A Reexamination of the Role of Employer Motive Under Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

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The question of the role of employer motive in analysis of the unfair labor practices defined by Sections 8(a)(1) and (3) of the National Labor Relations Act[1] has troubled the National Labor Relations Board and the courts from the time of the enactment of that legislation.[2] Despite repeated efforts by the Supreme Court to authoritatively define that role[3] and repeated efforts by academics to advise the Court in the task,[4] motive's

1. 29 U.S.C. §§ 158(a)(1), (3) (1976):

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 7; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Although the original Wagner Act (49 Stat. 449 (1935)) was amended in 1947 (Taft Hartley Act, 61 Stat. 136 (1947)) and in 1959 (Landrum-Griffin Act, 73 Stat. 541 (1959)), Sections 8(a)(1) and 8(a)(3) of the Act were not for present purposes affected. Another amendment with potential for impact on Sections 8(a)(1) and 8(a)(3), a 1947 addition to Section 10(c) (29 U.S.C. § 160(c) (1976)) of the Act precluding the Board from reinstating and granting back pay to an employee discharged "for cause," has generally been thought to merely confirm the Board's Wagner Act practice. Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 1, 20-22 (1947). *See infra* notes 204 and accompanying text.

2. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937).

3. *See, e.g.*, NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964); NLRB v. Erie Registor Corp., 373 U.S. 221 (1963); Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

4. *See, e.g.*, Christensen & Svanoe, *Motive and Intent in the Commission of Unfair*

function remains confused—the subject of diverse viewpoints compromised in the cases by an analysis which submerges fundamental issues in the language of procedural burdens of proof.[5]

The submerging is not news. It has constituted the state of the law since the Supreme Court's 1967 decision in *NLRB v. Great Dane Trailers, Inc.*[6] But the phenomena has recently reemerged with a vengeance in the context of the appropriate test to be applied in determining employer section 8(a)(3) liability for employee discharges alleged to have been discriminatory within the meaning of that Section. The Board, which had long adhered to the view that an employer motivated even "in part" by an "anti-union animus" in discharging an employee violated the Act,[7] recently succumbed to repeated First Circuit criticism of that position[8] and adopted, in *Wright Line*,[9] a "but for" cau-

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Labor Practices: The Supreme Court and the Fictive Formality, 77 YALE L.J. 1269 (1968); Cox, *supra* note 1, at 21-22; Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967) [hereinafter cited as *Economic Pressure*]; Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employer Choice*, 32 U. CHI. L. REV. 735 (1965) [hereinafter cited as *Section 8(a)(3)*]; Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Ship Building and Great Dane Trailers*, 70 COLUM. L. REV. 81 (1970); Meltzer, *The Lockout Cases*, 1965 SUP. CT. REV. 87; Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491 (1967); Shieber, *Section 8(a)(3) of the National Labor Relations Act; A Rationale: Part I. Discrimination*, 29 LA. L. REV. 46 (1968); Shieber & Moore, *Section 8(a)(3) of the National Labor Relations Act: A Rationale - Part II Encouragement or Discouragement of Membership in any Labor Organization and the Significance of Employer Motive*, 33 LA. L. REV. 1 (1972); Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59 (1965); Ward, *"Discrimination" Under The National Labor Relations Act*, 48 YALE L.J. 1152 (1939); Comment, *Discrimination and the NLRB: The Scope of Board Power Under Sections 8(a)(3) and 8(b)(2)*, 32 U. CHI. L. REV. 124 (1964); Comment, *Employer Discrimination Under Section 8(a)(3)*, 5 U. TOL. L. REV. 722 (1974); Comment, *Intent, Effect, Purpose and Motive As Applicable Elements to § 8(a)(1) and § 8(a)(3) Violations of the National Labor Relations Act*, 7 WAKE FOREST L. REV. 616 (1971); Note, *The Motivation Requirement in Single Employee Discharge Cases*, 11 LOY. U. CHI. L.J. 501 (1980).

5. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

6. 388 U.S. 26 (1967).

7. *See, e.g.*, Wood Transformers, Inc., 226 N.L.R.B. 112 (1976); Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574 (1976); Wire Prods. Mfg. Corp., 198 N.L.R.B. 652 (1972), *enforcement granted in part and denied in part*, 484 F.2d 760 (7th Cir. 1973). In addition to the "in part" test, the Board adhered to the view that an employer's pretextual business reason for a discharge rendered the discharge traceable only to illicit grounds and that "pretext" cases are distinguishable from the "mixed motive" cases to which the "in part" test applied. *See* Capitol Temptrol Corp., 243 N.L.R.B. 575 (1979).

8. *See, e.g.*, NLRB v. Wilson Freight Co., 604 F.2d 712 (1st Cir. 1979), *cert. denied*, 445 U.S. 962 (1980); Texas Instruments, Inc. v. NLRB, 599 F.2d 1067 (1st Cir. 1979); NLRB v. Eastern Smelting Ref. Corp., 598 F.2d 666 (1st Cir. 1979); NLRB v. Rich's of

sation test of employer motive tied explicitly to an allocation of the burden of proof and derived from the Supreme Court's similar test in the constitutional arena:[10]

> [W]e shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected activity.[11]

Wright Line presents anew old dilemmas concerning the meaning and efficacy of motive as a touchstone for analysis of an employer's conduct in the context of Sections 8(a)(1) and (3) unfair labor practices. The not immodest task I propose here is to attempt a reexamination of these questions, using *Wright Line's* adoption of the *sine qua non* causation test as both the occasion and vehicle for that reexamination.

I. The Role of Motive - Generally

It is with some trepidation that one approaches an outline of the role played by employer motive in the analysis of Sections 8(a)(1) and 8(a)(3). There is no want of scholarly discourse on the problem[12] and the problem is one of substantial complexity because the Supreme Court has not been consistent in its view of the matter.[13] It is nevertheless necessary to provide some background for the present inquiry and to hopefully suggest the perspective from which the inquiry is made.

Plymouth, Inc., 578 F.2d 880 (1st Cir. 1978); Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251 (1st Cir. 1978); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977); NLRB v. Billen Shoe Co., 397 F.2d 801 (1st Cir. 1968); NLRB v. Pioneer Plastics Corp., 379 F.2d 301 (1st Cir. 1967).

9. 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

10. *See* Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). *See also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

11. *Wright Line*, 251 N.L.R.B. at 1089.

12. *See* authorities cited *supra* note 4. For an historical and analytical summary of the problem see R. Gorman, Basic Text on Labor Law 326-38 (1976). *See also* A.B.A., The Developing Labor Law 111-34 (C. Morris ed. 1971).

13. *See* R. Gorman, *supra* note 12, at 333-35. *Compare, e.g.*, Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961) *with* Republic Aviation, Inc. v. NLRB, 324 U.S. 793 (1945).

A. *Motive or Balancing - The Procedural Resolution*

In *American Ship Building Co. v. NLRB*[14] an employer had locked out its employees following a bargaining impasse. The Board had found that the lockout was for the purpose of using economic pressure to obtain a settlement on terms favorable to the employer. Such an "offensive lockout"[15] in the Board's view, both interfered with the employees' exercise of Section 7 rights[16] in violation of Section 8(a)(1) of the Act and discriminated against the employees in violation of Section 8(a)(3) of the Act.

The Court used *American Ship Building* as the vehicle[17] for an attempted reconciliation of three inconsistent strands of doctrine. The first of these strands required, particularly with respect to Section 8(a)(3), that an employer's conduct be tracea-

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14. 380 U.S. 300 (1965).

15. The Board, prior to *American Ship*, had validated the so-called "defensive lockouts," which were designed to preserve employer interests (particularly in production, maintenance of property or inventory, and customers) independent of bargaining objectives. *See generally* Meltzer, *Lockouts Under the NLRA: New Shadows On An Old Terrain*, 28 U. CHI. L. REV. 614 (1961); Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956). The Board's position before *American Ship* required an analysis which sought to identify controlling employer reasons for a lockout, and inevitably therefore generated a form of "mixed motive" problem. *See* Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951). Although *American Ship* validated the bargaining pressure purpose the Board had earlier condemned and therefore rendered the offensive-defensive distinction largely irrelevant, WGN of Colorado, Inc., 199 N.L.R.B. 1053, 1053 n.2 (1972); Ozark Steel Fabricators, Inc., 199 N.L.R.B. 847, 847 n.3 (1972), the mixed motive problem remained after *American Ship* in the form of separating retaliatory lockouts from bargaining lockouts. *See, e.g.*, Tomco Communications, Inc., 220 N.L.R.B. 636 (1975), *enforcement denied*, 567 F.2d 871 (9th Cir. 1978); Wire Prods. Mfg. Corp., 198 N.L.R.B. 652 (1972), *enforcement denied*, 484 F.2d 760 (7th Cir. 1973); Port Norris Express Co., 174 N.L.R.B. 684 (1969). *Cf.* Royal Packing Co., 198 N.L.R.B. 1060 (1972) (alleged § 8(d)(4) violation). On the question of lockouts generally see Baird, *Lockout Law: The Supreme Court and the NLRB*, 38 GEO. WASH. L. REV. 396 (1970); Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship*, 57 CORNELL L. REV. 211 (1972); Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 CORNELL L.Q. 193 (1966).

16. 29 U.S.C. § 157 (1976):

> 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 bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

17. *See also* NLRB v. Brown, 380 U.S. 278 (1965); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

ble to an anti-union animus.[18] Employer actions undertaken for legitimate business reasons did not, under this doctrine, violate the statute even where the action tended to discourage union membership or activity.[19] The second strand suggested, particularly but not exclusively[20] with respect to Section 8(a)(1), that an employer motivation for its actions was at best merely relevant to the question of violation.[21] That question turned, rather, upon a balancing of legitimate employer interests against the effect or impact of the employer's conduct upon union activity[22] or Section 7 interests.[23] The accommodation of these conflicting interests was a matter to be left to the Board in the exercise of its supposed expertise.[24] The third strand of doctrine was not explicitly concerned with Sections 8(a)(1) or (3), but was nevertheless implicated by the bargaining context in which *American Ship* arose,[25] and by the Court's varying willingness to rely upon an assumption of Board expertise.[26] It was that the Board was not authorized by Congress to "balance" economic weapons in, at least, contexts in which the organizational rights of employees are not directly implicated.[27]

Laid upon the contradictory fabric of these strands of doctrine was the further unresolved problem of the relationship between Sections 8(a)(1) and (3), because although generally motive was not relevant in the context of 8(a)(1) even if relevant in the context of 8(a)(3),[28] it was not clear when 8(a)(1) could be

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18. NLRB v. Aero Corp., 581 F.2d 511, 514 (5th Cir. 1978). *See also* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 674-75 (1961); Radio Officers' Union v. NLRB 347 U.S. 17, 42-44 (1954).

19. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 333-45 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937).

20. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945).

21. *See, e.g.*, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965); NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 22 (1964).

22. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

23. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

24. *Id.*

25. It has been suggested that the Court's 1965 lockout decisions more properly presented Section 8(a)(5) issues than 8(a)(1) or 8(a)(3) issues. *See* Oberer, *supra* note 4, at 499.

26. *Compare, e.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) *with* NLRB v. United Steelworkers, 357 U.S. 357 (1957).

27. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-90 (1960). *But compare Insurance Agents' with* NLRB v. Erie Resistor Corp., 373 U.S. 21 (1964).

28. *See, e.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. Aero Corp., 581 F.2d 511 (5th Cir. 1978); El Rancho Market, 235 N.L.R.B. 468 (1978), *enforced*, 603 F.2d 223 (9th Cir. 1979); Aero-Motive Mfg. Co., 195 N.L.R.B. 790 (1972), *enforced*, 475 F.2d 27 (6th Cir. 1973). It is of course the case, however, that motive often

invoked independently of 8(a)(3).[29]

The Court's reconciliation was to invoke motive as the controlling question in both 8(a)(1) and 8(a)(3) cases.[30] Although the Court conceded that the lockout tended to interfere both with the right to bargain (by punishing employees for demanding terms inconsistent with the employer's bargaining position) and with the right to strike (by preempting that right), neither interference was of a type so "destructive" of employee rights to make inquiry into employer motivation under Section 8(a)(1) unnecessary:[31] "Proper analysis of the problem demands that the simple intent is to support the employer's bargaining position . . . be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful."[32] Moreover, the court noted that a violation of Section 8(a)(3) "will normally turn on the employer's motivation."[33] Although there is a "natural tendency" in many employer actions to discourage union membership or activity, 8(a)(3) does not prohibit "actions taken to serve legitimate business interests."[34] The Board must, therefore, "find that the employer acted for a proscribed purpose."[35]

To that rule the Court nevertheless postulated an exception designed to accommodate the "balancing" strand of its earlier doctrine: "There are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other anti-union animus is required."[36] Nevertheless, the bottom line of *American Ship* was that the Board was not free to balance economic weapons. An employer purpose to achieve its bargaining objectives through a lockout was, according to the Court, a permissible objective.[37] The Court left open the possibility of a category of cases with respect to

is crucial under 8(a)(1). *See infra* notes 61-69 and accompanying text.

29. *See* NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964).

30. *See American Ship*, 380 U.S. at 309-10. *Accord* NLRB v. Brown, 380 U.S. 278, 286-87 (1965). *But see* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965).

31. *American Ship*, 380 U.S. at 309-10. *Accord* NLRB v. Brown, 380 U.S. 278, 287-88 (1965).

32. *American Ship*, 380 U.S. at 309.

33. *Id.* at 311.

34. *Id.*

35. *Id.* at 313.

36. *Id.* at 311.

37. *Id.* at 313.

which the Board would not be required to find an impermissible employer purpose but failed to provide guidance concerning the boundaries of that category.

The boundary issue was ostensibly faced in *Great Dane Trailers*.[38] The employer had declined to pay striking employees accrued vacation benefits but announced that it would pay those benefits to nonstrikers and replacements. The Board found 8(a)(1) and (3) violations. The Court framed the issue before it as "whether, in the absence of proof of an anti-union motivation, an employer may be held to have violated"[39] those sections, and answered that question by postulating tests for the boundaries between illicit purpose cases and cases not requiring a finding of illicit purpose. The tests were to be based explicitly upon an allocation of burden of proof:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an anti-union motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.[40]

The quoted portion of the Court's opinion does more, of course, than merely limit cases in which motive will not be controlling to those in which an employer's conduct is "inherently destructive of employee rights."[41] In the first place, the Court suggested that the Board "can" find a Section 8(a)(3) violation in such cases. The Board is presumably not invariably required to do so. What standard is the Board to employ in exercising the discretion thus granted? It is presumably some form of balancing of

38. 388 U.S. 26 (1967).
39. *Id.* at 27.
40. *Id.* at 34.
41. *See Economic Pressure, supra* note 4, at 1201.

the legitimate employer interest assumed by the "inherently destructive" category and the employee interests "destroyed" in cases falling within that category.[42] In the second place, the Board is to select the analysis it will employ both on the basis of its characterization of degree of impact of the employer conduct and on the basis of its characterization of the employer's legitimate interest (substantial or insubstantial) furthered by its conduct. Since the employer has the burden of establishing the substantiality of its reasons,[43] the Board is clearly in a position to "balance" competing interests both expressly in the substantiality characterization it makes[44] and indirectly in its judgments regarding satisfaction of that burden.[45]

It is therefore not surprising that *Great Dane* was widely viewed as a retreat from *American Ship's* insistence upon anti-union or anti-protected activity "purpose" and as a reimposition of a "balancing test" disguised by an adoption of the language of motive analysis.[46] The Court's use of burden of proof as the touchstone for unfair labor practice analysis clearly served, at least at a formal level, to rationalize procedure by allocation of proof. That allocation served legitimate procedural policies.[47] But the allocation also served, when combined with the Court's use of the vague characterizations its opinion canonizes, as an apparent grant to the Board of the balancing authority purportedly withdrawn in *American Ship.*

Such, at least, is a prevailing academic view of the matter, supported by the further view that employer motive is a fiction that should not control analysis.[48] Balancing of interests is, by the terms of that prevailing viewpoint, both inevitable[49] and

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42. *Id.*

43. It was and remains unclear, however, what was meant by burden of proof. The alternatives are presumably burden of production and burden of persuasion. Janofsky, *supra* note 4, at 96. *Cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (burden of proof in Title VII disparate treatment cases). The use of the term "substantial" would seem to imply either burden of persuasion or something akin to a strong presumption — probably a presumption stronger than that suggested by the analogy to FED. R. EVID. 301. *See* NLRB v. Wright Line, 662 F.2d 899, 904 n.8 (1st Cir. 1981).

44. *Great Dane*, 388 U.S. at 39 (Harlan, J., dissenting).

45. *Id.* at 38 (Harlan, J., dissenting).

46. *See Economic Pressure, supra* note 4, at 1201; Janofsky, *supra* note 4, at 98.

47. *Great Dane*, 388 U.S. at 38 (Harlan, J., dissenting). *See* Oberer, *supra* note 4, at 505-06.

48. *See, e.g.*, Christensen & Svanoe, *supra* note 4; *Economic Pressure, supra* note 4; *Section 8(a)(3), supra* note 4.

49. *See Economic Pressure, supra* note 4, at 229; Oberer, *supra* note 15, at 229;

desirable. Although it would be preferable, then, that balancing be conceded forthrightly,[50] a surreptitous grant of balancing authority by means of a burden of proof schema allegedly is a desirable judicial direction.[51]

Perhaps, but it is not to me clear that motive is either as fictional or as undesirable a ground for decision as the viewpoint I have described suggests. My doubts require an attempt to evaluate what I perceive to constitute the four basic issues generated by the Supreme Court's pre-*Great Dane* uses and non-uses of motive. Those issues are: the role, if any, played by motive under Section 8(a)(1); the meaning of the term "discrimination" in Section 8(a)(3); the relationship of "anti-union animus" to that meaning; and, the validity of a claimed distinction between cases of retaliation against individual employees, as in the instance of discharge, and a second category of cases in which it is conceded that an employer has responded to protected activity.[52]

B. *Motive and Section 8(a)(1)*

The standard wisdom has been[53] and continues to be[54] that motive is not an element of Section 8(a)(1) and is an element of Section 8(a)(3).[55] As a matter of formalities, the standard wis-

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Shieber & Moore, *supra* note 4, at 7.

50. *See generally* Christensen & Svanoe, *supra* note 4.

51. *Economic Pressure, supra* note 4, at 1202.

52. The latter distinction is suggested by Professor Getman. *See Section 8(a)(3), supra* note 4, at 743-44. *See also* Christensen & Svanoe, supra note 4, at 1276, 1280 n.38; Shieber & Moore, *supra* note 4, at 37. The First Circuit has recently made a similar distinction in reviewing *Wright Line*, NLRB v. Wright Line, 662 F.2d 899, 904 n.8 (1st Cir. 1981).

53. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268-69 (1965); NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 22-23 (1964).

54. Norton Concrete Co., 249 N.L.R.B. 1270 (1980); Caterpillar Tractor Co., 242 N.L.R.B. 523 (1979), *enforced*, 638 F.2d 140 (9th Cir. 1981); National Aluminum, 242 N.L.R.B. 294 (1979).

55. If there is in fact a distinction between the sections with respect to the issue of motive, the difficulty is in determining when application of an 8(a)(1) analysis is appropriate. If the answer is "always," or, at least, is in the Board's or Court's discretion, Section 8(a)(3) is rendered a dead letter. *See* NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964) (8(a)(1) violated, therefore unnecessary to reach question of employer's motive under 8(a)(3)); Aero-Motive Mfg. Co., 195 N.L.R.B. 790 (1972), *enforced*, 475 F.2d 27 (6th Cir. 1973) (objective impact of employer's action proves 8(a)(1) violation regardless of subjective motivation). *See generally* Oberer, *supra* note 4. The answer in fact appears to be that the NLRB will apply a non-motive 8(a)(1) analysis independently of 8(a)(3) in traditional contexts, particularly employer interference with organizational activity. *See* cases cited *supra* note 54. Derivative violations of 8(a)(1) are, of course, to

dom would seem, under *American Ship*, to be in error,[56] but it is at least apparent that the categories of cases generally viewed as paradigmatic Section 8(a)(1) cases turn or purport to turn on a balancing analysis in which the language of motive seldom appears.[57] Support for the standard wisdom may be found in the statutory language, for 8(a)(1) broadly prohibits interference, restraint and coercion of employees "in the exercise" of Section 7 rights.[58] Neither of the crucial 8(a)(3) elements that have generated the motive controversy with respect to that section — "discrimination" and encouragement or discouragement of membership in a labor organization — appear in 8(a)(1).[59] Even if it is assumed, however, that motive (in the sense or senses that notion is employed in Section 8(a)(3) analysis) is generally an immaterial consideration in Section 8(a)(1) analysis, it is nevertheless apparent that there are at least two substantial exceptions to that assumption.

The first exception constitutes that category of case that resembles in all material features, save one, the standard 8(a)(3) case.[60] The absent feature is union membership, union activity or, for that matter, a union. The common example is the discharge for concerted activity not involving a union.[61] The analy-

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be distinguished. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965).

56. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308-09 (1965); NLRB v. Brown, 380 U.S. 278, 282-83 (1965). Professor Gorman suggests that the Supreme Court's lockout cases "appeared to destroy the independent utility of Section 8(a)(1) . . . ." R. GORMAN, *supra* note 12, at 335. *See* Tex Tan Welhausen Co. v. NLRB, 419 F.2d 1265, 1271 (5th Cir. 1969), *vacated and remanded*, 397 U.S. 819 (1970).

57. *See* Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) (solicitation); Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978) (solicitation); Hudgens v. NLRB, 424 U.S. 507 (1976) (economic picketing on employer property); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (employer speech); NLRB v. United Steelworkers, 357 U.S. 357 (1957) (employer speech); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (solicitation and distribution); Giant Food Mkts., Inc. v. NLRB, 633 F.2d 18 (6th Cir. 1980) (area standards picketing on employer property); Plasticrafts, Inc. v. NLRB, 586 F.2d 185 (10th Cir. 1978) (change of wage "status quo"); Sturgis Newport Business Forms, Inc. v. NLRB, 563 F.2d 1252 (5th Cir. 1977) (interrogation/surveillance); McDonnell Douglas Corp., 240 N.L.R.B. 794 (1979) (distribution); Continental Chem. Co., 232 N.L.R.B. 705 (1977) (interrogation).

58. 29 U.S.C. § 158(a)(1) (1976).

59. *Id.* § 158(a)(3).

60. Oberer, *supra* note 4, at 511-13.

61. *See, e.g.*, NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962); American Mfg. Ass'n v. NLRB, 594 F.2d 30 (4th Cir. 1979); NLRB v. Leprino Cheese Co., 424 F.2d 184 (10th Cir.), *cert. denied*, 400 U.S. 915 (1970); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970); B & P Motor Express v. NLRB, 413 F.2d 1021 (7th Cir. 1969); First Nat'l Bank of Omaha v. NLRB, 413 F.2d 921 (8th

sis employed is a motive analysis indistinguishable from the analysis that would be employed if 8(a)(3) was applicable.[62] The second exception[63] is broader and more troublesome. It is suggested by cases in which discriminatory application of an employer's otherwise presumptively lawful no-solicitation or no-distribution rule renders the rule unlawful under Section 8(a)(1).[64] As the presumptive validity of a sufficiently narrow rule of this type is founded upon an 8(a)(1) balancing analysis,[65] the question naturally becomes why discrimination would rebut the presumption. The answer is generally thought to lie in the proposition that disparate application impeaches the employer interest presumed to underlie the balance struck by the rule of presumptive validity.[66]

But that explanation is implicated in every case in which an accommodation of conflicting interests is reached by "balancing." Balancing assumes the legitimacy of the conflicting interests it seeks to accommodate, and an inconsistent (that is,

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Cir. 1969); Sioux City Foundry, 241 N.L.R.B. 481 (1979); Bron Constr. Co., 241 N.L.R.B. 276 (1979); Montana-Dakota Util. Co., 189 N.L.R.B. 879 (1971), *enforcement denied*, 455 F.2d 1088 (8th Cir. 1972); Ben Pekin Corp., 181 N.L.R.B. 1025 (1970). *See generally* Johnson, *Protected Concerted Activity In the Non-Union Context: Limitations On The Employer's Rights to Discipline or Discharge Employees*, 49 Miss. L.J. 839 (1978).

62. The distinction is in the stated nature of the illicit basis of decision and purpose. In the 8(a)(3) context, the basis must be union membership or activity. *See* NLRB v. Brown, 380 U.S. 278 (1965). In the 8(a)(1) context, basis and purpose are framed in terms of protected concerted activity. *See* Bob's Casing Crews, Inc. v. NLRB, 458 F.2d 1301 (5th Cir. 1972); First Nat'l Bank of Omaha v. NLRB, 413 F.2d 921 (8th Cir. 1969). The distinction is, however, largely academic. The term "membership" in 8(a)(3) has consistently been conceived as including participation in protected concerted activity. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 233 (1963). *But see* Ward, *supra* note 4, at 1155, 1160-61; *infra* notes 44-60 and accompanying text. An additional issue is, of course, whether the activity in issue is in fact "protected" and "concerted." *See* NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953). *Compare* NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967) (attempts to enforce collective bargaining provisions deemed to be for concerted purposes) *with* NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971) (employee attempt to press pay grievance held not to be acting in concert).

63. *See* Oberer, *supra* note 4, at 511. There may be a third exception - where "intent" is a part of the surrounding circumstances that inform a balancing analysis. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 619 (1969) (intent underlying employer's ambiguous statements).

64. *See, e.g.*, William L. Bonnell Co. v. NLRB, 405 F.2d 593 (5th Cir. 1969); Capital Records, Inc., 233 N.L.R.B. 1041 (1977); Bankers Club, Inc., 218 N.L.R.B. 22 (1975); State Chemical Co., 166 N.L.R.B. 455 (1967); Walton Mfg. Co., 126 N.L.R.B. 697 (1960), *enforced*, 289 F.2d 177 (5th Cir. 1961).

65. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

66. NLRB v. Electro Plastic Fabrics, Inc., 381 F.2d 374 (4th Cir. 1967). *But see* NLRB v. United Steelworkers, 357 U.S. 357 (1957).

facially discriminatory)[67] employer history of pursuit of an interest asserted as justification for conduct alleged to interfere with concerted employee activity is always subject to a claim of pretext.[68] Motive, in the sense of true basis of employer decision, would seem invariably to constitute an 8(a)(1) element, even if in the unexpressed and unpursued analysis underlying an assumption.

A balancing analysis also assumes, of course, that even a legitimate interest may be outweighed by its competitors. Thus, it may be said that 8(a)(1), because it prohibits some employer conduct traceable to legitimate employer "motives," is broader in scope than 8(a)(3). But there is a further sense in which motive is immaterial in a balancing analysis. The initial identification of the employer interest to be balanced may be conceived as merely a characterization of potential reasons for an employer's conduct without reference to the actual reasons for that conduct. That is, the initial step in a balancing analysis might be objective in the sense that real reasons for employer decision are less important than a search for conceivable rationalization for employer decisions.[69] That is why some employer rules governing the workplace are "presumptively" valid.

There are, then, two forms of employer interests relevant in a Section 8(a)(1) analysis: (1) presumptive and abstract employer interests (the interests of employers as a class); and (2) the interests actually at stake in the particular case[70] — repre-

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67. By facially discriminatory, I mean disparate treatment not (or not yet) rebutted by reasons characterized as legitimate. *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (disparate treatment under Title VII of the Civil Rights Act of 1964).

68. There is, for example, "purpose" language in the Supreme Court's opinion in NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) (grant of benefits coercive in violation of 8(a)(1)) that may suggest merely that the conduct in issue did not serve the employer's interest. *Compare* Plasticrafts, Inc. v. NLRB, 586 F.2d 185 (10th Cir. 1978) (employer failed to follow established wage practice during organizing campaign) *with* NLRB v. Arrow Elastic Corp., 573 F.2d 702 (1st Cir. 1978) (employer announced establishment of pension plan prior to election). And the Board's use of "purpose" as a factor in employer polling cases serves a similar function. Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967). *See* R. GORMAN, *supra* note 12, at 175.

69. The Supreme Court has used this approach as a "rational basis" analysis under the equal protection clause. Williamson v. Lee Optical, Inc., 348 U.S. 584 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

70. *See* Haggard, *Picket Line Observance as a Protected Concerted Activity*, 53 N.C.L. REV. 43, 90 (1974). The Supreme Court's lockout cases, American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965) may, albeit in very limited degree, suggest such an approach by legitimizing a broadly stated employer purpose — bargaining pressure — and thereby eliminating the need to explore the multiple

sented and tested by a particular employer's motive. The justification for inquiry into motive — that is, into the legitimacy of a particular employer's claim that its interests are the interests of employer's as a class — is a matter of underlying policy. If the policy of Section 8(a)(1) is not literally to prohibit "all employer interference, restraint or coercion," but rather to accommodate employer interests as well, a search for any potential reasons for employer action would expand the scope of permissible employer conduct far beyond any conceivable justification for the non-literal reading. An assessment only of the tendency of action to serve the hypothetical interests of employers as a class is possible, but its relationship to the justification for considering employer interests is tenuous. Those interests lack substance if they are not present in the particular case and lack substance, where present, if the employer is indifferent to them.[71]

Employer interests admittedly are at least[72] balanced under Section 8(a)(1), and such a balancing implies that some employer interference, restraint and coercion is permissible. The legality of certain interference, restraint or coercion of employees in the exercise of their Section 7 rights is in part a matter of the weight to be assigned general employer interests furthered by conduct having such consequences,[73] but it is also a matter of the legitimate presence of those interests in a particular case. If warranted interference, restraint and coercion are to be permit-

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possible purposes subsumed by that purpose.

It can be argued that the "objective approach" is, in effect, what occurs in fact in any event because the employer will invariably conduct an after the fact search for legitimate reasons for his past conduct in formulating a legal defense. Indeed, the employer may do so quite honestly by emphasizing the legitimate aspects of inevitably "mixed" reasons for his conduct. Moreover, to the extent that a balancing inquiry focuses upon the interests of employers, unions and employees generally, the "objective" approach is appropriate.

71. If the employer is indifferent, that indifference is likely to estop the employer from achieving whatever interest the reviewing authority deems conceivable and worthy of protection. *See infra* note 175 and accompanying text.

Compare NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (recognizing employer interest in property where such an interest is present) *with* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (ignoring property interest where not present). *See also* Eastex, Inc. v. NLRB, 437 U.S. 556, 570-76 (1978).

72. Employer interests would be protected to an even greater degree by a motive requirement. *See* Lane v. NLRB, 418 F.2d 1208, 1211-12 (D.C. Cir. 1969).

73. Interference, restraint and coercion are — in degree — assumed to have been intended in an offensive lockout. American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965). Such consequences may be merely incidental or intended; the interesting question is whether this makes a difference. *See infra* notes 75-90 and accompanying text.

ted and unwarranted interference, restraint and coercion prohibited, the analysis must include an inquiry into the credibility of specific employer claims.

This credibility inquiry is an inquiry into a particular employer's motive in a particular case. It cannot be a balancing of interests inquiry because such a balancing expressly permits the defense of hypothetical employer interests and because it leaves the definition of the conduct prohibited by Section 8(a)(1) to a "case by case" determination that makes employer prediction about the legal consequences of its conduct impossible. A balancing analysis concerned with the weight to be assigned particular employer interests in particular cases generates open-ended prohibitions, and those prohibitions encourage employer risk taking — a tendency exacerbated where remedial risks are not, from the employer's viewpoint, unacceptable.[74] In short, the balancing of interests aspect of Section 8(a)(1) analysis is properly a balancing of the generalized interests of employers as a class. Examination of the interests of a particular employer in a particular case is properly undertaken as a matter of credibility, and it is with respect to the matter of credibility that employer motive is an element of 8(a)(1).

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74. *See generally* Haggard, *supra* note 70. Professor Haggard appears, however, to regard the employer's presumptive interest as in the nature of a "right" lost only if "abused." *Id.* at 90. Indeed, he apparently views the "presumption" irrebuttable absent Section 8(a)(3) discrimination. *Id.* at 89 & n.197 (criticizing Daylin Inc., 198 N.L.R.B. 281 (1972), *enforced*, 496 F.2d 484 (6th Cir. 1974). By contrast, I view the presumption rebuttable and the function of discrimination in this context merely evidentiary. The distinction between these views, as a practical matter, may be unimportant.

Discrimination would seem the only viable means of rebuttal. Absent discrimination, Board inquiry into a particular employer's actual need for the protection of the presumptive interest notion would invite ad hoc second guessing of individual business decisions, and, if balancing in the 8(a)(1) context is the controlling conception, Board second guessing of business judgment is best confined to characterization of the relative importance of abstract employer interests. Still, it is not an individual employer's "abuse" of presumptive interests that is the target of a discrimination inquiry in this context. It is, rather, the absence of the interest in a case where discrimination is found.

Authoritative emphasis upon the open-ended nature of a balancing analysis of alleged employer unfair labor practices may have encouraged both employer lawlessness (as a consequence of inability to predict prohibitions or as a consequence of the breadth of the potential prohibition resulting from the analysis) and legislative refusals to strengthen toothless remedies. *Cf.* H.R. REP. No. 637, 95th Cong., 1st Sess. 64, 81, 84, 92 (1977) (minority views on adverse effect of enhanced remedies upon settlement of 8(a)(3) charges). *But see* O'Hara & Pollitt, *Section 8(a)(3) of the Labor Act: Problems and Legislative Proposals*, 14 WAYNE L. REV. 1104 (1968). *See generally* Eames, *The History of the Litigation of Darlington as an Exercise in Administrative Procedure*, 5 U. TOL. L. REV. 595 (1974) (inadequacy of remedies).

I have suggested here that employer motive in the sense, at least, of the legitimacy of a particular employer's claimed basis for its action, is inherent in Section 8(a)(1). If that proposition is accepted, it suggests an apparent partial congruence with Section 8(a)(3): motive is a material consideration under 8(a)(1) because the balance undertaken under that section rests upon the assumption that an employer's asserted interest is legitimately claimed. There is, however, a distinction between inquiry into motive as a test of the legitimacy of an employer's claimed interest and inquiry into the distinct form of "motive" that is intent to bring about particular illicit consequences as an essential element of a statutory prohibition. The former seeks to identify actual reasons for decision, and, once identified, those reasons may be subjected to balancing. The intent sense of motive serves an identification function as well, but does so with a particularly narrow focus. Under the analytical regime imposed by intent as an essential element of a prohibition, legitimate bases of decision are trumps. The impact upon countervailing interests of the conduct characterized as serving those trumps is immaterial except to the extent relevant to the antecedent question of actual illicit purpose.

C. *Discrimination and Section 8(a)(3)*

An essential element of Section 8(a)(3) is that encouragement or discouragement of union membership or protected activity[75] must occur by means of[76] "discrimination." To the extent that the preceding discussion of Section 8(a)(1) is accepted, a form of motive inquiry — in the sense of a determination of the presence or absence of legitimate grounds for employer action — is an underlying element of that section. The present question is what role is played by motive in defining the

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75. Despite the statutory language, which is limited to union membership, discouragement of protected activity, at least to the extent that the activity is union-related, is also the object of the 8(a)(3) prohibition. Radio Officers' Union v. NLRB, 347 U.S. 17, 39-42 (1954).

76. It has been suggested that this means that discrimination is a mere "condition" to liability and that the effect of discouragement is the basis of liability, Ward, *supra* note 4, at 1154, but it is less than clear what this might mean. Ward argued that it means that discrimination "because of" union activity is not what Section 8(a)(3) is about; rather it is discouragement of membership that the section is about. Discrimination because of union activity would therefore be prohibited only where its effect was discouragement of membership. *Id.* at 1158. *See also* Christensen & Svanoe, *supra* note 4, at 1315.

meaning of discrimination in Section 8(a)(3).

It is the premise of the present discussion that it is the discrimination element[77] which has given rise to the motive controversy. The premise is admittedly controversial. The importance of "discrimination" has often been deemphasized, particularly by critics who support an effects and balancing analysis of 8(a)(3).[78] The courts and, with judicial prompting, the board, have focused on employer motive, purpose or intent. On occasion the source of that focus has been viewed as "discrimination"[79] and at others as the "to encourage or discourage" element of the statute.[80] The elements have also, at least in judicial rhetoric, been fused[81] in a manner suggesting that employer "purpose" is an element derived not from statutory language but rather from the general policies of the statutory scheme as a whole.[82] It is my thesis, however, that the crux of the matter of motive is in the meaning of discrimination.[83] I will postpone, temporarily, my justification for that assertion because it is first essential to explore alternative potential meanings of

77. *See* Meltzer, *supra* note 4, at 90.

78. *See* Christensen & Svanoe, *supra* note 4, at 1272-73, 1285 n.53; *Section 8(a)(3), supra* note 4, at 735-36; Shieber & Moore, *supra* note 4, at 75-77 (recognizing independent significance of discrimination but broadly defining it).

79. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961).

80. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32-33 (1967); Radio Officers' Union v. NLRB, 347 U.S. 17, 44 (1954). *See* Christensen & Svanoe, *supra* note 4, at 1272-73.

81. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 312 (1965) ("discourage . . . or otherwise discriminate"); NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28 (1963) (intent to discriminate and foreseeable discouragement).

82. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); NLRB v. Brown, 380 U.S. 278, 286 (1965).

83. *See generally* R. GORMAN, *supra* note 12, at 327. There are a number of considerations favoring my treatment. First, the discrimination element constitutes the sole ground for distinguishing 8(a)(1) from 8(a)(3) and therefore provides the possibility that 8(a)(3) has independent significance. It is true that 8(a)(3) refers explicitly to matters of "hire and tenure of employment" and that 8(a)(1) does not, but that circumstance would be of importance only for purposes of proper citation; it would not vary the nature of employer conduct prohibited by the two sections.

My second justification follows from the premise that statutory language must be given effect and should not, at least normally, be treated as surplusage. If employer purpose is a part of 8(a)(3), but derived from the "to encourage or discourage" element, discrimination is rendered largely irrelevant. If the effect or impact of employer conduct is a part of 8(a)(3), it clearly resides in encouragement or discouragement.

My final justification is largely intuitive. It is that the term discrimination is so inherently ambiguous and so susceptible to diverse meaning infused by external values that it has given the judiciary substantial conceptual difficulty in non-labor contexts. Where there is conceptual fire arising from the term elsewhere, one may at least tentatively assume that the smoke arising from 8(a)(3) has a similar source.

discrimination.

The initial and clearest possible meaning assignable to "discrimination" is disparate treatment. Disparate treatment may be viewed as classification of employees in the objective sense that there occurs, without regard for the reasons for the occurence, distinction in treatment in fact.[84] Disparate treatment is more commonly understood, however, as distinction in treatment in fact *and* for an illicit, or at least suspect reason.[85] It is the latter possibility that defines disparate treatment for Section 8(a)(3) purposes: discrimination, when what is meant is disparate treatment, is employer conduct motivated by union membership or protected activity.[86]

Disparate treatment does not, however, exhaust the possibilities, for it is apparent that employer conduct undertaken in response to union membership or activity that does not constitute distinction in treatment motivated by such membership or activity may also satisfy 8(a)(3)'s discrimination element.[87] An employer's action may be in response to conditions generated by union activity in the sense that it is triggered by such activity without being necessarily motivated by such activity, because the employer's response would occur, as well, where similar conditions were generated by causes unrelated to union membership or activity.

"Discrimination" as mere response does not constitute disparate treatment.[88] That proposition is illustrated by the case of a neutral employer rule or practice, evenhandedly applied, prohibiting a category of employee conduct inclusive of but not limited to union activity. The employer's claim in such a case is that an employee disciplined for breach of such a neutral rule by conduct constituting protected union activity was not treated differently than an employee disciplined for a breach of the rule by means unrelated to union activity. The Supreme Court responded to that argument in *Republic Aviation Corp. v.*

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84. *See* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 688 (1961) (Clark, J., dissenting).

85. *Id.* at 680 (Harlan, J., concurring).

86. *Id.* at 675 (opinion of the Court). Section 8(a)(3) may be violated even where an employee is discharged for unprotected activity where union status is the employer's reason for that form of discipline. Precision Castings Co., 233 N.L.R.B. 183 (1977).

87. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947).

88. *See Section 8(a)(3), supra* note 4, at 737; Meltzer, *supra* note 4, at 90-91; Shieber, *supra* note 4, at 70-71.

NLRB.[89] Employees were discharged for violating an employer's no-solicitation rule by soliciting union membership. The rule was held unlawful on a Section 8(a)(1) balancing analysis. Although the rule had been consistently applied to all union and non-union solicitation, the Court held, in addition, that the discharges violated Section 8(a)(3): "a discharge because of violation of that rule discriminates within the meaning of Section [8(a)(3)] in that it discourages membership in a labor organization."[90]

A second illustration of the proposition that disparate treatment may be absent in a case involving an employer's response to protected activity is employer replacement of economic strikers. The employer defense to the charge that replacement constitutes discrimination is similar to the employer defense in *Republic*: although replacement is a response to union activity (the strike), it is not a response distinct from the response the employer would undertake to a loss of employees from non-union induced causes; the loss of employees, rather than the strike, is the motive.[91] Such a defense was apparently accepted by the Supreme Court in *NLRB v. Mackay Radio & Telegraph Co.*[92]

The employer's defense in both illustrations is subject to the objection that was earlier termed, here in the Section 8(a)(1) context, an objection on the grounds of legitimacy,[93] for in both it might be argued that the defense is pretextual. Specifically, the employer's conduct arguably might have been different if in response to conditions not union-related and, therefore, the legitimate (non-union) ground for decision is absent. If, however, the credibility of the employer claim is accepted, and if the characterization of the motive postulated by the defenses is assumed, there is no disparate treatment in either illustration.[94]

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89. 324 U.S. 793 (1945).

90. *Id.* at 805.

91. Meltzer, *supra* note 4, at 90-91; Shieber, *supra* note 4, at 74.

92. 304 U.S. 333 (1938). *See also* NLRB v. International Van Lines, 409 U.S. 48 (1972); Fleetwood Trailer Co. v. NLRB, 389 U.S. 375 (1967).

93. *See supra* notes 63-68 and accompanying text.

94. A case involving a mass discharge or other action directed at all employees such that no observable classification of employees occurs in fact may nevertheless involve employer conduct amounting to disparate treatment, for there may always be postulated a hypothetical class of employees who would have been treated differently under non-union related but similar circumstances. *See* Shieber, *supra* note 4, at 70-71. *But see* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 312 (1965); *Section 8(a)(3), supra* note 4, at 737-38; Ward, *supra* note 4, at 1170-71.

Since disparate treatment was not present in either case, is disparate treatment an essential element of Section 8(a)(3)? *Republic* clearly indicates that it is not, for the Court there assumed the employer's characterization of the union-neutral reason for discharge and nevertheless found a violation.[95] *Mackay* may be viewed[96] as announcing, however, a different rule. The immediate question therefore remains that of defining the meaning of the 8(a)(3) discrimination requirement by exploring potential alternative meanings of the discrimination as mere employer response rule announced in *Republic* or the alternative discrimination as employer action motivated by illicit reasons rule suggested in *Mackay*.

II. Discrimination as "Cause" or "Response"

There were clearly two classes of employees generated by the employer's conduct in *Republic*: those discharged and those not discharged. There was therefore distinction in treatment of employees. Professor Shieber has argued, I think correctly, that there was nevertheless no disparate treatment of employees in *Republic* in the sense of a comparison of the treatment the employees would have received if their breach of the employer's rule was unrelated to protected activity with the treatment they received given that their breach of the rule was related to such activity.[97] Shieber concludes that disparate treatment is not an essential aspect of 8(a)(3) discrimination, but that employer action "caused by" protected activity is an essential aspect of that discrimination.[98] Disparate treatment apparently means, for Shieber, treatment distinct from that which would have occurred had the employee conduct not been union-related.[99] If disparate treatment is immaterial, in what sense may an employer's action be said to have been caused by protected activity? Was not the employer, in *Republic*, defending on the ground that the discharges were not "caused by" protected activity by asserting that there was no disparate treatment — that it would have acted in the same manner if confronted with employee conduct not union-related?

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95. 324 U.S. at 805.
96. *Compare* Meltzer, *supra* note 4, at 90-91 *with* Shieber, *supra* note 4, at 76.
97. Shieber, *supra* note 4, at 74-76.
98. *Id.* at 70, 75-76.
99. *Id.* at 70-71.

The employer in *Republic* was making that assertion, but its argument was an illicit motive argument. Professor Shieber's "cause" argument is not an illicit motive argument; it is, rather, a form of factual cause argument. Factual causation is a simple fact issue: was there or was there not a connection between protected activity and employer response.[100]

Assuming that factual cause is what *Republic* means by discrimination as employer response to protected activity, is it the case that an employer's action taken in good faith reliance upon a mistaken belief that an employee has engaged in unprotected activity not "caused by" protected activity? Professor Shieber clearly thinks it is the case, for he cites *NLRB v. Burnup & Sims*[101] for the proposition that a discharge based upon unprotected employee misconduct occurring in the course of protected activity is not caused by such protected activity.[102] It is, rather, "caused by" the unprotected activity even where the employer is mistaken, as in *Burnup & Sims*, about the actual occurrence of such activity.[103] The factual connection between protected activity and employer response Shieber demands is therefore a connection to be found in the employer's mind. Is there, then, a workable distinction between factual cause and motive?

That question may be made more difficult by adding another case to the mix. In *Local 357, International Brotherhood of Teamsters v. NLRB*,[104] the Supreme Court rejected the contention that an employer violated Section 8(a)(3) by discharging an employee on the basis that the employee had not been referred by a union hiring hall. Referral through the hiring hall was mandated in the employer's collective bargaining agreement with the union, and that agreement expressly forbade discrimination between union members and non-members in referrals. The Court employed an illicit motive analysis: discharge occurred on the basis of the employee's failure to use an assertedly neutral employment procedure, not on the basis of union

100. *See* Section 8(a)(3), *supra* note 4, at 737.

101. 379 U.S. 21 (1964).

102. Shieber, *supra* note 4, at 62-63.

103. *See id.* at 63. The difficulty is that the employer's mistake might be viewed as meaning that the underlying employee conduct "caused," in a purely factual sense, the discharge. That underlying activity, however, may be narrowly defined (as no activity at all) so as to preclude the characterization "protected." The discharge, assuming that characterization, is no longer "caused by" protected activity. Cause becomes clearly a matter of the "reason" in the employer's mind. *See* 379 U.S. at 23.

104. 365 U.S. 667 (1957).

membership or activity.[105] The dissent in *Local 357* contended that although there was no union-based decision, there was both distinction in treatment in fact and encouragement of membership, and that these elements made out a violation.[106] In Professor Shieber's view, the majority in *Local 357* required both cause and disparate treatment.[107] The dissent would, in Shieber's view, require distinction in treatment in the sense of an observed phenomena, but not "cause."[108]

"Cause," for Professor Shieber must therefore mean motivation even if it does not mean illicit motive. The employer must have been motivated by protected activity even if it would have or in fact had acted in precisely the same manner when confronted with similar, but non-union related employee activity. Cause is not, then, merely a factual connection between an employer's action and protected activity or status; there was factual connection in *Burnup*.[109] It means, rather, motivation in the sense that a challenged employer action is a response to protected activity or status but not to some circumstance independent of protected activity or status. It does not mean disparate treatment because disparate treatment requires that the employer's action in response to protected activity or status be different than what that action would have been in response to a similar circumstance independent of protected activity or status. The cause notion must therefore be understood as entailing motivation in the sense of a conscious response to protected activity, and the illicit motive or purpose notion must therefore be understood as entailing motivation in the sense of illicit reasons for the employer's response. To avoid confusion, I will use "cause" or "response" to describe the former notion and "motive" to describe the latter notion.

III. Discrimination as Disparate Treatment

A. *Disparate Treatment: A Definition*

The difficulty presented by a cause conception of the discrimination element of 8(a)(3) is that it does not take into account the possibility that the employer may have a business

105. *Id.* at 674-75.
106. *Id.* at 688-89.
107. Shieber, *supra* note 4, at 51-52.
108. *Id.* at 55-56.
109. *See supra* note 103.

interest distinct from punishing or avoiding protected activity that is furthered by its response to protected activity. This difficulty may be described, as well, in causal terms: protected activity causes business conditions similar to conditions that could arise from causes independent of protected activity. The employer's response may be viewed as a response both to those conditions and to protected activity. That is, although the conditions are dependent upon protected activity in the particular case in which the employer's response is challenged, the conditions resulting from the protected activity as well as the protected activity itself, caused the response.

It is possible to conclude that employer interests should not be considered once cause is established and to prophylactically prohibit all employer action taken in response to protected activity,[110] but that conclusion has never been accepted in the present context. One means of resolving the dilemma posed by the presence of both a legitimate and illegitimate cause is that advocated by Professor Shieber and others:[111] the discrimination element is satisfied if protected activity was a cause of the response and the business condition cause of that response is considered by balancing the employer's legitimate business interest served by its response against the effect or impact of the response upon protected activity or status. A second means of resolving the dilemma is by defining discrimination as requiring, in addition to cause, disparate treatment.[112] The former approach requires a judgment about the relative weight (importance) to be assigned competing interests. The latter approach requires a judgment about the independence of an employer's

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110. *Cf.* Loving v. Virginia, 388 U.S. 1 (1967) (strict scrutiny under equal protection analysis); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (same). On the question of the reasons for such an approach in the equal protection context, see generally Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).

111. Shieber & Moore, *supra* note 4. *See also* Christensen & Svanoe, *supra* note 4; *Section 8(a)(3), supra* note 4; *Economic Pressure, supra* note 4.

112. Decisions may be found invoking disparate treatment as a controlling conception. Mueller Brass Co. v. NLRB, 544 F.2d 815, 819 (5th Cir. 1977); Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617, 621 (5th Cir. 1961) (discharge); Central Freight Lines, 255 N.L.R.B. No. 56 (1981); Lebanon Apparel Corp., 243 N.L.R.B. 1024 (1979); Knuth Bros., 229 N.L.R.B. 1204 (1977), *enforced*, 584 F.2d 813 (7th Cir. 1978); Jorgensen's Inn, 227 N.L.R.B. 1500, 1514 (1977) (ALJ's decision). There are also cases denying its necessity, NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) (employer "response" to protected activity) and cases treating it as "evidence" of "anti-union animus," Hamilton Die Cast Co., 254 N.L.R.B. No. 113 (1981).

action from the employer's illicit interest in punishing union membership or activity.

The disparate treatment conception is understood in other contexts as a reference to discrimination as mere "cause."[113] Despite Professor Sheiber's somewhat distinct definition, that definition appears sufficiently useful to warrant its adoption here.[114] The definition has two components: a factual cause com-

113. *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (sex discrimination). *But see* Gedulig v. Aiello, 417 U.S. 484 (1974) (sex discrimination).

114. It may be argued that a prohibition merely of employer conduct motivated by the protected nature of employee status or activity is not in fact a disparate treatment conception and that the "cause" conception of discrimination better comports with the disparate treatment notion. The argument is that an employer interest generated by protected activity (e.g. an interest in continuing operations through replacements in the face of a strike) is in the nature of a justification for disparate treatment rather than a denial of the presence of disparate treatment. *Cf.* Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981) (Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), is not a disparate treatment prohibition as a particular handicap on the basis of which a handicapped person is denied employment may render that person "not otherwise qualified" for the job).

The argument has merit, but only if it is assumed that the employer's duty of impartiality is as extensive as the argument assumes. Under the argument, there was disparate treatment in *Republic*, but the result in *Republic* also generated disparate treatment: the employer, under the Court's ruling, "discriminated" by discharging a union solicitor, but could (because charitable solicitation is unprotected) discharge with impunity a non-union, charitable purpose solicitor. The union solicitor's preferred status is "caused by" his union status. The employer's conduct in *Republic* did not amount to disparate treatment if its obligation is viewed as limited to refraining from action based upon the protected *nature* of employee conduct. It did amount to disparate treatment if its obligation is viewed as refraining from any response to protected employee conduct.

What constitutes "disparate treatment" is a matter, then, of the scope of the duty of impartiality imposed upon the employer. Moreover, the duty imposed is equally the question where the analysis is grounded upon a requirement that an employer "justify" its conduct after an initial determination that protected employee activity "caused" that employer conduct. The point is illustrated by judicial analysis of cases involving race-based decision by both governmental and private actors. One may view those cases as entailing four distinct forms of legal prohibition and, therefore, four distinct forms of impartiality duty:

(1) An action may be caused by race even where race generates conditions with respect to which an actor has legitimate interests supporting its response to those conditions. The action is nevertheless prohibited. For example, an employer may not refuse to hire a black applicant for employment even where the employer's customers prefer dealing with white employees. The "disparate treatment" prohibition in such a case is a prohibition of race-caused decision and is a prohibition that permits, by its terms, no justificatory defense.

(2) An action may be caused by factors independent of race but may nevertheless have an impact that is racially disproportionate. In such a case, it may be difficult to determine whether the actor's knowledge of disproportionate racial impact implies merely that the action was taken for reasons independent of race in spite of impact or was taken, at least in part, because the impact was anticipated. *See* Personnel Adm'r of

ponent (did the employer respond to protected activity or sta-

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Mass. v. Feeney, 442 U.S. 242 (1979) (sex). If the duty imposed on the actor is one of refraining from an action that generates disproportionate impact, the legal prohibition is not described as a prohibition of disparate treatment. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The action having such an impact may nevertheless be characterized as a response to a condition "caused" by race, in the sense, at least, of past racial discrimination. For example, an educational requirement imposed upon job applicants may disproportionately affect a racial minority because that minority has been deprived of the education necessary to fulfilling the requirement. The actor's defense in such a case is a defense in justification: for example, business needs justify the educational requirement despite the disproportionate disqualification imposed by the requirement upon the minority.

(3) It is possible that an action will be both caused by race and directed at race and nevertheless be "justified" on grounds arguably distinct from race. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); Korematsu v. United States, 323 U.S. 214 (1944). The justification is factually dependent upon race but, arguably, conceptually independent of race. In such a case, the prohibition is a prohibition of insufficiently justified disparate treatment. The third category of case is distinguishable from the second chiefly on the ground that the third involves action directed at race *qua* race and the second involves action directed at a circumstance or condition arguably independent of race because hypothetically caused by or causable by factors independent of race. For example, internment of persons of Japanese ancestry for military security reasons is action directed at persons of Japanese ancestry. A high school education requirement as a condition to a job is action directed (however imperfectly) at the condition of job incompetence. The latter condition may be generated, with respect to some applicants, by past racial discrimination, but may also have been generated, with respect to other or all applicants, by causes unrelated to race. It is nevertheless apparent that the distinction is not easily drawn, and the difficulty explains why pleas in justification may be framed in terms of denials of disparate treatment. *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (sex); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (sex).

(4) An action may be caused by race and directed at race but, arguably, not within a prohibition because not within the scope of the reasons for a prohibition of race-related decision. In such a case, the action may be viewed either as not requiring the usual degree of justification, Regents of the Univ. of California v. Bakke, 438 U.S. 265, 361 (1978) (Brennan, J., concurring and dissenting) or as not accompanied by a prohibited motivation, *see* J. ELY, DEMOCRACY AND DISTRUST 170-72 (1980). Both views suggest a prohibition of illicit reasons for action caused by race.

The distinction between a prohibition of race caused action to which a plea in justification will be entertained and a prohibition of action caused by race *qua* race is arguably that sufficient justification is a complete defense even where it is assumed that race *qua* race was a necessary condition to the action. (Only persons of Japanese ancestry were interned on national security grounds in WW II; persons of German ancestry were not interned). Still, the distinction is less than complete: the very difficulty of establishing an adequate justification tends to turn the justification argument into an absence of disparate treatment argument (*Gilbert*) or into an absence of illicit reasons argument (*Bakke*). The reason for such shifts in argument is that the scope of the actor's duty shifts where both race and interests arguably independent of race "cause," in one degree or another, action. The shift in duty may be grounded upon judicial perception of the strengths of the arguably independent interest distinct from race, but may also be grounded upon judicial perception of the degree of independence from race of that distinct interest. If the ground for the shift in the scope of the actor's duty is relative strength of the actor's claimed interest, the analysis is appropriately characterized as a

tus?) and a judgmental component (if the employer responded, was its motive the protected activity rather than business needs either generated by the protected activity or present independently of the activity?). Discrimination as mere cause or response is satisfied by an affirmative answer to the former question. Discrimination as disparate treatment requires affirmative answers to both questions.

I wish, however, to add a further component, derived from but not in all contexts supported by the *Wright Line* decision,[115]

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balancing of competing interests. If the ground is, instead, the degree of independence of the interest from race, the analysis is not a balancing of interests, it is an attempt of characterization informed by a reluctance to engage in balancing. The difficulty with the latter ground is that characterizations about degrees of independence are difficult because race is quite often factually related to claimed independent interests. (A government interest in remedying past racial discrimination may be thought distinct from a claimed interest in race *qua* race, but it is not factually unrelated to race). The irony inherent in the latter ground is that a reluctance to engage in balancing, at least if a prophylactic standard of analysis is adopted, may prohibit action that would pass muster under a balancing test. *See* Cox, *Book Review*, 15 VAL. U.L. REV. 637, 646-47, 666 n.127 (1981).

It may be argued that, as a matter of terminology, "disparate treatment" should be reserved to describe "discrimination as cause" and that legitimate interests distinct from but factually related to a "suspicious" basis for action should be treated in terms of justification — e.g. in terms of an additional requirement that illicit purpose be established. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32-33 (1967). But the problem which both a "disparate treatment" and a "justification as licit purpose" label seek to resolve, I think equivalently, is that of the meaning of discrimination. That meaning is a matter of the scope of an impartiality duty, and I have opted to treat the problem of meaning by directly confronting it with the disparate treatment notion indicated in the text.

115. The *Wright Line* test has been described as placing the burden on the employer to establish that an *un*protected activity was a sufficient condition for a discharge. Haggard, *Picket Line and Strike Violence As Grounds For Discharge*, 18 HOUS. L. REV. 423, 477 (1981). This is an accurate description of the Board's statement of its test, but is also consistent with the "illicit motive as necessary condition" element advocated here.

In a case, such as a mixed motive discharge case, where the causes (licit and illicit reasons) for the discharge are assumed to be mutually independent, a conclusion that a licit reason for discharge was a sufficient condition for the discharge negates the possibility that the illicit reason for the discharge was a necessary condition. If licit reasons were sufficient, illicit reasons could not have been necessary. If the burden of proof is on the employer, the most likely means of negating the necessary condition element is by establishing employee misconduct as a sufficient condition.

The sufficient condition test will not disprove another cause as a necessary condition if the two causes of a result are in fact not mutually independent. That is, if two causes are evaluated as possible causes of some act or result, a conclusion that one of those causes was a sufficient condition for a result will not establish that the other cause was not necessary where the causes are themselves causally related. In a case such as *Mackay*, protected activity may be said to have caused the business condition relied upon by the employer as his "true" motive. A strike causes the absence of employees which

to the definition of disparate treatment. To warrant a conclusion that disparate treatment is present, one must find that an illicit or impermissible reason was a "necessary condition" to the challenged employer conduct.[116] The necessary condition require-

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impairs the employer's interest in continuing production. However, the conclusion that the employer replaced employees to continue his operations does not negate the fact that *protected activity* was actually the basis and a necessary condition for the need for replacement.

In the *Mackay* form of case, then, one might approach the necessary condition question directly — by asking the hypothetical question, what would the employer have done if the loss of employees had been attributable to non-union causes? The question in effect "controls" for protected activity as an antecedent cause to determine whether the employer's action (e.g. replacement of strikers) is attributable to a legitimate business interest (e.g. continued production). Such an approach denies that 8(a)(3) is concerned with responses to protected activity as such; the occurrence of protected activity is not the "cause" evaluated by the question. The assumption underlying the hypothetical question is that 8(a)(3) prohibits a category of employer reasons for employer action far narrower than the factual occurrence of "protected activity" as a reason. *See infra* notes 153, 222-30, 344-59 and accompanying text. Specifically, the approach suggests that 8(a)(3) prohibits, in a case such as *Mackay*, employer response to protected activity motivated by employee choice (participation in the activity) *qua* choice (participation). *See infra* notes 344-59 and accompanying text. Moreover, the approach suggests that this narrow category of prohibited employer reasons, if treated as causes of employer action, should be assumed to be sufficiently independent of the occurrence of "protected activity" to warrant application of the *Wright Line* test in the following form: punishment of employee choice or participation *qua* choice or participation was not a sine qua non of an employer response to protected activity if the employer would have undertaken that response in pursuit of the legitimate business interests generated by the occurrence of protected activity. *See infra* notes 153-85, 239-72 and accompanying text.

116. *Compare* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) *with* H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW, 106-07 (1959) (describing distinct meanings of cause as necessary condition).

My reliance upon "necessary condition" should not be taken to mean that I think it possible to establish, in the sense of formal logic, either "necessary" or "sufficient" causal conditions in the litigation process. Indeed, I deny that possibility. *See infra* notes 239-72 and accompanying text. The relevance of the necessary condition notion is not that it permits precision in decision, but that it provides a conceptual guide to a judgment.

Hart and Honoré suggest that there are three senses of necessary condition: (1) a condition necessary "in the sense that it is one of a set of conditions jointly sufficient for the production of the consequence" but necessary "to complete this set." H.L.A. HART & A.M. HONORÉ, *supra*, at 116; (2) a condition may be necessary in the sense that it is always necessary to a "given type of occurrence." *Id.*; (3) a condition may be necessary in the first sense but not necessary in a sine qua non sense because two or more sufficient conditions bring about an occurrence. *Id.* at 106-07. Hart and Honoré are critical of "necessary condition" and "but for" causation, but recognize the at least tentative usefulness of such notions if their limitations (in the sense of relevance) are recognized. *Id.* at 122.

Hart and Honoré suggest that there are two types of conditions sine qua non that are causally irrelevant: analytic connections and incidental connections. *Id.* at 108-09. The first may be viewed as a condition necessarily connected to an occurrence (the fact that a man is a human being is a necessary condition to the description of the event of that man's being struck by an automobile) but irrelevant in causal terms to the occur-

ment is essential because the disparate treatment concept is the treatment of "like cases" differently.[117] The "like cases" element of that definition is a characterization that expresses a prohibition. The prohibition is that some difference distinguishing the cases — here, protected activity or status in one case and not in the other — is a difference that may not be the reason for different treatment.[118] Because all other possible reasons for different treatment are permissible,[119] the prohibition of the impermissible reason must be so framed as to not preclude an action taken for any reason other than the impermissible reason.[120] A disparate treatment prohibition is, therefore, a prohibition of action

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rence. *Id.* at 108. The second type of irrelevant condition sine qua non is the incidental condition: e.g., the fact that a murderer pulled the trigger of a gun with his *right hand*. *Id.* at 109-10. For criticism of Hart and Honoŕe on these points, see A. BECHT & F. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES, 165-67, 191-94 (1961).

By necessary condition I mean for purposes of this article a legally relevant condition *sine qua non*, recognizing that the resolution of the problem of what constitutes a legally relevant condition *sine qua non* is an evaluation conducted through a screening process laden with value judgments. *See* Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 251-59 (1950); *see infra* notes 239-72 and accompanying text.

117. *See, e.g.*, Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); Baltimore Rebuilders, Inc. v. NLRB, 611 F.2d 1372 (4th Cir. 1979); NLRB v. Wilson Freight Co., 604 F.2d 712 (1st Cir. 1979); NLRB v. Murray Ohio Mfg. Co., 326 F.2d 509, 515 (6th Cir. 1964); Miller Brewing Co., 254 N.L.R.B. No. 24 (1981); Joshua's, Inc., 253 N.L.R.B. 588 (1980); Lebanon Apparel Corp., 243 N.L.R.B. 1024 (1979); Gould Corp., 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979); *cf.* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (Title VII); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 n.18 (1973) (Title VII).

118. The prohibition therefore requires employer impartiality, but the required impartiality is quite narrow. To postulate a general duty of impartiality implies that the adverse effects of one's decision must be considered. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, 232-38 (1977); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157-59 (1976). The prohibition contemplated here requires only employer impartiality with respect to protected status or activity, and then only to the extent of the necessary condition element. In particular, it would not prohibit the undervaluation by an employer of protected activity or status. *Cf.* J. ELY, DEMOCRACY AND DISTRUST 157 (1980) (undervaluation of minority interests as legislative mistakes).

119. *See, e.g.*, Mueller Brass Co. v. NLRB, 544 F.2d 815 (5th Cir. 1977); Richardson Paint Co. v. NLRB, 574 F.2d 1195 (5th Cir. 1978); U.S. Postal Serv., 245 N.L.R.B. 901 (1979); Summitville Tile, Inc., 245 N.L.R.B. 863 (1979); J.S. Alberici Constr. Co., 231 N.L.R.B. 1030 (1977). *But see* NLRB v. Miranda Fuel Co., 326 F.2d 172, 181 (2d Cir. 1963) (dissenting opinion).

120. The risk inherent in an impact standard is of course that the prohibition it expresses is overinclusive with respect to effects. The impact standard clearly requires a greater degree of regulation, and is implicitly a regulation of substantive employer policy because that policy, although undertaken to achieve objectives independent of protected activity, may impact employee interests independent of protected activity or status. That impact may nevertheless encourage or discourage such activity or status.

taken for illicit reasons. It is not a prohibition of impermissible reasons as such and it is therefore not a prohibition of action that would have been undertaken for permissible reasons.[121]

Some argue that a defense that a challenged action would have been taken for permissible reasons even though impermissible reasons were considered is a harmless error defense.[122] My point here is that I think such an argument wrong when applied to disparate treatment. The argument is an argument that a breach of a prohibition against consideration of an impermissible reason should not be *remedied* because the breach was harmless.[123] Under my view of disparate treatment, a conclusion that an action would have been taken for permissible reasons necessitates a conclusion that there has been no breach. The necessary condition element therefore preserves permissible reasons — that is, employer interests independent of discouragement of protected activity or status — by requiring hypothetical

121. A strict scrutiny analysis of racial classifications suggests as much. *See* Note, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh*, 12 HARV. C.R.-C.L.L. REV. 725, 745-55 (1977). A rejection of an effects or impact standard does not necessarily preclude an insistence upon a form of decision maker impartiality that takes into account the effect of the decision maker's action or the pre-existing condition of the persons affected by that action. *See generally* Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). But permitting such consideration requires a broadening or narrowing of the definition of those motives thought prohibitable. *See, e.g.*, Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 1113-14 (1978).

122. Codd v. Velger, 429 U.S. 624, 630 (1977) (Brennan, J., dissenting).

123. *Id. See* Note, *supra* note 121, at 750-52. The Board's treatment of "necessary condition" as an affirmative defense in *Wright Line*, 251 N.L.R.B. 1083 n.11 (1980), nevertheless suggests a position consistent with the harmless error theory. *See infra* note 168.

The First Circuit, in reviewing *Wright Line*, rejects the "harmless error" notion on the rather odd ground that *Mt. Healthy* was a case in which "the employer conceded that he had fired the employee for speech activity" and in which the "but for" test was "applied only after such a violation had been proven:" "The employer's claim, then, was a true affirmative defense to a rehiring order — i.e., the employer contended that notwithstanding his violation of the Constitution reinstatement was improper as a remedy . . . ." NLRB v. Wright Line, 662 F.2d 899, 906 (1st Cir. 1981).

The difficulty with this analysis is that *Mt. Healthy* was a "mixed motive" case, not a case involving after the fact claims of justification. *Compare* NLRB v. Wright Line, 662 F.2d at 906 n.11 *with* Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283 n.1 (1977). *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979). The First Circuit's conclusion is correct — the issue in *Wright Line* is not harmless error — but for the wrong reason. If *Mt. Healthy* is distinguishable, it is on the ground that any consideration of protected speech is impermissible and that "but for" causation was there used to decide an issue of remedy. The issue in *Wright Line* was, by contrast, disparate treatment.

inquiry into what the employer might have done in the absence of protected activity or status. It is nevertheless the case that the protection afforded employer interests by this test is incomplete: the "illicit reason as necessary condition" requirement does not fully protect permissible employer reasons for its actions because such permissible reasons may also be necessary or, even if not necessary, at least reasons that represent interests furthered by its action.[124]

The motive as necessary condition requirement makes the hypothetical question an inherent element of disparate treatment.[125] It is inherent because it asks whether the treatment (employer conduct) in question was "disparate." It is always hypothetical because similar conditions are not identical conditions. Even where we know, as in *Republic*, the history of the

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124. An illicit motive that is merely a sufficient condition to an employer's action fails the test I have proposed: an employer's action might have been taken for both permissible and impermissible reasons, both of which would have been sufficient for the action. *See supra* note 115. The employer's interest represented by the permissible sufficient reason for its action is therefore preserved by the requirement that an illicit reason be a necessary condition to that action. The difficulty with this result is that it permits action that would have occurred in the absence of an illicit motive but that would also have occurred in the absence of permissible motives and for impermissible reasons. That difficulty is thought of sufficient import to warrant, in somewhat analogous contexts, W. Prosser, Torts § 41 (4th ed. 1971), the suspension of a necessary condition requirement, and it may be that employer interests do not warrant the protection afforded by that requirement in the independent sufficient conditions case in the present context. As a practical matter, however, the proof problems in such a context are so insurmountable that the issue is obviated by burden of persuasion.

125. *See* Shieber & Moore, *supra* note 4, at 70-71. The courts can apply two forms of hypothetical questions. In a discharge case, such as *Wright Line*, the causal problem may be viewed as that of choosing between independent causes of an employer's action. In such a case, the question is whether the discharge would have occurred but for one of those causes — the discharged employee's union status or activity. In a case such as *Mackay*, the employer action in issue is not the product of two independent factual causes: the protected activity cause (e.g. a strike) caused the business condition cause (e.g. the absence of employees motivating replacement of those employees). The *Mackay* hypothetical postulates a wholly fictional circumstance — a loss of employees for reasons unrelated to a union — as a means of testing for disparate treatment. Moreover, the *Mackay* hypothetical does not ask whether protected employee activity was a necessary condition for employer action; it asks whether a narrowly defined illicit motive was such a cause. In effect, the hypothetical question postulates an illicit motive and postulates the employer's claimed business reason for its action, treating both motives as independent causes of employer action despite the factual dependence of both upon the occurrence of protected activity.

Despite these distinctions, I argue at *infra* text accompanying notes 266-72, that the causal inquiries in both types of case are functionally identical. *Cf.* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (under Title VII, "no more is required to be shown than that race was a but for cause").

employer's past or contemporaneous response to a similar condition not generated by protected activity, the fact of protected activity is a fact different from the facts of that history. In formulating the hypothetical question in cases in which there is no such employer history, the business condition generated by causes unrelated to protected activity may be defined with varying degrees of abstraction. The more abstract the condition, the more remote from the facts in issue the hypothetical becomes. Moreover, it is always possible to hypothesize facts, however remote from those in issue, that would generate business reasons for employer conduct. The risks of abstraction and remoteness (and consequent difficulties of proof) help to explain the tendency of commentators to reject hypothesis (and disparate treatment) as adequate explanations of results.[126]

Hypothesis has, however, also been rejected for a reason distinct from abstraction. If disparate treatment is viewed as requiring an observed distinction in treatment in the sense that there is proof that some employees were actually treated differently than other employees, an employer would be free to punish protected activity or status by retaliating against all employees for the union membership activity of some employees.[127] Such an employer freedom has been properly rejected,[128] but the

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126. *See, e.g.*, Christensen & Svanoe, *supra* note 4, at 1327; *Section 8(a)(3), supra* note 4, at 755-56; Shieber & Moore, *supra* note 4, at 76, 77.

127. *See Section 8(a)(3), supra* note 4, at 763-65.

128. Allis Chalmers Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947). *But see* NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963). In *Miranda*, the union induced the employer to reduce an employee's seniority for reasons other than the employee's union membership or activity. The Second Circuit rejected an 8(a)(3) theory, reasoning that, because the employer must engage in disparate treatment, the union's reason for its inducement must be impermissible. *Id.* at 179. Professer Shieber contends that the employer's action was "caused by" union activity or status whenever the union induces employer action. Shieber & Moore, *supra* note 4, at 66-67. That theory would seem, however, inconsistent with Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961), because the employer's discharge action in that case was "caused by" union inducement. *But see* Shieber & Moore, *supra* note 4, at 69 n.74.

Professor Getman reasons that *Miranda* was wrongly decided because "the Act does not require that the employee discriminated against be the one encouraged for purposes of a violation of Section 8(a)(3)." *Section 8(a)(3), supra* note 4, at 765 (citing Radio Officers' Union v. NLRB, 347 U.S. 17, 51 n.2 (1954)). Nor, however, does the disparate treatment concept impose such a requirement. The issue is whether the employer acted for impermissible reasons. If one defines impermissible to include unreasonable or unjustified reasons, *Miranda*, 326 F.2d at 181 (Friendly, J., dissenting), one has expanded the prohibition beyond that advocated here, but has retained the disparate treatment concept. If union activity or status is the only impermissible reason, then the employer in *Miranda* applied no disparate treatment because there was no impermissible reason.

rejection does not mean that the employer violates 8(a)(3) in such a case despite the absence of disparate treatment. Assume, for example, that an employer reclassifies all of its employees in response to a union victory by less than a unanimous employee vote in a representation election.[129] Upon the assumption that such an action would not have occurred in the absence of the union victory, there is disparate treatment. It is true that the employees treated differently in such a case are fictional: they are employees who would not have been reclassified if the union had lost.[130] But an observed distinction in the treatment of actual employees is not the essence of the disparate treatment conception.[131] The essence of that conception is an impermissible reason for an action which is a necessary condition to the action.[132]

The problem presented by an employer's action directed at all employees is therefore fundamentally distinct from the problem presented by *Republic*.[133] It is true that in *Republic* there were not two categories of employee violators of the employer's no-solicitation rule: all employees who violated the rule were discharged.[134] But the absence of an observed distinction in the treatment of actual employees is not the reason for the absence of disparate treatment in *Republic*. Disparate treatment was not present in *Republic* because an impermissible necessary reason for discharge was not present in *Republic*. The employer was found to have discriminated in *Republic* only after the Court rendered the employer's permissible reason for discharge impermissible by imposing an affirmative duty on the employer to

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Section 8(a)(3), supra note 4, at 764-65.

In cases decided after *Miranda* the courts have often enforced the Board's view that it has jurisdiction to enforce the fair representation duty, but have often done so on Section 8(b)(1)(A) grounds, thus avoiding in part the 8(a)(3) problem raised by reliance upon Section 8(b)(2). *See* Truck Drivers Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967); Local 12, Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966). *See also* Independent Metal Workers Local 1, 147 N.L.R.B. 1574 (1964) (dissenting opinion).

129. Allis Chalmers Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947).

130. *Cf.* County of Washington v. Gunther, 449 U.S. 950 (1981) (disparate treatment in wages where similarly situated male not available for comparison).

131. *See* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961). *Cf.* Electrical Workers (IUE) v. Westinghouse Elec. Corp., 631 F.2d 1094, 1108 n.2 (3d Cir. 1980) (Van Dusen, J., dissenting) (Equal Pay Act). *But cf.* Rinkel v. Associated Pipeline Contractors, 17 F.E.P. Cases 224, 226 (D. Alaska 1978) (Equal Pay Act).

132. *See* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 680 (1961) (Harlan, J., concurring).

133. *But see Section 8(a)(3), supra* note 4, at 737-38.

134. 324 U.S. 793, 805 (1945).

exempt union solicitation from its no-solicitation rule.[135]

B. Disparate Treatment as Employer Action Motivated by Protected Activity and Disparate Treatment as Employer Action Intended to Discourage Protected Activity

Disparate treatment has been defined here as requiring both cause and an illicit employer purpose or motive. I assume that the distinction between motive and purpose is not of importance and that both refer to the employer's objectives or goals.[136] There is, however, a distinction between illicit motive as a necessary condition and intent. This distinction is important because one argument supporting the proposition that disparate treatment should not be an essential element of 8(a)(3) is that such an element's function is merely that of precluding an employer's "bad thoughts" — a function rather difficult to justify.[137]

By intent I mean either intent in the tort sense that the natural and probable consequences of an actor's conduct are intended[138] or intent in the sense of a subjective desire to harm that is not a necessary condition to employer action. I will expand the former notion somewhat by assuming, as well, that clearly foreseeable consequences of an actor's conduct are subjectively intended consequences.[139]

1. Intent as Foreseeable Consequence

A foreseeable consequence test of intent is not the equivalent of illicit motive as necessary condition. It is true that the Supreme Court has on occasion resorted to foreseeable consequences as an explanation of 8(a)(3) liability, but that explanation became the rationale for the "inherently destructive"

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135. *See infra* notes 304-05 and accompanying text.

136. *See* Clark, *supra* note 121, at 955-56. *Compare id.* at 1217-21 *with* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1223-30 (1970). I mean, then, that the question is the employer's goal or objective and that an objective of harm to protected activity or status (or discouragement of same) is illicit. *See infra* notes 154-84 and accompanying text.

137. *See* Christensen & Svanoe, *supra* note 4, at 1326. I think it possible, however, to justify prohibiting bad thoughts first, if one recognizes that bad thoughts are proxies for disparate treatment and second, if one assumes the risk that the prohibition will be overinclusive. *See* Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 601 (1981).

138. W. PROSSER, TORTS 31-32 (4th ed. 1971).

139. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 232 (1963).

employer conduct branch of *Great Dane Trailers*,[140] and that branch does not require an illicit employer motive.[141] In a case in which the employer's conduct is "inherently discriminatory or destructive"[142] "[t]he employer . . . must be held to intend the very consequences which foreseeably and inescapably flow from his actions. . . ."[143]

Foreseeability may serve either of two quite distinct functions. First, it may be viewed as merely evidentiary. Its function under such a view is as an aid to determining motive or purpose.[144] It is, however, only an aid; the analysis under which it is employed assumes that motive or purpose is an essential element of the prohibition. Second, foreseeability may be viewed as imposing an affirmative duty to refrain from conduct naturally and probably producing undesirable consequences without reference to the motivation for such conduct.[145] The employer's motive for such conduct may be permissible, but motive, under such a view, is immaterial. Employer intent, in the sense of foreseeable or even inevitable undesirable consequence is therefore distinct from motive for the quite fundamental reason that such an intent prohibition is not a prohibition of illicit motive, purpose or objective, it is a prohibition of impact or effect.[146]

2. *Intent as Employer Desire to Punish Union Status or Activity*

A mere subjective desire to harm is not the equivalent of illicit motive as a necessary condition to an employer's action,

140. 388 U.S. 26, 33 (1967). *See* NLRB v. Lantz, 607 F.2d 290, 299 (9th Cir. 1979); J.S. Albericci Constr. Co., 231 N.L.R.B. 1030 (1977).

141. 388 U.S. at 33 (relying on *Erie Resistor*).

142. *Id.*; NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963).

143. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963). *See* J.S. Albericci Constr. Co., 231 N.L.R.B. 1030 (1977).

144. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (equal protection); Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (equal protection).

145. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). The line between the first sense in which foreseeability may be used and the second sense in which it may be used may nevertheless become indistinct. *See* Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring); Note, *supra* note 121, at 752-55. *Compare* United States v. School Dist., 521 F.2d 530, 536 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975) *with* School Dist. v. United States, 433 U.S. 667, 670 (1977) (Brennan, J., dissenting).

146. *Compare* Washington v. Davis, 426 U.S. 229 (1976) (equal protection) *and* Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (per curiam) (Title VII) *with* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII).

because it is possible that an employer would undertake the action even absent its ignoble intent. An employer's replacement of striking employees illustrates the point. We might conclude that an employer would replace its employees if confronted with a loss of employees attributable to causes unrelated to protected activity or status and conclude, as well, that the employer's purpose in replacing strikers was to punish the strikers for striking. The replacement of strikers would have been "caused" in a factual sense by the strike, caused in the same sense by the loss of employees and caused in a subjective purpose sense by the employer's ignoble desire to punish protected activity. There would be no disparate treatment, however, in that the employer would have responded to similar conditions unrelated to protected activity in quite the same manner. If we conclude that the employer's conduct in the hypothetical is unlawful under Section 8(a)(3), it is because illicit intent taints an otherwise legitimate employer response to the "operative consequences" of protected activity.[147] The evil 8(a)(3) seeks to preclude is, under such a view of motive, an employer's bad thoughts.[148]

I suggest, however, that the function of a disparate treatment requirement, like the alternative balancing of interests approach, is to provide a measure of protection to legitimate employer interests even where protected activity caused an employer's action.[149] A subjective intent or bad thoughts requirement does not serve that function both because bad thoughts are likely to be present in most cases in which an employer's conduct furthers interests unrelated to the discouragement of protected activity[150] and because a bad thoughts prohibition is not responsive to the requirement that illicit employer motive be a necessary condition to its action.

A rejection of subjective intent as a synonym for disparate treatment is not easily supported by the cases both because intent is sometimes held adequate even where an employer's impermissible motive was arguably not a necessary condition to its action,[151] and because the comparatively slight effect branch

147. *See* Meltzer, *supra* note 4, at 99.

148. *See* Christensen & Svanoe, *supra* note 4, at 1326-27.

149. *See supra* notes 115-23 and accompanying text.

150. *See, e.g.*, Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978); Mueller Brass Co. v. NLRB, 544 F.2d 815, 819 (5th Cir. 1977); NLRB v. McGahey, 233 F.2d 406, 412-13 (5th Cir. 1956).

151. *See, e.g.*, Movers & Warehousemen's Ass'n v. NLRB, 550 F.2d 962 (4th Cir.

of *Great Dane Trailers* appears to invoke subjective intent to harm as the governing standard: there must be an intent to discourage protected activity or status.[152] There is, moreover, a further difficulty with the claim that motive is not intent. I earlier argued that discrimination as disparate treatment is distinct from discrimination as "cause" because employer conduct that responds to protected activity does not necessarily constitute disparate treatment. Illicit motive as a *sine qua non* cause of an employer's action must therefore be distinct from protected activity as the *sine qua non* cause of an employer's action.[153] If illicit motive is distinct, may it be distinguished from subjective intent to harm?

I think that subjective intent to harm may be distinguished[154] by examining the *Great Dane* intent standard. Once it is assumed that disparate treatment requires a finding of

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1977) (lockout motivated "in part" by unlawful intent); NLRB v. Duncan Foundry & Machine Works, Inc., 435 F.2d 612, 618 (7th Cir. 1970); Freezer Queen Foods, Inc., 249 N.L.R.B. 330 (1980); Wire Prods. Mfg. Corp., 198 N.L.R.B. 652 (1972), *enforcement denied*, 484 F.2d 760 (7th Cir. 1973). *Cf.* NLRB v. Lantz, 607 F.2d 290 (9th Cir. 1979) (dominant motive test not appropriate in a response case where employer's conduct "inherently destructive").

152. *See* 388 U.S. at 33.

153. *See* R. GORMAN, *supra* note 12, at 327.

154. I suggested earlier that "discrimination" is the source of the motive or purpose controversy. *Supra* text accompanying notes 110-21. That claim is at least facially inconsistent with the Supreme Court's attempts at reconciling the discrimination as cause conception of discrimination represented by *Republic Aviation* and the discrimination as disparate treatment conception of discrimination represented by *Mackay*. In *Great Dane Trailers* the Court concluded that 8(a)(3)'s discrimination element is satisfied by the cause conception. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32 (1967):

> There is little question but that the result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form. *Compare* Republic Aviation Corp. v. Labor Board, 324 U.S. 793 (1945), *with* Teamsters Union v. Labor Board, 365 U.S. 367 (1961). Some employees who met the conditions specified in the expired collective bargaining agreement were paid accrued vacation benefits in the amounts set forth in that agreement, while others were denied such benefits.

That conclusion enabled the Court to explain conflicting lines of precedent by formulating its two categories of case approach independently of the discrimination element and to invoke illicit employer "purpose" as an explanation of those precedents I have characterized as relying upon a disparate treatment conception of discrimination. 388 U.S. at 33. My claim, then, is that discrimination as cause became at least roughly "inherently destructive" employer conduct and discrimination as disparate treatment became at least roughly "comparatively slight" effect requiring a showing of illicit employer purpose. I think my claim is warranted if "illicit employer purpose" may be shown to be targeted at the evil the disparate treatment conception seeks to prohibit, and its justification is therefore intimately a matter of the alternative evils I have postulated.

impermissible motive, the immediate difficulty is in defining which motives are to count as impermissible. That difficulty may be viewed as a problem of defining the scope of the employer's impartiality obligation:[155] the disparate treatment conception suggests that the employer has an obligation to treat employees impartially because it precludes, at a minimum, employer retaliation for reasons of protected activity or status.[156] But an impartiality obligation may be broad or narrow. The broad obligation is suggested by the second sense of intent as foreseeable harm. An employer's impartiality obligation under that view of intent includes the obligation to take into account the impact of its decisions, and that obligation requires that the employer sacrifice those legitimate interests it views as served by its conduct. The narrow obligation is the obligation implicit in the Supreme Court's definition of the motive that is to count as impermissible: an employer must intend discouragement of protected activity or status.[157] The subjective intent notion expressed by this definition is therefore a statement that only a narrow range of employer motives are to count as impermissible motives.

If the narrow range of employer motives prohibited under the *Great Dane* standard is understood, however, as the presence in the employer's mind of a subjective desire to harm, the *Great Dane* intent requirement is a prohibition of bad thoughts. A conclusion that bad thoughts are themselves sufficient for a violation of Section 8(a)(3) would be supported by the "true" purpose test of motive used by the courts in a variety of contexts,[158] by the "a purpose" test of motive used by the Board and Courts in discharge and other cases prior to *Wright Line*,[159] and by the intent to discourage test used by the Supreme Court in *Great Dane*[160] if those tests were in fact designed to prohibit employer conduct merely on the ground that such conduct was

155. *See* Alexander, *Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 941-42 n.56 (1978).

156. *See* NLRB v. South Shore Hosp., 571 F.2d 677, 683 (1st Cir. 1978).

157. 388 U.S. at 33.

158. *See, e.g.*, Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961); Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937); Loomis Courier Serv. Inc. v. NLRB, 595 F.2d 491, 495 (9th Cir. 1979).

159. *See, e.g.*, M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166 (10th Cir. 1977); Movers & Warehousemen's Ass'n v. NLRB, 550 F.2d 962 (4th Cir. 1977); Wire Prods. Mfg. Corp., 198 N.L.R.B. 652 (1972), *enforcement denied*, 484 F.2d 760 (7th Cir. 1973).

160. 388 U.S. at 33.

tainted by bad thoughts. I think, however, that such was not the design. Such tests of motive are not so much tests of bad thoughts as expressions of frustration with difficulties of proof.[161] The "true purpose," "a purpose," and "intent" tests serve administrative conveniences because an analysis focused merely upon the presence of anti-union animus, a presence inferrable from general employer attitude or from circumstances,[162] makes further inquiry unnecessary. If there is error in the use of such tests, it is because the tests are overinclusive:[163] because illicit motive as necessary condition is resistant to proof, the tests allocate the risk of adjudicative error to the employer.

The tests are overinclusive because they preclude employer conduct motivated "in part" by anti-union animus (bad thoughts) that would have been undertaken in the absence of such thoughts as a response to legitimate business needs. The Board's rejection of the in-part test in *Wright Line* suggests that the risk of overinclusive prohibition was too great a cost to pay for prophylaxis.[164] The Supreme Court's recognition on occasion[165] that an employer's lawful conduct may be accompanied by delight with the adverse effect on protected activity it generates suggests the same conclusion.

The Board's rejection of overinclusive prohibition occurred, however, in the context of a "typical discharge case" — that is, a case in which an employer's permissible and impermissible reasons for its action are factually independent.[166] Is a similar rejection warranted in a case, such as *Republic* and *Mackay*, in which it is clear that an employer has responded to protected activity

161. *See* Loomis Courier Serv., Inc. v. NLRB, 595 F.2d 491 (9th Cir. 1979) (shutdown); NLRB v. Lloyd Wood Coal Co., 585 F.2d 752 (5th Cir. 1978) (layoff and sale of business); W.W. Grainger, Inc. v. NLRB, 582 F.2d 1118 (7th Cir. 1978) (discharge); Hambre Hombre Enter., Inc. v. NLRB, 581 F.2d 204 (9th Cir. 1978) (discharge); M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166 (10th Cir. 1977) (discharge).

162. *See, e.g.*, Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978); Bandag, Inc. v. NLRB, 583 F.2d 765, 768-69 (5th Cir. 1978); Merchants Truck Line, Inc. v. NLRB, 577 F.2d 1011, 1014 (5th Cir. 1978).

163. *See* NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666, 674 (1st Cir. 1979); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90 (2d Cir. 1978); Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251 (1st Cir. 1978); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977).

164. Wright Line, 251 N.L.R.B. 1083, 1084-89 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

165. *See* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961).

166. *See, e.g.*, Delco-Remy Div., General Motors Corp. v. NLRB, 596 F.2d 1295, 1304-06 (5th Cir. 1979); Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251 (1st Cir. 1978).

— that is, where it is clear that legitimate reasons for employer action are factually dependent upon the occurrence of protected activity? My tentative answer to that question is to claim that a rejection of overinclusive prohibition — that is, an insistence upon disparate treatment — is warranted in such a case because, despite the Court's emphasis upon employer "intent" to discourage protected activity in *Great Dane*, *Great Dane's* intent requirement is not a bad thoughts prohibition but, rather, a shorthand for disparate treatment.[167] This claim rests on the proposition that the narrow impartiality obligation imposed by the *Great Dane* standard is consistent with a disparate treatment conception. That obligation is at least tentatively consistent with such a conception if it can be shown that subjective intent serves a function distinct from prohibiting bad thoughts and compatible with prohibiting illicit reasons as necessary conditions. The distinct and compatible function I think it serves is that it approximates a finding that impermissible motive was a necessary condition to employer action — it is a proxy for motive. If the bad thoughts proxy is made controlling, it becomes a prophylactic rule of the sort rejected in *Wright Line*. If it is merely evidentiary, it becomes a useful means of reaching, at least tentatively,[168] a disparate treatment issue.

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167. Discharge cases entailing a necessary condition standard and other cases involving the problem of "cause" express this equivalence directly. *See, e.g.*, Loomis Courier Serv., Inc. v. NLRB, 595 F.2d 491 (9th Cir. 1979); NLRB v. Computed Time Corp., 587 F.2d 790 (5th Cir. 1979); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977); National Family Opinion, Inc., 246 N.L.R.B. 1398 (1978); Joint Indus. Bd. of Elec. Indus. and Pension Comm., 238 N.L.R.B. 1398 (1978); Xidex Corp., 238 N.L.R.B. 1208 (1978); Lebanon Apparel Corp., 243 N.L.R.B. 1024, 1035-38 (1979). The equivalence may, however, be viewed as the explanation of some response cases, at least where "response" is broadly defined and illicit reason narrowly defined. Mackay Radio & Tel. Co. v. NLRB, 304 U.S. 333 (1938); Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227 (7th Cir. 1979); NLRB v. Martin A. Gleason, Inc., 534 F.2d 466 (2d Cir. 1976); Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1965); Bedford Cut Stone Co., 235 N.L.R.B. 629 (1978); Aero-Motive Mfg. Co., 195 N.L.R.B. 790, 795 (1972) (Member Kennedy, dissenting), *enforced*, 475 F.2d 27 (6th Cir. 1973). *Cf.* Baltimore Rebuilders, Inc. v. NLRB, 611 F.2d 1372, 1378 (4th Cir. 1974), *cert. denied*, 447 U.S. 922 (1979) (§§ 8(b)(1)(A), 8(b)(2); cause but no disparate treatment). *But see, e.g.*, Movers & Warehousemen's Ass'n v. NLRB, 550 F.2d 962 (4th Cir.), *cert. denied*, 434 U.S. 826 (1977); NLRB v. Duncan Foundry & Mach. Works, Inc., 435 F.2d 612, 618 (7th Cir. 1970). The difficulty, however, is precisely in the scope of the terms "response" and "illicit reason." *See, e.g.*, NLRB v. Armour-Dial, Inc., 638 F.2d 51 (8th Cir. 1981); B.F. Goodrich Co., 195 N.L.R.B. 914 (1972). *See infra* notes 221-31 and accompanying text.

168. *Cf.* Oberer, *supra* note 4, at 505 (distinguishing intent and motive by suggesting that intent established a prima facie case and licit motive an affirmative defense). Proof of intent, standing alone, shifts the burden to the employer to establish that

I will illustrate my point with *Mackay*. The explanation thus far indulged for the *Mackay* decision is that replacement would have occurred if the employer had responded to a loss of employees attributable to causes not related to protected activity or status. In illicit or licit motive terms, the employer's purpose was the legitimate purpose of continuing operations and not the illicit purpose of punishing strikers. On what do we base the conclusion that the purpose or basis was legitimate and not illegitimate? That conclusion may be viewed as the product of a factual inquiry: which of two possible "causes" — protected activity or loss of employees — was "the" cause,[169] but that view is patently absurd in that both causes "caused" the replacement because the protected activity caused the loss of employees. Loss of employees is a cause of replacement dependent upon the protected activity cause of that replacement. The task of choosing

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impermissible reasons for its conduct were not necessary conditions for that conduct under *Wright Line*. *See also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 288 (1977). One issue raised by this shift in the burden is precisely what form of burden is shifted. *Cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 298 (1981) (burden of proof in Title VII disparate treatment cases).

In *Great Dane*, the Court held that, in both an inherently destructive employer conduct case and a comparatively slight effect case, "the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." 388 U.S. at 34. It also held, however, that in a comparatively slight effect case, "an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justification." *Id.* The implication was either that the "burden" shifts again to the general counsel or that the burden of persuasion always remains on the general counsel and that only the burden of production shifts to the employer. *See* 29 U.S.C. § 160(c) (1976); Campbell & MacLean, Inc., 118 N.L.R.B. 967, 971 (1957).

In *Wright Line*, the Board stated that the burden of persuasion remains with the general counsel, 251 N.L.R.B. at 1088 n.11, but also stated that the burden is on the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Id.* at 1089. The latter statement seems rather clearly to constitute a standard of persuasion: the Board is requiring the employer to establish a legal conclusion, not evidence. *See* DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of* Mt. Healthy Board of Education v. Doyle *Upon the NLRA*, 66 GEORGETOWN L.J. 1109, 1126-32 (1978). *Cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 298 (1981) (Title VII). *But see* Wright Line, 251 N.L.R.B. at 1084 n.6 (employer must establish an affirmative defense, but this does not "shift the ultimate burden"); Gee, *Teacher Dismissal: A View From Mount Healthy*, B.Y.U.L. REV. 255, 266-69 (1980).

In NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), the First Circuit rejected the Board's approach to the burden of proof question and concluded that the burden of production is shifted to the employer by the general counsel's prima facie showing; burden of persuasion remains on the general counsel.

169. *See, e.g.*, Mueller Brass Co. v. NLRB, 544 F.2d 815, 819 (5th Cir. 1977); Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617 (5th Cir. 1961).

between such causes might be undertaken by balancing interests,[170] but also might be undertaken by asking hypothetical questions.[171]

One form of hypothetical question is an objective form: would a reasonable employer (by which I mean an employer concerned only with efficient production) confronted with similar conditions not related to protected activity respond in the same manner?[172] It would not be material, in using this form of question, that the employer in question entertained a subjective desire to punish protected activity, and the form of question therefore permits no role for subjective intent. The evil Section 8(a)(3) would preclude by asking such a question is only that employer conduct which serves ends that cannot themselves be objectively characterized as unrelated to protected activity.[173]

There are three difficulties with this form of question. The first is that if the question is made sufficiently abstract (can any set of circumstances be imagined that would render an abstract employer's goal independent of protected activity or status), the disparate treatment conception places no limitation upon employer conduct. The second difficulty is that the test is concerned with a hypothetical reasonable employer's conduct and therefore ignores the possibility that the employer in question may not be "reasonable." If the values underlying regulatory restraint (immunity for employer decision having an adverse effect upon protected activity or status but nevertheless motivated by considerations distinct from that activity or status) are business interests thought legitimate,[174] those interests are not served by an immunity conferred upon an employer who would not in fact have pursued those interests.[175]

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170. Christensen & Svanoe, *supra* note 4; *Section 8(a)(3), supra* note 4.

171. The prevailing academic view is, however, that balancing is inevitable. Christensen & Svanoe, *supra* note 4, at 1325-28. And that view is supported by the tendency of at least some courts to weigh interests even while purporting to apply a disparate treatment analysis. *See, e.g.*, Texas Instruments, Inc. v. NLRB, 599 F.2d 1067, 1073 (1st Cir. 1979); Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251, 1255 (1st Cir. 1978); Trustees of Boston Univ. v. NLRB, 548 F.2d 391, 393 (1st Cir. 1977).

172. *See, e.g.*, NLRB v. Wilson Freight Co., 604 F.2d 712, 722 (1st Cir.), *cert. denied*, 445 U.S. 962 (1979); NLRB v. Lloyd Wood Coal Co., 585 F.2d 752 (5th Cir. 1978); Joint Indus. Bd. of Elec. Indus., 238 N.L.R.B. 1398 (1978).

173. *See infra* notes 283-303 and accompanying text. *But see* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

174. *See* DuRoss, *supra* note 168, at 1117-18; Meltzer, *supra* note 4, at 92-93.

175. *Cf.* R. POSNER, ECONOMIC ANALYSIS OF LAW 174 (2d ed. 1977) (one function of

The third difficulty is that the form of question would authorize the destruction of protected activity or status by an employer desiring precisely that end so long as the means used to achieve the end could be hypothetically traced to ends distinct from protected activity or status. This, however, is only one version of the third difficulty. An alternative version is that the objective form of hypothetical question permits excessive Board regulation of employer conduct. The Board, in asking the objective question, may not "balance" in the sense of weighing the impact of employer action upon protected activity or status, but the phrase "reasonable employer" implies that the Board may assign a weight to the employer's claimed interest, may consider the rationality of the relationship between means and business ends as a matter relevant to the presence of legitimate business ends, and may therefore consider the availability of alternative means.[176] The advantage of the objecting hypothetical question is that it is administratively convenient because it avoids the difficulty inherent in determining a particular employer's motive under particular circumstances. The disadvantage in the form of question is that it is potentially inconsistent with the policy I have attributed to the disparate treatment conception: immunization of employer business interests from regulating intrusion. It is nevertheless possible to view judicial analysis of some 8(a)(3) cases as grounded upon a presumption that a reasonable employer would undertake generic forms of responsive conduct for permissible reasons. *Mackay* may be viewed as such a case: reasonable employers replace absent employees.[177]

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subjective intent in criminal law is to isolate "coerced transfer" from "byproduct of socially productive activity"); Griffiths, *Review — The Limits of Criminal Law Scholarship*, 79 YALE L.J. 1388, 1397 n.38 (1970) (rules of responsibility [culpability] in criminal law as optimizing conduct likely to lead to undesireable results).

176. The substantial danger in this proposition is that alternative means analysis will become Board assessment of appropriate means. *Compare, e.g.*, Summitville Tile, Inc., 245 N.L.R.B. 863 (1979) *with* Freezer Queen Foods, Inc., 249 N.L.R.B. 330 (1980); F.P.C. Advertising, Inc., 231 N.L.R.B. 1135 (1977); Alexander Linn Hosp. Ass'n, 244 N.L.R.B. 387 (1979) *and* C.P. & W. Printing Ink Co., 238 N.L.R.B. 1483 (1978), *enforced*, 605 F.2d 1201 (4th Cir. 1979).

177. It is possible to view *Mackay* as generating a firm "rule" which has been applied without regard to actual motive in particular cases. *Compare* Haggard, *supra* note 70, at 57 n.60 *with* Gillespie, *The* MacKay *Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782, 795 (1972) *and* Schatzki, *Some Observations and Suggestions Concerning Misnomer — "Protected" Concerted Activities*, 47 TEX. L. REV. 378, 382-92 (1969).

If the *Mackay* replacement rule is "firm," it may be argued that an employer could replace strikers even if that employer would not replace in other circumstances in which

The business interests of the hypothetical reasonable employer is a notion inconsistent, however, with a view of anti-union purpose, reflected in court and Board decisions, that emphasizes actual or "true" employer motives.[178] A finding that an employer entertained an illicit intent might occur in the rare case in which such an intent was admitted and might occur in a case in which the employer's historical conduct has been inconsistent with the business justification the employer asserts for its conduct[179] or in which there is direct or circumstantial evidence

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employees are absent, and, therefore, that the rule was not the product of a finding that the employer did not "discriminate" in *Mackay*. The viability of this argument is dependent upon the premises from which the firmness of the *Mackay* rule is derived. One possible premise is that the employer's interest in replacement is inviolable, whatever the employer's need for replacement. *See* Haggard, *supra* note 70, at 88. Such a premise is arguably supported by the notion that the employer's interest in replacement reflects and furthers society's interest in "continuous production." *See* Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432, 471 (1959).

There is, however, another possible premise giving a different character to the firmness description of the *Mackay* rule. That premise is that it is, as a matter of evidence or of judgments about evidence, difficult to conceive of a hypothetical circumstance similar to a strike in which a rational employer would not at least temporarily replace absent employees in the interest of continuous production and it is, again as a matter of evidence and judgments about evidence, difficult to establish that no need for replacement existed in a particular case. *Cf.* Schatzki, *supra*, at 392 (distinguishing between employers needing and employers not needing *Mackay* doctrine of permanent replacement may not be feasible).

The picket line cases — in which the Board does inquire into the need for discharge of employees who honor a stranger picket line, Redwing Carriers, Inc., 137 N.L.R.B. 1545, 1547 (1961), *enforced sub nom.* Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1962), *cert. denied*, 377 U.S. 905 (1964) — are distinguishable on the ground that the individual partial work stoppage which characterizes such cases permits an individualized inquiry into employer need (whether or not such an inquiry is legitimate). Under this "evidentiary" premise the firmness of the *Mackay* rule is not inconsistent with a disparate treatment explanation of the rule: the rule is firm precisely because disparate treatment would be extremely difficult to establish.

It is of course possible to view the *Mackay* rule as the product of a balancing process which favored employer interests. And it may be that such a "balancing" explanation is at least in part accurate, *see infra* notes 382-86. Once that balance is assumed, however, an attack upon replacement of strikers as discriminatory remains at least a theoretical possiblity — whatever the prudential evidentiary support for the firmness of the presumption that discrimination did not occur.

178. *See, e.g.*, C & N Super Markets, Inc. v. NLRB, 581 F.2d 618 (7th Cir. 1978); NLRB v. Houston Distrib. Serv. Inc., 573 F.2d 260 (5th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1979); M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166 (10th Cir. 1977); Movers & Warehousemen's Ass'n v. NLRB, 550 F.2d 962 (4th Cir.), *cert. denied*, 434 U.S. 826 (1977); Max Factor & Co., 239 N.L.R.B. 804 (1979), *enforced*, 640 F.2d 197 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); C.P. & W. Printing Ink Co., 238 N.L.R.B. 1483 (1978), *enforced*, 605 F.2d 1201 (4th Cir. 1979); Products Mfg. Corp., 198 N.L.R.B. 652 (1972).

179. *See, e.g.*, Bandag, Inc. v. NLRB, 583 F.2d 765 (5th Cir. 1978); Allen v. NLRB,

of an employer desire to punish union activity or membership. Such circumstances would be immaterial if we were concerned only with the interests of hypothetical employers. But, as a matter of Board and Court behavior, such circumstances are quite material — they indicate that the employer's asserted business justification for its conduct is pretextual.[180] Such Board and court behavior suggests, then, that there is a second form of hypothetical question: would *this* employer, confronted with similar conditions not related to protected activity, respond in the same manner?

There are two potential explanations for a concern with actual employer behavior. First, historical employer behavior is very good evidence of the presence or absence of permissible reasons for present behavior. In the absence of historical evidence, direct or circumstantial evidence of a subjective intent to punish employees for protected activity or union status is, similarly, good evidence of the employer's probable response to similar conditions not generated by such activity or status. By the terms of this explanation, illicit intent is a proxy or test for disparate treatment. It eases the difficult task of hypothesis.[181] The second explanation is a function of the second difficulty with the reasonable employer test of disparate treatment. If the value underlying the regulatory immunity conferred by disparate treatment is preservation of business interests presumed to further general social (that is economic) welfare, that objective is not served by conferring the immunity upon an employer who has not been (and inferentially, therefore, is not now) pursuing those interests. To the extent that the value preserved by the immunity is employer prerogative — in the sense of the economists' faith in the employer's own evaluation of the course of

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561 F.2d 976 (D.C. Cir. 1977); Trustees of Boston Univ. v. NLRB, 548 F.2d 391, 393 (1st Cir. 1977).

180. *See, e.g.*, Silvey Refrigerated Carrier, Inc., 244 N.L.R.B. 1006 (1979); White Transfer & Storage Co., 241 N.L.R.B. 1206 (1979); Melones Contractors, 241 N.L.R.B. 14 (1979). *But cf.* NLRB v. Charles Batchelder Co., 646 F.2d 33, 39 (2d Cir. 1981) (mixed motive distinct from pretext); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978) (mixed motive problem distinct from pretext); Capital Temptrol Corp., 243 N.L.R.B. 575 (1979) (in part test distinct from pretext).

181. *See* NLRB v. Pilgrim Foods, Inc., 591 F.2d 110 (1st Cir. 1979); Allen v. NLRB, 561 F.2d 976 (D.C. Cir. 1977); Silvey Refrigerated Carriers, Inc., 244 N.L.R.B. 1006 (1979); Melones Contractors, 241 N.L.R.B. 14 (1979). *Cf., e.g.*, W.W. Grainger, Inc. v. NLRB, 582 F.2d 1118 (7th Cir. 1978) (Board may infer intent from circumstances); *accord*, Hambre Hombre Enter., Inc. v. NLRB, 581 F.2d 204 (9th Cir. 1978); NLRB v. South Shore Hosp., 571 F.2d 677 (1st Cir. 1978).

action that will further the employer's legitimate interests — the employer's historical conduct and subjective intent are fair (or, at least, available) measures of that evaluation.

My argument, then, is that an "intent to discourage" requirement imposed in a case such as *Mackay*, in which it is apparent that protected activity "caused" the employer response is not a fictional or non-functional "bad thoughts" requirement. Illicit subjective intent is rather a proxy for disparate treatment. An illicit intent finding indicates, moreover, that the reasons for the employer immunity conferred by a disparate treatment requirement are absent in a particular case. The latter rationale is not so much balancing as an attempt at achieving more precision in applying an employer "defense."[182] If, as is quite common, there are no facts from which one may infer illicit subjective intent, one is forced back to a general hypothesis about the conduct of a reasonable employer.[183] And, even where subjective intent is present, the degree to which that "fact" should influence a decision should be limited by a recognition of its limited function. An employer admission that it was delighted by the adverse effects of its action upon protected activity or status should not be permitted to obscure the issue; the function of such evidence is only to inform the issue. The problem is to decide what the employer would have done in the absence of protected activity. Subjective intent as a proxy for disparate treatment or as a shorthand for pretext is not an appropriate ground for a decision where an employer's "delight" is merely a byproduct (even if an anticipated byproduct) of an action that would have been taken in any event.[184]

My claim that an intent requirement is not a bad thoughts prohibition but, rather, a means of approximating a disparate treatment prohibition ignores, of course, the possibility that a disparate treatment prohibition is itself a prohibition of "bad thoughts." I make the additional claim, however, that disparate

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182. Great Dane Trailers Co. v. NLRB, 388 U.S. 26, 34 (1967) (burden on employer to show justification); Wright Line, 251 N.L.R.B. 1083, 1088 n.11 (1980) (employer justification as affirmative defense). *But see* NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981).

183. *See* NLRB v. Wilson Freight Co., 604 F.2d 712 (1st Cir. 1979), *cert. denied sub nom.* Smith v. Wilson Freight Co., 445 U.S. 962 (1980); Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617 (5th Cir. 1961); Phillips Medical Systems, Inc., 243 N.L.R.B. 944 (1979); Joint Indus. Bd. of Elec. Indus., 238 N.L.R.B. 1398 (1978).

184. *See, e.g.*, Bron Constr. Co., 241 N.L.R.B. 276 (1979); Klate Holt Co., 161 N.L.R.B. 1606, 1612 (1966).

treatment confers upon employers an immunity from regulation — an immunity premised upon proof of legitimate motive in particular cases. My claim is not yet supported by reasons for conferring immunity, but, before considering that question, I wish to examine in more detail the argument that a typical discharge case, such as *Wright Line,* requires an analysis distinct from the analysis appropriate in a response case, such as *Mackay.*

C. On The Distinction Between The "Typical Discharge Case" and the "Employer Response to Protected Activity" Case

It was earlier suggested here that there are two competing understandings of the Section 8(a)(3) discrimination requirement: discrimination as a response and discrimination as disparate treatment (illicit motive). Those conceptions may be reconciled by suggesting that there are two distinct factual contexts in which the problem of discrimination is presented. The distinct factual contexts to which I refer are described by Professor Getman as: (1) the typical discharge case in which "the employer defends on the grounds that the discharge was not based on union activity, but on poor work or misconduct;"[185] and (2) the type of case in which "the employer seeks to defend anti-union activity on the grounds it was intended to serve a proper business purpose."[186] A motive or purpose defense is, for Professor Getman and others,[187] appropriate in the former case

185. *Section 8(a)(3), supra* note 4, at 743.

186. *Id.*

187. *See* Christensen & Svanoe, *supra* note 4, at 1276; Oberer, *supra* note 4, at 506 n.51. The First Circuit has suggested a similar distinction in distinguishing *Great Dane* from *Wright Line*:

> The Board relies on NLRB v. Great Dane Trailers, 388 U.S. 26 (1967), in which the Court held that "once it has been proved that the employer engaged in discriminatory conduct which would have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." Id. at 34. Great Dane, which involved a challenge to an overall policy of the employer rather than to a single discharge, is inapposite here. Where an overall policy concededly does discriminate against protected activity, the Board must balance the employer's justification against the employee's interest, and it may fairly require the employer to demonstrate the genuineness and strength of its asserted business reason. But here the issue is whether the discharge was in fact discriminatory — whether it was caused by protected activity or whether some other factor was operative. Great Dane has no application. See L. Janosky, "New Concepts in Interference and Discrimination under the

and inappropriate in the latter.[188] Indeed, talk of motive or purpose in the latter type of case obscures real grounds for decision — a balancing of interests.[189] The motive or purpose defense in the former, discharge, case is the element Professor Shieber labels "cause" and the motive or purpose defense in the latter, response, case is the element I earlier labeled motive in the sense of illicit reason.

Professor Getman's distinction is framed in terms of employer purpose as a defense to an 8(a)(3) charge. The same distinction may be framed in terms of the hypothetical causation question asked to resolve the disparate treatment issue. The hypothetical question asked in the typical discharge case seeks to determine whether the employer's action was caused by an employee's protected activity or by a legitimate business interest factually unrelated to such activity, and is represented by the Board's conception of the problem presented in the *Wright Line* situation.[190] The question asks whether the employer would have acted in the same manner in the absence of protected activity as a means of testing for cause. The conceptual ordering of facts suggested by the question is roughly analogous to the notion of independent factual causes in the law of torts.[191] The inquiry is, however, not merely a factual inquiry; it is also a disparate treatment inquiry in the sense that it seeks to answer the preliminary question[192] posed by the hypothetical: was protected activity or status a motive in the sense of cause?

NLRA," 70 Colum. L. Rev. 81, 96 (1970).

NLRB v. Wright Line, 662 F.2d 899, 904 n.8 (1st Cir. 1981). There are two difficulties with the "overall policy" argument. First, the distinction between "overall policy" and isolated employer decision is less than clear. An employer may have an "overall policy" adversely affecting protected activity, as in *Republic*, and may discharge in an isolated instance for legitimate reasons, also adversely affecting protected activity, as in *Burnup & Sims*. If adverse effect is not the rationale for the distinction, what is? Second, the First Circuit's suggestion is that *Great Dane* motive inquiry is pretext inquiry and that the inquiry under *Wright Line* is "cause" inquiry. That, however, is not the case: under the comparatively slight branch of *Great Dane*, legitimate motive trumps adverse effect.

188. *Section 8(a)(3), supra* note 4, at 743.

189. Christensen & Svanoe, *supra* note 4, at 1325-26.

190. *See* 251 N.L.R.B. at 1084-86.

191. *See generally* Thode, *A Reply to the Defense of the Use of the Hypothetical Case to Resolve the Causation Issue*, 48 TEX. L. REV. 1344 (1969); Henderson, *A Defense of the Use of the Hypothetical Case to Resolve the Causation Issue — The Need for an Expanded Rather Than a Contracted Analysis*, 47 TEX. L. REV. 183 (1969); Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968).

192. *See supra* notes 112-16 and accompanying text.

The form of hypothetical inquiry in the non-discharge or response case also asks whether the employer would have behaved in the same manner in the absence of protected activity, but it does not make this inquiry to make a factual cause determination because the factual context in which the second form of hypothetical question is asked is not unambiguous. While protected activity "caused" the employer's conduct,[193] it also "caused" business conditions that could hypothetically be generated by causes unrelated to protected activity. Similar employer responses could, thus, be illegitimate punishment of protected activity or a legitimate response to business conditions created by the protected activity. The hypothetical question is asked as a means of making a judgment about the legitimacy of an employer's response by utilizing the employer's past or reasonably probable hypothetical conduct as a test of that legitimacy. The conceptual ordering suggested by the hypothetical question in the response case is arguably not analogous to a factual cause determination, but rather, is arguably analogous to a proximate or legal cause determination.[194]

I have earlier suggested, however, that the hypothetical question is always hypothetical even where the employer's conduct in response to conditions unrelated to protected activity is known.[195] Moreover, I have thus far treated both contexts in which the hypothetical question might be asked as identical. I have done so because my claim is that, although the factual cause/legal cause (or cause/illicit reason) distinction is descriptively real, the distinction between the forms of case Professor Getman postulates is not material, at least so long as the policy

193. *See supra* notes 107-09 and accompanying text.

194. The business reasons present in the response case may be described, then, as dependent causes. Professor Eisenberg has in the equal protection context suggested that motive analysis requires both factual and legal (attribution) cause inquiries. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 62-68 (1977), but I doubt that he would view a dependent legitimate cause in that context as presenting a substantial issue of reasonable attribution — at least not unless the relationship between the independent and dependent causes was "indirect." *See id.* at 67.

On the question whether the actions of one person may be viewed as the cause of another person's behavior, see H.L.A. HART & A.M. HONORÉ, *supra* note 116 at 48-57 (distinguishing causes, reasons and opportunities). It is my view that reasons may be viewed as causes if one recognizes that the function of a causal analysis of motive is descriptive and that one cannot in any but a very rarefied sense identify particular reasons as "causes." The causal analysis is a tool by which an approximation of relevant policy is expressed, not a precise observation.

195. *See supra* notes 125-26 and accompanying text.

underlying Section 8(a)(3) is viewed as protection of free employee choice.

My claim that the distinction is not material is not a claim that there is in fact no distinction. Professor Getman's observation that the typical discharge case and the response case are different is, I think, unassailable. Moreover, the distinction may serve a viable descriptive function I intend to examine in another section of this paper.[196] The present question is, however, whether the differences are, as a matter of relevant policy, material.[197]

I intend here to explore Professor Getman's distinction by viewing it, as a distinction between a factual cause inquiry and a legal cause inquiry.[198] I am therefore characterizing Professor Getman's point as analogous to the point made by certain realist critics of the doctrine of legal cause in the law of torts. The realist's argument is that factual cause is an objective, quasi-scientific matter of observation; legal cause, on the other hand, is not a matter of observation, it is a policy judgment.[199]

I think Professor Getman's argument similar to the realist's argument for two reasons. First, the argument that the response and non-response cases are different is grounded on the proposition that we know that protected activity is a factual cause of the employer's action in the response case. In my terminology, legitimate employer motive in such a case is therefore causally dependent upon the fact of protected activity. Second, the argument assumes that this causal dependence is important because it invokes the policy of protecting union status and union activity from any employer conduct that discourages such status or activity.[200] Such a policy is presumably not invoked, or is invoked in at least lesser measure, in the discharge case because the sole issue in such a case is whether employer conduct was in

196. *See infra* notes 370-76 and accompanying text.

197. This, indeed, is Professor Getman's view of the question as well, for he is concerned that the courts and Board explicitly adopt a policy approach rather than the conceptualistic approach suggested by motive inquiry. *See Section 8(a)(3), supra* note 4, at 735-36.

198. *Id.* at 743.

199. *See, e.g.*, Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1. *See also* Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 241-44, 344-52 (1924).

200. *See* Christensen & Svanoe, *supra* note 4, at 1280; *Section 8(a)(3), supra* note 4, at 743; Oberer, *supra* note 4, at 506 n.51.

response to protected activity or status. The argument, then, is that a balancing of interests approach is the appropriate approach[201] because there are two weighty policies to be accommodated in the response case (protection of legitimate employer interests and protection of union status or activity).

I will attempt to make two points in reply to this argument. The first is that the perceived distinction in the cases is not important because the policies which might be relied upon to support the distinction are equally present in both types of case. The second is that the perception that there is merely a factual cause inquiry present in the discharge case is erroneous. In making these points, the identification of possible arguments supporting the distinction in the cases is by inference from the above balancing argument and should not be understood as relying upon any express statement of such arguments by any advocate of the distinction.

1. The Distinction in Applicable Policies: Impact on Free Employee Choice

The function served by a disparate treatment inquiry in both of the contexts under discussion is that postulated here earlier: immunization of legitimate business interests from regulatory intrusion. That is the case in the "legal cause" (response) context because the inquiry assumes a protected activity "cause" and nevertheless goes to considerable lengths to discover business interests that will justify employer conduct.[202] It is true in the "factual cause" (discharge) context as well because the inquiry is expressly that of identifying such interests.[203] Moreover, the need for immunization — upon the assumption, of course, that such a need is accepted — is not materially different in the two contexts. One may suggest that some device other than motive inquiry is a better means of accommodating employer interests, but it is not clear, unless one relies on a nar-

201. Christensen & Svanoe, *supra* note 4, at 1325-32; *Section 8(a)(3), supra* note 4, at 750-51.

202. *See, e.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) (lockout); A.S. Abell Co. v. NLRB, 598 F.2d 876 (4th Cir. 1979) (refusal to immediately hire striker); NLRB v. Martin A. Gleason, Inc., 534 F.2d 466 (2d Cir. 1976) (lockout and replacement with locked-out employee).

203. *See, e.g.*, Texas Instruments, Inc. v. NLRB, 599 F.2d 1067 (1st Cir. 1979) (neutral employer rule); American Mfg. Ass'n v. NLRB, 594 F.2d 30 (4th Cir. 1979) (discharge); NLRB v. Lloyd Wood Coal Co., 585 F.2d 752 (5th Cir. 1978) (layoff following sale of business).

row view of Section 10c of the Act, why such a better mousetrap is desirable in one context and not desirable in another.[204]

The argument that balancing is the preferable technique in a response case is, I presume, that the psychological impact of an employer's response to protected activity is necessarily greater than the impact of an employer response to the inherently ambiguous situation presented by a union adherent's misconduct or poor performance.[205] I doubt that this difference in impact may be assumed for two reasons. First, the discharge case typically entails a single employee pitted against the rather overwhelming power of an employer. Whatever the employer's "true motive" for the discharge, its impact under circumstances likely to give rise to an 8(a)(3) complaint probably will be substantial and the ability of other employees to distinguish poor performance or misconduct on the part of the employee discharged from the union sympathies of that employee probably will be quite limited.[206] Second, the typical response case entails employer action affecting a number of employees. Because the employer's power is not individually directed, it is as likely to generate solidarity as fragmentation in employee ranks.[207] If

204. Section 10c provides, in relevant part, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. § 160c (1976). The Section is, by its terms, a limitation on remedial authority. To the extent that it tells us anything about the issue of substantive violation, it expresses a policy consistent with the disparate treatment conception that would not seem necessarily limited to the typical discharge case.

205. *See Section 8(a)(3), supra* note 4, at 750. *See also* Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681, 689 (1972).

206. *See* NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964) ("Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith."); Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617, 621 (5th Cir. 1961) ("Such discharges make other employees apprehensive that if they join a union they endanger their jobs. The inquiry must be made even where the discharged employee has done something that might warrant his discharge, since it is something that the employer might pass over in another instance. . . ."). *But see id.* ("If, however, the misdeeds of the employee are so flagrant that he would almost certainly be fired anyway, there is no room for discrimination to play a part. The employee will not have been harmed by the employer's anti-union animus, and neither he nor any others will be discouraged from membership in the union. . . .").

It is of course quite possible that a discharge will generate worker solidarity, but the phenomenon is not dependent upon the employer's reasons for the discharge. *Cf.* Cedar Coal Co. v. UMW, 560 F.2d 1153, 1157 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978) (discharge for unprotected activity).

207. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 312-13 (1965); Schatzki, *The Employer's Unilateral Act — A Per Se Violation — Sometimes*, 44 TEX. L. REV.

there is a difference in impact in the two types of cases, the employee isolation typical of a discharge case would seem to warrant the greater degree of employee protection implicit in a balancing analysis.

Whatever one's conclusion about effect, however, it is important to recognize that a claimed distinction (as well as a claimed absence of distinction) between the two types of cases necessarily rests upon perceptions regarding appropriate regulatory policies. The argument that there is a distinction seems clearly grounded upon the assignment of a primary value to protected activity, as does the argument that employer interests should be merely "balanced" against that activity.[208] The argument for the immunity granted employer interests by a disparate treatment requirement in both the discharge and the response case is equally grounded upon an assignment of primary value to those employer interests.[209] My point for present purposes is not that either assignment of value is preferable; it is, rather, that an emphasis upon protecting union status and activity from the impact of employer action would seem to require a rejection of employer motive as an element of 8(a)(3) in both discharge and response cases[210] as a means of maximiz-

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470, 502-03 (1966).

208. *See Section 8(a)(3), supra* note 4, at 750.

209. *See* DuRoss, *supra* note 168, at 1117; Janofsky, *supra* note 4, at 99.

210. *See* NLRB v. Duncan Foundry & Mach. Works, Inc., 435 F.2d 612 (7th Cir. 1970). The employer declined to pay strikers vacation benefits. The Board had found that the employer's past practices had been that employee status on a benefit accrual date (presence or non-presence on the job) determined vacation pay. NLRB v. Great Dane Trailer Co., 388 U.S. 26 (1967), was distinguishable on the ground that partial or total entitlement had not preceded the strike. There was in short, a neutral employer rule and no disparate treatment. The Court nevertheless found an 8(a)(3) violation, apparently fearing the effect of the denial. *See also* Freezer Queen Foods, Inc., 249 N.L.R.B. 330 (1980) (neutral employer rule; Board finds business justification inadequate because other means of achieving legitimate objective would have less impact); Solboro Knitting Mills, Inc., 227 N.L.R.B. 738 (1977) (recall of seasonal employees duty imposed by Board in non-response case). Each of these cases may be viewed as "response" cases in the *Republic Aviation* sense: the employee conduct that "violates" the neutral employer rule is protected conduct. But each may also be viewed as non-response cases in that they entailed the automatic operation of benefits rules. In either event, I think that the employer's claim that its conduct was grounded on a reason so wholly independent of protected activity that employees would not perceive it as connected to the protected activity is at least as colorable as a similar claim in a discharge (clear non-response) case. I think such a claim patently wrong.

An appropriate analysis in this type of case frankly recognizes that the impact of neutral employer decision can be substantial and, if balancing is the appropriate response to that recognition, 8(a)(1) is the proper context in which it should occur. *See* Texas Instruments, Inc. v. NLRB, 599 F.2d 1067 (1st Cir. 1979).

ing that protection.

2. The Distinction in Applicable Policies: Presence or Absence of Employer Interests

In the factual cause context represented by the "typical" discharge case, the motive inquiry mandated under *Wright Line* is an inquiry to determine which of two independent employer motives — a licit motive or an illicit motive — "caused" the discharge. Ignoring the problem of the allocation of the burden of proof, the illicit motive will be said to have caused the discharge if it was a necessary cause. The licit motive in such a case, for example poor job performance, represents legitimate employer interests; the illicit motive, for example punishment for protected activity, represents illegitimate employer interests. Employer freedom from protected status or activity is, by definition, an illegitimate employer interest.[211] There is, in the discharge case, therefore no further inquiry into the legitimacy of the discharge once it has been determined that protected status or activity was a necessary cause of the discharge. In that event, it is improbable that any employer interest independent of freedom from protected status or activity may be asserted.

In the response case, it is assumed that protected activity was a necessary cause of the employer's action. It is apparent, for example, that a strike is a necessary cause of an employer's decision to replace strikers. There is in such a case, however, an employer interest independent of freedom from protected activity asserted as justification for the employer's action: maintaining production.

In both the response and discharge cases there are, then, employer business interests asserted that are distinct from an interest in freedom from protected activity or status. The distinction between the cases is that an employer's business interests and freedom from protected activity interests are factually independent in the discharge case. The former is factually dependent upon the latter in the response case. Professor Getman's distinction between response and discharge cases would grant balancing protection to employer interests in the first and motive protection to employer interests in the second. If I am correct in believing that the difference in protection

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211. *See* South Shore Hosp. v. NLRB, 630 F.2d 40 (1st Cir.), *cert. denied*, 450 U.S. 965 (1981).

afforded by the two tests is substantial, and in claiming that the difference is not justified by the effect of employer action upon protected activity or status in discharge versus response cases, what might justify the distinction?

Professor Getman has not specifically addressed this question. I nevertheless intend to address it here for the light I think it sheds upon the distinction between response and discharge cases. A possible justification for a difference in the level of protection granted employer interests by the distinction is that of limiting protection where the employer may be said to be "responsible" for the effect of its conduct upon protected activity. That is, if one conceives of the legal cause (response) case as distinct from the factual cause (discharge) case on the ground that it is permissible to preclude an employer's conduct only where the employer's conduct was in fact generated by protected activity (a sort of fault principle), there is a reason to distinguish the two classes of cases. There is a reason since the factual cause case is a case in which that fact is in issue and the legal cause case is a case in which that fact is assumed.

What is the nature of such a "fault" principle? It would appear to constitute at least a close cousin to Professor Epstein's reliance, in the context of tort law, upon Aristotle's principle[212] of "corrective justice:" if A harms B, B has, at least prima facie,[213] a moral right to demand, and A a moral duty to pay, compensation.[214] Epstein advocates a factual cause analysis of tort cases premised upon a belief that particular antecedent causes of harm may be identified.[215] That belief runs counter, of course, to the traditional notion that harm is the product of multiple necessary causes and that "policy" (in the form of "proximate cause" or "duty" analysis) should govern allocation of risk between such "causes."[216] Epstein's justification for his scheme is expressly moral: the objective is to preserve individual liberty[217] by constraining utilitarian justifications for allocating

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212. ARISTOTLE, ETHICA NICOMACHEA, bk. 5, ch. 4.

213. *See generally* Epstein, *Defense and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

214. *See generally* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

215. Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 421 (1979); Epstein, *supra* note 214, at 160-66.

216. *See, e.g.*, W. PROSSER, TORTS 244 (4th ed. 1971).

217. *See, e.g.*, Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 503-04 (1979) [hereinafter cited as *Causation*]; Epstein, *Nuisance*

risks of harm to a defendant whose conduct was not a cause of harm within the causal paradigms[218] he postulates. The scheme, significantly, is both individualized and backward looking;[219] it does not consider future behavior.

Of what relevance is Epstein's theory to the present discussion?[220] Labor law is not tort law, and I am not claiming equivalence. Epstein's theory, however, is not tort law in the orthodox sense: it is a moral (more specifically, libertarian) theory, not a risk allocation theory. Its relevance here is this: one potential claim in favor of Professor Getman's distinction between the response and discharge cases is that it is assumed, in the former, that protected activity "caused" the employer response. That assumption is important if it is further assumed that such an established causal relationship satisfies any statutory requirement for motive inquiry and warrants prima facie employer "liability."

Even if it is assumed, however, that a response to protected activity may be said to fit the causal paradigms essential, under Epstein's theory, to a case of prima facie strict liability,[221] a conclusion that protected activity "caused" employer action in the

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Law: Corrective Justice and Its Utilitarian Constraints, 8 J. LEGAL STUD. 49, 58 (1979) [hereinafter cited as *Nuisance Law*].

218. *See* Epstein, *supra* note 214, at 163-84.

219. Borgo, *supra* note 215, at 454.

220. Interestingly, Epstein's notions of prima facie case, defense and subsequent pleas bear a striking resemblance to the allocation of proof under *Wright Line, Mt. Healthy* and Title VII. *See generally* Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975).

221. Professor Epstein's theory rests in part upon a distinction between negative and positive rights, and his rejection of "but for" causation is conditioned upon that distinction. *See Causation*, *supra* note 217, at 499; Epstein, *supra* note 220, at 425-26; Epstein, *supra* note 214, at 160-63. Once one assumes a positive right, Epstein's causal paradigms break down.

The Section 7 rights involved in the present context may be stated in negative terms: the employee's right to free choice may not be invaded by the employer and the employer has a duty to refrain from such an invasion. They may also, however, be stated in affirmative terms: the employee is, by Section 7, guaranteed an affirmative right to employment to the extent that the employer may not refuse to deal with the employee for *some* reasons. Thus, the employer has an affirmative duty to deal with the employee to the extent that it cannot assert other reasons for a refusal to deal. The affirmative nature of the employer's duty becomes even more apparent if the employer must also consider the impact of its decisions upon employee free choice. It appears that Epstein would view the employer's 8(a)(3) duty as affirmative. *See* Epstein, *supra* note 220, at 425-26, 436-38. *See generally* Coppage v. Kansas, 236 U.S. 1, 19 (1914); Machan, *Some Philosophical Aspects of National Labor Policy*, 4 HARV. J.L. PUB. POL'Y 67, 108-09 (1981). *Cf.* A. BECHT & F. MILLER, *supra* note 116, at 23-33 ("but for" causation necessary to trace the effect of "omissions," not "acts").

response case is not, for Professor Getman, the end of the matter. Pleas in justification to be resolved by balancing, are permitted. The question is, therefore, why balancing and not motive? That is, what is it about the assumption in the response case in which "cause" is established that warrants a different analysis?

I think the answer to the riddle I have proposed is that advocates of the distinction between response and discharge cases conceive of the employee right involved in the discharge case as a right distinct from the employee right involved in the response case. I hasten to add that this distinction in the nature of the rights involved is unexpressed. Indeed, the right involved in both cases is said to be the right of "free employee choice."[222] I am contending, however, that the distinction between the response and discharge cases rests in fact upon two quite different conceptions of the right to choice and that this difference represents the second reason why Professor Epstein's insights are relevant here: causal analysis, for Epstein, is dependent upon an initial understanding of the rights allocated to the parties to a dispute before the occurrence of the events giving rise to the dispute.[223]

Advocates of the distinction concede that, in the discharge case, employer motive is an appropriate means of separating lawful from unlawful employer conduct.[224] I argued earlier that, if it is the effect of employer action upon protected activity or status (upon free employee choice) that is of concern, the distinction between the response and discharge cases is unwarranted: the effect on employee choice is, at least as a matter of speculative generalization (as opposed to empirical inquiry in

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222. *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1953); *Section 8(a)(3), supra* note 4, at 735.

223. In Professor Epstein's tort theory, causal analysis is made possible only because a prior distribution of rights (in the nature of property rights) is assumed. *See Nuisance Law, supra* note 217, at 58, criticizing Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). Coase's position is that both the plaintiff's and defendant's conduct are causally relevant in a nuisance case and the problem, then, is one of incompatible uses of a single resource, not "cause." *Id.* at 11-13. Epstein's counter-argument is that tort law assumes and operates on the background of an initial allocation of rights, and that causal conclusions are possible given the assumption of that allocation.

I note that the analysis in the text assumes that the employer's freedom of action has not been limited by contract — e.g. by a collective bargaining agreement — and is not limited by an existing statutory right to bargain.

224. *Section 8(a)(3), supra* note 4, at 743. *See also* Christensen & Svanoe, *supra* note 4, at 1316-17.

individual cases) indistinguishable.[225] If motive is material in the discharge case, it is material despite the effect on employee free choice. And if effect on choice is not controlling in the discharge case, the employee right involved in such a case is necessarily narrower than freedom from discouraging effect. The limited nature of the "free choice" right involved in the discharge case is crucial: it is not a substantive right to the job, and it is not a right to freedom from substantive changes in the job made by the employer by the statute.[226] The employer's correlative duty implicit in the employer's exercise of the freedom of action assumed motive requirement establishes the nature of the right: it is a right merely to be free from employer action directed at employee choice, *qua* choice.

Advocates of the distinction reject motive as an appropriate ground for decision in the response case despite their recognition that the employer may act in the response case in pursuit of business objectives quite as substantial and legitimate as those present in the discharge case.[227] The rejection may be explained in part on the ground that difficulties of proof are insurmountable: legitimate business reasons for an employer action may be so dependent upon the presence of protected activity that separation of good from bad motives is not possible in the litigation process.[228] But difficulty of proof is not a sufficient ground for distinguishing the discharge case because it can easily be as difficult to separate good reasons from bad reasons for a discharge.[229] Moreover, the difficulty of proof does not explain why the risk of adjudicative error should be resolved by generating the distinct and lesser form of protection for legitimate employer interests represented by a balancing of interests analysis. Such an analysis substantially modifies the employer's duty of impartiality: the duty is no longer that of refraining from action directed at influencing employee labor choices *qua* choice; it is to refrain from subjectively union-neutral business actions impacting employee choices that are of insufficient importance

225. *See supra* notes 202-10 and accompanying text.

226. *See* Summitville Title, Inc., 245 N.L.R.B. 863 (1979); U.S. Postal Serv., 245, N.L.R.B. 115 (1979).

227. *See* Christensen & Svanoe, *supra* note 4, at 1325; *Section 8(a)(3)*, *supra* note 4, at 735.

228. *See* NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961).

229. *See* Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617 (5th Cir. 1961), *cert. denied*, 366 U.S. 909 (1961).

to outweigh the employee interest in free choice.

If that is the employer's duty in a response case, the employee's right in such a case has been substantially modified as well. The protected activity to which an employer responds in a response case has economic repercussions for both the employer and the employee—that is the source of the employer's claim to legitimate motive. The employee right guaranteed by a balancing analysis is a right to be free, in at least degree, both from employer response to these repercussions and from the repercussions themselves. That is a right significantly different than the right at stake in the discharge case, and the difference has two implications to which I will return in a later section of this paper.[230] First, the right to freedom from employer response to the economic consequences of protected activity is more than a right to freedom of choice in the decision to participate in protected activity, for it is not employer response to the choice, but employer response to the consequences of choice that is (at least partially) precluded. Second, the leap from recognizing one form of employee right to recognizing a second form of employee right implicit in the distinction between a discharge and a response case is unwarranted if "free employee choice" is defined either as freedom from the impact of employer decision upon protected activity or as freedom from employer decision founded on choice *qua* choice. It is warranted only if the meaning of free employee choice shifts with context, and the policy basis for shifting meaning is justified.

3. *The Distinction in Applicable Policies: Deterrence*

If the fault principle is viewed not in moral (and retrospective) terms but in deterrence (and prospective) terms, it fares no better as a ground for material distinction. The argument in support of a deterrence justification for distinguishing the employer response (non-discharge) case from the discharge case is presumably that a causal link between protected activity and an employer's action is necessary because the employer would not otherwise have an incentive to avoid that conduct we wish prohibited.[231] Such a link is assumed in the response case and is the issue in the discharge case.

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230. *See infra* notes 371-95 and accompanying text.

231. *Cf.* Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 84 (1975).

If the effect of employer conduct is of sole concern, a motivational link should not be required in either case; the prohibition should deter any employer conduct tending to have the proscribed psychological effect.[232] Effect is, however, not the only concern; accommodation of employer interests is also of concern. In deterrence terms, the problem is therefore to deter only employer conduct that serves no legitimate employer interest (the employer immunity view postulated earlier) or that serves interests which do not outweigh their discouraging effect (the balancing of interests view advocated by Professor Getman and others). The refined deterrence argument for distinguishing the response and discharge cases is therefore that, under a conception of the discharge case as entailing either of two independent causal motives, a conclusion that the employer discharged an employee because the employee was a union supporter necessarily means that there is no employer interest to be accommodated — either absolutely (by immunity) or partially (through balancing).

The discharge and response cases would be distinguished on a deterrence rationale, then, because a causal link between protected activity and employer conduct is an essential predicate to deterrence only of unjustified employer conduct and because the possibility of justification despite causal linkage is best taken into account by means of a balancing analysis.[233] Since the

232. *Cf. id.* at 78-79 ("but for" causation test inappropriate where collective or specific deterrence is the objective). Professor Calabresi's scheme with respect to deterrence distinguishes specific deterrence (deterrence of some conduct or activity as so dangerous that it should not be permitted at all) from general deterrence (allocation of injury costs to those actors best able to evaluate, through the operation of the market, the optimum accommodation of safety and injury costs). Both forms of deterrence seek to "balance" injury and safety costs — the first by political decision and the second by market decision. *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

Labor law does not seek to balance injury and safety costs, but it may be viewed as seeking to "balance" the costs of protected activity to the employer (the analog of safety costs) and the costs imposed by employer conduct on protected activity (the injury costs analog). Specific deterrence might then be viewed as explaining the inherently destructive branch of *Great Dane*: some employer conduct is too dangerous to be permitted whatever its motive. I think, however, that specific deterrence must also be taken as the justification for the illicit motive requirement in the comparatively slight effect branch of *Great Dane*; that branch may be viewed as encompassing those cases in which facially neutral (that is, potentially social desirable employer conduct) is to be proscribed only where "the actor has a certain mental attitude." Calabresi, *supra* note 231, at 79. And "but for" causation would further specific deterrence in such a case. *Id.*

233. *Cf. Shieber & Moore, supra* note 4 (invoking a utilitarian calculus).

response case is the case in which the possibility of justification despite linkage arises, a balancing analysis is the appropriate analysis in such a case.

The deterrence argument assumes that the problem of causal linkage is confined to the discharge case. It is, in the sense that we assume that the employer's conduct in the response case is in fact responsive to protected activity and that we cannot make that assumption in the discharge case. But we assume as well that the difficulty in the response case is that the employer's conduct is also responsive to real business needs distinct from freedom from unions. The problem in the response case is not unlike the problem in the discharge case precisely because the assumption in the response case that there is causal linkage does not itself establish an illicit employer interest underlying employer conduct. The causal finding in the discharge case is not equivalent to the causal assumption made in the response case because the causal finding in the discharge case establishes illicit employer reasons for its conduct, while the causal assumption in the response case, even under the scheme imposed by a balancing analysis, does not establish an illicit reason.[234] So long as it is only employer action taken in pursuit of illicit employer interests we seek to deter, the factual relationship between protected activity and employer response in the response case is an inadequate basis for finding a violation of the statute: the causal link which is the predicate for such a deterrence theory is, despite the causal assumption, still missing.

It is, however, possible to argue that my statement of the deterrence argument is too narrow. An alternative form of deterrence is deterrence not merely of employer action undertaken in pursuit of illicit interests, but deterrence of employer action insufficiently justified by the legitimate interests it furthers. This of course is an argument favoring a balancing analysis. In a sense, it is an argument that requires the employer to engage in its own balancing process prior to taking an action: employer

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234. *See, e.g.*, Loomis Courier Serv., Inc. v. NLRB, 595 F.2d 491 (9th Cir. 1979) (lockout and shutdown); Tomco Communications, Inc., 220 N.L.R.B. 636 (1975) (lockout). There are, however, a number of cases in which an illicit motive ground for decision appears clear and in which the courts nevertheless opt for an "inherently destructive" rationale. *See, e.g.*, NLRB v. Haberman Constr. Co., 618 F.2d 288 (5th Cir. 1980) (repudiation of agreement, constructive discharge), *modified on other grounds en banc*, 641 F.2d 351 (5th Cir. 1981); NLRB v. Lantz, 607 F.2d 290 (9th Cir. 1979) (same); Los Angeles Marine Hardware Co. v. NLRB, 602 F.2d 1302 (9th Cir. 1979) (repudiation of collective bargaining agreement, runaway shop).

action outweighed by employee interests is deterred by forcing, through threat of legal sanction, antecedent employer assessment and consideration of those employee interests.[235] One difficulty with the argument is that it discounts the employer's interest in predictability;[236] but the present question is whether the broader form of deterrence argument justifies a distinction between the discharge and response cases. It does not justify such a distinction for the reasons suggested here earlier: if it is the impact of employer action upon protected activity that is of concern, a deterrence rationale requiring employers to assess risks of impact is appropriate in both discharge and response cases. A shift from a narrow deterrence rationale (deterrence of action taken in pursuit of illegitimate interests) in the discharge case to a broad deterrence rationale (compelled employer assessment of risks of impact) in the response case is justified only if the employee right involved in the two types of cases shifts in meaning. A narrow deterrence objective may of course, be a part of the policy mix accommodated by a balancing test, but it becomes under such a test only *an* ingredient.[237] An insistence upon the sort of causal linkage implied by an illicit motive as necessary condition requirement in a response case is rather explicitly an insistence upon a deterrence justification for prohibition[238] — a justification limited, of course, to deterrence of a very limited range of employer conduct.

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235. *Cf.* Calabresi, *supra* note 231, at 87-92 (market or general deterrence).

236. *Cf.* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981) (subjects of bargaining); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-13 (1963) (predictability in First Amendment context).

To the extent that balancing produces relatively firm rules that operate prospectively, my complaint loses much of its force. *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1961); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); System Council T-4 v. NLRB, 446 F.2d 815 (7th Cir. 1971). The difficulty is in extensions of the rules and in contexts which produce no rules. *See, e.g.*, NLRB v. United Steelworkers, 357 U.S. 357 (1957) (Section 8(a)(1)); NLRB v. Rubatex Corp., 601 F.2d 147 (4th Cir. 1979) (8(a)(3)), *cert. denied*, 444 U.S. 928 (1980); NLRB v. Duncan Foundry & Mach. Works, Inc., 435 F.2d 612 (7th Cir. 1970) (8(a)(3)). *See also supra* note 232.

237. *See* Christensen & Svanoe, *supra* note 4, at 1317; Thode, *supra* note 193, at 1352.

238. *See* Calabresi, *supra* note 231, at 79 ("but for" causation as expressive of specific deterrence where "mental attitude" material). *But cf.* Thode, *supra* note 191, at 1352 ("but for" test precludes consideration of deterrence presumably in sense of general deterrence). I am, of course, assuming that "mental attitude" is material as the proxy for those employer interests thought illegitimate and therefore not worthy, as a matter of our "collective" (that is the legislative) judgment.

4. *The Distinction Between Factual and Legal Cause*

The argument that motive is relevant only in the discharge case may be viewed as an argument that it is not clear in such a case whether some employer action was related or not related to protected activity.[239] The issue in the discharge case is therefore a factual cause issue in Professor Shieber's sense: is there a factual connection (in the employer's mind)[240] between the employer's action and protected activity or status?

My point here is that, although a factual connection is assumed in the response case[241] and insistence upon an illicit motive in a response case imposes a kind of legal cause requirement, that same requirement is imposed in a non-response case by the *sine qua non*[242] test of motive adopted in *Wright Line*.[243]

239. *See Section 8(a)(3), supra* note 4, at 743.

240. *See supra* notes 103-09 and accompanying text.

241. *Id. See also* Christensen & Svanoe, *supra* note 4, at 1275-76, 1278 n.32. The practical difficulties with the view that response and non-response cases are distinct are that it is often quite difficult to tell the difference and that the impact on employees cannot, in contexts in which it is difficult to tell the difference, be distinguished even if such impact may be distinguished in the discharge context. *See, e.g.*, Loomis Courier Serv., Inc. v. NLRB, 595 F.2d 491 (9th Cir. 1979) (shutdown); NLRB v. Lloyd Wood Coal Co., 585 F.2d 752 (5th Cir. 1978) (layoff and sale of business); Free Flow Packaging Corp. v. NLRB, 566 F.2d 1124 (9th Cir. 1978) (layoff); National Family Opinion, Inc., 246 N.L.R.B. 521 (1979) (partial closing).

242. With respect to the abstract question whether motive may properly be conceived in causal terms, see H.L.A. HART & A.M. HONORÉ, *supra* note 116, at 48-57; WHITE, CAUSATION AND ACTION IN PHILOSOPHY, SCIENCE, AND METHOD 250 (1969); Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1576-88 (1981). I am not pursuing the free will debate here. With respect to the relationship between motive and cause in legal contemplation, *see, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudiciation*, 52 N.Y.U.L. REV. 36, 57-83 (1977).

243. 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). In *Wright Line* the Board imposed the burden on the employer "to demonstrate that the same action would have taken place in the absence of the protected activity." 251 N.L.R.B. at 1089. The First Circuit has held that this burden is, however, merely one of production. NLRB v. Wright Line, 662 F.2d 899, 904 (1st Cir. 1981). The issue, divorced from the problem of burden of proof, is therefore what, hypothetically, would have occurred in the absence of protected activity. This is a *sine qua non* test of causation: was the protected activity a necessary condition to the employer's action? *See supra* note 115; *Wright Line*, 251 N.L.R.B. at 1089 n.14 (if protected activity is the "straw that broke the camel's back," there is a violation). Note, however, that the burden of proof issue is significant: the Board's test presumes that protected activity was a necessary condition and requires the employer to rebut this presumption. The General Counsel need not, under the *Board's* test, prove necessary condition; the employer must prove the absence of necessary condition. *See supra* note 168. *But cf.* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (Title VII disparate treatment case). The First Circuit's rule reverses that allocation with respect to the risk of nonpersuasion.

That is, the *Wright Line* test is in fact not a test of "factual cause" in Professor Shieber's sense; it is a test of disparate treatment. This assertion is presumably controversial because the "but for" test has generally been viewed, at least in the context of the law of torts in which it is most often used, as rather clearly a test of factual causation,[244] but there are other views.

The "but for" test of the factual causation element of the negligence formula is that an "actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent."[245] There are, however, two senses in which the general causal notion thus expressed may be viewed. One may view the question as whether harm would have followed in the absence of an actor's conduct or one may view the question as whether harm would have occurred in the absence of that aspect of the actor's conduct that was negligent.[246] For convenience, I will refer to the former question as the factual cause issue and to the latter as the legal cause issue. I view the latter as a legal cause issue because its function is to distinguish between the negligent and non-negligent aspects of a defendant's conduct, to isolate

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Wright Line was a non-response, typical discharge case. If its test is understood as not invoking illicit motive in the narrow sense required by *Great Dane*, *supra* notes 154-84 and accompanying text, its application to a response case would always necessitate a conclusion that 8(a)(3) is violated: the employer's "response" is a "response" to protected activity. *See supra* notes 151-53 and accompanying text. If it recognized, however, that the issue in a discharge case is whether the discharge was a response to protected activity and that this issue serves as a sufficient proxy for the *Great Dane* motive requirement because the employer cannot in such a case invoke a legitimate business reason, *supra* notes 211-30 and accompanying text, the test is equally applicable to the response case if reframed in terms of that requirement.

What is unclear from *Wright Line* is whether there will be an 8(a)(3) violation in a case in which protected activity is one of two sufficient conditions to employer action but is not a necessary condition to that action. *See* Trustees of Boston Univ. v. NLRB, 548 F.2d 391, 393 (1st Cir. 1977); Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617, 621 (5th Cir. 1961). Given the Board's *Wright Line* allocation of the burden, the answer to this question seems rather clear: the employer, in such a case, has not met its burden, at least if that burden is one of persuasion. Given the First Circuit's *Wright Line* allocation, the General Counsel has the risk of nonpersuasion in such a case.

244. *See* A. BECHT & F. MILLER, *supra* note 116 at 13-21, 24 (but nevertheless rejecting "but for" as an adequate test in many cases on the grounds that it is "evaluative"); H.L.A. HART & A.M. HONORÉ, *supra* note 116, at 103-22, 262-68 (differentiating cases in light of necessary conditions, conditions causally irrelevant or not *sine qua non*, and conditions causally relevant); R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 49-60 (1963) (risk rule as factual but evaluative.).

245. RESTATEMENT (SECOND) OF TORTS § 432(1) (1965).

246. *See, e.g.*, A. BECHT & F. MILLER, *supra* note 116, at 28-33; R. KEETON, *supra* note 244, at 5-9.

the negligent aspect and to impose liability only for harm attributable to that negligent aspect: "Negligence . . . consists of creating a set of unduly risky forces or conditions or circumstances, and the negligence is a *sine quà non* of subsequent harm only if some force or condition or circumstance within this set is a *sine qua non.*"[247] This is the "harm within the risk" rule. The policy basis for the rule is limiting potential liability so as to avoid discouraging socially desirable conduct.[248]

Of what relevance is this digression to 8(a)(3)? Negligence law is, again, not labor law, and it is crucial that this point be made emphatically lest my use of the digression be misinterpreted. In the first place, 8(a)(3) is not concerned with allocation of risks of harm — a central rationale in tort.[249] In the second, and most fundamental place, 8(a)(3) is a statute. Realist critics challenge causation tests of scope liability in negligence law because such tests impose a too-restrictive unidimensional focus upon only one of a multitude of relevant policy considerations in deciding scope of liability issues, considerations appropriate to the legislative function performed by judges in formulating common law.[250] The policies material to the present discussion, however, are of a distinct character and, more importantly, from a different "legislative" source.

I think, nevertheless, that there is justification for the digression. Immunization of employer conduct serving legitimate employer interests is a policy similar to that suggested here as the justification for the "harm within the risk" principle in neg-

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247. R. KEETON, *supra* note 244, at 8. *See also* A. BECHT & F. MILLER, *supra* note 118, at 28-33; H.L.A. HART & A. M. HONORÉ, *supra* note 116, at 256-60. Despite the criticism Becht and Miller level at "but for" causation, A. BECHT & F. MILLER, *supra* note 116, at 13-21, they nevertheless view it as a necessary means of tracing the effect of omission. *Id.* at 23-33. A *sine qua non* test is not useful where a defendant's act is in issue because the relationship between an act and a result is determined by describing what occurred. *Id.* at 22-23. An "omission" requires, however, hypothesis because we need to determine what would have occurred in the absence of the omission. *Id.* at 23. (That is, what would have happened if the defendant had not breached some positive legal duty?). In short, an omissions case requires separation of an actor's conduct into its negligent and non-negligent aspects, and this separation is (or at least can be) a factual inquiry, not a value inquiry. *Id.* at 24. My difficulty with this argument is that the "omission" characterization is intimately a matter of the policy decision made in defining the duty "breached." *See supra* note 221.

248. *See* R. KEETON, *supra* note 244, at 19. *But see* Thode, *supra* note 191, at 1352.

249. *See* R. KEETON, *supra* note 244, at 19. Moreover, the parallel I attempt to draw here is considerably less than perfect: the issue in the present context is not scope of liability; it is "liability." *See supra* notes 122-24 and accompanying text.

250. *See generally* Green, *supra* note 199; Thode, *supra* note 121.

ligence law.[251] Moreover, the distinction noted in negligence law between "but for" as a test of whether a defendant's conduct in all of its aspects factually caused harm and "but for" as a test of whether the negligent aspect of a defendant's conduct legally caused harm is suggestive of the claimed distinction between a response and a discharge case.

The "but for" tests of cause in tort are concerned with the relationship between an alleged tortfeasor's conduct and harm where the conduct of other persons (other tortfeasors, the plaintiff, or innocent third persons) is also related to the harm. In the response and discharge cases, the cause issue may be viewed as an issue concerned with the relationship between the conduct of employees and the employer's reaction to that conduct. In the discharge case the causal issue is which of two independent causes — protected activity or, e.g., employee misconduct — "caused" the employer's reaction. That question must be answered by reference to motive and it is that inquiry into motive Professor Getman approves and Professor Shieber terms "cause." The inquiry is arguably like the factual inquiry in the tort context: in the tort context the factual question is whether the actor's conduct was a necessary (or, at least, sufficient) cause of harm; the question in the discharge case is whether protected activity was a necessary cause of employer reaction.

In the response case we know that protected activity was a necessary cause of employer reaction either because the employer expressly relied upon protected activity as a type of employee conduct that produces a given employer reaction without reference to its protected or unprotected status (*Republic Aviation*) or because protected activity is known to have produced a business condition the employer claims in turn produced its reaction and would have produced the same reaction if not generated by protected activity (*Mackay*). What is not known in the response case is whether the employer's claim that its reaction to protected activity was impartial (in the sense that its objective was not discouragement of protected activity) is acceptable.[252] An inquiry into that unknown is an inquiry into the sort of motive Professors Getman and Shieber and others

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251. *See* Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977). *Compare, e.g.*, R. KEETON, *supra* note 244, at 19 *and* Henderson, *supra* note 191, at 204 *with* Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1143-44 (1978).

252. By acceptable I mean both accurate and, by reference to relevant policy or principle, justified.

reject as immaterial. It is an inquiry arguably like the legal cause inquiry in tort law: the legal cause inquiry in the tort context is whether the negligent aspect of the actor's conduct caused harm (i.e., whether the harm was within the risk that warrants the negligence characterization); the legal cause inquiry in the response case is whether the protected activity or status aspect[253] of the employee conduct or business condition confronting the employer caused the employer's reaction (i.e., whether the harm to protected activity was within the risk of partiality that warrants an illicit motive characterization).[254] In more comprehensible "duty" terms,[255] the inquiry in the

253. By "protected activity or status aspect" I mean the union activity or status, and not some other circumstance, that generates the condition or constitutes the characterization of the employee conduct.

My characterization of the response case as involving a proximate cause issue similar to a proximate cause issue in a negligence case, however, ignores some fundamental distinctions. In a negligence case, the tortfeasor's conduct is evaluated separately from its negligent aspect to determine whether the non-negligent aspect would produce the harm in issue. If the non-negligent aspect would be sufficient to produce the harm, the "but for" test is not met. The harm is not within the risk that made the actor's conduct negligent.

In the response case, the actor's conduct is evaluated separately from its illicit motive aspect only through fictionalizing a chain of events. One postulates a non-union cause of the business condition to which the employer responds. In effect, the test treats the response case as a discharge case by treating employer business reasons and employer illicit reasons as independent causes of a response. For example, in *Republic* the employer's business reasons underlying its response are treated as independent of the employer's illicit reasons for its response when it is argued that the automatic operation of the employer's no solicitation rule was a sufficient cause of the discharge of a union solicitor. As a matter of fact, these "independent" causes are both the product of the occurrence of protected activity. As a matter of fiction, the business interest is the product of a hypothetical circumstance in which a non-union solicitation takes place.

The negligence case and the response case are, then, differently analyzed because the negligence case does not require an analysis dependent upon this degree of fiction. In the negligence case the "but for" test is fictional, for that test postulates, as independent causes of harm, the negligent and the non-negligent aspects of the tortfeasor's conduct. But the test does not require a fictional antecedent cause of the tortfeasor's conduct to make the distinction between the negligent and non-negligent aspects of that conduct.

Despite this difference between the modes of analysis in the negligence and response cases, I think the parallel between the legal cause notion in tort and the disparate treatment notion in the response case sound to the extent that in both cases, the focus of inquiry is a legal construct concerned with the evaluation of the scope of some legal obligation.

254. If *Great Dane* is viewed as requiring only subjective intent and not necessary cause, this analogy will not hold. In that event, Professor Getman is correct: the intent requirement is quite unlike the motive requirement in the non-response (discharge) case. Moreover, in that event Christensen and Svanoe are right: intent is a "fictive formality." Christensen & Svanoe, *supra* note 4, at 1325.

255. *Cf.* Thode, *supra* note 201 (tort duties).

response case is whether the employer's impartiality obligation encompasses its reaction — and the difference in opinion between Professors Getman and Shieber and myself is the breadth of that obligation.

As thus described, the causal inquiries in the response and non-response cases appear quite distinct. My claim, however, is that they are not distinct. They are not distinct because a disparate treatment test[256] is in neither case a test of "factual cause;" it is a conceptual guide to the application of a policy judgment. If I am correct in that view, one cannot justify a different analysis of the response and non-response cases on the ground that the non-response case entails merely a factual judgment and the response case a policy judgment.

In the tort case, a "but for" evaluation of factually independent causes is arguably "factual" if it does not require the separation of a single actor's conduct into negligent and non-negligent aspects. In the non-response (discharge) case in the 8(a)(3) context, an employee's misconduct and his protected activity are independent causes, but those causes are expressed in terms of employer motive: it is "mixed motive" that is evaluated. Despite the factual independence of an employee's misconduct and that employee's union status or activity, the "mixed motive" evaluation is an evaluation of the employer's conduct, not the employee's conduct. The inquiry is into which aspect of the employer's motivation — the licit or illicit aspect — "caused" the employer's action. That inquiry is not an inquiry into "cause" in any sense other than a judgmental one. Except in the rare discharge case in which the employer was unaware of the discharged employee's protected activity or union membership at the time of the discharge, that activity or membership is always "a" cause of the discharge: the employer in a discharge case always "responds" to a factual situation entailing protected activity and status. The "but for" evaluation does not, then, evaluate factual causation, it evaluates the independence of the discharge from the employer's illegitimate interest in freedom from the employee's union activity or membership. One may legitimately argue that the evaluation is a "fact-oriented" evaluation,[257] but the evaluation does not occur in a vacuum. It is not

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256. *See supra* note 114.

257. *Cf.* R. KEETON, *supra* note 244, at 49 ("legal" cause in tort).

policy-neutral.[258] The imposition of a "but for" test in a "typical discharge case" does much more than merely determine whether the employer did or did not "respond" to protected activity, it determines the extent to which employer interests will be immunized from regulatory scrutiny. The imposition is an imposition of the disparate treatment conception,[259] and is no more a simple matter of observed fact than is the inquiry into employer motive in the response case.

Perhaps my point may be better understood by again examining the example of a replacement of strikers. Such a replacement is a response to protected activity in the form of a strike. It is therefore caused by the strike in a factual sense. The loss of employees, however, is a motivationally independent cause for employer action even if it is factually dependent upon the presence of protected activity. The employer has violated 8(a)(3) in a replacement of strikers case only where he acted from "anti-union animus" — under my proposal, only where he would not have replaced in other "loss of employee" circumstances.[260] The issue, therefore, is which of two aspects of the factual situation confronting the employer — the legitimate or illegitimate aspect, stated in terms of the employer's motivation — was the *sine qua non* of the replacement.[261] In the typical discharge case under *Wright Line*, the ultimate question is not whether protected activity or status was a factual cause of the discharge; that question is only preliminary. The "but for" standard requires a determination whether the illegitimate aspects of the employer's motivation (e.g., the employee's union membership) was a *sine*

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258. *Cf.* R. KEETON, *supra* note 244, at 19 (legal cause as policy based); Thode, *supra* note 199, at 14 n.50. *But cf.* Thode, *supra* note 121, at 1352.

259. *See* Wright Line, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981); *cf.* H.L.A. HART & A.M. HONORÉ, *supra* note 116, at 108-16 (*sine qua non* cause as distinct from causally relevant necessary condition); R. KEETON, *supra* note 244, at 10 (postulating a "third" formulation of the risk principle as entailing two components: the cause in fact question and the question whether "a result [is] within the scope of the risks by reasons of which the actor is found to be negligent").

260. *See* NLRB v. Int'l Van Lines, 409 U.S. 48 (1972).

261. *Cf.* NLRB v. Westinghouse Elec. Corp., 603 F.2d 610 (7th Cir. 1979) (vacation pay for returning strikers); NLRB v. Community Shops, Inc., 301 F.2d 263 (7th Cir. 1962) (employment experience rule in rehiring); Aero-Motive Mfg. Co., 195 N.L.R.B. 790, 795 (1972) (Member Kennedy dissenting), *enforced*, 475 F.2d 27 (6th Cir. 1973) (bonus to non-striking employees). *But cf.* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) (super-seniority for replacements); NLRB v. Rubatex Corp., 601 F.2d 147 (4th Cir.), *cert. denied*, 444 U.S. 928 (1979) (bonus for nonstrikers); NLRB v. Transport Co. of Tex., 438 F.2d 258 (5th Cir. 1971) (super-seniority for replacements); NLRB v. Duncan Foundry & Mach. Works, Inc., 435 F.2d 612 (7th Cir. 1970) (vacation pay for strikers).

qua non of the discharge.[262]

The questions in both cases are identical. It is true that an employee's misconduct and his union membership are factually independent reasons for employer action in a discharge case and that an employee's absence from work and participation in a strike are factually inseparable reasons for employer action in a response case. It is therefore equally true that the employer's legitimate interest in replacing employees is inescapably an interest factually dependent upon the occurrence of protected activity in the strike (response) case. But the factual dependence of legitimate employer interests upon the protected activity that gave rise to those interests does not resolve the question of whether the replacement is dependent or independent from the fact that the absence of ėmployees is by reason of a strike. The independence of employer action from the protected nature of the circumstances confronting the employer is a question of attribution resolved by a judgment founded upon the policies underlying the statute; it is not a matter of factual causation, even though causation is the conceptual tool used to describe the judgment.[263] This characterization does not, however, distinguish the discharge case, for the question in the discharge case under the *Wright Line* test is equally a question of the independence of the employer's action from the protected aspect of the circumstances confronting the employer and is equally a question not resolvable as a matter of factual causation. "But for" cause or "necessary condition" are, under *Wright Line*, descriptive labels for judgments about the independence of a discharge from the protected aspects of the discharged employee's behavior where both protected and unprotected aspects of that behavior are factually related to the discharge. The factual independence of an employer's misconduct and that employee's union membership or activity would distinguish the discharge case as involving only a factual cause issue only if the test for a violation of Section 8(a)(3) was the test rejected in *Wright Line*: a discharge violates 8(a)(3) if it occurred "in part" for protected activity or status.

The decision whether to employ a "but for" test of causa-

262. *See* Wright Line, 251 N.L.R.B. 1083, 1087 (1980) *enforced*, 662 F.2d 899 (1st Cir. 1981).

263. *See Section 8(a)(3), supra* note 4, at 743. I do not represent that Professor Getman has spoken in these causal terms, but I think his point may be framed in such terms for purposes of analysis.

tion or an in part test of causation in a discharge case is clearly a policy issue,[264] not a factual issue. An "in part" test protects activity on prophylactic grounds; a "but for" test protects employer interests on preservation of socially desirable conduct or on libertarian grounds. The decision to separate or not to separate aspects of an employer's motivation in a response case is equally a policy issue resolved by a choice between the same countervailing policies involved in the discharge case.[265] The problem may again be reframed as one of an employer's duty: is that duty merely of refraining from conduct responsive only to the protected nature of employee conduct or is it that of refraining from conduct likely to adversely impact protected activity? Upon the assumption that the appropriate obligation is to refrain from conduct reponsive only to the protected nature of employee conduct, the issue in both the discharge and response cases is not an issue of factual causation. It is, rather, an issue of the application of that legal obligation: was the harm to protected activity within the scope of the obligation?

It has been suggested here that this issue may be framed in causal terms as a conceptual guide to decision. But the causal inquiries in the response and discharge cases, although in some respects distinct, reflect the functional equivalence of the issue each inquiry seeks to reach.

The *Wright Line* test, as the Board applies it, imposes on an employer the burden of establishing that a discharge would have occurred in spite of the protected status or activity of the discharged employee: the employer, in effect, must establish that some reason for discharge independent of protected activity or status was a sufficient condition for discharge.[266] Such a showing, assuming the independence of the employer's reasons, negates protected activity as a necessary condition for discharge.[267] The sufficient condition defense is not available in a response case if the relevant causal inquiry is whether protected activity was a necessary condition for the response because it is apparent, as a matter of the facts of such a case, that protected activity and the employer's business interests are not indepen-

264. *See supra* notes 199-201 and accompanying text.

265. *But see Economic Pressure, supra* note 4, at 1202 ("The employer should not be the sole judge of whether his economic interests justify conduct which makes protected activity costly for the participants.").

266. *See supra* note 115.

267. *Id.*

dent.[268] In short, a conclusion that a business interest was a sufficient condition for employer response in a response case tells us nothing about the characterization of the causal relationship between response and protected activity.

However, the relevant causal inquiry in the response case is not whether protected activity was a necessary condition for employer response. That is not the inquiry because employer response to protected activity is not necessarily prohibited. It is only employer response insufficiently justified by business interests (under a balancing test) or employer response illicitly motivated (under a disparate treatment test) that is prohibited. Under the assumptions of a disparate treatment conception, then, the relevant causal inquiry in a response case is that of determining whether some illicit employer reason for the employer's response was a necessary condition to that response.[269] That is the relevant causal inquiry in the discharge case as well. It is true that the inquiry in the discharge case is abbreviated — if protected activity was a necessary condition (under *Wright Line*, if legitimate employer reasons were insufficient), there is a violation. But it is abbreviated precisely because the employer can cite no legitimate reason for a discharge found to have been caused by protected activity; that finding satisfies, automatically, the illicit reason as necessary condition requirement.[270]

If the relevant causal inquiry in the response case is an inquiry into illicit employer reasons for a response to protected activity, may such an illicit reason be said to be sufficiently independent of the legitimate business reason claimed by an employer as the motive for its action to warrant application of the *Wright Line* test? As a matter of known facts, the answer would appear to be no: if an employer response was a response, factually, to protected activity, it is difficult to see how it can be assumed that the employer's illicit motivation for its response (the illicit purpose of punishing protected activity) is independent of the legitimate motivation for its response (the licit purpose of meeting business needs) where both motivations are generated by the factual occurrence of protected activity.

But it is known that, in at least some clear cases, an illicit

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268. *Id.*

269. *See supra* notes 153-57 and accompanying text.

270. *See supra* notes 233-35 and accompanying text.

employer motive may be treated as independent of the legitimate employer business interest generated by the occurrence of protected activity. The clear cases, such as *Republic*, involve the automatic operation of employer rules.[271] An overbroad no-solicitation rule (prohibiting *all* employee solicitation) may be triggered either by protected union solicitation or by unprotected non-union solicitation. Where triggered by protected union solicitation, the employer factually responds (by discharging the union employee solicitor) to protected activity (the solicitation). The legitimate business interest underlying the no-solicitation rule is therefore an interest triggered by, and factually dependent upon, the occurrence of protected activity. But the employer's illicit motivation — its purpose of punishing the union employee solicitor because the solicitation was union related — is arguably a cause of the employee's discharge independent of the business interest the employer claims as the reason for discharge. It is of course quite true that such an illicit motive is not independent of the occurrence of protected activity as a factual matter: such a motivation arose from the occurrence of protected activity. But the illicit motive is conceptually independent of the business interest "caused by" the occurrence of protected activity because the automatic operation of the no-solicitation rule rendered the motivation irrelevant: the employee would have been discharged for solicitation in spite of the motivation. Note that the reason for the conclusion that illicit motive was not a necessary condition in *Republic* (that no disparate treatment occurred in that case) is that the automatic operation of a rule furthering business interests was a sufficient condition for the employer's action.[272]

In response cases not involving the automatic operation of an employer rule, the sufficient condition test (illicit motive as necessary condition) becomes at least more difficult because one is forced to postulate hypothetical antecedent circumstances which are often wholly fictional. At least as a matter of theory, however, both the *Wright Line* test of independent factual causes (protected and unprotected employee conduct) in a discharge case and a disparate treatment conception of the response case evaluate the same (non-factual) causal issue: the

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271. *See* Knuth Bros., 229 N.L.R.B. 1204 (1977), *enforced*, 584 F.2d 813 (7th Cir. 1978).

272. *See supra* notes 97-100 and accompanying text.

relationship between employer action and the licit and illicit employer interests underlying that action under a standard precluding only employer action taken in pursuit of illicit interests.

There is, however, a caveat. To hypothesize a set of circumstances that would give rise to a business interest to which an employer could legitimately respond is to ignore the facts of the case. It is, moreover, to treat the response case as a case involving independent causal motives when in fact both such motives are the product of the occurrence of protected activity. The hypothetical question asked in the typical discharge (*Wright Line*) and response (e.g. *Mackay*) cases *are* distinct in form, if not in function. In the discharge case, one evaluates the question of disparate treatment by ignoring one known fact (the protected status or activity of the discharged employee) and asking whether another known fact (the misconduct of that employee) would have produced a known result (the discharge). In the response case, one evaluates the question of disparate treatment by postulating fictional facts (a non-union antecedent cause of the business need claimed by the employer) in place of known facts (the protected activity antecedent cause of that business need) and asking whether the fictional facts would have produced a known result (the employer "response").

I have claimed here that both forms of question are functionally equivalent because neither is a test of causation in any factual sense and because both seek, in distinct circumstances to evaluate the scope of a single legal obligation applied to particular facts. But that conclusion should not obscure two fundamental difficulties inherent in the application of the disparate treatment standard to the response case. One, the high degree of fiction inherent in the application generates substantial risks of distortion — in particular the risks that conceptualization will replace judgment and that reliance upon fiction will permit all employer responses to protected activity by permitting all claims to fictional facts. Two, the application assumes that a response to protected activity is permissible absent illicit motive. The latter assumption is warranted only if Section 8(a)(3) imposes a rather narrow legal obligation upon employers. The next section of this article evaluates both the problem of risks and the problem of the viability of that assumption.

IV. Disparate Treatment Reexamined: The Risk of Manipulation

In the earlier section of this paper, I have argued that illicit employer motive as an element of Section 8(a)(3) expresses a disparate treatment conception of the term "discrimination" in that statute. Specifically, I have argued that the subjective intent standard imposed by the Supreme Court in *American Ship Building* and *Great Dane Trailers* is not merely a "bad thoughts" prohibition, but is, rather, consistent with the disparate treatment conception of "discrimination." Additionally, I have argued that the prevailing distinction between cases involving employer "response" to protected activity and cases in which the central issue is whether employer action is attributable to protected activity or to factually unrelated circumstances is not supportable by reference to a policy favoring free employee choice where that policy is understood either as protecting choice from the discouraging effect of employer action or protecting choice from employer action directed specifically at the choice made. The argument has been that there is impact on choice in both types of cases and that employer action may be directed at goals independent of influencing employee choice in both types of cases. Nevertheless, I propose here to argue that a disparate treatment conception is an inadequate explanation of "response" cases for reasons quite distinct from a policy favoring free employee choice.

The difficulty with the disparate treatment conception is that its application is controlled by one's definition of the reasons that are to count as impermissible — that is, those not "independent" of protected activity. To the extent that independence is a matter of degree under an imprecise definition of the impermissible reasons, the conception is subject to manipulation. The risk of manipulation is illustrated by the Supreme Court's decisions in *American Ship Building*[273] and *Darlington Manufacturing Co.*[274]

A. American Ship Building: *Alternative Function of Motive*

The difficulty presented by *American Ship Building* is that an employer's offensive bargaining lockout is not only caused by,

273. 380 U.S. 300 (1965); *see also* NLRB v. Brown, 380 U.S. 278 (1965).
274. 380 U.S. 263 (1965).

but is directed at protected activity and cannot viably be explained as responsive to business conditions generated by protected activity but independent, hypothetically, from that activity.[275] The same difficulty is presented by *Darlington*, where the Court legitimized a shutdown motivated by employees' pro-union vote. In both instances the Court imposed a subjective intent element as a necessary condition to a violation (in *American Ship*, a non-bargaining purpose to harm[276] and in *Darlington* a purpose to reap future benefit).[277] That imposition is the source of the notion that subjective intent is an element of Section 8(a)(3) distinct from discrimination.[278]

In both cases it is so difficult to hypothesize a similar employer response to conditions not generated by protected activity that disparate treatment seems rather clear. The argument that it was present is avoided in both cases only by defining the employer's motive — in *American Ship Building*, bargaining pressure, and, in *Darlington*, the employer's prerogative to cease operations — as legitimate. In this sense, the cases are analytically the equivalents of *Republic Aviation*, for in that case the invalidity of the employer's no-solicitation rule under 8(a)(1) supplied the necessary "impermissible reason" for employer action.[279]

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275. Meltzer, *supra* note 4, at 99.

276. *American Ship*, 380 U.S. at 313.

277. *Darlington*, 380 U.S. at 275-76.

278. *See* Christensen & Svanoe, *supra* note 4, at 1326.

279. *See* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 680 (1961); Texas Instruments, Inc. v. NLRB, 599 F.2d 1067 (1st Cir. 1979). *American Ship* and *Darlington* may therefore be viewed as the equivalents — albeit on the opposite end of a spectrum on which disparate treatment occupies an ill-defined middle ground — of the inherently destructive branch of *Great Dane*. Substantial confusion exists in the cases with respect to the distinction between the *Great Dane* categories. *See, e.g.*, NLRB v. Lantz, 607 F.2d 290 (9th Cir. 1979) (shutdown and repudiation of collective bargaining agreement where employer claimed economic motive; court applies inherently destructive branch); Los Angeles Marine Hardware Co. v. NLRB, 602 F.2d 1302 (9th Cir. 1979) (runaway shop inherently destructive); Local 155, Int'l Molders and Allied Workers Union v. NLRB, 442 F.2d 742 (D.C. Cir. 1971) (unlawful employer purpose renders its conduct inherently destructive); Borg Warner Corp., 245 N.L.R.B. 513 (1979) (because legitimate employer reasons did not clearly cause its action, action was inherently destructive); Consumers Power Co., 245 N.L.R.B. 183 (1979) (discipline of union steward *for* administering grievance procedure inherently destructive); Wallace Metal Prods., Inc., 244 N.L.R.B. 41 (1979) (refusal to pay accrued benefits to strikers inherently destructive); Laidlaw Corp., 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (no business justification for failure to reinstate and failure was inherently destructive). *Compare* Inland Trucking Co. v. NLRB, 440 F.2d 562 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971) *with* Inter-Collegiate Press v.

One difficulty with the Court's legitimization of employer motives inseparable from protected activity in *American Ship* is that the case has not been an adequate guide to subsequent decisions. We do not know when bargaining pressure will be found legitimate and when illegitimate.[280] An explanation of the problem is that *American Ship Building* was not "really" an 8(a)(3) case: it is "really" an 8(a)(5) case.[281] But that explanation merely presents the unresolved problem of the appropriate subject matter of 8(a)(3).[282]

There is, however, a more fundamental difficulty. My earlier discussion of the relationship between anti-union animus and disparate treatment suggested that the former is a proxy for the latter because it serves both an evidentiary function and as an assurance of the presence of employer interests function.[283] That suggestion is made questionable by *American Ship Building* because the anti-union animus requirement appears to serve, in that case, some distinct fuction. It appears to serve some distinct function because it is clear that a protected activity or status aspect of the factual situation confronting the employer is the motive for an offensive lockout: the lockout in *American Ship Building* was, under the Court's assumption, not merely caused by protected activity, but was directed at protected activity in the form of the union's bargaining demands.

One function clearly served by the Court's definition of "anti-union animus" as distinct from bargaining pressure was preservation of its conclusion that bargaining pressure is legitimate. The Court licensed the "offensive lockout" as a legitimate economic weapon: an employer purpose to use such a weapon in support of its bargaining position was declared lawful; a purpose to use the weapon to discourage protected activity or status was declared unlawful.[284] The distinction between such purposes is,

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NLRB, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

280. *See* NLRB v. Katz, 369 U.S. 736 (1962); Local 155, Int'l Molders and Allied Workers Union v. NLRB, 442 F.2d 742 (D.C. Cir. 1971); Sun Oil Co. 245 N.L.R.B. 59 (1979); Chevron Oil Co., 182 N.L.R.B. 445 (1970), *enforced in part*, 442 F.2d 1067 (5th Cir. 1971); United States Pipe & Foundry Co., 180 N.L.R.B. 325 (1969), *enforced*, 442 F.2d 742 (D.C. Cir. 1971); Schatzki, *The Employer's Unilateral Act — A Per Se Violation — Sometimes*, 44 TEX. L. REV. 470, 502-03 (1966).

281. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 306 n.5 (1965); Oberer, *supra* note 4, at 499. *See also infra* notes 360-96 and accompanying text.

282. *See Section 8(a)(3), supra* note 4, at 756-61; Meltzer, *supra* note 4, at 112-17; Oberer, *supra* note 4, at 494-98.

283. *See supra* notes 154-84 and accompanying text.

284. *American Ship*, 380 U.S. at 313.

arguably, indistinct.[285] Is the distinction also devoid of substance?

The offensive lockout is clearly a response to protected activity and is equally clearly an action not explicable in terms of a business purpose hypothetically independent of protected activity. One may postulate an economic interest in the use of such a weapon as a legitimate "cause" of its use meriting immunity from liability even though the use of the weapon is factually dependent upon a protected activity, but one is merely covering up a determination of legitimacy reached on grounds (specifically, balancing of weapons grounds) quite distinct from any issue of disparate treatment.[286]

There is, however, a counterargument. *American Ship Building's* version of anti-union animus may be viewed as serving a function consistent with disparate treatment despite the difficulty inherent in distinguishing employer conduct directed specifically at protected activity from the definition of disparate treatment earlier formulated here. The view is grounded upon an employer's hypothetical use of an offensive bargaining lockout in combination with permanent replacements.[287] The employer, in such a case, might allege both a legitimate interest in bargaining pressure and a legitimate interest in continuing operations.

One counterargument to the employer's contention is that the employer applying offensive lockout claims too effective an economic weapon. This is an argument about permissible levels of employer response to protected activity inevitably relying upon a balancing of conflicting interests. A second counterargument is that the employer's action does not merely respond to bargaining demands in a manner consistent with a model of legally sanctioned economic warfare, it responds to employee choice of union representation. This is an argument about anti-union animus in the sense that a lockout plus permanent replacements appears directed at employee choice (of union representation) *qua* choice. The employer is, in short, punishing

285. Meltzer, *supra* note 4, at 99.

286. *See* Christensen & Svanoe, *supra* note 4, at 1325-28.

287. The use of temporary replacements, Ottawa Silica Co., 197 N.L.R.B. 449 (1972), *enforced*, 482 F.2d 945 (6th Cir. 1973), is distinguishable on the ground that temporary replacement is consistent with the use of the lockout as a bargaining weapon. *But see* Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126 (5th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

employees for organizing.

By the terms of the argument from anti-union animus, the lockout plus permanent replacements is distinguishable from the *American Ship Building* lockout: the concerted activity in *American Ship Building* did not involve the sort of direct employee participation that is present, for example, in the case of a strike. It involved, rather, indirect (and presumed rather than observed) employee participation in the union's bargaining demands. The *American Ship Building* lockout was directed ultimately, then, at the union's bargaining demands and only instrumentally at employee decision to support those demands. If the lockout plus permanent replacements is viewed as employer action directed at organization, it is an action punishing the employees' decision to organize and is directed primarily (not instrumentally) at that decision. It seeks employer freedom from the employees' decision to support a union not freedom from the particular demands made by a union. If the hypothetical lockout and the *American Ship Building* lockout are distinguishable, the Court's anti-union animus requirement does have substance, because it suggests a distinction between legitimate response to protected activity and illegitimate response to employee choice — a distinction made by reference to distinct employer purposes.[288]

Despite the argument just made for a distinction, the facts remain that the *American Ship Building* lockout was motivated by and directed at protected activity, and that the presumed participation of employees in that activity is a presumption compelled by the logic of the Labor Act.[289] Whether or not one accepts the proposition that there is a difference between a purpose to discourage a union's bargaining demand and a purpose to discourage employee choice of union representation, the lockout is not explicable in terms of a business interest hypothetically distinct from protected activity, and my inability to so explain the lockout necessarily suggests that something is going on in judicial analyses of response cases distinct from the identi-

288. *See American Ship*, 380 U.S. at 312:

[I]t is difficult to understand what tendency to discourage union membership or otherwise discriminate against union members was perceived by the Board. There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union.

289. *See* 29 U.S.C. § 159(a) (1976).

fication of disparate treatment. The Court's observation in *American Ship Building* that although Section 8(a)(3) protects employees from discouragement of participation in protected activity it does not grant freedom "from the sort of economic disadvantage which frequently attends bargaining disputes,"[290] suggests the distinction in purposes argued above, but clearly suggests as well, the presence of a controlling principle distinct from protection of the choice to participate.

B. Darlington: *Illicit Motive or Impact Elsewhere?*

The plant closing in *Darlington* was clearly a response to protected employee conduct and status: it occurred because the employees voted in favor of union representation. "But for" that vote, the plant would have remained open. The Court nevertheless imposed a motive requirement: the employer motive for a partial closing must be to reap a future benefit — that is, to chill unionism — elsewhere.[291] In the case of a complete closing (where the employer goes out of business in preference to dealing with the union) there can be no violation either of 8(a)(1) or of 8(a)(3) because a purpose to reap such a benefit is, by definition, absent.[292]

Thus, the *Darlington* Court required more than responsive employer conduct; it required a rather specific form of illicit motive. The future benefit requirement ensures the presence of an employer's claimed interest in ceasing business operations, and such an interest is an interest distinct from, though clearly dependent upon the protected activity cause of the closing. Is the employer's claimed interest distinct from an interest in punishing employees for the choice they made in voting for union representation? Certainly not from the viewpoint of the employees discharged as a consequence of the closing. And, to the extent that viewpoint is emphasized, *Darlington* is a case in which the employer's prerogative to go out of business "outweighed" employee rights to free choice.[293]

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290. 380 U.S. at 313.

291. *See Darlington*, 380 U.S. at 269-70, 273-75.

292. *Id.* at 273.

293. *See, e.g.*, Christensen & Svanoe, *supra* note 4, at 1307; *Section 8(a)(3)*, *supra* note 4, at 754-55. It has been argued that no one disputed in *Darlington* the right of the employer to go out of business. The issue was whether the employer should compensate the employees for the harm done, and therefore the obligation to compensate should have been imposed. R. Gorman, *supra* note 12, at 146; *Section 8(a)(3)*, *supra* note 4, at

But the Court's "future benefit" rationale is more than a facade. Its substance is revealed if the narrow factual context contemplated by the Court's opinion in *Darlington* is recognized. We are asked by that opinion to assume an employer who prefers closing to recognition and bargaining. Such an employer seems possible in only two contexts: the context in which the employer's operation is so marginal that it cannot bear the anticipated costs of unionization, and the context in which the employer acts from pure "spite."[294] The former context entails a business reason for the closing dependent upon unionization but also hypothetically independent of unionization.[295] The "spite" context, however, appears facially inseparable from unionization, and therefore presents the harder case. I say facially, because the Court did not license mere spite; it licensed spite purchased by the employer with its business.[296] The right to spite was conditioned upon the absence of a benefit to the employer other than the emotional satisfaction derived from spite.

It is quite true that the Court recognized an employer "right" to cease operations, and might therefore be said to have "balanced" interests in the sense that it characterized an interest as legitimate and assigned a weight to it. But it is not necessarily the case that the conditional right to close recognized in *Darlington* was the product of a balancing of employer and

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755. The difficulty with the argument is that it denies the "right." Had the argument been adopted, the employer who closes down in response to a pro-union vote by employees would have a privilege *to not deal with a union* conditioned on its willingness to pay for the privilege by compensating employees for the loss of jobs. *Cf.* Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959) (conditional privilege in tort). That result would not have recognized the "right" recognized by the *Darlington* Court. It is true that the right recognized in *Darlington* was itself conditional — the employer's right to go out of business was conditioned on the absence of a chilling of unionism "benefit" to be reaped by that employer — but the condition is merely an assurance that it is the right to go out of business and not some other claimed right (*e.g.* the claimed right to avoid dealing with a union) that is exercised by the employer.

294. Professor Douglas Leslie is responsible, although not in the context of this article, for suggesting this point to me. He is not responsible, and would apparently disagree, with the use I make of it. *See* D. LESLIE, LABOR LAW 113-14 (1979).

295. *Cf.* NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955) (partial closing). The runaway shop cases, although distinguished from *Darlington* on the ground that the possibility of a future benefit is inherent in that context, 380 U.S. at 273 n.19, illustrate the point that the economic consequences of protected activity, though clearly causally dependent upon that activity, are nevertheless distinguishable from the activity. *See, e.g.*, NLRB v. Lassing, 284 F.2d 781 (6th Cir.), *cert. denied*, 366 U.S. 909 (1960), Co. Ed. Garment Co., 231 N.L.R.B. 848 (1977). *Cf.* NLRB v. Lloyd Wood Coal Co., 585 F.2d 752 (5th Cir. 1978) (sale of business).

296. *See supra* note 293.

employee interests in the sense in which the "right" to use an offensive lockout recognized in *American Ship Building* was the product of a balancing of interests. The employer's interest in the spite case may be viewed as hypothetically independent of protected activity precisely because there is in such a case an absence of future benefit. The absence of future benefit identifiable with an employer's interest in being free from unionization (*Darlington's* "chill unionism elsewhere" requirement) ensures that the "right" claimed by the employer is not a right to be free from protected activity. It is, rather, a right to cease engaging in business.[297] The latter "right" is clearly dependent upon protected activity in the spite case, but it is not so clear that an employer's claimed interest in ceasing operations, whatever the reasons for the claim, is identical to a claimed interest either in freedom from unionism or in punishment of employee choice.[298]

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297. *Id.*

298. My claim that the interests are not identical is supported, I submit, by the following hypothetical involving the question of the meaning of a "strike." Assume a prohibition of employee "participation in a strike" and a sanction, *e.g.*, a criminal sanction, for such "participation." *See* 18 U.S.C. § 1918 (1976) (federal employees). Assume further that a union calls a strike on December 1st and that most employees subject to the prohibition withhold their services from the employer (*i.e.*, fail to report to work). Assume, finally, that the defendant employee, an employee eligible for retirement and a member both of the union calling the strike and of the bargaining unit in issue, permissibly submits his retirement demand on the strike date and (again permissibly under the relevant retirement law) withholds his services from the employer on that date. Has the retiree "participated" in a "strike"?

Let us assume that the retiree admits that his purpose was to aid the union and his fellow employees in the strike. If "participation" is defined as any act of withholding services for the purpose of furthering, supporting or aiding a union's objective of economic coercion, a conviction would appear permissible. One's nervousness (or, at least, my nervousness) about this result is a function of concern that the definition of participation is much too broad and runs risks of catching in its net persons not representative of the evil at which the criminal prohibition is targeted.

If we define participation in the strike, instead, as the withholding of one's services as a participant in the concerted activity of the group, the retiree could not be convicted despite his admission regarding purpose. At least so long as the retirement decision is not unilaterally revocable by the retiree (so long as the pretext argument cannot be credibly made), the act of retirement is fundamentally inconsistent with the notion of group membership even where the retiree retains formal membership in the union and even though the retiree continues to subscribe to the group's objectives. It is inconsistent because both the power and the "evil" of the strike are dependent upon the possibility of the participant's return to work (or, alternatively, the possibility that the group may either legally or by coercion make replacement costly). Absent the possibility of return and the possibility that replacement will be costly, the strike is not a weapon — it has no coercive capacity.

It is true that retirement imposes, as well, the cost of replacement, but that cost is a cost that has been factored, antecedently, into the employer's operational calculations.

The difficulty with my explanation of *Darlington* is that the Court's "future benefit" rule refers to the impact of an employer's partial closing and discharge of employees upon employees elsewhere. Despite the legitimacy of the distinction between an employer's claimed right to go out of business and its claimed right to be free of protected activity, it is undeniable that the employees actually discharged were discharged "because of" their choice.[299] Freedom of choice is precisely what Section 8(a)(3) under a disparate treatment conception protects.[300] To the extent, then, that the future benefit requirement is viewed as preserving the interests of employees other than those actually discharged as the consequence of a closing,[301] it expresses a view of 8(a)(3) consistent with an impact standard[302] and therefore consistent with the view that *Darlington* was in fact a case in which the language of motive was employed as a disguise for a balancing analysis.[303] Moreover, if the "chill elsewhere" requirement is viewed as having independent substantive significance beyond ensuring the character of the employer's claimed interest, it is a requirement that protects a class of employees distinct from the class of employees whose exercise of the right to choice was penalized. The implication of that observation is that it was not freedom of choice that was the object of protection in *Darlington*. Rather, some other interest was protected, and some premise quite distinct from freedom of choice was of controlling importance in the *Darlington* decision.

The strike presents new and uncalculated costs distinct from replacement of retiree costs, and the act of retirement does not, then, produce the cost that the strike ban seeks to preclude. Because retirement is inconsistent with the possibility of return and is inconsistent with the cost of replacement the prohibition seeks to avoid, the retiree's subjective intent is immaterial. In short, the union's (and retiree's) illicit interest in economic coercion is not, despite the retiree's illicit intent, the interest asserted or furthered by the act of retirement.

299. *See* Christensen & Svanoe, *supra* note 4, at 1308 ("The case . . . would appear to be a classic situation in which both the motive and effect of discouragement were incontestably present."); Summers, *supra* note 4, at 63-66.

300. *See infra* notes 344-59 and accompanying text.

301. That is, to the extent that the alternative function I have postulated — identification of the nature of the employer's claim — is rejected.

302. *See* R. GORMAN, *supra* note 12, at 146; D. LESLIE, CASES AND MATERIALS ON LABOR LAW 197 (1978) (hypothesizing an argument to the effect that *Darlington* is consistent with *Republic Aviation*). By the terms of this view, the criticism of *Darlington* should be understood not as criticism of the approach, but as criticism of the weights the Court assigned competing interests.

303. The most thorough statement of the latter view is found in Christensen & Svanoe, *supra* note 4, at 1327.

C. *Further Examples of Balancing In Fact:* Republic *and* Fleetwood

That both *Darlington* and *American Ship Building* appear to involve principles distinct from disparate treatment suggests the reason for the attractiveness of a balancing approach: such an approach avoids the potential for sophistry present when an employer claims "legitimate causes" for its conduct undeniably dependent upon protected activity causes, and when motive is used to accommodate the interests implicit in such a claim. Moreover, the causal dependence of legitimate employer interests upon protected activity generates a risk of sophistry in contexts in which it is the employee's interest rather than the employer's interest that is successfully defended. That point is illustrated by *Republic Aviation* when one attempts to explain the 8(a)(3) result in that case by claiming that the invalidity of the employer's no-solicitation rule supplied the "impermissible reason as necessary condition" element.[304] The impermissibility in *Republic* was the product of a Section 8(a)(1) balancing analysis directed at the issue of solicitation. Section 8(a)(3) discrimination was in *Republic* a matter of the impact of union-neutral employer action upon employee participation in protected activity — a form of discrimination necessitating an impartiality obligation substantially broader than merely refraining from action motivated by the protected nature of employee status or conduct.

The point is illustrated, as well, by the problem of the reinstatement rights of economic strikers. In *Fleetwood Trailers*[305] the employer's failure to reinstate was treated under *Great Dane* analysis[306] as action responsive to protected activity that the employer had failed to justify by evidence of legitimate business reasons. To suggest that an impermissible reason for the employer's action was therefore found to have been a necessary condition to that action is to ignore the fact that an affirmative duty to reinstate was imposed on the employer, again as a matter of balancing of interests.[307] The Court's analysis in *Fleet-*

304. *See* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 680 (1961) (Harlan, J., concurring).

305. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

306. The issue in *Fleetwood* was framed as whether the employer had a legitimate business reason for its failure to reinstate. 389 U.S. at 378. The "balance" expressed by the case may be viewed as one reached by Congress. *Id.* at 283 (Harlan, J., concurring).

307. *See* Laidlaw Corp., 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir.

wood, although framed as a *Great Dane* analysis, was clearly premised upon a concern with the efficacy of the strike as an economic weapon — a premise again quite distinct from a concern with free employee choice.[308]

American Ship, Darlington, Republic and *Fleetwood* have been used here only as examples. The two problems they present for a disparate treatment conception are involved to some degree in many contexts in which 8(a)(3) is applied.[309] First,

1969), *cert. denied*, 397 U.S. 920 (1970). *See also* NLRB v. Transport Co. of Tex., 438 F.2d 258 (5th Cir. 1971); American Mach. Corp. v. NLRB, 424 F.2d 1321 (5th Cir. 1970); Brooks Research & Mfg., Inc., 202 N.L.R.B. 634 (1973); Aero-Motive Mfg. Co., 195 N.L.R.B. 790 (1972), *enforced*, 475 F.2d 27 (6th Cir. 1973) (8(a)(1)).

308. In *Fleetwood* the employer, as a consequence of a decline in business, did not have available openings on the date particular strikers applied for reinstatement. Some months later, such openings were available, but the employer filled the openings with non-strikers. The Court's conclusion that the employer violated 8(a)(3) was purportedly grounded on the employer's failure to produce evidence of a "legitimate and *substantial*" justification for the failure to reinstate. 389 U.S. at 380 (emphasis supplied). There is, of course, an entirely plausible justification: the administrative burden of prolonged maintenance of reinstatement listings. *See* Brooks Research & Mfg., Inc., 202 N.L.R.B. 634 (1973).

What *Fleetwood* does is impose an affirmative obligation to maintain such a listing, a result warranted by statutory command independent of 8(a)(3). 29 U.S.C. § 152(3) (1976). But the affirmative obligation finds its proper rationale in the rationale underlying the rehiring preference for strikers: without that preference, the strike would lose much of its attraction as a weapon, and avoiding the *impact* of an employer refusal to reinstate upon the individual employee's decision to participate in a strike is therefore necessary as the *means* of preserving the *union's* "right" to that weapon.

309. There are a number of additional examples of the problem: when an employer disciplines a union steward for engaging in a strike in breach of a no-strike clause and fails to discipline other strikers, the discipline is "caused by" the union status of the steward. This is disparate treatment if the employer's obligation is to refrain from a "response" to union status and is not disparate treatment if the employer need only refrain from intending discouragement and can assert the greater contractual responsibilities of the steward. *Compare* Indiana-Michigan Elec. Co. v. NLRB, 599 F.2d 277 (7th Cir. 1979), NLRB v. Armour-Dial, Inc., 638 F.2d 51 (8th Cir. 1981) *and* Gould, Inc., 612 F.2d 728 (3d Cir. 1979), *cert denied*, 447 U.S. 921 (1980) *with* C.H. Heist Corp. v. NLRB, 657 F.2d 178 (7th Cir. 1981). The difficulty may be resolved by defining precisely what the union steward's implicit "contractual" duties may be, American Bakeries Co., Inc., 249 N.L.R.B. 1249 (1980); *cf.* Carbon Fuel Co. v. UMW, 444 U.S. 212 (1980) (§ 301, Taft Hartley), but such a resolution is really a backhanded way of defining the employer's permissible view of what those duties are.

A similar difficulty is presented by super-seniority for union stewards. Some forms of super-seniority are permissible on the ground that they are necessary for effective contract administration and other forms are impermissible because not limited to that "permissible" purpose. *See* Dairylea Corp., 219 N.L.R.B. 656 (1975), *enforced sub nom.* NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162 (2d Cir. 1976). There is disparate treatment in any super-seniority grant if one assumes an impartiality obligation precluding "response"; there is none if one assumes the legitimacy of the employer's (and union's) interest in contract stability. *See* Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521 (1949); NLRB v. American Can Co., 108 L.R.R.M.

what is the nature and scope of the employer's impartiality obligation: what reasons are to count as impermissible reasons; what intent is to count as illicit intent? Treatment is disparate or not disparate only by reference to the scope of that obligation.[310] Second, if, as is indicated by the discussion here of *Darlington*, some premise distinct from employee freedom of choice animates judicial decision, what is that premise and what is its relationship to the policy of free employee choice and to the impartiality obligation that protects that choice?

V. THE CONCEPTION REASSEMBLED: THE EMPLOYER'S IMPARTIALITY OBLIGATION

A. *The Policy Justification for a Narrow Obligation*

The preceding discussion suggests, at a minimum, that a disparate treatment conception cannot be applied mechanically. Its viability is dependent upon judgment informed by the policies that invoke it. The policy that justifies a disparate treatment approach is protection of employer interests from regulatory intrusion. The policy that cautions against a mechanistic application of the approach is legal protection of union activity or status threatened by mechanistic application. Does this mean that "balancing" is necessarily inevitable and that the disparate treatment approach is a sham?

In response to that question I first wish to emphasize the obvious point that the decision to adopt a disparate treatment approach either generally or in a specific case is itself a decision

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2192 (10th Cir. 1981).

The difficulty is present, again, where an employer grants benefits to unorganized employees and fails to grant such benefits to unionized employees. It is said that there is no disparate treatment in such a case because the "discrimination" is on the basis of bargaining unit rather than union status. *See* Meredith Corp., 194 N.L.R.B. 588 (1971). There is, however, "cause" and "response." *See* South Shore Hosp. v. NLRB, 630 F.2d 40, 45-46 (1st Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). The justification for the result is the intervening 8(a)(5) bargaining obligation imposed on the employer. *See* B.F. Goodrich Co., 195 N.L.R.B. 914 (1972); Chevron Oil Co., 182 N.L.R.B. 445 (1970), *enforced in part*, 442 F.2d 1067 (5th Cir. 1971); Shell Oil Co., Inc., 77 N.L.R.B. 1306 (1948).

The distinction between a response and non-response case does not resolve the problem of definition because that problem is equally present in both types of cases. It is merely avoided in those cases in which the employer presents no defense to the "factual" conclusion that its conduct was a response to protected activity. *See supra* notes 239-65 and accompanying text.

310. *Compare* South Shore Hosp. v. NLRB, 630 F.2d 40, 45-46 (1st Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) *with* Chevron Oil Co. v. NLRB, 442 F.2d 1067, 1074 (5th Cir. 1971). *See supra* notes 153-63 and accompanying text.

reached through balancing. The balance struck by that decision is, however, a balance favoring employer interests. The interests favored are two: the employer's operational interests granted immunity by the approach; and, the employer's interest in freedom from regulatory analysis of the weight to be assigned those operational interests. It is important that those interests be recognized as distinct. The latter interest is not an interest in continuing to pursue the operational policy the employer adopts; that interest could be accommodated either absolutely (by immunity)[311] or partially (by balancing).[312] Nor is the interest merely an interest in predictability, although it is partially so.[313] The latter interest, rather, is an interest in freedom from analysis — a form of liberty interest. It is an interest possibly grounded upon an ideological notion about the appropriate role of government, but is in any event reflected in the notion, sometimes expressed[314] and sometimes ignored,[315] that the Board's authority to examine an employer's operational interests is to be exercised for the purpose of ensuring the presence of such interests and not for the purpose of valuing such interests.[316] To put it another way, it is the free-market notion that the actor's assessment of economic value is the preferable measure of value.[317] That is the reason why a characterization of the legitimacy of an employer's interest under a disparate treatment approach cannot be controlled by the Board's assessment of the degree of its legitimacy or importance, even if it may be impossible to preclude consideration of these matters as evidence.[318] Further, it is why the hypothetical question is so useful as an analytical technique. The hypothetical question does not ask

311. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1956).

312. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

313. *Cf.* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674-80 (1981) (subjects of bargaining).

314. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 39 (1967) (Harlan, J., dissenting).

315. *See Economic Pressure, supra* note 4, at 1202.

316. *See supra* notes 182-84 and accompanying text.

317. I am not suggesting that the employer's assessment of the value of unions is to control. My point, rather, is that the Board's assessment of the strength of or weight to be assigned an employer interest found actually to be present in a case is a mode of decision inconsistent with the notion stated in the text.

318. *See, e.g.*, Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363 (3d Cir. 1978); NLRB v. Florida Medical Center, Inc., 576 F.2d 666 (5th Cir. 1978); Mueller Brass Co. v. NLRB, 544 F.2d 815, 819 (5th Cir. 1977); Alexander Linn Hosp. Ass'n, 244 N.L.R.B. 387 (1979).

whether the employer's perception of its interest is warranted; it asks only whether the perception occurred.[319] The employer's interest in freedom from analysis, assuming we wish to recognize it, is an interest that cannot be accommodated by balancing in individual cases because a balancing technique is itself a form of denial of that interest.

The question remains, however, whether balancing is nevertheless inevitable. I think that it is, in degree, but that there is a significant difference in the degree of intrusion upon the employer's interest imposed by a disparate treatment approach and by an approach that frankly recognizes that it is balancing countervailing interests. First, balancing is inevitable in the sense that the degree to which an employer's operational interest is dependent upon the fact that the interest arose from the occurrence of protected activity is a judgment not susceptible to a precise solution in causal terms.[320] At some point dependence, as *American Ship* and *Darlington* illustrate, becomes identity. Second, it is inevitable in the sense that disparate treatment is merely a test by which a policy regulatory restraint is expressed. As *American Ship* and *Darlington* also illustrate, balancing cannot be permitted to preclude consideration of countervailing policies where they are relevant.[321] Finally, balancing is inevitable because the employer immunity policy expressed by the approach, cannot be permitted as the inherently destructive branch of *Great Dane* illustrates, to so overwhelm competing policies as to render them impotent. A judgmental evaluation of facts and of the interests and policies implicated by those facts is, in short, essential.[322]

Does a judgmental evaluation mean that the approach is a facade? I think it does not, for the conceptual structure of the approach imposes a discipline that cannot be dismissed as mere sham. Even if that dismissal was warranted, however, the dismissal is no ground for the complaint that balancing of interests is a preferred mode of analysis. That complaint is partially the

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319. *See supra* notes 182-84 and accompanying text.

320. *See supra* notes 273-310 and accompanying text.

321. *See infra* notes 360-96 and accompanying text.

322. *Cf.* R. KEETON, *supra* note 242, at 49 (judgmental evaluation of cause); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1032 (1978) (difficulties of proof); Miller, *If "The Devil Himself Knows Not the Mind of Man," How Possibly Can Judges Know the Mind of Legislators?* 15 SAN DIEGO L. REV. 1167 (1978) (criticizing motive analysis); Probert, *Causation in the Negligence Jargon: A Plea for Balanced Realism*, 18 U. FLA. L. REV. 369, 374-79 (1965) (flexibility inherent in the "syntax" of cause).

realist's complaint about judicial self-delusion,[323] but the complaint is also a complaint that disparate treatment is too confining.[324] The complaint suffers, I submit, from the standard realist error: the notion that decision maker's discretion is "what is" too readily becomes the notion that that discretion is what "should be."

The advantage of balancing the adverse effect of an employer decision and the employer's legitimate interests is that it purports to express what occurs in fact. Its disadvantage is that it is notoriously open-ended:[325] there are no standards for assigning weights to competing interests.[326] That disadvantage has three consequences: predictability of result is impaired;[327] the judicial or administrative decision maker's discretion, and therefore, value orientation becomes unlimited and something of a self-fulfilling prophecy;[328] and the employer's interests are so subjected to regulatory second-guessing that, assuming at least some risk-aversion, they become either substantially discounted in the employer's calculations[329] or justification for limiting regulation by limiting remedy.[330]

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323. *See* Christensen & Svanoe, *supra* note 4, at 1325-28.

324. *See Section 8(a)(3), supra* note 4, at 750.

325. *See* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963). *See also, e.g.*, Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961). I am not contending that the concerns material in the constitutional context are equally concerns here. I am contending that the tendency toward ad hoc judgment and the absence of meaningful scales implicit in a "balancing formula" are present here. *Compare* Fried, *supra*, 763-70 (Fried's notion of "competencies") *with* Brousseau, *Toward a Theory of Rights in the Employment Relation*, 56 WASH. L. REV. 1, 43 n.189 (1980) (balancing *in concreto or in abstracto* under 8(a)(3)).

326. The Board's notorious tendency to change course — particularly following changes in the occupant of the White House — illustrates the point.

327. *See supra* notes 231-38 and accompanying text. *Cf.* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674-80 (1981) (subjects of bargaining). This risk is reflected in the rather substantial difficulty in distinguishing cases on grounds of the effect or impact of employer actions where there is in fact no principled or empirical ground for the differences in assessment. *Compare* Mackay Radio & Tel. Co. v. NLRB, 304 U.S. 333 (1938) *with* Erie Resistor Corp. v. NLRB, 373 U.S. 221 (1963).

328. *See* authorities cited *supra* note 316.

329. The evil here is not mere uncertainty as such, it is the loss of the interests furthered by the employer conduct "deterred" by uncertainty. *Cf.* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 683 (1981) ("Labeling this type of decision mandatory *could* afford a union a powerful tool for achieving delay, a power that *might* be used in a manner unrelated to any feasible solution the union *might* propose." (emphasis supplied)).

330. *See supra* note 74.

These disadvantages have some parallels in the constitutional arena. The difficulty there is the nondemocratic character of judicial review and the need for confining that review so as to preclude unwarranted intrusion into decisions by the political branches of government.[331] In the equal protection context — the constitutional context providing the closest analog to 8(a)(3) — the problem perceived by the Supreme Court is that an impact standard is too intrusive.[332] Therefore, it has insisted upon a motivation standard,[333] and upon the sine qua non test of the validity of governmental decision[334] borrowed by the Board in *Wright Line*.[335] The impact standard rejected by the Court for equal protection purposes may be viewed as analogous to the balancing test rejected for at least some purposes by the Court in insisting upon anti-union animus for 8(a)(3) purposes. Moreover, the reasons for rejecting that standard may be viewed as analogous.

One such reason is the notion that the process of political decision should not be "tainted" by an improper consideration (such as race) either because such a consideration is an evil in itself[336] or because such a consideration is dysfunctional to the process.[337] I have, of course, here rejected the first of these reasons as an explanation of motive analysis under 8(a)(3).[338] The second reason might be argued to be present in the 8(a)(3) context: if one assumes that the employer (in somewhat the same

331. *See generally*, J. ELY, DEMOCRACY AND DISTRUST (1980).

332. Personnel Director of Mass. V. Feeney, 442 U.S. 256 (1979); Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

There is, however, a substantial distinction between the analysis employed in dealing with an equal protection issue and the analysis suggested for 8(a)(3) purposes. At least in the case of "suspect" (*e.g.*, racial) classifications, the disparate treatment prohibition of the equal protection clause would not, until relatively recently, permit a governmental "response" to race on the ground of a government interest hypothetically distinct from race as such. *See* Loving v. Virginia, 388 U.S. 1 (1967). *But see* Korematsu v. United States, 323 U.S. 214 (1944). "Disparate treatment" under the equal protection conception would, then, find its closest analog for the present context in discrimination as "cause." Indeed, recent relaxation of the prohibition is framed in terms of rebuttal by proof of substantial interest rather than in terms of a denial of the presence of "discrimination." *See* Fullilove v. Klutznick, 448 U.S. 448 (1980). *See also supra* note 114.

333. Washington v. Davis, 426 U.S. 229 (1976).

334. Village of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 270 n.21 (1977).

335. Wright Line, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

336. A. BICKEL, THE MORALITY OF CONSENT 133 (1975).

337. J. ELY, *supra* note 331, at 103.

338. *See supra* notes 148-84 and accompanying text.

manner as a legislature) must consider the interests of all of its "constituencies," and that employees constitute such a constituency,[339] an employer's distaste for unionism is a breach of its obligation. But that argument won't wash; the Act imposes no such obligation. It imposes, rather, both an obligation to respect an adversary relationship and an obligation to respect an employee's freedom of choice — obligations that, to the extent that they are reflected in a disparate treatment conception, are obligations to refrain from acting for reasons of the protected nature of employee activity or status.[340]

A second way of viewing the Court's rejection of impact as a constitutional standard is, however, its tendency to grant greater judicial license to intrude upon democratic decision that is permitted by a limited view of the legitimacy of the institution of judicial review.[341] I am not making the absurd contention that employer decisions are "democratic" or that democracy is a justification for limited regulatory authority. I am contending that the underlying policy basis for an insistence upon disparate treatment is institutional in the sense that it limits institutional authority and therefore expresses the value of freedom from analysis. A rejection of a Board authority to balance interests is therefore grounded upon the tendency of balancing to grant greater administrative license to intrude upon employer decisions than is permitted by a limited view of the Board's role. I am also contending that such an insistence upon disparate treatment can in at least some measure limit that authority by imposing a mode of regulatory thought that, if applied with discipline, precludes in degree the open-ended dangers inherent in a balancing of interests approach.[342] The freedom from analysis value is justified in the context of judicial review by democratic theory. The freedom from analysis value in the present context is justified only if one concludes that Congress intended that such a value be recognized[343] or, given the ambiguity of that

339. *See, e.g.*, Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1156 (1932); Ratner, *The Government of Corporations: Critical Reflections on the Role of "One Share One Vote,"* 56 CORNELL L. REV. 1 (1970).

340. *See* cases cited *supra*, note 318.

341. *See* J. ELY, *supra* note 331, at 156-57; Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 982-83 (1978).

342. *See* Oberer, *supra* note 4, at 498-99 (motive as legitimately limiting the Board's authority).

343. *See* S. REP. No. 573, 74th Cong. 1st Sess. 11 (1935):

Of course nothing in the bill prevents an employer from discharging a man for

intent, if one concludes that it is a general value (derived, presumably, from history or from one's preference for something similar to the free-market) Congress did not intend to abrogate. That Congress intended to preserve this freedom from regulatory intrusion is suggested, I think, by the narrow nature of the employee interest protected by Section 8(a)(3).

B. *The Nature of the Interests Protected by a Narrow Impartiality Obligation*

Congress sought, by enacting Section 8(a)(3), to insulate an employee's job from his organizational rights,[344] but that characterization may be viewed either as insulating "free employee choice" from the discouraging impact of employer actions,[345] or as insulating "free employee choice" from employer action founded upon the employee choice made.[346] A determination of which of those alternatives is the appropriate understanding of the statute is both complicated and informed by additional Congressional objectives in the statutory scheme as a whole. One of those additional objectives was to foster collective bargaining through the legal recognition and protection of collective interests exclusively represented.[347] But another was to leave the success or failure of both collective proposals and collective action

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> incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self-organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work.

Cf. 29 U.S.C. § 160(c) (1976) (limiting Board's remedial authority in discharge cases where discharge is "for cause").

344. "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus, Sections 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or to abstain from joining any union without imperiling their livelihood." Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954). *See Section 8(a)(3), supra* note 4, at 735.

345. *See* Christensen & Svanoe, *supra* note 4, at 1315-17; *Section 8(a)(3), supra* note 4, at 750.

346. *See* Meltzer, *The Lockout Cases, supra* note 4, at 91.

347. 29 U.S.C. § 159 (1976). That the Act protects in substantial degree a union's efforts to organize employees is apparent from the use of Section 8(a)(1) to preclude employer interference with those efforts. *See supra* notes 53-74 and accompanying text. That the Act also provides some measure of protection to a union's use of economic power to further collective interests is apparent from the Court's use of Sections 8(a)(1) and (3) at the collective bargaining stage of the relationship between union and employer. *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

in support of those proposals to be worked out by the disputing parties, by means including resort to economic warfare.[348] There is of course a tension between these additional objectives, for protection afforded collective action is *pro tanto* interference with the freedom granted to engage in economic warfare. But there is also tension between these additional objectives and the original insulation objective. The confusion in the law of Section 8(a)(3) is, it is submitted, traceable to the notion that the insulation objective is part and parcel of the tension between the policy granting legal protection to the organization of collective interests and the countervailing policy favoring free collective bargaining. The problem of insulation of employee jobs — the protection of employee choice — is not a problem resolvable by the process of accommodating those policies, because insulation presents an issue distinct from that accommodation.[349]

Whatever the weight assigned to a policy of protecting the organization of collective interests, it has never been the case that employee organizational success is guaranteed by the statute. It is, rather, the opportunity for success that is guaranteed.[350] Success cannot be guaranteed consistently with insulation of organizational rights because such a guarantee denies free choice.[351] The opportunity for success guaranteed by the statutory scheme is, at the organizational stage, the union's opportunity to appeal to the exercise of employee choice; at the collective bargaining stage, it is the union's opportunity to exercise collective power in furtherance of collective interests. At both stages, the opportunities are threatened by the impact of employer action upon employee choice, because employer action

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348. American Ship Bldg. v. NLRB, 380 U.S. 300 (1965); NLRB v. Insurance Agents Int'l Union, 361 U.S. 375 (1960). Moreover, the substantive terms of the employment relationship — the private accommodation of interests to be reached by the parties — is not a permissible subject of regulation. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). *But see* NLRB v. Wooster Div., Borg Warner Corp., 356 U.S. 342 (1958).

349. *See* Brousseau, *supra* note 325, at 40-43.

350. Section 8(a)(1) is clearly concerned with impact as such. *See* NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964). But that concern does not mean that union success is 8(a)(1)'s objective. The statute precludes "interference"; it does not mandate nurturing. 8(a)(1)'s objective is to ensure the opportunity for success and is therefore concerned with the right of a collective body (the union) to that opportunity. The distinction between 8(a)(1) and 8(a)(3) may therefore be viewed as the distinction between a group's opportunity right and the individual's right to choice.

351. *See* 29 U.S.C. § 157 (1976): "Employees shall have the right [to form, join, assist and engage in other concerted activities] and shall also have the right to refrain from any or all of such activities. . . ."

that has the effect of discouraging a choice exercised in favor of organization or in favor of collective power limits the opportunity for the success of the collective. But, to the extent that it is the collective's opportunity that is at stake, protection of "choice" is derivative. The protection is provided for the instrumental reason that it is the sole means available, short of insuring success, for preserving opportunity.[352]

Section 8(a)(3)'s insulation of jobs from "organizational rights" is, it is submitted, not an insulation for instrumental or derivative reasons. It is, rather, expressive of that aspect of the Labor Act which provides primary protection of employee choice.[353] As so understood, the obligation imposed upon an employer by 8(a)(3) is only that it may not act with respect to employee choice; it is free to act for reasons independent of the choice, *qua* choice.

A disparate treatment conception expresses that obligation. The risk that conception imposes is the risk of a union's failure to achieve its institutional goals, a failure from which the employer may even derive pleasure and benefit. A part of that risk is that an employer action not grounded upon employee choice *qua* choice will nevertheless have an adverse impact upon employee choice in general. That risk is, however, the risk that employees will be influenced by an employer decision directed at business objectives independent of the choice. The concern with impact expressed by a standard that balances employer interests and adverse impact is inevitably a concern with the success of organization and with the substantive terms of employment

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352. This assertion is inconsistent with the language the Court employs in many of its opinions, for that language suggests that it is the individual's right of participation that is at stake. *See, e.g.*, American Ship Bldg. v. NLRB, 380 U.S. 300, 312-13 (1965). But the Court has occasionally "slipped" into using language more accurately describing the appropriate analysis. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 231 (1963): "We think the Board was entitled to treat this case as involving conduct which carried its own indicia of intent and which is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of *union* rights." (emphasis supplied). *See also* NLRB v. Rubatex Corp., 601 F.2d 147 (4th Cir. 1979), *cert. denied*, 444 U.S. 928 (1980); American Mach. Corp. v. NLRB, 525 F.2d 1321 (5th Cir. 1970); Borg Warner Corp., 245 N.L.R.B. 513 (1979); Aero-Motive Mfg. Co., 195 N.L.R.B. 790 (1970), *enforced*, 475 F.2d 27 (6th Cir. 1973).

353. Congress, in enacting Section 8(a)(3) had primarily in mind the "yellow dog contract" and the blacklist — devices rather clearly directly interfering with individual choice. *See, e.g., Hearings on H.R. 6288 Before the House Committee on Labor*, 74th Cong. 1st Sess. 13-14 (1935) (Remarks of Sen. Wagner); H.R. REP. No. 972, 74th Cong., 1st Sess. 17 (1935); S. REP. No. 573, 74th Cong., 1st Sess. 11 (1935).

because it is a standard directed at the risk of impact.[354] Such a balancing scheme imposes substantive regulation because it imposes an obligation to consider employee interests independent of free choice. Those interests must be considered under such a standard because the harm to them generated by an action directed to objectives independent of free choice influence that choice.[355] A standard concerned with impact risks precisely the evil suggested by the argument that a less rigorous standard than *sine qua non* motive places a union adherent in a favored position:[356] the sole matter insulated by Section 8(a)(3) is employee choice; the section does not insulate from even arbitrary employer action other employee interests.[357]

The source of the employer's "liberty" interest in pursuing action not directed at employee choice turns out, then, to be the limited nature of the employee right to choice granted by Section 8(a)(3). Although my claim that the right is so limited is supported by only some[358] of the many confused strands of Section 8(a)(3) case law,[359] it is a claim consistent with the conflicting strands of doctrine if they are viewed not as a part of Section 8(a)(3) jurisprudence, but as finding their source in quite distinct policy premises. The remaining problem is to examine the relationship between the right to choice and these premises.

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354. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32 (1967): "The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity."

355. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963): "Whatever the claimed overriding justification may be, [the employer's action] carries with it unavoidable consequences which the employer not only foresaw but which he must have intended."

356. NLRB v. Wright Line, 662 F.2d 899, 902 (1st Cir. 1981), *enforced*, 662 F.2d 899 (1st Cir. 1981). *Cf.* Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977) ("A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.")

357. *See, e.g.*, United States Postal Serv., 245 N.L.R.B. 901 (1979) (harsh and callous treatment insufficient); Summitville Title, Inc., 245 N.L.R.B. 863 (1979) (ALJ cannot second guess business judgment); J.S. Albericci Constr. Co., 231 N.L.R.B. 1030 (1977) (purpose of avoiding Title VII consent decree insufficient).

358. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961).

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

VI. The Relationship Between a Policy of Free Employee Choice and Policies Protecting Group Action

The distinction between a policy of free employee choice on the one hand and the conflicting policies of protection of organization and non-interference with economic conflict on the other, is the distinction between a collective or "group" right and an individual right.[360] Professor Brousseau has recently made this point: Section 8(a)(3) protects the individual "participatory" rights of employees;[361] cases involving employer response to protected activity entail issues of "intercollective adjustments" of power between groups[362] — that is, accommodations of group "rights." For Professor Brousseau, the response case presents a Section 8(a)(1), not 8(a)(3), problem.[363]

The difficulty is in defining the scope of an employee's participatory right, for, as Professor Brousseau recognizes,[364] adjustments of group rights implicate individual interests.[365] Although Brousseau is apparently confident that cases controlled by individual rights and cases controlled by group rights may be distinguished, there is nonetheless a substantial problem in separating the two categories of cases. Moreover, Professor Brousseau's distinction is quite similar, albeit made on distinct grounds, to Professor Getman's distinction between the response and nonresponse cases rejected here in an earlier section.[366]

Why, then, have I suggested that the collective rights/group rights dichotomy is a viable explanation? There are three strands of my argument consistent with that explanation: 8(a)(3)

360. *See* Fullilove v. Klutznick, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting). *See generally* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Rutherglenn, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199 (1979); Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979). For earlier discussions of the group rights notion, see Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432 (1959); Cowan, *Group Interest*, 44 VA. L. REV. 331 (1958).

361. Brousseau, *supra* note 325, at 40 (1980). *Cf.* Machan, *Some Philosophical Aspects of National Labor Policy*, 4 HARV. J.L. & PUB. POL'Y 67, 113-29 (1981) (conflict between individualism and collectivist utilitarianism, with emphasis upon the latter, in labor law).

362. Brousseau, *supra* note 325.

363. *Id.* at 42. *Cf.* Meltzer, *supra* note 4, at 116-17 (8(a)(3) should govern issues of denials of jobs and 8(a)(1) other issues).

364. Brousseau, *supra* note 325, at 43. *But see id.* at 40.

365. *See Section 8(a)(3)*, *supra* note 4, at 754 (criticizing *Darlington*).

366. *See supra* notes 185-265 and accompanying text.

protects a narrow employee interest in "free choice" and does not protect other employee interests; a disparate treatment conception expresses the very limited nature of that protection; and an adverse impact (balancing approach) standard protects a much broader range of interests by insuring in some measure the opportunity for successful employee organization. These strands are consistent with the explanation because free choice is preeminently an individual right,[367] disparate treatment is a conceptual scheme designed to protect individuals,[368] and an adverse impact or effect standard is a conceptual scheme designed to protect group interests.[369]

The explanation of the inherently destructive conduct branch of *Great Dane* is therefore that it is not directed at the protection of individual rights; it is directed, rather, at the preservation (in at least some measure) of the continuing ability of collectivities labeled "unions" to engage in future economic conflict. The explanation of the middle ground between *Republic* and *American Ship Building* occupied by disparate treatment is that it is directed only at the preservation of individual employee rights to choice. The explanation of *Republic, American Ship* and *Fleetwood* is that each represents an accommodation of group rights and power.[370] The relevant distinction is not between response and non-response cases, but rather between the nature of the employee interests at stake.

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367. *See* Brousseau, *supra* note 325, at 26.

368. *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978); McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 281-82 (1976). *See generally* Van Alstyne, *supra* note 110.

369. *See* authorities cited *supra* note 360.

370. Professor Brousseau suggests that there may be a distinction between a balancing of power "*in concreto*, that is between the parties to the case, or *in abstracto*, between management and unions generally." Brousseau, *supra* note 325 at 43 n.189. To the extent that the Supreme Court lays down general rules, the cases used as examples in the text entailed balancing "*in abstracto*." The Supreme Court's assertion that the Board lacks authority to balance, *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965), is an assertion that the Board's patently obvious authority to balance is nevertheless limited by its proper rule. Brousseau's distinction nevertheless has some parallel in the distinction between an analysis focused upon a hypothetical reasonable employer's interests and an analysis focused upon *this* employer's interests. *See supra* notes 172-84 and accompanying text. Indeed, balancing "*in concreto*" would seem to constitute a per se overstepping of the boundaries of the Board's role. *But see* Haggard, *supra* note 70, at 92-93 (Board improperly balances concrete employer interests rather than presumptive employer interests in picket line cases). The concrete question is, in short, the 8(a)(3) discrimination question. The "*in abstracto*" (or presumptive employer interest) question is the 8(a)(1) or 8(a)(5) question.

Does this nevertheless mean that there is in fact an important distinction between the typical discharge (non-response) case and the response case? I earlier argued that the distinction was immaterial where both types of cases are viewed as implicating the notion of free employee choice. I have here agreed with Professor Brousseau that Section 8(a)(3) should be viewed as limited in purpose to preserving individual rights to choice and that Sections 8(a)(1) and 8(a)(5) should be viewed as the appropriate sources of authority for accommodating collective interests. On these premises, the impact of an employer action motivated by permissible reasons is not a material consideration under 8(a)(3) because the employer's impartiality obligation is limited to the duty to refrain from decision founded upon employee choice *qua* choice. The response and non-response cases both invoke that obligation to the extent that they invoke, as well, an employer obligation to refrain from conduct having an impact that threatens collective rights to survival or to the opportunity for success, those collective rights, as *Burnup & Sims* illustrates, are implicated in both types of cases. The distinction between the response and the non-response case is, on this rationale, viable as an empirical generalization — the group rights issue is arguably more likely to arise in a response than in a non-response case — but it is not an adequate explanation of reasons for the apparently inconsistent behavior of the courts in this context unless the distinct nature of group and individual claims is recognized.

The mere recognition that group and individual claims are distinct does not resolve the problem of defining the boundaries between such claims. One means of explaining those boundaries is to suggest that *NLRB v. Burnup & Sims, Inc.*[371] was, on a collective rights/individual rights rationale, correctly decided. There an individual right to choice was not invaded by the employer because the employer was not motivated by impermissible reasons for its discharge of the employee.[372] The collectivity's right to an opportunity for success was, however, threatened by the impact of the employee's discharge.[373] The employer therefore did not violate 8(a)(3), but did violate 8(a)(1).[374] The typically perceived difficulty with *Burnup &*

371. 379 U.S. 21 (1964).

372. *See supra* notes 101-03 and accompanying text.

373. 379 U.S. at 23.

374. *Id.*

Sims — that it rendered 8(a)(3) a dead letter by making an 8(a)(1) balancing analysis a freely available substitute for disparate treatment[375]—is not, on this theory obviated, but it is diminished. The reasons for protection of the collectivity must in a given case be both present and, on balance, controlling. If they are not, the sole available ground for finding an employer violation is disparate treatment.[376]

Burnup & Sims does not, however, solve the problem of overlapping group and individual interests implicated in the same case. *Darlington* and *American Ship* may be viewed as entailing group rights accommodations,[377] but both entailed, as well, the destruction (*Darlington*) or curtailment (*American Ship*) of individual jobs for reasons of individual participation in protected activity. Does such participation submerge an individual right to choice or participation such that the sole issue is the scope of a group right? The Section 7 right to engage in "concerted activity" is presumably a group right: the activity must be concerted and for the purpose of *collective* bargaining or *mutual* aid or protection. To the extent that the right protects individuals the protection is derivative and instrumental — it is the means by which the group's interest is preserved.[378] The Section 7[379] right "to form, join or assist labor organizations" or to refrain from doing so are rather expressly individual rights of participation and choice.[380] But unless one is inclined to insist upon what I perceive to be a too-narrow view of the term

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375. *See* Oberer, *supra* note 4, at 500-01. For an example of this problem, see Knuth Bros., 229 N.L.R.B. 1204 (1977), *enforced*, 584 F.2d 813 (7th Cir. 1978).

376. This view is at least similar to Dean Oberer's "escape hatch," albeit somewhat in terms of a reversal of presumption. *See* Oberer, *supra* note 4, at 506-09.

377. *Darlington* was not a balancing of economic weapons case in the *American Ship Bldg.* sense: such a balancing contemplates a continuing economic existence and that assumption is missing in *Darlington*. To the extent that *Darlington* may protect employees other than those discharged by the *Darlington* closing, *supra* note 299-303 and accompanying text, it was arguably concerned with the employer's use of an anti-organization weapon to defeat the union's right to an opportunity for successful organization. An alternative argument is that the employee's right to choice was submerged in the collectivity's (union's) claimed interest in a bargaining relationship with a going concern, but this argument merely points out the interrelationship of group and individual claims.

378. *See* Brousseau, *supra* note 325, at 26-27. There is, of course, substantial confusion in the cases on this point. *See* NLRB v. Weingarten, Inc., 420 U.S. 251, 260-61 (1975). *Compare, e.g.*, Ontario Knife Co. v. NLRB, 626 F.2d 1327 (2d Cir. 1980) *with* NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967).

379. 29 U.S.C. § 157 (1979).

380. Brousseau, *supra* note 325, at 26.

"assist" so as to confine Section 8(a)(3)'s protection only to an individual's status as a union member,[381] the rights at stake in a response case include in some measure an individual right to "participate" in concerted activity. In some degree, then, individual rights are implicated in a group rights case in which disparate treatment exists seems clear.[382] The fact that the employer's response in such a case is a response directed at the group does not extinguish the individual rights aspect of the problem because 8(a)(3) under a disparate treatment conception protects individuals from action taken for group status reasons.[383]

The solution must, therefore, lie in a frank recognition that individual rights of choice are indeed submerged by the force of the problem of accommodating group interests and not in the assertions either that there are no individual rights, or that there is no discrimination in such a context.[384] The problem of

381. *See id.* at 43; Ward, *supra* note 4, at 1158. Section 8(a)(3) is, by its terms, confined to protection of union membership and would therefore seem to support this notion. *But see* Radio Officers' Union v. NLRB, 347 U.S. 17, 39-40 (1954).

382. *See, e.g.*, Victor Patino & Nydia Patino, 241 N.L.R.B. 774 (1979) (unlawful objective under 8(a)(5) of plant closing renders discharges violative of 8(a)(3)); Production Molded Plastics, Inc., 227 N.L.R.B. 776 (1977), *enforced*, 604 F.2d 451 (6th Cir. 1979) (8(a)(5) violation, no 8(a)(3) violation absent discriminatory purpose). This is not, under my view of Mackay Radio & Tel. Co. v. NLRB, 304 U.S. 333 (1938), a difficulty with that decision. *Mackay* presented the issue of balancing (an 8(a)(1) or 8(a)(5) issue) just as *Erie Resistor* presented that problem, but the 8(a)(3) issue in *Mackay* was, on a disparate treatment rationalization, properly decided. *Contra* Shieber, *supra* note 4, at 76.

383. *See* Cox, *supra* note 114, at 651-53.

384. *Cf.* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (exercise of claimed individual rights in derogation of union's exclusive status not protected). *Compare* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (union may waive right to strike by contract) *with* NLRB v. Magnavox Co., 415 U.S. 322 (1974) (contractual waiver of solicitation/distribution rights not a waiver of Section 7 rights enforced under Section 8(a)(1)). If the "right" to strike is the group's right, it is presumably subject to group waiver. If *Magnavox* is viewed as a case entailing a group waiver of individual rights of communication, it is perhaps explicable on that ground despite the absence of an 8(a)(3) issue. Brousseau, *supra* note 325, at 38-39. Section 8(a)(3) is, despite its emphasis upon the individual, not necessarily the exclusive source for protection of those Section 7 rights that may be characterized as individual. *Magnavox* may also be viewed, however, as entailing not only a problem of individual choice, but a problem of accommodating the rights of competing unions to opportunities for successful organization. The no-strike clause analog is on this rationale inapposite precisely because it assumes Section 9 exclusivity and the benefits of exclusivity to both union and employer — an assumption not appropriate where exclusivity is the issue. *See* Gale Products, 142 N.L.R.B. 1246 (1963).

An interesting further question is why waiver of the right to a protest strike must be explicit. Upon the assumption that the rationale is not in fact a matter of the intent of

boundaries is solved by the *Burnup* option to consider the group rights implications of facts presenting individual rights issues and by recognizing that Professor Getman's "response" case will most often (but not exclusively) present the problem of adjustment of group rights that mandates an analysis (preferably undertaken under 8(a)(1) or 8(a)(5)) distinct from disparate treatment. If the adjustment favors the employer, the result may be viewed as a defense to disparate treatment where the adjustment would be impaired by an application of 8(a)(3).[385] Where the adjustment favors the union the result may be viewed as permitting an independent inquiry into the issue of disparate treatment.[386] Where there is no adjustment to be made — that

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the parties — an assumption consistent with the caveat that the unfair labor practice must be "serious," Arlan's Dep't Store, Inc., 133 N.L.R.B. 802 (1961) — the rationale would seem to be either government conscription of employees in the war against unfair labor practices, or the importance of the group's right to survival where survival is threatened and self-help, given adjudicatory delay, is necessary.

385. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 313 (1965); Darlington Mfg. Co. v. NLRB, 380 U.S. 263, 272 (1965).

386. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) (employer's 8(a)(3) duty arguably supplied an 8(a)(1)-like balancing of weapons); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (same). On this view, the balance struck in Mackay Radio & Tel. Co. v. NLRB, 304 U.S. 333 (1938) favored the employer, and a subsequent 8(a)(3) disparate treatment analysis would not impair that adjustment. *See supra* note 382.

An adjustment favoring unions is suggested by the problem of individual employee refusals to cross a picket line at the premises of another employer. That problem has been consistently treated by the Board as giving rise to Section 8(a)(1) issues, most particularly the issue of the legitimacy of the employer's claimed interest in continuing its operations. *See, e.g.*, Torrington Constr. Co., 235 N.L.R.B. 1540 (1978); Swain & Morris Constr. Co., 168 N.L.R.B. 1064 (1967), *enforced*, 431 F.2d 861 (9th Cir. 1970); Overnite Transp. Co., 154 N.L.R.B. 1271 (1965), *enforced*, 364 F.2d 628 (D.C. Cir. 1966). Assuming that a given employer would discharge both the employee who declines to make a delivery for, *e.g.*, political or religious reasons and an employee who so declines for reasons of union loyalties, there is in such a case no disparate treatment cognizable by the Board. Whose rights are implicated in this situation? The employee is arguably "participating" in concerted activity — the activity, however, of the employees of a third party and activity constituting an economic weapon leveled at the third party. Government protection of the refusal to cross is, moreover, grounded specifically upon group related interests: the rationale is that the non-crossing employee's back scratching will be reciprocated. *See* NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942).

Should the honoring employee be protected by means of government intervention? The efficacy of the picket line as a weapon may be viewed as dependent upon the protection, so there is certainly a group interest — and here the group is the union in the abstract — in protection. But the question is whether that interest should be recognized as a protectable right. Perhaps. There is a statutory argument that Congress intended protection. *See* 29 U.S.C. §§ 152(3), 152(9) (1973). But the question boils down to the problem of determining the contours of the relevant group — just how much Section 7 mutuality should the law recognize? *See* NLRB v. William S. Carroll, Inc., 578 F.2d 1, 3

is, where the efficacy of a union or employer "weapon" is not threatened to a degree warranting an adjustment of an imbalance — the sole issue is disparate treatment.[387]

There is, however, yet another difficulty confronting this

(1st Cir. 1978). If the focus is on the employees of the delivering employer, there is no easily recognized group interest; if the focus is upon unionized employees generally — that is, upon the picket line as a weapon — the interest is more readily apparent, and the latter focus therefore explains the general proposition that there is a "right" to refuse to cross. The "right" is a group right to the weapon, not an individual right of participation. The focus may also explain the otherwise odd notion that the employee's protection from discharge is derivative — an unlawful picket line precludes protection. *See* Drivers & Salesmen Local 695 v. NLRB, 361 F.2d 547, 551 (D.C. Cir. 1966); Truck Drivers Local 413 v. NLRB, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964); AT&T, 231 N.L.R.B. 556 (1977).

387. An illustration is the runaway shop. The runaway shop is a response to protected activity; it is not, necessarily, a violation of 8(a)(3). The employer may be motivated by economic conditions causally dependent upon protected activity (*e.g.* a union wage scale making further operations in the locale organized by the union unprofitable) but arguably distinct from protected activity. *See, e.g.*, NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960), *cert denied*, 366 U.S. 909 (1961); Co-Ed Garment Co., 231 N.L.R.B. 848 (1977).

Whose rights are implicated by the runaway shop? The employees stand to lose their jobs, but Section 7 does not purport to guarantee jobs. The job loss is nevertheless arguably traceable to the employees' organization as a group. Assuming, however, that the employer's "response" to such organization was motivated by economic conditions generated by that organization, the employees' individual rights to choice were not punished. They have, rather, been subjected to the economic risks run by the group in taking economic positions at the bargaining table. If there is a right at stake here, it is a group right — a right to return to the bargaining table; not a right to be free from the economic consequences of positions taken at the bargaining table. Government-imposed limitations either upon the bargaining table, *cf.* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981) (partial closing), or upon those risks are very difficult to justify either as necessary balancing of weapons or as authorized regulatory intrusion into the substantive terms of the employer-employee relationship.

Threatened "runaway" remains, of course, a potential anti-organization weapon that threatens both choice and the union's right to an opportunity, free of coercion, for successful organization. The runaway itself might be used as a "weapon" that denies the enforceable premise of a bargaining obligation and therefore threatens the group's right to that obligation. *See* Victor Patino & Nydia Patino, 241 N.L.R.B. 774 (1979) (8(a)(5) violation and, in effect, derivative 8(a)(3) violation). The runaway might also constitute retaliation unaccompanied by economic justification — that is, it might indicate an employer claim to freedom from employee choice — and therefore intrude upon individual rights. *But cf. supra* text accompanying note 290, discussion of *Darlington*.

In the *Darlington* context, the group's right to recognition (that is, its right to a share of decision making on a continuing basis under Section 8(a)(5)) is trumped by the right of employers to eliminate the premise upon which that right to recognition is based — the existence of the enterprise. *Cf.* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981) (no obligation to bargain over partial closing). There remains of course punishment of choice aspects to the *Darlington* situation. And the *Darlington* "chill elsewhere" requirement may be viewed either as a test for punishment or as preserving the group's opportunity rights "elsewhere."

scheme. To suggest that balancing is an appropriate technique under Sections 8(a)(1) and 8(a)(5) is to authorize regulation of employer action undertaken for permissible purposes and to insist merely upon proper statutory citation. The spectre of unlimited Board authority generated by *Burnup & Sims* is not obviated by the scheme because the scheme does not provide a limiting principle. That spectre is, indeed, the spectre the Court sought to preclude in *American Ship Building* by banning Board balancing of economic weapons and by restricting Board authority to an inquiry into motive. It is, moreover, the spectre explaining the Court's insistence in *Great Dane* upon both having and eating the motive cake by dividing cases, on a procedural rationale, into "inherently destructive" and "comparatively slight" categories. To suggest that the *Board*, despite *American Ship Building*, must necessarily police a balance of power does not begin to resolve the problem of preventing the Board (or courts) from tampering with that balance to a degree that threatens the self-regulating premises of a balance of power system.

If the "inherently destructive" branch of *Great Dane* roughly represents that category of case entailing enforceable group "rights," the comparatively slight branch roughly represents that category of case entailing group interests unenforceable by administrative or judicial means and requiring (again roughly) a finding of the sort of employer motive that threatens individual rights to choice. The latter requirement preserves the employer interest in freedom from regulatory analysis and containing Section 8(a)(3)'s protection to the limited individual interest in choice implicit in the statute's discrimination element. The inherently destructive category subordinates both the employer's interest in freedom from analysis and the general policy favoring free collective bargaining (and free use of economic weapons) in favor of correcting perceived imbalances of economic power, imbalances threatening group interests in opportunities for group organization or survival. The distinction between the categories is supposed to be grounded upon degree of impact;[388] and degree of impact is presumably the limiting principle precluding both Board intrusion into free collective bargaining[389] and Board valuation of an employer's operational

388. *Great Dane*, 388 U.S. at 33-34.

389. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Insur-

interests.[390] It is, however, impact on group interests that is of concern; if impact on individual employee choice is relevant, it is only relevant where such an impact threatens the group as a group.

Does the notion that it is a group interest being claimed when the Board is asked to readjust the economic power balance provide substantive content to a differentiation of cases on a degree of impact basis? I think that it does for two reasons. First, when it is recognized that it is a group rather than an individual claim to the law's protection that is made when an employer's action though not directed at protected activity adversely affects it, discouragement of individual participation in such activity is automatically viewed from the instrumental perspective mandated by the group nature of the claim. The problem is not, then, one of reconciling a seemingly absolute individual claim to freedom from discouragement with the need for accommodating legitimate employer interests. It is, rather, a problem of measuring the impact of the discouragement of individual participation upon the group's interest in organization[391] or its interest in the efficacy of union economic weapons.[392] That problem is one of balance, but a balance informed by the limiting principle that a balance of employer and union economic power, and indeed the acquisition of union power, is to be substantially self policing.[393] Specifically, it is a balance not misinformed by the notion that it is an individual's right to choice that is at stake in the balancing process.

Second, the recognition of a group interest justifies the further recognition that distinct historical stages in the development of the relationship between an employer and the union warrant distinct degrees of Board intervention with the power equation.[394] Distinct degrees of intervention are not warranted if

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ance Agents Int'l Union, 361 U.S. 477 (1960).

390. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 39 (1967) (Harlan, J., dissenting).

391. *Cf.* Isaacson, *Organizational Picketing: What is the Law? - Ought The Law To Be Changed?*, 8 BUFF. L. REV. 345 (1959) (interest of organized sector of industry inconsistent with that of unorganized sector).

392. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 235 (1963) ("[I]n view of the deference paid the strike weapon by the federal labor laws and the devastating consequences upon it which the Board found was and would be precipitated by respondent's superseniority plan, we cannot say the Board erred . . . .").

393. American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960).

394. *See* Oberer, *supra* note 4, at 510-16. Dean Oberer speaks of the "right to organ-

it is assumed that it is an individual right to participation that is at stake, for it is not apparent that such an individual interest in choice varies over time.[395] The group's relative power does vary with time, and the group's capacity to further its interests without intervention is therefore more limited at an organizational stage than at a collective bargaining stage. The degree to which the impact of employer action not directed at individual employee choice *qua* choice adversely impacts employee willingness to engage in protected action therefore varies with time and context. More importantly, the relevance of that impact varies with time and context, for its relevance is an instrumental relevance: the question is the degree of impact upon legitimate group claims.

VII. Conclusion

Section 8(a)(3) presents one of the most difficult problems of statutory interpretation in labor law. The difficulty, however, is the product of the overwhelming weight the statute has been made to carry. It has been argued that the weight is the combined sum of two conflicting policies inherent in the legislative scheme: the grant of legal protection to concerted activity; and the grant of a license, seemingly necessary to the notion of free collective bargaining, to employers to resist the demands made upon them.[396] But this description underestimates the difficulty, for the problem of accommodating those conflicting objectives has been superimposed upon a statutory provision designed to protect neither concerted activity nor employer resistance to that activity. The provision was designed, rather, to protect individual employee — choice in the membership decision, choice in the union representation decision, and choice in the decision *qua* decision to participate in concerted activity. It was also designed to protect, by virtue of the discrimination element, employer

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ize" as a right to a fair opportunity to make its appeal to employees. *Id.* at 514. This right is, arguably, definable as the group's incipient right to exist.

395. To the extent that the individual's claim to protection from employer power is satisfied by group representation at the collective bargaining or contract maintenance stage of a relationship, the strength of the claim may vary. That is, however, a claim considerably broader than a claim to choice free of employer action founded upon that choice. Indeed, a claim to protection is a claim constituting a rationale for recognition of the group as an entity entitled to the law's protection, not a claim justifying, in the absence of a substantive law of the employment relationship, greater regulatory intervention on behalf of the individual where the group does not yet formally exist.

396. Meltzer, *supra* note 4, at 117.

action undertaken for reasons independent of the choice made by employees. The design was narrow and wholly inadequate to resolve the tension between policies of facilitating group formation or survival and policies of non-regulation of the substantive terms of the employment relationship — a tension quite independent of the policy of protecting individual choice.

The argument made here may then be summarized in six steps. (1) The discrimination element of the statute contemplates disparate treatment, a contemplation only sporadically confirmed by the courts. (2) To the extent that the courts have insisted upon proof of illicit employer motive through the device of the intent element of the "comparatively slight effect" branch of *Great Dane Trailers*, that intent element is functionally consistent with a disparate treatment conception and consequently is consistent with the narrow employer impartiality obligation. (3) Although there is an observable distinction between cases entailing an employer response to business conditions generated by protected activity and cases in which it is unclear whether employer action was responsive to union membership/activity or to circumstances factually unrelated to such membership/activity, the observed distinction does not warrant a distinction in analysis on the basis of a policy of protecting choice. Specifically, a rejection of disparate treatment is not warranted in the response case if the employer's impartiality obligation is viewed as the narrow obligation to refrain from action directed at employee choice *qua* choice. And, an insistence upon disparate treatment is not warranted in the non-response case if the employer's impartiality obligation is viewed as encompassing the impact upon choice of actions taken for reasons independent of choice. (4) It is nevertheless apparent that there are policies inherent in the legislation distinct from protection of choice, and that those policies, as illustrated by *Republic, Darlington, American Ship Building* and *Fleetwood Trailers*, have been expressed in the opinions through the use of Section 8(a)(3). (5) Those distinct policies are policies concerned with collective rights, and those rights implicate employee choice only in the sense of derivative protection of choice: the individual's right to participate in concerted activity is, in short, the group's right to the economic power implicit in the individual's participation. (6) Once it is recognized that there is a distinction between the individual's right to choice and the group's right to gain and exercise economic power, the Court's insistence upon illicit motive in

"response" cases may be understood as: (a) recognizing that an accommodation of employer and union interests favoring the union necessarily grants protection to individual employees in excess of and for policy reasons distinct from those supporting the protection conferred by Section 8(a)(3); and (b) recognizing that an accommodation favoring non-regulation of union and employer conflict nevertheless leaves untouched the protection afforded by Section 8(a)(3) to individuals — at least to the extent that the accommodation is not threatened by that protection.