant court was in accord and so held. It is indeed unfortunate, however, that the court, in dealing with a matter so fraught with consequences, should have couched its opinion in ambiguous language, for it is unclear whether this was, in fact, the holding of the case.

Constitutional Law—State Department Regulation Restricting Travel to Cuba Held Constitutional.—Appellant, in 1962, applied to the State Department to have his passport validated for travel to Cuba as a tourist. The application was denied on the ground that the purpose of the trip was not within the standards previously established for such travel.¹ Appellant sought declaratory and injunctive relief in the federal district court for the District of Connecticut, and, in a divided opinion, a three judge court granted summary judgment for the Secretary of State on the ground that the Secretary had valid and constitutional statutory authority to impose area restrictions on travel.² On direct appeal, the Supreme Court, three justices dissenting, affirmed the district court's ruling, holding that the Secretary of State had congressional authority under the Passport Act of 1926³ to impose area restrictions on travel, and that the restriction on travel to Cuba did not violate appellant's constitutional rights. *Zemel v. Rusk*, 381 U.S. 1 (1965).

The Passport Act of 1926 authorizes the Secretary of State to grant and issue passports "under such rules as the President shall designate . . ."⁴ In 1952, a

27. Judge Fuld's denouncing of a deprivation of "all right" to fourth amendment protection and a search of a parolee's home "at any time, without probable or reasonable grounds" could be a basis for inferring that a curtailment, as opposed to a total deprivation, would be permissible. 15 N.Y.2d at 527, 202 N.E.2d at 550, 254 N.Y.S.2d at 100 (dissenting opinion).

1. In January 1961, the State Department issued State Dep't Reg. 103.456, 22 C.F.R. § 53.3(b) (1965), amending 22 C.F.R. § 53.3(b) (1958), which made it necessary for a United States citizen to have a valid passport in order to travel to Cuba. Simultaneously, Public Notice 179, 26 Fed. Reg. 492 (1961), and Department of State Press Release, No. 24, Jan. 16, 1961, were issued by the State Department; the former declaring all outstanding passports invalid for travel to Cuba because unrestricted travel would be contrary to United States foreign policy and not in the national interest, and the latter stating that exceptions on the travel ban to Cuba would be made when it was considered in the best interest of the United States.

2. *Zemel v. Rusk*, 228 F. Supp. 65 (D. Conn. 1964).

3. 44 Stat. 657, as amended, 22 U.S.C. § 211(a) (1964).

4. *Ibid.* The Passport Act of 1926 is a substantial re-enactment of the Act of August 18, 1856, ch. 127, § 23, 11 Stat. 60, which was the first statute enacted by Congress regulating

State Department regulation was issued prohibiting the issuance of passports to members of the Communist Party, to persons who actively support the Communist movement, and to persons going abroad to advance the Communist cause.⁵ Two applicants who were denied passports under this regulation sought relief in the federal courts.⁶ In *Kent v. Dulles*,⁷ the Supreme Court, in a five-to-four decision, held that the Passport Act of 1926 and section 215 of the Immigration and Nationality Act of 1852⁸ "do not delegate to the Secretary the kind of authority exercised here."⁹ The majority, in construing these statutes, found no evidence in their legislative history or in the administrative practice of granting passports prior to the 1926 act to support a holding that Congress intended to authorize the Secretary of State to refuse passports to citizens because of their beliefs or associations.¹⁰ The Court found that, at the time the 1926 act was adopted, "the administrative practice, so far as relevant here, had jelled only around the two categories . . ."¹¹—refusals of passports based on non-allegiance, and unlawful conduct.¹² Although the Court declared that the right to travel is a liberty protected by the fifth amendment,¹³ it did not decide to what extent this liberty could be constitutionally curtailed.¹⁴

After the *Kent* decision, the State Department revised its 1952 regulation,¹⁵ basing the revision on sections 6 and 7 of the Subversive Activities Control Act

the issuance of passports. Prior to 1856, passports were issued by various federal, state and local officials. The 1856 act made it unlawful for one not under the authority of the Secretary of State to issue passports; and today, only the State Department has authority to grant and issue passports.

5. State Dep't Reg. 108.162, 17 Fed. Reg. 8013 (1952).

6. Dr. Walter Briehl, a psychiatrist, and Rockwell Kent, an artist, were denied passports for travel to Europe on the ground that they were Communists. After being denied relief at separate State Department hearings, both parties sued in the district court for the District of Columbia for declaratory relief. The district court, in unreported decisions, granted summary judgment for the Secretary of State in both cases. On appeal, the court of appeals, in affirming the district court decisions, held that the State Department had congressional authority to deny passports to Communists. *Briehl v. Dulles*, 248 F.2d 561 (D.C. 1957); *Kent v. Dulles*, 248 F.2d 600 (D.C. Cir. 1957).

7. 357 U.S. 116 (1958).

8. 66 Stat. 190, 8 U.S.C. § 1185 (1964). This section made it unlawful to enter or leave the United States without a valid passport after the issuance of a presidential proclamation of war or national emergency. A proclamation by President Truman in 1953 made this section effective, and, as the proclamation is still outstanding, this restriction on travel is currently in force. Proc. No. 3004, 18 Fed. Reg. 489 (1953).

9. 357 U.S. at 129.

10. *Id.* at 129-30.

11. *Id.* at 128.

12. *Ibid.*

13. *Id.* at 127, 129.

14. *Id.* at 129-30.

15. State Dep't Reg. 108.475, 22 C.F.R. § 51.135 (1965). This regulation provides: "A passport shall not be issued to, or renewed for, any individual who the issuing officer knows or has reason to believe is a member of a Communist organization registered or required to be registered under § 7 of the Subversive Activities Control Act of 1950 as amended."

of 1950.¹⁶ Section 7 of this Act requires all Communist organizations to register with the Attorney General, including any organization required to register by a final order of the Subversive Activities Control Board. Section 6 made it unlawful for a member of a registered organization or one under a final order of the Board to apply for or use a passport. Section 7 was held to be constitutional when, in 1961, the United States Supreme Court upheld a 1953 order of the Board requiring the registration of the Communist Party of the United States.¹⁷ Subsequently, the passports of Herbert Aptheker and Elizabeth Flynn, high ranking members of the Communist Party,¹⁸ were revoked pursuant to section 6, and the parties sought relief in the district court for the District of Columbia.¹⁹ In *Aptheker v. Secretary of State*,²⁰ the Supreme Court, six-to-three, applying a test²¹ previously reserved for restrictions dealing with first amendment freedoms,²² held section 6 to be unconstitutional on its face, stating that "the section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."²³ Mr. Justice Goldberg, writing for the majority, found that the section indiscriminately excluded from consideration the individual's actual knowledge of the registration or registration order,²⁴ his activity in and commitment to the Communist organization,²⁵ his purpose in traveling,²⁶ and his destination.²⁷ As a result of the Supreme Court's rulings in *Kent* and *Aptheker*, the State Department currently does not have the power to curtail the travel of an individual because he is a Communist or Communist supporter.

16. 64 Stat. 993, 50 U.S.C. § 785 (1964); 64 Stat. 995, 50 U.S.C. § 786 (1964).

17. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

18. Aptheker was the editor of *Political Affairs*, a major Communist periodical published in the United States, and Flynn was the chairman of the party.

19. *Flynn v. Rusk*, 219 F. Supp. 709 (D.D.C. 1963). The district court, relying on congressional findings as to the nature of the World Communist Movement, held § 6 constitutional, finding the restriction on the issuance of passports a reasonable regulation of the evil sought to be controlled. Summary judgment was granted to the Secretary of State, and the parties appealed directly to the Supreme Court under 28 U.S.C. § 1253 (1964).

20. 378 U.S. 500 (1964).

21. The majority stated that, "although previous cases have not involved the constitutionality of statutory restrictions upon the right to travel abroad, there are well-established principles by which to test whether the restrictions here imposed are consistent with the liberty guaranteed in the Fifth Amendment. It is a familiar and basic principle, recently reaffirmed in *NAACP v. Alabama*, 377 U.S. 288, 307, that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" 378 U.S. at 507-08. (Italics omitted.)

22. The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 196-97 (1964).

23. 378 U.S. at 514.

24. *Id.* at 509-10.

25. *Id.* at 510-11.

26. *Id.* at 511.

27. *Id.* at 512.

Appellant, in the instant case, challenged the State Department's refusal to validate his passport for travel to Cuba on two theories: first, that the Secretary of State lacked authority to impose a restriction on travel to Cuba; and, second, that this restriction constituted a violation of his constitutional rights as guaranteed by the first and fifth amendments.²⁸

As to the first ground, the Court held that the Passport Act of 1926 granted to the Secretary of State authority to restrict travel to Cuba.²⁹ In construing this statute, the majority found that its legislative history indicated an intent neither to authorize area restrictions nor to preclude such authority. However, it considered the use by Congress of language broad enough to authorize area restrictions, after the State Department had imposed area restrictions on travel under predecessor statutes,³⁰ to support a conclusion that Congress intended to grant this power under the 1926 act. Also, it found that the continued imposition of area restrictions by the Secretary of State in implementing the 1926 act,³¹ coupled with the enactment of section 215 of the Immigration and Nationality Act of 1952,³² which dealt with passports and which left untouched the broad authority granted in the 1926 act, was evidence reinforcing this conclusion.³³ *Kent* was distinguished on the basis that the history of the Passport Act was considered only "so far as material to passport refusals based on the character of the particular applicant,"³⁴ whereas the instant situation was concerned with a passport refusal based on "foreign policy considerations affecting *all* citizens."³⁵

Mr. Justice Goldberg, dissenting, examined the legislative history of the 1926 act and the administrative practice before and after the act, and concluded that the only intent of Congress in enacting this statute was to centralize in the State Department the authority to issue passports.³⁶ Prior to the enactment of the Passport Act, restrictions were imposed on travel to Belgium in 1915 because of the famine in that country, and, from 1914 to 1918, travel was permitted only to specified countries and for specified purposes due to World War I. After the war, passports were not validated for travel to Austria and Germany until July

28. 381 U.S. at 4.

29. *Id.* at 7-8.

30. Acting pursuant to the Act of 1856, ch. 127, § 23, 11 Stat. 60, the State Department, in 1915, stopped issuing passports for travel to Belgium, except for emergency purposes, because of the famine in that country, and, during World War I, passports were validated only for specific purposes and for specific countries. 381 U.S. at 8-9.

31. After 1926, restrictions were imposed on travel to the following countries: Ethiopia, in 1935; Spain, in 1936; China, in 1937; Yugoslavia, in 1947; Hungary, from 1949 to 1951; Czechoslovakia, in 1951; Albania, Bulgaria, Communist China, Czechoslovakia, Hungary, Poland, Roumania and the Soviet Union, in 1952; in 1955, the travel ban on Czechoslovakia, Hungary, Poland, Roumania and the Soviet Union was removed, but North Korea and North Viet Nam were added to the list; and Hungary was added again in 1956. *Id.* at 9-11.

32. 66 Stat. 190, 8 U.S.C. § 1185 (1964).

33. 381 U.S. at 9-12.

34. *Id.* at 13.

35. *Id.* at 13. (Emphasis added.)

36. *Id.* at 31-40 (Goldberg, J., dissenting).

1922, and none were issued for travel to Russia until September 1923. Mr. Justice Goldberg dismissed these restrictions from consideration as wartime regulations.³⁷ However, it would appear that the danger to the United States and its citizens in these instances was similar to that which the State Department sought to avoid in restricting travel to Cuba. As to the area restrictions imposed after 1926, Mr. Justice Goldberg did not view them as a "consistent administrative interpretation of the 1926 Act"³⁸ to be given weight in construing the statute. Criticizing the majority's distinguishing of *Kent*, he considered that case controlling since, in his opinion, that decision was based on a finding that the Secretary of State had no authority to impose travel restrictions of any kind in peacetime.³⁹ It is submitted that these post-1926 restrictions on travel do indicate a consistent administrative interpretation of the 1926 act by the State Department, and that the majority was correct in declaring the pre- and post-1926 travel restrictions to be evidence of a congressional intent to authorize the Executive to impose area restrictions on travel. The *Kent* holding is not controlling in the instant situation, for, as the majority pointed out, that decision was concerned with *unlimited* travel restrictions based on the individual himself, rather than on the travel destination.⁴⁰

Having determined that the Secretary of State had authority to impose area restrictions on travel, the instant Court then held that the use of this authority to restrict travel to Cuba did not violate appellant's constitutional rights. After reaffirming the *Kent* finding that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment,"⁴¹ the majority stated that this fifth amendment liberty could be curtailed under certain circumstances, and that the requirement of due process is relative to the extent of, and the necessity for, the restriction imposed. Writing for the majority, Mr. Chief Justice Warren reasoned that, due to the danger of Communist subversion, and particularly in view of the President's statutory duty to use any means short of war to free a United States citizen unjustly detained by a foreign government, "the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel."⁴² The Court ignored the test used in *Aptheker* that the restrictive regulation must be "narrowly drawn to prevent the supposed evil,"⁴³ applying, instead, a test whereby the reasonableness and necessity of the regulation are considered in relation to the evil it seeks to control. The principle applied in *Aptheker* seemed to be based on a consideration that the right to travel is a freedom closely related to the first amendment

37. Id. at 37 (Goldberg, J., dissenting).

38. Id. at 35 n.7 (Goldberg, J., dissenting).

39. Id. at 37-39 (Goldberg, J., dissenting).

40. Id. at 13.

41. Id. at 14, quoting from *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

42. Id. at 15.

43. 378 U.S. at 514, quoting from *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

liberties of free speech and association. The *Zemel* majority, by ignoring the test used in *Aptheker*, would appear to have rejected this contention.

This apparent rejection of *Aptheker* seems to be supported by the Court's refusal to accept appellant's assertion that the ban on travel to Cuba violated his first amendment right to travel abroad to learn firsthand of "the effects abroad of our Government's policies,"⁴⁴ and of conditions in other countries "which might affect such policies."⁴⁵ The majority, finding the travel ban a restriction on action rather than on the right to free speech and press, stated that "the right to speak and publish does not carry with it the unrestrained right to gather information."⁴⁶ Mr. Justice Douglas, also dissenting, declared the right to travel to be "peripheral" to the enjoyment of the first amendment guarantees of free speech and free press, as travel is necessary to acquire the knowledge which gives meaning and substance to these liberties.⁴⁷ He agreed that Congress has the power to restrict or ban travel to certain areas when the danger involved demands it.⁴⁸ In the instant situation, however, since there was no congressional determination that travel to Cuba was dangerous to our national security, he considered the restriction on travel to that country to be based on an arbitrary decision by the Secretary of State. In his view, the Communist regime in Cuba did not present a danger to our national interest which justified a restriction on the right to travel.⁴⁹

The majority, considering the Communist regime in Cuba to present a danger to be avoided,⁵⁰ concluded that the Secretary of State was justified in restricting the right to travel in order to prevent the threat to our national security.⁵¹ The finding of a danger was based on the acts of the Cuban Government in attempting to spread Communist subversion throughout the hemisphere and in arresting United States citizens without cause.⁵² It seems clear that the majority was justified in its conclusion. The area restriction would appear to be an effective way to meet the Cuban threat without undue regulation of the constitutional right to travel.

Labor Law—Federal Pre-emption—New York's Railroad Full Crew Laws Held To Be Constitutional and Not Superseded by Binding Arbitration Award Made Pursuant to Federal Statute.—Ten railroad companies, engaged in interstate commerce in New York, questioned the constitutional validity of the "railroad full crew laws" as provided for in sections 54(a), (b) and (c) of

44. 381 U.S. at 16.

45. *Ibid.*

46. *Id.* at 17.

47. *Id.* at 25 (Douglas, J., dissenting).

48. *Ibid.*

49. *Ibid.*

50. *Id.* at 15.

51. *Ibid.*

52. *Id.* at 14-15.

the New York Railroad Law.¹ Petitioners asserted that the effect of these sections is to compel them to employ unnecessary train crew members, which constitutes a confiscation of their property² without due process of law; that sections 54(a) and (c), which apply only to railroads of more than fifty miles in length, deny to petitioners equal protection of the laws; that sections 54(a) and (c) interfere with interstate commerce;³ and that, due to the congressional enactment of Public Law 88-108,⁴ the sections, insofar as they differ from the provisions of the federal statute, have been superseded by it⁵ and, therefore, are unconstitutional.⁶ The court, in dismissing the complaint, denied relief on all charges and upheld the constitutionality of the full crew laws. *New York Cent. R.R. v. Lefkowitz*, 259 N.Y.S.2d 76 (Sup. Ct. 1965).

1. N.Y. R.R. Law §§ 54(a)-(c). In essence, the full crew laws are safety measures which require that a train be manned by a crew of a specified number depending on the type of engine used for propulsion, the car length of the train, the track distance of the railroad, and the type of transportation and activity in which the train is engaged.

2. Petitioners claimed that the cost of employing additional members for the crew in order to conform with the railroad full crew laws averages annually to \$13,444,694, which is approximately \$1,350,000 per railroad. They further asserted that the sections in question have no reasonable relationship to the safety of the public, and, therefore, that the result is to impose on them a financial burden of employing unnecessary firemen (annually costing \$8,746,866.24), brakemen (\$2,921,054.28), trainmen (\$1,504,031.80) and baggagemen (\$272,741.68), which constitutes a confiscation of their property without due process of law.

3. U.S. Const. art. I, § 8 provides, in part: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States . . ." The rationale behind petitioner's assertion is that the full crew laws discriminate against interstate commerce in favor of local or intrastate commerce since §§ 54(a) and 54(c) apply only to railroads of more than fifty miles, while railroads of less than fifty miles in length are exempt. Plaintiffs, therefore, maintain that the intrastate railroads which have shorter railroad lines are benefited while interstate railroads are burdened.

4. 77 Stat. 132 (1963), 45 U.S.C. § 157 (1964). This federal legislation was enacted in August of 1963 in order to avoid a threatened national railway strike. Section 2 of the act provided for the creation of an arbitration board which was directed to resolve the train crew issues which were raised by the railroads. The arbitration board, pursuant to Public Law 88-108, issued its award in November 1963. The award greatly reduced the number of firemen positions previously required on the railroads by the full crew laws. The award was predicated on the board's finding that the crew positions could be abolished without endangering the safe operation of freight and yard diesel locomotives. In regard to the other crew positions, including baggagemen, brakemen and trainmen, the board found that there was some overmanning, but felt that the crews necessary to insure safety should be determined on a local basis by special boards of adjustment. These special boards have convened and, pursuant to the award, have approved changes which allow the operation of trains with crews consisting of fewer trainmen than were required under the full crew laws. 259 N.Y.S.2d at 88-89.

5. U.S. Const. art. VI, cl. 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

6. 259 N.Y.S.2d at 83-84.

The New York controversy concerning full crew laws originated in 1907.⁷ In 1911, the United States Supreme Court seemed to settle the constitutional question by holding that an Arkansas full crew statute was constitutional.⁸ In light of this decision, New York enacted section 54(a) in 1913, section 54(b) in 1936, and section 54(c) in 1937, as safety measures requiring trains to be manned by crews of specified numbers.⁹ The intention of the legislature was that the greatest care should be taken to protect human life and safety, despite the additional expense incurred by the railroads in maintaining larger crews.¹⁰ Since the time of their passage and, particularly, in the last five years, legislation to repeal the full crew laws has been introduced into the New York Legislature,¹¹ but such legislation has not yet been adopted.

In 1963, Congress passed Public Law 88-108,¹² which established, for the purpose of collective bargaining between the railroad and its employees, an arbitration board empowered to make a binding award with respect to the number of crew members required on various types of trains.¹³ The resulting award lessened, in some cases, the number of crew members previously required by the full crew laws.¹⁴ Thus, new fuel was added to the constitutional logomachy, which has been intensified as a result of a recent federal court decision which held that Public Law 88-108 superseded state full crew laws.¹⁵ The

7. The first full crew law was introduced and passed by the New York Legislature in 1907, but it was later vetoed by Governor Hughes on the grounds that it violated the equal protection and due process clauses. *Id.* at 84.

8. *Chicago, R.I. & Pac. Ry. v. Arkansas*, 219 U.S. 453 (1911). The Arkansas statute was attacked again in 1916 and 1931, but the Supreme Court upheld its constitutionality, stating that the state may pass laws as police regulations and may specify requirements to be observed by the railroads for the safety of its employees and the public. *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, modified per curiam, 283 U.S. 809 (1931); *St. Louis, I. Mt. & So. Ry. v. Arkansas*, 240 U.S. 518 (1916).

9. See note 1 *supra*.

10. 259 N.Y.S.2d at 85.

11. See, e.g., Sen. Introd. No. 2517, N.Y. State Leg. 188th Sess. (1965).

12. 77 Stat. 132 (1963), 45 U.S.C. § 157 (1964). See note 4 *supra*.

13. 259 N.Y.S.2d at 110-11. Collective bargaining agreements made pursuant to federal legislation become the law of the land. *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959); *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956); *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945). "Since the arbitration was conducted under the aegis of Congress, the award becomes part of the law of the land." *In re Certain Carriers*, 229 F. Supp. 259, 260 (D.D.C. 1964). In this case, an action was brought by railroad petitioners for an injunction to implement an award made by a special board of adjustment.

14. See note 4 *supra*.

15. *Chicago, R.I. & Pac. R.R. v. Hardin*, 239 F. Supp. 1 (W.D. Ark. 1965). The court reasoned that where the enforcement of a state law would substantially interfere with the administration or policy promulgated under the federal law, the state law is pre-empted. *Id.* at 15-17. The court, finding that the practical administration of the state statute conflicted with the award made pursuant to Public Law 88-108, held that the state full crew laws were therefore superseded. *Id.* at 27-28.

decision under consideration has disagreed with the conclusions reached by that federal court.¹⁶

The instant court, in deciding that the statutes under attack did not violate due process, operated under the theory that due process of law is satisfied if a statute is reasonable and calculated to correct some manifest evil or danger.¹⁷ In the determination of the reasonableness of the statutes, the court considered the additional cost to the railroads of conforming to the crew requirements of the statutes.¹⁸ The evidence indicated that the advantage to the public was far greater than the proportionate expense incurred by the railroads.¹⁹ The court was also of the opinion that the statutes were calculated to protect the public from a manifest hazard since the evidence showed that the crew required by the full crew laws could not be lessened without some sacrifice of safety, and that, although technological advances since the statutes were enacted have diminished the danger of rail travel, such diminution does not allow, as far as safety is concerned, a proportional lessening of the train crew requirements of the disputed statutes.²⁰

The court further found, contrary to petitioner's claim, that the statutes did not contravene the equal protection clause of the United States Constitution. The legislature has a wide margin of discretion in exclusion and inclusion with regard to classes which must conform to any particular state police law.²¹ Thus, even though it may seem discriminatory, at first glance, that railroads of more than fifty miles have been singled out from other forms of rail transportation by being required to adhere to standards set by full crew statutes, such statutes do not deny equal protection of the laws, assuming the classification is reasonable, since they are applicable to all belonging to the same class.²²

16. 259 N.Y.S.2d at 107-15.

17. *Id.* at 93; accord, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

18. See note 2 *supra*.

19. 259 N.Y.S.2d at 102-03.

20. *Id.* at 92.

21. *Id.* at 104; *Morey v. Doud*, 354 U.S. 457, 465-67 (1957). "A classification having some reasonable basis does not offend against that clause [equal protection] merely because it is not made with mathematical nicety, or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). The instant court recognized that equal protection of the laws requires that such a classification be reasonable. The court felt that § 54(c), which applies only to railroads of more than fifty miles, constitutes a reasonable classification since the switching and road operations on longer runs are more hazardous than on shorter runs. 259 N.Y.S.2d at 105.

22. *St. Louis, I. Mt. & So. Ry. v. Arkansas*, 240 U.S. 518, 521 (1916); *Chicago, R.I. & Pac. Ry. v. Arkansas*, 219 U.S. 453, 465-66 (1911); *New York, N.H. & H.R.R.R. v. New York*, 165 U.S. 628, 634 (1897); *New York Cent. & H.R.R.R. v. Williams*, 199 N.Y. 103, 123, 92 N.E. 404, 409 (1910), *aff'd sub nom. Erie R.R. v. Williams*, 233 U.S. 685 (1914). "The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable." (*Chicago, R.I. & Pac. Ry. v. Arkansas*, *supra* at 465, quoting from *New York, N.H. & H.R.R.R. v. New York*, *supra* at 634) . . . [Thus,] there is no basis for the contention that there has been a denial of the equal protection of the laws." *Id.* at 466.

The instant court further stated that the full crew laws did not interfere with interstate commerce so as to contravene the United States Constitution.²³ Full crew laws undeniably have some effect upon interstate commerce, but they do not substantially burden it to a degree which would impede the flow of commerce into or out of the state.²⁴ The court reasoned that the states are allowed a wide scope in their exercise of power within the purview of their jurisdiction even though interstate commerce may be affected, as long as Congress, which may take entire charge of the field, has not adopted any national regulatory statute which would conflict with the state statute.²⁵

Thus, the court was faced with the question of whether Congress has, in fact, expressly or impliedly superseded state railroad full crew laws by the enactment of Public Law 88-108 in 1963.²⁶ The court reasoned that the safeguarding of health and safety is a local problem to be regulated by the states unless the field has been occupied by Congress.²⁷ The instant court found that although Public Law 88-108 pertained to crew standards, it had not superseded the full crew laws.²⁸ The court concluded, after analyzing the legislative history of the federal enactment and award made thereunder,²⁹ that Public Law 88-108 was passed in an effort to provide a settlement of an existing labor dispute and that Congress did not propose to enter the crew requirement field.³⁰ Moreover, it was doubted that Congress intended that constitutionally provided police powers of the states were to be superseded by a collective bargaining agreement between the railroads and their employees.³¹ In examining the report of the Committee on Interstate and Foreign Commerce and the statement of the neutral members of the arbitration board, the court decided that the language used in each indicated that the award was not clearly intended to supersede or modify any state full crew law.³² Thus, in finding that the legislative purpose with respect to pre-emption was not apparent, the court reasoned that it was not bound to hold that the state statutes under attack were superseded.³³

23. 259 N.Y.S.2d at 106-07.

24. *Id.* at 106. "While the full train crew laws undoubtedly placed an added financial burden on the railroads . . . they did not obstruct interstate transportation or seriously impede it." *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 782 (1945); *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, 255, modified per curiam, 283 U.S. 809 (1931); *Chicago, R.I. & Pac. Ry. v. Arkansas*, 219 U.S. 453, 466 (1911).

25. 259 N.Y.S.2d at 108-09; see *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 9 (1937); *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, 252, modified per curiam, 283 U.S. 809 (1931); *Chicago, R.I. & Pac. Ry. v. Arkansas*, 219 U.S. 453, 466 (1911); *New York, N.H. & H.R.R.R. v. New York*, 165 U.S. 628, 632 (1897).

26. 259 N.Y.S.2d at 107; see note 4 *supra*.

27. 259 N.Y.S.2d at 107. "Regulation to insure safety is an exercise of the police power. It is primarily a state function . . ." *Bradley v. Public Util. Comm'n*, 289 U.S. 92, 95 (1933).

28. 259 N.Y.S.2d at 114.

29. *Id.* at 107-14.

30. *Id.* at 110-11.

31. *Id.* at 111.

32. *Id.* at 112-13.

33. *Id.* at 114.

In analyzing the instant court's reasoning on the preemption issue, two notable shortcomings are evident. Though conceding that some of the language used in the award clearly and expressly authorized what the state statutes interdict,³⁴ the court, nevertheless, reasoned that the state statutes should be enforced since an examination of the legislative history of Public Law 88-108 and the award made thereunder did not clearly manifest a congressional intent to pre-empt the state statutes.³⁵ It is a generally accepted principle that the clear requirements of a statute cannot be overcome by legislative history.³⁶ With reference to this issue, a federal court has recently written: "The language of the Act, Public Law 88-108, and of the Award is plain and unambiguous, and courts should not resort to legislative history when the language of the statute is clear."³⁷

The second shortcoming inherent in the court's argument with respect to the pre-emption issue is centered around its loose application of the principle that, where congressional intent is lacking in a federal statute, a principal guideline in determining whether a state statute has been pre-empted is to consider whether the enforcement of the state law would substantially conflict with the policy promulgated under the federal law.³⁸ By using a more pragmatic interpretation of this principle than the instant court did,³⁹ it can be argued that the full crew laws have been superseded. In applying this test to the particular facts of this case, it can be seen that the congressional policy promulgated by Public Law 88-108 is being frustrated, since the petitioners cannot operate under the lower requirements set by the award while the higher standards set by the state full crew laws are enforced. The application of the statutes in question defeats the full realization of the congressional policy and intent, which was to allow the parties to carry out those issues, including crew requirements, which were agreed upon through collective bargaining.⁴⁰

34. *Id.* at 109.

35. *Id.* at 114.

36. *Ex parte Collett*, 337 U.S. 55, 61 (1949); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945).

37. *Chicago, R.I. & Pac. R.R. v. Hardin*, 239 F. Supp. 1, 23 (W.D. Ark. 1965).

38. Federal legislation pre-empts state statutes which palpably infringe on its policy or practical administration. *California v. Taylor*, 353 U.S. 553 (1957); *UMW v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942); *McDermott v. Wisconsin*, 228 U.S. 115 (1913).

39. The instant court attempted to justify its holding by stating that the administration and policy of Public Law 88-108 and the statutes in dispute were not in conflict since compliance with the higher standards set by the state statutes satisfied the federal statute and the award made thereunder. 259 N.Y.S.2d at 109. In essence, the court reasoned that the state full crew laws should complement the award rather than be superseded by it. However, in *Missouri Pac. R.R. v. Porter*, 273 U.S. 341, 346 (1927), the court stated that Congress has supreme power to regulate commerce, and that, once that power has been executed through legislation, state laws have no application. "They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." *Ibid.*

40. See *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959); *California v.*

By comparing and evaluating the effect which results from the administration of the award and the state full crew laws, it clearly appears that greater flexibility and fairness can be attained in regulating train crew requirements by the application of the provisions of the award. The purpose of the state full crew laws was to provide safety and protection for the public from the manifest danger of rail travel which undeniably existed when the statutes were enacted several decades ago. However, these statutes, as they stand today, do not reflect the present state of improved railroad technology and local operating conditions which has eliminated many of the dangers which existed when the statutes were enacted. The award, however, seems to solve this problem by providing for a binding arbitration procedure whereby crew members to be used in road, freight and yard crews are to be determined on a local basis by special boards of adjustment. Through this procedure, crew requirements can be determined with consideration given to present day conditions and to the individual railroads. These criteria for determining crew requirements are certainly less arbitrary and more flexible than the state full crew laws requirements which arbitrarily apply to all railroads of fifty miles or more regardless of their individual technological improvements and safety precautions and of the improved local operating and switching conditions.

Taylor, 353 U.S. 553 (1957); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945). In *Local 24, Int'l Bhd. of Teamsters v. Oliver*, supra, the court resolved the conflict between a state statute and a collective bargaining award made pursuant to federal legislation which expressed no congressional intent with respect to pre-emption. The court decided that the state statute must be pre-empted, since to allow the application of the state law would frustrate the congressional intent which was to allow the parties to conform to the award of the collective bargaining agreement. Where federal legislation instructs parties to bargain collectively, and an agreement is reached, the inconsistent application of state law is necessarily outside the power of the state. *Id.* at 295-96. In *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, supra, the New York Board's ruling, with respect to a bargaining unit in an industry, was held invalid since it conflicted with the policy laid down by the congressionally established NLRB. Where a state board and a federal board lay down conflicting policies in an area where the federal board has been authorized to act by Congress, the federal policy is necessarily given effect as the supreme law of the land. *Id.* at 774.

There seems, however, to be one exception to this rule. Where the public is threatened with breaches of the peace which may result in personal injury and/or property damage, it has been held that the state may exercise its police powers even though Congress has entered the field. In *Allen-Bradley Local 1111, UEW v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942), where a state employment board had ordered a union, which was obstructing the streets and roads, to desist from mass picketing of the employer's factory since such picketing threatened personal injury and property damage, the Supreme Court held that, even though Congress had authorized the NLRB to deal with such matters, the state board order was not unconstitutional.

In *Garner v. Local 776, Teamsters Union*, 346 U.S. 485, 488 (1953), the court stated that the state may not exercise its police power since Congress had entered the field. However, Garner emphasizes the fact that this was not "a case of mass picketing, threatening of employees, obstructing streets and highways Nothing suggests that the activity enjoined [by the lower court] threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority." *Ibid.*

Taxation—Legal Fees Expended in Unsuccessful Criminal Defense Held Deductible as an Ordinary and Necessary Business Expense.—Petitioner, a securities dealer, was convicted for violating, and conspiring to violate,¹ the fraud section of the Securities Act of 1933² and the mail fraud statute.³ He deducted from his gross income the legal expenses⁴ of his defense as an “ordinary and necessary” business expense under Section 162(a) of the Internal Revenue Code of 1954.⁵ The Commissioner disallowed the deduction and was upheld by the Tax Court.⁶ The court of appeals reversed, holding that the expenses were deductible despite petitioners adjudicated criminal behavior. *Tellier v. Commissioner*, 342 F.2d 690 (2d Cir. 1965).

The Tax Court, in disallowing the deduction of the legal expenditures, followed a long-standing precedent first established in *Sarah Backer*.⁷ There, the taxpayer, in the course of his business activity, bribed a union official. When subpoenaed to testify, the taxpayer denied giving the bribe, but reversed himself before leaving the witness stand. He was then indicted for perjury, but the case was subsequently dismissed.⁸ The Commissioner and the Board of Tax Appeals disallowed a deduction of the legal expenditures incurred in taxpayer's defense. The Board reasoned that it was neither “ordinary” nor “necessary” to bribe or to lie while carrying on a business and that any expenses resulting from those activities are, therefore, of a personal, rather than a business, nature.⁹ Further, the Board observed that public policy requires that “illegal” acts are not to be sanctioned by the courts, even if the taxpayer is not convicted of any crime.¹⁰

Subsequent cases following the reasoning in *Sarah Backer* evolved the clear-cut rule that legal fees expended in an unsuccessful¹¹ defense of a criminal proceeding were not deductible regardless of the proximate relation between the expense and the business.¹² The latter cases in the Second Circuit are now overruled.¹³

1. 18 U.S.C. § 371 (1964).

2. 48 Stat. 84, as amended, 15 U.S.C. § 77(q)(a) (1964).

3. 18 U.S.C. § 1341 (1964).

4. There was no question as to the reasonableness of the amount (\$22,964.20), nor that the expense resulted from taxpayer's business rather than personal activities.

5. This section provides: “There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business”

6. Walter F. Tellier, 22 CCH Tax Ct. Mem. 1062 (1963).

7. 1 B.T.A. 214 (1924).

8. *Id.* at 215.

9. *Id.* at 217.

10. *Ibid.* The court was inaccurate in calling taxpayer's acts “illegal” since he was never convicted of a crime.

11. The taxpayer in *Sarah Backer*, of course, had been successful, but the court considered his acts immoral. Later cases narrowed the rule slightly so that only an unsuccessful defense would indicate immorality.

12. E.g., *Peckham v. Commissioner*, 327 F.2d 855 (4th Cir. 1964); *Bell v. Commissioner*, 320 F.2d 953 (8th Cir. 1963); *National Outdoor Advertising Bureau, Inc. v. Helvering*, 89 F.2d 878 (2d Cir. 1937); *Burroughs Bldg. Material Co. v. Commissioner*, 47 F.2d 178 (2d

The instant court relied primarily on the principles expressed in the Supreme Court case of *Commissioner v. Heininger*.¹⁴ Heininger, a Chicago dentist, manufactured false teeth and sold them through the mail. The Postmaster General, finding that Heininger had overstated the virtues of his product in his mailed advertisements, issued a fraud order instructing the Postmaster of Chicago to stamp all mail addressed to Heininger "fraudulent" and to have it returned to the senders.¹⁵ Without access to the mails, Heininger's business was virtually worthless. He promptly brought suit against the Postmaster General seeking a restraining injunction on the ground that there was no evidentiary basis for the fraud order. He was ultimately unsuccessful.¹⁶ His lawyer's fees and other

Cir. 1931); Thomas A. Joseph, 26 T.C. 562 (1956); John W. Thompson, 21 B.T.A. 568 (1930); Norvin R. Lindheim, 2 B.T.A. 229 (1925).

The results of courts making the distinctions between successful and unsuccessful, and between civil and criminal, were often "anomalous, arbitrary, artificial and conflicting . . ." *Tellier v. Commissioner*, 342 F.2d 690, 694 (2d Cir. 1965). For a more comprehensive discussion, see Arent, *Inequities in Non-Deductibility of Fines, Penalties, Defense Expense*, 87 J. Accountancy 482 (1949); Brookes, *Litigation Expenses and the Income Tax*, 12 Tax L. Rev. 241 (1957); Note, *Deduction of Business Expenses: Illegality and Public Policy*, 54 Harv. L. Rev. 852 (1941); Note, *Deductibility of Attorney's Fees Incurred in Defense of a Criminal Prosecution*, 13 Stan. L. Rev. 92 (1960); Note, *Business Expenses, Disallowance, and Public Policy: Some Problems of Sanctioning With the Internal Revenue Code*, 72 Yale L.J. 108 (1962).

One rule often adopted by the courts is that a deduction for legal fees will not be allowed whenever the courts disallow a deduction of the judgment taken against the taxpayer. *Burroughs Bldg. Material Co. v. Commissioner*, 47 F.2d 178, 180 (2d Cir. 1931). That is, the courts equated the payment of the legal fees with the payment of the penalty. This type of thinking is often nothing more than begging the question. However, the rule is often disregarded. For example, in the case of a compromise settlement, the amount paid in settlement often is not deductible, but the legal expenditure is. E.g., *Commissioner v. Longhorn Portland Cement Co.*, 148 F.2d 276 (5th Cir.), cert. denied, 326 U.S. 728 (1945). When a consent decree is issued, the legal fees are deductible to the extent that the taxpayer has been successful in resisting what was originally sought. *National Outdoor Advertising Bureau, Inc. v. Helvering*, 89 F.2d 878 (2d Cir. 1937). Logically, the same rule should be applied to a defendant who is convicted on only some of the counts in an indictment, but no case has ever so held. See Note, *Deductibility of Attorney's Fees Incurred in Defense of a Criminal Prosecution*, supra at 95. One of the chief advantages of the instant case's reversal is the elimination of these legal niceties.

13. However, the views expressed by the instant court are hardly novel. The position of allowing the deduction of this type of expense first appeared in the dissent in *Burroughs Bldg. Material Co.*, 18 B.T.A. 101, 103-05 (1929), aff'd, 47 F.2d 178 (2d Cir. 1931). It was argued that the tax law should be completely value-free, merely taxing the difference between a business's gross receipts and gross expenditures without making any other determinations. The dissent also argued that the legislative history of the Internal Revenue Code suggests this position.

14. 320 U.S. 467 (1943).

15. The Postmaster of Chicago was also ordered not to pay any money orders drawn to Heininger. *Id.* at 469.

16. *Heininger v. Farley*, 105 F.2d 79 (D.C. Cir.), cert. denied, 308 U.S. 587 (1939).

legal expenses amounted to 36,600 dollars, an admittedly reasonable amount.¹⁷ The Commissioner, disallowing the deduction of this amount from Heininger's gross income, argued that it was not ordinary and necessary, nor could it be, for a dentist to engage in fraudulent practices, and that, therefore, any expense arising out of such fraud could not be an ordinary and necessary business expense.¹⁸ The Supreme Court explicitly rejected this argument as unsound and held that, by any reasonable interpretation of the terms, Heininger's expenses were "ordinary and necessary."¹⁹ Threatened with the extinction of his business, it certainly was not extraordinary to defend it with any means available. And the expense was necessary since it represented the only hope of re-establishing the business.²⁰ The Court then went on to consider the public policy argument against allowance of the deduction. "It has never been thought . . . that the mere fact that an expenditure bears a remote relation to an illegal act makes it non-deductible. The language of § 23(a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible."²¹ Therefore, these expenses could only be held non-deductible if the deduction would be contrary to some "sharply defined" public policy. The only public policy involved was that of the mail fraud statute,²² i.e., the policy of protecting the public from fraud through the mail. It was not the policy of this statute to levy any penalties on the individuals involved. Denying the deduction is, therefore, a penalty that has not been provided for by Congress.²³

The instant case held that petitioner's legal expenses were ordinary and necessary as defined in *Heininger*.²⁴ However, *Heininger* had been consistently distinguished because it dealt with expenses arising out of civil litigation. In *Anthony Cornero Stralla*,²⁵ the taxpayer was engaged in an unlawful gambling enterprise and was not allowed to deduct the legal expenses of an unsuccessful criminal defense. The Tax Court distinguished *Heininger* on the basis that Stralla's business was entirely illegal, while Heininger's was a legitimate business with some illegal overtones.²⁶ In a later case, *Thomas A. Joseph*,²⁷ the Tax Court, disallowing the deduction of legal expenses of an attorney convicted of subornation of perjury, stated that the statutes involved in *Heininger* were for the protection of the public and not for penalizing individuals,²⁸ while the statute in *Joseph* was a penalizing statute. The court also distinguished civil litigation expenses (*Heininger*) and criminal litigation expenses (*Joseph*) and concluded: "This is indication to us that had the Supreme Court been confronted

17. 320 U.S. at 469.

18. Id. at 471-72.

19. Id. at 471.

20. Id. at 472.

21. Id. at 474. Section 23(a) is now Int. Rev. Code of 1954, § 162(a).

22. 39 U.S.C. §§ 4005, 4057 (1964).

23. 320 U.S. at 474-75.

24. 342 F.2d at 695.

25. 9 T.C. 801 (1947).

26. Id. at 820.

27. 26 T.C. 562 (1956).

28. Id. at 564.

with a deduction claimed for expenses incurred in defending against conviction for a crime which conviction eventuated, it would have reached a different result in *Heininger*.²⁹ Further, the court felt required to follow the old line of cases until they had been explicitly overruled.³⁰ It would seem that the *Joseph* court relied on the mild factual distinction in *Heininger* to avoid following the principles therein expressed.

Heininger's ambiguity as to the relationship of public policy to "ordinary and necessary" leaves room for divergent interpretations. However, from the Court's reasoning, the implication is inescapable that public policy is not an appropriate cause to hold an expense non-deductible unless that public policy is "sharply defined."³¹ This point was amplified in the later case of *Lilly v. Commissioner*,³² where petitioner, an optician, turned over one-third of the retail price of his eyeglasses to the physicians who referred the clients to him. He attempted to deduct the kickbacks as ordinary and necessary business expenses, but the Commissioner ruled that public policy required a disallowance of the deduction. The Commissioner's ruling was sustained by the Tax Court,³³ and the court of appeals affirmed.³⁴ The Supreme Court, in reversing, first pointed out that the expense was ordinary and necessary within the meaning of *Heininger* since without the kickbacks there would have been no business.³⁵ The Court then discussed the issue of public policy:

Assuming for the sake of argument that, under some circumstances, business expenditures which are ordinary and necessary in the generally accepted meanings of those words may not be deductible as "ordinary and necessary" expenses under § 23 (a)(1)(A) when they "frustrate sharply defined national or state policies proscribing particular types of conduct," . . . nevertheless the expenditures now before us do not fall in that class. The policies frustrated must be national or state policies evidenced by some governmental declaration of them.³⁶

The instant court argued that there is no such policy opposed to the hiring of counsel and the incurring of other litigation expenses.³⁷ In the absence of a

29. *Ibid.*

30. *Ibid.*

31. See 320 U.S. at 474.

32. 343 U.S. 90 (1952).

33. *Thomas B. Lilly*, 14 T.C. 1066 (1950).

34. *Lilly v. Commissioner*, 188 F.2d 269 (4th Cir. 1951).

35. 343 U.S. at 93-94.

36. *Id.* at 96-97.

37. The court indicated that such a policy, if it did exist, might be unconstitutional under the sixth amendment's guarantee of the right to counsel. 342 F.2d at 694. This point was further amplified in a concurring opinion by Chief Judge Lumbard, who noted that the Supreme Court has recently expanded the meaning of the right to counsel and, therefore, agreed that there is no policy discouraging the defense of criminal charges. *Id.* at 695-96. However, the guarantee of the right to counsel does not seem to logically require the allowance of a deduction of the expense of counsel.

Judge Lumbard also pointed out that, in 1964, Congress enacted the Criminal Justice Act, 18 U.S.C. § 3006(a) (1964), providing compensation for counsel for indigent defendants in criminal cases, regardless of the guilt or innocence of the defendant. Judge Lumbard rea-

policy, the only question is whether the expenses were ordinary and necessary as defined in *Heininger*.³⁸ The court held that they were and, therefore, allowed the deduction.

This reasoning represents a complete shift of focus. The earlier cases, in determining if an expense was deductible, looked at the crime out of which the expense arose. The instant court looked at the act of hiring a lawyer and indicated that the hiring, rather than the crime, is the act out of which the expense arose.³⁹ Though one might infer that this decision is a reflection of a change in public policy,⁴⁰ actually, only the court's notion of proximate relation has changed. The *Sarah Backer* court questioned whether the charge of perjury against the taxpayer was a proximate result of the taxpayer's business.⁴¹ The court gave a negative answer, viewing the bribe and the lie as intervening causes breaking the proximate relation between the business and the expense.⁴² The instant court is more realistic. "White-collar crime" is not infrequent, and is part and parcel of many a business. Criminals, be they price-fixers or burglars, often are apprehended, and it is only reasonable to expect them to defend themselves. Therefore, the chain of causation from the business to the expense is unbroken.

It would appear, therefore, that the instant court reached the proper result. However, it did not go far enough in its reasoning. The court allowed the deduction because it could find no public policy against incurring legal expenses.⁴³ Apparently, the court would be willing to disallow deductions if it does find an applicable public policy. There is no support for this view in the authorities cited by the court. The Supreme Court, when discussing public policy in both *Lilly* and *Heininger*, assumed, *arguendo*, that a deduction might be disallowed because of public policy, and then found no policy requiring a deduction of the expenses involved.⁴⁴ The cases, therefore, do not lend any weight to the view that deductions may be disallowed on policy grounds. Also, the present court quotes two comments on the legislative history of the Internal Revenue Code which indicate that the sole purpose of tax law is to levy a tax on net income.⁴⁵ These sources maintain that the rules used to arrive at a measure of net income should be com-

soned that "if the compensation of counsel under the Criminal Justice Act does not depend on the success of the defense, it would seem to follow that the allowance of the deduction should not depend on the outcome in cases where the defendant is able to and does assume the financial burden of defending against criminal charges." 342 F.2d at 696.

38. *Id.* at 695.

39. See *id.* at 694.

40. It is highly unlikely that earlier courts had a policy of discouraging the defense of criminal charges. If they did, the policy only manifested itself when the defense was unsuccessful. Of course, it is possible that some highly unconventional judges felt that only the innocent have a right to counsel. If this is so, the feeling was never strong enough to be expressed in any decision.

41. *Sarah Backer*, 1 B.T.A. 214, 216 (1924).

42. See *id.* at 216-17.

43. 342 F.2d at 695.

44. *Lilly v. Commissioner*, 343 U.S. 90, 97 (1952); *Commissioner v. Heininger*, 320 U.S. 467, 474 (1943).

45. 342 F.2d at 692-93.

pletely free of any moral considerations.⁴⁶ Thus, apparently the court could have held that petitioner's legal expenses are deductible because all ordinary and necessary business expenses (as defined in *Heininger*) are deductible regardless of any policy considerations. Instead, the court rather timidly concluded that it found "no sharply defined public policy against the allowance of such deductions,"⁴⁷ and, therefore, that petitioner's legal expenses were deductible.

It would seem that *Heininger*, *Lilly*, and *Tellier* are all landmark cases which refused to disallow a deduction on public policy grounds. However, the *Tellier* court still followed the old procedure of casting about for a public policy, and only allowed the deduction when it found none applicable. It is this procedure that the court should have struck down. If Congress wishes to penalize certain conduct by disallowing a deduction of the expenses arising out of such conduct, then Congress may so provide in the Internal Revenue Code. In the absence of such legislation, courts should look no further and should allow the deduction of proximately related business expenses as a matter of course.

Trade Regulation—Sales-Commission Agreement Held Unfair Method of Competition.—The Federal Trade Commission filed a complaint against defendants alleging unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.¹ Defendants, Atlantic Refining Company and Goodyear Tire Company, were parties to a sales-commission agreement which governed the sale of Goodyear tires, batteries and accessories to Atlantic's various dealers and wholesalers. By the terms of the agreement, Atlantic would "encourage" its dealers and wholesalers to buy only Goodyear tires, batteries and accessories. In return for this "encouragement," Goodyear would pay Atlantic a commission² on all auto supplies purchased by Atlantic's dealers and wholesalers. The hearing examiner found that, in initiating this plan, Atlantic had coerced its dealers into carrying only Goodyear supplies and, accordingly, the examiner enjoined any further use of coercive tactics toward this end. The Federal Trade Commission approved this finding but also held that the sales-commission plan itself was illegal,³ finding it to be, "a classic example of the use

46. *Ibid.*

47. *Id.* at 695.

1. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964). Actions similar to this one had previously been brought under the Sherman Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964); Clayton Act § 3, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964); or both. For a discussion of the relationship of the three acts, see Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act With the Sherman and Clayton Acts*, 59 Mich. L. Rev. 821 (1961).

2. Atlantic received a 10% commission on all sales to its dealers and a 7.5% commission on sales to its wholesalers. *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 365 (1965).

3. *Goodyear Tire & Rubber Co.*, 58 F.T.C. 309 (1961). In recent years, sales-commission agreements have been a favorite tool of the oil companies for marketing tires, batteries and accessories. See 30 Fordham L. Rev. 380, 382 (1961).

of economic power in one market . . . to destroy competition in another market"⁴ Atlantic did not contest the findings of the hearing examiner, but contended that the Commission had gone too far in holding the sales-commission plan illegal even when stripped of the previously employed overt coercive tactics. The court of appeals⁵ and the Supreme Court affirmed the Commission. *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965).

It is clear that the findings of the hearing examiner were correct.⁶ Indeed, as the Supreme Court noted, the effectiveness of the program was clearly shown by the results achieved in a relatively short time; within seven months of the start of the program, Goodyear had signed up over 95 per cent of Atlantic's dealers.⁷ In addition, the Supreme Court followed the Commission's decision to enjoin Atlantic from entering into a sales-commission agreement with any other distributor of tires, batteries and accessories, and to enjoin Goodyear from entering into similar agreements with any other oil company.⁸ Mr. Justice Goldberg, dissenting, argued against the broadness of the order and contended that the Commission did not have sufficient facts before it to show that the sales-commission agreement was an inherently unfair method of competition.⁹

It would appear that the order was not too broad in light of the facts or the law.¹⁰ The order was in keeping with the very purpose of the Commission. Orders of the Commission are not punitive in nature, but are issued to prevent future illegal practices. In order to accomplish this, the Commission cannot be limited in its remedy to the narrow infraction directly before it, but must strike at the roots of the infraction, closing all roads towards the prohibited goal.¹¹

In the case at hand, even absent direct coercion by Atlantic on its dealers, the very nature of the economic relationship between them is potentially coercive.¹² Once the oil company takes an economic interest in the distribution of tires, batteries and accessories, the dealers, by virtue of their subservient economic positions, must adhere to its policies.¹³ While admitting that

4. *Goodyear Tire & Rubber Co.*, 58 F.T.C. 309, 367 (1961).

5. *Goodyear Tire & Rubber Co. v. FTC*, 331 F.2d 394 (7th Cir. 1964).

6. Atlantic threatened its dealers with termination of their leases and other economic penalties for failure to stock only Goodyear tires, batteries and accessories. *Goodyear Tire & Rubber Co.*, 58 F.T.C. 309, 342-45 (1961).

7. 381 U.S. at 366.

8. *Id.* at 361-62 nn.2 & 3.

9. *Id.* at 382-91 (dissenting opinion).

10. But see 63 Mich. L. Rev. 713 (1965).

11. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); accord, *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *FTC v. Cement Institute*, 333 U.S. 683, 708 (1948).

12. See *Texaco, Inc. v. FTC*, 336 F.2d 754, 766 (D.C. Cir. 1964) (Washington, J., dissenting) and cases cited therein.

13. Among the sources of leverage in Atlantic's hands were its lease and equipment loan contracts containing cancellation and short term provisions, control of the dealers' supply of gasoline and oil, and extensive control of all advertising on the dealers' premises. 381 U.S. at 368. A somewhat analogous situation is presented by *Simpson v. Union Oil Co.*,

coercive tactics had been employed,¹⁴ Atlantic reasoned that, since it and its dealers were mutually dependent, the sales-commission agreement could be executed without coercion.¹⁵ However, if that were true, Goodyear would have little need for the sales-commission agreement or any other arrangement with Atlantic.¹⁶ It could fend for itself, selling to Atlantic's dealers in direct competition with other marketers of auto supplies. It seems obvious that the primary need that Goodyear has for Atlantic is the influence which Atlantic enjoys over its dealers.

Further, when viewed in its broader aspects, this plan would appear to be essentially a tying arrangement, which is an agreement by a party to sell a product on the condition that the purchaser also purchase a different, or tied, product if he is to buy at all.¹⁷ However, the Court did not see fit to classify the sales-commission agreement as a tying agreement:

We recognize that the Goodyear-Atlantic contract is not a tying arrangement. Atlantic is not required to tie its sale of gasoline and other petroleum products to purchases of Goodyear tires, batteries and accessories. Nor does it expressly require such purchases of its dealers.¹⁸

In spite of this pronouncement, much of the reasoning of the Court is based on the principles applicable to tying agreements. Indeed, previous cases on similar facts have held such plans to be tying arrangements.¹⁹

A brief comparison with some of the characteristics of tying agreements indicates that, in effect, such an agreement is present here. A tying agreement need not be expressly set forth but may be deduced from the parties' course of conduct.²⁰ Thus, the fact that Atlantic does not "expressly require" its dealers to purchase tires, batteries and accessories would not seem to be controlling in determining whether the sales-commission agreement was a tie-in. Atlantic's course of conduct would seem to indicate that its dealers were effectively required to carry Goodyear supplies.

The Court's position that the agreement was not a tying arrangement seems

377 U.S. 13 (1964), in which the oil company utilized these very methods of coercion in conjunction with a consignment agreement whereby the oil company fixed the retail prices at which the dealers were permitted to sell gasoline. The Court found such agreement illegal and upheld the granting of summary judgment. For a further discussion of the Simpson case, see 33 *Fordham L. Rev.* 336 (1964).

14. 381 U.S. at 363.

15. *Id.* at 368.

16. *Id.* at 376.

17. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958).

18. 381 U.S. at 369.

19. *E.g.*, *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964); *Osborn v. Sinclair Ref. Co.*, 286 F.2d 832 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961); *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951), aff'd per curiam, 343 U.S. 922 (1952); *Standard Oil Co. v. United States*, 337 U.S. 293, 305 n.8 (1949) (dictum).

20. *Osborn v. Sinclair Ref. Co.*, supra note 19; *McElhenny Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959).

untenable. As previously indicated, if Atlantic did not require such purchases of its dealers, there would be little reason for Goodyear to be interested in such an arrangement. As stated by the Supreme Court in *Standard Oil Co. v. United States*,²¹

Tying agreements serve hardly any purpose beyond the suppression of competition. . . . In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device . . . could induce a buyer to enter one.²²

This seems to be apt description of the agreement under consideration, even absent the extensive findings of fact which Mr. Justice Goldberg would require. Indeed, such findings are unnecessary in determining the extent of a tying arrangement.²³

It would appear that a more fundamental tie-in is present here. Even assuming that the sale of tires, batteries and accessories were not tied to the sale of gasoline and oil, it is apparent that their sale was tied to the leasing of the stations themselves. When Atlantic utilized direct coercion, it did not specifically threaten to stop selling gasoline to its dealers, but rather threatened to cancel their leases.²⁴ Viewed in this light, the case is similar to *Northern Pac. Ry. v. United States*,²⁵ in which the Supreme Court held an analogous agreement to be a tie-in and, as such, per se illegal.

What makes a tie-in agreement per se illegal? The criteria are laid down in *International Salt Co. v. United States*²⁶ and subsequent cases.²⁷ A "not insubstantial" amount of interstate commerce has to be affected and restraint of free competition in the tied product must result. The vice of tying agreements lies in economic power in one market restraining free competition in another market.²⁸ In *International Salt Co.*, the market foreclosed was 500,000

21. 337 U.S. 293 (1949).

22. *Id.* at 305-06.

23. It is seldom necessary in such a case to embark on a full-scale factual inquiry to determine the scope of the market affected or the particular seller's status in that market. These criteria may be inferred from the character of the products and the relationship of the parties involved. *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962).

24. *Goodyear Tire & Rubber Co.*, 58 F.T.C. 309, 342-43 (1961).

25. 356 U.S. 1 (1958). The railroad leased certain lands to various lessees. In return for the lease, the lessees agreed to ship over the railroad's lines all commodities produced or manufactured on the land, provided that the railroad's rates (and, in some instances, its service) were equal to those of competing carriers. It should be noted that in the instant case the dealers had no choice even if the competing products were better or less expensive.

26. 332 U.S. 392, 396 (1947).

27. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); cf. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). For a good discussion of the development of tie-in cases and further clarification of the per se illegality doctrine, see Turner, *The Validity of Tying Arrangements Under the Anti-Trust Laws*, 72 *Harv. L. Rev.* 50 (1958).

28. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 11 (1958).

dollars annually. The sale of tires, batteries and accessories involved in the instant case exceeded 11,000,000 dollars annually, certainly not an "insubstantial" amount of interstate commerce. Similarly, the free competition of auto supplies had been restrained. Not only were all dealers other than Goodyear excluded from the Atlantic market, but Goodyear outlets themselves could not sell to Atlantic stations which were not in their designated district.²⁹ Thus, whether viewed as a tying arrangement or as inherently coercive, it would seem that the Court had ample justification for holding the sales-commission agreement to be illegal.

Mr. Justice Stewart, in his dissenting opinion, noted that the sales-commission plan did not confer any *distinctive* coercive power on Atlantic.³⁰ He concluded that, absent any such finding, there was no basis for holding the plan illegal since equal coercive power would have existed under the prior plan of distribution.³¹ Prior to 1951, when the sales-commission plan went into effect, Atlantic marketed its tires, batteries and accessories through a plan known as the purchase-resale plan. Under this plan, Atlantic would purchase the required tires, batteries and accessories, store them, and sell them to its dealers as required. It would appear that such a plan contains the same coercive factors as the sales-commission plans.³² Atlantic's economic interest in auto supplies is even greater under the purchase-resale plan than under the sales-commission plan. The former requires a large capital investment, along with storage and administrative expenses not present in the latter. Thus, failure of the purchase-resale plan would involve a loss of capital, not just a loss of potential income (commissions) as would be the case under the sales-commission plan.³³

It is not the type of plan employed which is inherently coercive, since the same economic imbalance is present with either, but the improper manipulation of the economic imbalance which must be guarded against. Such a result can be realized only by excluding the oil companies from the marketing of tires, batteries and accessories entirely. Removal of the oil company's economic incentive removes its desire to curb free competition among the marketers of these products.

29. Goodyear divided the Atlantic stations into various districts and assigned one of its wholesale outlets to each district.

30. 381 U.S. at 378 (dissenting opinion).

31. *Id.* at 379 (dissenting opinion). Mr. Justice Goldberg also criticized the majority's failure to draw a distinction between the two plans. *Id.* at 386 (dissenting opinion).

32. Mr. Justice Goldberg, in discussing the Court's failure to distinguish the two plans, indicated that the heart of the violation, i.e., the utilization of economic power in one market to destroy the competition in another, is present with either plan. "Indeed, it would seem difficult to draw any distinction between the two plans on this basis." *Id.* at 387 (dissenting opinion). But see *United States v. Sun Oil Co.*, 176 F. Supp. 715 (E.D. Pa. 1959), where the purchase-resale plan itself was not declared illegal, but coercive tactics similar to those under consideration were found to exist.

33. The Court did not consider this question, stating that "the merits of the purchase-resale plan, however, were not before the Commission and we therefore have no occasion to pass upon them." 381 U.S. at 372.