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Comments

COMMENTS

CONSTITUTIONAL LAW—SUPREME COURT SCOPE OF REVIEW—STATE SOVEREIGNTY V. COURT PROTECTION OF CONSTITUTIONAL FREEDOMS*

I. Introduction

The validity of a state felony arrest without a warrant is an issue that has been much litigated, and its resolution is of increasing importance. Because of the many instances where an arrest must be made without a warrant and because of the danger of tainting the evidence seized if the arrest is adjudged illegal,[1] it is imperative that the standards used to determine the validity of such an arrest be clearly stated. Despite this need for clear and definite rules, a cloud of doubt and speculation hovers over this area. Rules have been promulgated, but they lack certainty and are difficult to apply to specific factual situations.

Like most questions of individual rights and freedoms, the problem of a valid arrest arises from the interpretations given to the Bill of Rights and the fourteenth amendment. The Supreme Court has held that the fourth amendment applies alike to questions of arrest as well as search and seizure.[2] They have further held that the freedoms guaranteed by the fourth amendment are an essential element in the concept of ordered liberty, and, as such, are entitled to the protection of the fourteenth amendment against illegal state action.[3] In order to insure this protection, the Court has indicated its intent to make an independent examination of the facts in each case that alleges a violation of constitutional freedoms.[4]

Before discussing the specific problems of felony arrests without a warrant, it may be beneficial to trace the general develop-

* Beck v. Ohio (Sup. Ct. 1964).

1. Both federal and state courts must exclude from a trial all evidence that was illegally obtained. When incident to a valid arrest even without a warrant, seized evidence is admissible. However, where the arrest is invalid, the subsequent search and seizure is also invalid, and any evidence acquired thereby must be excluded as "fruits of the poisonous tree." The federal exclusionary rule was established by Weeks v. United States, 232 U.S. 383 (1914). It was not until 1961 that the states were subjected to the same requirement by Mapp. v. Ohio, 367 U.S. 643 (1961).

2. Giordenello v. United States, 357 U.S. 480 (1958).

3. Wolf v. Colorado, 338 U.S. 25 (1949). *Accord,* Mapp v. Ohio, 367 U.S. 643 (1961).

4. Ker v. California, 374 U.S. 23, 34 (1963).

ment of constitutional decisions by the Supreme Court as they affect state actions in the criminal field.

II. Is State Sovereignty Being Sacrificed?

By holding in *Wolf v. Colorado*[5] that the fourth amendment was applicable to the states through the fourteenth amendment, the Supreme Court initiated an inquiry into two separate, but related, areas. First, in determining whether a case met the fundamental constitutional criteria required by the fourteenth amendment, how close would the Court come to making a de novo review? Second, to what extent did the Court intend to interfere with state rules and decisions?

A. Enlargement of the Supreme Court's Scope of Review

The Court has frequently stated the rules of review to which it adheres. While it is within their province to determine whether a state court's finding is supported by sufficient evidence, such an inquiry is generally limited to the undisputed sections of the record.[6] Any conflict is presumed to come to the Supreme Court authoritatively resolved by the state's adjudication.[7] This rule of noninterference applies to cases where the conflict is in the evidence and to cases where the conflict is in the factual inferences that may reasonably be drawn from the evidence. That is, where the conclusions depend on an appreciation of facts and circumstances which admit of different interpretations, the conclusions of the lower court will be accepted.[8] Further, where the evidence is not in the record, or where only part of the evidence is present, the presumption is that it was sufficient to sustain the judgment.[9]

While it appears that these rules of appellate review are well established, where a violation of constitutional rights is alleged, there is a tendency in the Supreme Court to approach each case de novo. In dealing with a question of constitutionality the court must determine if the action, whether state or federal, was rea-

5. 338 U.S. 25 (1949).

6. See Thomas v. Arizona, 356 U.S. 390, 402 (1958); Pollock v. Williams, 322 U.S. 4 (1944); Johnson Oil & Ref. Co. v. State *ex rel.* Mitchell, 290 U.S. 158 (1933); Berdler v. South Carolina Tax Comm'n, 282 U.S. 1 (1930).

7. Watts v. Indiana, 338 U.S. 49, 52 (1949).

8. See General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944); Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1940); Chicago, M. & St. P. Ry. v. Lowell, 151 U.S. 209 (1894).

9. International Milling Co. v. Columbia Transp. Co., 292 U.S. 511 (1934).

sonable in light of constitutional guarantees. As early as 1931 the Court stated that there was no formula for the determination of reasonableness and that each case was to be decided on its own facts and circumstances.[10] The Court reasoned that the only way they could determine whether the constitutional requirements had been met was to look at the particular facts of each case. It would be impossible for the Court to accept the state court's findings of fact in toto because of the restrictions it would place on the Court's duty to uphold the Constitution.[11] Thus, the only feasible approach was for the Court to review the state court's determination of the issues, and obviously this could not be accomplished without an independent examination of the facts and circumstances of each case. Such an examination borders closely on de novo review.

How close the Court's review is to de novo review depends on the extent to which they intend to carry on their independent determinations. Recently, in *Ker v. California*[12] the Court has attempted to define the limits of their review. Mr. Justice Clark, speaking for eight members of the Court, stated that it would be impossible to lay down a fixed formula to apply in specific cases; rather, the Court will be met with the recurring questions of reasonableness.[13] In attempting to strike a balance between deference to lower court findings and independent review by the Supreme Court, Mr. Justice Clark stated that the question of reasonableness is to be determined first by the trial court, and their findings will be accorded the usual weight.[14] However, he then indicated that while the findings of reasonableness are in the first instance for the trial court, they will be respected by the Supreme Court only insofar as they are consistent with federal constitutional guarantees. Mr. Justice Clark indicated that when it was necessary to the determination of constitutional rights, the Court would make a thorough and independent examination of the facts to determine whether the trial court had respected the "fundamental" or "constitutional" criteria.[15]

10. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

11. [T]his Court cannot allow itself to be completely bound by a state court determination of any issue essential to the decision of a claim of federal right, in view of the fact that the federal law could then be frustrated by distorted fact finding. . . .

Stein v. People, 346 U.S. 156, 181 (1953).

12. 374 U.S. 23 (1963).

13. Ker v. California, 374 U.S. 23, 31 (1963).

14. *Id.* at 31-32, quoting excerpts from Mapp v. Ohio, 367 U.S. 643, 653 (1961).

15. *Id.* at 34.

B. Supreme Court Criteria—From What Source?

In addition to the Court's general power of review over state court cases, it has a supervisory authority over proceedings originating in federal courts,[16] and as a necessary adjunct to this supervisory authority, the Court has formulated specific requirements that a federal arrest must meet when its constitutionality is questioned in a federal jurisdiction. The Court has frequently indicated that these requirements are more stringent than those used when state jurisdictions are involved.[17] The Supreme Court has stated that in order for a state arrest to be adjudged valid, it must meet the fundamental criteria established by the fourteenth amendment. This fundamental criteria was not considered to arise from the same sources as the supervisory requirements applied to federal actions. However, while the supervisory requirements were set out in specific written rules, fundamental criteria was merely a concept devoid of tangibility. *Wolf* and later cases raised the question of whether it was possible that the stricter federal requirements would be applied by the Court in making its independent determination of the facts in a state case. Previously, the review of a state case had not included an independent review of the facts and circumstances, and it appeared that as the Court began this new task, it would have to turn somewhere for standards to judge whether the events challenged on appeal met the fundamental criteria. What easier place to turn, intentionally or subconsciously, than to the familiar and specific federal standards. This possibility appeared more likely when *Mapp v. Ohio*[18] was decided. There, in dealing with the exclusionary rule,[19] the Court held that the fourth amendment was enforceable against the states by the *same sanction of exclusion* as is used against the federal government, by applying the *same constitutional standards.*[20] Later in *Ker* the Court attempted to deny this possibility and to clarify the distinction between state sovereignty (with which the Supreme Court will not interfere), fundamental criteria (which the Court is bound

16. McNabb v. United States, 318 U.S. 332 (1943). *Accord,* Miller v. United States, 357 U.S. 301 (1958); Nardone v. United States, 303 U.S. 379 (1937).

17. [F]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational and perverse claims of its disregard can be asserted. Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 124 (1956).

18. 367 U.S. 643 (1961).

19. *Supra* note 1.

20. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

to protect), and the more stringent rules resulting from their supervisory authority. Recognizing that the rules governing federal criminal trials went beyond basic constitutional principles because of the Court's supervisory authority, Mr. Justice Clark assured that in *Mapp v. Ohio* the Supreme Court did not establish its assumption of supervisory authority over state courts. Rather, both federal and state courts must respect the same fundamental criteria in their approaches. Mr. Justice Clark stated that it would be impossible to lay down fixed formulas that could be applied in specific cases, and he admitted that the Court would be met with "recurring questions of reasonableness" when dealing with state cases.[21]

C. The Unanswered Questions

The interrelation of the two basic questions is easily seen. The Court must distinguish between the standards they use regarding state sovereignty, fundamental criteria, and supervisory requirements. At the same time, they must review all cases to determine if the constitutional requirements have been met. The only way to make such a finding is by an independent determination of the facts and circumstances of each case. Such an independent review invades the concept of state sovereignty, but without it the Court feels it cannot protect an individual's constitutional rights. Further, once their independent determination takes place, the problem of standards arises. If the Court applies federal standards to test constitutionality, the important distinction between state and federal cases, that is between fundamental criteria and supervisory authority, will be eliminated. The difficult question, therefore, is whether in the long run the state courts will be held to the same standards as the federal courts.

A definite answer to this question has not been given. In *Ker* the Court attempted to answer it in the negative by saying that they had not assumed supervisory authority over state courts. But they appear to contradict this position by stating in the same case that both federal and state courts must respect the same fundamental criteria in their approaches,[22] and that the Court cannot establish fixed formulas to apply in each case but must meet the recurring question of reasonableness.[23] They further

21. Ker v. California, 374 U.S. 23, 31-32 (1963), quoting in part from Mapp v. Ohio, 367 U.S. 643, 653 (1961).

22. *Id.* at 31-32.

23. *Ibid.*

stated that while reasonableness is first for the trial court to determine, the Supreme Court would make an independent examination to determine for itself whether the fundamental criteria *established by this Court* have been respected.[24] The Court's language indicates that the standards used under the fourth amendment, *i.e.*, federal actions, and under the fourteenth amendment, *i.e.*, state actions, will tend to be the same,[25] at least when reasonableness is at issue. It further indicates that the standards used by the Supreme Court in their review of other aspects of state criminal activities will be quite similar to the federal requirements. Consequently, in cases of arrests without a warrant, the result would be that federal and state officers have the same grounds for probable cause before the arrest will be considered valid. *Beck v. Ohio*[26] indicates that the standards will be the same in federal and state cases. It further shows the extent to which the Court is willing to go in its de novo review in order to insure the protection of constitutional rights.

III. Beck v. Ohio, A Mountain Or A Molehill?

A. The Case

The petitioner, William Beck, was driving his car in the vicinity of East 115th Street and Beulah Avenue in Cleveland, Ohio. Cleveland police officers approached him, identified themselves, and asked him to pull over. The officers had neither arrest nor search warrant. However, after placing Beck under arrest, they searched his car. Finding nothing incriminating, they took Beck to a nearby police station where a more thorough search turned up a number of clearing house slips[27] in his sock. After a hearing, his motion to suppress the slips as evidence was denied, and he was convicted of violating a state criminal statute.[28] The conviction was affirmed by the Ohio Court of Appeals and by the Ohio Supreme Court. The United States Supreme Court granted certiorari to determine whether the clearing house slips had been seized in violation of the fourth and fourteenth amendments.

24. *Id.* at 31-32, 34.

25. Agular v. Texas, 378 U.S. 108, 110 (1964).

26. 85 Sup. Ct. 223 (1964).

27. Ohio Rev. Code § 2915.11 (Anderson 1953) states that possession of clearing house, *i.e.*, numbers game, tickets is punishable by fine and imprisonment. Such a penalty would thus make the crime a felony.

28. *Ibid.*

The record on the writ of certiorari contained only the testimony of one of the arresting officers given at the hearing on the motion to suppress the clearing house slips as evidence. This testimony revealed that at the time of the arrest the officer had a police picture of Beck, knew what he looked like, and knew that he had a record in connection with clearing house slips. Further, it showed that the officer had testified that someone had given him information concerning Beck's allegedly illegal activities and that he knew who that person was. The officer stated that when he left the station house, he had in mind looking for Beck in the area of East 115th Street and Beulah and stopping Beck if he saw him make a stop in that area.[29]

Mr. Justice Stewart delivered the opinion of the Court which reversed the conviction in a six to three decision. Proceeding on the premise that if the arrest was legal the subsequent search would be upheld, he stated that the validity of the arrest in turn depended on whether, at the moment the arrest was made, the officers had probable cause to make it.[30] The Court found that the facts, as stated in the record, were not sufficient to constitute probable cause and that the arrest did not meet the demands of the fourth and fourteenth amendments.[31]

B. Standards Used and the Federal-State Distinction

The Court in *Beck* held that whether probable cause was present depended on whether, at the moment the arrest was made, the facts and circumstances within the officers' knowledge were sufficient to warrant a prudent man in believing that Beck had committed or was committing an offense.[32] They then quoted from *Brinegar v. United States.*[33]

> The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring

29. Beck v. Ohio, 85 Sup. Ct. 223, 227 (1964).

30. The requirement of probable cause for arrest without a warrant stems from the fourth amendment provision that no warrant shall issue except upon probable cause. The Court takes the position as stated in Wong Sun v. United States, 371 U.S. 471 (1963), that the requirements for an arrest without a warrant can be no less stringent than where a warrant is obtained.

31. Beck v. Ohio, 85 Sup. Ct. 223, 226 (1964).

32. *Id.* at 225. Justice Stewart cited Brinegar v. United States, 338 U.S. 160 (1949) and Henry v. United States, 361 U.S. 98 (1959) in support of this statement.

33. 338 U.S. 160 (1949).

> more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice.[34]

Mr. Justice Clark joined by Mr. Justice Black and Mr. Justice Harlan dissented in *Beck*. However, they did not criticize either the standards used to determine probable cause or the source from which these standards were taken, implying that they were in accord on these points. It indicates that these standards and their source are viewed by the entire Court as manifestations of fundamental criteria.

The *Ker* case distinguished between fundamental criteria and supervisory authority, but the question remained as to what extent the Court would rely on federal precedents when deciding whether a state arrest met the constitutional requirements of probable cause. By relying on cases involving federal agents as the source for their standards, *Beck* supplied a possible answer. Since both *Brinegar* and *Henry v. United States*[35] dealt with federal arrests, their use by Mr. Justice Stewart in *Beck* indicates that the Court is prepared to abandon the federal-state distinction when applying constitutional standards. Neither dissent attacked this position, indicating their accord with this abandonment of the federal-state distinction.

Later in the decision this conclusion finds further support when Mr. Justice Stewart discusses the qualifications on the general rule that information supplied to an officer by an informer may establish probable cause. Again he cites only cases involving federal agents. He quoted *Wong Sun v. United States*,[36] a case involving arrests by federal narcotics agents.

> Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent when an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained.[37]

The informer must be known to the officer and he must be reliable, as is usually indicated by having given information in the past which proved accurate.[38] It has been held that where the

34. Brinegar v. United States, 338 U.S. 160, 176 (1949).
35. 361 U.S. 98 (1959).
36. 371 U.S. 471 (1963).
37. Wong Sun v. United States, 371 U.S. 471, 480 (1963).
38. Draper v. United States, 358 U.S. 307 (1959); Costello v. United States, 324 F.2d 260 (9th Cir. 1963), *cert. denied*, 376 U.S. 930 (1963).

informer is reliable, the officer may act solely on information obtained from that source.[39] The information that is received must be specific. It must indicate a certain person involved in a certain crime or a certain person planning to commit a crime at a certain time and place.[40]

In applying the rule to Beck's arrest, these were the limitations to which the Court adhered. Justice Stewart stated that the record did not indicate what information had been received, *i.e.*, whether it was specific as to time and place, or from what source it had come, *i.e.*, whether the source was reliable. This arrest was compared with the arrest in *Draper v. United States*,[41] another case involving an arrest by a federal narcotics agent. It was found that the *Beck* record did not contain any facts to support the officer's belief that Beck was engaged in criminal activity when they arrested him. "The arresting officer said no more than that someone [he did not say whom] had told him something [he did not say what] about the petitioner."[42]

C. Ohio's Syllabus Rule—A Peculiar Problem for the Court

Prior decisions, such as *Mapp* and *Ker*, had recognized the impossibility of establishing fixed formulas of reasonableness and indicated the need for the Court to scrutinize the facts, the findings, and the record of each case to determine whether the constitutional criteria had been met. No doubt such scrutiny in the *Beck* case proved to be more difficult than the Court had hoped when they adopted this view. Here, the trial court made no findings of fact, the judge merely stating that a lawful arrest had been made and that the search was incident thereto. The court of appeals merely found that no prejudicial error had been made. In the Ohio Supreme Court, Judge Zimmerman's opinion contained a narrative recital of the facts, but the majority of the United States Supreme Court chose to ignore this recital and use only the meager record in its search for probable cause.

39. Costello v. United States, 324 F.2d 260 (9th Cir. 1963), *cert. denied*, 376 U.S. 930 (1963).

40. Draper v. United States, 358 U.S. 307 (1959); Wong Sun v. United States, 371 U.S. 471 (1963). Further, there is a privilege to conceal an informer's identity unless disclosure is relevant to the accused's defense or is essential to a fair determination of the cause. Roviaro v. United States, 353 U.S. 53 (1957). However, the grounds on which the informer's reliability is based must be indicated.

41. 358 U.S. 307 (1959).

42. Beck v. Ohio, 85 Sup. Ct. 223, 228 (1964).

The problem arises because of a rule that is peculiar to the Ohio Supreme Court. Ohio's syllabus rule[43] provides that when a case is decided, the judge assigned to deliver the opinion shall also write a syllabus of the decision, which will contain only the points of law that were determined by the court.[44] On its face it would appear that the syllabus is the only significant part of the case, and that the accompanying opinion, as the one written by Judge Zimmerman, must be disregarded, or at most treated as dictum. This is the position taken by the majority of the United States Supreme Court in *Beck*, relying on a prior Ohio case which held that individual opinions merely speak the conclusions of their writer.[45]

However, the majority of cases dealing with the acceptability of the accompanying opinion lead to a different conclusion. In *Perkins v. Bright*[46] the Ohio court recognized statements from the accompanying opinion of the previous case as controlling on the disposition of that case and the case before them. The court then quoted *In re Poage*,[47] another Ohio case, which stated that each syllabus must be read in light of the findings of fact in that particular case since it would be impossible for the court to comprehend in each syllabus all the many phases of facts that may arise in other cases touching similar areas.[48] The syllabus must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the Ohio court.[49]

Both dissenting opinions contended that the majority erred in not considering this accompanying opinion, and that if it had been considered, probable cause for the arrest could have been found. After citing the Ohio cases previously mentioned, Mr. Justice Clark, joined by Mr. Justice Black, declared that reasonably supportable facts determined by the highest court of a state should stand. In a separate dissent Mr. Justice Harlan agreed that the accompanying opinion should have been considered. Proceeding on the premise that the United States Supreme Court

43. OHIO SUP. CT. R. 6.

44. *Ibid.*

45. Thackery v. Helfrich, 123 Ohio St. 334, 336, 175 N.E. 449, 450 (1931).

46. 109 Ohio St. 14, 141 N.E. 689 (1923).

47. 87 Ohio St. 72, 100 N.E. 125 (1922).

48. *In re* Poage, 87 Ohio St. 72, 100 N.E. 125 (1922) as quoted in Perkins v. Bright, 109 Ohio St. 14, 141 N.E. 689, 690 (1923).

49. Williamson Heater Co. v. Radich, 128 Ohio St. 124, 125, 190 N.E. 403, 404 (1934). *Accord,* Hack v. City of Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963).

would have considered findings of fact made by the trial court, he stated that although Judge Zimmerman's opinion articulated the finding in question, this finding must be attributed to the trial court because the Court must assume that Judge Zimmerman's conclusion that the arrest was constitutionally permissible was based on the factual findings necessary to support it.[50] Thus, the Court did not argue over the nature of probable cause standards that should be applied, but rather over the source from which the facts should be taken in determining whether the standards had been met.

The Ohio Supreme Court syllabus for the *Beck* case stated that a search without a warrant is not unlawful where the officer has probable cause to believe that a felony has been committed and that articles seized during such a search are properly admissible into evidence at the trial. On the question of whether an informer must be named, the syllabus stated that it was not reversible error for the trial court to refuse to order the disclosure of the informer's identity where such disclosure would not be helpful to the accused in making his defense.[51] In his accompanying opinion Judge Zimmerman disclosed the facts upon which the Ohio Supreme Court apparently based its syllabus decision. He stated that the Cleveland police had good reason to believe that Beck was regularly involved in a gambling operation and that there had been testimony as to his previous convictions for this crime. Further, the police had been given information by an informer that Beck would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality, as predicted.[52]

D. Enlarged Scope of Review Used in the Beck Case

Judge Zimmerman's opinion indicates that there was no lack of common understanding at Beck's trial that the informer had given the officer the crucial information. According to the usual standards of review, any conflict as to inferences that could have been drawn should have been deemed resolved at the state level. While it is clear that in cases involving asserted violations of constitutional rights the Court is free to draw its own inferences from the established facts, the Court has stated that it does not

50. Beck v. Ohio, 85 Sup. Ct. 223, 230 n. 1 (1964) (dissenting opinion).
51. State v. Beck, 175 Ohio St. 73, 191 N.E.2d 825 (1963).
52. *Id.* at 75, 191 N.E.2d at 827.

sit in nisi prius to evaluate contradictory factual questions.[53] Rather, the fourteenth amendment presents the most far reaching and most frequent federal basis of challenging state criminal justice. Thus, when the Court reviews a state decision under a claim based on the fourteenth amendment, the state's responsibilities for enforcing its criminal law must be kept in mind, and the Court must exercise with due humility its merely negative function.[54] As Mr. Justice Harlan stated in his dissenting opinion:

> The distinction between facts and inferences may often be difficult to draw, but the guiding principle for this Court should be that when a question is in doubt and contemporaneous understandings have a part to play in its resolution, the Court should be slow to upset the state court's inferential findings.[55]

Judge Zimmerman's opinion definitely stated the role that the informer had played in bringing about Beck's arrest. But even if his opinion is not considered, sufficient facts are present in the record (which the Court did consider) or could be inferred to lead to the conclusion that the probable cause standards had been met. The officer testified that he received information from a known informer and then set out to find Beck at a specific locality. It can be inferred from this testimony that the information he received told him that Beck would be in a certain locality pursuing his illegal activity. It was never specifically stated that the informer had previously reliable information, but the fact that he was referred to as a known informer is some indication that the officer had had previous dealings with him.

The record also stated that when asked on what basis he had probable cause to stop Beck, the officer replied, "information and previous record and observation."[56] *Draper v. United States*[57] was used by the majority as the main precedent for denying the presence of probable cause in Beck's arrest. There, an informer told police that Draper was to alight from a train on one of two days, described how he would be dressed, and stated that he would be carrying narcotics. The federal narcotics

53. Ker v. California, 374 U.S. 23, 34 (1963).
54. Rochin v. People, 342 U.S. 165, 168 (1952).
55. Beck v. Ohio, 85 Sup. Ct. 223, 230 (1964) (dissenting opinion).
56. *Id.* at 231.
57. 358 U.S. 307 (1959).

agent who made the arrest did not know Draper and had only a picture by which to make an identification. The informer's tip was the only reason the agent had to suspect Draper was engaged in unlawful activity. The Court sustained the conviction stating that when the agent saw Draper alight from the train as the informer said he would and Draper fit the description given by the informer, the agent had personally verified the information and thus had probable cause to arrest. Thus, the Court inferred that the personal verification eliminated the need for a previously reliable informer. In the *Beck* case the record indicated that the officers were given accurate and specific information as to the identity of the criminal, the nature of the offense, and the time and place of its occurrence. This information was received from a known informer. The officers knew Beck and were aware of his previous record. It would seem that when they saw Beck in the predicted locality, they had personally verified the information given to them. They still could not be sure that Beck had the clearing house slips, just as the federal agent still was not sure that Draper was carrying narcotics. However, as the Court viewed the situation in *Draper*, since all the other information had been personally verified, there were reasonable grounds to believe that the remaining unverified piece of information was likewise true.[58] In no case is an officer required to be absolutely sure that a crime has been committed before he can make an arrest. He need only have a probable cause to so believe. The Court has frequently stated that when handling a probable cause question, they are dealing, as the name implies, with probabilities. These are not technical requirements, but rather, "they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[59]

Where the highest court of a state affirms a judgment of conviction entered by the state trial court, the judgment before the Supreme Court for review is the judgment which the highest state court made on the record before it and not the action of the state trial court.[60] If the judgment being considered was that rendered by the Ohio Supreme Court, at least the usual weight should be given to the facts they used to support their findings. The syllabus holding seems to be a weak way to deny consideration of the Zimmerman opinion. The weight of authority sup-

58. Draper v. United States, 358 U.S. 307 (1959).
59. *Id.* at 333.
60. Wolfe v. State, 364 U.S. 177, 194-95 (1960).

ports the view that the syllabus must be read in light of the facts, even when these facts are brought out in the accompanying opinion. On previous occasions the Supreme Court agreed with this authority and considered the accompanying opinion.[61]

While the Court has stated its intent to make an independent examination of the facts, findings, and record to determine if the fundamental criteria have been respected, they also indicated that findings made by state courts would be given the usual weight and that reasonableness is to be determined in the first instance by the trial court.[62] *Beck* took the position that since the appellate opinion was not equivalent to findings made by the trial court, the Court would consider the record de novo. They did not give any consideration to prior holdings, nor did they fill in any gaps in the record by drawing inferences favorable to the state.

Ker indicated the intent to make independent examinations and *Beck* stated that the reason for this type of review stemmed from the belief that the Court would not be able to provide full protection for constitutional rights unless it could freely and completely redetermine the facts involved in each case.[63]

That there have been, and still are, critics of this type of review is shown by the dissents in *Beck*. Mr. Justices Clark and Black warn that if the Court fails to recognize determinations made by the state courts, the Supreme Court will continually be involved in disputes with lower courts over the minutiae of facts present in every case. Mr. Justice Harlan believes that when the feel of a case may have been an important element in deciding an issue which is unclear on the record, the lower court was in a better position to determine whether a constitutional right had been infringed. Thus, the Supreme Court's independent judgment should yield to this greater capacity of the trial court. Such an approach is essential if the dual nature of our judicial system is to be maintained.

However, the majority of the Court seem firmly convinced that de novo review is the only trustworthy way to insure the protection of constitutional freedoms. *Beck* indicates the strength of this conviction, because here, the Court disputed the findings sua sponte. No attack had been leveled at them by the petitioner. He raised no question as to the source or content of the informa-

61. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).
62. Mapp v. Ohio, 367 U.S. 643, 653 (1961).
63. Beck v. Ohio, 85 Sup. Ct. 223, 230 (1964).

tion that had led to his arrest.[64] Rather, the Court took it upon itself to view the record with an open mind and question anything that was not clearly explained.

Assuming that the Court will not be disposed to change its position concerning scope of review, a valuable lesson can be learned from the *Beck* case. Herein Mr. Justice Stewart remarked that when the constitutionality of the arrest was questioned it was incumbent on the prosecution to demonstrate with extreme specificity exactly what the informer said and why the officer thought the information was credible. Since the Court has indicated that it will not draw inferences from the facts presented in the record, that it will rely solely on the record, and that it will not be bound by lower court findings, care should be taken to see that the record is complete and accurate in its report of the case. Such a step is in lieu of meeting the Court head on in a dispute over appellate scope of review.

Beck further indicates that the Court's standards for a valid arrest are derived from federal court precedents and federal rules standards. Thus, in establishing arrest procedures, it would be wise for state officials to keep in mind the requirements to which federal agents must adhere. If this is done, it is likely that a great many more state court convictions will be upheld on appeal.

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64. Judge Zimmerman indicated that Beck had "made no actual defense and by stipulation the cause was submitted to the Court solely on evidence furnished by police and introduced at the hearing on the motion to suppress." State v. Beck, 175 Ohio St. 73, 76, 191 N.E.2d 825, 828 (1963).

CRIMINAL LAW—FEDERAL ESCAPE ACT—WHAT CUSTODY NECESSARY TO CONSTITUTE ESCAPE A CRIME*

In November of 1964, the District of Columbia Circuit Court handed down the decision of *Frazier v. United States*,[1] a case which involved the interpretation of the words "custody of the Attorney General" found within the Federal Escape Act.[2] Cases interpreting this act have not been particularly numerous, but the wide divergence of opinion and the general confusion that has resulted make this case worthy of comment.

Leroy Frazier was convicted of narcotics violations and placed in the custody of the United States Attorney General. He was subsequently transferred to Saint Elizabeths Hospital pursuant to a statute which authorized the director of the department of corrections to make such a transfer if a prisoner is found to be mentally ill. Frazier escaped from the hospital and was convicted of violating the Federal Escape Act for escaping from the custody of the Attorney General. He appealed, contending that his escape was not from the "custody of the Attorney General," and therefore not a violation of the Federal Escape Act. The majority found that the "custody" intended was not limited to actual physical control but denoted a type of legal or constructive custody. Thus, the Attorney General would retain custody even though the prisoner was assigned to an institution over which the Department of Justice had no control. It would be a continuous custody which followed the prisoner from one institution to another.

There was a vigorous dissent by Judge Fahy[3] who felt that the Attorney General no longer had physical custody of the appellant after he was transferred to an institution which was not under his supervision, administration or control. Judge Fahy felt that this was an escape from Saint Elizabeths Hospital and not from the custody of the Attorney General. He pointed out that there are other provisions of the Federal Escape Act applicable to an escape from an institution in which one has been confined by direction of the Attorney General, but that the appellant was not indicted under those provisions. Judge Fahy con-

*Frazier v. United States (D.C. Cir. 1964).

1. 339 F.2d 745 (D.C. Cir. 1964).
2. 18 U.S.C. § 751 (1952).
3. Frazier v. United States, 339 F.2d 745, 747 (D.C. Cir. 1964).

tinues by reasoning that if this constructive custody remained after the transfer of physical custody from the Attorney General to another department, then it would also remain after the appellant's escape from Saint Elizabeths. He would be escaping only from the hospital and not from the constructive custody of the Attorney General which would follow him, and would preclude the escape from being an escape at all.

A. Escape—The Crime and its Consequences

The Federal Escape Act in part provides:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both. . . .[4]

In *United States v. Brown*[5] the Supreme Court stated some of the more serious considerations leading to the adoption of this statute:

> Escapes and attempted escapes from penal institutions or from official custody present a most serious problem of penal discipline. They are often violent, menacing, as in the instant case, lives of guards and custodians, and carry in their wake other crimes attendant upon procuring money, weapons, and transportation, and upon resisting recapture.[6]

The association of violence with the crime of escape is to be expected. Escapees are desperate men concerned only with regaining their freedom. They have known imprisonment and are fully aware of the punishment which awaits them upon apprehension.

The crime of escape has no special relationship to the crime for which the prisoner is held.[7] A misdemeanant in the process

4. 18 U.S.C. § 751 (1952).
5. 333 U.S. 18 (1948).
6. *Id.* at 21 n. 5, quoting from the government's brief.
7. United States v. Person, 223 F. Supp. 982, 985 (S.D. Cal. 1963).

of escaping is equally as dangerous as an escaping felon. It is also apparent that length of time served and duration of sentence remaining bear no relationship to the creation of danger and that the propriety of confinement is also irrelevant to the offense. These considerations produce the holding that a prisoner cannot test the correctness of his confinement by means of an escape.[8]

It would seem that the purpose of the Federal Escape Act is to prevent these evils and not to punish the failure of a physically free man to return to his jailers.[9] It logically follows that custody of some sort is required as an element of the offense. *Calabria v. State*[10] held that the state owes the duty of careful, efficient and effective care and treatment to patients at a hospital for epileptics and that the state would not be justified in keeping the patients under such conditions of restraint that a mere absence without leave would constitute an escape. The court stated that the use of the word "escape" presupposes restricted confinement.

A broad definition of escape is the voluntary departure of a prisoner from the limits of his custody.[11] Custody consists of the detention or restraint of a person against his will.[12] It entails keeping the prisoner "either in actual confinement or surrounded by physical force sufficient to restrain him from going at large or obtaining more liberty than the law allows."[13] Custody has been held to mean nothing less than actual imprisonment.[14]

B. Case Law—The Doctrine of Constructive Custody versus Physical Custody

In the past the judiciary agreed with the requirement of physical custody. In *Wilkes v. Slaughter*[15] the court held that cus-

8. See Lucas v. United States, 325 F.2d 867 (9th Cir. 1963); Godwin v. United States, 185 F.2d 411 (8th Cir. 1950); Bayless v. United States, 141 F.2d 578 (9th Cir. 1944).

9. United States v. Person, 223 F. Supp. 982, 985 (S.D. Cal. 1963).

10. 176 Misc. 925, 29 N.Y.S.2d 477 (1941).

11. See 19 AM. JUR. *Escape* § 2 (1939); BLACK, LAW DICTIONARY 639 (4th ed. 1951); 1 BOUVIER, LAW DICTIONARY, RAWLES THIRD REVISION 1068 (8th ed. 1914; WEBSTER, NEW INTERNATIONAL DICTIONARY 871 (2d ed. (1963).

12. See BLACK, LAW DICTIONARY 460 (4th ed. 1951), and authorities there cited.

13. 30 C.J.S. *Escape* § 5 (1942).

14. *Ex parte* Powers, 129 Fed. 985 (W.D. Ky. 1904); Turner v. Wilson 49 Ind. 581 (1875); Smith v. Commonwealth, 59 Pa. 320 (1868).

15. 10 N.C. 211 (1824).

tody implies physical force, and the moment that force is withdrawn, there is no longer any legal custody; the prisoner becomes a free agent. In *Steere v. Field*[16] where the prisoner had possession of the keys to all the doors both when the jailer was at the jail and when he was at home, the court held that the prisoner was not in custody even though he never left his place of imprisonment. And, in *United States v. Hoffman*[17] where men who had been placed in jail were allowed to leave to go to the dentist for all day visits and sometimes to go out at night without guards, the court held that these men were not in the custody of their jailer even though the prisoners always returned.

The court in *Frazier* relied on three cases as precedents for the novel expansion of the basic definition of custody. A review of these cases clearly indicates that the idea of constructive custody still retains the notion of some, although possibly slight, physical detention.

In *Giles v. United States*[18] the prisoner was sentenced to confinement in Alcatraz. He was performing, under general supervision, chores assigned to him on the island when he managed to slip under the dock and into a supply boat while the guards were looking the other way. His defense to a charge of escape under the act was that he was not in the custody of the Attorney General, that the guard did not follow him around and keep him under observation every moment. Faced with these facts the Ninth Circuit held that even though the prisoner was not watched every minute, he was still in custody within the meaning of the Federal Escape Act.

The factual situation of this case is extremely different from that of the *Frazier* case. There, the prisoner was confined in a mental hospital located in a large city. The aim of this institution was the care and treatment of its patients. In *Giles*, however, the prisoner was sentenced to confinement at the penitentiary on Alcatraz Island, an island whose sole purpose was the imprisonment of criminals and which consists of only about ten or twelve acres outside of prison walls. Alcatraz was called the "Rock" and escape was generally considered to be impossible. Also, the appellant in *Giles* was on a work detail under the supervision of prison guards and was in actual physical custody. It is difficult to visualize how any conception of constructive custody

16. 22 Fed. Cas. 1210 (No. 13350) (C.C. R.I. 1822).
17. 13 F.2d 269 (N.D. Ill. 1925).
18. 157 F.2d 588 (9th Cir. 1946).

might enter the case. Despite this fact, one judge felt that even in this situation sufficient physical custody had not been shown. Judge Denman in his dissenting opinion[19] stated that there was no evidence presented to show that anyone remained as a physical custodian of the prisoner and that an interpretation of the statute to mean something other than physical custody would be absurd.

The second case relied upon to support the court's argument for constructive custody was *United States v. Piscitello*.[20] Here, the defendant who was a narcotics addict was sentenced to the Federal Public Health Service Hospital in Lexington, Kentucky, where he was released under guard to attend the funeral of his mother in New York City. In the Pennsylvania station he escaped from the two guards who were returning him to the hospital. The Second Circuit held that the defendant was a federal prisoner at an institution properly designated by the Attorney General for his confinement and that the public health service guards from whom the prisoner escaped were "representatives of the Attorney General" within the provisions of the Federal Escape Act. Obviously, this case involves no constructive custody.

The third case cited by the majority in *Frazier* was *Tucker v. United States*[21] where the defendant was removed from Alcatraz to the Los Angeles County Jail in order that he might testify at a criminal proceeding. This transfer was arranged under a government contract between the Bureau of Prisons and the county jail. The contract also provided that the local sheriff was to keep the prisoner in custody. When the prisoner became ill the jail doctor directed that the defendant be removed to the Los Angeles County General Hospital for emergency treatment. A deputy sheriff took him to the jail unit of the hospital which was by statute a part of the Los Angeles County Jail. In order to take x-rays, the prisoner was removed to another portion of the hospital not within the jail unit. An orderly took the handcuffed prisoner on a stretcher into an elevator and down to a lower floor. As he was being pushed down a corridor, the prisoner jumped from the stretcher and ran out of the hospital.

On an appeal from a conviction for escape, the prisoner contended that he was not in custody because he was not in the jail

19. *Id.* at 590 (dissenting opinion).
20. 231 F.2d 443 (2d Cir. 1956).
21. 251 F.2d 794 (9th Cir. 1958).

unit, was not accompanied by a deputy sheriff and the orderly was not an authorized representative of the Attorney General. The Ninth Circuit disagreed and held that after being removed from Alcatraz to the county jail by a United States Marshal, from the county jail to the jail unit of the hospital by a deputy sheriff, and from the jail unit to another portion of the hospital by an orderly, the prisoner was still in the custody of the United States Attorney General.

In these three cases the various courts took the trouble to set out myriad facts pointing to the control which was being exercised over the person of the prisoner. It would seem that facts relating to physical custody would not be important if the court did not still feel that some degree of physical custody was necessary to a conviction under the Escape Act.

A case which might be argued as support for such a theory of custody as was advanced in *Frazier* is *Johnson v. United States*.[22] Here, a prisoner who escaped from the honor farm of the United States Penetentiary at Leavenworth, Kansas, claimed that because of the nature of the farm he did not escape from "custody". The court, conceding that he was accorded wide freedom and that security measures were minimal, characterized this defense as frivolous. It appears that the court was not concerned with the lack of physical custody.

United States v. Person[23] was a definite rejection of the doctrine of constructive custody. There, after being sentenced to the custody of the Attorney General, the defendant was committed to the Federal Correctional Institute at Lompoc, California. He was later transferred from Lompoc to the Federal Pre-Release Guidance Center where he was allowed to go to an outside job but was required to return at night. When he was given a five hour night pass so that he could visit his grandmother, he did not return. The district court in this case went back to the basic definition of custody as being purely physical and decided that the prisoner was not in "custody" within the meaning of the Federal Escape Act and therefore was not guilty of violating this statute. They stated that the comments on custody in *Johnson* were characterized as being the purest kind of dictum, and the court did not perceive *Giles* as supporting any theory of constructive custody. They also felt that *Tucker*, which involved a man being wheeled along on a stretcher by an orderly of a hos-

22. 313 F.2d 953 (8th Cir. 1963).
23. 223 F. Supp. 982 (S.D. Cal. 1963).

pital and who was wearing a white gown and handcuffs, could not be compared to the case of a prisoner who is allowed to go about physically unfettered, dressed like any other man.

C. The Result of the New Doctrine

Recent cases generally have attempted to extend the common conception of physical custody, but to what avail? Judge Fahy in his dissenting opinion in *Frazier* points out that if there were such a thing as constructive custody, then the prisoner would have escaped from such custody only if his original commitment for the term of his imprisonment had the effect of continuing the custody of the Attorney General regardless of any supervening transfer of physical custody. If this be the case, then the resulting constructive custody of the Attorney General would remain even after the prisoner's escape from Saint Elizabeths. He would only be able to escape confinement and could never escape constructive custody because it would follow him wherever he went.

In *Nace v. United States*[24] the defendant was sent to the Federal Pre-Release Guidance Center at Los Angeles, where he was permitted to go out on a job with a private employer as a part of the Guidance Center program. Following one of these trips, he did not return to the Guidance Center. His contention was that because of the freedom which was allowed him and the minimal security measures over him, he was not in such custody as could make his failure to return an escape. The Eighth Circuit dismissed this contention as frivolous and said that whatever privileges the prisoner enjoyed, he was, nevertheless, under the legal restraint of his sentence. The lower court[25] had said that the appellant was committed to the custody of the officer in charge of the center and that the officer had not abandoned him. If the officer had not abandoned him and this constructive custody remained after the prisoner left the guidance center, how could he escape that constructive custody which followed him and was seemingly with him at all times for the duration of his sentence?

Judge Denman, dissenting in *Giles*,[26] comprehended the government's argument to be that the right of the Attorney General to have custody means that the prisoner is in his custody any-

24. 334 F.2d 235 (8th Cir. 1964).

25. Nace v. United States, 231 F. Supp. 528 (D. Minn. 1964).

26. Giles v. United States, 157 F.2d 588, 590 (9th Cir. 1946) (dissenting opinion). See text accompanying notes 18 and 19 *supra*.

where in the area of the Attorney General's authority, which would be the entire United States. The Government expressed its view that it is not necessary to escape from the actual physical custody of the Attorney General or one of his authorized representatives, and the prisoner is in the custody of the Attorney General even though there is no physical custody whatsoever. Denman stated that if this were true, the crime of escape from custody could never be committed in the United States, for no matter where the felon is or what he does, he is still in custody.

D. Conclusion

The sole purpose of the Federal Escape Act is to provide punishment for the crime of escape. It is an elastic act and contains several provisions under which an indictment can be brought. A prosecutor could bring an indictment charging that the prisoner escaped or attempted to escape from an institution in which he had been confined by direction of the Attorney General.[27] An indictment might also be brought charging that the prisoner escaped or attempted to escape from custody under or by virtue of any process issued under the laws of the United States by any court, judge or commissioner.[28] Judge Chambers, concurring in *Tucker v. United States*,[29] thought the latter alternative would have been a better basis for the indictment, rather than the one used. It was his belief that the majority opinion implied that "custody of the Attorney General" is a necessary prerequisite to a violation, and his purpose in writing a separate opinion was to quash any thoughts that the indictment form which was used in this case is always required.

Why is it that prosecutors with these numerous provisions before them choose to bring an indictment charging that the prisoner was in the custody of the Attorney General? In some cases such custody is difficult to prove while there are other provisions in the escape statute which are more fitting to the particular case before the court. *Rutledge v. United States*[30] recognized the established rule that criminal statutes must be construed strictly and favorably to liberty of citizens and ap-

27. See Strickland v. United States, 339 F.2d 866 (10th Cir. 1965); United States v. Kinsman, 195 F. Supp. 271 (S.D. Cal. 1961).

28. See, *e.g.*, Payne v. United States, 85 F. Supp. 404 (M.D. Pa. 1949).

29. 251 F.2d 794, 800 (9th Cir. 1958) (concurring opinion). See text accompanying note 21 *supra*.

30. 146 F.2d 199 (5th Cir. 1944).

plied it to the Federal Escape Act. The courts in expanding the definition of custody have not followed this maxim. Custody means and has always meant physical custody. The courts, in trying to administer the law by punishing the offender, have been forced by prosecutors who bring indictments charging "custody of the Attorney General" to create the legal fiction of constructive custody. This has developed to such an extent that it precludes an escape from being an escape at all. The startling thing about this problem is the simplicity of the solution. The dispute in *Frazier* could have been avoided and the case disposed of with much less difficulty if the prosecutor had charged in the indictment that the prisoner escaped from an institution in which he was confined by direction of the Attorney General. Rather than the courts trying to follow the prosecutors and enforce their indictments by distorting the theory of the crime of "escape" and the meaning of the word "custody", they might simply return to the proper meaning of the word, and no doubt, after a few cases have again established that physical custody is required, prosecutors will take more care in the framing of their indictments.

LARRY J. RITCHIE

LABOR LAW—PLANT CLOSURE—INHERENT AND INTENTIONAL DISCRIMINATION UNDER SECTION 8(a) (3)*

Founded in 1883, the now defunct Darlington Manufacturing Company operated a print cotton mill in Darlington, South Carolina. In March, 1956, the Textile Workers Union of America began a campaign to organize Darlington's employees. Following a union election victory,[1] Darlington closed its doors and disposed of its machinery and equipment at auction. The union then filed unfair-labor practice charges with the National Labor Relations Board charging that, by closing its plant, Darlington had violated section 8(a) (3) of the National Labor Relations Act.[2] The union further charged that Darlington was one of a chain of mills controlled by Deering, Milliken & Company;[3] that Deering Milliken occupied a "single employer" status to the employees of Darlington and the related corporations; and that, as such, Deering Milliken was liable for the alleged unfair labor practices of Darlington.

* Textile Workers v. Darlington Mfg. Co. (Sup. Ct. 1965).

1. Of the 523 eligible voters, 256 voted for the union and 248 against. Darlington Mfg. Co., 139 N.L.R.B. 241, 270 (1962).

2. It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

29 U.S.C. § 158(a) (3) (1958). The union further charged that Darlington violated § 8(a) (1) by coercing their employees in the exercise of their protected rights and § 8(a) (5) by refusing to bargain with the union after the election. For a general discussion of business changes and their effect on § 8(a) (5) duty to bargain see Maddux, *Labor Law Problems Arising From Changes in Business Operations,* 20 BUS. LAW. 573 (1965); *Burnstein, Subcontracting and Plant Removals,* 13 LAB. L.J. 405 (1962); Note, 77 HARV. L. REV. 1100, 1103 (1964); Note, 37 NOTRE DAME LAW. 357 (1962).

3. When Darlington liquidated in 1956, it had outstanding 150,000 shares of common stock, owned as follows:

Deering, Milliken & Co.	41.4%
Cotwool Manufacturing Corp. (of which members of the "Milliken family" owned a majority of shares)	18.3%
Individuals of the "Milliken Family"	6.4%
Directors and employees of Deering, Milliken & Co.	2.9%
Others (more than 200 scattered over the United States)	31.0%
Total	100.0%

Brief for Respondent, p. 3, Textile Workers v. Darlington Mfg. Co., 85 Sup. Ct. 994 (1965).

Darlington maintained that its closure was prompted by economic considerations[4] and that, at all events, it had the absolute right to go out of business regardless of the reason. It listed eight factors that influenced its decision to liquidate, six of which, according to the Board, fit the traditional concept of "economic" considerations; the two remaining factors pertained to the economic impact of the union election on the profitable operations of the mill.[5] The Board rejected Darlington's contention that its right to go out of business was absolute[6] and held that, but for the organizational activities of its employees, the decision to close would not have been made. The Board further held that the union election victory was not such an economic factor as was contemplated by the act.[7]

4. Aside from those factors which had rendered Darlington Mill a marginal operation for a number of years, three "new" factors were cited:

(1) a projected loss of 6 cents per pound on products which it manufactured in 1956 if they were carried into 1957 with the same costs and the same prices;

(2) a wage increase granted at other mills and the loss that would result should it be granted at Darlington; and

(3) the increase in textile imports from Japan.

Darlington Mfg. Co., 139 N.L.R.B. 241, 273-74 (1962).

5. The union campaigned primarily on its promise to the workers that it would prevent Darlington from carrying out the work assignments and procedures that the company believed necessary to reduce costs to the point where the plant could continue in business.

Brief for Respondent, p. 6, Textile Workers v. Darlington Mfg. Co., 85 Sup. Ct. 994 (1965).

6. Darlington argued that, by shutting the mill, it had ceased to be an employer within the meaning of the Act. Conceding that the Act did not define specifically the characteristics of an "employer," the Board found, however, that the discharged employees remained "employees within the meaning of the Act" and reasoned, apparently, that for every "employee" there must be an "employer."

Darlington's discharged workers remained employees within the statutory definition, and their employment relationship vis-a-vis their employer did not terminate.

Darlington Mfg. Co., 139 N.L.R.B. 241, 248 (1962), citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 190-91 (1941). *Phelps Dodge,* however, though it was concerned with discharged employees, did not involve an employer who had gone out of business.

7. When an employer discharges its employees for selecting a union to represent them, the motivation is not "economic" in the sense contemplated by the Act—notwithstanding the employer's belief that it could not afford to pay increased wages that the union representative might demand. The overall effect of Darlington's listing of the eight so-called "economic" factors is an admission that the employees' union activities were, in part, the *cause* of its decision to close the mill.

Darlington Mfg. Co., 139 N.L.R.B. 241, 245 (1962), citing Industrial Fabricating, 119 N.L.R.B. 162 (1957). (Emphasis added.) The Board adopted the trial examiner's findings that Darlington had violated § 8(a) (1) of the Act by:

(a) interrogation of employees with respect to their activities on behalf of the union;

> Moreover, even assuming, as the Respondent contends, that six genuine economic factors as well as the employees' union activities were responsible for the closing of the mill, Darlington's action was no less unlawful. A plant shutdown resulting in the discharge of employees that is partly due to employees' union activities constitutes an unfair labor practice.[8]

The Board found sufficient common ownership, common control over labor relations,[9] and common control over operations among Deering Milliken and its related corporations, including Darlington, to constitute a single employer[10] responsible for unfair labor practices and ordered Darlington to provide back pay to its dis-

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(b) statements made before the election that Darlington would close the plant if the employees selected the union as their bargaining agent;

(c) statements made connecting the decision to close the plant with the employees activities on behalf of the union; and

(d) encouraging the employees to sign the petition disavowing the union that circulated after the election.

Darlington Mfg. Co., 139 N.L.R.B. 241, 244-45 (1962). The trial examiner also found, and the Board adopted such findings, that Darlington had violated §8(a) (5) by anticipating the workers union demands and terminating its operations to avoid bargaining over such demands. *Id.* at 252-53.

8. Darlington Mfg. Co., 139 N.L.R.B. 241, 246 (1962), citing NLRB v. Jamestown Sterling Corp., 211 F.2d 725 (2d Cir. 1954) and NLRB v. Whitin Mach. Works, 204 F.2d 883 (1st Cir. 1953). Neither of these cases involves an attempted economic justification for a plant closure. In *Jamestown Sterling,* the court held that the National Labor Relations Act was violated when an employee was discharged partly for neglect of duty and partly for his union activities. *Whitin Mach. Works* held that a discharge was unlawful only when motivated more by an employee's union activities than his poor performance.

9. Centralized control over labor relations is a factor frequently stressed by the Board in finding common control of separate entities. See, *e.g.,* Dearborn Oil & Gas Corp., 125 N.L.R.B. 645 (1959); Editorial "El Imparcial," Inc., 123 N.L.R.B. 1585, 1593 (1959), *enf'd* 278 F.2d 184 (1st Cir. 1960); Thomas Morelli, 123 N.L.R.B. 635 (1959); Combined Century Theatres, Inc., 120 N.L.R.B. 1379, 1380-81 (1958); Aconsti Eng'r, Inc., 114 N.L.R.B. 1415, 1416 (1955); National Electronic Mfg. Corp., 113 N.L.R.B. 620 (1955). It appears, however, that common control of labor relations alone is not sufficient.

> We believe that it is proper to require that both elements—common ownership and common control—coexist before we assess joint liability.

Dearborn Oil & Gas Corp., 125 N.L.R.B. 645, 647 (1959). Common ownership without common control over labor relations apparently is also insufficient. Knight Newspapers, Inc., 138 N.L.R.B. 1346 (1962).

10. (1) *Common ownership.* The Board noted that the "Milliken family" owned, either directly or individually through Deering, Milliken & Co. and Cotwool Manufacturing Corp., 66% of Darlington and from 88% to 55% of all the affiliated corporations. Darlington Mfg. Co., 139 N.L.R.B. 241, 256 (1962).

(2) *Common control over labor relations.* In this "crucial area," the Board found that Roger Milliken, as president of all but one of the corporations, exercised ultimate control over the labor relations of all the corporations and that the major decisions were exclusively in his hands. *Id.* at 256-57.

(3) *Control over operations.* The board stressed the integrated administration of tax and accounting procedures, insurance and financial reports, plus partici-

charged employees until they should obtain substantially equivalent employment elsewhere.[11] However, Darlington might reduce its back pay liability by an affirmative showing that on a particular date it would have ceased operations or laid off a portion of its labor force even had the union not won representation.[12]

Sitting en banc, the United States Court of Appeals, Fourth Circuit, by a divided vote and with a strong dissent, denied enforcement of the order.[13] Even assuming that unionization was responsible for the closure, the court held that an actual, unfeigned, and permanent discontinuance, either of all or only part of an employer's operations,[14] is his absolute prerogative. The majority maintained that the fundamental purpose of the National Labor Relations Act is to protect the rights of both labor and industry only so long as an employer-employee relationship exists; that it compelled no one to become or remain an employer or an employee; and that either might lawfully withdraw from that status, so long as the obligations of any employment contract have been met.[15]

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pation in details of operations of the related corporations by other officers of Deering Milliken. *Id.* at 257.

Members Leedom and Rogers dissented as to the finding of a "single employer." Member Leedom found no "common ownership" within the meaning of the decided cases, since, while members of the "Milliken family" owned stock in all the corporations involved, all such members did not own stock in *each* of the corporations. *Id.* at 262 (dissenting opinion).

Member Rogers argued that the mere potentiality of common control and integrated operations, absent an affirmative showing of the exercise of such potential, is not sufficient grounds to support a finding of a single employer. *Id.* at 263 (dissenting opinion). See Knight Newspapers, Inc., 138 N.L.R.B. 1346 (1962).

11. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197-200 (1941). Deductions must be made, not only of the actual earnings of employees during the period, but also of any amounts which the employees failed without excuse to earn.

12. In any event the Trial Examiner's finding that the record establishes that Darlington's mill would not have closed but for the employee's union activities gives rise to the presumption that Darlington would have continued to operate the mill absent that union activity.

Darlington Mfg. Co., 139 N.L.R.B. 241, 254 n.38 (1962).

13. Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963) (Chief Judge Sobeloff and Judge Bell dissenting).

14. Even assuming that Darlington was found to be a division of Deering Milliken under the single employer concept, the court held that a *part* of a business could be abolished with impunity when the dissolution was entire, bona fide, and irrevocable. *Id.* at 687.

15. If a cessation of business is adopted to avoid labor relations, the proprietor pays the price of it: permanent dissolution of his business, in whole or in part. A statute authorizing an order forcing the continued pursuit of operations in these circumstances would be of doubtful validity.

Id. at 685. The dissenters argued that the plant closure violated the basic policies embodied in the National Labor Relations Act as well as the literal language of § 8(a) (3). They concurred in the reasoning of the Board that the

On writ of certiorari to the Supreme Court, the decision of the court of appeals was vacated and the case remanded for further proceedings.[16] The court upheld an employer's absolute right to terminate his entire business[17] but held that a partial liquidation[18] is an unfair labor practice in violation of section 8(a) (3) if motivated by an intent to chill unionism in any of the remaining plants and if the employer might reasonably have foreseen that his closing would likely have that effect. A complete liquidation yields no future benefit to the employer, but a discriminatory partial closing may afford leverage, as in the case of a "runaway shop" or a temporary closing, for discouraging the free exercise of protected rights among the remaining employees. The closing of a plant immediately following a union election victory is not, however, absent an inquiry into the employer's motives, inherently discriminatory.

A. The Discouragement Factor

Section 8(a) (3) of the National Labor Relations Act provides that:

> It shall be an unfair labor practice for an employee . . . by discrimination in regard to hire or tenure of employment or

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economic and financial effects of unionization on the future profitable operations of the business were not such factors as the employer might lawfully consider in his decision to liquidate.

> A belief that union wage demands and bargaining attitudes towards work loads may make future operations unprofitable does not constitute an economic reason which would excuse the petitioner's conduct in this case.

Id. at 691. The dissenters also found sufficient evidence to support the Board's conclusion that Darlington and Deering Milliken constituted a "single employer."

16. Textile Workers v. Darlington Mfg. Co., 85 Sup. Ct. 994 (1965) (Justices Stewart and Goldberg not participating).

17. A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Act. We find neither.

Id. at 999.

18. In setting the applicable standards for the finding of a "single employer" for purposes of establishing an 8(a) (3) violation, the Court stressed that organizational integration of plants and corporations was not necessary. The persons exercising control over a plant being closed for anti-union reasons must (1) have an interest in another business sufficient to give promise of their benefitting from the discouragement of unionization in that business; (2) close their plant in order to produce that result; and (3) occupy a relationship to the other business which makes it reasonably foreseeable that its employees will fear that that business will also be closed if they participate in organizational activities. *Id.* at 1002.

any term or condition of employment to encourage or discourage membership in any labor organization. . . .[19]

As all employer acts resulting in the discharge of any or all of his employees affect their tenure of employment, the issue in all 8(a) (3) cases is whether the action complained of encouraged or discouraged membership in a labor organization and, if so, whether such encouragement or discouragement was accomplished through discrimination.

It has been said that discouragement is a "subtle thing" requiring "a high degree of introspective perception."[20] Whether or not this is true, the courts have not required proof of actual discouragement; rather, they have spoken in terms of a tendency to discourage, basing violations on the foreseeable effect[21] of the employer's actions rather than actual discouragement in fact.[22] The Supreme Court has concurred with this reasoning, stating that the employees discriminated against need not be the ones discouraged and that the change in the employees' desire to join a union need not have immediate manifestations.[23] But any stand taken by an employer which effectively blocks a union demand tends in some way to discourage support of the union, and it is not discouragement alone or discrimination alone which is prohibited—only a combination of the two.[24]

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19. Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 158(a) (3) (1958).

20. Radio Officers' Union v. NLRB, 347 U.S. 17, 51 (1954).

21. Mr. Justice Harlan in *Darlington* states that an unfair labor practice is made out if the employer had the requisite intent of "chilling" unionism and if he "may reasonably have foreseen that such closing will likely have that effect." Textile Workers v. Darlington Mfg. Co., 85 Sup. Ct. 994, 1002 (1965).

22. See, *e.g.*, Summit Mining Corp. v. NLRB, 260 F.2d 894, 898 (3d Cir. 1958); NLRB v. J. I. Case Co., 198 F.2d 919, 923 (8th Cir. 1952); 65 COLUM. L. REV. 537, 538 (1965).

> . . . no statistical proof of an actual 'encouraging' [or discouraging] effect on union membership need be shown where the discriminatory conduct by its nature 'tends to encourage or discourage' union membership.

NLRB v. Gaynor News Co., 197 F.2d 719, 722 (2d Cir. 1952), *aff'd* Radio Officers' Union v. NLRB, 347 U.S. 17 (1954). However, one commentator appears to favor the requirement of proof that membership in a labor organization was in fact discouraged.

> . . . it would be absurd to suppose that section [8(a) (5)] makes it an unfair labor practice unsuccessfully to attempt to refuse to bargain collectively. So it is with section [8(a) (3)].

Ward, *"Discrimination" under the National Labor Relations Act,* 48 YALE L.J. 1152, 1165-66 (1939).

23. Radio Officers' Union v. NLRB, 347 U.S. 17, 51 (1954).

24. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited.
Id. at 42-43.

B. Inherent Discrimination

Basically, acts of discrimination are of two types. One type involves differentiation or unequal treatment among members of a group. The second involves a change in treatment of the group as a whole. The latter is discriminatory in its effect, while in the former the discrimination is inherent in the act itself. However, discrimination is, by nature, an imprecise term.[25] In its broadest sense, as used above, it encompasses all differentiation in treatment[26] and is involved in all employer acts in departing from the status quo. Yet in its more colloquial sense it has a connotation of prejudice or hostility and injurious intent. Consequently, for discrimination to constitute a violation of section 8(a) (3), it generally must be shown not only that the act of the employer discouraged union membership but also that he intended to effect that result.[27]

The Supreme Court, however, has recognized that certain employer conduct so inherently discourages union membership that it is violative of the statute regardless of motive.[28] Moreover, not only is specific evidence of intent unnecessary in such cases, but proof of a legitimate business purpose will not necessarily preclude the establishment of a violation of 8(a) (3).[29] Such conduct is saved only by an overriding business purpose that is sufficiently significant to justify the deterrent effect on

25. Judge Medina of the United States Court of Appeals, Second Circuit has observed in a recent case what he terms the "natural tendency of human beings to attribute their lack of success to discrimination of one kind or another against them." See NLRB v. Miranda Fuel Co., 326 F.2d 172, 176 (2d Cir. 1963).

26. Thus two elements seem to be of essence—differentiation and affirmative action in the making thereof.

Ward, *"Discrimination" under the National Labor Relations Act,* 48 YALE L.J. 1152, 1170 (1939).

27. We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally does not amount to a violation of § 8(a) (3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect.

Textile Workers v. Darlington Mfg. Co., 85 Sup. Ct. 994, 1003 (1965).

28. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17 (1954). In *Erie Resistor,* the Court held that it was an unfair labor practice regardless of motive for an employer to grant a twenty year seniority credit to strike breakers. *But see* Mr. Justice Harlan's concurring opinion. *Id.* at 237. In *Radio Officers',* the Court held that a legitimate motive did not save the employer's conduct of granting preferential wages to union members over non-union members. See also Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961), holding that an agreement by which an employer hired only those prospective employees referred through a union hiring hall was not "inherently discriminatory." See generally, 48 VA. L. REV. 128 (1962).

29. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963).

employee rights.[30] The motivation factor in this type of discrimination is based on the common law concept of foreseeability—that the employer is held to intend the very consequences which foreseeably and inescapably flow from his actions.[31] Yet foreseeability of discouragement alone is not a sufficient basis to establish a violation;[32] the conduct itself must be so patently destructive of the employees' organizational rights as to be "inherently discriminatory."

Although the specific acts of the employer that would fit this test remain in doubt, two recent Supreme Court cases have clarified somewhat the inherent discrimination concept. In *American Ship Building Co. v. NLRB*[33] and *NLRB v. Brown*,[34] a minority of the Supreme Court were of the opinion that, in cases where an intent to discourage is absent, the correct test for determining a violation is the balancing of conflicting legitimate interests[35]—whether the business justification for the employer's action outweighs the discouragement of employees' organizational rights. This concept of inherent discrimination would then apply to all cases where a significant anti-union effect is foreseeable and where the Board determines as a matter of policy that the preponderant interests in conflict favor the union.

A majority of the Court, while not completely rejecting this balancing test, would require more than a mere imbalance of interests between the employer and the union. The employer's conduct must be inherently and demonstrably destructive of employee rights and completely devoid of significant economic

30. *Id.* at 231. See Mr. Justice Harlan's Concurring opinion. *Id.* at 237. *Compare* Olin Mathieson Chem. Corp. v. NLRB, 232 F.2d 158, 161 (4th Cir. 1956) *with* NLRB v. Potlatch Forests, Inc., 189 F.2d 82 (9th Cir. 1951). See also NLRB v. American Aggregate Co., 305 F.2d 559 (5th Cir. 1962); 39 NOTRE DAME LAW. 617 (1964); 4 BOSTON COLLEGE INDUS. AND COMMERCIAL L. REV. 438 (1963).

31. Radio Officers' Union v. NLRB, 347 U.S. 17, 45 (1954); NLRB v. Electric Steam Radiator Corp., 321 F.2d 733, 737 (6th Cir. 1963); Summit Mining Corp. v. NLRB, 260 F.2d 894, 898 (3d Cir. 1958).

> It is a well recognized rule in labor relations law that 'a man is held to intend the foreseeable consequences of his conduct'.

NLRB v. Tennessee Packers, Inc., 339 F.2d 203, 204-05 (6th Cir. 1964).

32. NLRB v. Great Atl. & Pac. Tea Co., 340 F.2d 690, 694 (2d Cir. 1965); NLRB v. Community Shops, Inc., 301 F.2d 263 (7th Cir. 1962). See concurring opinion of Mr. Justice Harlan, Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 677-85 (1961).

33. 85 Sup. Ct. 955 (1965).

34. 85 Sup. Ct. 980 (1965).

35. Citing NLRB v. Truck Drivers Local Union, 353 U.S. 87, 96 (1957).

justification.[36] Therefore, although under the circumstances the effect of the employer's conduct is so prejudicial to the employees' organizational rights as to outweigh the employer's interests, the showing of a legitimate interest by the employer that is in fact significant will preclude a finding of inherent discrimination.

The United States Courts of Appeals for the Second, Sixth and Ninth Circuits have limited this inherent discrimination concept to cases where the employer has discriminated *among* his employees, as opposed to discrimination against the group as a whole, and further only to cases where the sole criteria for such differential treatment was union membership or activity.[37] Accordingly, when the employer's action is directed at the employees as a whole, as in the closing of an entire plant, or against a part of the group that is defined by other than union membership or activity and includes non-unionists or non-activists, the conduct is lawful absent an intent to discourage union membership.[38] This rule is applied notwithstanding the fact that union activity may have been the direct cause of the business condition upon which an employer bases his decision. However, in light of the Supreme Court's decision in *NLRB v. Erie Re-*

36. The Court in *American Shipbuilding* held that an employer does not violate section 8(a) (3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees to bring economic pressure to bear on the union. In *Brown* the Court held that the non-struck members of a multi-employer bargaining unit did not violate the act when they locked out their employees and used temporary replacements in response to a "whipsaw" strike against one member of the group who also continued his business operations.

37. NLRB v. Great Atl. & Pac. Tea Co., 340 F.2d 690, 694 (2d Cir. 1965); Quality Castings Co. v. NLRB, 325 F.2d 36, 41 (6th Cir. 1963); Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74, 82 (9th Cir. 1960).

> Despite this broad language the Court clearly chose to limit the Board's ability to infer unlawful intent from a showing of discrimination and the foreseeable results thereof to those situations where the discrimination is based solely upon union membership or union activity.

Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74, 82 (9th Cir. 1960). *Cf.* NLRB v. Local 50, Am. Bakery Workers, 339 F.2d 324 (2d Cir. 1964); NLRB v. Richards, 265 F.2d 855 (3d Cir. 1959). *But see* NLRB v. Electric Steam Radiator Corp., 321 F.2d 733, 737 (6th Cir. 1963) (*semble*). Here, the employer omitted paying his customary Christmas bonus because his employees had voted for the union allegedly for legitimate reasons, an action which fits squarely into the category of discrimination *against,* rather than discrimination *among,* his employees. However, it is not clear whether this decision is based on a finding of inherent discrimination as well as an acceptance of the Board's finding of improper motivation or upon improper motivation alone. In either event, this case casts serious doubt on this proposition as it applies to the Sixth Circuit in cases where an employer has a mistaken belief that he has a legitimate reason for his actions. *Cf.* NLRB v. Burnup & Sims, Inc., 85 Sup. Ct. 171 (1964).

38. Quality Castings Co. v. NLRB, 325 F.2d 36, 41 (6th Cir. 1962).

sistor Corp.,[39] it is apparent that, if the concept of inherent discrimination is to be so limited, it must include not only those cases where the criteria for differential treatment is expressed solely in terms of union membership or activity but also those where the *effect* of the action is so limited.[40]

Although the Supreme Court has studiously avoided delineating strict guidelines for the application of this principle, it appears likely that the disparate treatment of union and non-union members or activists is the inherently prejudicial conduct they contemplated, and that their failure to specifically limit its application by a less viable standard is merely an allowance for an anticipated penumbra. Moreover, whatever the eventual extent of its application, it appears that the requirement of foreseeability of discouragement and lack of significant economic justification limit rather than delineate the scope of this concept. The correct formula appears to be, not that foreseeability plus lack of economic justification equals inherently discouraging conduct, but that conduct which is patently destructive of employee rights in and of itself is inherently discriminatory only when these two additional factors are also present. In all events, it is evident from Mr. Justice Harlan's opinion in *Darlington* that a plant closure, affecting union and non-union members alike, is not inherently discriminatory despite its immediately following the election of a union.[41]

C. Intentional Discrimination

In cases where the employer's conduct is not inherently discriminatory, the act is an unfair labor practice only if the motive is found to be unlawful—"both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required."[42] Although this principle appears never to have been in doubt,[43] it is per-

39. 373 U.S. 221 (1963).

40. In *Erie Resistor* the criteria used for differential treatment was not expressed in terms of union membership or activity but in terms of those employees and strike replacements who were available for work. However, by granting superseniority to this group, the *effect* of this action was felt solely by a group defined in terms of union activity—those employees who continued to strike.

41. It is also clear that the ambiguous act of closing a plant following the election of a union is not, absent an inquiry into the employer's motive, inherently discriminatory.
Textile Workers v. Darlington Mfg. Co., 85 Sup. Ct. 994, 999 n.10 (1965).

42. NLRB v. Brown, 85 Sup. Ct. 980, 985 (1965).

43. *But see* Judge Friendly's dissent in NLRB v. Miranda Fuel Co., 326 F.2d 172, 180 (2d Cir. 1963).

verted to a great extent by the Board's conclusion that section 8(a) (3) prohibits discrimination *because of* union activity.[44] This obvious shortcut[45] fails to distinguish between objective cause and subjective intent and fails to recognize the possibility and often the actuality that, while union activity may have caused the condition on which the employer acts, he does not intend thereby to discourage union membership. The correct rule, it appears, is not that a violation is made out merely by proving a causal connection between the union activity and the employer's act, but that the employer must actually intend to discourage union membership.[46] Therefore, absent an actual intent to discourage, an employer may discharge his employees or close his plant for the good reason, bad reason, or no reason.[47] And although a charge of unlawful motivation is generally countered by a showing of economic justification, the prevailing attitude among the courts of appeals is as is clearly expressed in

44. See Ward, *"Discrimination" under the National Labor Relations Act,* 48 YALE L.J. 1152, 1154-56 (1939).

45. Judge Medina's comment seems applicable:

> . . . like all clichés and short cuts in the law, designed to make life easy for the judicial officer who has to make decisions, this merely eliminates the thinking process necessary to get at the root of the matter.

NLRB v. Miranda Fuel Co., 326 F.2d 172, 175 (2d Cir. 1963).

46. An unfair labor practice has been committed only if the discrimination was deliberately designed to encourage [or discourage] membership in the union.

NLRB v. Miranda Fuel Co., 326 F.2d 172, 180 (2d Cir. 1963).

> In order to find a section 8(a) (3) violation it is necessary to either prove or infer (1) that the employer discriminated as to 'hire or tenure of employment or any term or condition of employment,' (2) that this discrimination encouraged or discouraged membership in any labor organization, and (3) *that this was done intentionally.*

NLRB v. W. L. Rives Co., 328 F.2d 464, 471 (5th Cir. 1964). (Emphasis added.)

> Thus, even though a natural foreseeable consequence of employer discrimination might be the discouragement of union activity, such discrimination is not unlawful unless actuated by an intent to achieve the foreseeable consequence rather than by a desire to carry out a legitimate business function.

Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74, 83 (9th Cir. 1960).

47. [A]n employer has the right to discharge an employee for good reason, bad reason or no reason, absent discrimination.

Steel Industries v. NLRB, 325 F.2d 173, 176 (7th Cir. 1963).

> Certainly, an employer may hire and discharge at will so long as his action is not based on opposition to union activities.

NLRB v. South Rambler Co., 324 F.2d 447, 449 (8th Cir. 1963).

> [But] no employer has yet appeared hardy enough—or foolhardy enough—to rest on the 'sheer caprice' defense. . . .

Ward, *"Discrimination" under the National Labor Relations Act,* 48 YALE L.J. 1152, 1170 (1939).

NLRB v. Savoy Laundry, Inc.[48] and *NLRB v. Dalton Brick & Tile Corp.*[49]

> We are not saying that the economic reasons offered by an employer must meet the approval of a governmental agency before he may go out of business, or even that the economic justification must be economically sound. Rather, we are merely saying that these economic considerations must be honestly invoked, and that an employer may not attempt to disguise an anti-union motive by speaking the language of economic necessity.[50]
>
> Nor is the so-called employer justification limited to those factors which might be described as economic hardship.[51]

The question then becomes, not whether the asserted economic reasons for a discontinuance or other business change are objectively sound, but whether the employer has acted on the sincere exercise of his business judgement.[52] The question is not one of justification but one of motivation. Proof of economic justifica-

48. 327 F.2d 370 (2d Cir. 1964).

49. 301 F.2d 886 (5th Cir. 1962).
A businessman retains the untrammeled prerogative to close his enterprise when in the exercise of a legitimate and justified business judgement he concludes that such a step is either *economically desirable* or economically necessary.
NLRB v. New England Web, Inc., 309 F.2d 696, 700 (1st Cir. 1962).

50. NLRB v. Savoy Laundry, Inc., 327 F.2d 370, 372 (2d Cir. 1964).

51. NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886, 894 (5th Cir. 1962).

52. NLRB v. Kelly & Picerne, Inc., 298 F.2d 895 (1st Cir. 1962) (dictum).
It is not the wisdom of the business acumen reflected by the change, which is determinative of whether there is a violation. It is the predominant motive behind the change.
NLRB v. Kingsford, 313 F.2d 826, 830 (6th Cir. 1963).
A good faith belief, even if it turns out in fact to be incorrect, can be sufficient to refute a charge of unlawful discharge.
Cedar Rapids Block Co. v. NLRB, 332 F.2d 880, 886 (8th Cir. 1964).
But it is not for the Board to determine whether or not an employer's business judgement was too harsh under the circumstances. Rather the burden is on the Board to show that an improper motive dictated the employer's decision. . . .
NLRB v. Almeida Bus Lines, Inc., 333 F.2d 725, 726 (1st Cir. 1964). *Accord,* Snow v. NLRB, 308 F.2d 687, 691 (9th Cir. 1962); Action Wholesale, 145 N.L.R.B. 627, 635 (1963). *But see* NLRB v. Brown-Dunkin Co., 287 F.2d 17 (10th Cir. 1961), where the court of appeals appears to have based its enforcement of the Board's order on the fact that the employer's decision to subcontract was later found to increase rather than decrease the cost of operations. In NLRB v. Bank of America Nat. Trust & Sav. Ass'n, 130 F.2d 624 (9th Cir. 1942), the court of appeals rejected the employer's contention that its department was discontinued solely in the interest because the discontinuance was not made in response to any immediate change in circumstances. However, the decision appears to turn on a rejection of the alleged motive rather than a requirement of a showing of new economic factors.

tion is important only in so far as it might tend to prove or disprove the actual motive; it does not allow the Board to substitute its business judgement for that of the employer.

The Board, however, has taken a contrary position. It has apparently rejected the concept of discrimination through intent and has consistently adhered to another theory of discrimination—differentiation without sufficient justification. Before the Board, therefore, an employer must not only refute the charge of unlawful intent but must also sustain the propriety of his decision. Further, it appears that the only justification recognized by the Board for an employer who closes his plant without first bargaining with the victorious union is absolute economic necessity.[53]

Notwithstanding this conflict between the Board and the courts of appeals, both readily accept the proposition that the existence of some justifiable grounds for affecting a business change is no defense if it was not the moving cause.[54] If an intent to discourage union membership was the real motive, it is no defense that at the same time there were justifiable grounds for such action.[55]

D. Determination of Motive

The Board is the trier of facts, the drawer of inferences from circumstantial and conflicting evidence, and the judge of the proper weight of the evidence.[56] A court of appeals is without

53. In Mayer B. Cohen, 142 N.L.R.B. 580, 586 (1963), the Board accepted the trial examiner's determination that "there was no *economic necessity* demonstrated to justify the discontinuance." (Emphasis added.) In Ethel J. Hinz, 140 N.L.R.B. 232, 234 (1962), the Board noted that the employer had failed to produce "proof indicating that there was an *economic necessity* for closing the plant." (Emphasis added.) And in Brown Transp. Corp., 140 N.L.R.B. 954, 957 (1963), the Board held that the employer's contention that he was unable to pay the wage demands of the union was "supported only by speculation and conjecture" and therefore that he had violated § 8(a) (3) by subcontracting. Moreover, in Clodomiro Isolino, 142 N.L.R.B. 1299 (1963), *enforcement denied* Oneonta Dress Co. v. NLRB, 333 F.2d 1 (2d Cir. 1964), the Board appears to hold that the employer must produce "documentary evidence" to support his claim of economic necessity.

54. *E.g.*, NLRB v. Solo Cup Co., 237 F.2d 521, 524 (8th Cir. 1956); NLRB v. Texas Independent Oil Co., 232 F.2d 447, 450 (9th Cir. 1956).

55. *E.g.*, Wonder State Mfg. Co. v. NLRB, 331 F.2d 737, 738 (6th Cir. 1964).

56. See, *e.g.*, NLRB v. Winona Knitting Mills, Inc., 163 F.2d 156, 160 (8th Cir. 1947), citing International Ass'n of Machinists v. NLRB, 311 U.S. 72, 79 (1940) and NLRB v. Link-Belt Co., 311 U.S. 584, 597-99 (1941). Inferences to be drawn from evidence as to unfair labor practices is a function of the Board and not the courts. NLRB v. Chicago Steel Foundry Co., 142 F.2d 306, 308 (7th Cir. 1944), citing NLRB v. Nevada Consol. Copper Co., 316 U.S. 105 (1942).

authority to substitute its own judgement for that of the Board and must uphold the Board's findings whenever they are supported by substantial evidence.[57] The court may not displace the Board's choice between two fairly conflicting views of the evidence, even though the court would have justifiably made a different determination had the matter been before it de novo.[58]

However, the reviewing court must consider the record as a whole, taking into account not only the evidence which supports the Board's conclusion but also that which fairly detracts from its weight. It is not barred from setting aside a Board decision when it cannot conscientiously find that substantial evidence supports that decision when viewed in the light of the record in its entirety.[59] It is not sufficient for the Board to draw inferences from circumstances out of context,[60] nor does it sustain its burden of proof merely by discounting all the explanations offered by an employer without finding an unlawful motivation through substantial direct or indirect evidence.[61]

Since the employer's motive is an intangible factor, direct proof is usually impossible. Motivation, therefore, is generally determined from inferences drawn from surrounding circum-

57. NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962); Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-90 (1951); NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940).

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). See NLRB v. Southland Mfg. Co., 201 F.2d 244, 246-48 (4th Cir. 1952).

58. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

> So long as the view which the Board embraced is supported by substantial evidence . . ., that determination will not be set aside.

NLRB v. United States Air Conditioning Corp., 302 F.2d 280, 283 (1st Cir. 1962).

> [However] although the Board's expertise deserves respect, its conclusions must have some evidential or rational inferential support before we can endorse them.

NLRB v. Great Atl. & Pac. Tea Co., 340 F.2d 690, 696 (2d Cir. 1965). See NLRB v. Council Mfg. Corp., 334 F.2d 161, 164 (8th Cir. 1964); NLRB v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300, 308-09 (5th Cir. 1961); NLRB v. Brown-Dunkin Co., 287 F.2d 17, 19 (10th Cir. 1961).

59. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-90 (1951). See, *e.g.*, NLRB v. Dan River Mills, Inc., 274 F.2d 381, 385-86 (5th Cir. 1960); Annot., 95 L. Ed. 473 (1950).

60. Beaver Valley Canning Co. v. NLRB, 332 F.2d 429, 432 (8th Cir. 1964).

> Our duty to examine the record as a whole . . . was made impossible by the Examiner's ignoring without explanation or analysis and seemingly without consideration the evidence offered by the respondent. . . . Respondent's offer of a coherent and logical explanation for its conduct deserves a less cavalier treatment.

NLRB v. Daniels Constr. Co., 332 F.2d 791, 792 (4th Cir. 1964) (per curiam).

61. Riggs Distler & Co. v. NLRB, 327 F.2d 575, 580 (4th Cir. 1963).

stances. But an unlawful motive is not lightly to be inferred.[62] The burden is not on the employer to exonerate himself of unfair labor practices, the burden is on the Board to prove the charges by substantial evidence.[63] Among the factors considered most important by the Board in making such a determination, and by the courts of appeals in reviewing the Board's findings, are a prior history of opposition or hostility towards unionism,[64]

62. NLRB v. Dan River Mills, Inc., 274 F.2d 381, 385-86 (5th Cir. 1960).

63. Administrative Procedure Act §7 (c), 5 U.S.C. §1006 (1958). *E.g.*, NLRB v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300, 309 n.15 (5th Cir. 1961); NLRB v. Goodyear Footwear Corp., 186 F.2d 913, 916 (7th Cir. 1951).

> But it is not for the Board to determine whether or not an employer's business judgement was too harsh under the circumstances. Rather the burden is on the Board to show that an improper motive dictated the employer's decision. . . .

NLRB v. Almeida Bus Lines, Inc., 333 F.2d 725, 726 (1st Cir. 1964). *Compare with* Board case, Almeida Bus Lines, 140 N.L.R.B. 280 (1962). The Board apparently requires that once a prima facie case has been established, that the employer must go forward with the evidence by introducing *documentary evidence* of economic justification. *Compare* Clodomiro Isolino, 142 N.L.R.B. 1299 (1963) *with* Oneonta Dress Co. v. NLRB, 333 F.2d 1 (2d Cir. 1964) (denying enforcement of same). *Cf.* Brown Transp. Corp., 140 N.L.R.B. 954, 957 (1963), where the Board held that the employer's attempted economic defense based on his inability to pay the wage demands of the union was "supported only by speculation and conjecture."

64. A general bias or general hostility and interference, whether proved or conceded, does not supply the element of purpose. . . . But anti-union bias and demonstrated unlawful hostility are proper and highly significant factors for Board evaluation in determining motive.

NLRB v. Dan River Mills, Inc., 274 F.2d 381, 384 (5th Cir. 1960). *Accord,* NLRB v. New England Web, Inc., 309 F.2d 696, 701 (1st Cir. 1962); NLRB v. Norma Mining Co., 206 F.2d 38, 42 (4th Cir. 1953). However, though anti-union hostility may be significant in finding an illegal motive, it is not conclusive. "[A]n employer's general hostility to unions, without more, does not supply an unalwful motive as to a specific discharge." NLRB v. South Rambler Co. v. NLRB, 324 F.2d 447, 449-50 (8th Cir. 1963). The courts have generally recognized that anti-union hostility during the course of an organizational campaign is to be expected. See, *e.g.*, Fort Smith Broadcasting Co. v. NLRB, 341 F.2d 874, 879 (8th Cir. 1965). For that reason, more is required than a mere showing of animosity, especially in cases where there is convincing evidence that a business change is economically motivated. See, *e.g.*, NLRB v. Kingsford, 313 F.2d 826, 830 (6th Cir. 1963); NLRB v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300 (5th Cir. 1961); NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 175 (2d Cir. 1961). On the other hand, it appears that a lack of demonstrated hostility or opposition towards unionism has been the controlling factor in cases failing to find an illegal motive. See, *e.g.*, NLRB v. Daniels Constr. Co., 332 F.2d 791 (4th Cir. 1964) (per curiam); NLRB v. R. C. Mahon Co., 269 F.2d 44, 47 (6th Cir. 1959); NLRB v. Great Falls Employers' Council, Inc., 277 F.2d 772 (9th Cir. 1960); Missoula Motel Ass'n, 148 N.L.R.B. No. 146 (1964); Anderson Box Co., 147 N.L.R.B. No. 77 (1964).

threats and coercion of employees,[65] and the timing of the employer's action.[66] All are significant, but none conclusive.

E. Cause versus Motivation: The Objective versus the Subjective Measure of Discrimination

Although the NLRB apparently concluded that Darlington's action was motivated by an intent to discourage union membership, the primary rationale of the Board case rests on the proposition that an 8(a) (3) violation is made out if there is a cause and effect relationship between the employee's activity and the

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65. A near coincidence of threats, coercion or interrogation of employees with a layoff or plant closure has been regarded as highly significant. See, *e.g.*, NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961); NLRB v. Hill & Hill Truck Line, Inc., 266 F.2d 883 (1st Cir. 1959); NLRB v. Sifers, 171 F.2d 63 (10th Cir. 1948). However, at least one of the courts of appeals has expressed some concern over what it considers to be the tendency of the Board to give more weight to isolated employer statements than seems justified.

> We have the impression that the Board of late has tended to overstretch this type of issue and that . . . a foundation of much greater substance is required than the isolated statement present here.

NLRB v. Council Mfg. Co., 334 F.2d 161, 165 (8th Cir. 1964).

66. While the near coincidence of a business change with union activity, without more, is not substantially indicative of an unlawful motive, the proximity of the employees' activity and the employer's action renders an employer vulnerable and serves to make his motive an issue of fact. NLRB v. Council Mfg. Corp., 334 F.2d 161, 164 (8th Cir. 1964). It appears, however, that more important than the timing of the employer's action is the manner in which it is carried out. In cases involving individual or mass discharge, plant removals, subcontracting, or shutdowns, the suddenness of the action and the summariness of the discharge gives rise to some doubt as to the good faith of the assigned reasons. See, *e.g.*, NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961) (mass layoffs); NLRB v. Hill & Hill Truck Lines, Inc., 266 F.2d 883 (1st Cir. 1959) (mass layoffs); NLRB v. Montgomery Ward & Co., 242 F.2d 497, 502 (2d Cir. 1957) (discharge of two employees); NLRB v. Somerset Classics, Inc., 193 F.2d 613 (2d Cir. 1951) (temporary closure); NLRB v. Sifers, 171 F.2d 63 (10th Cir. 1948) (temporary closure—plant closed without the customary notification to employees); NLRB v. Bank of America Nat. Trust & Sav. Ass'n, 130 F.2d 624 (9th Cir. 1942) (abolition of a department). See generally Annot., 83 A.L.R.2d 535, 546-47 (1962). The fact that an employer had considered the change before the advent of the union activity tends to support his assertion of good faith. See, *e.g.*, NLRB v. Kingsford, 313 F.2d 826 (6th Cir. 1963); Jay Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961). In such a case, it may appear that the union activity was instituted to combat the employer's anticipated action rather than the employer's action being an attempt to combat the union. See NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848, 853 (5th Cir. 1954). In cases where a decision has already been reached by the employer, there is a split between the Board and the courts of appeals as to whether the accelerated implementation of this decision because of union activity constitutes a violation of § 8(a) (3). The Board has held that it does. M. Swack Iron & Steel Co., 146 N.L.R.B. 1068 (1964); Ethel J. Hinz 140 N.L.R.B. 232 (1962). Two courts of appeals have explicitly held that it does not. NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); Mount Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954). This does not mean, however, that an employer may accelerate the implementation of his decision if he intends thereby to discourage membership in the union. *Compare Mount Hope with* NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962).

employer's action.[67] This rationale raises one major question which strikes at the heart of section 8(a) (3): that is, is the controlling factor in 8(a) (3) discrimination the circumstances and conditions upon which an employer bases his decision or his actual subjective intent?[68] More specifically, may an employer who intends merely to make the most effective use of his capital consider the economic ramifications of unionization and act accordingly?[69] While at least six of the courts of appeals have answered this question in the affirmative,[70] the Board has yet to concur.[71]

67. Darlington Mfg. Co., 139 N.L.R.B. 241, 246-47 (1962). For other Board cases applying this "but for" concept, see, *e.g.*, Morrison Cafeterias Consol., Inc., 148 N.L.R.B. No. 15 (1964); Star Baby Co., 140 N.L.R.B. 678 (1963), *enforcement denied,* NLRB v. Neiderman, 334 F.2d 601 (2d Cir. 1964); Industrial Farbicating Inc., 119 N.L.R.B. 162, 170 (1957), *enf'd per curiam,* NLRB v. Mackneish, 272 F.2d 184 (6th Cir. 1959). See generally Rothman, *The "Right" to go out of Business,* 6 BOSTON COLLEGE INDUS. & COMMERCIAL L. REV. 1, 3-5 (1964); 48 CORNELL L.Q. 572, 576-78 (1963).

68. See Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 HARV. L. REV. 1, 20-22 (1947).

69. One commentator has divided the possible employer motives into three categories: (1) "independent economic motives"; (2) "economic anti-union motives"; and (3) "non economic anti-union motives." By "economic anti-union motives," he apparently means the consideration of the economic aspects of unionization. See Note, 77 HARV. L. REV. 1100, 1101 (1964). The Board refuses to recognize the distinction between (2) and (3), calling it a "distinction without a difference." Morrison Cafeterias Consol., Inc., 148 N.L.R.B. No. 15 (1964) (trial examiner's report adopted by the Board).

70. *1st Cir.*—NLRB v. New England Web, Inc., 309 F.2d 696, 701 (1st Cir. 1962). "Certainly the company could reasonably expect the advent of the Union to affect its already precarious cost picture."

2d Cir.—NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 175 (2d Cir. 1961). "The decided cases do not condemn an employer who considers his relationship with his plant union as only one part of the broad economic picture he must survey. . . ."

4th Cir.—Mount Hope Finishing Co. v. NLRB, 211 F.2d 365, 371-72 (4th Cir. 1954). *But see* dissent, Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 687, 691 (4th Cir. 1963).

6th Cir.—NLRB v. Lassing, 284 F.2d 781, 783 (6th Cir. 1960), *cert. denied,* 366 U.S. 909 (1961); NLRB v. R. C. Mahon Co., 269 F.2d 44, 47 (6th Cir. 1959); NLRB v. Adkins Transfer Co., 226 F.2d 324, 327 (6th Cir. 1955). *Cf.* Quality Castings Co., v. NLRB, 325 F.2d 36, 41 (6th Cir. 1963).

7th Cir.—Jay Foods, Inc. v. NLRB, 292 F.2d 317, 320 (7th Cir. 1961). "An employer has a right to consider objectively and independently the economic impact of unionization of his shop and to manage his business accordingly."

9th Cir.—Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74, 84 (9th Cir. 1960) (by implication). "That protected union activity is the direct cause of a business condition upon which an employer actually predicates discrimination among his employees does not mean that the basis for discrimination is the protected union activity."

In accord with these cases is Phillips v. Burlington Industries, 199 F. Supp. 589, 592 (N.D. Ga. 1961).

> If Congress had meant to say what the Board says it meant, subsection [(a) (3)] would have read: 'To discriminate in regard to hire or tenure of employment or any term or condition of employment *because of* labor organization membership or activities.'

Ward, *"Discrimination" under the National Labor Relations Act,* 48 YALE L.J. 1152, 1156-57 (1939).

71. The basic purpose and design of Congress in the Act was to protect employees in their right to organize collectively and to better their working

The Board in finding discrimination has a tendency to emphasize the effect of the employer's action upon his employees rather than his intent.[72] Their concept of discrimination appears to be, not the intentional discrimination generally embraced by the courts of appeals but rather discrimination without sufficient reason, not discrimination *in order to discourage* union membership but discrimination *because of* union membership.[73] This is contrary to the position usually taken by the courts of appeals, who have generally based their decisions upon the motive of the employer, not what it may appear to have been either to the victim or to the union.[74]

It is the policy of the Board that, while an employer might anticipate that increased costs might flow from unionization, he may not act upon his anticipation until he has first bargained with the victorious union.[75]

> An employer who has afforded his employees their full statutory rights and has bargained in good faith, and then

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conditions. Although the employees decision to organize may result in economic expense to their employer, Congress cannot have intended to permit the employer for that reason to take anticipatory action and to nip such organization in the bud.

Industrial Fabricating, Inc., 119 N.L.R.B. 162 (1957), *enf'd per curiam,* NLRB v. Mackneish, 272 F.2d 184 (6th Cir. 1959). See Ethel J. Hinz, 140 N.L.R.B. 232, 234 n.8 (1962), in which the Board interpreted *Rapid Bindery* and *Lassing* (*supra* note 70) as cases where "the preponderant motive for the acceleration was business necessity; that is, reasonably anticipated increased costs, including the cost which might result from unionization of employees." The Board, however, respectfully disagreed with the holding of these two cases. See note 67 *supra.*

72. See, *e.g.,* Industrial Fabricating, Inc., 119 N.L.R.B. 162, 170 (1957), *enf'd per curiam,* NLRB v. Mackneish, 272 F.2d 184 (6th Cir. 1959). See note 67 *supra.*

73. Judge Friendly dissenting in NLRB v. Miranda Fuel Co., 326 F.2d 172, 180, 181 (2d Cir. 1963), embraces the view of the Board partially by stating that Congress neither said to discriminate *because of* union membership or to discriminate *in order to* discourage union membership. Instead, he would interpret "to discriminate" as meaning "to distinguish or differentiate without sufficient reason." However, if the economic impact of unionization is not a "sufficient reason," then the practical effect of this test is to prohibit discrimination *because of* union membership or activity.

74. NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886, 897 (5th Cir. 1962).

75. *E.g.,* Morrison Cafeterias Consol. Inc., 148 N.L.R.B. No. 15 (1964); Star Baby Co., 140 N.L.R.B. 678 (1963), *enforcement denied,* NLRB v. Neiderman, 334 F.2d 601 (2d Cir. 1964); Ethel J. Hinz, 140 N.L.R.B. 232 (1962). This is to be distinguished from the case where an already unionized employer is beset by inflexible union demands and moves his plant, subcontracts, or closes. See Israel Traub, 145 N.L.R.B. 682 (1963). The HARVARD LAW REVIEW concurs with the Board's belief that the employees should be allowed to demonstrate "that the advantages of organization can be attained without undue economic burden to the employer. Accordingly, the employer should be required to wait to see what terms the union will demand." Note, 77 HARV. L. REV. 1100, 1101 (1964).

> changes or discontinues operations in the belief that he is *financially unable* to withstand or meet their union's economic demands, violates no proscription contained in the Act.[76]

It also appears probable that, even after bargaining in good faith, the Board would require an employer to show that he was actually financially unable to pay the increased costs of unionism rather than merely that he could invest his capital more wisely elsewhere.[77] Therefore, despite the reasoning of six courts of appeals that an employer may anticipate the increased costs of unionization,[78] the Board recognizes unionization as an economic consideration only when the increased costs are, for all practical purposes, fully realized.

The Supreme Court has long recognized two distinct types of discrimination under 8(a) (3): (1) discrimination through unlawful motive and (2) a narrowly confined[79] area of discrimination regardless of motive or inherent discrimination. The Board has developed a third.[80] Their discrimination without

76. Morrison Cafeterias Consol., Inc., 148 N.L.R.B. No. 15, 56 L.R.R.M. 1483, 1484-85 n.16 (1964). (Emphasis added.)

77. See, *e.g.*, Sidele Fashions, Inc., 133 N.L.R.B. 547, 551-52 (1961). Although the employer was faced with a demand by the union that it sign a new contract which would have increased costs more than double the amount of his previous year's net profits, the Board determined that the employer could have afforded to continue to operate under the old contract. Since the union had not threatened economic action to compel adoption of the new contract, the Board concluded that there was *"no basis"* in the record for inferring that economic considerations motivated the employer. *Id.* at 552. (Emphasis added.)

78. The courts have used different terminology in allowing an employer to anticipate increased costs of unionization, leaving some doubt as to how much leeway will be allowed an employer in this area. While Jay Foods, Inc. v. NLRB, 292 F.2d 317, 320 (7th Cir. 1961) and NLRB v. New England Web, Inc., 309 F.2d 696, 701 (1st Cir. 1962) indicate that an employer may "reasonably" anticipate increased costs of unionization, NLRB v. R. C. Mahon Co., 269 F.2d 44, 47 (6th Cir. 1959) and NLRB v. Adkins Transfer Co., 226 F.2d 324, 327 (6th Cir. 1955) speak of the employer's "practical choice" of paying increased wages or shutting down. This leaves some question as to whether an employer who is not faced with immediate demands by the union may anticipate increased costs over a longer period.

> Relocation based on economic antiunion bias should be an unfair labor practice where the employer merely anticipates increased costs because of organization but not where a recognized union has demonstrated its intention to impose actual increases in cost.

Note, 77 HARV. L. REV. 1100, 1101 (1964).

79. See Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 680 (1961) (concurring opinion of Mr. Justice Harlan).

80. The conclusion that the application of the "but for" causation concept of discrimination will necessarily indicate an employer's intent may possibly work in the case of a discharge of an individual employee. *Cf.* NLRB v. Jones Sausage Co., 257 F.2d 878, 881 (4th Cir. 1958); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 22 (1947). However, it obviously does not follow that in other cases the external cause of an employer's

sufficient reason, or discrimination because of union membership or activity, like inherent discrimination, is based on foreseeability of discouragement. Yet, unlike inherent discrimination, it encompasses discrimination *against*, as well as discrimination *among*, employees.[81] Also, and more importantly, it does not conform to the requirement of a complete lack of significant economic justification expressed by the Court in *American Ship Building Co. v. NLRB*[82] and *NLRB v. Brown.*[83] And finally, while in some cases it does have the salubrious effect of encouraging collective bargaining, it often condemns the act of employers who are seeking only to protect their own legitimate interests and who do not intend in the least to infringe upon the rights of their employees.

In *Darlington*, the Supreme Court rejected the Board's view at least as far as it applies to a partial liquidation by holding that such an action violates section 8(a) (3) only if it is "motivated by a purpose to chill unionism."[84] The basic rationale of the *Darlington* case is that 8(a) (3) prohibits the discriminatory use of economic weapons as a lever to obtain future benefits by discouraging future collective employee activities.[85] It is therefore probable, though not necessarily certain, that this holding would apply to plant removals, temporary closures, and other business changes as well.[86]

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action is necessarily indicative of what he intends to accomplish by his actions. Though the unionization of his plant is admittedly the *cause* of his actions, he may still be "actuated by a desire to protect a recognized interest"—his profits. (Quoted material is taken from Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 20-21 (1947).)

81. See text accompanying notes 37-41 *supra.*

82. 85 Sup. Ct. 955 (1965).

83. 85 Sup. Ct. 980 (1965).

84. Textile Workers v. Darlington Mfg. Co., 85 Sup. Ct. 994, 1002 (1965). *Darlington* requires that the employer intend to "chill" unionism among his *remaining* employees (employees in plants other than the one which he liquidated) and also that he "reasonably have foreseen that such closing will likely have that effect." *Ibid.*

85. One of the purposes of the Labor Act is to prohibit the discriminatory use of economic weapons in an effort to obtain future benefits. The discriminatory lockout designed to destroy a union, like a "runaway shop," is a lever which has been used to discourage collective union activities in the future. But a complete liquidation of a business yields no such future benefit for the employer, if the termination is bona fide.

Textile Workers v. Darlington Mfg. Co., 85 Sup. Ct. 994, 1000 (1965).

86. Mr. Justice Harlan states that employer action which has the foreseeable consequence of discouraging concerted activities "generally" does not constitute a violation of § 8(a) (3) "in the absence of a showing of motivation which is aimed at achieving the prohibited effect." Textile Workers v. Darlington Mfg. Co., 85 Sup. Ct. 994, 1003 (1965). Since the "generally" limitation is referred to a discussion of the "inherently discriminatory" activities of *Erie Resistor* and *Radio Officers'* (see the Court's note 22 referring to note 10), it follows, especially in light of the development of the law in this area, that this was the only exception intended. *Expressio unius est exclusio alterius.*

F. Partial Motivation

Another area in which the Board and the courts of appeals have taken somewhat divergent approaches is the problem of dual or partial motivation. The Board in *Darlington* held that a plant shutdown that is partly motivated by an intent to discourage unionism constitutes an unfair labor practice.[87] Again the courts of appeals predominantly disagree. Although there are statements in several cases which appear to support the Board's position,[88] it appears that they are merely recognizing the Board's familiar doctrine that the mere existence of a just cause for a discharge or plant shutdown is not a justification if it is not acted on.[89] The predominant number of cases discussing this issue have used language indicating that the anti-union motive must be "substantial" or must "weigh more heavily" in the decision than the economic reasons.[90]

87. Darlington Mfg. Co., 139 N.L.R.B. 241, 246 (1962). To the same effect is an earlier statement of the Board that an employer violates § 8(a) (3) if his action is not taken *solely* for economic reasons. NLRB 26th Ann. Rep. 97 (1961).

88. See NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 728 (2d Cir. 1965); General Tire, Inc. v. NLRB, 332 F.2d 58, 60 (5th Cir. 1964); NLRB v. Symons Mfg. Co., 328 F.2d 835, 837 (7th Cir. 1964); Town & Country Mfg. Co. v. NLRB, 316 F. 2d 846, 847 (5th Cir. 1963); NLRB v. Jamestown Sterling Corp., 211 F.2d 725, 726 (2d Cir. 1954).

> Moreover, respondent would be in violation if the selection of the Union by the clerks was a contributing factor in its decision to subcontract the work.

NLRB v. National Food Stores, Inc., 332 F.2d 249, 252 (7th Cir. 1964).

> And even though the discharge may have been based upon other reasons as well, if the employer was partly motivated by union activity, the discharges were violative of the act.

NLRB v. Great E. Color Lithographic Corp., 309 F.2d 352 (2d Cir. 1962).

89. Apparently the Board does not, or at one time did not, recognize the distinction. See Ward, *"Discrimination" under the National Labor Relations Act*, 48 YALE L.J. 1152, 1164 (1939).

90. *Predominant motive*—NLRB v. Kingsford, 313 F.2d 826, 830 (6th Cir. 1963).

Substantial or motivating reason—NLRB v. Electric Steam Radiator Corp., 321 F.2d 733, 738 (6th Cir. 1963); NLRB v. Whitin Mach. Works, 204 F.2d 883, 885 (1st Cir. 1953).

Weigh more heavily—Nachman Corp. v. NLRB, 337 F.2d 421, 423 (7th Cir. 1964); NLRB v. Whitin Mach. Works, 204 F.2d 883 (1st Cir. 1953).

True purpose or real motive—Wonder State Mfg. Co. v. NLRB, 331 F.2d 737, 738 (6th Cir. 1964); NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886, 896 (5th Cir. 1962); Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74, 77 (9th Cir. 1960); NLRB v. Potlatch Forests, Inc., 189 F.2d 82, 86 (9th Cir. 1951); NLRB v. Electric City Dyeing Co., 178 F.2d 980, 982 (3d Cir. 1949).

Moving cause—NLRB v. Solo Cup Co., 237 F.2d 521, 525 (8th Cir. 1956); Wells, Inc. v. NLRB, 162 F.2d 457, 460 (9th Cir. 1947).

Primarily Motivated—NLRB v. Neiderman, 334 F.2d 601, 604 (2d Cir. 1964); NLRB v. Winchester Electronics, Inc., 295 F.2d 288, 292 (2d Cir. 1961); NLRB v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300, 309 (5th Cir. 1961).

Although this supposed divergence has been expressly recognized in at least one case,[91] the difference is more apparent than real. The Supreme Court has continually recognized that it is the employer's "true purpose" or the "real motive" that is controlling[92] and has said that the Board must find that the employer's conduct was "primarily" motivated by anti-union animus.[93] Further it appears that despite the language used the courts of appeals have followed this test, enforcing the Board's orders when their findings are supported by substantial evidence and denying enforcement when they are not.

The one danger of the Board's test is that it might circumvent the Supreme Courts' admonition in *Universal Camera*[94] that a court of appeals must view the record as a whole, taking into account not only that evidence which supports the Board's position but also that which detracts from its weight. If so, it may happen that an employer who has unquestionably acted for economic reasons may be held to violate section 8(a) (3) merely because he was not at the same time overly enthusiastic about the prospect of unionization. It could also lead to the rather novel conclusion that an employer, having once expressed anti-union sentiment, is then incapable of making a purely business decision.

G. Conclusion

Recognizing the difficulty that the Board and the courts of appeals have had in navigating the murky waters of section 8(a) (3), the Supreme Court from time to time has thrown up a few stars for them to steer by. The *Darlington* case is a fitting example. It settled the employer's absolute right to go completely out of business in the affirmative and his absolute right to go partially out of business in the negative. In so doing it has also given some much needed clarity to the motivation factor in 8(a) (3) discrimination. Nevertheless, the Board has declared its intention to adhere to its objective theory of motivation until the

91. See Tompkins Motor Lines, Inc. v. NLRB, 337 F.2d 325, 330 (6th Cir. 1964). See also Note, 48 CORNELL L. REV. 572, 575-76 (1963).

92. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961); Radio Officers Union v. NLRB, 347 U.S. 17, 42-44 (1954); Associated Press v. NLRB, 301 U.S. 103, 132 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937).

93. NLRB v. Brown, 85 Sup. Ct. 980, 986 (1965).

94. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). To the same effect is NLRB v. Walton Mfg. Co., 369 U.S. 404, 832-33 (1962).

Supreme Court declares otherwise,[95] and it appears unlikely that they will interpret the *Darlington* decision as a complete rejection of this concept as it applies to all 8(a) (3) cases.

The requirement that the courts of appeals accept all findings of the Board that are supported by substantial evidence necessitates that both the Board and the courts of appeals speak the same language. Therefore, it is greatly to be desired that the Supreme Court shed more light on the motivation problem when the next opportunity presents itself. Otherwise it is likely that the Board and the courts of appeals will continue to pass each other like ships in the dark, the Board speaking of "motive" in terms of causation and the courts of appeals denying enforcement for lack of substantial evidence. *The voice is the voice of Jacob, but the hands are the hands of Esau.*

J. KENDALL FEW

95. See Morrison Cafeterias Consol., Inc., 148 N.L.R.B. No. 15, 56 L.R.R.M. 1483, 1485 (1964) (trial examiner's report adopted by the Board); Ethel J. Hinz, 140 N.L.R.B. 232, 234 n.8 (1962); Ox-Wall Prod. Mfg. Co., 135 N.L.R.B. 840, 842 n.4 (1962).

TAX—BUSINESS EXPENSE—DEDUCTION ALLOWED FOR EXPENSE INCURRED IN ENTERTAINING GOVERNMENT EMPLOYEES*

Dukehart-Hughes Tractor & Equip. Co. v. United States,[1] entertained in the United States Court of Claims, concerned an Iowa firm which sought a refund of corporate income taxes on the grounds that the Commissioner of Internal Revenue erred in disallowing certain entertainment deductions claimed by the company under section 162(c) of the 1954 Internal Revenue Code.[2] In disallowing these deductions, the Commissioner contended that the taxpayer's entertainment expenses were not directly related to its business activities as required by section 274 of the Code.[3]

The plaintiff was a heavy construction equipment company which received about one-fourth of its gross income from the sales of machinery to municipal, county and state agencies in Iowa.

As was customary in the industry, it was the plaintiff's policy to entertain prospective buyers, including employees of government purchasing departments in various ways, such as fishing trips, transportation and tickets to athletic contests, hospitality rooms at conventions, tickets for state fairs, dinners, and golf tournaments. Christmas gifts were also given to many buyers but normally cost less than five dollars each. All prospective customers were entertained in some manner, with no distinctions made on the basis of past business transactions. As the plaintiff

* Dukehart-Hughes Tractor & Equip. Co. v. United States (Ct. Cl. 1965).

1. 341 F.2d 613 (Ct. Cl. 1965).

2. *Trade or Business Expenses.*
   (a) *In General*—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.

Int. Rev. Code of 1954, § 162.

3. *Disallowance of Certain Entertainment, Etc., Expenses.*
   (a) Entertainment, amusement or recreation.
      (1) *In General*—No deduction otherwise allowable under this chapter shall be allowed for any item.
         A. Activity—with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly proceeding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise) that such item was associated with, the active conduct of the tax payer's trade or business....

Int. Rev. Code of 1954, § 274.

did not advertise, its only method of encouraging potential sales was through personal contacts and entertainment of prospective customers.

In *Dukehart-Hughes* the questions the court had to decide were whether or not these entertainment expenditures were "ordinary and necessary" within the meaning of section 162, and, if so, whether the practice frustrated public policy. To date, despite much effort, courts have failed to establish definite criteria to determine whether a given expenditure is in conformity with section 162.

In order to be considered "ordinary and necessary," an entertainment expenditure must be related to the taxpayer's business and the deductions "must have a proximate relation to the taxpayer's trade or business and must be of a character reasonably expected to benefit the trade or business."[4] The mere fact that the entertainment aids in meeting prospective clients does not in itself make an expense "ordinary and necessary."[5] The remote possibility of some future sale is not enough to support the deduction of entertainment expenses. Thus, deducting the expense of maintaining a race horse which bore the owner's name was disallowed as the court thought that the expenditure was made for the individual's private pleasure rather than for any benefit to his business.[6] Generally, there is only the requirement that the expenditures be in some way sufficiently related or helpful to the business.[7]

Of the words "ordinary and necessary," the word "necessary," when related to an expense, can be simply defined as "an expenditure that is appropriate and helpful in developing and maintaining the taxpayer's business."[8] However, "necessary" is not the only criterion. To be deductible, an expense must be "ordinary" as well as "necessary." These words are not synonymous. Indeed, the most difficulty stems from the word "ordinary." This difficulty arises from attempting to apply the fixed standards of section 162 to all types of business activities. To be effective, such standards must vary with the type of business and the expenditure under the court's consideration.[9]

4. 2 CCH 1965 STAND. FED. TAX REP. 97 ¶ 1340.2661.
5. Lucien W. Rolland, 18 CCH Tax Ct. Mem. 702, 706 (1959).
6. James Schultz, 16 T.C. 401, 406 (1951).
7. 54 HARV. L. REV. 853 (1941).
8. 4 MERTENS, FEDERAL INCOME TAXATION § 25.09, at 24 (1960).
9. *Id.* at 26.

"Ordinary," as used in section 162, means an expense which is ordinary as evidenced by the common usage of the community at large or a particular class in the community. The expense can not be "ordinary" to only one man.[10] However, an expense may be ordinary though it happens only once in the taxpayer's lifetime,[11] but it must be "ordinary" in his business community.

To determine what is ordinary in the activities of a particular business, every aspect of the business must be considered by the court.[12] In attempting to do this, courts have developed two major guidelines. The first is the principle of "economic reality" which states that the economic "obligations imposed by the usages of trade and the requirements of good business are compelling"[13] in determining the necessity of an expense. In other words, any essential expenditure required by business and not contrary to public policy is ordinary. This concept places the burden of proving the absolute necessity of an expenditure on the taxpayer and leaves the court in the unfortunate position of having to pass judgment on a businessman's decisions, for which the court is often unsuited.

The second principle is known as the "hard-headed businessman" test. In applying this test, the court inquires whether an imaginary, but typical, businessman would have made the same business expenditures. This test is not unlike the "reasonable man" standard found in torts.

> The hardheaded businessman formula undoubtedly simplifies the application of the necessity test to particular cases and excludes the "bizarre analogies" which the Supreme Court was afraid might be offered for acceptance in cases of expenditures for education, reinstatement of reputation and the like. The suggested test is supported also on the ground that the payments made to establish reputation and learning are akin to capital assets and accordingly might not be deductible on the general ground applicable to payments made in acquiring capital assets which have a life of more than a year.[14]

10. Welch v. Helvering, 290 U.S. 111 (1933).

11. Deputy v. Dupont, 308 U.S. 488, 495 (1940).

12. See Robinson Land & Lumber Co. v. United States, 112 F. Supp. 33 (S.D. Ala. 1953).

13. Canton Cotton Mills v. United States, 94 F. Supp. 561 (Ct. Cl. 1951).

14. 4 MERTENS, *op. cit. supra*, note 8, at 34.

As the above quotation points out, this test is designed to eliminate deductions for self-improvement projects that are only incidentally related either to the taxpayer's business or to the establishment of good will.

Obviously then, there exists no uniform standard by which the court can determine which expenditure is "ordinary and necessary." The court in solving the individual problems must apply its total knowledge and experience to the problem, for there exists no simple "verbal formula that will supply a touchstone."[15] It is readily apparent that each case must stand on its own peculiar circumstances and merits.[16]

Once the court determines that a taxpayer's entertainment expenditures are "ordinary and necessary," the question of public policy still remains. In many instances ordinary and necessary expenditures are disallowed because a public policy is contravened. A finding of necessity cannot uphold the deduction when such a finding would frustrate sharply defined national or state policies.[17] After much litigation the courts have arrived at a fairly clear policy which was stated by the United States Supreme Court. In order for a deduction of a business expense to be denied as a matter of public policy, the policies frustrated must be national or state policies prescribing particular types of conduct evidenced by some governmental declaration.[18] Business ethics or community feelings do not seem to be regarded as sufficient to justify a court's disallowance of an expenditure. Deductions will not be disallowed merely because the expenditure contravenes public feelings of propriety and custom.[19] This rule strongly indicates that in order to find a contravention of public policy the court must find a definite and specific prohibition against the expenditure in state or federal statutes.[20]

Although the circumstances surrounding a given expenditure border on illegality and are perhaps to be frowned upon, these circumstances must more than approximate an illegal act in order to make the expenditure non-deductible.[21] However, once the

15. Welch v. Helvering, 290 U.S. 111, 115 (1943).
16. See Commissioner v. Heininger, 320 U.S. 467 (1943); Wohle v. United States, 267 F.2d 605, 607 (5th Cir. 1959), *cert. denied* 361 U.S. 391 (1960); Jones v. Commissioner, 242 F.2d 616, 620 (5th Cir. 1957).
17. See Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958); Hoover Motor Express Co. v. United States, 356 U.S. 38 (1958); United States v. Winters, 261 F.2d 675 (10th Cir. 1958).
18. Lilly v. Commissioner, 343 U.S. 90, 96 (1952).
19. Commissioner v. Heininger, 320 U.S. 467 (1943).
20. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).
21. Commissioner v. Sullivan, 356 U.S. 27 (1958).

contravention of a public policy is found, no amount of proof that the practice is customary or even necessary to the continuance of the business will support a plea for deduction.[22]

A good example of this distinction is in the area of rebates and kickbacks. Although rebates and kickbacks are not regarded as being among the most praiseworthy practices, morally or ethically, the courts have allowed deductions for this sort of expenditure as long as there is no conflict with any statute.[23]

Dukehart-Hughes deals with a rather specialized area of public policy. It involves the entertaining of government employees by a private company seeking contracts with government agencies. The overwhelming number of cases have held that entertainment of government employees by private concerns is against public policy.[24] In *Bay v. Davidson*[25] a member of the town

22. In the case of Boyle, Flagg & Seaman, Inc., 25 T.C. 43 (1955), the petitioners, an insurance company, paid Illinois automobile sellers a commission in return for the sellers referring their buyers to the petitioners. Although this was the common practice and necessary in order for the petitioners to continue in business, the court held that their expense was non-deductible as there was an Illinois statute prohibiting such dealings.

23. An Ohio insurance agent paid for promoting credit loans to auto dealers and their customers. This was held to be deductible since it was the common practice and was not against Ohio law. E. T. Kirtz, 304 F.2d 460 (6th Cir. 1962). *Accord,* Lilly v. Commissioner, 343 U.S. 90 (1958); Richardson v. Commissioner, 264 F.2d 400, 401, (4th Cir. 1959); Fiambolis v. United States, 152 F. Supp. 10 (1957); *But cf.* United Draperies, Inc., v. Commissioner, 340 F.2d 936 (7th Cir. 1964). Rebates paid to employees of company's customer were not deductible, even though this practice was necessary to appellant's business. The court based its decision on grounds that this practice was not ordinary in that other companies did not pay rebates. The court did not base its ruling on the actual practice of giving rebates and kickbacks.

> Since payments for innocuous forms of commercial bribery have been held deductible, cases involving the more interesting variations must be justified in terms of policy; this is certainly the only explanation of cases disallowing sales commissions where the salesman is hired to use personal influence in securing public contracts.

54 HARV. L. REV. 853, 857 (1941).

One of the more interesting aspects of whether or not a deduction is adverse to public policy is in the area of a taxpayer's deduction of trial expenses. 49 OPS. S. C. ATT'Y GEN. 263 (1949). "If a taxpayer incurs attorney's fees and other costs in defending actions against him for violating the O.P.A. law or regulations... and no penalties are assessed against him, such fees are a proper deduction for income tax purposes." There seems to be a double penalty for being found guilty of a civil or criminal violation. Apparently the taxpaper is required to anticipate accurately the outcome of a trial before expending attorney's fees. See Gould Paper Co. v. Commissioner, 72 F.2d 698 (2d Cir. 1934), *contra,* Commissioner v. Heininger, 320 U.S. 467 (1943); See generally 72 YALE L.J. 108 (1963).

24. *E.g.,* Finley v. Commissioner, 255 F.2d 128, 134 (10th Cir. 1958); Cohen v. Commissioner, 176 F.2d 394 (10th Cir. 1949); Harden Mortgage Loan Co. v. Commissioner, 137 F.2d 282, 284 (10th Cir. 1943), *cert. denied* 320 U.S. 791 (1943); Rugal v. Commissioner, 127 F.2d 393, 395 (8th Cir. 1942); Bay v. Davidson, 133 Iowa 688, 111 N.W. 25 (1907); Cecil I. Haas, 12 CCH Tax Ct. Mem. 1117 (1953); Raymond T. Flanagan, 47 B.T.A. 782 (1942).

25. 133 Iowa 688, 111 N.W. 25 (1907).

council made a sales contract with the municipal government. Finding the contract to be against public policy, the court said: "It matters not if he made his private interests subservient to his public duties."[26] In *Raymond T. Flanagan*[27] petitioner, a contractor, customarily entertained government employees, as did his competitors. The court said: "Such entertainment of public officials who necessarily have a direct or indirect relation to the contracts which the petitioner seeks is, speaking generally, commonly regarded as contrary to the public interest."[28] Even so slight and customary an entertainment as lunch for government employees has been held to be against public policy, although there was no statute barring this practice.[29] In short, it is readily apparent that prior to *Dukehart-Hughes*, the mere fact that there was a possibility of bribery or corruption of governmental officials was sufficient to cause a disallowance of a deduction.

In deciding for the plaintiff and upholding the deduction, the court in *Dukehart-Hughes* relied upon the Supreme Court's "sharply defined national, or state policies" test.[30] The court found no such specific prohibition in the related Iowa statutes.[31] Concurring and dissenting in *Dukehart-Hughes*, Judge Davis stated that while the giving of luncheons, free tickets to fairs and other minor gifts could not be found to frustrate a sharply defined state policy, he could not agree with the allowing of the deductions of the larger gifts, such as invitations to golf tournaments and fishing trips. Since these expenses were of such magnitude that the recipient must realize that they were in the nature of rewards, Judge Davis infers that such gifts would influence their recipients.

Where does *Dukehart-Hughes* leave the law? By allowing the cost of plaintiff's gifts to be deducted, the court has apparently opened the door to more activity in this area. The problem has evidently been left to the legislatures for solution. They will have the burden of forbidding by statute every gift or entertainment that might be used improperly to influence a government em-

26. *Id* at 26.

27. 47 B.T.A. 782 (1942).

28. *Id* at 783. The court also said "we hold that the deduction is also withheld by the statute from expenditure by one who is selling materials under contract with towns and counties for entertaining public officials, even though it does not appear that the expenditures are repugnant to express provisions of law."

29. Cecil I. Haas, 12 CCH Tax Ct. Mem. 1117 (1953).

30. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).

31. IOWA CODE ANN. ch. 738 §§ 739.10, 739.11 & 741.1 (1962).

ployee. The legislation will have to be very detailed and specific because enterprising companies seeking to gain a step on their competitors, will attempt to discover ways not covered by statute to gain favor with government buyers.

A better solution to the problem is suggested by the dissent. Judge Davis realizes that entertainment of government employees is now a fact of life and that a line should be drawn between expenditures which are allowable and those that are not. Otherwise, it is not unforeseeable that companies seeking government business will curry the favor of strategically placed government officials with a veritable shower of gifts. The public interest demands a more well defined line of demarcation than that given in *Dukehart-Hughes*.

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