Volume 17 | Issue 1 Article 5

1971

# Admiralty - Unseaworthiness - An Isolated Act of Operational Negligence Does Not Constitute an Unseaworthy Condition and Cannot Render a Ship Instantaneously Unseaworthy

N.R. Powers

# RECENT DEVELOPMENTS

ADMIRALTY — UNSEAWORTHINESS — AN ISOLATED ACT OF OPERATIONAL NEGLIGENCE DOES NOT CONSTITUTE AN UNSEAWORTHY CONDITION AND CANNOT RENDER A SHIP INSTANTANEOUSLY UNSEAWORTHY.

*Usner v. Luckenbach Overseas Corp.* (U.S. 1971)

The petitioner, a longshoreman employed by an independent stevedoring contractor,[1] was injured while loading cargo onto the respondent's ship. Usner was standing on a barge where he was attaching a cargo of steel rods to the ship's boom by means of a sling. On one occasion, the winch operator lowered the sling too far and too fast, causing it to strike the petitioner and knock him down onto the barge.[2] Neither before nor after the incident was any difficulty experienced or defect discovered in the equipment involved.[3] As a result of his injuries, petitioner brought an action for damages against the shipowner in federal district court, averring that his injuries were caused by the ship's unseaworthiness. The respondent's motion for summary judgment was denied,[4] but on an interlocutory appeal, the United States Court of Appeals for the Fifth Circuit reversed.[5] The Supreme Court granted certiorari.[6] Upon review, the Court affirmed the Fifth Circuit's decision and reasoning, with four justices dissenting,[7] *holding* that an isolated act of personal negligence could not constitute an unseaworthy condition and, accordingly, a longshoreman injured by such an act could not recover from the shipowner under the unseaworthiness doctrine. *Usner v. Luckenbach Overseas Corp.,* 400 U.S. 494 (1971).

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1. The stevedoring contractor, T. Smith & Son, Inc., was an independent contractor and in charge of all phases of the loading operation. No member of the ship's crew was involved in any pertinent aspect of the operation.

2. The petitioner was preparing to attach the sling to a bundle of rods when he noticed that the sling was out of reach. He motioned to the flagman to have the winch operator lower the sling further. The injury occurred in the course of the operator's attempt to carry out Usner's directions. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 495 (1971).

3. Moreover, there was no contention that the equipment was operated in a systematically negligent or incompetent manner.

4. 400 U.S. at 495.

5. Usner v. Luckenbach Overseas Corp., 413 F.2d 984 (5th Cir. 1969). The circuit court stated that " 'instant unseaworthiness' resulting from 'operational negligence' of the stevedoring contractor is not a basis for recovery by an injured longshoreman." *Id.* at 985–86.

6. 397 U.S. 933 (1970).

7. Mr. Justice Stewart wrote the opinion of the Court, in which Chief Justice Burger and Justices Blackmun, Marshall and White concurred. Mr. Justice Douglas wrote a dissenting opinion in which he was joined by Justices Black and Brennan, while Mr. Justice Harlan filed a separate dissenting opinion.

There is no area of federal law whose fundamental principles have been created so completely by the judiciary as admiralty.[8] The doctrine of shipowner liability for personal injuries caused by unseaworthiness is no exception.[9] Although, on occasion, reference had been made to this doctrine in earlier cases,[10] it was not specifically enunciated in the United States until 1903, when Mr. Justice Brown, writing for the Supreme Court in *The Osceola,*[11] stated in dictum that a shipowner is liable for damages whenever seamen receive injuries "in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."[12] Originally, *The Osceola* was contrued as limiting liability to situations in which the unseaworthiness resulted from negligence. Thus, at first, unseaworthiness was a limited species of negligence, the only type for which the owner was liable.[13] However, in 1922, Mr. Justice McReynolds in *Carlisle Packing Co. v. Sandanger,*[14] expressed the view, again in dictum, that liability for injuries resulting from unseaworthiness can attach without regard to any question of negligence.[15]

8. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (Frankfurter, J., dissenting).

9. It should be mentioned at the outset that this note will be limited to an examination of the doctrine of unseaworthiness in personal injury cases. It will not consider, for the sake of brevity and clarity, the related doctrine of unseaworthiness in cargo bailment and maritime insurance cases. It has been noted by commentators that the doctrines were, for the most part, independently developed by the courts — their bases being "radically different" — and that to employ, except by way of analogy, cases in one area as authority in the other is unwarranted and often unnecessarily confusing. *See, e.g.,* Tetrault, *Seamen, Seaworthiness and The Rights of Harbor Workers,* 39 CORNELL L.Q. 381, 393–95 (1954). *See* note 15 and accompanying text *infra.*

Pursuant to the above restriction, the phrase "warranty of seaworthiness" will be avoided for the most part in this discussion of personal injury liability because, while many courts have on occasion described the shipowner's duty to seamen in terms of a warranty, it carries with it a contractual connotation, whereas the liability at issue in the instant case is not dependent upon a contractual relationship. The phrase "warranty of seaworthiness" pertains to the duty of the shipowner in cargo bailment and marine insurance agreements. Tetrault, *supra* at 395.

10. *See, e.g.,* Dixon v. The Cyrus, 7 F. Cas. 755 (No. 7621) (D. Pa. 1789); Scarff v. Metcalf, 107 N.Y. 211, 13 N.E. 796 (1887).

11. 189 U.S. 158 (1903). For treatments of the history of the doctrine prior to *The Osceola, see* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 543–45 (1960); United Pilots Ass'n v. Halecki, 358 U.S. 613, 616 (1959) (doctrine of dubious origin); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90–92 nn.7 & 8 (1946) (origins of doctrine may not be ascertainable); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6–38 (1957); Tetrault, *supra* note 9, at 382–90.

12. 189 U.S. at 175.

13. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 546 (1960); Tetrault, *supra* note 9, at 391, 395.

14. 259 U.S. 255 (1922).

15. *Id.* at 259. However, this view was supported only by citation to three cargo bailment cases: The Southwark, 191 U.S. 1 (1903); The Sylvia, 171 U.S. 462 (1898); The Caledonia, 157 U.S. 124 (1895). As has been mentioned, cargo bailment cases do not constitute authority for imposing strict liability on a shipowner for bodily injuries to seamen. *See* note 9 *supra.* The doctrine that a shipowner had an absolute duty to provide a seaworthy vessel with respect to cargo, and was held strictly liable where the cargo was destroyed due to the vessel's unseaworthiness, was contractual in nature and basically unrelated to the unseaworthiness doctrine with regard to injuries to seamen. For a discussion of the dubious origin of this imposition of strict liability, *see* Tetrault, *supra* note 9, at 393–96.

This dictum was ignored for the most part until it was reasserted in a dictum by the Court in *Mahnich v. Southern Steamship Co.*[16] In *Mahnich,* Mr. Justice Stone argued that the imposition of strict liability in unseaworthiness cases was traceable to *The Osceola.*[17]

Originally, unseaworthiness was defined as a defective condition in a ship or its appurtenances which was of such gravity that the ship was not reasonably fit for its intended use as a vessel, or was not a reasonably safe place in which to work.[18] Examining this definition closely, it would appear that the term was originally intended as being limited to an inherent defect of a non-transitory character which was serious enough to render the vessel unfit for voyage. This would correspond roughly with a layman's concept of what unseaworthiness would entail.[19] However, while the courts continued to employ the same terminology, they wandered, either by design or oversight, from the original meaning of the terms, and therefore from the natural scope of the original definition.[20] In a series of landmark decisions, the Supreme Court boldly expanded the scope of unseaworthiness liability, often by a sharply divided vote. This was accomplished by what may be described as a gradual "swelling" of the concept of a condition — an incremental expansion of the definition of a condition — ultimately to its conceptual limits. The cases which follow highlight the history of this expansion.

In *Mahnich,* the Court expanded unseaworthiness to include unsafe conditions in equipment, even though the accident resulted from the unnecessary use of clearly defective equipment when good equipment was readily available.[21] The next major expansion of the scope of unseaworthiness liability was carried out in the Court's per curiam decision in *Alaska Steamship Co. v. Petterson,*[22] where it was held that the shipowner was liable for injuries caused by defective equipment brought on board by others, even when it was outside the control of the owner and his employees. *Boudoin v. Lykes Brothers Steamship Co.*[23] ex-

16. 321 U.S. 96, 100 (1944). In *Mahnich,* an unseaworthy condition was found to exist when a staging collapsed because rotted rope was employed by a crew member in the staging's construction. It was held that the unseaworthy conditions of the rope and the staging were the owner's responsibility despite the fact that the accident was the result of a crew member's negligent use of clearly defective rope when good rope was available.

17. 321 U.S. at 100. Mr. Tetrault seriously questions the correctness of Justice Stone's interpretation of *The Osceola. See* Tetrault, *supra* note 9, at 397–98.

18. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960); The Osceola, 189 U.S. 158, 175 (1903) (dictum).

19. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 2050 (3d ed. 1971).

20. *See* notes 29–39 and accompanying text *infra.*

21. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). For the facts of the case, *see* note 16 *supra.*

22. 347 U.S. 396 (1954) (longshoreman injured by unsafe equipment owned, operated and brought on board by the stevedoring contractor and outside the control of the owner and his employees).

23. 348 U.S. 336 (1955). In *Boudoin,* the petitioner was allowed to recover for injuries which were received when a fellow seaman, known for his heavy drinking and violent propensities, attacked him in a drunken rage. The Court

tended the doctrine to include men unfit for duty as well as defective equipment. However, the Court was careful to limit liability to cases of habitual incompetence or unfitness, excluding isolated negligent or violent acts.[24] In *Crumady v. The J. H. Fisser*,[25] the Court continued this liberal trend by holding that a winch with no inherent defects was nevertheless rendered unseaworthy by the failure of those in charge of the winch operation to properly reset the circuit breakers so as to prevent the overloading of the winch. In so holding, the Court shifted from imposing liability where the injury was caused by an unseaworthy condition which resulted from the unnecessary and therefore negligent use of already unseaworthy equipment, as in *Mahnich*, to imposing it also where the injury resulted from an unseaworthy condition created solely by a negligent act — the negligent misuse of otherwise seaworthy or sound equipment.[26] Finally, in *Mitchell v. Trawler Racer, Inc.*,[27] the

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reasoned that no legitimate distinction, with regard to unseaworthiness liability, could be drawn between unfit equipment and unfit crewmen.

In a recent casenote on the *Usner* decision, the author expressed the opinion that, given the Court's liberal trend, *Boudoin* would probably be expanded as authority for the view that an isolated personal act of negligence by a crewman would render a ship unseaworthy. 31 LA. L. REV. 650 (1971). Since *Usner* denied that a ship may be rendered unseaworthy by the isolated act of a longshoreman, the obvious conclusion is that the two cases are in conflict and distinguishable only in regard to who is the actor — a crewman or a longshoreman. *Id.* at 651–52.

It is submitted that this is not the proper interpretation of *Boudoin*, and that the case is in no way in conflict with *Usner*. *Boudoin* explicitly drew a distinction between a negligent act which was a manifestation of habitual incompetence and an isolated negligent act which was, perhaps, the result of a merely momentary inadvertence — a distinction between a physical attack by a seaman of violent tendencies and an attack by a seaman who, though not violent by nature, lost his temper in this particular instance. The distinction is quite clear. Who would deny that there is an essential difference between an habitual drunk and the weekend socializer who simply had one too many? To say that *Boudoin* may be readily expanded to include an isolated act of negligence or anger is to say, in effect, that incompetence can be equated with momentary forgetfulness or inadvertence. To be sure, the resulting negligent or violent acts in any given situation may cause the same injurious results to the victim, but the actors are quite different. The first exhibits a continuing *condition* of incompetence, while the second is guilty of only an isolated mistake. The *Boudoin* test easily separates the two men. A single act of negligence or violence is reasonably to be expected from any average seaman of ordinary abilities and sensibilities, while habitual incompetence or uncontrollable violent tendencies would not be expected and could not be tolerated in the average seaman. 348 U.S. at 339–40.

Further, *Boudoin*'s rationale is not, and was not intended to be, limited to only crewmen. The same is true of *Usner* with respect to longshoremen. *See* note 39 *infra*.

24. *Accord*, Jones v. Lykes Bros. S.S. Co., 204 F.2d 815 (2d Cir. 1953); Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952).

25. 358 U.S. 423 (1959).

26. At first glance, this may appear to be no broader than the holding in *Mahnich*, but the difference is considerable and significant. In *Mahnich*, the rope which broke was already defective, and the seaman's negligence in choosing the rotted rope when good rope was available was only a concurrent cause of the injury together with the existing, though latent, defect. In *Crumady*, however, the unsafe condition had not existed previously; rather, it was created in an otherwise safe mechanism solely through the negligence of whoever had the duty of checking the circuit breaker setting.

27. 362 U.S. 539 (1960) (seaman injured when he slipped off a rail which had become covered with slime and fish gurry during an unloading operation earlier that morning).

Court rejected any distinction between unseaworthy conditions which existed at the beginning of the voyage and those transitory in nature, or between those of a temporary and those of a permanent character. The Court reasoned that liability for unseaworthiness was completely independent of any concepts of negligence, and therefore the owner's control over the situation or his actual or constructive notice thereof was irrelevant.[28]

There are many other landmark cases which have expanded the scope of the unseaworthiness doctrine as a whole.[29] The above cases are singled out in particular because they mark various stages in the development of the act–condition distinction and the definition of what constitutes unseaworthiness. Each of these decisions can be analyzed, in part, as an attempt by the Court to swell or expand the concept of a condition. Thus, while unseaworthiness originally referred only to some inherent defect in the ship or its appurtenances, it was expanded to include any situation that could be considered a condition, whether temporary or permanent, inherent or created by the negligent act of a seaman, provided that it rendered the ship not reasonably fit for its intended use. Eventually, all that the courts required, in effect, was some time lapse between the creation of the danger and the resulting injury, so that it could be said that an unsafe condition existed prior to the injury and was its proximate cause.[30]

Clearly, the only remaining step was to allow recovery for what had come to be called "instant" unseaworthiness; *i.e.,* to allow recovery for injuries caused by a single simultaneous negligent act where, in a sense, the act itself is the unseaworthy condition. To state it another way, the act, the condition created by the act, and the resulting injury occur, for all practical purposes, simultaneously. However, most of the lower courts had attempted to maintain the act–condition distinction[31]

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28. *Id.* at 550.

29. *See, e.g.,* Gutierrez v. Waterman S.S. Co., 373 U.S. 206 (1963) (doctrine expanded to include condition of cargo containers); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962) (method of loading and manner of stowage included); Pope & Talbot v. Hawn, 346 U.S. 406 (1953) (repairmen working on board considered covered by the "warranty" of seaworthiness); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (longshoreman allowed to recover for unseaworthiness).

30. Perhaps the point is illustrated best by an example used by Judge Hays, concurring in Paddu v. Royal Netherlands, 303 F.2d 752 (2d Cir. 1962):

> A ship is not unseaworthy because it has glass in a window which might be broken. The injuries of a seaman who negligently breaks such a glass are not the result of unseaworthiness, nor are the injuries of a seaman who is cut by the falling glass. But injury incurred in stepping on the broken glass does result from unseaworthiness.

*Id.* at 757.

31. *See, e.g.,* Robichaux v. Kerr McGee Oil Indus., Inc., 376 F.2d 447 (5th Cir. 1967); Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443 (5th Cir. 1967); Paddu v. Royal Netherlands, 303 F.2d 752 (2d Cir. 1962); Williams v. the S.S. Richard De Larrinaga, 287 F.2d 732 (4th Cir. 1961); Grillea v. United States, 232

and chose to advocate what may be termed the rule denying "instant" unseaworthiness; "instant" unseaworthiness is not an unseaworthy condition within the scope of the doctrine of unseaworthiness liability or, more precisely, there is no such thing as "instant" unseaworthiness. Prior to the instant case, the Supreme Court had never ruled directly on the viability of the act–condition distinction or on whether there could be such a thing as "instant" unseaworthiness.

Nevertheless, the per curiam decision of the Court in *Mascuilli v. United States*[32] was interpreted by several courts[33] as an assertion that unseaworthiness could be instantaneous, and therefore as a rejection of the rule denying "instant" unseaworthiness. Mascuilli was killed during a loading operation when fellow longshoremen negligently allowed one of three interconnected cables to be wound up by its winch faster than the other two were let out by their respective winches. The resulting tension caused a shackle to spread and the cable to strike and kill Mascuilli.

Although the *Mascuilli* case was decided without an opinion, the Court reversed the lower court's denial of recovery, merely citing *Mitchell* and *Crumady*. The decision was thus open to several interpretations in light of the questions posed by the petition on certiorari.[34] Examining the petitioner's brief for certiorari, it is evident that the Supreme Court's decision could have been predicated upon any one of at least three grounds: (1) that the district court's finding that the improper setting of the circuits did not affect the seaworthiness of the ship was clearly erroneous; or (2) that the negligent operation of inherently seaworthy equipment may render a ship instantaneously unseaworthy; or (3) that the longshoremen were incompetent, and the ship was unseaworthy by virtue of their unfitness. If it were decided on either the first or third of these grounds. *Mascuilli* would not have constituted a change in the Court's position as previously enunciated in *Mahnich, Crumady, Petter-*

F.2d 919 (5th Cir. 1956). *But see* Blassingill v. Waterman S.S. Corp., 366 F.2d 367 (9th Cir. 1964). *See also* Note, *The Doctrine of Unseaworthiness: Developing Restriction of the Act–Condition Dichotomy,* 21 RUTGERS L. REV. 322, 328–32 (1966).

32. 387 U.S. 237 (1967). The district court denied recovery claiming that the fact that the circuit breakers were improperly set in excess of the rated pull of the winches was not relevant to the claim of unseaworthiness. It found the ship seaworthy as a matter of fact, the accident being caused solely by the single negligent act of a stevedore. 241 F. Supp. 354, 362 (E.D. Pa. 1965). The Court of Appeals for the Third Circuit affirmed, holding that the district court's findings of fact were not clearly erroneous and, therefore, there were no grounds for reversal. 358 F.2d 133 (3d Cir. 1966).

33. *See, e.g.,* Alexander v. Bethlehem Steel Corp., 382 F.2d 963 (2d Cir. 1967); Canadiano v. Moore-McCormick Lines, Inc., 382 F.2d 961 (2d Cir. 1967). *See* note 35 and accompanying text *infra.*

34. The questions posed were: (1) Did a prior unseaworthy condition come into play due to the tightline condition? (2) Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy? (3) Was the vessel unseaworthy because the longshoremen were not reasonably competent seamen? Petitioner's Brief for Certiorari at 2, Mascuilli v. United States, 387 U.S. 237 (1967).

*son* and *Boudoin*. The second ground, however, would have meant a rejection of the rule denying "instant" unseaworthiness.

Confusion among the circuit courts arose almost immediately concerning the interpretation of *Mascuilli*. The Second and Fourth Circuits interpreted the decision as an unqualified rejection of the rule denying "instant" unseaworthiness, and an acceptance of the proposition that a shipowner was liable for unseaworthiness where injuries are caused instantaneously by an act of negligence.[35] The courts took the view that the Supreme Court had seen no substantive difference or just distinction between *Crumady* and *Mascuilli*, simply because in the former the negligent act could be viewed as creating an unsafe intermediate condition which in turn caused the injury, while in the latter the consequences of the negligent act were immediate.

The Fifth and Ninth Circuits, however, adhered to the more conservative interpretation of *Mascuilli*, namely, that in light of *Crumady* and *Mahnich*, the Supreme Court had considered the district court's conclusion that the improper setting of the circuit breakers had no bearing on the unseaworthiness of the ship to have been clearly erroneous

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35. Candiano v. Moore-McCormick Lines, Inc., 382 F.2d 961 (2d Cir. 1967) (longshoreman injured by falling beam because fellow longshoreman had not fully brought one hook through hole in the beam). The Second Circuit proclaimed that on the basis of *Mascuilli*, the distinction between negligent operational acts and unseaworthiness which had been established previously in a long line of cases beginning with Grillea v. United States, 232 F.2d 919 (2d Cir. 1956), was no longer controlling, and the rule that operational negligence was fundamentally different from unseaworthiness, was no longer a factor in determining liability. However, the court remarked that it could see no "basis in logic for attributing unseaworthiness to a vessel which is in every respect soundly constructed and completely equipped merely because of the negligence of longshoremen or crew members . . . ." 382 F.2d at 962.

It should be noted that the *Candiano* interpretation of *Mascuilli* was based on the United States Law Week report of the case. 35 U.S.L.W. 3052 (U.S. July 26, 1966). This report gave the impression that the sole question before the Court was whether the operational negligence of a longshoreman in handling proper equipment could make a vessel unseaworthy. Thus, the *Candiano* decision was based upon a mistaken impression, which was later admitted by Judge Moore in his concurring opinion on the petition for rehearing. 386 F.2d 444 (2d Cir. 1967). *See* Tim v. American President Lines, Ltd., 409 F.2d 385, 389-92 (9th Cir. 1969); Note, *The Law of Unseaworthiness and the Doctrine of Instant Unseaworthiness*, 28 MD. L. REV. 249, 285-90 (1968).

The Second Circuit reiterated its position, allowing recovery in the *Alexander* case, which was virtually indistinguishable from *Usner*. Alexander v. Bethlehem Steel Corp., 382 F.2d 963 (2d Cir. 1967) (longshoreman struck by pieces of storing dunnage which were hurled into the air because winch operator negligently allowed lift to fall during last few feet). *Accord*, Tarabocchia v. Zim Israel Navigation Co., 417 F.2d 476 (2d Cir. 1969), *rev'd per curiam*, 401 U.S. 930 (1971) (citing *Usner* decision); Cleary v. United States Lines Co., 411 F.2d 1009 (2d Cir. 1969).

The Fourth Circuit followed the Second Circuit, expressly rejecting the conservative interpretation of *Mascuilli*. *See, e.g.*, Lundy v. Isthmian Lines, Inc., 423 F.2d 913 (4th Cir. 1970); Venable v. A/S Det Forende Dampskibsselskab, 399 F.2d 347 (4th Cir. 1968). In *Venable*, the court was of the opinion that the Supreme Court had cited *Crumady* and *Mahnich* not merely for their factual similarities, but in order to reemphasize the Court's deep concern for, and liberal policy of protecting seamen. 399 F.2d at 351.

and contrary to the *Mahnich* and *Crumady* decisions.[36] Thus, for these courts, *Mascuilli* had left untampered the "instant" unseaworthiness rule.[37]

At any rate, these positions exemplify the rather confused state of maritime law with reference to the status of "instant" unseaworthiness at the time of the decision now under consideration. In *Usner,* the Court has written its first full opinion directly dealing with the concept, and a majority has decided to halt the expansion of the definition of unseaworthiness by rejecting "instant" unseaworthiness as a basis for shipowner liability.[38] With this decision, the Court has concluded quite clearly that a distinction must be made between an unfit condition existing prior to occurrence of the injury, and an isolated negligent act by a seaman which simultaneously causes the injury.[39]

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36. In Tim v. American President Lines, Ltd., 409 F.2d 385, 390–92 (9th Cir. 1969), the court cogently argued that the *Mascuilli* reversal was predicated solely upon the issue concerning the improper setting of the circuit breakers, since this was the petitioner's major contention, and since she had repeatedly stressed in her brief the factual similarity with *Crumady* and *Mahnich,* citing the two cases only in connection with this argument. Petitioner's Brief for Certiorari at 8, Mascuilli v. United States, 387 U.S. 237 (1967). The Fifth Circuit advanced similar arguments for this interpretation. *See, e.g.,* Grisby v. Coastal Marine Service, Inc., 412 F.2d 1011, 1032–33 (5th Cir. 1969).

Several commentators have taken the position that this was the more responsible interpretation of *Mascuilli* in that it did not involve a change in the law, whereas the Second and Fourth Circuits' interpretation involved a definite expansion. The argument is that such an expansion was unjustified because *Mascuilli* was a per curiam decision without any explanatory opinion, and, therefore, open to a more conservative reading. *See* Note, *supra* note 35, at 290; Note, *Unseaworthiness, Operational Negligence and the Death of the Longshoreman's and Harbor Workers' Compensation Act,* 43 NOTRE DAME LAW. 550 (1968).

37. It is worthwhile to mention at this point that the *Usner* opinion also tends to leave one in doubt as to what actually was the issue upon which the Court had decided *Mascuilli.* The majority in *Usner* stated that it was "evident" from the citation to *Crumady* and *Mahnich,* that the Court's reversal was based on an affirmative answer to the first question. 400 U.S. at 500, n.19. However, Mr. Justice Douglas in his dissent, in which Justices Brennan and Black joined, indicated in his final footnote and his short textual explanation of *Mascuilli* that the case had been decided on the second question. *Id.* at 503. Thus, he stated that "[o]nly the Fifth Circuit in the instant case [among others] . . . stood against the rule of *Mascuilli." Id.* (Douglas, J., dissenting). This, of course, would mean that the Fifth Circuit's holding that "instant" unseaworthiness is no basis for recovery was in direct conflict with what Justice Douglas asserted the "rule of *Masculli*" to be, and since the Supreme Court opinion on appeal in *Usner* was in complete agreement with the circuit court's reasoning, it also "stands against the rule of *Mascuilli.*" Therefore, in the opinion of the dissenting justices, *Usner* constituted a tacit overruling of *Masculli.*

38. 400 U.S. at 499–500.

39. While the holding spoke of an isolated negligent act by a longshoreman, it is submitted that the rule applies to acts of seamen in general, *i.e.,* to both crewmen and longshoremen. The reasoning of the opinion affords no basis for drawing a distinction between a crewman's negligent act and a longshoreman's negligent act. They are both seamen insofar as they perform the tasks traditionally carried on by seamen. Cf. Seas Shipping v. Sieracki, 328 U.S. 85 (1946). The only legitimate distinction that can be drawn between the act of a longshoreman performing traditionally seamen's tasks and the act of a crewman, would be the fact that the shipowner–employer is responsible for the acts of his crewmen–employees whereas he is not responsible (except where unseaworthiness results) for the acts of the non–employee–longshoremen. Drawing such a distinction in the instant case would be totally contradictory since the majority relied so heavily on the *Mitchell* rule which requires a divorcement of negligence concepts from unseaworthiness liability. Since the only possible distinction in the instant case between longshore-

In support of the distinction, the Court emphasized, citing *Mitchell* and *Sieracki*,[40] that it was well settled that liability based on unseaworthiness is "wholly distinct from liability based on negligence."[41] Apparently, the Court concluded that this principle somehow demanded a holding that a negligent act cannot be an unseaworthy condition, because to hold otherwise would be violative of the total divorcement of negligence concepts from unseaworthiness liability which had been firmly established by the Court.[42]

It is suggested, however, that if anything demanded the holding that an isolated act of negligence cannot be an unseaworthy condition upon which strict liability may be predicated, it is the basic act–condition distinction — that unseaworthiness, by definition, is a condition, a state of affairs, and therefore cannot be an act. It is not, as the Court suggested, that a contrary holding would confuse negligence liability with unseaworthiness liability, but that a contrary holding would confuse acts with conditions. This may become clearer if we analyze the logical steps, in order of priority, necessary to find that a certain injury was due to unseaworthiness. The definition of unseaworthiness is: (1) a condition of a ship, its equipment or crew, (2) that is of such a nature that it renders the vessel not reasonably fit for its intended purpose or not a reasonably safe place in which to work. If an injury was the result of a situation which satisfies (1), and if (1) can be characterized as (2), then the injury was due to unseaworthiness.

Now, the *Mitchell* rule is that if the injury were due to an unseaworthy condition — the "cause" of the injury satisfies the requirements of (1) and (2) — then the court may not consider whether or not the condition was negligently created, negligently allowed to exist, or was not discovered or corrected because of negligence. The Court had imposed strict liability for unseaworthiness.[43] Therefore, it is irrelevant

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men and crewmen is precluded by the principal rule upon which the holding is founded, the holding cannot be limited to longshoremen alone.

40. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94 (1946).

41. Mr. Justice Stewart, writing for the majority in *Usner*, explained that:
[T]he Court has repeatedly taken pains to point out that liability based on unseaworthiness is *wholly distinct* from liability based upon negligence. The reason, of course, is that unseaworthiness is a condition . . . .
. . . What has caused the petitioner's injuries in the present case, however, was not the condition of the ship . . . , but the isolated personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions.
400 U.S. at 498–500 (emphasis added).

42. *Id.*

43. In *Mitchell*, the Supreme Court concluded:
[T]he decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent

whether or not the unseaworthy condition was unavoidable; irrelevant how long the condition had existed and whether there had been a reasonable opportunity to correct it. *Mitchell* mandated that once the court determines that the injury was the result of an unseaworthy condition, then responsibility and liability for the injury falls on the shipowner, irrespective of negligence. The unseaworthy condition could be due to negligence, but it need not be.

However, in the *Usner* case, we are concerned only with the definition of unseaworthiness. As the Court itself stated: "the question here goes to the very definition of what unseaworthiness is and what it is not."[44] The question before the Court was whether or not it should expand the definition, and thus whether or not a single, isolated act could meet the requirement of (1) above. The Court had to decide if such an "act" could be a "condition;" that is, whether the traditional act–condition distinction was a proper distinction to draw. The Court could have said that the distinction is not viable and hold that a ship may be unseaworthy during the occurrence of the act; that is, a condition of danger may exist from the time the act is initiated until it results in an injury. However, the Court did not choose to assume this stance. Rather, it held that a single, isolated, personal act may not be considered to be an unseaworthy condition.

It is submitted, however, that the rationale the Court gave for its holding is inappropriate and unnecessary. The Court said that a contrary holding would "subvert" the *Mitchell* rule,[45] but this does not seem to be the case. As indicated above, the *Mitchell* rule is applicable only after the court has determined that the injury was due to an unseaworthy condition. In *Usner,* this determination had not been made. The issue was whether a single act could be a condition. Accordingly, it is posited that the Court should have stressed the fundamental difference between an act and a condition, rather than the fundamental difference between negligence liability and unseaworthiness liability.

In rebuttal to this position, it may be argued that the Court was not confronted with merely an isolated personal act, but rather an isolated personal act *of negligence,* and that the *Mitchell* rule demands that negligence liability and unseaworthiness liability be kept separate. However, unless *Mitchell* can be construed to mean that negligence and unseaworthiness are mutually exclusive theories of liability, and that an injury

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> of his duty under the Jones Act to exercise reasonable care (citations omitted). . . . [T]he shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability . . . .
> . . . What has evolved is a complete divorcement of unseaworthiness liability from the concepts of negligence.

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549–50 (1960).

44. 400 U.S. at 498.

45. *Id.* at 500.

is either the result of one or the other, but never both,[46] there would appear to be no reason why the fact that the act was negligent should preclude a finding of unseaworthiness notwithstanding the *Mitchell* rule. At this point, a possibly revealing question may be asked: If the *Mitchell* rule does not prevent a finding of unseaworthiness based on conditions created by prior negligent acts (which it does not), then why should it preclude such a finding with respect to negligent acts alone? In both injury-causing situations, negligence is present. Yet, it has not been held that the *Mitchell* rule prevents a finding of unseaworthiness in the former situation; the simple reason is that the rule *never* prevents a finding of unseaworthiness. Rather, *Mitchell* stands for the proposition that unseaworthiness liability is not limited to situations in which the unseaworthiness is caused by negligence. The only difference between the two situations is that in the former there is a *condition,* while in the latter there is only an *act.*

Therefore, the *Usner* Court should have stressed the point that the definition of unseaworthiness, as a condition which renders the ship not reasonably fit, cannot accommodate a single isolated act without substantially expanding the concept of a condition (for the purposes of the unseaworthiness definition), which the Court was unwilling to do.[47] To do so would have made the shipowner a virtual insurer.

Regardless of whether the above thesis is correct, the effect of *Usner* is to firmly establish the act-condition distinction as a central consideration in any unseaworthiness action. Thus, it is of crucial importance to recognize the problem that is created by the act-condition dichotomy. As a result of the distinction, recovery for grievous physical injuries is totally dependent upon the time element which separates an event (or

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46. It would seem elementary that such is not the case. It is hard to believe that the *Usner* court was really thinking along those lines. Yet, consider the following:

> [T]he Court has repeatedly taken pains to point out that liability based upon unseaworthiness is *wholly distinct* from liability based upon negligence.

400 U.S. at 498 (emphasis added).

The Court cited *Sieracki* and *Mitchell* as authority for this statement. However, consider whether the Court made equivalent statements in those cases:

> [T]he liability [for unseaworthiness] is neither *limited by* conceptions of negligence nor contractual in character.

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94 (1946) (emphasis added).

> What has evolved is a *complete divorcement* of unseaworthiness liability from the *concepts* of negligence . . . .

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (emphasis added).

It is quite probable that the Court meant the same thing in each of the above quotes as it did in *Usner.* Nevertheless, strictly speaking *Mitchell* and *Sieracki* stress only that unseaworthiness is not limited by the concepts of negligence, and this does not mean that negligence liability is "wholly distinct" from seaworthiness liability, if by this the Court inferred that they are somehow mutually exclusive spheres of liability.

47. The majority in the instant case referred to the act-condition distinction, but not in those terms; the opinion placed emphasis on the need to maintain a distinction between negligence liability and unseaworthiness liability. The Court viewed the negligence-unseaworthiness distinction as the primary reason behind its holding and did not consider the act-condition dichotomy as an independent justification. *See* note 41 *supra.*

act) as it is happening, from the situation created by that event immediately upon its completion. For example, if a pipe is negligently dropped by longshoremen *X*, and it strikes *Y* on the head, this injury is the result of an event or act while it is occurring. But if the pipe misses *Y*, and falls to the deck whereupon *Z* trips over it, *Z's* injury is due to a situation or a condition which has been created by the negligent act of *X*, completed prior to *Z's* injury.[48] *Y* would not be able to recover against the shipowner for unseaworthiness, but *Z* could recover.[49] Analytically, the result may be defensible, but somehow reason and fairness are lost, it would seem, in the attempt to maintain the act–condition distinction as it is now defined.[50]

48. However, the condition need not have existed for any particular length of time. To take such a time factor into consideration would seem to be violative of the *Mitchell* rule. Why should a court consider how long the condition had existed unless it was concerned with factors such as control, notice and discoverability; that is, the concepts of negligence which *Mitchell* had specifically divorced from unseaworthiness liability. 362 U.S. at 548–50. Thus, most courts felt compelled not to consider the length of existence of the condition. *See, e.g.,* cases cited in notes 30 & 31 *supra.*

On the other hand, it can be argued that there is a period of time just after the completion of the act during which the situation cannot yet be considered a condition — where the situation which has been created by the act is so close in time to the act that it is more like an extension of the act than a condition resulting from it. If analyzing cases in terms of this three-way division — an act, a condition, and a hybrid of the two — is feasible, then it is perhaps legitimate to consider the length of time after the act itself is completed in determining whether the injury results from a condition. It is submitted, however, that such an approach, rather than solving the problem, only serves to shift it to another level. If the problem with the act-condition distinction is differentiating between an act and a condition which results therefrom, the problem still remains, in essence, in trying to draw the distinction between the act–condition hybrid and the ultimate condition.

49. *See, e.g.,* Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443 (5th Cir. 1967) (factually indistinguishable from *Usner;* court held that an injury due to a negligent act at the moment of injury was not due to unseaworthiness, but one caused by an unsafe condition created by a completed negligent act would be due to unseaworthiness); Paddu v. Royal Netherlands, 303 F.2d 752, 757 (2d Cir. 1962) (Hays, J., concurring); Grillea v. United States, 232 F.2d 919 (5th Cir. 1956) (held that while one act of operational negligence did not make a vessel unseaworthy, unseaworthiness would still result if the negligent act was but an intermediate step in the creation of an unfit condition which in turn caused injury); Mollica v. Compania Sud Americana, 202 F.2d 25 (2d Cir. 1953) (held that an injury from a fall into a ill-lighted hole was due to unseaworthiness even though the sole reason for the condition was that the lampman had negligently failed to rig extra lights as he had been ordered).

While this may not make much difference to a crew member, since he could sue as an employee for negligence under the Jones Act, 46 U.S.C. § 688 (1970), a longshoreman would have no such recourse if *X* were a longshoreman not employed by the owner. At common law, an employer (here a shipowner) is only responsible for his employees, and an action under the Jones Act is restricted to employee versus employer situations.

50. It should be noted that there is at least one way of indirectly reintroducing the length of time that the condition existed prior to the injury as a factor to be considered in determining whether the ship was unseaworthy. It can be argued that even if there is a condition, not all conditions that cause injuries render ships unseaworthy, for it must also be found that the condition made the ship not reasonably fit for its intended use. *See* notes 41 & 43 and accompanying text *supra.* Is not the length of time the condition existed a factor in deciding whether, by virtue of it, the ship was rendered unseaworthy? Certain accident-causing conditions are inevitable, indeed, frequent on ships, and therefore, while they may make the ship dangerous or unfit, they do not make it unreasonably so because of their unavoidability. Thus, the issue becomes not whether the condition existed, but how long

While the majority in *Usner* maintained this distinction, the dissent argued, in effect, that the distinction is untenable from the standpoint of the results achieved by its application. This is what Justices Douglas and Harlan meant in their respective dissents when they concluded that *"Crumady* cannot *justly* be distinguished from the case before us."[51] In one case, the negligent misuse of a winch created a dangerous condition which in turn caused the injury, while in the other, the negligent misuse of the winch caused the injury directly. In both cases, a negligent act has brought about the injury. The only difference is that in one, the consequences of the negligence are delayed and can be viewed as resulting from a dangerous condition which existed as a potential for injury for some period of time, no matter how momentary, while in the other, the consequences are immediate.[52] Based upon this distinction, the majority chose to determine the liability of shipowners and the rights of injured men.

In analyzing the *Usner* decision, it is also important to clarify what the Court did not say. The *Usner* holding is limited to situations where the injury is caused by an isolated, single act of negligence. The Court did not rule against finding unseaworthiness where the injury was caused by an act of negligence, the act being a manifestation of habitual incompetence,[53] or where the act was only one incident in a continuing

it had existed prior to the injury. For example, the momentary slippery condition of an engine room's steps due to oil droppings should not be considered unreasonable unfitness unless it can be shown that the condition had persisted for an unreasonable length of time. Pinto v. States Marine Corp., 296 F.2d 1 (2d Cir. 1961), *cert. denied,* 369 U.S. 843 (1962).

The obvious rebuttal is that this is a violation of the *Mitchell* rule of separating negligence concepts from unseaworthiness liability, and yet this reasoning is based on the "reasonable fitness" criterion also emphasized in *Mitchell.* 362 U.S. at 550. Given the fact that the Court denied certiorari in *Pinto,* one might legitimately wonder just what was the intended application of the *Mitchell* rule, and exactly when the concepts of negligence liability, such as the time duration of the condition, are to be considered, if at all. For an interesting analysis of the inherent contradictions of the *Mitchell* rule, *see* Zobel, *The Unseaworthy Instant,* 45 ST. JOHN'S L. REV. 200 (1970).

51. 400 U.S. at 504 (Harlan, J., dissenting) (emphasis added). Mr. Justice Douglas dissented, with Justices Black and Brennan joining in his opinion. He argued that the majority's holding was a tacit reversal of the law as it had been established in previous rulings of the Court. Justice Douglas was of the opinion that alongside traditional unseaworthiness concepts, unseaworthiness based on operational negligence had been firmly established. 400 U.S. at 501–03 (Douglas, J., dissenting). *See* note 37 *supra.*

Mr. Justice Harlan also dissented, in a separate opinion. He explained that although he had repeatedly questioned the trend of the unseaworthiness doctrine as it had been expanded by the Court, the instant decision was clearly inconsistent with prior judgments (in particular he cited *Crumady v. The J. H. Fisser,* 358 U.S. 423 (1959)), and should not be handed down without a thorough re-examination of the doctrine as a whole. 400 U.S. at 504. For cases in which Justice Harlan had questioned the expansion of the unseaworthiness doctrine, *see, e.g.,* Waldron v. Moore-McCormick Lines, 386 U.S. 724, 729 (1967) (dissenting opinion of White, J., joined by Harlan, Brennan, & Stewart, JJ.); Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 216 (1963) (Harlan, J., dissenting); Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (Frankfuther, J., dissenting, joined by Harlan & Whittaker, JJ.); Crumady v. The J. H. Fisser, 358 U.S. 423, 429 (1959) (Harlan, J., dissenting).

52. *See* notes 47 & 48 and accompanying text *supra.*

53. Boudoin v. Lykes S.S. Co., 348 U.S. 336 (1955).

course of negligent or otherwise unnecessary or improper conduct, or where the injury-causing act is performed in pursuance of an unreasonably dangerous plan or method of operation.[54]

It may seem blatantly unjust and illogical to allow and deny recovery by the application of a classification that has little or nothing to do with the merits of the injury claim or the possibility of the owner anticipating, noticing or controlling the act or the condition which causes the injury.[55] Therefore, it is submitted that the Court cannot remain in its present position if just and consistent decisions are to be rendered. It should either go forward, which would require the overruling of the *Usner* decision, or it must reverse the trend it has now halted and retrace its legal steps to some point at which the definition of unseaworthiness is on a firmer conceptual foundation and therefore more conducive to consistent and just decisions. A move forward would mean that the trier of fact would be allowed to find unseaworthiness as the cause of all injuries which occur on ships, whether due to a clear-cut inherent defect of a permanent character in the ship, or a transitory condition created by the negligent act of a seaman, or simply a simultaneous act of negligence, involving no defective equipment, and causing immediate injury. Thus, the shipowner would become, by means of judicial construction, the insurer for all or almost all injuries on or near his ship to those men working in connection with the ship.[56]

On the other hand, a reversal of the trend would involve the overruling of several past decisions. It would also involve a "thoroughgoing reexamination" of the past evolution of the unseaworthiness doctrine, as Justice Harlan suggested,[57] and a re-evaluation of the protection given seamen and the burden imposed on shipowners by the doctrine as it was originally formulated, as opposed to the burden imposed as a result of recent extensions. Such a re-evaluation would need to be broad in scope, taking into consideration the various other protections and recourses available to crewmen and/or longshoremen, including maintenance and cure,[58] negligence and statutory violations arising under the

54. *Cf.* Waldron v. Moore-McCormick Lines, Inc., 386 U.S. 724 (1967); Morales v. City of Galveston, 370 U.S. 165 (1962) (dictum — improper method of loading). *See generally* Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 362 U.S. 355 (1962).

55. The distinction makes no difference in the responibility of the owner, since he can no more anticipate, uncover, or correct a momentary, transitory condition than he can an act of negligence by a seaman. Yet, for the former, strict liability is imposed, whereas no liability attaches in the latter instance if the seaman is a longshoreman.

56. The only exceptions might be totally self-inflicted injuries or those caused by the non-negligent act of another.

57. 400 U.S. at 504 (Harlan, J., dissenting).

58. Maintenance and cure is owed to all crew members who are injured regardless of the cause, so long as the injury was received while in the ship's service. The owner is obligated to bear the cost of the injured seaman's food, lodging and medical care until he has been cured as much as is possible, given the nature of the particular injury. Also, the injured crewman is entitled to his salary for the duration of the ship's tour. Unjustified failure to provide proper maintenance and cure makes the owner liable for all consequential damages. Of course, maintenance

Jones Act,[59] common law negligence actions,[60] and the Longshoremen's and Harbor Workers' Compensation Act.[61] It is not within the scope of this casenote to undertake a thorough re-evaluation. However, it would be worthwhile to at least point out a few of the factors which should be considered.

The Jones Act allows a seaman to sue the owner of his ship for injuries incurred as a result of the negligence of the owner or his employees.[62] Thus, it duplicates to a great extent the protection afforded to crewmen by the unseaworthiness doctrine in general maritime law, wherever unseaworthiness could be considered the result of the negligence of the owner or his employees.[63] In addition, the Jones Act criteria for finding negligence are more liberal than general common law requirements, both in terms of causation and the duty owed by the owner to his employees.[64] Moreover, as in the general tort law of some jurisdictions, negligence need not be proved if the injury was, at least in part, the result of a violation of a statute. Again, the Jones Act is more liberal than the common law in that the injured seaman need not be within the class sought to be protected by the statute violated, nor must the injury be of the type sought to be avoided.[65] Thus, the Jones Act covers many situations which would support an unseaworthiness action by a seaman.[66]

Furthermore, even in those situations where the Jones Act does not afford an adequate alternative remedy, other types of actions are often available. For example, while the Jones Act is not applicable to longshoremen, they are able to bring a common law negligence action against the shipowner as business invitees.[67] In such an action, the longshoreman could recover from the owner for any injury incurred as the result

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and cure is available to crew members only; longshoremen do not get it. For a detailed treatment of this maritime right, *see* 1 P. EDELMAN, MARITIME INJURY AND DEATH 7-62 (1960).

59. 46 U.S.C. § 688 (1970).

60. *See* notes 67 & 68 and accompanying text *infra.*

61. 33 U.S.C. §§ 901 *et seq.* (1970).

62. The Act extends to crew members the rights established by the Federal Employer's Liability Act, which provides for actions by employees for the negligence of their employer "in whole or in part" or for any "defect or insufficiency" in equipment due to negligence. 45 U.S.C. § 51 (1970).

63. *Cf.* Tetrault, *supra* note 9, at 402.

64. *See* 1 P. EDELMAN, *supra* note 58, at 65-69.

65. Kernan v. American Dredging Co., 355 U.S. 426 (1958). In a 5-4 decision, the shipowner was held liable for the death by fire of a seaman, when a lamp three feet above the water line ignited oil wastes on the water. By regulation, the lamp should have been at least eight feet above water. *See* 1 P. EDELMAN, *supra* note 58, at 67-69.

66. There are some exceptions; for example, a longshoreman can no longer bring an action under the Jones Act. *See* 1 P. EDELMAN, *supra* note 58, at 74-75. Another exception is that in a Jones Act negligence suit, a shipowner would not be liable for the negligence of a third party, non-employee working on board his vessel. He would be responsible for the same injury in an unseaworthiness action in admiralty if the negligent act created an unsafe condition which in turn caused the injury, whether or not the owner had any control over the third parties or their equipment. *See* Note, *supra* note 35, at 271.

67. *See* 1 P. EDELMAN, *supra* note 58, at 74-75.

of (1) the existence of an unseaworthy condition negligently created or allowed to persist by the owner or his employees, or (2) the negligent act of an employee under the doctrine of respondeat superior.[68] However, with the exception of an unseaworthiness action, a longshoreman has no remedy for injuries caused by another longshoreman, other than compensation under the Longshoremen's and Harbor Workers' Compensation Act (the "LHWA").[69] As several courts and commentators have recognized, allowing recovery for unseaworthiness in such cases effectively repeals the LHWA since in most cases the shipowner, in turn, sues the stevedoring company for indemnification for breach of the implied warranty of workmanlike service which has been held to exist. As a result, the stevedoring company is forced to pay for the same injury twice — compensation directly and damages indirectly — which is contrary to the purpose of the Act.[70]

It would appear, therefore, that the various other remedies available to crewmen and harbor workers largely duplicate the protection afforded by admiralty through the unseaworthiness action.[71] Additionally, these remedies provide for recovery of damages for negligence or, at least, compensation or medical care, food and lodging for almost any injury in those cases where unseaworthiness is not a factor. Therefore, if the Court were to go forward and expand the unseaworthiness definition to include "instant" unseaworthiness by dropping the act–condition distinction, it would not, as a practical matter, expand significantly a shipowner's liability for ship and dockside injuries. At least, such an expansion would have the benefit of eliminating a possibly vague and confusing distinction, along with its attendant inequities.[72] However, in light of the Court's refusal to do so in *Usner,* it is doubtful that the Court intends to further expand unseaworthiness in the near future.

On the other hand, it might prove simpler to do away with the act–condition problem by completely abolishing the unseaworthiness claim as a remedy under maritime law. Such an abandonment would leave

68. *Cf.* Tetrault, *supra* note 9, at 412–18. Of course, this would not include injuries caused by any non–employee for whom the owner is not responsible.

69. 33 U.S.C. §§ 901 *et seq.* (1970). For a detailed treatment of longshoremen's rights under this statute and their right to recover damages, *see* 1 P. EDELMAN, *supra* note 58, at 173–237, 265–406; Tetrault, *supra* note 9, at 403–18.

70. Tetrault, *supra* note 9, at 418–24. *See also* A & G Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); Kaminski v. A/B Svenska Ostasiatiska, No. 18,457 (3d Cir., filed July 14, 1971); Candiano v. Moore-McCormick Lines, Inc., 382 F.2d 961 (2d Cir. 1967).

It has been argued, however, that the owner pays twice if he does not sue the stevedoring company, since he is paying indirectly for the insurance such companies carry in order to cover their liability under the LHWA. Tetrault, *supra* note 9, at 417.

71. The argument has even been made that the Jones Act was intended to include all unseaworthiness claims. *See, e.g.,* Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2d Cir. 1959) (Lumbard, J., concurring).

72. For a more detailed analysis of the advantages and disadvantages of dropping the act–condition distinction, *see* Note, *supra* note 35, at 272–75.

but a few injuries, once recoverable in an unseaworthiness action, unremedied through some alternative action.[73]

However, since total abandonment of the unseaworthiness doctrine is improbable, the act–condition distinction and the "instant" unseaworthiness problem could be avoided by redefining what constitutes an unseaworthy condition along more conservative connotations of the terms. Basically, seaworthiness refers to the reasonable fitness of a ship for a voyage as to its hull, machinery and other equipment, fuel and provisions, officers and crew, and its reasonable safety as a place to work. An unseaworthy condition in common–sense terms indicates an inherent defect of a permanent character in the ship, its equipment or men which is of such gravity that the ship is not reasonably fit for its intended use. This was the original meaning of the term in admiralty, at least with respect to unseaworthiness as grounds for liability for personal injuries.[74] Once the Court allows itself to slip beyond this conservative definition of unseaworthiness into the more liberal definition which includes any condition, whether permanent or transitory, inherent or external, initially existing or subsequently arising — just so long as some state of danger existed over some period of time prior to the injury — then inevitably it will become entangled in the problems of the act–condition distinction.[75]

The majority of the Court in *Usner* accepted the act–condition distinction. The immediate impact of this is the clear rejection of the idea that there may be an "instant" type of unseaworthiness, and the halting of the expansion of the scope of unseaworthiness. Thus, *Usner* vindicates the common position of the Fifth and Ninth Circuits' rejection of "instant" unseaworthiness and interpretations of *Mascuilli,* and repudiates the approach taken by the Second and Fourth Circuits.[76]

However, in halting the liberal trend, the Court has left the definition of unseaworthiness in an uncomfortable position. If fairness is to be served, the Court cannot leave the definition where it stands; it must go forward or its must reverse the trend. In light of *Usner,* it is doubtful that the Court will go forward, since the only forward step would be to reject the "instant" unseaworthiness rule, and that would require that *Usner* be overruled. Accordingly, it is submitted that the Supreme Court must reverse the trend it has now halted, undertake the "thoroughgoing reexamination" suggested by Justice Harlan,[77] and formulate the suggested redefinition of unseaworthiness.

*C. R. Gangemi, Jr.*

73. *See* notes 62 to 71 and accompanying text *supra.*
74. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960); The Osceola, 189 U.S. 158 (1903) (dictum); note 19 and accompanying text *supra.*
75. *See* notes 48 to 50 and accompanying text *supra.*
76. *See* Zim Israel Navigation Co. v. Tarabocchia, 401 U.S. 930 (1971), *vacating and remanding* 417 F.2d 476 (2d Cir. 1969). *See* notes 32 to 37 and accompanying text *supra.*
77. *See* notes 50 & 51 and accompanying text *supra.*

CIVIL RIGHTS — EQUAL EMPLOYMENT OPPORTUNITY — EMPLOYER-ADMINISTERED ABILITY TESTS ARE REQUIRED TO BE JOB-RELATED UNDER THE CIVIL RIGHTS ACT OF 1964.

*Griggs v. Duke Power Co.* (U.S. 1971)

The black employees of the Duke Power Company's Dan River Power Station brought suit in the United States District Court for the Middle District of North Carolina,[1] against the company under Title VII of the Civil Rights Act of 1964[2] (the "Act") alleging that the hiring and promotional practices of the company discriminated against members of their race in contravention of the provisions of Title VII. Specifically, plaintiffs argued that the company's policy of requiring a high school diploma and satisfactory performance on two professionally prepared aptitude tests,[3] as necessary prerequisites for employment and promotion, went counter to Title VII in that these criteria were not shown to have any relation to job performance.[4] The district court found that, while

1. Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D.N.C. 1968).

2. Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e *et seq.* (1970). Section 2000e–2 of the Act provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. The two tests were the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Aptitude Test. 292 F. Supp. at 246.

4. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Prior to the effective date of the Civil Rights Act of 1964, July 2, 1965, the company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. Blacks were employed only in Labor where the highest paying jobs paid lower than the lowest paying in the other four departments. Promotions were normally made within each department on the basis of job seniority, and transferees into a department usually began in the lowest position. 292 F. Supp. at 244–47.

Beginning in 1955, the company required a high school education for initial assignment to any department except the Labor department, and for transfer from Coal Handling to any higher level department. The company, of course, discontinued its policy of restricting blacks to the Labor department in 1965, but at that time began to require a high school diploma for transfer from Labor to any other department. In addition, starting on July 2, 1965, in order to qualify for placement in any but the Labor department, it became necessary to register satisfactory scores on two professionally prepared aptitude tests. Completion of high school alone continued to render employees eligible for transfer to the four departments from which blacks had previously been excluded, if the incumbent had been employed prior to the time of the new requirement. In September of 1965, the company began to permit incumbent employees who lacked a high school education to qualify for transfer to an "inside" job by passing the Wonderlic and Bennett Tests. *Id.* at 245–46.

The following two facts compel the conclusion that these requirements were not related to job performance; (1) from the time the high school requirement

the company had followed a policy of overt racial discrimination prior to the Act, such conduct had ceased, and since the Act was meant to be prospective only, the present impact of past inequities was beyond the reach of any corrective action authorized by the Act.[5] Finally, the court rejected plaintiffs' contention that employment testing must be job-related. Plaintiffs appealed.

Although the Court of Appeals for the Fourth Circuit reversed in part, holding that residual discrimination arising from prior employment practices was not insulated from remedial action, it affirmed the district court's finding that there was no invidious intent in the adoption of the job requirements. Moreover, the court held that absent a discriminatory purpose, the use of such requirements was permitted and tests need not be job-related under Title VII of the Act.[6] The Supreme Court granted certiorari and reversed, *holding* that the Civil Rights Act of 1964 proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operaton. Therefore, employment practices which operate to exclude blacks and cannot be shown to be related to job performance are prohibited. *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

In recognition of the need for pervasive legislation protecting and insuring the civil rights of minority groups, and doubtless inspired by the monumental activities of civil rights groups during the early sixties, Congress enacted the Civil Rights Act of 1964.[7] In one specific chapter, Title VII,[8] Congress addressed itself to the problem of employment discrimination, basing its authority in this area on the power granted to it in the commerce clause.[9] Apparently, a prime motive of Congress in enacting Title VII was "a desire to enhance the relative social and

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was instituted to the time of trial, white employees hired prior to the initiation of the requirement continued to perform satisfactorily and achieve promotion in the "operating" (the top four) departments; (2) neither the Bennett nor the Wonderlic Test was directed or intended to measure the ability to learn to perform a particular job or category of jobs — the requisite scores used for both initial hiring and transfer approximated the national median for high school graduates. *Id.* at 247, 250.

5. Since a high school education was not a prerequsite for employment in the Labor department, but was for all other departments from 1955 on, and since blacks were hired only into Labor prior to 1965, they remained frozen there unless they had a high school education. Three of the blacks had a high school education, and two of them were promoted, including one black, not a plaintiff herein, and one of the thirteen plaintiffs who was promoted subsequent to the institution of the suit. *Id.* at 247–48.

6. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970).

7. 42 U.S.C. §§ 1981 *et seq.* (1970).

8. 42 U.S.C. §§ 2000e to 2000e–15 (1970).

9. U.S. CONST. art. I, § 8(3). Under Title VII, discriminatory employment practices are prohibited if the employer is engaged in an industry affecting commerce, and employs twenty-five or more employees. 42 U.S.C. § 2000e(b) (1970). Commerce is defined as "trade . . . among the several states; or between a state and any place outside thereof . . . ." 42 U.S.C. § 2000e(g) (1970). An "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow thereof. 42 U.S.C. § 2000e(h) (1970).

economic position of the American black community."[10] This goal is to be achieved under the Act by eliminating various extrinsic criteria of a subjective nature — namely, race, color, religion, sex or national origin — from those upon which an employer may base his hiring decisions.[11] Racial discrimination was certainly the main target of this Title.[12]

Notwithstanding the pervasive measures imposed by the bill to eliminate discrimination in employment, certain specified areas were delineated in which limited discrimination would be tolerated.[13] Undoubtedly the most controversial of these qualifying provisions of Title VII has been the provision which allows an employer to utilize professionally developed ability tests in selecting and promoting employees.[14] This subsection had as its progenitor the Tower Amendment[15] to the original draft of the Act, which in turn was conceived in response to an Illinois Fair Employment Practice Commission decision, *Myart v. Motorola*.[16] This case held, in effect, that ability tests could not be used

10. Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113 (1971). This note surveys the entire scope of Title VII and contains a detailed account of the judicial analysis of employment testing problems.

11. 42 U.S.C. § 2000e–2 (1970). *See* note 2 *supra*.

12. *See* Note, *supra* note 10, at 1116; 109 Cong. Rec. 11174–79 (1963) (address by President John F. Kennedy to the House of Representatives).

13. *See e.g.*, 42 U.S.C. § 2000e–2(e) which provides in part that an employer may hire and employ an individual "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." Sections 2000e–2(f) and 2000e–2(g), respectively, allow an employer the right to discriminate against Communists, and, in security jobs, those who have not fulfilled necessary security requirements. 42 U.S.C. §§ 2000e–2(f), (g) (1970).

14. Section 2000e–2(h) provides in pertinent part that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to . . . give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin . . . .

42 U.S.C. § 2000e–2(h) (1970). The controversy began in the Senate when the provision was proposed centering primarily on the need for such a clause. Originally, the proposed Act contained no such provision. In order to prevent the complete exclusion of testing from employment practices, the Senate sought to settle the issue by the inclusion of the Tower Amendment. *See* notes 15 & 16 and accompanying text *infra*. Despite this effort at clarification, the interpretations of the provision as rendered by various federal courts have been controversial. *See* notes 27 to 35 and accompanying text *infra*.

15. *See* 110 CONG. REC. 13492 (1964).

16. The hearing of the case was held on January 27, 1964, before the Illinois Fair Employment Practice Commission; it is reported at 110 CONG. REC. 9030–33 (1964).

> The plaintiff, a black, despite considerable experience in the field for which he sought the job, was denied employment after taking a ten minute company-administered verbal understanding test. Plaintiff alleged that he passed the test; respondent denied this, but failed to produce plaintiff's test results. Primarily on this basis, the examiner held for plaintiff. He nevertheless went on to condemn the test by noting in dictum that if the respondent desired to utilize the test in the future, it would be required to revise it to compensate for the cultural inequities found among different groups. This decision has been interpreted to mean that such tests could never be justified even if the needs of the business required them. *See* 110 CONG. REC. 9024–26 (1964); Griggs v. Duke Power Co., 420 F.2d 1225,

in making hiring decisions if they excluded a disproportionate number of blacks. The present testing provision was finally added to the original draft of the bill, subsequent to lengthy Senate debate over the Tower Amendment, to prevent the Equal Employment Opportunity Commission[17] (the "EEOC") and the federal courts from following the *Motorola* decision as precedent.[18]

While it was thus clear from section 2000e–2(h) that ability tests could be utilized by employers in reaching employment decisions, it became crucial to determine the meaning of the descriptive phrase "professionally developed" as used in conjunction with "ability tests" in the Act.[19] Unfortunately, no definitive meaning was applied to the term by its Senate authors,[20] and the ensuing administrative and judicial interpretations did little in the way of providing a uniform interpretation. Despite its lack of power to formulate substantive law,[21] the EEOC has given the term "professionally developed" a very restrictive interpretation. The most recent *Guidelines* issued by the EEOC[22] require not only that a test be validated[23] (*i.e.*, basically that performance on it is

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1242 (4th Cir. 1970) (Sobeloff, J., dissenting). For a discussion of this case *see* Kovarsky, *The Harliquinesque Motorola Decision and Its Implications*, 7 B.C. IND. & COM. L. REV. 535 (1966).

17. This Commission was created by Congress in 42 U.S.C. § 2000e–4 (1970). Its purpose is, basically, to follow up complaints made to it by aggrieved individuals and, in studying the problem at hand, to eliminate unfair practices through conference, conciliation and persuasion. As a last resort, the Commission is to "refer matters to the Attorney General with recommendations for intervention in a civil action . . . and to advise, consult and assist the Attorney General on such matters." 42 U.S.C. § 2000e–4(f)(6) (1970).

18. 110 CONG. REC. 13492–505 (1964). *See* Note, *supra* note 10, at 1123–24.

The debate revolved around the necessity of such a provision, and its possible weakening effect on the Act. While Senator Tower thought it was necessary to prevent a repetition of the *Motorola* decision, Senators Case and Humphrey thought the Act sufficient to prevent another such decision, and feared that the proposed amendment might allow discrimination under the guise of statutory adherence. The amendment as finally adopted was Senator Tower's second draft which, while similar to the original, included the additional requirement that the test not be "designed, intended, or used to discriminate." *See* note 14 *supra*.

19. 42 U.S.C. § 2000e–2(h) (1970). *See* note 14 *supra*.

20. While it may be argued that the phrase "professionally developed ability test" was intended to mean one that had been properly validated (*see* note 23 *infra*), it is equally possible that the legislators never considered "the possibility that general intelligence tests would not always be instructive indicators of an applicant's potential." Note, *supra* note 10, at 1125–26. In the latter situation, validation would be considered unnecessary since the test would be considered inherently valid.

21. *See* Dobbins v. Local 212, Int'l Bhd. of Elec. Workers, 292 F. Supp. 413 (S.D. Ohio 1968) (only procedural, and not substantive regulations are within the Commission's power); American Newspaper Publishers Ass'n v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968) (the Commission has no enforcement powers). *See also* Schmidt, *Title VII: Coverage and Comments*, 7 B.C. IND. & COM. L. REV. 459 (1966); Comment, *Enforcement of Equal Employment Opportunity Under the Civil Rights Act: How About Cease and Desist Powers?*, 9 DUQ. L. REV. 75, 78–92 (1970).

22. 29 C.F.R. §§ 1607 to 1607.14 (Supp. 1971).

23. The determination of a test's validity should be based upon evidence which consist[s] of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

*Id.* § 1607.4(c). In other words, a candidate who performs well on a validated test "will be most nearly like those who have succeeded in the particular job." Interview

shown to be indicative of performance on the job for which it is required), but also that suitable alternative hiring policies must be unavailable if the test leaves minority workers under-represented.[24] Additionally, if feasible, this validation is to be conducted separately for each minority group for which the test under evaluation is used,[25] and unless promotion is nearly automatic, candidates shall not be evaluated for a higher level job as a requisite for initial employment at a lower level.[26]

Of course, since the EEOC lacks substantive power,[27] the ultimate delineation of the allowable testing procedures has rested with the federal

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with Dr. Neil Miller, President, Neil Miller and Associates, Lafayette Hill, Pennsylvania, in Philadelphia, Aug. 14, 1971 [hereinafter cited as Miller Interview].

Basically, validation studies take one of two forms; the first would consist of hiring a large group of candidates irrespective of their performance on any tests, deciding which employees are good for the job on the external criteria of job success, and then correlating the test scores with job performance. While this is the best possible method, it is little used for a number of obvious reasons, all primarily economic. Most employers do not operate on a scale of sufficient scope to warrant hiring a large enough group of employees with which to conduct the study. Those that do operate on a large scale are reluctant to hire everyone that applies simply because of the economic risk that they feel they would be assuming. The second type of study consists of evaluating the performance of the present employees. These employees are then given the test, and the scores are correlated with the employees' performances. If the better performing employees score well, the test will be assumed to be valid. This method is more commonly utilized, and is much more feasible especially for smaller employers. *Id.* For a more comprehensive discussion of validation, its methods and problems, *see* Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education,* 68 COLUM. L. REV. 691, 696–703 (1968).

24. 29 C.F.R. § 1607.3 (Supp. 1971). Assuming the test being used has been validated, this requirement would prove well nigh impossible for employers to follow. *See* Note, *supra* note 10, at 1130.

25. 29 C.F.R. § 1607.5(b)(5) (Supp. 1971). This is what is known as differential validity — "the notion that tests can be valid for one race but not for another, or that a lower score for one race may be equally as predictive of job success as a higher score is for another." Note, *supra* note 10, at 1129. Not only is this concept unproven, it would significantly increase the cost and difficulty of test validation. *Id.*

The rationale for differential validation is that due to cultural deprivation, minority groups — blacks in particular — will perform more poorly on written tests than whites with the same ability. Therefore, a different solution would be to administer a culture-free test — "one emphasizing pictorial, spatial or figural content and minimizing verbal content." *See* Note, *supra* note 23, at 704. This approach too, is not without criticism. For one thing, a non-verbal test is not as indicative as a verbal test; and for another, a non-verbal test can be culturally differentiated just as can a verbal test. For example, when given the following four pictures of a thief: (1) breaking into a house, (2) being arrested, (3) before a judge, and (4) in jail, most people would arrange them in this order, and would consider a deviation from that order incorrect. A criminal, however, may very well invert numbers (3) and (4), putting the jail scene before the trial scene. This would be a result of having experienced long detention periods while awaiting trial. Therefore, an obviously culture-free test could stimulate an "incorrect" response from one whose culture views certain stimuli in a different light. Miller Interview, *supra* note 23.

26. 29 C.F.R. § 1607.4(c)(1) (Supp. 1971). This requirement has been criticized as discriminatory against more highly qualified applicants. Note, *supra* note 10, at 1129. Nonetheless, it would seem to be a better policy than hiring only promotables when many will never be promoted, since, when the time for promotion arises, the better qualified will then have an opportunity to prove their superior ability.

27. It should not be supposed, however, that the Commission is wholly emasculated. In addition to providing interpretative guidance for the courts, the very strictness of the *Guidelines* may give them effectiveness as a scare-crow mechanism

courts.[28] The lower federal courts, however, did not resolve the issue.[29] While there has been a paucity of decisions which directly address the testing question, even these few have been unable to agree as to the proper interpretation of the clause. Therefore, the judicial history of section 2000e–2(h), although limited, evidences a conflict of job testing theory. One theory, exemplified by the court of appeals decision in *Griggs*,[30] assumes a position antithetical to the *Guidelines;* that is, that the Act does not require tests which measure the ability and skill required by a specific job, and thus, validation is unnecessary. In affirming the lower court's holding on this point,[31] the fourth circuit refused

forcing employers, at the least, to re-evaluate their hiring and promotional policies in light of Title VII. *See* Note, *supra* note 10, at 1130–32. It should be cautioned, however, that this could produce undesirable effects as well. For example, an employer may decide that the easiest way to avoid trouble is to hire on a quota, or first–come–first–served basis. *Id.* at 1132. A quota system would contravene § 703(j) (42 U.S.C. § 2000e–2(j) (1970)), the nonpreferential clause, and thus could be discriminatory against whites. *Cf.* Rachlin, *Title VII: Limitations and Qualifications,* 7 B.C. IND. & COM. L. REV. 473, 491 (1966), wherein the author observes that it will be satisfactory to recruit Negroes voluntarily so long as a white is not refused employment as a result of this policy. By hiring on a first–come–first–served basis, an employer would be sacrificing any objective hiring criteria which he may have. This could have undesirable economic consequences, and economic well–being, of course, is an employer's paramount concern. *Cf.* Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern,* 34 U. CHI. L. REV. 817 (1967).

28. *See, e.g.,* United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970); United States v. H. K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968); Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D.N.C. 1968), *aff'd in part, rev'd in part,* 420 F.2d 1225 (4th Cir. 1970). *See generally* Note, *supra* note 10, at 1132–40.

29. *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1654–55 (1969). In this article, the authors discuss in depth the need and justification of employment testing, and the possible differential impact of various testing methods. Their proposed solution is a general effect–oriented approach to objective criteria. This approach has two steps: (1) a determination of the racial impact of the testing practice; and (2) a determination whether any significant adverse racial impact that exists can be adequately justified by non–racial considerations. Thus, whether a test could be used would depend primarily upon whether the non-racial justification (business need) for the practice is sufficient to support its racial impact. *Id.* at 1669–79.

30. Griggs v. Duke Power Co., 420 F.2d 1225, 1237 (4th Cir. 1970), Sobeloff, J., dissenting). Judge Sobeloff laid much of the groundwork for the Supreme Court's ultimate reversal by pointing out that tests that were fair in form might still discriminate because of unequal educational opportunities afforded to blacks. It was his opinion that the critical inquiry is business necessity; therefore, practices which exclude blacks must stem from legitimate needs or be discontinued. *Id.* at 1238. Finally, in surveying the legislative history of Title VII, he concluded that employment tests must be job–related. *Id.* at 1239–44. *See also* Broussard v. Schlumberger Well Servs., 315 F. Supp. 506 (S.D. Tex. 1970) (court would not interfere with employer's estimate of his employee's ability since this constituted a business judgment).

31. The district court held that the tests did not constitute prohibited discrimination since:

> Nowhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs. . . .
>
> The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available. Rather, they are intended to indicate whether the employee has the general intelligence and overall mechanical comprehension of the aveage high school graduate regardless of race. . . . The evidence establishes that the tests were pro-

to hold that the EEOC interpretation was binding upon it.[32] Instead, the court held that "intent to discriminate," as used in the Act, meant "done for the purpose of discriminating," and a showing of genuine business purpose would negate any possible wrongful intent.[33]

In *United States v. H. K. Porter Co.*,[34] the court implicitly accepted as its standard the job-related requirement of the EEOC's *Guidelines*. Nevertheless, the court held the instant tests to be job-related despite a differential racial impact on the basis of the company's personnel manager's say so ("one of the subjects in which he majored in college was psychology").[35] The court went on to reject the abstract proposition that a test must be validated to be legitimate, and held that nonvalidation per se does not necessarily equal discrimination.[36] Thus, while the *Porter* court held that there was no violation of Title VII on the facts presented, it did adopt as a rule of law the EEOC job-related test requirement.[37]

In granting certiorari in the instant case, the Supreme Court was faced with the rather narrow issue of defining the limitations which would be placed upon ability tests under section 703(h) (section 2000e-2(h)) of Title VII of the Civil Rights Act of 1964. The Court, speaking through Chief Justice Burger, unanimously[38] adopted the *Porter* job-related requirement[39] over the interpretation urged by the respondent Duke Power Company.

Initially, the Court addressed itself to the question of the employer's intention in administering the test, and noted that under the Act, "practices, procedures, or tests neutral on their face, and even neutral in terms

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fessionally developed to perform this function and therefore are in compliance with the Act.
292 F. Supp. at 250.

32. *Compare* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 997 (5th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1968) (sexual discrimination). In contrast to the position taken by the fourth circuit, in these two decisions the fifth circuit held that the EEOC *Guidelines* were entitled to great weight.

33. 420 F.2d at 1232. The "genuine business purpose" of the company was a desire to upgrade the general quality of its work force. *Id.* at 1231. This reading of intent put the *Griggs* courts in a distinct minority. *See, e.g.*, Local 189 United Papermakers & Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969); United States v. Bethlehem Steel Corp., 312 F. Supp. 977, 993 (W.D.N.Y. 1970); Dewey v. Reynolds Metals Co., 304 F. Supp. 1116, 1120 (W.D. Mich. 1969) (religious discrimination); Clark v. American Marine Corp., 304 F. Supp. 603, 607 (E.D. La. 1969).

34. 296 F. Supp. 40 (N.D. Ala. 1968).

35. *Id.* at 76.

36. *Id.* at 76–79. In reaching this conclusion, the court noted that the fact that blacks may be culturally disadvantaged, and thus not perform so well as whites on aptitude tests, does not compel the court to require validation. The court did, however, concede that there could conceivably be a situation in which Title VII might require validation.

37. *See* Cooper & Sobol, *supra* note 29, at 1655. For other cases accepting the *Guidelines*' job-related requirement, *see* Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536 (E.D. La. 1970); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970); Arrington v. Massachusetts Bay Transit Authority, 306 F. Supp. 1355 (D. Mass. 1969).

38. Mr. Justice Brennan took no part in the consideration or decision of the case.

39. *See* notes 34 to 36 and accompanying text *supra*.

of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[40] The Court concluded that, since "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation," employment discrimination could be found irrespective of the good faith of the employer.[41]

The opinion next analyzed the reasons behind the differential racial impact of the tests. The fact that whites fared much better on the company's alternative tests[42] was directly traceable to race, the Court reasoned, since prolonged discrimination in North Carolina schools had deprived Negroes of the means of articulation necessary to manifest basic intelligence.[43] The Court interpreted Title VII as not requiring that a job be guaranteed to every person regardless of qualifications, but as demanding "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[44] The Court concluded that:

> The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[45]

Therefore, while requirements of an aptitude test or a high school diploma may discriminate against blacks because of their traditionally inferior schooling, they still may be demanded if there is a genuine business necessity for such qualifications.[46] The company's testing practices, however, were found to be prohibited since they did not meet this standard.[47]

In reaching its decision, the Court placed great emphasis on the interpretation given the Act by the EEOC.[48] This intepretation, and

40. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).
41. *Id.* at 432.
42. *See* notes 3 & 4 *supra.*
43. *Id.* at 430. The Court relied on Gaston County v. United States, 395 U.S. 285 (1969), in which a voter literacy test was struck down for the same reason, *i.e.*, that the right to vote would be abridged indirectly on account of race. The Court noted that according to the 1960 census, while 34% of white males had completed high school, only 12% of Negro males had done so. 401 U.S. at 430 n.6. *See also* Hobson v. Hanson, 269 F. Supp. 401 (D.D.C. 1967); Note, *supra* note 23 at 737–39.
44. 401 U.S. at 430–31.
45. *Id.* at 431.
46. The paradigm of this is that one may require that a secretary know how to type.
47. 401 U.S. at 431. The Court observed that:
> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to the jobs for which it was used. . . . The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.

*Id.* at 431–32.
48. *See* notes 22 to 26 and accompanying text *supra.*

thus the present reliance on it, was well supported by the legislative history of Title VII[49] which seemingly requires, at the very least, that ability tests be validated.[50] Whether, in following the instant decision, lower courts will be forced to adhere to all of the EEOC's directives is not at once apparent.[51] It is submitted, however, that complete adherence to the *Guidelines* would have a chilling effect on an employer's viable implementation of objective hiring procedures, with the possible result of forcing him into illegal preferential hiring policies and possible economic hardship.[52] On the other hand, the Court's acceptance of the EEOC interpretation as being entitled to great deference should have the indirect result of supplying the Commission with some much needed law-making power.[53]

The Court's concluding paragraph succinctly capsulizes its rationale and holding in the instant case:

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controllng factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[54]

The Court's holding is not complex; job-ability and employment qualification tests must be reasonably related to the job for which they are required. It is submitted that this is the only logical interpretation of the testing provision of the Act.[55] If the Court were to have adopted

49. 401 U.S. at 433–36. The purpose of Title VII was to promote hiring on the basis of job qualifications, rather than on the basis of race or color. Since the Tower Amendment expressly protected the employer's right to utilize job-tests, it follows that, in order to comply with the underlying purpose of the Act, the tests used must evaluate the applicant's qualifications and not his aptitudes unrelated to the job in question.

50. *See* note 23 *supra*. This observation would seem to follow from the language used by the Court in requiring job-related tests since, despite the holding to the contrary in *Porter*, it would be a rare instance in which a verbal test could be determined to be job-related without the help of a validation study. Miller Interview, *supra* note 23.

51. This question is partially answered in the affirmative in Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). The *Robinson* court cited the *Guidelines* in requiring that an employer seek out alternative policies which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact than the one used if that does discriminate.

52. *See* notes 24 to 26 and accompanying text *supra*.

53. *See* notes 17 & 21 *supra*.

54. 401 U.S. at 436.

55. *See* 401 U.S. at 434 n.11; Cooper & Sobol, *supra* note 29, at 1650–51. The *Griggs* Court and Messrs. Cooper and Sobol indicate that the emphasis placed on the word "qualifications" by Senators Clark and Case in discussing the testing provision demonstrates that they understood that a test must measure concrete qualifications and not abstract aptitudes. *See also* Note, *supra* note 10, at 1117–18.

the respondent's thesis, discriminatory employment policies could very well have been sanctioned under the guise of statutory compliance[56] — a result scarcely contemplated by the drafters of this legislation.

Although the holding of *Griggs* is quite narrow, its ramifications may be monumental. The decision has had an immediate impact on employers and professional testers alike.[57] While some employers have understandably abandoned their testing programs in favor of quota systems or subjective hiring criteria such as the interview, it is expected that many more (especially larger employers) will have their testing programs validated.[58] Since an overwhelming majority of employers are testing for economic reasons rather than for discriminatory purposes, it will be for their own benefit to utilize tests which most accurately measure the man for the job.[59]

Professional industrial psychologists who administer employment tests are in the process of re-evaluating existing tests and developing new ones in an effort to render hiring procedures even more objective.[60] The *Griggs* holding is not shocking to most, since psychologists have questioned the validity of tests such as the Wonderlic (which measures general aptitudes or particular culture–related educational achievements) for years.[61] The problem presented by such tests is that, despite their dubious value, they are readily available and thus can be administered without the aid of a professional psychologist properly trained in their interpretation.[62] In trying to cut corners in this way, employers may be unconsciously hiring in a discriminatory fashion. The EEOC must increase its surveillance of employers in light of the instant decision to insure that section 703(h) will not provide a loophole for employment discrimination, be it intentional or unwitting.

Significantly, not only the company's testing program, but its high school education requirement as well, was condemned by the Court on the same rationale; it was not shown to be related to job performance.[63] Since this requirement was "an employment practice" discriminatory in operation, this condemnatory result was compelled by the Act. The language of the Court in so ruling may have implications which reach beyond the scope of the Act. The Court stated:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with

56. For example, if all that the Act required was professional development of a test, an unscrupulous employer could hire an unscrupulous psychologist to create tests which would emphasize cultural differences, and thus discriminate through compliance.
57. Miller Interview, *supra* note 23.
58. *Id.*
59. *Id.*
60. *Id.*
61. *See* Note, *supra* note 10, at 1121; Note, *supra* note 23, at 712.
62. *See* Note, *supra* note 23, at 696.
63. 401 U.S. at 431.

> examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress had mandated the common-sense proposition that they are not to become masters of reality.[64]

This language constitutes a recognition by the Court, as one observer has noted, of

> certain principles which seem to point to the elimination of institutionalized schooling as a legitimate requirement for advancement in other situations neither governed by a special statute nor involving the special class discrimination which is prohibited by the Civil Rights Act.[65]

The Act is couched in terms of minority group protection. The Court, in the future, should not refrain from eliminating discriminatory employment practices regardless of the victim's personal characteristics. A criterion which is not job-related is not valid for blacks or whites,[66] and the economic effects on the white victim may be equally as devastating. Obviously, the equal protection doctrine should provide a basis of relief for anyone disqualified from a job by irrelevant criteria; the *Griggs* court implies that it will, in fact, do so. Thus, despite the minority group language found in Title VII, the instant case should stand as precedent for the protection of anyone wrongfully denied a job.

The use of unrelated criteria and tests as a prerequisite for employment is doubly unfortunate because it, in large measure, acts to perpetuate the elements which create a differential in testing ability among the poor and the rich, the blacks and the whites. Denial of a job to an able parent[67] may be the beginning of a vicious cycle which at the very least

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64. *Id.* at 433.

65. I. Illich, Draft of An Essay Submitted to the Editors of The New York Times, CIDOC Doc. A/E 71/310, at 1-2 (1971) (copy on file at *Villanova Law Review* office). The author goes on to state that:

> Employers will find it difficult to show that schooling is a necessary prerequisite for any job requirement. It is easy to show that it is necessarily anti-democratic because it inevitably discriminates. I believe it can be shown that almost all the American structure of schooling is irrelevant to gaining competence in the vast majority of American jobs. I also belive [*sic*] that it can be shown that our open-ended structure of schooling is inherently discriminatory. It is evidently so for those who, like Griggs et al [*sic*] are denied a fair part in the school budget because of their color. It is equally discriminatory for any one who — in however a favored way — does participate in it but without climbing the last rung.

*Id.* at 4-5. A compilation of Illich's ideas has recently been published — I. ILLICH, DESCHOOLING SOCIETY (1971).

66. *See* Note, *supra* note 23, at 701.

67. As the court in Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) observed:

> Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses.

will cause the parent to lose his self respect,[68] may cause the complete break-up of the family, and, in any event, will most certainly perpetuate the almost total absence of cultural stimuli which will eventually determine the type of employment his children will be able to obtain.[69] Since success both in school and in general ability tests hinges in large measure on inculcation of a cultural nature, obviously to employ only one who has had the opportunity to absorb this type of knowledge is discriminatory against the job applicant who lacks such knowledge yet possesses the technical capabilities required by the job. By relegating the latter to unemployment, or, at best, menial labor, the opportunity to provide his offspring with sufficient positive cultural stimuli to overcome the headwinds which such employment criteria create, is destroyed, thus perpetuating the cycle.

It is not suggested that the instant decision will eliminate poverty in America, or even all discrimination in employment. Nor is it likely to insure Illich's goal of a complete disestablishment of the American school system,[70] however meritorious such a goal may be. The Court does guarantee that a prospective employee will not be denied employment because of a failure to meet criteria which are irrelevant to the job in question. It should give not only hope, but positive results to those who possess ability yet lack, for whatever reason, other requirements which the employer seeks to impose. This guarantee alone makes the instant decision one of great significance.

*James S. Green*

68. Although the following comment was made in reference to formal schooling, it is submitted that it is equally applicable to a man who feels qualified to do a certain job, but is nevertheless rejected because of poor testing ability.

> One of the diabolic features of this system is that it teaches the individual who is caught up in it to discriminate against himself. He is taught to disqualify himself as incompetent, uneducable or unworthy of a job for which he has no formal credentials.

I. Illich, *supra* note 65, at 6.

69. If parents are unable to provide the basic necessities of life for their children, they will most certainly have difficulty in instilling many of the culturally acquired abilities which are prerequisites for schooling and employment. Illich has observed that:

> It should be obvious that even with schools of equal quality a poor child can seldom catch up with a rich one. Even if they attend equal schools and begin at the same age, poor children lack most of the educational opportunities which are casually available to the middle class child. These advantages range from conversation and books in the home to vacation travel and a different sense of oneself, and apply, for the child who enjoys them, both in and out of school. So the poorer student will generally fall behind so long as he depends on school for advancement or learning.

Illich, *Why We Must Abolish Schooling*, N.Y. REV. OF BOOKS (July 2, 1970) reprinted in CIDOC CUADERNO No. 1016, Doc. 70/222, at 4 (1971).

70. Ivan Illich, the Director of the Center for Intercultural Documentation in Cuernavaca, Mexico, asks in response to the *Griggs* decision:

> May we not hope that a court as daring as the Burger Court has shown itself to be, may extend its present ruling further to diminish the discrimination inherent in our system of publicly established and compulsory schooling? May we not hope that Congress together may eventually abolish the mastery over contemporary reality of an overgrown institution of past centuries?

I. Illich, *supra* note 65, at 7–8.

CONSTITUTIONAL LAW — EQUAL PROTECTION — FOURTEENTH AMENDMENT DOES NOT BAR A CITY FROM CLOSING RECREATIONAL FACILITIES UNDER COURT ORDER TO BE INTEGRATED.

*Palmer v. Thompson* (U.S. 1971)

For eight years after the *Brown v. Board of Education* decision,[1] the city of Jackson, Mississippi, maintained its policy of racial segregation in public recreational facilities. In 1962, however, a class action was brought by three Negro plaintiffs, seeking a declaratory judgment that segregation of municipally-operated recreational facilities constituted a denial of equal protection to the black citizens of Jackson, and an injunction requiring the city authorities to integrate these facilities. The District Court for the Southern District of Mississippi granted declaratory relief to plaintiffs as individuals, but declined to enter an injunction, stressing its confidence that the city officials would comply with the order. The Court of Appeals for the Fifth Circuit affirmed, and the United States Supreme Court denied certiorari.[2]

After appellate review was completed, the city desegregated its parks, zoo, golf courses and other facilities, with the exception of five swimming pools which were closed. In 1965, petitioners brought the instant action challenging the city's closing of the pools as a denial of equal protection to Jackson's Negro population. The city defended its action by citing considerations of economy and public safety. The district court held for the defendant–municipality.[3] The Court of Appeals for the Fifth Circuit, sitting en banc, affirmed, stating that a decision to terminate a non-essential public service rather than operate it on an integrated basis did not violate the fourteenth amendment.[4] On appeal, the United States Supreme Court affirmed, *holding, inter alia,*[5] that a decision to close governmentally-operated recreational facilities, rather than attempt to operate them on an integrated basis, is not discrimina-

1. 347 U.S. 483 (1954). In *Brown,* the Supreme Court overruled Plessy v. Ferguson, 163 U.S. 537 (1896) and declared that segregated schools were in violation of the equal protection clause of the fourteenth amendment. The Court, in so ruling, stated that "separate educational facilities are inherently unequal." 347 U.S. at 495. The principle that segregation of public recreational facilities was also unconstitutional was established in subsequent cases; *see e.g.,* Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf course ordered integrated). *See generally* Comment, *Desegregation of Public Schools: An Affirmative Duty to Eliminate Racial Segregation Root and Branch,* 20 SYRACUSE L. REV. 53 (1968).

2. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd,* 313 F.2d 637 (5th Cir.), *cert. denied,* 375 U.S. 951 (1963).

3. The district court's opinion is unreported. Palmer v. Thompson, 403 U.S. 217, 219 & n.3 (1971).

4. Palmer v. Thompson, 419 F.2d 1222 (5th Cir. 1969). The court of appeals distinguished this case from prior Supreme Court cases involving the closing of schools to avoid integration; the distinction is that schools are an essential municipal service. *See* Griffin v. County School Bd., 377 U.S. 218 (1964); Bush v. Orleans Parish School Bd., 365 U.S. 569 (1961); notes 26 & 31 and accompanying text *infra.*

5. *See* note 29 *infra.*

tory state action, and therefore does not constitute a denial of equal protection. *Palmer v. Thompson,* 403 U.S. 217 (1971).

The enactment of the fourteenth amendment guaranteed that no state could deny any person within its jurisdiction the equal protection of the laws.[6] Although the primary responsibility for enforcing this guarantee was assigned to Congress,[7] judicial decisions have contributed significantly to the development of the equal protection clause as a device for the protection of minorities against discriminatory state action.[8] In recent years, the Supreme Court has demonstrated the remarkable elasticity of the concept of state action as an instrument for extending the scope of the constitutional right of equal protection.

Beginning with *Shelley v. Kraemer,*[9] in which the Court declared racially restrictive covenants unenforcible in equity, the scope of permissible state involvement with private discriminatory practices has been steadily narrowed. *Barrows v. Jackson*[10] extended the principle of *Shelley v. Kraemer* to preclude the recovery of damages at law for breach of such covenants.[11]

The ruling in *Brown v. Board of Education* that "separate educational facilities are inherently unequal"[12] was not only swiftly extended to preclude segregation of other governmental activities (including recreational facilities),[13] but was applied to inhibit state assistance to the practice of discrimination by private parties. Lessees occupying government property were required to conduct their businesses in a nondiscriminatory manner.[14] State attempts to use "private" agencies as vehicles for the maintenance of segregation in the performance of governmental services were consistently struck down. In *Griffin v. County*

6. U.S. CONST. amend. XIV, § 1 states in pertinent part: ". . . nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

7. U.S. CONST. amend. XIV, § 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

8. 403 U.S. at 220. "[T]he Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States." *Id.* "[T]he central purpose of the Fourteenth Amendment is to protect Negroes from invidious discrimination." *Id.* at 240 (White, J., dissenting).

9. 334 U.S. 1 (1947).

10. 346 U.S. 249 (1953).

11. The Court reasoned that to allow a plaintiff to recover money damages from an owner who violated a racially restrictive covenant would be an unconstitutional interference with the right of a member of a minority group to obtain housing. The practical effect of such enforcement would be either (1) that fewer persons would offer their houses for sale to the minority group member because of fear of liability, or (2) that the breaching party would increase the price to the minority group member to insulate himself from anticipated liability in damages. In either case, the state's action would interpose obstacles to a minority group member seeking housing that would not be present for whites. *Id.* at 254.

12. 347 U.S. at 495.

13. Holmes v. City of Atlanta, 350 U.S. 879 (1955); Mayor & City Council v. Dawson, 350 U.S. 877 (1955).

14. Burton v. Parking Authority, 365 U.S. 715 (1961). Here the Court held that a restaurant, located on a municipally-owned parking lot and leased to a private operator, was required to serve Negroes. The Court's reasoning was that the city could not permit its facilities to be used by a private party in a manner which would be unconstitutional if done by the city directly. *Id.* at 724-26.

*Board of Prince Edward County*,[15] the public schools in one Virginia county under court order to desegregate were closed, while the schools in other counties remained open. The state and county collaborated in providing assistance to the establishment of private (whites only) schools, and offered to do the same for private schools for Negroes. The Supreme Court declared unconstitutional those laws passed to assist the segregated private schools, ordering the public schools re-opened in Prince Edward County and declaring that the closing of these schools to avoid integration constituted a denial of equal protection to that county's school children.[16]

Under the more recent decisions of *Reitman v. Mulkey*[17] and *Hunter v. Erickson*,[18] it is evident that state "encouragement" of private discrimination need not assume the tangible form of financial assistance to be offensive to the equal protection clause. In *Reitman*, the Supreme Court declared unconstitutional an amendment[19] to the California state constitution, approved by referendum, which prohibited the state from enacting laws against discrimination by private individuals in real property transactions. The Court affirmed the finding of the California Supreme Court[20] that the enactment of the amendment represented significant state involvement in the discriminatory actions of private parties. In *Hunter*, the Court took the same position in striking down an amendment to the Akron city charter which required any "fair housing" ordinance to be submitted to public referendum before becoming effective.[21]

The recent case of *Evans v. Abney*,[22] however, demonstrates that the Court will not invalidate the enforcement of racially neutral laws on equal protection grounds merely because, in a given instance, the result is to inhibit integration. In this case, the city had received parkland through a devise containing a racial restriction on its use. When segregated operation was declared unconstitutional,[23] the city integrated the park; the Board of Managers of the property then sued to have the city removed as trustee, and both the testator's heirs and the plaintiff in the previous litigation were permitted to intervene. The Georgia Supreme Court declined to

15. 377 U.S. 218 (1964).

16. *Id.* at 225.

17. 387 U.S. 369 (1967).

18. 393 U.S. 385 (1969), *noted in* 11 WM. & MARY L. REV. 776 (1970).

19. In November, 1964, the voters of California had approved Proposition 14, a constitutional amendment which effectively overturned both the Unruh Act (a "public accommodations" law) and the Rumford Act (a "fair housing" law), statutes currently in force in California. *See* Comment, *California's Proposition 14 and the "State Action" Concept*, 27 MD. L. REV. 291 (1967).

20. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

21. The Court found that the referendum requirement imposed a special burden on groups seeking to secure the enactment of "fair housing" ordinances. 393 U.S. at 390. *But see* James v. Valtierra, 402 U.S. 137 (1971), in which the Court upheld a charter amendment requiring voter approval of municipal participation in the construction of *low-income* housing projects.

22. 396 U.S. 435 (1970).

23. Evans v. Newton, 382 U.S. 296 (1966).

apply the *cy-pres* doctrine to the grant in order to permit the operation of an integrated park, but rather ordered a reversion of the property to the testator's heirs.[24] The United States Supreme Court affirmed the decision, ruling that the application of a neutral state law which had an equal effect on the white and black races of a city would not be considered a denial of equal protection.

While not being the sole basis for challenging the pools' closing,[25] the principal issue before the Court in *Palmer v. Thompson* was whether the city's action constituted a denial of equal protection to the black citizens of Jackson. Petitioners attacked the city's act as discriminatory state action; the Court agreed that state action was present, but denied that it was discriminatory. In so deciding, the Court noted that the city was not under an affirmative duty to provide such a service to its citizens, and that the termination of the service had an equal effect on the entire city population.

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24. Evans v. Abney, 224 Ga. 826, 833, 165 S.E.2d 160, 164 (1968).

25. Closely related to the equal protection framework is the Court's apparent revival of the thirteenth amendment as an alternative ground for halting racial discrimination. This amendment provides in part:

> Neither Slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.
>
> Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1, 2.

While the value of the thirteenth amendment seemingly lies in its grant of authority to Congress to proscribe private actions, early cases construed this grant as applying only to state-imposed disabilities. In Civil Rights Cases, 109 U.S. 3 (1883), the Court declared unconstitutional the Civil Rights Act of 1875, 18 Stat. 335, a law which prohibited discrimination against Negroes by individuals offering public accommodations. Mr. Justice Harlan, dissenting, argued that such acts of private discrimination constituted "badges of slavery and servitude" in that they were an outgrowth of bondage which imposed upon Negroes a stigma of inferiority; a result inconsistent with their status as free citizens. *Id.* at 34, 35 (Harlan, J., dissenting).

A similar split of opinion was revealed in Plessy v. Ferguson, 163 U.S. 537 (1896), where the "separate but equal" doctrine was established. *See* note 1 *supra*. While the Court held that segregated public facilities were constitutional, Mr. Justice Harlan asserted that compulsory separation was repugnant to the thirteenth amendment. *Id.* at 562 (Harlan, J., dissenting).

Insofar as its impact on civil rights, the thirteenth amendment remained dormant until 1968. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court upheld the constitutionality of the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970), a law prohibiting all forms of interference with the right of Negroes to acquire property, and providing criminal penalties for attempts to do so under color of law. The Court interpreted the statute to mean that private attempts to discriminate against Negroes were also illegal, although not subject to criminal penalties (thereby making civil relief available to aggrieved parties). Further, the Court held that Congress had the power under the thirteenth amendment to abolish all "badges and incidents of slavery" which would include interference with acquisition of property by private individuals. *See* Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537 (1968); Note, 17 LOYOLA L. REV. 79 (1969).

In the instant case, the Court rejected petitioners' thirteenth amendment argument that the closing of the swimming pools constituted a "badge of slavery." While acknowledging that Congress was empowered to enforce the mandate of the amendment, the Court summarily dismissed petitioners' contention, stating:

> But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.

403 U.S. at 227.

In deciding this case, the Court distinguished several recent cases of major importance involving the issue of equal protection. In a thorough analysis of *Griffin v. County School Board of Prince Edward County*,[26] the Court elucidated several important factual differences. In *Griffin*, the state of Virginia permitted the closing of schools in one county (under court order to integrate), but required other counties to continue to operate public schools which were not under similar court pressure. In *Palmer*, the city of Jackson integrated most of its facilities, closing only its swimming pools. In *Griffin*, both the state and county provided financing to enable private groups to assume the public function of education on a segregated basis,[27] thereby continuing in the activity of public education, albeit through an intermediary; in *Palmer*, the city of Jackson was not involved in assisting private groups to operate segregated public facilities.[28] In essence, the Court said that the actions of Prince Edward County served to perpetuate segregation, whereas Jackson merely closed its public swimming pools.

Similarly, the Court rejected petitioners' argument that the city's action "encouraged" private discrimination in a manner similar to that forbidden in *Reitman v. Mulkey*.[29] The Court noted that in *Reitman*, the state of California passed a constitutional amendment prohibiting the passage of Fair Housing Laws, thereby giving assurance that it would not interfere with private discrimination. But in *Palmer*, reasoned the Court, the city merely ceased performing a certain function.[30] Were this function to be taken over by private parties and performed in a discriminatory manner by them, the city probably could not be held responsible for encouraging this discrimination.

Finally, the Court distinguished the instant case from *Bush v. Orleans Parish School Board*,[31] where the Supreme Court affirmed the lower court decision striking down as unconstitutional laws permitting the governor of Louisiana to close schools to prevent their integration. The Court noted that *Bush* involved schools, a far more important local function than the operation of swimming pools, that the discriminatory motivation of Louisiana was explicit, rather than disputed as it was in the instant case, and that the laws struck down in *Bush* were part of a

26. 377 U.S. 218 (1964). *See* notes 15 & 16 and accompanying text *supra*.

27. This financing was in the form of "tuition grants" enabling the private schools to operate. Also, the county granted property tax relief to those who donated to the private schools. 377 U.S. at 223–24.

28. 403 U.S. at 252. This conclusion is questionable. The city terminated its lease with the YMCA on the Leavell Woods pool, which was then used by the YMCA for whites only. The city then sold the College Park Pool (located in a Negro neighborhood) to the YMCA, which attempted to operate it as a pool for Negroes only. When this failed due to a boycott by the black community, the city sold it to predominantly Negro Jackson State College, the practical consequences being that the pool is currently serving Negroes almost exclusively. *Id.*

29. 387 U.S. 369 (1967). *See* notes 17, 19 & 20 and accompanying text *supra*.

30. 403 U.S. at 223–24.

31. 365 U.S. 569 (1961).

package designed to perpetuate segregated public schooling, rather than merely terminate one medium of public recreation.[32]

Although the dissenting justices agreed that the aforementioned cases were not controlling, their criticism of the distinctions made by the majority was sharp.[33] The dissenters' most serious disagreement focused upon the interpretation of *Bush v. Orleans Parish School Board.* Rejecting the majority's implication that there may be a meaningful distinction between the termination of essential and non-essential public services with respect to the equal protection clause, they argued that had this rationale been accepted by the Court, then the *Brown v. Board of Education* principle should never have been extended to include recreational facilities.[34] Furthermore, the dissenting justices contended that the operation of public recreational facilities should be regarded as an important governmental activity.[35] With respect to the question of motivation, the dissent called attention to Mississippi's Interposition Statute, a law specifically designed to require local officials to resist public school integration by all lawful means.[36] Although the statute related only to schools, the dissenting justices believed that it was indicative of a general attitude of resistence to integration by local officials.[37] Finally, Justice Douglas also challenged the majority's implication that school closing statutes, standing alone rather than being part of a discriminatory legislative package, might have been found constitutional.[38]

The actual importance of the *Bush* case is open to question. The Supreme Court merely affirmed the district court decision without opinion, and therefore was not bound by the legal reasoning of the lower court. Furthermore, since the avowed purpose of the laws struck down in *Bush* was to perpetuate school segregation, the rationale applied in distinguishing *Griffin* from *Palmer* could also have been applied to *Bush.*[39] However, by treating *Bush* independently, the majority made itself vulnerable for its unnecessary speculation as to other possible distinctions between *Bush* and *Palmer.* If the majority were unwilling to take a definite stand on the distinction between essential and non-essential public services — the basis for the circuit court's decision in *Palmer* — it could

32. 403 U.S. at 221 n.6. For a critique of the validity of the distinction between essential and non-essential municipal services, *see* Note, 21 MERCER L. REV. 507 (1970).

33. The opinion of the Court was written by Mr. Justice Black and was joined in by Justices Harlan and Stewart. Chief Justice Burger concurred, as did Mr. Justice Blackmun. Justices White, Brennan, Marshall and Douglas dissented.

34. 403 U.S. at 262 n.16 (White, J., dissenting).

35. *Id. See* Evans v. Newton, 382 U.S. 296, 302 (1966), wherein the Court states: "Mass recreation through the use of parks is plainly in the public domain."

36. This statute required all state and local government officials to use all lawful means to prevent the implementation of the school integration decisions of the United States Supreme Court. MISS. CODE ANN. § 4065.3 (Supp. 1969).

37. 403 U.S. at 263 n.16 (White, J., dissenting).

38. 403 U.S. at 232 (Douglas, J., dissenting).

39. The Court could have reasoned that if the intention of the legislative act was to continue a public function in a segregated manner, then it would be unconstitutional; but if the intention was to terminate a public service, then the action would be constitutionally permissible. *See* p. 163 *supra.*

have avoided the issue completely instead of merely raising the unsupported implication that it might agree with the appellate court's rationale. Similarly, although perhaps true in an historical context,[40] the suggestion that the school closing laws were declared unconstitutional primarily because they were closely associated with other laws which were considered discriminatory unnecessarily blurs the issue. Standing alone, school closing laws would have been unconstitutional if used as a subterfuge to continue segregated public schools under a different guise, but the *Bush* decision would not have compelled any such result if the laws had genuinely been aimed at ending public education.

The dissenting justices do not challenge the *Griffin* and *Reitman* distinctions so strongly, although they do attribute a greater significance than does the majority to the *Griffin* Court's concern about motivation.[41] The majority's reasoning with respect to *Griffin* is difficult to refute: the *Griffin* case involved not merely the termination of a government service, but also direct assistance to private organizations seeking to perform the function abdicated by government. Such assistance to private groups was absent in *Palmer*. Moreover, the decision in *Reitman* is fundamentally concerned with a state "going on record" in favor of private discrimination.[42] As the later decision of *Evans v. Abney*[43] indicates, the enforcement of racially neutral laws will not be deemed a denial of equal protection even though, in a given instance, the effect is to facilitate the discriminatory intent of a private party. The *Palmer* case is somewhat analogous to *Evans;* arguably, legislative enactment of racially neutral laws should be treated by the same standard as the Court applied to the judicial enforcement of them.

The importance of motivation was another crucial watershed between the majority and the dissenting justices. The majority accepted the lower court's findings that the city of Jackson had been motivated by considerations of economy and public safety in its decision to close the pools.[44] Furthermore, the Court stated that motivation was not of central importance, and indeed, stressed the difficulties and uncertainty

40. The *Bush* case achieved national publicity. District court Judge Skelly Wright, now sitting on the Court of Appeals for the District of Columbia Circuit, was regarded as a valiant defender of the law as interpreted by the Supreme Court. Judge Wright made it clear that he regarded the school closing laws as a deliberate defiance of his previous orders to integrate. By the time the case reached the Supreme Court, opinion in the legal community was at a fever pitch. Under these circumstances, a reversal might have seriously undermined the morale of the lower federal court; an affirmance without opinion enabled the Supreme Court to uphold Judge Wright, without commenting on his legal reasoning.

41. 403 U.S. at 265 (White, J., dissenting).

42. For an analysis of the *Reitman* decision, *see* Note, 27 MD. L. REV. 291 (1967); Note, 13 VILL. L. REV. 199 (1967).

43. 396 U.S. 435 (1970). *See* notes 22 to 24 and accompanying text *supra.*

44. The Court said:

> [T]he courts below found that the pools could not be operated safely and economically on an integrated basis. There is substantial evidence in the record to support this conclusion.

403 U.S. at 225.

of motivational analysis of legislation.[45] The Court also emphasized that the unequal effect of legislation is the appropriate standard for determining whether there has been a denial of equal protection; if the law has a discriminatory impact, good motivation will not justify it,[46] and, absent such a discriminatory impact, bad motivation will not vitiate it. Since whites and Negroes were similarly deprived by the city's action, there was no such unequal impact.[47]

The dissenting justices, although acknowledging that improper motivation alone would not render a law unconstitutional, center their attention on the question of adverse effect to a minority group, rather than unequal effect, in determining whether there has been a denial of equal protection.[48] Furthermore, they regard the "stigma of inferiority" conveyed by the city's decision to close, rather than integrate the pools as constituting an additional, and therefore unequal effect upon the minority.[49] Also, they assess the factual situation differently than the majority, ascribing other motivation to the city officials. They regard the closing of the pools as but one more step in a long campaign by the city to resist

45. 403 U.S. at 224. *See* United States v. O'Brien, 391 U.S. 367 (1968). In *O'Brien,* the plaintiff's argument that the law against draft card burning should be declared unconstitutional because Congress passed it to stifle dissent was rejected, the Court refusing to speculate on legislative intent. *See also* Comment, *supra* note 1, at 98.

46. *See* Buchanan v. Warley, 245 U.S. 60 (1917). Here a law prohibiting persons from moving into neighborhoods of "the other race" without approval of new neighbors was struck down as unconstitutional. In rejecting the argument that the law prevented racial strife, the Court stated: "Desirable as this [promoting the public peace] is . . . this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.* at 81. Similarly, in Watson v. City of Memphis, 373 U.S. 526 (1963), the Court declared:

> [I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them.

*Id.* at 537.

47. The Court rejected the argument that Negroes will be deterred from objecting to the operation of segregated public facilities due to a fear of not having these facilities available at all. 403 U.S. at 220 n.5.

48. It is submitted that the dissenting justices are correct in their view that merely because a law is superficially nondiscriminatory, this alone does not automatically make it constitutional. For example, a municipal ordinance vesting unrestricted discretion in the mayor of San Francisco was held unconstitutional because it was implemented in a manner blatantly discriminatory against Chinese. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The *Yick Wo* Court stated:

> Though the law itself be fair on its face . . . yet, if it is applied and administered . . . so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

*Id.* at 373–74.

Even if the discrimination is unintentional, equal protection may still be violated. Smith v. Texas, 311 U.S. 128 (1940). In this case, the rape conviction of a Negro defendant was overturned because the grand jury which returned the indictment was selected in such a way as to systematically, although unintentionally, exclude Negroes. *Id.* at 30–31. *Accord,* Pierre v. Louisiana, 306 U.S. 354, 357 (1939); Martin v. Texas, 200 U.S. 316, 319 (1906); Carter v. Texas, 177 U.S. 442, 447 (1900). *See also* Comment, *supra* note 1, at 98.

49. 403 U.S. at 266–67 (White, J., dissenting). According to the dissenting judges in the circuit court opinion, the argument that both races are similarly affected by the closing "is a tired contention, one that has been overworked in civil rights cases." 419 F.2d at 1232 (Wisdom, J., dissenting).

integration.[50] The dissenting justices reject the economy argument, citing the low fees charged and the deficits endured during segregated operation of the pools.[51] The public safety argument is similarly discredited due to the absence of racial friction in the city.[52] With regard to public safety, the dissenters made reference to earlier cases which rejected the argument that integration of public facilities could be delayed because of the infeasibility of immediate integration.[53] Moreover, they emphasized that the plaintiffs were entitled to the present enjoyment of their constitutional rights; the equal protection clause should not be intepreted as sanctioning delay, based merely on an official's apprehension of trouble.[54] They do, however, leave open the possibility that if such predicted problems were actually to develop, then closing the pools might well be a permissible response.[55]

The majority's approach to the question of motivation appears to rest on firmer ground. Findings of fact by lower courts should be reversed on appeal only when they are clearly erroneous.[56] Here, the district court's findings that Jackson was motivated by considerations of economy and public safety, although debatable, were amply supported by evidence. The claim that the closing worked an unequal effect on Negroes is open to question; in terms of lost facilities, the whites had had access to four pools, the Negroes to one.[57] In terms of

50. On this point, the dissenting justices have a tenable position. Jackson resisted integration as long as possible, even continuing to operate its recreational facilities in a segregated manner until appellate procedures were complete in *Clark v. Thompson*. This segregation was continued despite the fact that the city had not appealed the declaratory judgment in favor of integration. Thus, there was ample basis for the statement of the court of appeals: "We again take judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating official policy of segregation." United States v. Jackson, 318 F.2d 1, 5-6 (5th Cir. 1963).

51. The Department of Parks and Recreation described its swimming fees as the lowest in the country; the objective of these low fees was to make the pools accessible to the public. 403 U.S. at 258 (White, J., dissenting). Furthermore, the pools had sustained an average annual deficit of $11,700 during each of the past three years. *Id.*

52. The dissenting justices noted the district court's reference to the statement in *Clark* that Jackson is "noted for its low crime rate and lack of racial friction. . . ." 403 U.S. at 248, *quoting* Clark v. Thompson, 206 F. Supp. 539, 541 (S.D. Miss. 1962).

53. *E.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963).

54. *See* Cooper v. Aaron, 358 U.S. 1 (1958). There, the school board of Little Rock had been proceeding in good faith to integrate the school system when Governor Faubus intervened. The intervention of the governor stirred racial passions; the school board feared that the aroused emotions of the people might render rapid integration dangerous. It requested a delay which the Supreme Court rejected. Justice Frankfurter stated: "Deep emotions have no doubt, been stirred. They will not be calmed by letting violence loose . . . *nor by submitting to it* under whatever guise employed." 358 U.S. at 25 (concurring opinion) (emphasis added).

55. Both Justices White and Marshall made it clear that they do not feel obliged to follow the policy that the petitioners' counsel suggested when he indicated that as long as integration was in any way a factor in causing the Jackson authorities to wish to close the pools, they would be required to continue to operate them. Justice Blackmun was disturbed by this implication. *See* Record at 43-44, Palmer v. Thompson, 403 U.S. 215 (1971).

56. FED. R. CIV. P. 52(a).

57. The population ratio was 2:1 in favor of whites and, before the closing, the whites had more facilities at their disposal. 403 U.S. at 251 n.9 (White, J., dissenting).

stigma, while the black community might think it had been branded as inferior, it is at least arguable that the white community might consider itself as having been classified as prejudiced.[58] Moreover, it should be noted that the cases cited by the dissent — those supporting the proposition that laws apparently equal on their face may actually be unconstitutionally discriminatory — all involved situations where the unequal effect was tangibly demonstrable, rather than merely speculative.[59]

The practical implications of this decision may be very important. Although it is unlikely that the closing of recreational facilities to avoid integration will be widely utilized, both because relatively few segregated facilities still exist and because the total loss of recreational facilities will usually be much less politically palatable with both whites and Negroes than would their integration, such closings may occur in a few communities. Where there is still bitter resistance to integration, or where adequate private facilities exist, the *Palmer* decision may well support continued segregation. Similarly, it is possible, as the dissenting justices fear, that minority groups may be more hesitant to challenge the vestiges of segregation if they stand to lose worthwhile, albeit segregated, public facilities.[60] It is extremely unlikely that "essential" services, such as schools, will be closed in response to court demands for integration. Justice Blackmun's concurrence suggests that he would regard such an action as being violative of equal protection,[61] and even the late Justice Black's opinion suggests, by its distinction of *Bush v. Orleans Parish School Board,* that the closing of schools might be treated differently by the Court.[62]

Just as *Evans v. Abney* indicated that judicial application of racially neutral laws would not be deemed a denial of equal protection merely

58. Justice White suggested:
> Stated more simply, although the city officials knew what the Constitution required . . . their judgment was that compliance with that mandate, at least with respect to swimming pools, would be intolerable to Jackson's [white] citizens.

403 U.S. at 255 (White, J., dissenting).

59. A clear example is Anderson v. Martin, 375 U.S. 399 (1964). Certainly the law requiring the race of a candidate to be printed on the ballot, which was struck down as unconstitutional, is facially equal in its effect on candidates of all races. Just as clearly, however, a candidate of the majority race will, at minimum, receive the advantage of a sense of identification from the voters of his group, which will be denied to a candidate of the minority since fewer voters will identify with him.

60. Although the majority deprecates the importance of the possible "chilling effect" of this decision on the assertion of constitutional rights, the dissenters cite many precedents in which the Court showed concern about this issue. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (imposition of residency requirement for recipt of welfare chills the constitutional right of interstate travel); United States v. Jackson, 390 U.S. 570 (1968) (permitting jury, but not judge, to impose death penalty for kidnapping constituted an impermissible burden on the exercise of the constitutional right to demand trial by jury).

61. Justice Blackmun stated: "They [the pools] are a general municipal service of the nice-to-have but not essential variety. . . ." 403 U.S. at 229 (Blackmun, J., concurring).

62. 403 U.S. at 221 n.6 wherein the Court, citing *Brown v. Board of Education,* stated that: "public schools [are] an enterprise we have described as perhaps the most important function of state and local governments."

because, in a particular instance, a minority group might be adversely affected, similarly *Palmer* suggests that the Supreme Court will be hesitant to challenge a municipality's discretion on equal protection grounds merely because a minority group may suffer adverse consequences. Furthermore, the continued reluctance of the Court to employ motivational analysis in determining the constitutionality of legislation avoids the uncertainties implicit in attempting to read the minds of the legislators.

It is submitted that the true value of *Palmer v. Thompson* is its establishment of a realistic limit on the judicial use of the equal protection concept as a basis for disturbing matters properly subject to legislative discretion. Virtually any legislative determination will be more favorable to one segment of the community than another, whether it involve taxation, welfare regulations, law enforcement or the providing of public services. To have made an equal protection question of these matters, absent fairly conclusive evidence of unequal treatment, would have constituted a judicial interference with the legitimate prerogatives of the people's elected representatives.

Regrettably, the *Palmer* decision may reward the imaginative application of prejudice in a few situations where the die-hard segregationists have not yet been thoroughly demoralized; the alternative, had the appellate court been reversed, might have been the gradual assumption of legislative power by the judiciary.

*John F. Bradley*

FEDERAL SECURITIES REGULATION — SECTION 16(b) — INSIDER STATUS ATTAINED SIMULTANEOUSLY WITH THE PURCHASE OF TEN PER CENT OF THE CORPORATION'S STOCK BUT REDUCTION OF HOLDINGS BELOW TEN PER CENT TERMINATES THIS STATUS.

*Emerson Electric Co. v. Reliance Electric Co.* (8th Cir. 1970)

On June 16, 1967, Emerson Electric Company (Emerson) purchased 152,282 shares or 13.2 per cent of Dodge Manufacturing Corporation (Dodge) common stock in order to block ratification of a pending merger agreement[1] between Dodge and Reliance Electric Company (Reliance). The attempt having proved fruitless, Emerson desired to dispose of its Dodge holdings. Prior to shareholder approval of the Dodge-Reliance merger, Emerson sold 37,000 shares to investment brokers on August 28,

1. In addition to blocking this merger, Emerson sought to convince the Dodge stockholders to merge with it instead. Emerson Elec. Co. v. Reliance Elec. Co., 434 F.2d 918, 920 (8th Cir. 1970), *cert. granted*, 401 U.S. 1008 (1971).

1967[2] and thereby reduced its holdings to 9.9 per cent. The remaining shares were sold to Dodge two weeks later.[3] Both sales having been made within six months of the original purchase, and profits having been realized, Emerson sought a declaratory judgment[4] on the question of its liability to Reliance,[5] if any, under section 16(b) of the Securities Exchange Act of 1934.[6]

The district court held that the profits from both sales inured to the issuer. Determining that the purchase of 13.2 per cent of Dodge stock was a purchase within the meaning of section 16(b), and that Emerson became a more than ten per cent owner at the very moment of purchase,[7] the court found Emerson subject to the provisions of the Act. It decided further that both sales, though not legally tied to one another,[8] were related parts of a single plan designed solely to avoid the consequences of section 16(b) and thus the profit on the second sale was recoverable by Reliance.[9]

On appeal, the Court of Appeals for the Eighth Circuit reversed in part the decision of the district court, *holding* that Emerson must disgorge profits realized on the first sale but not on the second.[10] Since Emerson did not own more than ten per cent of Dodge stock at the time of the second sale, the court concluded that because the statute expressly excluded recoupment of profits from a security holder who was not a beneficial owner of more than ten per cent of the stock at the time of the purchase and sale, the second sale was exempt from liability under section 16(b).[11] *Emerson Electric Co. v. Reliance Electric Co.*, 434 F.2d 918 (8th Cir. 1970), *cert. granted*, 401 U.S. 1008 (1971).

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2. Emerson feared that possession of more than ten per cent of Dodge stock at the time the stock was converted into Reliance stock as a result of the merger would be considered a sale under section 16(b). *See* Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967). The district court declined to consider this possibility. Emerson Elec. Co. v. Reliance Elec. Co., 306 F. Supp. 588, 591 (E.D. Mo. 1969).

3. *See* note 8 and text accompanying note 49 *infra*.

4. 28 U.S.C. § 2201 (1970).

5. As a result of the Dodge-Reliance merger, Reliance became a successor in interest to all legal rights previously possessed by Dodge.

6. Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970), provides as follows:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved. . . .

7. 306 F. Supp. at 592.

8. *Id.* When it designated the sales as not legally tied to each other, the court apparently meant that the sales were not part of a single purchase agreement with one buyer, but rather were to different buyers at different times.

9. *Id.* at 589.

10. 434 F.2d at 924–25.

11. *Id.* at 926.

The Securities Exchange Act of 1934[12] was enacted to regulate activity in both the regional exchanges and over-the-counter markets, and specifically to prevent inequitable trading practices in these markets.[13] Prior to the passage of the Act, corporate insiders[14] utilized their positions of public trust to obtain advance inside information concerning the activities of their corporations, and implemented this information in "short-swing" speculative transactions[15] for personal gain.[16] Section 16(b) was specifically drafted to curb the use of inside information by large stockholders and corporate officers.[17] In order to arrest this particular breach of fiduciary duty, it provides a remedy of recoupment of profit by the affected corporation.[18]

Liability under section 16(b) will be imposed if the following criteria are met. Initially, there must be a purchase and sale, or a sale and purchase, of equity securities[19] occurring within six months of one another. Secondly, the transactions must be made by an insider who is such "both

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12. 15 U.S.C. § 78 (1970).

13. Securities Exchange Act of 1934 § 2, 15 U.S.C. § 78b (1970).

14. The Act defines an insider as:

> [e]very person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any [registered] equity security (other than an exempted security) . . . or who is a director or an officer of the issuer of such security. . . .

Securities Exchange Act of 1934 § 16(a), 15 U.S.C. § 78p(a) (1970).

15. A "short-swing speculative transaction" is a shorthand description which denotes trading by insiders involving purchases and sales within six months of one another with the knowledge or expectation that the trading will result in profit due to an impending market rise. Meeker & Cooney, *The Problem of Definition in Determining Insider Liabilities Under Section 16(b)*, 45 VA. L. REV. 949, 963 (1959).

16. SENATE COMM. ON BANKING AND CURRENCY, STOCK EXCHANGE PRACTICES, S. REP. No. 1455, 73d Cong., 2d Sess. 55 (1934), observed:

> Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities. Closely allied to this type of abuse was the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others.

17. W. PAINTER, FEDERAL REGULATION OF INSIDER TRADING 24–25 (1968); Painter, *The Evolving Role of Section 16(b)*, 62 MICH. L. REV. 649 (1964); Comment, *Insider Trading: The Issuer's Disposition of an Alleged 16(b) Violation*, 1968 DUKE L.J. 94, 108–09.

18. Section 16(b) permits the issuer to recoup all profit made by a corporate insider on a short-swing sale.

> Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized.

Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970).

19. An equity security is defined to mean:

> [a]ny stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors to treat as an equity security.

Securities Exchange Act of 1934 § 3, 15 U.S.C. § 78c(a)(11) (1970).

*at the time of purchase and sale."*[20] There is no need to prove actual use of inside information[21] to impose liability;[22] the section creates an irrebuttable presumption that an officer, director or a more than ten per cent stockholder has used inside information whenever he engages in profit-yielding "short-swing" transactions.[23]

The rationale for extending liability to the ten per cent shareholder of a corporation, while less apparent than in the case of officers and directors, is readily justifiable. Large shareholders often exert sufficient control over the affairs of a corporation to gain access to information not available to the public. Congress felt that this use of otherwise inaccessible information was contrary to the public interest, and therefore sought to inhibit its perpetration by conferring "insider" status upon the more than ten per cent owner. Although section 16(b) clearly subjects the ten per cent shareholder to its proscription, the designation of who is a ten per cent owner, and at what point he attains this status is not readily discoverable from the language of the section.[24] Since Emerson's liability to Reliance is determined by the wording of section 16(b), the interpretation of this ambiguous language is of central concern in the case.

The first issue discussed by the court was whether the very purchase by which Emerson became an owner of more than ten per cent of Dodge stock is included within the meaning of the language of section 16(b) requiring a person to be a beneficial owner "both *at the time* of purchase

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20. Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970) (emphasis added). *See* note 6 *supra*. *See also* Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 387 (1953).

21. *See* Smolowe v. Delendo Corp., 136 F.2d 231, 235 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943), wherein Judge Clark said, "the only remedy which its framers deemed effective for this reform was the imposition of a liability based upon an objective measure of proof." In Gratz v. Claughton, 187 F.2d 46, 49 (2d Cir.), *cert. denied*, 341 U.S. 920 (1951), Judge Hand stated that section 16(b) "does indeed cover trading by those who in fact have no such information. . . ."

The objective approach is preferred to one that requires proof of actual use of inside information since the latter involves difficulty in proving intent to use inside information. Thus, the deterrent effect desired would have been significantly frustrated by a subjective test. *Hearings on S. 84, S. 56 and S. 97 Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st and 2d Sess. 6557-59 (1934). *See generally* II L. LOSS, SECURITIES REGULATION 1041 (2d ed. 1961).

22. *But see* Blau v. Lamb, 363 F.2d 507 (2d Cir.), *cert. denied*, 385 U.S. 1002 (1966). The court rejected the extension of the objective rule to transactions that could not possibly have involved insider use of information for speculative transactions. Here, the transaction involved was the conversion of preferred stock to common stock, a transaction not susceptible to the abuses of insider trading. In Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967), the court refused to deem a conversion to be a purchase within the purview of the Act because the particular transaction could not have lent itself to the speculation the Act sought to preclude.

23. Meeker & Cooney, *supra* note 15, at 951-52.

24. The issues involved in this case arose from the ambiguous language of section 16(b) which exempted short-swing profits from recoupment where the insider did not hold the insider status at both the time of the *purchase and sale*. The commentators generally agree that this language is somewhat ambiguous. Seligman, *Problems Under Securities Exchange Act*, 21 VA. L. REV. 1, 19-20 (1934); Comment, *Short-Swing Profits and the Ten Per Cent Rule*, 9 STAN. L. REV. 582, 583-84 (1957); Note, 57 COLUM. L. REV. 287, 289 (1957).

and sale."[25] It is undisputed that Emerson became a more than ten per cent owner after purchasing 13.2 per cent of Dodge stock. However, the precise question is whether this acquisition was sufficient to make Emerson an insider *"at the time* of purchase" within the meaning of 16(b). Reliance maintained that insider status is attained *simultaneously with* the purchase that raises a stockholder's holdings above ten per cent.[26] Emerson submitted that the proper interpretation for "at the time" is *prior to* the purchase; therefore, unless Emerson was an insider prior to the purchase of 13.2 per cent of Dodge stock, that purchase was exempt for determining 16(b) liability.[27] The *Emerson* court concluded that the language of the section was indeed ambiguous and that both proffered constructions were tenable.[28] Faced with this situation, the court was obliged to look beyond the language of the section and ascertain the interpretation which best fulfilled the purposes of the legislation.[29] Therefore, the court probed the legislative history[30] of section 16(b) for its underlying purpose, and examined other relevant sources, including case law,[31] opinions of the Securities and Exchange Commission[32] and commentators' observations,[33] for guidance to clarify the ambiguity.

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25. Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970) (emphasis added).

26. The adoption of the Reliance position would mean that Emerson's purchase of 13.2 per cent would be within the purview of section 16(b). Insider status would attach immediately with the purchase that raises the purchaser's holdings to more than ten per cent. *See* Stella v. Graham-Paige Motors Corp., 232 F.2d 299 (2d Cir.), *cert. denied,* 352 U.S. 831 (1956).

27. If Emerson's interpretation were selected as the proper interpretation by the court, then Emerson, which was not a ten per cent owner prior to the initial purchase of 13.2 per cent of Dodge stock, would not be held accountable for the profit made on either sale. There would have to be an additional purchase after Emerson became an insider as a condition precedent to the operation of section 16(b). *See, e.g.,* Arkansas Louisiana Gas Co. v. W.R. Stephens Inv. Co., 141 F. Supp. 841 (W.D. Ark. 1956).

28. 434 F.2d at 923.

29. Although addressing himself specifically to the interpretation to be given the term "security" as defined in section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1) (1970), the following statement of Mr. Justice Jackson typifies the criterion to be followed in construing either Act:

> [C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will read text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350–51 (1943) (footnote omitted).

30. *See* notes 16 & 21 *supra.*

31. Stella v. Graham-Paige Motors Corp., 232 F.2d 299 (2d Cir.), *cert. denied,* 352 U.S. 831 (1956); Arkansas Louisiana Gas Co. v. W.R. Stephens Inv. Co., 141 F. Supp. 841 (W.D. Ark. 1956).

32. The position of the Securities and Exchange Commission, with respect to the time when a person becomes a more than ten per cent beneficial owner, is:

> [T]he Commission has consistently, for 17 years regarded the purchase by which a stockholder achieved a ten per cent interest in the corporation as subject to liability imposed by the section.

Brief for SEC as Amicus Curiae at 5, Stella v. Graham-Paige Motors Corp., 104 F. Supp. 957 (S.D.N.Y. 1952).

33. *See generally* II L. Loss, *supra* note 21, at 1040–1132; W. PAINTER, *supra* note 17; Comment, *supra* note 17; Comment, *supra* note 24; Note, *supra* note 24; Note, 45 VA. L. REV. 1057 (1959); Note, 70 HARV. L. REV. 1312 (1957).

There are a limited number of judicial decisions that deal with the issue of when insider status is attained.[34] Reliance relied heavily on *Stella v. Graham-Paige Motors Corp.*[35] to support its interpretation of the language in question. The *Graham-Paige* court held that insider status was attained simultaneously with that purchase which elevates an individual's holdings above ten per cent,[36] feeling that this interpretation was the only one that effectively fulfilled the intendment of the Act. Most commentators have concurred in this result, agreeing that in terms of the purpose of the Act, the *simultaneous with* construction is the proper interpretation.[37] In light of this authority, the *Emerson* court adopted the *simultaneous with* position, concluding that the *prior to* interpretation would allow the purpose of the Act to be subverted.[38]

It may be argued, however, that the *simultaneous with* construction is too broad to correspond with congressional intent. The function of the Act is to inhibit the use of inside information in "short-swing" transactions by imposing a conclusive presumption that the insider did in fact use it.[39] Nevertheless, section 16(b) liability is limited to individuals who possess insider status both at the time of purchase and sale or sale and purchase.[40] Thus, the conclusive presumption should be valid only where the complete transaction — purchase *and* sale — occurs while the holder of the securities owns more than ten per cent prior to the first part of the "short-swing" transaction. However, the *simultaneous with* inter-

34. *E.g.*, Newmark v. RKO General, Inc., 425 F.2d 348 (2d Cir. 1970); Arkansas Louisiana Gas Co. v. W.R. Stephens Inv. Co., 141 F. Supp. 841 (W.D. Ark. 1956); Stella v. Graham-Paige Motors Corp., 232 F.2d 299 (2d Cir.), *cert. denied,* 352 U.S. 831 (1956).

35. 232 F.2d 299 (2d Cir.), *cert. denied,* 352 U.S. 831 (1956).

The *Graham-Paige* litigation involved a shareholder suit to recoup the profits made by Graham-Paige on a short-swing transaction of Kaiser-Frazer stock. The question of when a purchaser becomes a more than ten per cent holder under section 16(b) was raised in a motion for summary judgment. The district court held that the insider status is attained immediately upon the purchase of more than ten per cent of the stock. 104 F. Supp. 957 (S.D.N.Y. 1952). Subsequently, this rule was adopted by the district court once again in its hearing of the case on the merits. 132 F. Supp. 100 (S.D.N.Y. 1955). On appeal, the Court of Appeals for the Second Circuit affirmed the lower court's reading of section 16(b) to mean *at the very moment,* but remanded the case to ascertain whether there was, in fact, any profit realized. 232 F.2d 299 (2d Cir.), *cert. denied,* 352 U.S. 831 (1956). The district court on remand found that no profits were made on the sale of the Kaiser-Frazer stock, but rather that a loss was incurred. 149 F. Supp. 390 (S.D.N.Y. 1957), *aff'd,* 259 F.2d 476 (2d Cir. 1958).

36. 232 F.2d at 300-01.

37. II L. Loss, *supra* note 21, at 1060; Seligman, *supra* note 24, at 19-20; Cook & Feldman, *supra* note 20, at 631-32. *But see* Note, 70 HARV. L. REV. 1312, 1313 (1957).

38. 434 F.2d at 924. With regard to the *prior to* interpretation, Judge Kaufman said in *Graham-Paige*:

> A construction such as this would provide a way for the evasion of § 16(b) by principal stockholders, and render it largely ineffective to prevent some of the financial evils which led to the passage of this legislation by Congress.

104 F. Supp. at 959. *But see* Arkansas Louisiana Gas Co. v. W.R. Stephens Inv. Co., 141 F. Supp. 841 (W.D. Ark. 1956), where the court, in computing the recoverable profits, was unwilling to consider the original purchase that elevated the purchaser to an insider status.

39. *See* note 21 *supra.*

40. Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1970). *See* note 6 *supra.*

pretation extends the presumption to include the particular purchase by which a person first becomes a ten per cent holder. Since this person could not be in a position to *obtain* inside information before the purchase, it would be erroneous to conclusively presume that he *used* it.[41]

On the other hand, by prescribing boundaries Congress did not intend to render this section ineffective. In this respect, it is apparent that the *prior to* interpretation would result in removing the full deterrent effect of section 16(b). Under this view, a speculator could trade heavily in a stock with the benefit of inside information, avoiding liability simply by lowering his holdings below ten per cent before engaging in his next purchase.[42] Moreover, as one court would have it,[43] only those short-swing profits made on holdings *over* ten per cent would be recoverable by the issuer. Thus, in terms of actual deterrent value, it is submitted that the *simultaneous with* view is preferable.

Emerson reduced its holdings to an amount below ten per cent of the outstanding shares of the issuer, and then completed its second sale of the Dodge stock. The instant court was then faced with the remaining issue of whether this second "short-swing" sale is exempted from the proscription of section 16(b). More importantly, if it is exempted by the literal language of the section, the question then raised is whether the statute should be so broadly interpreted to include within its contours a scheme which circumvents liability under the Act.[44]

Since this question was regarded as a matter of first impression, the court turned to a close study of the statute itself for the intended meaning. In the view of the court, the specific wording of section 16(b) appeared to exempt a sale where the shareholder was not a more than ten per cent owner *at the time* of the sale regardless of which interpretation of "at the time" was applied — *simultaneous with* or *prior to*. There-

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41. *Cf.* Arkansas Louisiana Gas Co. v. W.R. Stephens Inv. Co., 141 F. Supp. 841, 847 (W.D. Ark. 1956).

Such an application of the conclusive presumption may also be subject to constitutional infirmities. Since the effect of the presumption is to foreclose any litigation concerning the issue of actual use of inside information, the *simultaneous with* extension of the presumption may raise a due process issue.

42. This profitable procedure could be repeated indefinitely so long as the trader did not hold more than ten per cent of the stock prior to the time of the purchase. For example, *A* owns nine per cent of *X* stock; he then purchases thirty per cent. Under the *prior to* interpretation, if *A* sells one share or the entire thirty-nine per cent *X* may not recover the profit. Having reduced his holdings to less than ten per cent, *A* could then buy another huge quantity and sell that as well without fear that the profit could be recouped by *X*. The *Emerson* court observed that this procedure could involve holdings in excess of fifty per cent of the issued stock. 434 F.2d at 924.

43. Arkansas Louisiana Gas Co. v. W.R. Stephens Inv. Co., 141 F. Supp. 841 (W.D. Ark. 1956).

44. The district court held that the transaction was within the scope of the section since Emerson was trying to avoid the liability of section 16(b). The court reasoned that, although the sales were not part of one unitary transaction to a single buyer, they were part of a single scheme to avoid the consequences of the Act. Therefore, the sales should be considered as one single sale. 306 F. Supp. at 592.

fore, the court felt that Emerson's second sale was free of section 16(b) liability.[45]

Despite this compelling view, Reliance argued that "at the time" should be broadly construed to include a second sale where there was a conspicuous attempt to avoid liability under section 16(b) — an interpretation adopted by the district court below.[46] Given the purpose of the Act, the question is whether an insider may legitimately minimize his loss of profit by means of a bona fide sale which reduces his holdings enough to qualify for the statutory exemption.

In resolving this aspect of the Reliance argument, the *Emerson* court drew an analogy to tax avoidance as treated by the courts under the Internal Revenue Code.[47] In those instances, the minimization of taxes through means provided by law is an accepted legal right. Thus, since the Securities Exchange Act did not specifically forbid avoidance by a two-sale plan, the court felt that Emerson should not be penalized for intentionally minimizing its loss by a means not prohibited by law.[48] While the effect of this holding is to permit a ten per cent holder to maximize profits on a dual sale scheme,[49] the court does intimate that if the sales were tied together and not independent of one another, then the profits from all such connected sales might be recoverable.[50]

Upon closer examination, some aspects of the court's reasoning behind the second issue appear open to critical comment. The first point which seems questionable is the court's use of two conflicting approaches in resolving the first and second issues. In deciding the first issue, the court followed the tendency of earlier courts to expand the coverage of section 16(b) to situations susceptible to abusive practices, and used the underlying purpose of the Act as the basis for its holding. In contrast, the resolution of the second issue reflects the court's disinclination towards including more transactions within the scope of section 16(b) — a decision perhaps made in deference to the regulatory framework which itself provides for a number of exempt transactions.[51] In terms of the

45. 434 F.2d at 926. *See* Seligman, *supra* note 24, at 20. *See also* II L. Loss, *supra* note 21, at 1060 (adopting without discussion the hypothetical case that Seligman used to analyze this particular aspect of section 16(b)).

46. 306 F. Supp. at 592. *See* note 44 *supra*.

47. *E.g.*, Gregory v. Helvering, 293 U.S. 465, 469 (1934). In that case, the Court considered the evasion of income taxes under the Internal Revenue Code of 1939, stating:

> The legal right of a taxpayer to decrease the amount of what would be his taxes, or altogether avoid them by means which the law permits cannot be doubted.

48. 434 F.2d at 926.

49. The amount of profit to be made from such a plan can still be quite large. In the instant case Emerson made a $691,392 profit on the second sale.

50. 434 F.2d at 926. The *Emerson* court stated:

> [W]e have determined as a matter of law that intent to avoid loss of realized profits by engaging in two *independent sales not legally tied* to each other and made at different times to different buyers . . . does not result in treating the two sales as one sale of the entire stock held. . . . (emphasis added).

*Id.*

51. The Securities and Exchange Commission is authorized to exempt certain transactions in addition to those exempted by the language of section 16(b). For

policy of the Act, however, this particular method of avoiding the proscription of section 16(b) could not have been considered an acceptable exception by Congress. If the purpose is to deter the use of inside information by large shareholders, that purpose is not implemented by the *Emerson* court. Insiders may still utilize inside information in short-swing transactions by selling a sufficient quantity of securities to reduce their holdings below ten per cent, and then sell the remainder at a significant profit[52] which could very well have resulted only from the use of inside information.

Another aspect of the decision on this issue merits examination. There is an apparent contradiction between the resolution of the issues with respect to the operation of the irrebuttable presumption of section 16(b). Each time that an insider engages in "short-swing" transactions, it is conclusively presumed that he has utilized information not available to the public. The court applied this presumption to the first sale but not to the second thus suggesting that the presumption terminates with the sale that reduces the holdings below ten per cent.[53] This position may be somewhat artificial. By assuming that Emerson used inside information *only* when it made the first sale, the court overlooked the reality of the situation, namely that the same information presumed to have been used in the first sale would provide the motivation behind a second. Thus, the two-sale scheme calculated to avoid losing the entire profit poses as great a potential for a breach of public trust as does a single sale by an insider.

It is posited that where a court is presented with strong evidence of an evasionary scheme — one involving a series of "short-swing" insider transactions — it should seriously consider the possibility of regarding the entire scheme as one single transaction for purposes of 16(b). While such an imputation may be difficult for obvious evidentiary reasons, nevertheless it would appear that such an intermediate position would be required to assure the continued vitality of section 16(b) as an effective tool of securities regulation.

A further disputable point is the validity of the tax analogy used to sanction Emerson's two-sale plan. It is submitted that this comparison is unsound since the court has likened a revenue raising measure with a regulatory act. In terms of purpose and the permissible degree of judicial interpretation, the two laws cannot be equated.[54] Whereas the Internal

example, the SEC has exempted securities held by a guardian, receiver or trustee in bankruptcy, and securities reacquired by or for the account of the issuer and held by it for its account. 17 C.F.R. § 240.16a-4 (Supp. 1971).

52. *See* note 42 *supra.*

53. It follows from the rationale of *Emerson* that if the transaction does not fall within the arbitrary classifications of section 16(b), then the objective standard and the presumption of use cannot be applied to the second transaction. *See* 434 F.2d at 925-26.

54. The Internal Revenue Code of 1954 is drawn rather explicitly, setting forth the exact extent of a taxpayer's obligation. The purpose was to let the taxpayer know exactly where he stood in relation to the law. Those areas left untouched by

Revenue Code necessarily *requires* some interpretation, the Securities Exchange Act *depends* upon a judicial viewpoint consistent with the broadly stated congressional purpose.

Finally, the court's decision is in disharmony with the spirit of the Act and in contrast to the expansion of liability under the entire securities regulatory scheme. For example, the language of section 10(b)[55] has been liberally construed, and liability extended to persons not explicitly specified in order to effectuate the section's overriding purpose. Similarly, section 16(b) warrants an expansive interpretation to implement the remedial nature of the enactment.

The court's resolution of both issues does have its laudable points. As a result of this decision, a purchaser knows that he will become an insider at the time of the purchase of more than ten per cent, and that he will cease to be an insider at the time he sells enough to reduce his holdings below this figure. Therefore, in terms of reliability, the *Emerson* decision elucidates dependable guidelines for investors. Moreover, the decision may deter inside trading to a certain extent. As a practical matter, an insider may not find it worth his while to settle for high profits on only nine per cent of his holdings, when he could wait over six months and enjoy a moderate profit on the entire amount. Furthermore, the *Emerson* court in no way sanctioned either explicitly or implicitly every multiple transaction scheme[56] designed to avoid liability under section

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the law are presumed to be proper means of avoiding the tax. On the other hand, the Securities Exchange Act could not encompass every conceivable method of abusive use of inside information. The Act was therefore broadly drawn while at the same time revealing the specific purposes within its prefatory language.

55. Section 10 provides in part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (1970).

Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (Supp. 1971).

56. A multiple-sale scheme is subject to limitation. The two sales must be independent; for example, the sales can not be parts of a divisible contract of sale to one buyer. 434 F.2d at 926. *See* note 50 *supra.*

16(b). To this extent, the deterrent policy of the section and the Act is preserved.[57]

In the final analysis, however, it is submitted that the strong points of this decision are outweighed by the weaker aspects. The effect of *Emerson* will be to preserve a loophole for a limited number of speculative transactions by insiders, and thereby undercut the purpose of section 16(b). While some may advocate the elimination of section 16(b) to handle insider trading problems, and the use of section 10(b) instead, this view fails to perceive the original impetus for the passage of section 16(b). Proof of actual use of inside information is virtually impossible, and an irrebuttable presumption is essential to deter insiders from potential abuse. However, the impact of the *Emerson* decision may well force the SEC to shift its emphasis to the fraud portion[58] of the Securities Exchange Act in order to seal the remaining gaps — a consequence which Congress could not have envisioned.

*Jonathan C. Waller*

LABOR LAW — A NONSTRIKING WORKER WHO REFUSED OUT OF FEAR OF PHYSICAL HARM TO CROSS ECONOMIC STRIKERS' PICKET LINE DID NOT BECOME AN ECONOMIC STRIKER ENTITLED TO PROTECTION UNDER THE NATIONAL LABOR RELATIONS ACT.

*NLRB v. Union Carbide Corp.* (4th Cir. 1971)

Three employees in the construction division of Union Carbide charged their employer with unfair labor practices, alleging that the company had violated section 7[1] and 8(a)(1)[2] of the National Labor

57. *See* Goodman, *Expanding Short-Swing Liability*, 3 REV. SEC. REG. No. 13–1, 891, 896 (1970).

Another commentator suggests an alternative direction which section 16(b) should follow; rather than the strict objective approach to insider trading, a more subjective approach should be taken.

> It is submitted that there should be a rebuttable presumption of "guilt" . . . which would apply when the insider's second transaction has followed his first transaction by less than one year. Conversely, the rebuttable presumption would be one of "innocence" when the insider's second transaction has followed his first transaction by between one and two years.

Munter, *Section 16(b) of the Securities Exchange Act of 1934: An Alternative to "Burning Down the Barn in Order to Kill the Rats,"* 52 CORNELL L.Q. 69, 90 (1966). This standard would place the emphasis on the question of whether inside information was actually used in the transaction.

58. *See* note 55 *supra*.

1. National Labor Relations Act § 7, 29 U.S.C. § 157 (1964), provides in part:

> Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective

Relations Act (the "Act"). The claimed violation was the discharge of these employees for refusal to cross a picket line erected at their place of employment by production and maintenance employees of Union Carbide who were participating in an economic strike.[3] On recommendation of the Hearing Examiner, the National Labor Relations Board (the "Board") ordered the company to reinstate the discharged employees and compensate them for the loss of pay incurred between the date that the strike was terminated and the date the employees were reinstated.[4] On appeal by the company,[5] the Court of Appeals for the Fourth Circuit set aside the Board's order as to one of the employees,[6] *holding* that one who is afraid to cross a picket line for fear of physical harm contributes nothing to the common cause or mutual aid and protection of his fellow employees and therefore is not protected under section 7 of the Act.[7] *NLRB v. Union Carbide Corp.*, 440 F.2d 54 (4th Cir. 1971).

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bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

2. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964), provides in part:

It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . .

3. An "economic striker" is a worker entitled to section 7 protection because his action as part of a group will promote the collective bargaining effort or other mutual aid or protection. Concerted activities recognized as fulfilling these qualifications include efforts to obtain higher wages, shorter hours or better working conditions, and other economic concessions from the employer.

Prior to the strike in the instant case, Union Carbide had issued a leaflet warning non-striking employees to report to work in the event of a strike or be subject to disciplinary action. After commencement of the strike, the absent non-striking employees were warned on two other occasions of possible disciplinary action for failure to report. After the three employees failed to obey the final warning, they were discharged.

4. Union Carbide, 174 N.L.R.B. No. 147 (1969). The Board acted pursuant to National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1964), which provides:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .

5. National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1964), provides in part that:

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business . . . by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

6. National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1964), further provides that:

Upon the filing of such petition, the court shall . . . have . . . jurisdiction . . . to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . .

7. The court felt differently toward the two non-striking workers who refused "on principle," rather than for fear of physical harm, to cross the economic striker's picket line. The court contended that respect for the picket line could be a source of strength for the entire collective bargaining process since any assistance would result in mutual aid or protection to the non-striking unionist if the situation were ever reversed. NLRB v. Difco Labs., Inc., 427 F.2d 170 (6th Cir. 1970), *cert. denied,*

The National Labor Relations Act[8] gave employees the right to organize labor unions and bargain collectively. The primary purpose of section 7 of the Act is the recognition of the right of employees to exert economic pressure to counterbalance the power of employers.[9] This equalization was to be accomplished by permitting certain forms of "concerted activity."[10] While section 7 grants these rights, section 8(a) complements them by limiting the ability of the employer to interfere with, restrain or coerce the employees in their exercise.[11]

The picket line is probably the most visible form of concerted activity used by employees to exert economic pressure on their employers.[12] The absence of work output by the strikers and those honoring the picket line disrupts the employer's normal business routine. This, in combination with the prospect of continued disruption, constitutes a strong economic weapon to be used by strikers at the bargaining table. However, controversy over the disciplining of workers who honor the picket lines has not been prevalent. While there may be any number of reasons why employers have chosen to overlook the failure of a non-striking employee to cross a picket line,[13] the majority of employers realize that there will

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400 U.S. 833 (1971); NLRB v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir. 1970). Thus the court held that the non-striking unionists who honored the picket line on principle had a sufficient economic interest to warrant protection under section 7, even though they had no immediate stake in the labor dispute.

8. 29 U.S.C. §§ 1 to 531 (1964).

9. As one commentator has observed:

> The Wagner Act became law on the floodtide of belief that the conflicting interests of management and worker can be adjusted only by private negotiations, backed if necessary, by economic weapons, without the intervention of law.

Cox, *The Right to Engage in Concerted Activities,* 26 IND. L.J. 319, 322 (1951). *See also* Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act,* 115 U. PA. L. REV. 1195, 1195-97 (1967).

10. National Labor Relations Act § 7, 29 U.S.C. § 157 (1964). *See* note 1 *supra.*

11. National Labor Relations Act § 8(a), 29 U.S.C. § 158(a) (1964). *See* note 2 *supra.* Employers are not helpless, however, in responding to this economic pressure. For example, employee absence from work for union activity may be taken into account in computing bonuses. Quality Castings Co. v. NLRB, 325 F.2d 36 (6th Cir. 1963); Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74 (9th Cir. 1960). The employer may be justified in imposing a lockout. NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957). He may also delegate the work to an independent contractor. NLRB v. Robert S. Abbott Publishing Co., 331 F.2d 209 (7th Cir. 1964); Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963). He may even hire permanent replacements for striking employees. NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938). For a discussion of the available remedies, see Getman, *supra* note 9, at 1203-10.

12. "The reluctance of workers to cross a picket line is notorious." Printing Specialties Local 388 v. LeBaron, 171 F.2d 331, 334 (9th Cir. 1949). "[P]eaceful picketing . . . [is] the customary means of enlisting the support of employees to bring economic pressure to bear on their employers." International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 703 (1950). Refusal to cross a picket line is a "conventional method, time-honored in the history of the American labor movement. . . ." Cycril deCordova & Bros., 91 N.L.R.B. 1121, 1136 (1950). *See* Thatcher & Finley, *Respect for Picket Lines,* 32 NEB. L. REV. 25, 31-34 (1953).

13. It has been noted that:

> Many American workingmen feel an almost sacrosanct regard for picket lines. Some see their economic interest directly or indirectly involved in observance

be widespread refusals to cross them regardless of the consequences, and have accordingly acquiesced. Whatever the reason, relatively few attempts have been made at disciplining those who refuse.[14]

Congress has never explicitly considered the question of whether honoring a picket line erected by fellow workmen was a protected "concerted activity" under section 7.[15] While it is generally felt that a refusal to cross the line is not illegal,[16] there is no legislative guidance as to precisely what protection is extended to non-striking employees who refuse to cross.

The Board from the outset has ruled that such non-striking employees have a protected interest under section 7 similar to that afforded economic strikers.[17] Although earlier court decisions did not always enforce the Board's rulings,[18] it appears that this view is changing. In the two most recent pronouncements prior to the instant case, *NLRB v. Southern Greyhound Lines*,[19] and *NLRB v. Difco Laboratories, Inc.*,[20]

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of all picket lines; others are moved by fear of the social ostracism, economic reprisal, or physical violence that might result from crossing a picket line.

Carney & Florsheim, *The Treatment of Refusals to Cross Picket Lines: "By-Paths and Indirect Crook't Ways,"* 55 CORNELL L. REV. 940, 940-41 (1970). *See also* Thatcher & Finley, *supra* note 12, at 32.

14. *See* Carney & Florsheim, *supra* note 13, at 941.

15. One commentator felt that Congress' failure to deal with this issue was a product of its reluctance to formulate national labor policy because the area is so controversial and so fraught with political significance. Carney & Florsheim, *supra* note 13, at 966.

16. On April 11, 1947, Senator Taft, in commenting on provisions concerning unfair labor practices which were to be added to the Act through the then proposed Taft-Hartley Amendments, stated that:

> Attached to Section 8(b)(4) is a provision clause, which makes it clear that it shall not be unlawful for any person to refuse to enter upon the premises of any employer (other than their own), if the employees of that employer are engaged in a strike authorized by a union entitled to exclusive recognition. In other words, refusing to cross a picket line, or otherwise refusing to engage in strike-breaking activities, would not be deemed an unfair labor practice unless the strike is a "wildcat" strike by a minority group.

73 CONG. REC. 6859 (1947), *quoted in* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1623 (1948). This statement by the author of these pro-management revisions indicates that Congress wished to insure that the Taft-Hartley Act would not be interpreted to mean that honoring another union's picket line was illegal.

17. *E.g.*, Carnegie-Illinois Steel Corp., 84 N.L.R.B. 851 (1949), *enforced sub nom.* Albrecht v. NLRB, 181 F.2d 682 (7th Cir. 1950); L.A. Young Spring & Wire Co., 70 N.L.R.B. 868 (1946), *enforcement denied*, 163 F.2d 905 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 837 (1948); Montag Bros., 51 N.L.R.B. 366 (1943), *enforced*, 140 F.2d 730 (5th Cir. 1944); Rock Hill Printing & Finishing Co., 29 N.L.R.B. 673 (1941), *enforced*, 131 F.2d 171 (4th Cir. 1942); Club Troika, Inc., 2 N.L.R.B. 90 (1936). In all of these cases the Board ruled that the refusers were protected by section 7 without giving any justification for such rulings.

18. *E.g.*, L.A. Young Spring & Wire Co., 70 N.L.R.B. 868 (1946), *enforcement denied*, 163 F.2d 905 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 837 (1948). The court differed with the Board by holding that a supervisor who refuses to cross a picket line is not an employee who is entitled to protection under section 7.

19. 426 F.2d 1299 (5th Cir. 1970). The employee honoring the picket line was not a member of any union, yet, in spite of this fact, the court held that she was entitled to protection under section 7. It felt that since she was subjecting herself to the strikers' liabilities, she should be entitled to their protection. *Id.* at 1301.

20. 427 F.2d 170 (6th Cir. 1970). The refusing employees were members of another union. The court held that the employees were entitled to the protection of

the courts have indicated that, at least where the strikers and those honoring their picket line have the *same employer,* the non-strikers attain the status of economic strikers entitled to section 7 protection.[21] The rationale used is that if one union honors the picket line of another, the latter will reciprocate when the situation is reversed. In this sense, the non-striking worker is said to have an economic interest, although concededly he has no immediate stake in the labor dispute. This economic interest accords

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the Act, reasoning that even though they had no immediate stake in the outcome, such conduct on their part would create a feeling of solidarity among the workers so that if the situation were ever reversed, those workers could then count on support from those that they were presently helping. *Id.* at 171.

21. The controversy with respect to section 7 protection continues where a worker refuses to cross a picket line set up against a different employer, usually in a delivery situation. In this context, the courts have refused to follow the Board's rulings that such workmen are entitled to protection from retaliation by their own employer under section 7. *See, e.g.,* NLRB v. L.G. Everist, Inc., 334 F.2d 312 (8th Cir. 1964) (refusal to rehire a worker who applied for reinstatement after previously refusing to cross a picket line on the premises of another employer); NLRB v. Rockaway News Supply Co., 197 F.2d 111 (2d Cir. 1952), *aff'd,* 345 U.S. 71 (1953) (firing an employee for failure to cross picket line at premises of another employer); NLRB v. Illinois Bell Tel. Co., 189 F.2d 124 (7th Cir. 1951), *cert. denied,* 342 U.S. 885 (1951) (demotion of workers for refusal to cross picket line set up against different division of Bell Telephone by a different union). In all three cases, the respective courts held that section 7 of the Act was not intended to protect employees in these situations.

On the other hand, the Court of Appeals for the District of Columbia Circuit implied, by way of dictum, that workers honoring a picket line set up against another employer *are protected* under section 7 against retaliation by their own employer. Truck Driver's Local 413 v. NLRB, 334 F.2d 539 (D.C. Cir.), *cert. denied,* 379 U.S. 916 (1964); Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 905 (1964). Also, some legislators have agreed with the Board that refusals to cross another employer's picket line are protected. Senator John F. Kennedy, in commenting on the then proposed Landrum-Griffin Amendment to the Act, stated: "We have protected the right of employees of a secondary employer, in the case of a primary strike, to refuse to cross a primary strike picket line." 105 CONG. REC. 16255 (1959), *quoted in* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1389 (1959). For similar remarks by Senator Douglas, *see* 105 CONG. REC. A8372, *quoted in* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1834 (1959).

This problem has been the subject of several articles. *See generally* Carney & Florsheim, note 13 *supra;* Elbert & Rebman, *Common Carriers and Picket Lines,* 1966 WASH. U.L.Q. 232; Getman, note 9 *supra;* Marshall, *Carrier Service and the Picket Line: A Dilemma,* 13 LAB. L.J. 301 (1962); Petro, *National Labor Policy and Respect for Picket Lines,* 3 LAB. L.J. 83 (1952); Scurlock, *Carriers and the Duty to Cross Picket Lines,* 39 TEXAS L. REV. 298 (1961); Thatcher & Finley, note 12 *supra;* Woods, *The Plight of a Strike Bound Carrier,* 33 MINN. L. REV. 255 (1949); Note, *Respect for Picket Lines,* 42 IND. L.J. 536 (1967); Note, *Picket Line Observance: The Board and the Balance of Interest,* 79 YALE L.J. 1369 (1970).

In the situation where the worker refuses to cross a picket line set up against another employer, a much stronger argument may be made in favor of the employer. The employee who honors a picket line against another employer has, at most, the same economic interest as one who honors a picket line at his own place of employment. *See* note 22 and accompanying text *infra.* Actually, in the former situation, the refuser's economic interest is less; the chances of reciprocal cooperation are more remote in a case where the refuser is a member of a carrier's union. Conversely, the interest of the refuser's employer in having goods delivered past striking employees picketing a different employer is greater. Non-delivery may be grounds for a breach of contract action by the picketed employer against the refuser's employer, or may result in business being shifted away from the refuser's unionized employer to a non-unionized employer. Hence, in this situation, the employee's limited economic interest can justifiably be forced to give way to the employer's interest in maintaining his business. *See* Carney & Florsheim, *supra* note 13, at 942-44.

the non-striking worker the status of an economic striker, thus entitling him to section 7 protection.[22]

In *Redwing Carriers, Inc.*,[23] the Board indicated that a non-striker who refused to cross a picket line out of fear was entitled to section 7 protection. However, prior to the instant case, the judiciary had never considered the proposition that mental state would be a decisive factor in determining whether a worker would be entitled to protection under section 7.[24]

In *Union Carbide,* the court was faced with identical conduct by three workmen; all three had refused to cross a picket line erected by fellow employees belonging to a different union. The evidence indicated, however, that two of the workmen refused to cross "on principle" while the third (Mullins) testified that his refusal to cross was motivated by fear of physical harm to himself or his property.[25] In holding that the worker who refused out of fear was not entitled to section 7 protection, the court's entire disposition of the issue was expressed in two sentences:

> One who is afraid to cross a picket line by reason of physical fear makes no common cause, contributes nothing to the mutual aid or

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22. The classic statement delineating mutual aid or protection under section 7 was made by Judge Learned Hand:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection" although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are then all helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike" or secondary boycott; the immediate quarrel does not concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.

NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-06 (2d Cir. 1942).

23. 137 N.L.R.B. 1545 (1962) (*Redwing II*), *modifying* 130 N.L.R.B. 1208 (1961) (*Redwing I*), *enforced sub. nom.* Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 905 (1964). *See* note 24 *infra.*

24. The Board ruled on three separate occasions that individual refusals to cross a picket line, motivated by fear, would not constitute "concerted activity" protected under the Act. Redwing Carriers, Inc., 130 N.L.R.B. 1208 (1961); Cinch Mfg. Corp., 91 N.L.R.B. 371 (1950); New York Tel. Co., 89 N.L.R.B. 383 (1950). In *Redwing II,* however, it was decided that such refusals based on fear were protected by section 7. *See* note 23 *supra.* Nevertheless, the Board ruled that the employer had a right to replace the workers in such a situation if there was a legitimate purpose for so doing. The Court of Appeals for the District of Columbia Circuit affirmed the decision in its entirety, without discussing the merits of section 7 protection. Similarly, in Truck Drivers Local 413 v. NLRB, 334 F.2d 539, 545 (D.C. Cir. 1964), the same court referred back to the "protected activity in Redwing II," indicating that it felt that refusal out of fear was protected. However, in the *Truck Drivers* case the decision only affirmed the legality of an employment contract in which the employer promised not to retaliate for his employee's refusal to deliver goods to a picketed plant. Thus, the comments on protected activity were mere dicta and not an adjudication.

25. The court's determination of Mullins' mental state was based on an excerpt from his testimony before the Trial Examiner:

> A He asked me to come back to work. And I told him no, that I couldn't cross no picket line. And he said, "Well, there's other men crossing it and they haven't said anything to them." And I said, "Well, it is too dangerous to cross

protection and does not act on principle. Mullins' refusal to cross the picket line was not protected activity under Section 7, and enforcement of the Board's order as to him will be denied.[26]

Previous Board and court decisions had analyzed the problem of section 7 protection for non-striking workers in terms of economic considerations, rather than on mental state.[27] These decisions properly recognized the counterbalancing purpose of section 7, and allowed certain forms of concerted activity including the erection of picket lines.[28] Using this form of analysis, the determinative issue in the instant case should be whether Mullins had a sufficient economic interest in refusing to cross the picket line to entitle him to section 7 protection.

In deciding this issue it must be determined whether Mullins' conduct would contribute to mutual aid. Where a union member honors the picket line of another union, the rallying cry "respect our picket line and we will respect yours"[29] should be complied with if the situation is ever reversed. As a consequence of Mullins honoring the picket line of the production and maintenance workers, in the event that his union (construction) goes on strike, the production and maintenance workers should honor his union's picket line. This would aid his union in attaining its bargaining demands, and in turn would confer an economic benefit on Mullins. Thus, he has an economic interest in refusing to cross, and should be entitled to section 7 protection. In this context, it must be understood that the consequences of his actions are the same irrespective

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a picket line and I can't cross a picket line to go to work. It's too dangerous. I'm afraid to cross the picket line."

. . . .

Q Well, why didn't you cross the picket lines, Mr. Mullins?
A Well, I was afraid.
Q Any other reason?
A Well, that was the main reason. I was afraid. It was too dangerous.
Q And why were you afraid?
A Well, I was afraid somebody would beat me up or burn my house down or something like that.
Q Have you ever crossed a picket line in the past?
A No, sir.
Q Have you ever encountered them before?
A Sir?
Q Had you encountered them before last summer?
TRIAL EXAMINER: Encountered picket lines?
Mr. Murphy: Yes.
THE WITNESS: Well, yes. I never did cross one. If that's what you mean. I didn't quite get your question.
Q (By Mr. Murphy) Yes. That's what I meant. Was your reason always the same as it was last summer?
A Oh, yes. Yes. Too dangerous to cross a picket line. I've seen people beat up and everything else crossing picket lines.

440 F.2d at 56 n.1.

26. 440 F.2d at 56.

27. *See* notes 17 to 23 and accompanying text *supra*.

28. *See* note 9 and accompanying text *supra*.

29. Printing Specialists, Local 388 v. Le Baron, 171 F.2d 331, 334 (7th Cir. 1948). The court went on to say that "the picket line is truly a formidable weapon, and one must be naive who assumes that its effectiveness resides in its utility as a disseminator of information." *Id.* at 334.

of his motivation for performing them; it is the mere fact of his refusal to cross which establishes a basis for mutual aid.

The court in the instant case, however, did not address itself to this issue. Instead, it examined the motivation behind Mullins' refusal to cross the picket lines in concluding that his refusal to cross was not entitled to section 7 protection. Apparently the court felt that the refuser would not be contributing to the "common cause" or "mutual aid" of the striking union unless he was truly sympathetic. Although the court did not elaborate, it was probably interpreting strictly the word "purpose" in section 7, wherein protection is extended to concerted activities "for the purpose of collective bargaining or other mutual aid or protection."[30]

However, as previously mentioned,[31] the objective of section 7 was to recognize the right of employees to exert economic pressure to counterbalance the power of employers. It is submitted that in light of this objective, "purpose" can justifiably be interpreted to encompass concerted activity which will contribute to the purpose of section 7 — the promotion of collective bargaining or mutual aid.[32] This interpretation was espoused in *Joanna Cotton Mills Company v. NLRB*,[33] where the court stated:

> [W]here there is a bona fide concerted activity for any of the purposes named in the statute, *its protection will not be denied because of the motives of those engaging in the activity;* but it is not the motive of the participants that we are concerned with but the "purpose" of the activity.[34]

If the court in the instant case had construed section 7 more liberally, it could have come to a conclusion consonant with the previous Board and court decisions. The evidence supported a finding that, regardless of the motivation for so doing, a refusal to cross would have confronted the employer with an impressive showing of solidarity, and thus would have contributed to the collective bargaining position of the strikers and raised a likelihood of mutual aid being extended to the refuser's union if the situation were ever reversed. Relying on this factual determination, the

30. National Labor Relations Act § 7, 29 U.S.C. § 157 (1964). *See* note 1 *supra.*

31. *See* note 9 and accompanying text *supra.*

32. Courts have favored a liberal reading of section 7. In NLRB v. Washington Alum. Co., 370 U.S. 9 (1962), the Court, in concluding that the purpose of mutual aid need not necessarily relate to the purpose of collective bargaining, stated:

> To compel the Board to interpret and apply [section 7's] language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions.

*Id.* at 14. A similar interpretation of section 7 was made in Salt River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325 (9th Cir. 1953).

33. 176 F.2d 749 (4th Cir. 1949).

34. *Id.* at 753 (emphasis added). The activity involved was the circulation of a petition urging the discharge of a supervisor. The court reasoned that regardless of an employee's personal animosity in circulating the petition, it would still be a protected "concerted activity" so long as it contributed to collective bargaining or other mutual aid. However, the court held that this particular activity by its nature bore no relation to collective bargaining or mutual aid, and therefore was not entitled to section 7 protection.

court could then have held that since this activity by its nature fulfills the purpose of section 7, it is to be protected.

However, far from providing a powerful weapon for workers, the instant court's narrow reading of section 7 may actually produce a result inconsistent with that section's purpose. The court's opinion is unclear as to whether fear need merely be present or whether it must be the dominant factor in the non-striking worker's refusal to cross in order to deny him the protection of section 7.[35] If the court's position is that merely some element of fear need be present, then the decision gives a tremendous advantage to the employer. In reality, workers honoring a picket line are probably motivated by a combination of fear and principle,[36] but unions, undoubtedly, will instruct their members to claim that they are acting on principle alone. However, under intense cross-examination and reminders of the consequences of perjurous testimony, it is quite likely that the refuser will admit that the thought of reprisal has crossed his mind. If such an admission denies him the protection of section 7, and thereby makes him vulnerable to discharge, then the effectiveness of the picket line will be diminished since the worker will be forced to choose between his job and his fears for personal safety. Since the effectiveness of the picket line is directly proportional to the extent to which it is honored, to the extent that some workmen choose their job, the effectiveness of the picket line will be reduced.[37] Moreover, since the policy behind section 7 is to provide the worker with an economic weapon to counteract the power of the employer,[38] a decision which lessens the effectiveness of this weapon defeats the section's admitted purpose.

More likely, however, the court intended to hold that fear must be the dominant motivation in the refusal to cross a picket line in order to deny the refuser the protection of section 7. If so, the result produced will not be so detrimental to the interests of the employee as it would if the mere presence of some fear were the criterion. In fact, a subjective standard would be difficult to enforce because of the evidentiary problems inherent in such a determination;[39] since workers honoring a picket line are motivated by a combination of fear and principle,[40] deciding which of the two is decisive will be a formidable task. The unions will compli-

35. In Virginia Stage Lines v. NLRB, 441 F.2d 499 (4th Cir. 1971), the court was presented with an opportunity to clarify this issue where Board testimony indicated that a worker had refused to cross a picket line out of a combination of principle and fear. The court never addressed itself to this issue, however, but found that the worker's fear was only momentary, while in reality, his actions were motivated by principle. *Id.* at 504.

36. *See* note 40 and accompanying text *infra.*

37. *See* note 46 and accompanying text *infra.*

38. *See* note 9 and accompanying text *supra.*

39. In two earlier decisions in which the Board indicated that refusing to cross a picket line out of fear was not a protected activity under section 7, there was conflicting testimony by the workers as to whether their refusal was based on principle or on fear of the consequences. Cinch Mfg. Corp., 91 N.L.R.B. 371, 372, 381 (1950); New York Tel. Co., 89 N.L.R.B. 383, 384, 389-90 (1950).

40. This was the determination of the Trial Examiners in both the *Cinch Mfg. Corp.* and *New York Tel. Co.* decisions. *See* note 39 *supra.*

cate this evidentiary problem by advising their members to claim that principle was the dominant motive.[41] At the same time, cross-examination and reminders of the consequences of perjury will be less effective, since the refuser himself may honestly not know which motivation was decisive to him. This being the case, he will have no trouble attributing his actions primarily to principle, in spite of the pressures of cross-examination.

There are a number of additional considerations which do not in themselves justify section 7 protection, but nonetheless support the proposition that such protection should be extended to those persons who refuse to cross picket lines in instances which raise a probability that mutual aid will be forthcoming:

First, the refuser has "plighted his troth" with the strikers[42] by undertaking all of the strikers' liabilities. By his refusal to cross the strikers' picket line, the non-striking employee has exposed himself to the same deprivations as the strikers: loss of wages, the possibility of permanent replacement,[43] and the wrath of his employer. Since he will suffer these liabilities irrespective of his motive, he should be entitled to section 7 protection to the same extent as the strikers.[44]

Second, the refuser's mental state is immaterial to the union establishing the line. The main objective of the picket line is to coerce its observance.[45] Whether those observing it are in sympathy with the grievances proclaimed on the placards of the picketers, or are discouraged from entry by the very existence of the line itself, the result will be the

41. While the court had no problem in attributing the refuser's actions to fear, it may have only quoted that portion of the testimony before the Trial Examiner which indicated that Mullins was acting out of fear. *See* note 25 *supra*. The Board's determination of fact contained no consideration of motive. Union Carbide Corp., 174 N.L.R.B. No. 147, 70 L.R.R.M. 1425 (Mar. 5, 1969). However, if the subjective test is to continue to be used, the Board will make a determination of motive in its findings of fact. This should preclude a court's fastening its attention upon only a portion of the testimony since the National Labor Relation Act in section 10(e) provides that:

> The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

Thus, the courts as well as the Board will be faced with the same difficulty of determining the decisive factor, but in most cases the court will be forced to accept the Board's findings as conclusive.

42. NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970).

43. An employer is permitted to replace a worker for refusing to cross a picket line if this action is taken for economic reasons, and not out of punitive motives. NLRB v. MacKay Radio & Tel. Co., 309 U.S. 333 (1938). For a more complete discussion, *see* Getman, *supra* note 9, at 1203-10.

44. NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970). In this case, the worker honoring the picket line was not a member of a union. Since the concept of economic interest through mutual aid or protection would not be applicable in this situation, the court must have felt that the worker's subjecting herself to the strikers' liabilities created enough of an economic interest by itself to entitle her to section 7 protection.

45. As one commentator viewed the coerciveness of picketing:

> This very act of picketing . . . "is conceived in battle; its real purpose is to conquer. It would compel acquiescence, not induce it by mere persuasion. Unquestionably its tendency is always militant. . . ."

M. FORKOSCH, A TREATISE ON LABOR LAW 461 (1965) (footnotes omitted).

same — an economic boycott of the employer. Therefore, so long as this objective is fulfilled and entry discouraged, the strikers will not be concerned with the refuser's mental state.

Third, the refuser's mental state is immaterial to the employer against whom the picket line is established. The absence from work of the strikers and those honoring their picket line will of necessity result in a reduction of output. Indeed, this is the striker's main weapon in the collective bargaining process, since the disruption of the normal business routine and the prospect of its continued disruption are strong incentives to the employer to seek a rapid settlement.[46] The employer will acquiesce to at least some of the demands of the union to reach a settlement, and this acquiescence and the events leading to it will transpire irrespective of the refuser's mental state.

Fourth, some of the strikers on the picket line are probably motivated, in part at least, by fear of reprisal from the union or from their fellow picketers rather than by an interest in achieving economic gains for themselves. In such an instance, the striker would no more be acting "on principle" than his non-striking counterpart who refuses to cross out of fear. Yet, no one has ever claimed that this mental state should deprive the striker of the protection of section 7. This indicates an acceptance of an objective standard in judging the actions of the striker — a concession that his actions alone aid the collective bargaining process. It is submitted that an objective standard is applicable with equal justification to the non-striking worker who refused to cross the line; again, it is his actions alone which contribute to the likelihood of mutual aid.

If an objective standard is to be used to determine the coverage of section 7, it will be imperative to delineate the classes of employees that fall under its protection. Under an objective standard, the sole test will be whether the worker's actions contribute to the likelihood that mutual aid will be forthcoming. Generally, if the refuser is a member of another union, or if he is not a union member but is designated as part of another bargaining unit for collective bargaining purposes, his refusal will meet this test.[47] It would seem that only in an instance where the employee is neither a union member nor part of a bargaining unit is there no possibility of mutual aid.[48]

Even the objective test will give rise to some inequitable situations. For example, an employee may refuse to become a member of a union

46. The picket line is "the customary means of enlisting the support of employees to bring economic pressure to bear on their employer." Brotherhood of Elec. Workers v. NLRB, 341 U.S. 694, 703 (1950). *See* note 12 and accompanying text *supra*. *See also* Thatcher & Finley, *supra* note 12, at 31-32.

47. Of course, if the refusing employee is a member of the union or bargaining unit on strike, his refusal to cross contributes to the collective bargaining process directly and is also a protected activity under section 7.

48. A union member who refused to cross a picket line set up by another union would not contribute to the likelihood of mutual aid if there was no possibility that his union would ever go on strike or otherwise need any reciprocal help. This possibility, however, is rather remote.

because he wishes to avoid any connection with potential violent undertones of union activity — a view that is shared by many.[49] However, this same distaste for violence will cause him to refuse to cross the union's picket line. Under the objective test, he is not entitled to section 7 protection because his actions raise no possibility of mutual aid to him for his grievances. At the same time, his less principled fellow workmen who chose to join the union despite personal aversions on their part will be entitled to section 7 protection. The dissenting employee is in effect being penalized for his principles. In answer, however, the language of section 7 indicates that the employee's actions must in some way be related to the possibility of mutual aid before he will be entitled to its protection.

In summary, the instant court focuses on mental state rather than economic consequences in determining whether a worker's refusal to cross a picket line is a protected activity under section 7 of the National Labor Relations Act. In so doing, the court not only fails to promote the purpose of section 7, but actually reduces the effectiveness of the picket line by placing pressure on the non-striking worker to choose between crossing the line or losing his job. In reality, the non-striking union worker who honors a picket line erected at his place of employment by fellow workmen belonging to a different union should be entitled to protection under section 7 because he has an economic interest; his action contributes to the effectiveness of the line, and creates the likelihood that reciprocal aid will be forthcoming to his own union if the situation is ever reversed. His actions will bring about this result regardless of his motivation.

*N. R. Powers*

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49. In his concurring opinion in Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942), Mr. Justice Douglas observed:

> We recognize that picketing might have a coercive effect. . . .
>
> . . . .
>
> Hence those aspects of picketing make it the subject of restrictive regulation.

*Id.* at 776-77.