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THE VIRGINIA CONSPIRACY STATUTE PART II: LIABILITY OF CONSPIRATORS FOR COMPELLING ANOTHER TO ACT AGAINST HIS WILL OR CONSTRAINING ANOTHER FROM DOING A LAWFUL ACT

BY JOSEPH E. ULRICH* & KILLIS T. HOWARD**

Virginia¹ and Wisconsin² have essentially the same conspiracy statute. Each statute contains two separate prohibitions, one dealing with conspiracies injuring business and one with conspiracies to compel or constrain conduct. Unlike Wisconsin's, the Virginia statute grants a triple damage remedy for violation of the first part of the statute,³ but like its prototype, the Virginia statute does not include an express damage remedy for violation of the second.⁴ Both statutes impose criminal penalties.⁵

In a prior article,⁶ we considered the first part of the Virginia statute. Because of the punitive character of the triple damages remedy, we offered a construction of the conspiracies to injure business part that would limit its use to cases in which the defendant inflicted harm on the plaintiff because of ill will.⁷ In the alternative, we suggested the repeal of the triple damages provision, noting that if this suggestion were

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¹ VA. CODE § 18.2-499(a) (1975). The Virginia conspiracy statute states:

(a) Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally guilty of a Class 3 misdemeanor. Such punishment shall be in addition to any civil relief recoverable.

² WIS. STAT. ANN. § 134.01 (West 1975).

³ VA. CODE § 18.2-500(a) (1975).

⁴ *Id.* Wisconsin courts have long implied a civil damage remedy for violation of the second part of the conspiracy statute. *Randall v. Lonstorf*, 126 Wis. 147, ___, 105 N.W. 663, 664 (1905).

⁵ The criminal penalties provided by the two statutes are roughly analogous. *Compare* VA. CODE § 18.2-11(c) 1975 (fine not exceeding \$500) *with* WIS. STAT. ANN. § 134.01 (West 1975) (fine not exceeding \$500 or imprisonment not exceeding one year).

⁶ Ulrich & Howard, *Injuries to Business Under the Virginia Conspiracy Statute: A Sleeping Giant*, 38 WASH. & LEE L. REV. 377 (1981) [hereinafter cited as Ulrich & Howard].

⁷ *Id.* at 406-10.

adopted, a broader construction of the statute would be preferable.⁸ Either approach, of course, greatly reduces the statute's impact.

This article will focus upon the scope of the second part, conspiracies to compel or constrain another. The only judicial statement of the second part's purpose may be found in *Randall v. Lonstorf*⁹ in which the Wisconsin court distinguished the two parts of its statute in the following manner:

The *first part* of this section evidently was intended to cover conspiracies against another in his trade or business, but the *second part* of the act just as evidently was intended to cover another and broader field, namely, conspiracies maliciously intended to coerce or constrain the action of another by compelling him to do that which is against his will, or to refrain from doing any lawful act which he desires to do.¹⁰

Such comments do not preclude speculation concerning the scope of the statute.

We will treat the two issues which seem fundamental to us. First, whether the second part of this statute should be viewed as coextensive with the tort of civil conspiracy, or, in the alternative, whether the legislature intended the courts to develop a body of case law independent of the traditional tort concepts which have already evolved in this area. As yet no reported Virginia cases have examined this issue.¹¹ Several Wisconsin cases, however, have applied the second part of the statute to extend traditional tort law.¹² In pursuing our first inquiry we will describe the contours of civil conspiracy as a common law tort, and then consider Wisconsin's treatment of the second part of its statute. Our conclusion to the initial inquiry is that a court would not be compelled to adopt either construction. Having set forth our position on the first issue we shall turn to the second, should the General Assembly repeal the statute? We think the answer is yes, and in the last part of this article we set forth our reasons for this recommendation.

Civil Conspiracy¹³

Conspiracy, both criminal and civil, generally has been defined as a combination of two or more parties to accomplish by concerted action a

⁸ *Id.* at 410-12.

⁹ 126 Wis. 147, 105 N.W. 663 (1905).

¹⁰ *Id.* at ____, 105 N.W. at 664 (emphasis added).

¹¹ Several Virginia cases have considered the first part of the conspiracy statute. See note 98 *infra*.

¹² See text accompanying notes 66-96 *infra*.

¹³ See generally Note, *Civil Conspiracy: A Substantive Tort?*, 59 B. U. L. REV. 921 (1979) [hereinafter cited as Boston Note]. The development of civil conspiracy from its criminal counterpart is briefly outlined in P. WINFIELD, A TEXT BOOK OF THE LAW OF TORTS 663-64 (7th ed. Jolowicz & Lewis 1963). The history of conspiracy as a crime is set forth by Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922) [hereinafter cited as Sayre].

criminal or unlawful object, or a lawful object by criminal or unlawful means.¹⁴ In jurisdictions which recognize a separate tort of civil conspiracy,¹⁵ the plaintiff must prove three elements:¹⁶ formation of the conspiracy; a wrongful act or acts pursuant to the conspiracy; and damage inflicted upon the plaintiff by such act or acts.¹⁷ Once the plaintiff has established a prima facie case, the defendant may offer evidence of privilege.¹⁸ If the plaintiff is granted judgment, joint and several liability is extended to members of the conspiracy other than the actual wrongdoer.¹⁹

Courts and treatise writers have offered the above skeletal description of civil conspiracy as a guide. Like most generalizations it leaves a number of questions unanswered. Is civil conspiracy a distinct tort? Does the existence of a combination make acts unlawful that would be perfectly legitimate if done by an individual?²⁰ While many courts have answered such questions "yes," a careful reading of these holdings shows that the joint activities of the defendants ordinarily could have

¹⁴ The generally accepted definition of conspiracy is based on Lord Dehman's well known epigram that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means." *King v. Jones*, 110 Eng. Rep. 485, 487 (K.B. 1832). Prior to this decision most cases had held that the object of the conspiracy or the means used must be in fact criminal. According to Professor Sayre, "[L]ike the magic jingle in some fairy tale, through whose potency the betwitched adventurer is delivered from all his troubles, this famous [Dehman's] formula was seized upon by judges laboring bewildered through the mazes of the conspiracy cases as a ready solution for all their difficulties." Sayre, *supra* note 13, at 405. Lord Dehman's definition is employed in civil cases as well. See, e.g., *Ross v. Peck Iron and Metal Co.*, 264 F.2d 262, 268 (4th Cir. 1959) (Virginia law).

¹⁵ Some decisions have held that conspiracy is not a separate tort, but merely a theory of joint liability whereby a court may hold all who cooperate in another's wrong responsible. See, e.g., *Perry v. Apache Junction Elementary School Dist.*, 20 Ariz. App. 561, 514 P.2d 514 (1973); *Cohen v. Bowdoin*, 288 A.2d 106 (Me. 1972).

¹⁶ *Onderdonk v. Lamb*, 79 Wis. 2d 241, 247, 255 N.W.2d 507, 510 (1971) (quoting *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, —, 35 Cal. Rptr. 652, 660 (1963)). Other commentators have broken down the elements of conspiracy somewhat differently. See *Boston Note*, *supra* note 13, at 928-37.

¹⁷ Unlike the criminal law which condemns the agreement itself, a civil conspiracy is not actionable unless acts performed pursuant thereto cause injury to the plaintiff. The courts commonly state this distinction by saying that damage is the gist of the action, not the conspiracy. See, e.g., *Gallop v. Sharp*, 179 Va. 335, 19 S.E.2d 84 (1942). See also text accompanying notes 71-73 *infra*.

¹⁸ Although cases often do not refer to the privilege defense, defendants are not held strictly liable for intentionally inflicting harm. Defendants may offer justification for their actions. See, e.g., *American Well Works Co. v. Layne and Bowler Co.*, 241 U.S. 257 (1916).

¹⁹ Commenting on joint and several liability, one court stated, "The charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible in damages for any overt act or acts." *Rutkin v. Reinfeld*, 229 F.2d 248, 252 (2d Cir. 1956).

²⁰ Compare Charlesworth, *Conspiracy as a Ground of Liability in Tort*, 36 L. Q. REV. 38 (1920) [hereinafter cited as Charlesworth]; Burdick, *The Tort of Conspiracy*, 8 COLUM. L. REV. 117 (1908); Burdick, *Conspiracy as a Crime and as a Tort*, 7 COLUM. L. REV. 209 (1907) (concluding that combination makes legitimate individual acts illegitimate) with Hughes, *The Tort of Conspiracy*, 15 MOD. L. REV. 209 (1952) [hereinafter cited as Hughes] (taking the opposite position).

been characterized as a recognized nonconspiracy tort.²¹ Indeed, the tort of civil conspiracy appears to rest on a logical flaw. Professor Hughes²² sets forth this proposition cogently. Referring to the standard definition of conspiracy he asserts:

This definition would seem to be based on a fallacy in logic. For it is generally agreed that unlike the crime of conspiracy, the mere fact of agreement could not constitute the tort. To give rise to tortious liability there must be some carrying out of the agreement, causing damage. But it would seem evident that if there is some carrying out of the agreement to do an unlawful act or to employ unlawful means, then this is the equivalent to the doing of an unlawful act. In other words, under this definition, the existence of a tort of conspiracy would be quite otiose, for the defendants could always be such as joint tortfeasors under some other specific heading of tortious liability.²³

Nonetheless, the courts have invoked the conspiracy concept to expand the ambit of liability in order to reflect the social and economic policy of the community as divined by the judges.²⁴ The impetus for expanding liability through the fiction²⁵ of conspiracy rests upon two

²¹ See text accompanying notes 51-62 *infra*. See also Note, *Refusal to Deal as a Tort—Conspiracy in a Civil Suit*, 45 ILL. L. REV. 784, 788-91 (1951).

²² Hughes, *supra* note 20, at 209.

²³ *Id.*

²⁴ See J. FLEMING, *INTRODUCTION TO THE LAW OF TORTS* (1967). Perhaps the clearest case of the use of the judicial expansion of the conspiracy concept to carry out community policy came in the area of union activity around the turn of the century in both England and the United States. The courts used the concept of conspiracy in conjunction with the developing tort of inducement for breach of contract to engage in active judicial intervention for the purpose of breaking strikes:

The weapon thus fashioned was indeed for a time wielded by the courts in promoting, unabashed and unextended, the economic interest of the dominant entrepreneurial class against the aspirations of the emerging labour movement. Alike in their use of civil and criminal sanctions, the conspiracy doctrine was exploited throughout the 19th century in a manner which gave edge to the marks in postulate that the courts were only handmaidens to the ruling class in defense of their economic position against the perennial challenge by the underprivileged. About the turn of the 20th century this bald partisanship came to falter and was eventually replaced by the current doctrine of judicial neutrality.

Id. at 225.

The U.S. Supreme Court has made the same points: "The tort of 'conspiracy' is poorly defined and highly susceptible to judicial expansion; its relatively brief history is colored by use as a weapon against the developing labor movement." *United Mine Workers v. Gibbs*, 383 U.S. 715, 732 (1966).

²⁵ Fictions are commonly used in tort law. By using such a term we have no intention of being derogatory. A fiction is generally used to fill in a gap, ordinarily of fact, to get a good result. Transferred intent is one example. See, e.g., *Bannister v. Mitchell*, 127 Va. 578, 104 S.E. 800 (1920). In this context it means that a particular purpose to invade the plaintiff's interest will not be required to prove battery. If the defendant attempts to strike

separate deeply-held notions. First, there is the fear of group activity. This fear results from a notion that an organized body of people can produce results more oppressive or dangerous than the results produced by a single person.²⁶ While this distinction between individual and joint action probably made more sense at the turn of the century than it does now,²⁷ it still persists.

The second notion is that redress should be granted for all intentionally inflicted harms to another. This sentiment undoubtedly underlies the concept of the *prima facie* tort,²⁸ a theory whose time has not arrived.²⁹ Nonetheless, a number of nominate torts which have developed within the last 100 years probably owe their current existence to this judicial propensity. The development is most extensive in the area of intentionally inflicted economic losses.³⁰ Torts such as deceit,³¹ injurious

A but hits P in the process, P may recover unless privilege is demonstrated. Defendants may also establish defenses based on fictions. For example, implied consent has been developed to protect doctors in appropriate cases. See C. MORRIS & S. MORRIS, MORRIS ON TORTS 26-28 (2d ed. 1980) [hereinafter cited as MORRIS ON TORTS]. For the place of fictions in the law see L. FULLER, LEGAL FICTIONS (1967).

²⁶ *Shaltupsky v. Brown Shoe Co.*, 350 Mo. 831, ___, 168 S.W.2d 1083, 1086 (1943). See generally RESTATEMENT OF TORTS § 765, comments (a) & (b) (1939). Cf. R. PERKINS, CRIMINAL LAW 614 (2d ed. 1957) (conspiracy in criminal law).

²⁷ Pollock strongly opposed recognizing conspiracy as a tort. Thus, to the argument that a person could resist without much difficulty the wrongful act of an individual but coercion by many would be harder to resist, he responded, "the most powerful corporation is an individual before the law. Moreover individual natural persons, a Rockefeller or a Carnegie, may be very powerful." F. POLLOCK, LAW OF TORTS 258 n. (x) (14th ed. Landon 1939) [hereinafter cited as POLLOCK ON TORTS]. While we might add labor unions to the list, our response probably still would be in accord with Pollock.

²⁸ The *prima facie* tort doctrine originally was formulated in England by Lord Bowen in the *Mogul Steamship* case. *Mogul Steamship Co. v. McGregor, Gow and Co.* (1889), 23 Q.B.D. 598; [1892] A.C. 25. See generally F. POLLOCK, LAW OF TORTS 21 (1887). The first American formulation of the *prima facie* tort doctrine occurred in *Aikens v. Wisconsin*, 195 U.S. 194 (1904). In *Aikens*, the court held that the Wisconsin injuries to business statute, the forerunner to Virginia's conspiracy statute, did not violate the 14th amendment. *Id.* at 205. In the course of his opinion Justice Holmes stated: "It has been considered that *prima facie*, the intentional infliction of temporal damage is a cause of action which, as a matter of substantive law, whatever may be the form of the pleading, requires the justification if the defendant is to escape [liabilities]." *Id.* at 204.

²⁹ See generally Brown, *The Rise and Threatened Demise of the Prima Facie Torts Principle*, 54 NW. U.L. REV. 563 (1959); Halpern, *Intentional Torts Under Restatement*, 7 BUFFALO L. REV. 7 (1957). While the *prima facie* tort doctrine's primary significance may have been to broaden torts doctrines since the turn of the century, it adds little to traditional tort concepts in enabling the courts to choose and weigh the factors relevant to each particular case. Green, *Protection of Trade Relations Under Tort Law*, 47 VA. L. REV. 559, 569-73 (1961).

³⁰ Professor Heydon, recounting the progress of English law over the last one-hundred years, characterized the judicial sentiment for granting redress for all intentional torts as a "groping towards an embryonic innominate tort of causing intentional economic loss by 'unlawful' means." Heydon, *The Defense of Justification in Cases of Intentionally Caused Economic Loss*, 20 U. TORONTO L.J. 139, 139 (1970).

³¹ See generally MORRIS ON TORTS, *supra* note 25, at 291-328.

falsehood,³² and misappropriation³³ evolved through this process. To the list one should probably add such noneconomic torts as intentional infliction of mental distress³⁴ and invasion of privacy.³⁵ Concomitant with the development of these torts, the courts extended recognized concepts such as inducement of breach of contract³⁶ and conspiracy to give relief for injury caused by activity not easily pigeon-holed within conventional labels.

The two strongly felt sentiments have sensitized judges to the need for relief in conspiracy cases. Once a plaintiff establishes a combination inflicting harm, the courts become eager to find such conduct wrongful. The legal theory used by the court may take several different forms. The context may convince the court that the time is ripe to redefine an established tort, to carve an exception into a received rule of nonliability, or expand liability covertly. Only in a very limited number of cases has the existence of conspiracy been considered determinative.

From this perspective, consideration of the classic boycott case, *Mogul Steamship Co. v. McGregor, Gow and Co.*³⁷ is appropriate. The *Mogul* court declined to afford relief against a combination of traders organized to retain a monopoly of the China tea trade by destroying plaintiff's business through economically coercive tactics on the industry's customers. The opinion emphasized that the defendants engaged in no tortious activity. Rather, they did no more "to the plaintiffs than to pursue to the bitter end the war of competition waged in the interest of their own trade."³⁸ Since the defendant's purpose was self advancement and the destruction of the plaintiff's business was only incidental thereto and involved no malice, such conduct was privileged.³⁹

³² See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 128 (4th ed. 1971) [hereinafter cited as PROSSER].

³³ *International News Service v. Associated Press*, 248 U.S. 215 (1918). Whether this case still has any real significance is unclear. See R. CALLMAN, THE LAW OF UNFAIR COMPETITION, *Trademarks & Monopoly* Chap. 15 (3d ed. 1969) [hereinafter cited as UNFAIR COMPETITION].

³⁴ See generally Prosser, *Insult & Outrage*, 44 CALIF. L. REV. 40 (1956).

³⁵ See generally Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); RESTATEMENT (SECOND) OF TORTS § 767 (1975).

³⁶ The tort of interference with contractual relation was first stated in *Lumley v. Gye*, 118 Eng. Rep. 1083 (1853), but its existence was not firmly established until *Quinn & Leatham*, [1901] A.C. 495. In *Quinn* the court held that union activity aimed at coercing an employer to replace his nonunion workers with members of the union was actionable as a conspiracy to induce breach of contract. As indicated above both English and American courts used the conspiracy concept in an effort to regulate union activity. See note 24 *supra*. The Wisconsin conspiracy statute may well have been enacted as part of the state's effort to curtail union activity. The wording of the Wisconsin statute, however, precludes such use. Cf. VA. CODE § 18.2-499(b) (1950). See *Trade Press Publishing Company v. Moore*, 180 Wis. 449, 193 N.W. 507 (1920).

³⁷ (1889) 23 Q.B.D. 598; [1892] A.C. 25.

³⁸ *Id.* at 614.

³⁹ *Id.* at 49 (L. Morris). *Mogul* was a conspiracy case. As Professor Charlesworth notes, however, nonliability was the only decision the English court could have reached under the prevailing ethos. Professor Charlesworth states:

The finding that no "intimidation," defined as physical interference, was present is crucial to the result in *Mogul*. But "intimidation"⁴⁰ is not always defined so narrowly. Some courts have defined intimidation to include the coercive economic methods employed by the defendants in *Mogul*. The court in *Jackson v. Stanfield*,⁴¹ a case quite similar to *Mogul*, expanded the definition to reach the desired result. First, the court emphasized the existence of a conspiracy, thereby focusing attention more sharply on both the source and the potential extent of the harm. From this perspective, economic coercion appeared as dangerous to a business as physical interference, and the final short step of equating physical and economic interference is inevitable.⁴² Once the court sets up this equation, the presence of a conspiracy becomes irrelevant. Nonetheless, the *Jackson* court and many others often have traveled this route under the banner of conspiracy.⁴³

In many instances a court will invoke conspiracy as a basis for an exception to a longstanding, well recognized rule. In *Snipes v. West Flagler Kennel Club, Inc.*,⁴⁴ plaintiff alleged that five race track corporations conspired to prevent him from racing his dogs on defendants' tracks, solely for the purpose of ruining the plaintiff financially.⁴⁵ After

A contrary decision, indeed, would have upset the whole business world, and would have made it impossible for a newcomer, or two in partnership, to start any business, as every customer they got would have been at the expense of someone or other. The decision, then, merely emphasises the necessity of proving that the defendant's conspiracy was to employ unlawful means, as there is no authority for saying that the intentional infliction of damage by the employment lawful means is actionable.

Charlesworth, *supra* note 20, at 39-40 (citing *Mayor v. Pickles*, [1895] A.C. 587). For a similar view by an American writer, see Green, *Relational Interests*, 30 ILL. L. REV. 1, 20-23 (1935).

⁴⁰ See generally UNFAIR COMPETITION, *supra* note 33, § 50. For an example of a court carrying the theory of physical intimidation to its outer limits, see *Shamhart v. Morrison Cafeteria Co.*, 159 Fla. 629, 32 So.2d 727 (1947).

⁴¹ 36 N.E. 345 (Ind. 1894).

⁴² The *Jackson* court stated:

[W]here the policy pursued against a trade or business is of a menacing character, calculated to destroy or injure the business of the person so engaged, either by threats or intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil action for damages therefor. It is not a mere passive, let-alone policy, a withdrawal of all business relations, intercourse, and fellowship, that creates the liability, but the threats and intimidation shown in the complaint.

Id. at page 351.

⁴³ See *Crump v. Commonwealth*, 84 Va. 927 (1888), in which the court characterizes the "intimidation" inherent to a secondary union boycott in language identical to that employed in *Jackson*. See also notes 24 & 36 *supra*.

In the United States union activity is regulated by statute rather than common law torts or criminal law. Ulrich & Howard, *supra* note 6, at note 107. The English courts, on the other hand, reconciled the union conspiracy cases with *Mogul* by holding that if a strike were merely for the purpose of advancing union objectives, the strike was within the letter of the privilege stated by *Mogul*. *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435.

⁴⁴ 105 So. 2d 164 (Fla. 1958).

⁴⁵ *Id.* at 165.

conceding that the defendants' acts if performed individually would have been lawful and that generally civil conspiracy was not an independent tort,⁴⁶ the court adopted a line of Massachusetts cases recognizing an exception to the general rule where "the force of numbers" of many defendants gives them peculiar power over a plaintiff.⁴⁷ Of course, it was unnecessary to embrace such an amorphous standard. Instead, the court could have adopted the traditional position, that the plaintiff's allegations of a concerted refusal to deal sufficiently stated a malicious injury.⁴⁸ Since unilateral refusals to deal are privileged generally,⁴⁹ the allegation of conspiracy was necessary only to demonstrate lack of justification for the defendant's actions.⁵⁰

In other conspiracy cases, courts have declared that concerted action is crucial to a finding of illegality, yet the conduct challenged was clearly tortious in itself. *Keviczky v. Lorber*⁵¹ illustrates this proclivity. The opinion begins by stating that concerted activity may render otherwise lawful conduct unlawful where there is an "element of illegality" present and concludes that cheating a real estate broker of his commission is a tort. How the conspiracy doctrine affected this result is unclear.⁵² Possibly the court knowingly employed conspiracy doctrine to obscure the fact that it was expanding the law's protection.⁵³

⁴⁶ The basis for this position, said the *Snipes* court, was that "the gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong which is alleged to have been done pursuant to the conspiracy." *Id.* (quoting *Loeb v. Geronemus*, 66 So.2d 241, 243 (Fla. 1953)).

⁴⁷ 105 So.2d at 165. The court in *Snipes* pointed to its decision in *Liappas v. Augoustus*, 47 So.2d 582 (Fla. 1950). The *Liappas* court in dictum referred to the force of numbers exception. The Massachusetts rule referred to by the court is reviewed in Boston Note, *supra* note 13, at 937-40.

⁴⁸ RESTATEMENT OF TORTS § 709 & 765 (1938).

⁴⁹ RESTATEMENT OF TORTS §§ 762-64 (1938).

⁵⁰ See Ulrich & Howard, *supra* note 6, at 387-94, for a discussion of the distinction between unilateral and concerted refusals to deal at common law. In *Margolin v. Morton F. Plant Hosp. Ass'n*, 342 So.2d 1090 (Fla. Dist. Ct. App. 1977), a surgeon alleged that he had been maliciously precluded from operating at the defendant hospital by the conspiratorial refusal to its staff anesthesiologists to render services for him. To support his claim for relief, he cited *Snipes* and relied on its "force of numbers" exception. In reversing the trial judge's sustaining of defendant's demurrer, the appeals court stated that the traditional balancing test of RESTATEMENT OF TORTS § 765 (1938) was the same as that stated in *Snipes*. 342 So.2d at 1093-94.

⁵¹ 290 N.Y. 297, 49 N.E. 2d 146 (1943).

⁵² Other jurisdictions had reached this result without the aid of the conspiracy doctrine. See, e.g., *Krigbaum v. Sbarbaro*, 23 Cal. App. 427, 138 P. 364 (1913); *Kovar v. Bremer*, 281 Ill. App. 505 (1935).

⁵³ Quite often judges write in a way that obscures their true reasons for decision. For example, in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), defendants negligently damaged a boat owned by a third party. The defendants had contracted to repair the boat. The harm to the boat prevented plaintiff, who had hired the boat, from fulfilling a profitable contract. Justice Holmes denied plaintiff a recovery with little more than the cryptic remark that "the law does not spread its protection so far." *Id.* at 309. Whether Holmes thought plaintiff's claim failed because of no privity of contract with the wrongdoer, no

Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co.,⁵⁴ may be a better illustration of this technique. Defendants allegedly conspired to "rough shadow" the plaintiff, in order to harass and intimidate him so much that he would not testify against defendant insurance company in then pending litigation. "Rough shadowing" involves following a person openly so that both he and the public know he is being followed. The defendant admitted hiring a private eye to shadow plaintiff, but justified the action on the ground that it wanted to know of plaintiff's whereabouts until it decided whether or not to have him arrested.⁵⁵ The trial court's directed verdict for defendant was reversed.⁵⁶ The appellate court held that rough shadowing is sufficiently analogous to libel⁵⁷ to be actionable, for it is equivalent to the public proclamation that the one followed is suspect and deserves watching. The *Schultz* court state:

[T]he acts here complained of are the analogue of libel, except the writing, printing, and passing around. But these elements are supplied by the public, notorious, and a continued character of the surveillance. We must hold that rough or open shadowing as here described is an unlawful act resulting in legal injury to the reputation of the person who is the object of such attentions A conspiracy to libel the plaintiff or to commit any other wrong to his person, reputation, or property may when damages follow be the subject of civil action.⁵⁸

property right in potential profits, failure to demonstrate proximate cause, or some other reason will remain a mystery. Another great judge, Cardozo, offered the same language in denying liability in *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928) in an equally unrevealing opinion. Such tactics leave judges ample room to maneuver in subsequent cases.

⁵⁴ 152 Wis. 537, 139 N.W. 386 (1913).

⁵⁵ The Wisconsin Supreme Court in *Schultz* rejected the defendant's justification on the dual ground that the private detective was not authorized to engage in activities to enforce the criminal law any more than any other private citizen, and that his conduct violated the Wisconsin conspiracy statute by restraining plaintiff from doing a lawful act. *Id.* at ____, 139 N.W. 390-91. See text accompanying notes 92-95 *infra* (effect of the statute in this case).

⁵⁶ Whether the trial court's decision was based on plaintiff's failure to prove a substantive violation or defendant's proof of a complete privilege is unclear.

⁵⁷ In concluding that rough shadowing is analogous to libel, the *Schultz* court reasoned: It can scarcely be doubted that the publication of a cartoon showing the plaintiff followed and watched by detectives who pursue and watch him by day, and stand guard on the sidewalk in front of his house at night, would within the principle of the foregoing cases be an actionable libel—an injury to plaintiff's reputation. How, then, can it be said that the acts which the picture represents accompanied with equal publicity do not constitute an injury to reputation? Can we say they are actionable when represented by picture, but nonactionable when actually committed? It must be conceded that to publicly proclaim one suspect, to publicly charge that he deserves watching, and that he is being followed and watched does subject him to public disrepute, ridicule, and contempt.

152 Wis. at ____, 139 N.W. at 389-90.

⁵⁸ *Id.* at ____, 139 N.W. at 390.

Of course, under this analysis plaintiff could have sued the insurance company individually for harm to his reputation without alleging any conspiracy. Such reasoning seems apparent in *Schultz* because the private eye, unlike the traders in *Mogul* or the race track operators, had no independent purpose other than to earn a paycheck.⁵⁹ The result should have been the same if defendants had ordered one of its employees to do the rough shadowing. Today, most attorneys would describe *Schultz* as an archetypical privacy case,⁶⁰ but the Wisconsin court apparently was not ready to take that approach.⁶¹ As in the other cases reviewed, plaintiff could have stated a cause of action without mentioning conspiracy.⁶²

Finally, there are those rare cases in which the existence of a conspiracy seems to be the basis for finding a cause of action.⁶³ In *Deon v. Kirby Lumber Co.*⁶⁴ an employer forced its employees to boycott plaintiff's store, which competed with the defendant's company store, and to forego all social relations with plaintiff and his family. It was held that competitive self interest justified interference with patronage, but prohibiting employees from associating with plaintiff's family stated a cause of action since such a boycott of social relations could not be similarly

⁵⁹ The court held that plaintiff could base his claim on conspiracy and need not rely on *respondent superior* to hold the defendant insurance company liable. *Id.* at ___, 139 N.W. at 390.

⁶⁰ In his original hornbook, Prosser classified *Schultz* as a privacy case. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 1055 (1st ed. 1941). In his fourth edition, however, Prosser characterized *Schultz* as a libel case. PROSSER, *supra* note 32, § 112, at 752. See also Comment, 1952 WIS. L. REV. 507, 518.

⁶¹ Wisconsin courts still do not recognize the tort of invasion of privacy. See, e.g., *Yoeckel v. Samonig*, 272 Wis. 430, 75 N.W.2d 925 (1956) (sustaining demurrer to complaint in action for invasion of privacy); *Judevine v. Benzies-Montayge Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936) (holding no cause of action for invasion of privacy by printed matter); see Comment, 1952 WIS. L. REV. 507, 520.

⁶² The court stated that the plaintiff's pleading was not skillfully drawn. 152 Wis. at ___, 139 N.W. at 388. Apparently, plaintiff alleged a conspiracy and then asked the court to decide how to pigeonhole the action. *Id.* at ___, 139 N.W. at 389. One infers that counsel knew he had a good case, but didn't know what to call it. Better to let the judges give it a name. Quite possibly, counsel in *Snipes* adopted the same strategy. See note 47 *supra*.

⁶³ Arguably, the "concerted refusal to deal" cases which serve as a basis for § 765 of the Restatement of Torts should be included in the category of case in which conspiracy doctrine forms the basis of the action. Since unilateral refusals to deal are not actionable except in rare instances, the joint character of the refusal to deal must be the factor which causes illegality. We would respond that the former is an exception to the general rule. The exception is based on the courts' quite comprehensible reluctance to tell businessmen how to operate their business and the extreme difficulties of devising a remedy in those cases in which it has been thought necessary to require one trader to deal with another. Where the traders act in concert, these difficulties do not exist, and such combinations will not be permitted unless a valid justification is demonstrated. Today most concerted refusal to deal cases are brought under the antitrust law because plaintiff may be able to make use of a *per se* rule against concerted activity and, if successful, is entitled to triple damages. See generally Ulrich & Howard, *supra* note 6, at 394-402.

⁶⁴ 162 La. 671, 111 So. 55 (1927).

privileged. There are a few other decisions finding interference with social relations by groups actionable.⁶⁵ One might dispute whether *Deon* should be classified as a conspiracy case since the employees, as well as plaintiff, were unwilling victims of defendant's coercion. Undoubtedly, the defendant's capacity to organize such an extensive boycott was the controlling factor. This approach seems evident since the defendant owner could have socially boycotted plaintiff if he chose, without incurring liability. In *Deon*, therefore, the "conspiracy" appears to be the sole basis of liability.

The Conspiracy Statute in Wisconsin

Wisconsin's version of the conspiracy statute was adopted in 1887. The statute was part of the movement then sweeping the country designed to curtail the power of combinations of capital which were disrupting trade.⁶⁶ In conjunction with the state antitrust act⁶⁷ the injuries to business part of the statute altered the common law as stated in *Mogul*.⁶⁸ That case held that even though contracts which unreasonably restrained trade by driving competitors out of business were void at common law, such agreements were not actionable by third parties. The purpose of the conspiracy statute and the antitrust laws was to make "combinations to stifle independent, individual competition, illegal and actionable, civilly and criminally. . . ."⁶⁹ The two statutes provide complementary remedies. The antitrust laws prohibit contracts that unreasonably restrict competition, while the conspiracy statute expands the common law remedy for intentionally inflicted injury to traders by condemning joint activity justified solely by the self interest of the parties.⁷⁰

The statute does have a most significant effect in criminal conspiracy cases. At common law a conspiracy was punishable even if the

⁶⁵ *E.g.*, *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975) ("shunning" by church and members is a civil wrong recognizable in court).

⁶⁶ In the leading Wisconsin case construing the statute, *State v. Huegin*, 110 Wis. 189, 85 N.W. 1046 (1901), the court explained the policy of its conspiracy statute as follows:

One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that "deminimis non curat lex" applies: but when he unites others with him to maliciously injure the business of another for the mere gratification, in whole or in part, of a desire to inflict such injury, the condition of there being combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, . . .

110 Wis. at ____ , 85 N.W. at 1066; see text accompanying notes 28-36 *supra*.

⁶⁷ WIS. STAT. ANN. §§ 133.01-133.19 (West Supp. 1980-81) (originally enacted as L. 1893, c. 219, §§ 1, 2, 5; repealed and reenacted by L. 1979, c. 209, § 2).

⁶⁸ See text accompanying notes 37-43 *supra*.

⁶⁹ *State v. Huegin*, 110 Wis. 189, ____ , 85 N.W. 1046, 1063 (1901).

⁷⁰ *Hawarden v. Youghioghney & L. Coal Co.*, 111 Wis. 545, 87 N.W. 472 (1901). For the interface between the antitrust statute and the conspiracy statute worked out in Wisconsin, see Ulrich & Howard, *supra* note 6, at 403-06.

parties did nothing other than enter an illegal agreement.⁷¹ In accord with about half the states, Wisconsin originally required the plaintiff to prove an overt act pursuant to the conspiracy in addition to the agreement.⁷² The conspiracy statute repeals this change from the common law by permitting the prosecutor to offer evidence of the agreement to violate the statute to attain a valid conviction.⁷³

At what kinds of conduct is the second part of the statute aimed? By its terms it includes all methods by which a confederation might unlawfully restrict the activities of an individual. Its breadth is great, for Wisconsin defines "unlawful" in the conspiracy context as not being limited merely to criminal acts but "includ[ing] all willful, actionable violation of civil rights."⁷⁴ At first blush the statute seems to be focused upon secondary boycotts by trade unions. The classic secondary boycott concerned the effort to require employers to employ only union labor. Thus, assume that the union demanded that a businessman fire his non-union workers and hire in their place union members in order to prevent a strike. The business man is being compelled to perform acts against his will and the nonunion man is prevented from performing a lawful act. Thus, the statute outlaws secondary boycotts and permits primary

⁷¹ *King v. Gill*, 106 Eng. Rep. 341 (1818). On the subject of the overt act requirement in criminal conspiracy cases, see W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 476-78 (1972).

⁷² WIS. REV. STAT. § 4568 (1898) (recodified in WIS. STAT. ANN. § 939.31 (West Supp. 1981-82)).

⁷³ In *State v. Huegin*, 110 Wis. 189, 85 N.W. 1046 (1901), the court explained the history of the Wisconsin conspiracy statutes:

A combination with the malicious purpose indicated is an actionable wrong. Had it not been for section 4568, Rev. St. 1898, adding to the common law essentials of an indictable conspiracy the necessity for an overt act, section 4466a [the Wisconsin conspiracy statute] would have been unnecessary to enable the courts to punish criminally, such wrongs. That is a mere declaration of the common law. It operates as repeal, by implication of section 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy, to injure the trade, business, reputation or profession of another, an offense. The old doctrine, with its ancient meaning, should be referred to in construing 4466a.

110 Wis. at ___, 85 N.W. at 1066.

The principle is the same under the Sherman Act. In footnote 59 of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), Justice Douglas emphasized that:

[C]onspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.

Id. at 225. To recover damages, of course, private plaintiffs must show that the conspiracy caused them harm. See note 87 *infra*.

⁷⁴ *Martens v. Reilly*, 109 Wis. 464, ___, 84 N.W. 840, 843 (1901). *Martens* was a civil conspiracy case, but its definition of unlawful has been followed in construing the conspiracy statute. See, e.g., *Randall v. Lonstorf*, 126 Wis. 147, ___, 105 N.W. 663, 664 (1905); *State v. Huegin*, 110 Wis. at ___, 85 N.W. at 1064.

boycotts. Yet, the Wisconsin statute expressly exempts union activities from its prohibitions.⁷⁵

There are only two significant Wisconsin cases construing the second part of the conspiracy statute. The best known case is *Randall v. Lonstorf*,⁷⁶ in which an insane plaintiff alleged a conspiracy among her husband, his siblings and their wealthy mother to destroy her marriage. Prior to the institution of the conspiracy suit, the wife had lost a similar alienation of affections action⁷⁷ against her mother-in-law on the stated ground that "to entice away a wife's husband and deprive her of his *consortium* constitutes no injury in the law."⁷⁸ The defendants cited the earlier action as controlling precedent for the present action, arguing that since the court had held that malicious alienation of a husband's affections was not actionable where the case involved a single defendant, the presence of multiple defendants would not change the result.⁷⁹ The court overruled the defendant's demurrer, holding that the case was covered by the second part of the conspiracy statute. The court reasoned:

By these allegations it appears that the defendants maliciously conspired together to prevent the plaintiff from performing her marital duties, from living with her husband, from receiving at his hands that support to which she was entitled, from obtaining a divorce in her home jurisdiction which should fully protect her rights, and by reducing her to penury, compel her to allow her husband to obtain a divorce upon false and fraudulent allegations in a foreign jurisdiction. All these were unlawful constraints upon the plaintiff's action and will, which the law condemns. There can be no doubt, therefore, that the conspiracy charged was a criminal conspiracy within the statute. Whether it would not be criminal at common law, in the absence of a statute, we need not consider.⁸⁰

Indignantly, the court told the defendants and the bar that the law does offer redress for such flagrant wrongs, for it will never permit "conspirators against the marriage bond and the happiness of the family to go 'unwhipt of justice' any more than it will allow conspirators against a business or a profession to escape."⁸¹

⁷⁵ See note 36 *supra*.

⁷⁶ 126 Wis. 147, 105 N.W. 663 (1905).

⁷⁷ *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N.W. 961 (1903).

⁷⁸ *Id.* at ___, 95 N.W. at 963 (emphasis added). The court followed its prior holding in *Duffies v. Duffies*, 76 Wis. 374, 45 N.W. 522 (1890), that a mother who entices away the husband is not liable to the wife for loss of society or support, either under the common law or by virtue of the Married Women's Acts. This question was much litigated at the turn of the century with conflicting results. See T. COOLEY, A TREATISE ON THE LAW OF TORTS § 170 (4th ed. 1932).

⁷⁹ *Randall v. Lonstorf*, 126 Wis. at ___, 105 N.W. at 664.

⁸⁰ *Id.* at ___, 105 N.W. at 664.

⁸¹ *Id.* at ___, 105 N.W. at 665.

The method of reaching this result is quite interesting. In her first action against the mother-in-law the plaintiff lost because the law recognized no property right in her relation to her husband,⁸² but she won in the second case because a different issue was presented. The court stated that the issue in the second case was whether a criminal conspiracy existed and had caused damage.⁸³ The conspiracy's object, to have the husband desert his wife leaving her destitute, violated a criminal statute⁸⁴ which brought the case within the purview of part two. From this "it follows that a civil action lies, although there may be no redress for the same injuries inflicted by a single person."⁸⁵ Of course, under the court's theory of civil conspiracy the defendants' concerted efforts to have plaintiff's husband desert her was a sufficient "unlawful" act since it violated a criminal statute.⁸⁶

The *Randall* decision raises an interesting question: if the wife had no legally protectable interest in her husband's consortium and support, why did her interest arise solely because two people conspired to deprive her of it? Is the joint violation of the criminal statute crucial? Many cases exist in which courts have refused to give remedies to plaintiffs injured by conspiracies which violated a criminal statute on the ground that no legally protectable interest has been harmed.⁸⁷ Certainly, the court was aware that the opposite result was available.

What implications ought to be drawn from this case with regard to the second part of the statute? First, one could view the *Randall* outcome as being limited to its appealing facts. *Randall* only holds that where a number of people gang up on a wife to alienate her spouse's affections, she may recover.⁸⁸ The limits of such action seem well defined.

⁸² See *Duffies v. Duffies*, 76 Wis. at ___, 45 N.W. at 525 (one who entices away another's husband not liable to wife for damages). Non-recognition of a wife's property right in the marriage seems to be based on the position taken by Blackstone that "the inferior [the wife] hath no kind of property in the company, care or assistance of the superior, or the superior is to have in the inferior, therefore the inferior can suffer no loss of injury." T. COOLEY, A. TREATISE ON THE LAW OF TORTS § 170 (4th ed 1932). Compare the position of Soames Forsyte in J. GALSWORTHY, *THE FORSYTE SAGA* (1922).

⁸³ 126 Wis. at ___, 105 N.W. at 664.

⁸⁴ WIS. REV. STAT. § 4587c (1898).

⁸⁵ 126 Wis. at ___, 105 N.W. at 664-65.

⁸⁶ In his article *Conspiracy as a Crime, and as a Tort*, Professor Burdick cites *Randall v. Lonstorf* as authority for the proposition that conspiracy is a separate tort. He does not mention the existence of the conspiracy statute. 7 COLUM. L. REV. 229, 239-41 (1907).

⁸⁷ See, e.g., *Collier v. Stamatis*, 63 Ariz. 285, 162 P.2d 125 (1945) (parents of fifteen year old girl who became delinquent because of drinking liquor sold by defendants in violation of statute denied recovery). In private antitrust cases, plaintiffs often are precluded from recovering for harm inflicted by violators on the ground of lack of standing or no harm to an interest in property. See, e.g., *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), cert. denied, 414 U.S. 1045 (1973). See generally 2 P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, ¶3G, at 160-227 (1978).

⁸⁸ For example, the Wisconsin court did not overrule *Lonstorf v. Lonstorf* in *Randall*. See text accompanying notes 76-79 *supra*. Of course, the rule of *Lonstorf v. Lonstorf* could

It would not necessarily increase the wife's rights in the marital relation.⁸⁹ So viewed, the decision in no way affects the court's overall scheme of handling family relations, yet it sets up a rule which will be easy to administer.⁹⁰ On the other hand, *Randall* could be viewed as a nascent statement by the Wisconsin court that it intended to authorize a civil recovery for all joint activity intentionally harming another unless the defendant offers a valid justification. Like the antitrust laws,⁹¹ the conspiracy statute is a legislative mandate to the court to develop on a case by case basis a new standard of legality for joint activity.

The *Schultz* "rough shadowing" decision,⁹² the other significant decision⁹³ in Wisconsin invoking the second part of the statute, seemed to take this latter course. Not only did the *Schultz* court create a cause of action for plaintiff by analogizing rough shadowing to libel, but the case further held that, if the defendants maliciously hindered plaintiff from leaving town, they violated the conspiracy statute since he was prevented "from doing or performing a lawful act."⁹⁴ What seems of special significance is that the court itself suggested to plaintiff how a theory founded on conspiracy might serve his case.⁹⁵

Since *Schultz* is the last case in which the second part of the statute served as a basis for suit, and even then it may not have been controlling, our previous comments may be merely a rhapsody on what might have been. Why the statute has fallen into disuse is unclear. Given the

have been founded on the ground that a mother's advice and counsel to her child is conditionally privileged. See *White v. White*, 140 Wis. 538, 122 N.W. 1051 (1909); RESTATEMENT (SECOND) OF TORTS § 686 (1977).

⁸⁹ *Randall* does not mean that a wife has a complementary action for loss of the husband's consortium or services even if the law recognizes a cause of action for such losses due to injuries to the wife in his favor.

⁹⁰ See Green, *The Duty Problem In Negligence Cases*, 28 COLUM. L. REV. 1014, 1035-45 (1928).

⁹¹ See AREEDA, ANTITRUST ANALYSIS 5 (3d ed. 1980):

Federal antitrust laws are very much simpler than commercial codes or tax statutes. The basic statute, the Sherman Act, simply condemns (1) contracts, combinations and conspiracy restraint of trade, and (2) monopolization, combinations to monopolize, or attempts to monopolize. Although this is a statutory subject and we are concerned with statutory interpretation, the prohibition of trade restraints and monopolization is extremely vague and general. Indeed, the Sherman Act may be little more than a legislative command that the judiciary develop a common law of antitrust.

⁹² See text accompanying note 54-62 *supra*.

⁹³ Several other decisions invoking the second part of the statute are clearly the progeny of *Randall*. *White v. White*, 132 Wis. 121, 111 N.W. 1116 (1907) (overruling a demurrer); 140 Wis. 538, 122 N.W. 1051 (1909) (holding that husband was not a necessary party defendant in alienation of affections suit); *Jones v. Monson*, 137 Wis. 478, 119 N.W. 179 (1909) (alienation of affections suit by parents of the wife).

⁹⁴ 152 Wis. at ___, 139 N.W. at 391. The alternative theory may have been of little assistance to plaintiff since a valid privilege for rough shadowing probably also would demonstrate a privilege under the conspiracy statute.

⁹⁵ *Id.* at ___, 139 N.W. at 391.

court's broad definition of "unlawful"⁹⁶ in conspiracy cases and its recurrent statements that the statute is declaratory of the common law, Wisconsin attorneys may have concluded that it added nothing to their present arsenal of remedies for harmful joint conduct. After all, both *Randall* and *Schultz* could have reached their results in the absence of the conspiracy statute.

A Proposed Construction

In interpreting the compelling and constraining sections of the statute, Virginia courts will write on a clean slate. While Virginia does recognize the tort of civil conspiracy, no decision as yet has attempted to outline its features.⁹⁷ Although several cases have mentioned the first part of the statute,⁹⁸ the second part is still virgin territory. As we have

⁹⁶ See text accompanying note 74 *supra*.

⁹⁷ *Gallop v. Sharp*, 179 Va. 335, 195 S.E.2d 84 (1942); *Werth v. Fire Companies' Adjustment Bureau, Inc.*, 160 Va. 845, 171 S.E. 255, *cert. denied*, 290 U.S. 659 (1933); and *Crump v. Commonwealth*, 84 Va. 927, 6 S.E. 620 (1888) all hold that Virginia recognizes civil conspiracy as a distinct tort. Of these, *Werth* seems the most significant. That case involved an alleged conspiracy among insurance companies to organize an affiliate of insurance investigators who would work exclusively for the former for the alleged purpose of excluding independents such as plaintiff. The court held, apparently, that since no insurance company was coerced into hiring any particular investigator but could hire whom they pleased the combination operated a lawful business by lawful means. 160 Va. at 856, 171 S.E. at 259. Other Virginia conspiracy cases concern interference with a lawful contract. *Worrie v. Boze*, 198 Va. 533, 95 S.E.2d 192 (1956) (conspiracy to breach lawful contract actionable in tort action); *Stauffer v. Fredricksburg Ramada, Inc.*, 411 F. Supp. 1136 (E.D. Va. 1976); *Griffith v. Electrolux*, 454 F. Supp. 29 (E.D. Va. 1976) (need party other than those privy to contract to use tort theory of *Worrie*). The distinction made by the federal courts demonstrates that all interference with contract cases could be viewed as conspiracy cases since there must be two parties involved, one in contractual relations with plaintiff and one seeking to breach the contract.

⁹⁸ *Moore v. Allied Chemical Corp.*, 480 F. Supp. 364 (E.D. Va. 1979) and *Federated Graphics Cos. v. Napotnik*, 424 F. Supp. 291 (E.D. Va. 1976) were discussed in our prior article. See Ulrich and Howard, *supra* note 6, at 383-85. Two decisions just published seem worthy of note. In *Picture Lake Campground v. Holiday Inns, Inc.*, 497 F. Supp. 858 (E.D. Va. 1980), the court, before dismissing the case on the ground that plaintiff lacked standing to sue, asserted that the only difference between a common law claim for tortious injury to business and the statutory action under VA. CODE §§ 18.2-499 to 500 is that the statute requires a conspiracy. *Id.* at 864. In *Ward v. Conner*, 495 F. Supp. 434 (E.D. Va. 1980), the plaintiff alleged that defendants, his relatives and the family priest, conspired to "de-program" his religious beliefs. Among the many theories alleged by plaintiff was one under § 18.2-499 that the defendants "conspired to represent plaintiff as being of unsound mind in an effort to obtain a conservatorship over him and, in doing so, harmed his reputation." *Id.* at 439. The court, relying on *Federated Graphics*, *supra*, held that only harm to business reputations were actionable under the statute and dismissed this count. *Id.* Plaintiff might also have used the compelling and constraining part of the statute for he alleged that his movements were restrained for thirty days. Since he also asserted a false imprisonment theory to which defendants did not demur, use of the statute for this purpose would have been redundant.

just noted, the Wisconsin experience with the statute offers limited guidance as to its proper construction.⁹⁹

Let us note the possible approaches by working through two examples. First, how would *Schultz* have been decided in Virginia? In the absence of section 18.2-499, the plaintiff probably would have lost. Since Virginia disfavors the tort of libel,¹⁰⁰ one may infer that it would not aid the plaintiff by a creative analogy as did the Wisconsin court.¹⁰¹ Nor could *Schultz* have relied on the tort of invasion of privacy, since Virginia does not recognize this cause of action.¹⁰² Does the statute's second part affect the result? Following the Wisconsin court's statement that the statute merely is declaratory of the common law,¹⁰³ a Virginia judge might hold that the statute creates no new rights, but merely imposes criminal sanctions when conspirators wrongfully invade the civil rights of another. The civil conspiracy decisions from other jurisdictions might serve as guides to construction, with the criminal character of the statute inclining the bench toward the more conservative holdings.¹⁰⁴ Since the defendants' acts were not wrongful if judged by ordinary tort standards because no recognized interest of the plaintiff's was invaded,¹⁰⁵ it follows that the statute would not aid the plaintiff in Virginia.

⁹⁹ See text accompanying notes 76-96 *supra*.

¹⁰⁰ Where a written publication is defamatory on its face, i.e., the words hold the plaintiff up to hatred, contempt or ridicule, or cause him to be shunned or avoided, plaintiff need not plead or prove special damages to recover for injury. Some jurisdictions hold, however, that where extrinsic facts are required to demonstrate the defamatory meaning intended, this is libel "*Per Quod*" and is treated like slander. Thus, where the libel *per quod* rule prevails, plaintiff may recover only by proof of special damages unless the imputation falls into one of the four slander categories—imputation of a crime, a loathsome disease, incompetence in one's trade, business, profession or office, or unchastity in a female. See generally the dispute between Prosser & Eldredge in Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960); Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966). Virginia has gone even further than the libel *per quod* jurisdictions. In Virginia, all libel is treated like slander even if the written statement is defamatory on its face. *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588 (1959); *M. Rosenberg & Sons, Inc. v. Craft*, 182 Va. 512, 29 S.E.2d 375 (1944). Moreover, the Virginia Supreme Court has assimilated actions under the "fighting words" statute, VA. CODE § 8.01-45 (1977) as much as possible to that of defamation. *Shupe v. Rose's Stores, Inc.*, 213 Va. 374, 192 S.E.2d 766 (1972); *W.T. Grant Co. v. Owens*, 149 Va. 906, 141 S.E. 860 (1928). See generally Note, *Defamation in Virginia—A Merger of Libel and Slander*, 47 VA. L. REV. 1116 (1961).

¹⁰¹ Wisconsin appears to follow the libel *per quod* rule. *Kassowitz v. Sentinel Co.*, 226 Wis. 468, 277 N.W. 177 (1938). The argument of the court in *Schultz* indicates that it viewed a cartoon depicting plaintiff being rough shadowed as libelous on its face. See note 57 *supra*. A Virginia court probably would not view the matter in the same way because the cartoon would not fall within one of the four slander categories. See note 100 *supra*.

¹⁰² *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977), followed in *Ward v. O'Connor*, 495 F. Supp. 434, 440 (E.D. Va. 1980).

¹⁰³ *State v. Huegin*, 110 Wis. 189, 85 N.W. 1046, 1064 (1901). See also *Picture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F. Supp. 858 (E.D. Va. 1980).

¹⁰⁴ See text accompanying notes 13-65 *supra*.

¹⁰⁵ The original question in *Schultz*, for example, was whether rough shadowing

In contrast, the court could adopt the seemingly more expansive reading of *Randall* and *Schultz* suggested above.¹⁰⁶ Under that reasoning the statute manifests a legislative intent to create a "prima facie tort" liability in favor of any person intentionally injured by concerted action.¹⁰⁷ Once the plaintiff establishes his injury, the burden falls on those causing his harm to establish privilege. The restraint on Schultz's mobility or the repeated interference with his everyday affairs, both of which the statute expressly prohibits, would be the focus of attention. This violation of his civil rights qualifies as a wrong even if the defendants committed no nominate tort. In other words, the statute declares certain concerted action wrongful, even though the same action by an individual would be permitted.¹⁰⁸ Having established a prima facie case of maliciously inflicted harm, plaintiff could recover for any injury suffered due to the restraint, parasitic damages,¹⁰⁹ and possibly punitives,¹¹⁰ unless a privilege was established.

violated any interest of the plaintiff's which the law deems worthy of protection. The court answered "yes" due to the potential injury to plaintiff's reputation. Since Virginia courts do not protect the values incident to reputation as strongly as Wisconsin's it is likely that a Virginia judge would inform Schultz that no cognizable interest of his had been violated. See notes 100-02 *supra*. In this regard, compare *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977), in which plaintiff's attempt to invoke any number of theories on facts as compelling as *Schultz* failed on this basis, with Ms. Lonstorff's difficulties, text accompanying notes 79-89, *supra*.

¹⁰⁶ See text accompanying notes 91 and 96 *supra*.

¹⁰⁷ See text accompanying note 91 *supra*. As we view this matter, the statute would perform an interstitial function. Where the plaintiff could not show harm due to a recognized tort, the statute would be the plaintiff's vehicle to the jury so long as the judge agreed that the defendants' action ought to be actionable. See F. HARPER & F. JAMES, *THE LAW OF TORTS*, Chap. 15 (1956).

¹⁰⁸ See text accompanying notes 79-81 *supra*.

¹⁰⁹ Professor Dobbs offers the following explanation of parasitic damages:

Damages are . . . awarded in a variety of cases in which the injury is essentially non-pecuniary. This is true with many of the dignitary interests that receive protection either separately or parasitically to some other, more economic interest. For instance, the plaintiff against whom a harmful battery has been perpetrated, may be entitled to recover for mental anguish as well, parasitic to the recovery for the battery. . . . In all these cases courts have spoken of damages as compensatory, but the term is misleading. They are no doubt compensatory in the sense that they are not merely nominal and in the sense that they are not necessarily punitive. They are not, however, compensatory in the sense that they represent a money reward for a money loss or one measurable in money. The real purpose in such cases is to establish and vindicate a right that is deemed important, even though not pecuniary in its immediate consequence.

DOBBS, *REMEDIES* § 3.1, at 135-36 (1973). For illustrations of recoveries for mental distress parasitic to some other cause of action, see PROSSER, *supra* note 32, § 12.

¹¹⁰ In Virginia a party may recover punitive damages only where the act complained of is accompanied by circumstances of aggravation, such as fraud, malice, oppression, or such circumstances as show an absolute disregard of the right of others. See, e.g., *Virginia Ry. and Power Co. v. House*, 148 Va. 879, 139 S.E. 480 (1927).

If civil liability alone were authorized, we would prefer the second construction. Although liability would be limited to joint activities only, this result is a good beginning. Society need not tolerate oppressive group activity, and those inflicting harm on others should be compelled to justify their conduct or pay.¹¹¹ Further, the court could manipulate the concept of conspiracy to expand liability where justice so requires.¹¹² Our construction, therefore, would place the focus of the case on the defendant's reasons for inflicting harm. Such a focus is proper.¹¹³ For example, the defendants in *Schultz* might have justified their shadowing of the plaintiff on the ground that they wanted to prove a fraudulent connection between him and the party for whom Schultz planned to testify.¹¹⁴ To this assertion plaintiff might respond that rough shadowing was unnecessary, even counterproductive. A court might agree that the defendants failed to state a complete privilege, yet could offer its reasons as mitigation.¹¹⁵ Our point is that the privilege asserted is the crucial aspect

¹¹¹ See text accompanying notes 26-27 *supra* (policy reasons behind need to control oppressive group activity).

¹¹² VA. CODE § 18.2-501(b) (1975) defines a "person" as any person, firm, corporation, partnership or association. This definition is similar to that found in the Virginia Antitrust Act in which person "includes, unless the context otherwise requires, any natural person, any trust or association of persons, formal or otherwise, any corporation, partnership, company, or other legal or commercial entity." VA. CODE § 59.1-9.3(a) (1975). The definition of "person" in the current Virginia Antitrust Statute is clearly broader than the one found in the preceeding antitrust statute. VA. CODE § 59.1-22(a) (1968). The language of § 18.2-501(b) is sufficiently indefinite to support any results. The writers are aware of a holding in a Lynchburg Circuit Court that a corporate officer, acting on corporate business, may "conspire" with his employer for the purpose of this statute. This seems but a small step beyond the Wisconsin treatment of conspiracy in the *Schultz* case, text accompanying notes 59-62 *supra*. In *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the Supreme Court virtually read the conspiracy requirement out of § 1 of the Sherman Act. *Id.* at 150 n.6. Manipulation of the conspiracy concept by courts dealing with § 1 of the Sherman Antitrust Act to attain "proper" results is discussed by AREEDA, ANTITRUST ANALYSIS ¶334 (3rd ed. 1981). Cf. *Schultz's* treatment, text accompanying note 54-62, *supra*.

¹¹³ Prosser defines privilege in the following fashion:

"Privilege" is the modern term applied to those considerations which avoid liability where it otherwise might follow. In its broader sense, it is applied to any immunity which prevents the existence of a tort; but in its more common usage, it signifies that the defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the plaintiff. He is allowed freedom of action because his own interests, or those of the public require it, and social policy will be best served by permitting it. The boundaries of the privilege are marked out by our current ideas of what will most effectively promote the general welfare.

PROSSER, *supra* note 32, § 16, at 98.

¹¹⁴ Defense counsel asserted that Schultz was a "self confessed perjurer, drunkard and convict." 152 Wis. at ___, 139 N.W. at 391. These facts gave ground for an investigation of plaintiff's day to day conduct. Another potential justification seems inherent; defendant could assert that the imputation was true, that is, Schultz's character was so bad that he was a person who ought to be watched.

¹¹⁵ The *Schultz* decision adopted this approach. *Id.* at ___, 139 N.W. at 391. The bad character of the plaintiff in *Schultz* worked against him in that analog to libel since primary recovery was for damage to reputation.

of the case, and that our proposed construction mandates that the court focus upon it.

To further illustrate our preferred construction, let us against consider¹¹⁶ the case of the employee-at-will whose employment is terminated for reasons that are contrary to public policy. Such cases fall within the retaliatory discharge doctrine.¹¹⁷ For example, take the case of the female employee who alleges that she was discharged because she rebuffed the sexual advances of a supervisor who, to retaliate, subsequently fabricated a complaint of poor job performance.¹¹⁸ Virginia apparently does not authorize relief for this plaintiff on the ground, long recognized at common law, that an employer may hire and fire at his pleasure.¹¹⁹ We suggest that the second part of the statute should be read to offer this plaintiff redress. Arguably, a conspiracy between the supervisor and the company exists, since the supervisor was not acting within the scope of his duties in seeking the dismissal of the plaintiff.¹²⁰ The discharge from employment constrains her from performing a lawful act, much in the way the civil rights of the wife in *Randall* and the witness in *Schultz* were restricted. Finally, the discharge was malicious in the sense that it could not be justified. A privilege cannot be based on a purpose which contravenes public policy.¹²¹

We understand that our approach to part two of the statute would not be of aid to many employees wrongfully discharged. In the majority of these cases no conspiracy will be present. The facts of *Harless v. First National Bank*¹²² illustrate our point. An employee of a bank complained to his superiors about current lending practices of the bank which violated federal law. When the employee informed the federal authorities of these irregularities, he was fired. Presumably, the discharge of plaintiff could not be justified solely on the ground that such was in the best interests of the bank, since a privilege cannot be founded on the need to conceal a violation of law. Yet, since the plaintiff's superiors were acting in the bank's interest, as opposed to their own, no con-

¹¹⁶ See Ulrich & Howard, *supra* note 6, at 380-85.

¹¹⁷ See generally Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only In Good Faith*, 93 HARV. L. REV. 1816 (1980). Everyone who has written on the subject agrees that the common law rule permitting termination of an employee at the pleasure of the employer is unjust and ought to be changed. What the rule should be and the procedure to best implement it are much disputed.

¹¹⁸ The facts in the example in the text are taken from *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

¹¹⁹ See *Blevins v. General Electric Co.*, 491 F. Supp. 521 (W.D. Va. 1980).

¹²⁰ See, e.g., *Johnston v. Baker*, 445 F.2d 424 (3rd Cir. 1971); *Christopher v. General Computer Systems, Inc.*, 560 S.W.2d 698 (Tex. Civ. App. 1977).

¹²¹ See note 113 *supra*. In the *Monge* case, from which our illustration was taken, the court stated this proposition by saying that "[A bad faith termination] is not in the best interests of the economic system or the public good." 114 N.H. at 132, 316 A.2d at 551.

¹²² 246 S.E.2d 270 (W. Va. 1978).

spiracy would be present.¹²³ Such an analysis negates much of the potential of part two of the conspiracy statutes for this area and others. Nonetheless, when one considers the nature of the conspiracy concept, even this attenuated warning might be worthwhile.

Repeal of the Conspiracy Statute

The better alternative, in our opinion, is to repeal both parts of the conspiracy statute. We foresee little benefit flowing from it, but the possible harms caused by its continued existence seem substantial. In our prior article we set forth our basis for abolishing the triple damages remedy for violation of the injuries to business part of the statute.¹²⁴ Without a triple damages remedy this section should be viewed as declaratory of the common law.¹²⁵ While its retention in this form would have no appreciable effect on Virginia tort law, its repeal would abolish the criminal^c penalty. For the reasons set out below, we favor repeal.¹²⁶

The breadth of the compelling and restraining part of the statute is unsettling. It makes criminal any concerted activity for the purpose of compelling another either to act against his will or to refrain from doing a lawful deed. To illustrate our fear, we set forth an outlandish example. Suppose my wife and I agree to do everything within our power to prevent our neighbor Jones from cutting down a large oak tree in his front yard. To secure our goal we organize all of our neighbors to socially boycott Jones and his family in order to save the tree. Under our preferred construction, my wife and I appear to have violated the statute by organizing this social boycott. Although we have less coercive power than the employer in *Deon*,¹²⁷ a judge might find our conduct beyond acceptable community standards, especially under a statute apparently designed to prevent pressure tactics. To avoid liability, we would be forced to establish a privilege for our conduct. Even a judge sympathetic to our environmental and aesthetic concerns might well hold that the interests we tried to foster were not as important as those invaded by our boycott.¹²⁸

¹²³ See W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4884, at 385 (rev. perm. ed. 1978).

A corporation cannot conspire with itself any more than an individual can, and hence it appears to be the general rule that a corporation can not conspire with its officers, agents or employees when they are acting solely for the corporation.

Id. See also *Fowler v. Dept. of Education*, 472 F. Supp. 121 (E.D. Va. 1978) (two officials of state department of education acting within the scope of their employment cannot be held liable as conspirators under VA. CODE § 18.2-499 (a)).

¹²⁴ See Ulrich & Howard, *supra* note 6, at 410-12.

¹²⁵ See, e.g., *Picture Lake Campground v. Holiday Inns, Inc.*, 497 F. Supp. 858, 863-64 (E.D. Va. 1980); *State v. Huegin*, 110 Wis. 189, 85 N.W. 1046, 1062 (1901).

¹²⁶ See note 136 *infra*.

¹²⁷ See discussion of *Deon v. Kirby Lumber Co.*, 162 La. 671, 111 So. 55 (La. 1927), and text accompanying notes 63-65 *supra*.

¹²⁸ See note 113 *supra*.

Assuming that the two of us ought to pay damages to Jones, there is the more pressing question of criminal liability. If the local prosecutor wished to pursue the matter, we would be subjected to a criminal fine as well as tort damages.¹²⁹ In fact, we could be held criminally responsible even if our activities caused Jones no actual harm, or if we had agreed on a course of conduct but had done nothing to achieve our purpose, for the statute makes the agreement itself illegal.¹³⁰ In this regard, note that the potential scope of liability is quite broad. Those persons living on the block who knowingly shared our purpose apparently have violated the statute even though they were not parties to our agreement.¹³¹

Our illustration points up both the vagueness and the all encompassing character of the statute. We can readily understand why the legislature originally included a severability clause.¹³² Without the clause, the likelihood that the second part of the statute would be declared unconstitutional on this ground is high.¹³³ Couple this with the procrustean nature of the crime of conspiracy and you have created a potent weapon in the hand of any prosecutor. The prosecutor is in position to define the crime as he thinks fit.¹³⁴ Given the alleged "anti sit-in" impetus for the statute's birth, such fears do not seem chimerical.¹³⁵ All of this makes the statute's second part as much a sleeping giant as the first.

¹²⁹ In Virginia it has long been established that a private party may employ a private prosecutor to assist the Commonwealth's Attorney in particular instances. *McCue v. Commonwealth*, 103 Va. 870, 49 S.E. 623 (1905); *Sawyer v. Commonwealth*, 88 Va. 356, 13 S.E. 708 (1891). By hiring this assistant, Smith could place great pressure on the public prosecutor to proceed against us.

¹³⁰ See note 17 *supra*.

¹³¹ *Whited v. Commonwealth*, 174 Va. 528, 6 S.E.2d 647 (1940), holds that one who aided and abetted in the commission of a crime but did not share the criminal intent of the actual perpetrator may not be convicted of conspiracy. Presumably, if the defendants share this criminal purpose, as did those on the block joining Smith and myself, they could be held as conspirators by aiding and abetting us even in the absence of an agreement.

¹³² The pertinent part of the prior statute provided:

2. That if any part or parts, section, subsection, sentence, clause or phrase of this Act or the application thereof to any person or circumstance is for any reason declared unconstitutional, such decision shall not affect the validity of the remaining portions of this act which shall remain in the force as if such act had been passed with the unconstitutional part or parts, section, subsection, sentence, clause, phrase or such application thereof eliminated; and the general assembly hereby declares that it would have passed this Act if such unconstitutional part or parts, section, subsection, sentence, clause or phrase had not been included herein, or if such application had not been made.

VA. CODE § 18.1-74.1:3 (b) 2. (Supp. 1964). When the conspiracy statute was redrafted and moved to Va. Code § 18.2-199 to 501, the severability clause was deleted.

¹³³ See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). We note that the constitutionality of the statute was upheld in *Huegin v. State*, *aff'd sub nom Aikens v. Wisconsin*, 195 U.S. 194 (1904), but the focus in the case was upon the injuries to business part of the statute.

¹³⁴ See generally Y. KAMISAR, W. LAFAYE, & J. ISRAEL, *MODERN CRIMINAL PROCEDURE*, 811-34 (4th ed. 1974).

¹³⁵ See Ulrich & Howard, *supra* note 6, at notes 14-16. In addition, see Boothe, *Civil Rights in Virginia*, 35 VA. L. REV. 928 (1949).

We doubt that the repeal of the compelling or constraining section will unduly restrict the evolution of tort law concerning joint activities. The civil conspiracy doctrine is sufficiently flexible to deal with unique cases such as *Randall* and *Schultz*.¹³⁶ The adequacy of the civil remedy is suggested by the fact that these cases stand practically alone under the Wisconsin statute. If that statute were an important means of redress apart from the common law, one would expect the Wisconsin plaintiff's bar to invoke it with some regularity. Instead, the statute is practically ignored.

¹³⁶ See text accompanying note 96 *supra*.

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