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INJURIES TO BUSINESS UNDER THE VIRGINIA CONSPIRACY STATUTE: A SLEEPING GIANT

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I. Introduction

The law generally treats joint activity more stringently than individual conduct.¹ Quite often judges will state that conduct permissible if done alone may become wrongful if performed by several actors.² The tort of civil conspiracy is based on this distinction.³ The rationale for this divergent treatment is simple to state: mere force of numbers often increases the impact of group action thereby expanding the opportunities for abuse.⁴ Thus, conspiracies demand special treatment.

Virginia recognizes the tort of civil conspiracy.⁵ In addition, the legislature in 1962 enacted a statute⁶ which expressly forbids two quite

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¹ See, e.g., *Grenoda Lumber Co. v. Mississippi*, 217 U.S. 433, 440-41 (1910); *Callan v. Wilson*, 127 U.S. 540, 555-56 (1888).

² See, e.g., *Louis Kamm, Inc. v. Flink*, 113 N.J. 82, ____, 175 A. 62, 68-69 (1934); *Keveczky v. Lorber*, 290 N.Y. 297, ____, 49 N.E.2d 146, 149-40 (1943); In *Keveczky and Flink*, the defendants' conduct would not have been actionable if performed by one person. See Note, *Refusal to Deal as a Tort—Conspiracy in a Civil Suit*, 45 ILL. L. REV. 784, 788-89 (1951).

³ There has been a good deal of discussion as to whether conspiracy is to be regarded as a separate tort in itself. On the one hand, it is clear that the mere agreement to do a wrongful act can never alone amount to a tort, whether or not it may be a crime; and that some act must be committed by one of the parties in pursuance of the agreement, which is itself a tort. 'The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff.' W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 293 (4th ed. 1971) (quoting *James v. Evans*, 149 F. 136, 140 (3d Cir. 1906)) [hereinafter cited as PROSSER].

⁴ See PROSSER, *supra* note 3, at 293; *Developments in the Law: Competitive Torts*, 77 HARV. L. REV. 888, 929 (1964).

⁵ See, e.g., *Gallop v. Sharp*, 179 Va. 335, 338, 19 S.E.2d 84, 86 (1942).

⁶ VA. CODE § 18.2-499 (1975). Subsection (a) provides:

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 under §18.2-500.

Subsection (b) creates a criminal and civil cause of action for attempts to violate subsection (1) and prescribes the same penalties as provided in that subsection.

different types of joint conduct: A conspiracy (1) to injure another in his trade, reputation, business or profession, or (2) to compel another to either perform an unlawful act or to prevent another from doing a lawful act against his will. These are punished as class three misdemeanors.⁷ In addition to the criminal penalty, a private party showing an injury to his business is awarded three fold damages, cost of suit, and a reasonable attorney's fee.⁸ Surprisingly, no civil damage remedy is specifically set forth for a violation of the statute's second part.⁹ An injunction is authorized for any violation of the statute.¹⁰

This statute is an enigma. Its substantive provisions are identical to an old Wisconsin statute,¹¹ but the Virginia remedies are much harsher.¹² There is no legislative history.¹³ Given the time of its enactment, the sentiment of the legislature,¹⁴ and its similarity to statutes passed in other states during this period,¹⁵ many attorneys refer to it as the "Anti-Sit-In" Act.¹⁶ Of course, the statute does not say this directly. In fact the language is quite open-ended. If it is not just as "Anti-Sit-In" Act, what kinds of harm did the legislature seek to prevent by condemning conspiracies to injure a business? Both federal¹⁷ and state antitrust laws¹⁸

⁷ Class three misdemeanors are punishable by a fine of not more than 500 dollars. VA. CODE § 18.2-11(c) (1975).

⁸ VA. CODE § 18.2-500 (1975).

⁹ Section 18.2-499 states that civil relief for its violation is contained in § 18.2-500. Section 18.2-500 (a) grants treble damages only for injuries to reputation, trade, business or profession.

¹⁰ VA. CODE § 18.2-500(b) (1975).

¹¹ WISC. STAT. ANN. § 134.01 (West 1975). The Wisconsin Conspiracy Statute was enacted in 1887. See 1887 WISC. LAWS ch. 287.

¹² A triple damages remedy is provided for violations of the Virginia Conspiracy Statute. VA. CODE § 18.2-500(a). Although the Wisconsin statute does not expressly provide a civil remedy, Wisconsin courts have long implied a private right of action and a single damages remedy under it. See, e.g., *Randall v. Lonstorf*, 126 Wis. 147, ____, 105 N.W. 663, 664 (1905).

Contrary to the civil penalties, the criminal penalties provided by the two statutes are roughly analogous. Compare VA. CODE § 18.2-11(c) (fine not exceeding 500 dollars) with WISC. STAT. ANN. § 134.01 (West 1975) (fine not exceeding 500 dollars or imprisonment not exceeding one year).

¹³ The authors attempts to find any legislative history on § 18.2-499 were unsuccessful and the legislative clerk of the House of Delegates assured us that none existed. The legislative history of Virginia acts is generally not recorded.

¹⁴ In 1962, when the Conspiracy Statute was enacted, the Virginia legislature was following a policy of "massive resistance" to racial integration. See generally J. WILKINSON, *HARRY BIRD AND THE CHANGING FACE OF VIRGINIA POLITICS 1945-1966*, (1968).

¹⁵ See, e.g., ALA. CODE ANN. § 13.6-60 (1972); MISS. CODE ANN. § 97-23-85 (1972).

¹⁶ Many commentators contend that tort actions currently constitute the gravest menace to the civil rights movement. See, e.g., Madison, *Mississippi's Secondary Boycott Statutes: Unconstitutional Deprivations of the Right to Engage in Peaceful Picketing and Boycotting*, 18 How. L. J. 583, 607-09 (1975); Sandifer & Smith, *The Tort Suit for Damages: The New Threat to Civil Rights Organizations*, 41 BROOKLYN L. REV. 559, 570-71 (1975).

¹⁷ 15 U.S.C. § 1 (1976) (§1 of Sherman Act); 15 U.S.C. § 18 (1976) (§7 of Clayton Act).

¹⁸ VA. CODE § 59.1-24 (1973).

prohibit conspiracies to restrain trade. Common law tort principles also apply.¹⁹ The overlap with these bodies of law seems clear.²⁰ With its triple damage remedy, not to mention the criminal sanction,²¹ this is a menacing statute.

The writers believe that the time is ripe to consider the Injuries to Business part of the Conspiracy Statute. Both of us are aware of cases in which attorneys, encouraged in part by the lure of triple damages,²² have

¹⁹ *Crump v. Commonwealth*, 84 Va. 927, 934-37, 6 S.E. 620, 624 (1888).

²⁰ The second part of the Conspiracy Statute is broader than the first. In *Randall v. Longstorf*, 126 Wis. 147, 105 N.W. 663 (1905) the Wisconsin court distinguished the two parts 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 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.

Id. at 464. The Virginia legislature apparently feared that the second part of the statute might be voided for vagueness. The predecessor of the present Virginia Conspiracy Statute contained the following provision:

That if any part or parts, section, subsection, sentence, clause or phrase of this Act or the application thereof to any person or circumstances is for any reason declared unconstitutional, such decision shall not affect the validity of the remaining portions of this Act which shall remain in 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) (1960). When title 18.1 was replaced by title 18.2 in 1975, the legislature deleted the quoted section.

²¹ The writers have largely ignored the criminal aspects of the Conspiracy Statute. We have done so for two reasons. First, few criminal cases are likely to arise under the statute. There appears to be only one such case in Virginia, and this was based on a plea bargaining agreement. Furthermore, of all the reported Wisconsin cases under its statute, only one involved a criminal prosecution. *See State v. Huegin*, 110 Wis. 189, 85 N.W. 1046 (1901). In this regard it should be noted that the Virginia attorney general would not be able to participate in criminal proceedings under this section, for he is prevented by the Constitution of Virginia from participating in or appearing in any criminal trial. Thus any case under the statute would have to be brought by the local commonwealth attorney, and they seem to have shown little interest in doing so. (Letter from Katherine A. Schleich, Assistant Attorney General, to Joseph E. Ulrich (August 13, 1980)). Second, the criminal penalty is minimal. *See note 7 supra*.

²² The attorneys themselves fare less well under the Conspiracy Statute than under the antitrust laws. *Compare* VA. CODE § 18.2-500(a)(1975) (attorney for successful plaintiff under Conspiracy Statute entitled to reasonable fee awarded by court) with 15 U.S.C. § 15 (1975) (successful antitrust plaintiff receives reasonable attorney's fee as part of overall recovery) and VA. CODE § 59.1-9.12(b) (1975) (same). This means that the actual fees received by a successful plaintiff's lawyer in an antitrust case bear no necessary relationship to the court awarded amount. The attorney's fee is awarded to the plaintiff but counsel ordinarily works on a fee negotiated with his client. *See generally* Alioto, *The Economics of a Treble Damage Case*, 32 ANTITRUST L. J. 87 (1966); Kelly, *Comment on Attorney's Fees in Individual and Class Action Antitrust Litigation*, 60 CAL. L. REV. 1656 (1972).

sued under this statutory theory.²³ Indeed, it is the triple damage remedy which sets this section of the statute apart. First, we shall offer our views as to what kinds of harm fall within the statutory language "Injuries to Business". Second, we shall set forth a construction of this language which both carries out the apparent purposes of the statute as well as reconciles it with overlapping areas of antitrust and torts. Finally, we shall state reasons why the mandatory triple damages provision should be repealed.

II. Scope of the Statute

What kinds of harms will be classified as injuries to "reputation, trade, business, or profession"? We will consider the issue in the context of employment relationships, discussing especially the situation of the employee at will. A brief review of the employee-employer relationship is necessary.²⁴ An employee working pursuant to a written contract of employment (not terminable at will) may, of course, sue his employer for breach of the contract.²⁵ The basis of the action is contractual, and the issue of malice plays no part in the case.²⁶ Damages are limited to lost income pursuant to the contract and consequential damages.²⁷ Where the employee works under a contract terminable at will, he has no cause of action for discharge.²⁸ Clearly, the employee at will is largely unprotected from discharge. In response to this void, courts recently have fashioned a remedy for the employee at will who has been terminated for a reason which offends the particular court's sensibility. This class of remedy has been described as the doctrine of retaliatory discharge.²⁹

²³ The writers are themselves counsel in cases under the statute, one of us for plaintiff and the other for defendant.

²⁴ The present discussion is limited to situations not caused by collective bargaining agreements or legislative limitations on discharge.

²⁵ See, e.g., *American Aircraft Engineering Corp. v. Melton*, 211 Va. 562, 563, 179 S.E.2d 465, 465 (1971).

²⁶ *Crescent Horse-Shoe Iron Co. v. Eynon*, 95 Va. 151, 159, 27 S.E. 935, 937 (1897).

²⁷ *Standard Laundry Service v. Pastelnick*, 166 Va. 125, 129, 184 S.E. 193, 195 (1936). Punitive damages may be recovered where the defendant's acts amount to an independent intentional tort. *Wright v. Everett*, 197 Va. 608, 615, 90 S.E.2d 855, 859 (1956). See also *Worrie v. Boze*, 198 Va. 533, 543-44, 95 S.E.2d 192, 201 (1957).

²⁸ *Plaskitt v. Black Diamond Trailer Company, Inc.*, 209 Va. 460, 467, 164 S.E.2d 645, 650 (1968).

²⁹ The retaliatory discharge doctrine, being in its initial stages of development, consists of a number of theories. In *Harless v. First National Bank*, 246 S.E.2d 270 (W. Va. 1978), the court found a cause of action in favor of an at-will employee who was terminated after he advised governmental authorities of his employer's violations of federal lending laws. In *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), the court found a cause of action in favor of an at-will employee who was terminated after she refused sexual relations with her job foreman. The court stated that "a bad faith termination is not in the best interest of the economic system or the public good." 114 N.H. at 132; 316 A.2d at 551. Thus, in *Harless*, the employer was violating the public policy expression of a statute. In *Monge*, the policy was established by the courts.

This doctrine has been stated as the rule that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on a retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."³⁰

The doctrine is not universally accepted. Many decisions follow the common law rule that an employee at will may be discharged for good reason, bad reason, or no reason at all.³¹ While there are no reported Virginia court decisions on this point, a recent federal court opinion, applying Virginia law, held that no such action is available in Virginia,³² thus leaving the employee at will unprotected from retaliatory discharge.

Virginia does recognize the tort of intentional interference with contract,³³ but presumably an employee at will would be precluded from using this theory by the rule of *Plaskitt v. Black Diamond Trailer Co.*³⁴ In *Plaskitt*, the plaintiff acted as defendant's exclusive sales agent for the sale of trailers. For a period of two years, plaintiff was paid on a commission basis. When the defendant notified the plaintiff that it intended to takeover the business with its own sales force, the plaintiff sued to prevent termination. The court held that a contract for the rendition of service, which does not provide for the time which it is to continue, is terminable at will if reasonable notice is given.³⁵ The court found that the absence of "additional consideration [in addition to] such things as would normally be done . . . in the performance of personal services. . ."³⁶ precluded a right of recovery to an employee at will. Although the extent of the "additional consideration" required was not specified by the court, the expenses of plaintiffs in writing, telephoning or making personal calls in connection with selling merchandise did not qualify as sufficient additional consideration.³⁷

The employee may also sue under the common law in an action for damages caused by a conspiracy. Where one alleges that he suffered damage as a result of one or more overt acts pursuant to a conspiracy, he

³⁰ *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 132, 316 A.2d 549, 551 (1974) (citation omitted).

³¹ See, e.g., *Loucks v. Star City Glass Co.*, 551 F.2d 745, 747 (7th Cir. 1977).

³² *Blevins v. General Electric Company*, ___ F. Supp. ___, (W.D. Va. 1980).

³³ *Worrie v. Boze*, 198 Va. 533, 540, 95 S.E.2d 192, 196 (1957).

³⁴ 209 Va. 460, 164 S.E.2d 645 (1968).

³⁵ 209 Va. at 467; 164 S.E.2d at 650 (citing *Stonega Coke & Coal Co. v. Louisville & Nashville R.R.*, 106 Va. 223, 55 S.E. 551 (1906)). In his concurring opinion, Judge Gordon stated that he would have repudiated *Stonega*. 209 Va. at 470; 164 S.E.2d at 652.

³⁶ 209 Va. at 464; 164 S.E.2d at 648.

³⁷ *Id.* Despite plaintiff's assertion that his efforts had been responsible for building up defendant's sales of trailers as "piggyback" carriers for railroads into a profitable business, the court treated the plaintiff as a mere salesman providing personal services. If the plaintiff had invested in facilities or even purchased the trailers on consignment, a different case might have been presented. *Id.*

has set out a cause of action.³⁸ At common law, a conspiracy was a crime without an overt act, while a civil conspiracy was not actionable without an overt act.³⁹ By contrast, one effect of the Conspiracy Statute is to remove the requirement that plaintiff plead an overt act pursuant to the conspiracy to state a cause of action.⁴⁰ An allegation of a conspiracy causing unjustified damages states a cause of action under the statute.⁴¹ Although a plaintiff showing an injury to his business due to a conspiracy would be entitled to recover actual damages plus punitives in the proper case,⁴² under the *Plaskitt* decision it appears that an employee at-will is not engaged in business.⁴³

Does the Conspiracy Statute give a right of action to the otherwise unprotected employee at will? The statute applies to any "person" injured in his "reputation, trade, business or profession." The language of the statute seems to indicate clearly that an employee at will may use it. However, none of the reported cases decided under the Wisconsin statute⁴⁴ involved a plaintiff-employee at will. In a case seemingly well suited for the application of the statute, it was not even mentioned. In *Mendelson v. Blatz Brewing Co.*,⁴⁵ an officer/stockholder in Blatz Brewing Co. sued his employer and its officers claiming a conspiracy to injure Mendelson in his employment. He claimed that he was discharged from his employment, which was terminable at will, and was forced to sell his stock in the company so that another officer/shareholder's inexperienced son could fill Mendelson's position. The trial court sustained the defendant's demurrer, but this action was reversed on appeal, the Wisconsin Supreme Court holding that it does recognize a cause of action for wrongfully procuring the breach of an employment contract terminable at will.⁴⁶

This seems a classic case for the application of the Conspiracy Statute. Why did plaintiff's counsel not assert it?⁴⁷ In a similar case, the Wisconsin court mentioned the statute almost as an after thought.⁴⁸ Did the court find it not applicable in *Mendelson*?⁴⁹ Perhaps plaintiff's counsel wanted to avoid the issue, probably to be raised by the defense,

³⁸ Gallop v. Sharp, 179 Va. 335, 338, 19 S.E.2d 84, 86 (1942).

³⁹ Hyde v. Shine, 199 U.S. 62, 76 (1905); see note 3 *supra*.

⁴⁰ Radue v. Dill, 74 Wis.2d 239, 241, 246 N.W.2d 507, 510-11 (1977).

⁴¹ See note 175 *infra*.

⁴² Anchor Co. v. Adams, 139 Va. 388, 393, 124 S.E. 438, 439 (1924); see also Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1957).

⁴³ See text accompanying notes 34-37 *supra*.

⁴⁴ WISC. STAT. ANN. § 134.01 (West 1975).

⁴⁵ 9 Wis.2d 487, 101 N.W.2d 805 (1960).

⁴⁶ 9 Wis.2d at ____; 101 N.W.2d at 807.

⁴⁷ See also Lorenz v. Dreske, 162 Wis.2d 273, 214 N.W.2d 753 (1974) (fired contract employee did not assert Conspiracy Statute claim).

⁴⁸ See, e.g., White v. White, 132 Wis. 121, ____, 111 N.W.2d 1116, 1119, (1907).

⁴⁹ See note 45 *supra*.

that the defendant's actions were solely for the best interest of the corporation, thereby precluding a finding of malice, or even conspiracy.⁵⁰

With this background, a review of the limited Virginia case law interpreting the statute may be helpful. There are no reported Virginia court decisions construing Conspiracy Statute, but three federal court opinions construing it have been reported.⁵¹ Two of those opinions arose in the context of a defendant's motion to dismiss based on a plea of the statute of limitations.⁵² Virginia Code section 8-24, controlling at the time of both opinions, provided a two-year statute of limitations for injuries to the person, a five-year limitation for damage to property, and a one-year limitation for all other actions.⁵³ In *Federated Graphics v. Napotnik*,⁵⁴ plaintiff-corporation sued individual defendants, officers of the corporate defendant, claiming they wrongfully caused their corporation to file an involuntary petition in bankruptcy against the plaintiff destroying its business. The defendants moved to dismiss the action, solely on the basis of the statute of limitations.⁵⁵ They asserted that the plaintiff's claim was really in the nature of malicious prosecution to which the one-year statute applied. The court responded by stating that malicious prosecution involved injury to the person, while the Conspiracy Statute was directed at injuries to property⁵⁶ such as those alleged by the plaintiff.

A later case amplifies this distinction between injuries to a person and injuries to property. In *Moore v. Allied Chemical Corp.*,⁵⁷ William Moore, a principal in Life Science Products (LSP), producer of Kepone, sued Allied and others claiming a variety of causes of action relating to the many problems arising out of the manufacture of Kepone. Count II alleged that certain defendants conspired to injure Moore in his reputation, trade, business or profession in violation of the Conspiracy Statute, presenting to the court the question of the relation of the statute to an individual plaintiff who was also a principal in a business. The court held that the statute, by referring to "reputation, trade, business or profession," not only protects corporations but also individuals who own and operate their own business.⁵⁸ After reviewing the evidence, the court in

⁵⁰ Possibly counsel worried that the words in the statute referred only to business or property rights rather than personal rights. See text accompanying notes 59-61 *infra*.

⁵¹ *Moore v. Allied Chemical Corp.*, 480 F. Supp. 363 (E.D. Va. 1979); *Federated Graphics Co. v. Napotnik*, 424 F. Supp. 29 (E.D. Va. 1976); *Fowler v. Department of Ed.*, 472 F. Supp. 1211 (E.D. Va. 1970).

⁵² *Moore v. Allied Chemical Corp.*, 480 F. Supp. 363 (E.D. Va. 1979); *Federated Graphics Co. v. Napotnik*, 424 F. Supp. 291 (E.D. Va. 1976).

⁵³ VA. CODE § 8-24 (1976 Supp.).

⁵⁴ 424 F. Supp. 291 (E.D. Va. 1976).

⁵⁵ *Id.* at 292.

⁵⁶ *Id.* at 293.

⁵⁷ 480 F. Supp. 363 (E.D. Va. 1979). Arguably, Moore had a cause of action under VA. CODE § 18.2-499(a). ("preventing or binding another from doing or performing a lawful act.")

⁵⁸ 480 F. Supp. at 374.

Moore held that since plaintiff did not claim damage to his investment or monetary losses in Life Science Products, he was asserting a common law libel and slander action which was not actionable under the Conspiracy Statute. The court quoted the following language in *Federated Graphics* to support the proposition that the statute protected business, not individuals:

This statutory action provides a remedy for wrongful conduct directed to the business. An injury to one's business is clearly an injury to one's property interest (citations omitted). * * * Malicious prosecution involves wrongful conduct directed at a person which may indirectly damage property. The statutory action, on the other hand, focuses upon conduct directed at property, *i.e.*, one's business. Accordingly, the nature of the two actions differ.⁵⁹

Applying this analysis to plaintiff Moore, the court had no difficulty in holding that where the individual could show no damage to his property interests in the business, he could not recover under Conspiracy Statute.

Since plaintiff does not claim that the alleged conspiracy caused damage to his investment and monetary losses in connection with LSP, he obviously is advancing a common-law claim for libel and slander to his personal reputation. This type of claim is not actionable under Section 18.2-499.

In *Federated Graphics, supra*, Judge Merhige rejected the notion that the statute codifies common-law actions. Rather, statutory coverage is afforded only when malicious conduct is directed at one's *business*, not one's person. *Id.* at 294. On the basis of the deposition of Moore, the Court finds that Count II does not state a claim actionable under Va. Code Ann. § 18.2-499.⁶⁰

Lest there be any doubt, the *Moore* court in a footnote clearly rejected the notion that an individual plaintiff could recover under the Conspiracy Statute for damage to his "reputation, trade, business or profession" without proving damage to his business investment.

Plaintiff, of course, might argue that damage to his reputation would result in damage to his "business" or "profession" as a chemist. Under Section 8-24, however, such damage would be only to future earnings and profits—an indirect or consequential injury. More important, since injury and personal reputation ordinarily causes damage to one's business or profession, nearly

⁵⁹ 424 F. Supp. at 293.

⁶⁰ 480 F. Supp. at 374-75.

every defamation action would fall within the coverage of Section 18.2-499. *Federated Graphics* obviously rejected this theory.⁶¹

We submit that the analysis on which both *Moore* and *Federated Graphics* are grounded is somewhat suspect. The federal courts held that the phrase "reputation, trade, business, or profession" should be equated to business property interests as distinguished from interests of personalty. Apparently, the statute only applies if the plaintiff can show an injury to an investment interest in his business. The difficulty with this is that the distinction was developed in the context of the statute of limitations. We wonder whether this setting permitted the court to consider the full range of policy issues involved. It also seems significant that the Virginia Supreme Court has given the terms "trade", "business", and "profession" much broader meanings when interpreting them in other contexts.⁶² Arguably, the words trade or profession refer more to individual activity than to interests in business. Yet, this may be a case in which the court felt constrained to read the statute narrowly due to the severity of the remedy—triple damages.⁶³

We conclude, however, that if the rationale of these two federal decisions is carried to its logical conclusion, the unjustified destruction of the employment relationship by joint action would not give rise to a cause of action in favor of an employee under the Injuries to Business provision of the Conspiracy Statute. The employment relation would be characterized as a personal right as opposed to a business interest. On the other hand, the employer should be able to use the statute in certain cases, the superstar professional athlete being a clear illustration. Finally, it appears certain that the federal interpretation precludes a holding that the Conspiracy Statute protects employees at-will against retaliatory discharges.⁶⁴

⁶¹ *Id.* at 375 n. 3. If the plaintiff in *Mendelson*, see text accompanying notes 45 & 46 *supra*, had sued for the reduction in price of his stock due to the forced sale, he probably would have had a cause of action under *Moore's* construction of the statute since an injury to his investment would be alleged.

⁶² See *Board of Supervisors v. Boaz*, 176 Va. 126, 130, 10 S.E.2d 498, 499 (1940) (construing "trade, occupation, and business" as nontechnical terms used in their ordinary sense).

⁶³ See text accompanying note 178 *supra*.

⁶⁴ A federal case decided prior to *Moore* indicates that the courts might have intended to protect employees at-will. In *Fowler v. Department of Education*, 472 F. Supp. 121 (E.D. Va. 1978), the court dismissed the plaintiff's claim against various individual defendants, officials of defendant Department of Education, on the ground that their actions were done in the scope of their employment and therefore the defendants could not be found to have conspired. *Id.* at 122. The plaintiff was apparently an employee of the Department of Education, but the court did not dismiss the case on the basis that the statute did not protect individual plaintiffs, thus leaving open the possibility that the statute covers an employee, without a showing of damage to "investment."

Whether a retaliatory discharge case would give rise to a cause of action under the second part of the Conspiracy Statute, see note 20 *supra*, will be considered in a subsequent article.

III. Construction of the Statute

Assuming the phrase "Injuries to Business" is limited as just indicated, there are many different types of business behavior encompassed by the statutory language.⁶⁵ The most significant of these is the boycott,⁶⁶ and for this reason we will focus our discussion on this practice. As used here, a boycott involves an agreement among individuals to follow a uniform course of action, most often termination of business relations with a designated firm, in an effort to achieve some goal or purpose.⁶⁷ In addition, the distinction between commercial and noncommercial boycotts should be indicated.⁶⁸ In this regard the goal of the parties is crucial. A commercial boycott describes one form of joint efforts of business firms to increase profits.⁶⁹ Such business-motivated activities traditionally are regulated by the Sherman Act.⁷⁰ A noncommercial boycott involves joint efforts by nontraders whose goals may be either

⁶⁵ See, e.g., *Judevine v. Benzies-Montange Fuel and Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936) (conspiracy to damage business credit).

⁶⁶ Wisconsin judges have on occasion referred to its statute as an antiboycott statute. *Trade Press Pub. Co. v. Moore*, 180 Wis. 449, 193 N.W. 507, 512 (1923); *Hawarden v. Youghiogheny and L. Coal Co.*, 111 Wis. 545, 87 N.W. 472, 474 (1901).

The word boycott is an eponymic term which has as its origin the trials and tribulations of Captain Charles C. Boycott. Boycott, a retired British army officer serving as an estate manager in Ireland, refused to reduce rent in response to demands by the Irish Land League and served eviction on his tenant. At the urging of Charles Parnell, an Irish national leader, Boycott's tenants refused further dealing with him. Subsequently, the Captain was obligated to import workers from Oster to harvest his crop under the guard of hundreds of soldiers. See 2 *ENCYCLOPEDIA BRITANICA* 212 (15th ed. 1974).

⁶⁷ The boycott is a method of employing economic sanctions. Boycotts are normally divided into two categories. A primary boycott is usually defined to include situations in which a group attempts to induce favorable behavior by a trader at a different level of distribution by ceasing its own dealing with the trader, thus cutting off a vital economic relationship. See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons*, 340 U.S. 211 (1951) (whiskey manufacturers jointly refused to sell to retailers not following their price ceiling). The secondary boycott, however, is the more common. It requires the cooperation of a party at a different level in the distribution process from that on which the instigators operate. Where members of an industry desire to punish or eliminate a competitor, they can do so only by inducing the competitor's suppliers or customers to stop dealing with him. This is ordinarily done by threatening to stop dealing with the competitor's customers or suppliers. See, e.g., *FTC v. Fashion Originators Guild*, 312 U.S. 457 (1941); *Boutwell v. Marr*, 71 Vt. 1, 142 A. 607 (1899). See generally Note, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act*, 30 U. CHI. L. REV. 171, 176-181 (1962).

⁶⁸ The distinction between commercial and noncommercial boycotts was first articulated by Professor Coons in 1962. See Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. L. REV. 705, 709-13 (1962) [hereinafter cited as Coons]. Since that time, courts and commentators have followed Coons' terminology. See, e.g., *Missouri v. National Organization for Women*, 467 F. Supp. 289, 301 (E.D. Mo. 1978), *aff'd*, 620 F.2d 1301, 1315 n.16 (8th Cir. 1980); Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L. J. 247, 292 [hereinafter cited as Bird]; Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1140 (1980).

⁶⁹ See Coons, *supra* note 68, at 709-13.

⁷⁰ *Id.* at 727.

political, social, or religious rather than business.⁷¹ The traditional view is that such noncommercial activity is beyond the scope of the Sherman Act and is governed instead by constitutional and tort principles.⁷²

Before offering an interpretation of the injuries to business provisions of the Conspiracy Statute, it is necessary to look at its common law antecedents, the antitrust statutes regulating similar types of conspiracies, and the case law under the identical Wisconsin statute. In this way we should be better able to define the statute's ambit and place it into the scheme of remedies granted to Virginia plaintiffs for business injuries.

A. Common law antecedents.⁷³

The common law long recognized the right of everyone to engage in trade free from unjustified interference with his business relationships.⁷⁴ In fact, this was often described as a property right.⁷⁵ This property right was substantially tempered, however, by the privilege of competition.⁷⁶ What does competition mean in this context? As Milton Friedman has pointed out:

⁷¹ *Id.* at 709-13. It is possible, but unlikely, that businessmen could engage in a noncommercial boycott. To fall within such classification, businessmen could have no commercial interest in the boycott's success. *But cf.* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 92, at 262-5 (1977) (suggesting hypothetical case of competitor instigating consumer boycott). *See also* *Katex v. Lefkowitz*, 216 N.Y.S.2d 1014 (1961) (conspiracy by apartment owners not to rent to blacks.).

⁷² *Missouri v. National Organization for Women*, 620 F.2d 1301, 1315 (8th Cir. 1980); *Bird*, *supra* note 68, at 292; *Coons*, *supra* note 68, at 742.

⁷³ Justice Holmes had much to do with the development of the law in the area covered by this section. Of particular importance is his influential article, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). *See also* RESTATEMENT OF TORTS §§ 762-67 (1939).

⁷⁴ *See generally* PROSSER, *supra* note 3, §§ 128-130; Green, *Relational Interests*, 30 ILL. L. REV. 1 (1930).

⁷⁵ *See, e.g.*, *Dorcy v. Kansas*, 272 U.S. 306, 311 (1926); *Stein v. Schmitz*, 21 N. J. Misc. 218, —, 32 A.2d 844, 848 (Sup. Ct. 1943).

⁷⁶ The right to engage in competition, implicit in the right to engage in trade, has received much common law and statutory attention. Recognition of the law of entry in competition, even though it brings injury to the established trader's patronage, prices, and profits, came early in English law and represented to move out of feudalism. In the "Schoolmaster's Case," Y. B. Pasch. 17 Hen. 4, f. 47, pl. 21 (1410), *reprinted in* 7 AMES FOUNDATION 20 (1926), the headmaster of a grammar school in Gloucester brought a trespass action against another who established a competing school on the ground that the latter entry had brought the price per child down from 40 d. to 12 d. The court held that there was no cause of action. Two hundred years later, in "The Case of Monopolies," *Darcy v. Alley*, 77 Eng. Rep. 1260 (1602), the court held void a grant by Queen Elizabeth of a monopoly of playing cards to a trader and stated the historic objections:

[Any monopoly] is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects for the end of all these monopolies is for the private gain of the patentees . . . [T]here are three inseparable incidents to every monopoly . . . 1. that the price of the commodity will be raised. . . 2. after the monopoly grant, the commodity is not so good and merchantable as it was

[C]ompetition has two very different meanings. In ordinary discourse, competition means personal rivalry, with one individual seeking to outdo his known competitor. In the economic world, competition means almost the opposite. There is no personal rivalry in the competitive marketplace. There is no personal higgling. The wheat farmer in a free market does not feel himself in personal rivalry with, or threatened by, his neighbor, who is, in fact, his competitor. The essence of a competitive market is its impersonal character.⁷⁷

The common law adopted the nontechnical definition of competition. Given the setting of the cases in which the question arose, this was only natural. The plaintiff would claim that the defendant had harmed his business by some activity, thereby invading his property right to engage in trade. The defendant would originally respond by admitting the conduct and the intended harm to the plaintiff, but assert that so long as he took the custom from his rival by legitimate means—that is, by methods other than intimidation, coercion or other tortious activity,⁷⁸ he was privileged even though he knew, and intended, harm to his competitor. The courts agreed⁷⁹ with the defendant, holding that the law ap-

before. . . . 3. [i]t tends to the improvishment of divers, artificers and others, who before by [their labor] had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary

Id. at 1263. In 1623 Parliament passed "The Statute of Monopolies", 1623, 21 James 1, c. 3, invalidating crown grants of monopoly, providing an action for triple damages for persons injured by such a monopoly, and accepting limited grants for new inventions. See generally Jones, *Historical Development of the Law of Business Competition*, 35 YALE L. J. 905 (1926); 36 YALE L. J. 42, 207, 351 (1927).

⁷⁷ M. FRIEDMAN, *CAPITALISM AND FREEDOM* 119 (1962). Professor Bork has identified five district meanings for "competition" as used in antitrust cases. R. BORK, *THE ANTITRUST PARADOX* 58-61 (1977).

⁷⁸ Coercive conduct may take many different forms. See, e.g., *Evenson v. Spaulding*, 150 F. 517 (9th Cir. 1907) (physical interference as well as intimidation of plaintiff's customers); *Standard Oil Co. v. Doyle*, 118 Ky. 662, 82 S.W. 271 (1904) (harrassment of plaintiff's delivery wagon drivers); *Gilly v. Hirsh*, 122 La. 966, 48 So. 422 (1909) (placing signs to create impression that entrance of one store was entrance of another). See generally Annot., 9 ALR 2d 228 (1950).

⁷⁹ The classic American case sanctioning harm to a plaintiff by any competitive means is *Katz v. Kapper*, 7 Cal. App.2d 1, 44 P.2d 1060 (1935). In *Katz*, the plaintiff claimed that the defendants injured his business by, *inter alia*, selling below cost and threatening to drive out of business anyone who dealt with the plaintiff. In sustaining the defendant's demurrer, the court said:

The defendants are not charged with making any effort to deprive plaintiff of his trade except by transferring the same to themselves. This is essentially business competition. The defendant did or threatened to do nothing other than to gain a business advantage proportionate to the losses sustained a plaintiff, and by the accomplishment of that end their purposes would have been satisfied. . . .

[The defendant's acts] were not unlawful nor were they committed in an unlawful matter. They related solely to the aims of the defendants to engage in

proved of inflicting harm as a consequence of competition because the public benefited in the long run from lower prices and better products.⁸⁰ Thus, the focus of the case was upon the goals of the rivals and the methods employed to compete.⁸¹

The common law rules governing cases in which a single party inflicted harm on another's business ordinarily were stated in terms of the "malice formula."⁸² Where the defendant acted for the sole purpose of destroying another's business, such activity was "malicious," presumably on the ground that once the defendant accomplished his objective, his own business would close and therefore the public would lose both sources of supply.⁸³ There would be no public benefits to offset the harm inflicted. On the other hand, if the defendant possessed dual motives, to destroy plaintiff's business (malicious) and to compete for custom (legitimate), defendant's activities were protected.⁸⁴ Since

business competition with plaintiff for the resulting business advantage to themselves. The fact that the methods used were ruthless, or unfair, in a moral sense, does not stamp them as illegal. It has never been regarded as the duty or province of the courts to regulate practices in the business world beyond the point of applying legal or equitable remedies in cases involving acts of oppression or deceit which are unlawful.

7 Cal App. 2d at ____; 44 P.2d at 1062. The competitor-defendant's attitude toward his victim has been succinctly described as "disinterested malice." *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 256 U.S. 350, 358 (1921) (Holmes); *Nann v. Raimst*, 255 N.Y. 307, 319 (1931) (Cardozo).

⁸⁰ For instance, a man has a right to set up a shop in small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already. [This privilege] rests on the economic principle that free competition is worth more to society than it costs.

Holmes, *supra* note 32, at 3. The English position, to which Holmes owed much, is summarized in *J. FLEMING, LAW OF TORTS 214-18* (1967).

⁸¹ Rivalry of the parties is the focus of the comprehensive tort doctrines governing competitor cases. See Callmann, *Boycott and Price War: Violation of the Antitrust Laws or Unfair Competition*, 23 OHIO ST. L. REV. 128, 134 (1962) [hereinafter cited as Callmann] (prima facie tort doctrine); Note, *Unfair Competition Under the Sherman Act*. C. Albert Sauter Co. v. Richard S. Sauter Co. and the Pick-Barth Rule, 59 IOWA L. REV. 1194, 1217-20 (1974) (relationship between common tort activity and Sherman Act § 1 activity).

⁸² *Developments in the Law: Competitive Torts*, 77 HARV. L. REV. 888, 924-32 (1964).

⁸³ But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery.

Tuttle v. Buck, 107 Minn. 145, ____, 119 N.W. 946, 948 (1909).

⁸⁴ For examples of the use of the malice formula to protect defendants who intentionally inflicted harm on plaintiff, see L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS, A. SMITH & J. TREECE, *ADVANCED TORTS* § 22-23 (1977).

business rivals generally entertain such mixed motives towards each other, seldom will unilateral activity be characterized as malicious. Such an approach prevents the undue burdening of commercial activity which might occur if each businessman had to answer for his motives.⁸⁵

As noted earlier, group activity ordinarily has been viewed with greater suspicion than unilateral conduct due to the increased potential of a combination to cause harm.⁸⁶ In *Boutwell v. Marr*,⁸⁷ this distinction was decisive. In that case, the defendants, wholesalers, agreed to boycott any manufacturer who sold directly to retailers thereby eliminating these middlemen. The defendants asserted that the boycott was to protect the group's economic interests and therefore was privileged competition. In an opinion with a modern ring the Vermont court responded:

It is true, as suggested in argument, that everyone engaged in business is liable to have it injured or destroyed by the action of those upon whom he depends for patronage. But, when those upon whom he depends for patronage are acting as individuals, he has a measure of security in the probability that different preferences will be shown by persons left to their own choice; and, if some who desire to injure his business secure the cooperation of others by unlawful means, the law gives him a remedy. If the defendants are right, he can be deprived of this security and this remedy by converting those who desire his injury into the majority of an association, and those who do not into a suppressed minority, held to the designated course by the pressure of a system of fines and penalties. But giving a new face to an old

⁸⁵ The "malice formula," see text accompanying notes 41-43 *supra*, often has been used to illustrate the existence and operation of the "prima facie tort doctrine," see, e.g., Callman, *supra* note 81, at 134. Under the prima facie tort doctrine, a boycott is prima facie unlawful and the defendant is liable unless he can justify his act. *Id.*

The doctrine was originally formulated in England in the 1880s. See *Mogul S.S. Co. v. McGregor, Gow & Co.*, 23 Q.B. 598, 613 (1889), *aff'd*, [1892] A.C. 25 (1891); W. POLLOCK, *TORTS* 21 (1st ed. 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 fourteenth amendment. *Id.* at 206. In 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 pleading, requires a justification if the defendant is to escape liability." *Id.* at 204. While the prima facie tort doctrine's significance may have been to broaden tort doctrines since the turn of the century, see Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 Nw. L. REV. 563, 573-74 (1959); Halpern, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7, 12 (1957), it adds little to traditional tort concepts in enabling the courts to choose and weigh the factors relevant to each particular case. See Green, *Trade Relations Under Tort Law*, 47 VA. L. REV. 559, 569-73 (1961) [hereinafter cited as Green].

⁸⁶ See text accompanying notes 1-4 *supra*.

⁸⁷ 71 Vt. 1, 142 A. 607 (1899).

wrong can never defeat the remedy, for the law will inquire as to the substance of the thing complained of. If the plaintiffs were in fact injured by a forced withdrawal of patronage secured through the action of the defendants' organization, they are entitled to redress.⁸⁸

In sum, what makes this group behavior unlawful, said the court, is its superior effectiveness in the market. Where a single firm acts alone, its suppliers or customers receive protection from the actor's rivals;⁸⁹ but, if a group which controls the market refuses to deal, the victim has no alternative sources of supply or demand. Group activity may prevent the normal checks of the competitive market from operating.

The *Boutwell* decision, however, represented the common law minority view. Prosser notes that "[I]t undoubtedly is true that in the absence of statute, combinations to refuse to deal are not in themselves and without more unlawful, particularly where their purpose is merely to protect their members against evils which threaten their own business."⁹⁰ Boycotts, said the majority of courts, are merely one form of lawful competition.⁹¹ At worst, the combination possesses mixed motives. If the combination won out, this demonstrates the superiority of this

⁸⁸ 71 Vt. at ____; 142 A. at 609.

⁸⁹ Except in situations involving public utilities or monopolies, an unilateral refusal to deal was always lawful, even if motivated by actual malice. RESTATEMENT OF TORTS §§ 762-65 (1939). In addition to the fact that victims receive protection from an actor's competitors, it was asserted that competitive traders ought to have the absolute right to choose their customers. See generally *Brown, The Right to Refuse to Sell*, 25 YALE L. J. 194 (1916). The rule that a business ought to have the unfettered right to refuse to deal has been criticized. See e.g., *Callman, supra* note 81, at 134; Note, *Refusal to Deal as a Tort-Conspiracy in a Civil Suit*, 45 ILL. L. REV. 784 (1951).

⁹⁰ PROSSER, *supra* note 3, § 130, at 961.

⁹¹ The leading case articulating the majority rule is *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1892] A.C. 25, in which the defendants' boycott activities (rebates to shippers and predatory pricing) drove the plaintiff out of the market. The defendants' conduct was upheld by Lord Bowen on the following rationale:

What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? . . . No man, whether trader or not, can . . . justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contracts or other, assuming always that there is no just cause for it But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiff than pursue to the bitter end a war of competition weighed in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiff than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiff's share. . . . To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesman, and which is design-

business form. The marketplace, not the courts, is the proper forum for rivalry involving business self-interest.⁹²

The attraction of this concept of competition as rivalry becomes evident from a brief consideration of the labor combination cases decided under the common law.⁹³ The courts failed to distinguish business combinations from employee combinations.⁹⁴ Both were illegal unless privileged, and the applicable privilege was competition.⁹⁵ In both settings, competition was viewed as rivalry with others for the same product within the same market: businesses competed for the custom of buyers, while employees competed for jobs of the same employer⁹⁶ or increased share of the revenues earned by the employer's business.⁹⁷ In both instances combination was a method employed in pursuit of self-interest. Where the union's efforts were focused upon someone other than the employer, its "rival," the analogy to normal marketplace competition broke down, and the union's efforts were characterized as "malicious" even though the conflict between employers and employees was evident.⁹⁸ Since no other privilege applies, liability was imposed on the

ed to attract business to his own shop, would be a strange and impossible counsel of perfection.

Id. at 614-15.

⁹² *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, ____, 55 N.W. 1119, 1121 (1893). In *Hollis*, retail lumber dealers agreed to boycott any manufacturer or wholesale dealer that sold lumber directly to consumers. Since no fraud or intimidation was employed, the court reasoned that the threatened boycott simply presented the plaintiff-wholesalers with a business decision. Responding to the argument that the defendant association possessed too much power, the court stated that "[a]ssociations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious." *Id.*; see also *Mongul S.S. Co. v. McGregor, Gow & Co.*, [1892] A.C. 25 ("if peaceable and honest combinations of capital for purpose of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the bar of the common law.") *Cf.* *Holmes*, *supra* note 73, at 6-9 (legality of business combinations should be decided as policy matter by legislatures).

⁹³ See generally C. GREGORY & H. KATZ, *LABOR AND THE LAW* 13-199 (3d ed. 1979) [hereinafter cited as GREGORY & KATZ]. The following discussion is a simplified treatment of a very complicated area.

⁹⁴ See, e.g., *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, ____, 50 S.E. 353, 353 (1905); *Webber v. Barry*, 66 Mich. 127, ____, 33 N.W. 289, 291 (1887) *Crump v. Commonwealth*, 84 Va. 927, 934-37, 6 S.E. 620, 624 (1888); *Allen v. Flood*, [1898] A.C. 1.

⁹⁵ See generally 2 T. COOLEY, *A TREATISE ON THE LAW OF TORTS* § 232 (4th ed. 1932).

⁹⁶ *Id.*

⁹⁷ *Id.* If the employee strike or boycott harmed the employer's business, this was viewed as illegitimate competition. See, e.g., *Vegeahn v. Gautner*, 167 Mass. 92, ____, 44 N.E. 1077, 1078 (1896).

⁹⁸ In *Allen v. Flood*, [1898] A.C. 1, a boilermakers union pressured a shipyard to fire two shipwrights who refused to join the union. The House of Lords upheld the union's action on the ground that the shipwrights and the union were in competition for jobs. *Id.* at 24. By so holding, the court extended to labor unions the same competition defense it had previously sanctioned for business combinations. See *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1892] A.C. 25; note 49 *supra*. Subsequently, however, the court restricted the types of activities that unions could conduct. In *Quinn v. Leatham*, [1901] A.C. 495, an employer was

union.⁹⁹

Up to this point, the discussion has dealt with cases concerning business rivals who attempted to justify their conduct on the basis of competition. Suppose, however, nontraders attempted to justify the intentional infliction of economic harm on plaintiff's business for noncommercial reasons. Two cases involving college presidents illustrate the general approach. In *Gott v. Berea College*,¹⁰⁰ the defendant president directed his students not to patronize plaintiff's restaurant. The justification asserted was that the boycott was a necessary adjunct to the school's role of supervising the morals and education of its charges. While the court found these restrictions reasonable, it also held that their reasonableness was irrelevant. The mere existence of such justifications sufficed. On the other hand, when a college president organized a similar boycott merely to satisfy a personal grudge, as the defendant did in *Hutton v. Walters*,¹⁰¹ the plaintiff's claim succeeded. Since this defendant's conduct did not promote a bona fide societal interest, it was characterized as malicious.¹⁰²

The issue in these cases is more complicated than the competitor cases, for in the latter the existence of trade rivalry justifies the defendant's action no matter how powerful his other motives or how ruthless his tactics.¹⁰³ In the nontrader cases, the courts must decide whether the goals promoted by the defendant's conduct outweigh the plaintiff's property right to operate his business free from such interference.¹⁰⁴ This balancing process is extremely difficult since the interests are incommensurable. For this reason, an opinion like *Gott* seems arbitrary. Yet, what these opinions do demonstrate is that the common law has long permitted infliction of harm on a business by nontraders for reasons other than competition.¹⁰⁵

subjected to secondary boycott pressures by the union when he refused to replace his workers with union members. The House of Lords held that as a result of the *secondary* boycott, the combination did not have a justifiable objective and, consequently, the union was guilty of civil conspiracy. *Id.* at 525. Modern commentators have harshly criticized *Quinn*, charging that the case created a "double standard" for labor since the court had approved in *Mogul* secondary boycott tactics by business combinations. *See, e.g.*, GREGORY & KATZ, *supra* note 93, at 98; R. WYKSTRA & E. STEVENS, AMERICAN LABOR & MANPOWER POLICY 27-28 (1970).

⁹⁹ *Quinn v. Leathem*, [1901] A.C. 495.

¹⁰⁰ 156 Ky. 376, 161 S.W. 204 (1913).

¹⁰¹ 132 Tenn. 527, 179 S.W. 134 (1915). In *Hutton*, the president of a local college directed students at the college not to board with the plaintiff because she refused to dismiss a boarder with whom the president had a dispute.

¹⁰² *Cf.* *Tuttle v. Black*, 107 Minn. 145, 119 N.W. 946 (1909) (commercial boycott done solely to drive competitor out of business and irrespective of any personal profit is actionable tort).

¹⁰³ *See* text accompanying notes 90-99 *supra*.

¹⁰⁴ *See* RESTATEMENT OF TORTS § 767 (1939) (nonexclusive list of factors courts should use in balancing interests of parties)

¹⁰⁵ For an interesting analysis of the pre-1962 noncommercial boycott cases, see Coons,

The common law approach delineated above has been greatly modified by subsequent legislation, especially the Sherman Act¹⁰⁶ and the National Labor Relations Act.¹⁰⁷ The editors of the *Second Restatement of Torts* deleted the quite extensive materials dealing with competitive privilege in business and labor union settings on the ground that tort principles no longer have an important role to play for the law's development in these areas.¹⁰⁸ Traditional tort principles still apply to nontrader cases.¹⁰⁹

B. The Antitrust Laws

In 1890, Congress passed the Sherman Antitrust Act.¹¹⁰ Its purpose was to supplement market forces in regulating the economy.¹¹¹ Prior to 1890, most experts believed that the evils of monopoly could not arise in a free market.¹¹² Unless the state interfered to insulate the monopolist from competition, new firms, attracted by high profits, would eventually enter the monopolist's market.¹¹³ The appearance of the "Trusts" which dominated several industries for substantial periods of time weakened

supra note 68, at 729-46; see also Green, *supra* note 85, at 577-582 (expressing a slightly different perspective on these boycott cases).

¹⁰⁶ 15 U.S.C. §§ 1-7 (1976).

¹⁰⁷ 29 U.S.C. §§ 151-69 (1976). Although tort law recognized the right of workers to organize, *Commonwealth v. Hunt*, 45 Mass. (4 Met) 111, ____ (1842), the courts consistently used tort doctrines to restrict union activities. See, e.g., *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 252 (1917) (malice doctrine); *Vegeahn v. Gunber*, 167 Mass. 92, ____ (1896), 44 N.E. 1077, ____ (1896) (contractual interference doctrine). This hostility to labor activism was the product of both class distinctions and legal standards grounded in property and contract law. See R. SMITH & L. MERRIFIELD, *CASES AND MATERIALS ON LABOR RELATIONS LAW* 38 (rev. ed. 1960). As a result of the courts' unwillingness to respond to the electorate's growing support for the labor movement, legislation replaced common law torts as the law governing organized labor. *Id.* at 39.

Despite this legislative action, the courts remained hostile to granting organized labor any real power. Early attempts at legislation on labor matters were struck down by the Supreme Court as unconstitutional. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking Kansas statute prohibiting yellow dog contracts); *Adair v. United States*, 208 U.S. 161, 180 (1908) (striking federal statute regulating railroad labor relations). Only in the midst of the great depression did the Court rule such statutes constitutional. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 43 (1937) (upholding National Labor Relations Act); *Virginian Ry. v. System Federation No. 400*, 300 U.S. 515, 557 (1937) (upholding amended Railway Labor Act).

¹⁰⁸ RESTATEMENT (SECOND) OF TORTS §§ 708-951, Introduction at vii-viii (1979).

¹⁰⁹ See text accompanying notes 159-170 *infra*.

¹¹⁰ See 26 Stat. 209 (1980), as amended, 15 U.S.C. §§ 1-7 (1976). The statute was enacted in response to the widespread demand for government control of private economic power. See generally W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* (1965); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1954) [hereinafter cited as THORELLI].

¹¹¹ See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62 (1911). C. KAYSEN & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1959).

¹¹² See THORELLI, *supra* note 110, at 109-117, 564-68.

¹¹³ A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 82-83 (1776).

this traditional belief. The Trusts were proof that monopoly could continue indefinitely without state aid. Furthermore, the common law seemed powerless to prevent these unwanted developments. Agreements between competitors to limit rivalry were unenforceable as contracts in restraint of trade,¹¹⁴ but outsiders injured by these agreements were without recourse.¹¹⁵ As noted in the last section,¹¹⁶ this position generally prevailed even if the purpose of the agreement was to eliminate the outsider from the industry.¹¹⁷ Finally, the malice formula virtually precluded relief for anyone harmed by the unilateral action of a rival. What was needed was a federal statute to protect and promote competition affirmatively. The statute should be designed to prohibit those practices which prevented the market from functioning properly. Such is the task of the Sherman Act.¹¹⁸

In contrast to the common law, competition in the antitrust area is used in Friedman's economic sense rather than in the sense of rivalry between individuals.¹¹⁹ The emphasis is on the competitive process, not on individual competitors.¹²⁰ In an antitrust case, the issue is stated in terms of whether the challenged conduct impairs competitive values.¹²¹ Of course, there has been continuing dispute since 1890 as to the values and goals competition should foster.¹²² Nevertheless, the change from the

¹¹⁴ See *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1889] 23 Q.B. 598, 605.

¹¹⁵ "No case can be found in which it was ever held that, at common law, a contract or agreement in general restraint of trade was actionable at the instance of third parties or could constitute the foundation for such an action." *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, —, 55 N.W. 1119, 1121 (1893). One year later, the Indiana Supreme Court expressly refused to follow *Bohn* and its cited authorities, and granted a private plaintiff a cause of action in tort for injuries caused by defendants' illegal conduct. *Jackson v. Stanfield*, 137 Ind. 592, —, 36 N.E. 345, 352-53 (1894).

¹¹⁶ See text accompanying notes 74-81 *supra*.

¹¹⁷ Most significantly of all, government could not intervene to disrupt the trusts. As Thorelli indicates, the lack of public prosecution and inadequate penalties highlighted the insufficiency of the common law. THORELLI, *supra* note 110, at 53.

¹¹⁸ See 21 CONG. REC. 2461 (1890) (Senator Sherman's view of purpose of Act).

¹¹⁹ See generally D. DEWEY, *THE THEORY OF IMPERFECT COMPETITION* (1969).

¹²⁰ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

It is competition, not competitors, which the [Clayton] Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962). One cannot read this quotation without recognizing the ambivalence of the Supreme Court as to the purposes it was pursuing, and what it thought competition signified. See Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 372-73 (1965). [hereinafter cited as Bork & Bowman].

¹²¹ The values of competition include efficiency, full employment, and price stability. See P. AREEDA, *ANTITRUST ANALYSIS*, 6-25 (2d ed. 1974) [hereinafter cited as AREEDA].

¹²² Compare Bork & Bowman, *supra* note 120 with Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 376 (1965).

common law approach is crucial. Under traditional tort doctrine, one or more defendants could assert the privilege of competition so long as business rivalry with the plaintiff was demonstrated. The effect of the challenged activity on competition in the market was irrelevant.¹²³ In antitrust the focus is upon how the defendant's actions affect the marketplace. The mere assertion that the purpose of challenged activity was to further one's competitive interest against rivals is never sufficient standing alone.¹²⁴

For example, section 2 of the Sherman Act forbids single firm monopolizing.¹²⁵ Activity, the sole purpose of which is to obtain complete control of an industry, is proscribed.¹²⁶ In common law tort terms, this section expands the concept of malicious injury to efforts designed to achieve monopoly. Thus, if my purpose is to destroy my competitor to achieve market control, the common law mixed motive formula will not protect me under section 2.¹²⁷ On the other hand, if I gain market control due solely to superior efficiency, there is no Sherman Act violation even though my competitor is destroyed. Where I have succeeded in the competitive struggle by presenting a superior product at a price which cannot be matched, competitive values have not been offended.¹²⁸

Due to the potential overlap with the Conspiracy Statute, a more extended examination of section 1 of the Sherman Act seems in order. Section 1¹²⁹ governs joint activity.¹³⁰ Joint activity can usefully be divided into two types, that which is intended to limit competition between parties to the agreement (internal restraints), and that which is employed to exclude or inhibit outsiders to the combination from competing (external restraints).¹³¹ An agreement by A and B to hold prices above the market

¹²³ See text accompanying notes 78-81 *supra*.

¹²⁴ See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 210 (1959).

¹²⁵ "Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony" 15 U.S.C. § 2 (1976).

¹²⁶ See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945); *United States v. United Shoe Machinery Corp.* 110 F. Supp. 295, 346 (D. Mass. 1953). See generally L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* §§ 5-39 (1977) [hereinafter cited as SULLIVAN].

¹²⁷ See, e.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 32-33 (1911). In *Standard Oil*, the defendant allegedly engaged in various predatory practices to destroy its competitors. The Court found that Standard Oil violated the Sherman Act, although its activities would have been permissible at common law. See *id.* at 55, 76-77. Cf. *Katz v. Kapper*, 7 Cal. App.2d 1, 44 P.2d 1060 (1935) (defendant's boycott legal under common law).

¹²⁸ See note 126 *supra*. Defendants may find it difficult to prove that greater efficiency is the sole cause of their market power.

¹²⁹ "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ." 15 U.S.C. 1 (1976).

¹³⁰ See generally Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743 (1950).

¹³¹ Both internal and external restraints are used to improve the firm's market position.

level,¹³² the archetype of internal restraints, ordinarily will not adversely affect the position of their competitor C. On the contrary, the opposite result is more likely.¹³³ On the other hand, if manufacturers A and B join forces to induce R, a large retailer, not to deal with C, C's opportunity to compete with the combination may be greatly curtailed.¹³⁴ The A, B, & R boycott is the classic external restraint.¹³⁵ The Conspiracy Statute applies only to external restraints.¹³⁶

How would *Boutwell v. Marr* come out under Section 1? Beyond question the holding and rationale of the Vermont court would be adopted.¹³⁷ The defense that the boycott was simply a form of competitive strategy promoting group interest would be rejected. A boycott used by a powerful group poses great danger to competition since the opportunities of outsiders to compete are severely curtailed. This method of obtaining market control does not foster competitive goals such as lower prices and better quality of products. Rather, its purpose is simply to isolate competitors from necessary trade relationships¹³⁸ for the defendant's benefit.¹³⁹

Suppose the defendants' purposes are more socially acceptable. Assume that the defendants design and manufacture dresses. When they discover that some of their competitors are copying their designs and selling dresses in competition with them, the defendants inform their retailers that if the retailers buy goods from the style pirates, the defendants as a group (a very powerful organization) will refuse to deal. To the government's claim that this boycott violated section 1, they respond that they were simply enforcing state law which treated such

All business strategy, legitimate and illegitimate, is aimed at this goal. The dichotomy between internal and external restraints is more fully developed in Carstensen, *Annual Survey of Antitrust Developments*, 35 WASH. & LEE L. REV. 1, 3-22 (1978).

¹³² The Supreme Court has held that the Sherman Act absolutely prohibits cartels and price-fixing agreements. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (price-fixing is per se violation).

¹³³ C is in a position to sell above the market level and yet undercut both A and B. For these reasons, C should be able to increase the number of sales and the profit per sale. C's independence of the cartel is a prime reason why A and B's contract may be unprofitable unless C is included. See McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191, 197-204 (1960) (organizations and functions of cartels).

¹³⁴ See text accompanying note 88 *supra*; note 66 *supra*.

¹³⁵ Like price-fixing, boycotts are absolutely forbidden by § 1. See note 132 *supra*. In antitrust terminology, the Supreme Court has declared price fixing and boycotts illegal per se. *Id.* Once an arrangement is characterized as either price fixing or a boycott, no justifications are permitted. The characterization of an activity as a boycott, however, is often difficult. See R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 135-67 (1976).

¹³⁶ See text accompanying notes 134-139 *infra*.

¹³⁷ Cf. *Eastern State Retail Lumber Dealers Ass'n. v. United States*, 234 U.S. 600, 614 (1914) (conspiracy violating § 1).

¹³⁸ See Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 MICH. L. REV. 671, 675 (1966).

¹³⁹ See SULLIVAN, *supra* note 126, § 83.

copying as tortious. In sum, the guild asserts a form of self-help privilege.¹⁴⁰ In *FTC v. Fashion Originators Guild of America*¹⁴¹ the Supreme Court emphatically rejected this argument, holding that where the purpose is to exclude, such a "combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce. . . and this 'trenches upon the power of the national legislature and vitiates the [Antitrust] Statute.'"¹⁴² The defendant Guild was not permitted to act as a quasi-licensing agency authorizing competition on terms satisfactory to it.¹⁴³ This rationale applies to all similar exclusionary activities involving powerful groups.¹⁴⁴

This is not to say that every external restraint intended to exclude competitors necessarily violates Section 1. Antitrust courts often are compelled to decide whether the reasons for excluding a competitor are sufficiently meritorious to uphold the restrictive conduct.¹⁴⁵ In fact, exclusions have been upheld where such was necessary either to make the market perform more efficiently¹⁴⁶ or to allow firms to obtain the full benefits of a semi-integration.¹⁴⁷ Moreover, in those cases in which the defendant justifies the exclusion on one of these two grounds, the courts may also require that the method used be the least restrictive

¹⁴⁰ See, e.g., *Fashion Originators' Guild of Am. v. FTC*, 114 F.2d 80, 84 (2d Cir. 1940) (self-help remedy permitted if defendants show retailer participated in torts to gain access to designs); *Wm. Filene's Sons Co. v. Fashion Originators' Guild of Am.*, 90 F.2d 556, 560-61 (1st Cir. 1937) (defense accepted in antitrust case); *Wolfenstein v. Fashion Originators' Guild of Am.*, 244 A.D. 656, 659-61, 280 N.Y.S. 361, 366-67 (1935) (injunction against boycott denied).

¹⁴¹ 312 U.S. 457 (1941).

¹⁴² *Id.* at 465-66 (quoting *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1899)).

¹⁴³ Cf. *Silver v. New York Stock Exchange*, 373 U.S. 341, 357-61 (1963) (overlap with Securities Exchange Act of 1934 permits limited self-regulation by New York Stock Exchange).

¹⁴⁴ See, e.g., *Associated Press v. United States*, 326 U.S. 1, 19 (1945); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487, cert. denied, 344 U.S. 817 (1952). See also R. BORK, *THE ANTITRUST PARADOX* 58-59 (1977) [hereinafter cited as BORK] (novel analysis of *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918)).

¹⁴⁵ While concerted refusals to deal, or boycotts, are said to be illegal per se, see note 135 *supra*, not all arrangements with boycott characteristics should be declared unlawful automatically. Professor Sullivan distinguishes sharply between the classic boycott, which is designed to drive competitors out of business or to coerce them into price fixing or other antitrust violations, and concerted refusals to deal which seek only to regulate trade in a manner not inimical to competition (e.g. by adopting uniform contract terms to facilitate price comparison by buyers). See *Sullivan, supra* note 126, §§ 90-92. Commentators generally have followed Sullivan's treatment of boycotts. See, e.g., Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe For Reexamination*, 79 COLUM. L. REV. 685, 703-17 (1979) (different schemes for applying per se rule).

¹⁴⁶ See SULLIVAN, *supra* note 126, §§ 76, 87-88; Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486, 1486-87 (1966).

¹⁴⁷ See SULLIVAN, *supra* note 126, §§ 77, 89; Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531, 1536-38 (1958).

alternative.¹⁴⁸ For our purposes, the significant point is that the kinds of permissible justifications have become increasingly fixed for reasons of judicial administration.¹⁴⁹ In a tort case, on the other hand, the range of acceptable justifications seems to be more varied.¹⁵⁰

Yet, one must be careful not to draw too clear a line between antitrust and tort cases. There are a number of cases in which the courts have condemned as antitrust violations behavior which harms a competitor but which does not seem dangerous to competition in the economic sense.¹⁵¹ For example, in *Klor's v. Broadway Hale's Stores, Inc.*,¹⁵² plaintiff alleged that a retail competitor induced several important manufacturers to boycott it. To this boycott allegation defendant moved for summary judgment on the ground that no injury to competition could be shown. Defendant supported its motion with affidavits showing that there were a large number of retailers competing in this market and that the loss of one could not harm the public.¹⁵³ The Supreme Court overruled the demurrer on the ground that the allegation showed a boycott and boycotts were inherently harmful to competition.¹⁵⁴

Given the ease of entry into retailing, the conclusion that the boycott of Klor's could impair competition seems questionable. The facts seem to show a "purely private quarrel."¹⁵⁵ A personal dispute rather

¹⁴⁸ See *Union Circulation Co. v. FTC*, 241 F.2d 652, 656 (2d Cir. 1957).

¹⁴⁹ See 2 P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 314 (1978) [hereinafter cited as AREEDA & TURNER].

¹⁵⁰ RESTATEMENT (SECOND) OF TORTS § 766(b) (1977).

¹⁵¹ See note 157 *infra*. Similarly, many of the dealer termination cases might be viewed as essentially tort problems. The varying results in these suits are carefully explored by Bohling, *Franchise Terminations Under the Sherman Act, Populism & Relational Power*, 53 TEX. L. REV. 1180 (1975).

¹⁵² 359 U.S. 207 (1959).

¹⁵³ *Id.* at 210. By neither amending its complaint or submitting conflicting affidavits, plaintiff maintained that the Sherman Act prohibits a combination seeking to eliminate a single trader regardless of market effects. See Petitioner's Reply Brief at 2-10, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) reprinted in 5 *ANTITRUST LAW: MAJOR BRIEFS AND ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, 1955 TERM-1975 TERM* 373-81 (P. Kurland & G. Caspar, eds. 1979). [hereinafter cited as MAJOR BRIEFS].

¹⁵⁴ 110 U.S. at 212-214.

The combination clearly has, by its "nature" and "character" a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact, the Sherman Act has consistently been read to forbid all contracts and combinations "which tend to create a monopoly," whether "the tendency is a creeping one" or "one that proceeds at full gallop."

Id. at 213-14. (quoting *International Salt Co. v. United States*, 332 U.S. 302, 396 (1947) (footnote omitted)).

¹⁵⁵ In analyzing Broadway-Hale's boycott, the Ninth Circuit characterized the dispute between the two stores as a private "squabble." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 255 F.2d 214, 234 (9th Cir. 1958), *rev'd*, 359 U.S. 207 (1959). The court of appeals attempted

than competition in the economic sense seems to be the subject matter of the case. Professor Rahl's comments about *Klor's* appear pertinent:

As a legal concept, protection of competition has meant not an economic measure of so many sellers, so many buyers, specific heights of barriers to entry, and so forth. It has meant prevention of whatever kinds of conduct at the time seemed inconsistent with the preservation of a free, private enterprise society. Certain types of behavior, among them boycotts, have been condemned more because they are socially objectional *dirty tricks* than because they are clearly perceived as a real threat of monopoly.¹⁵⁶

Many recent antitrust cases might be included in the list of "dirty tricks" decisions.¹⁵⁷ The point is that the court treated *Klor's* much like a tort case. In essence it found a malicious injury. Plaintiff alleged harm caused by an intentional action, and the defendant offered no acceptable justification.¹⁵⁸ The focus was on the relationship of the parties and the unjustified damage inflicted on the competitor, rather than the competitive process.

to decide the case on economic standards of competition. The court characterized antitrust's goal as preserving public markets which provide consumers adequate alternatives in terms of price, quality, and service. *Id.* at 231. Since no significant change in the structure of this market was threatened through the elimination of *Klor's*, the court failed to find any harm to competition in the economic sense. *Id.* at 235.

¹⁵⁶ Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165, 1168 (1959) (emphasis added).

¹⁵⁷ *See, e.g.,* *Perryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F.2d 618, 620-21 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966); *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96, 97-99 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932). In *Pick-Barth*, plaintiff's employees conspired with its competitor to lure away customers and misappropriate customer lists, cost readings and other necessary data of the plaintiff. Although the conspirators' action was tortious, *see* 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 29 (1973), the First Circuit affirmed the trial court's finding of a § 1 violation even though there was no showing that the plaintiff would be driven from the market or that competition would have been impaired. It was only necessary that the defendant intended to harm the plaintiff without justification. 57 F.2d at 102. *See generally* Note, *Antitrust Treatment of Competitive Torts: An Argument for a Rule of Per Se Legality Under the Sherman Act*, 58 TEX. L. REV. 416 (1980) [hereinafter cited as *Antitrust Treatment*] (discussing history of *Pick-Barth* doctrine) Recently, however, the First Circuit retreated somewhat from its holding *Pick-Barth*. In *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547 (1st Cir. 1974), the court affirmed the trial judge's dismissal of an antitrust claim based on tortious actions directed at the plaintiff even though it characterized the defendant's actions as an "aggregation of dirty tricks." *Id.* at 559. It should be noted that the activities condemned in *Pick-Barth* could well increase competition in the economic sense. *See* 3 AREEDA & TURNER, *supra* note 149, ¶ 738; *Antitrust Treatment, supra* at 425-26.

¹⁵⁸ In oral argument before the Supreme Court, counsel for *Klor's* argued that Broadway-Hale organized the boycott to retaliate against plaintiff's price cutting activity. Rebuttal Argument of Petitioner at 10 (Feb. 26, 1959) *reprinted in* MAJOR BRIEFS, *supra* note 108, at 454.

Most authorities¹⁵⁹ agree that the antitrust laws apply only to commercial activities. According to Dean Rostow, the "Sherman Act largely concerns the behavior of businessmen, and their plans for making as much money as possible under the circumstances of their market position."¹⁶⁰ Thus, in *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools*,¹⁶¹ a nonprofit association which accredited colleges refused to examine or certify a proprietary school. The Association's members were all nonproprietary schools. This refusal was held not to violate the Sherman Act on the ground that non-commercial matters were beyond the purview of the antitrust laws.

Recent decisions have narrowed this exception. In *Goldfarb v. Virginia State Bar*¹⁶² the Supreme Court brought the business activities of the learned professions within the antitrust realm. Subsequently, in *National Society of Professional Engineers v. United States*,¹⁶³ the Court adamantly refused to let the defendants use "ethical rules" to subvert price competition. What the Court seems to have done in these cases is admit that profit motives play such an important part in the activities of the learned professions that the public needs the protection of the antitrust laws. No doubt *Goldfarb* and *Society of Engineers* will make courts increasingly sensitive to the existence of business motives. This new perspective ought to change the result in *Marjorie Webster*. The facts there indicated that the nonproprietary schools profited by maintaining their advantage in the market for students. The school's self-interest in suppressing competition for students was as strong as the Fashion Originators Guild's in seeking sales of dresses.¹⁶⁴ Nonetheless, these learned profession decisions do not overrule the basic proposition stated by Dean Rostow; rather, they reflect a growing awareness of what should be classified as profit-making activity under the antitrust laws.¹⁶⁵

At this juncture, a brief note of the celebrated National Organization of Women (NOW) boycott of various business enterprises in Missouri for the purpose of encouraging passage of the Equal Rights Amendment

¹⁵⁹ Compare Coons, *supra* note 68, at 727 and Note, *Now or Never: Is There Antitrust Liability for Non-Commercial Boycotts*, 80 COLUM. L. REV. 1317, 1339-40 (1980) (taking position that antitrust laws only apply to business activities and comprehensively listing authorities in agreement) with Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1164-65 (1980) [hereinafter cited as *Protest Boycotts*] (taking opposite position).

¹⁶⁰ See Rostow, *Monopoly Under the Sherman Act: Power on Purpose*, 43 ILL. L. REV. 745, 771 (1949) [hereinafter cited as *Rostow*].

¹⁶¹ 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

¹⁶² 421 U.S. 773 (1975).

¹⁶³ 435 U.S. 679 (1978).

¹⁶⁴ See Note, *Antitrust Laws-College Accrediting Association's Refusal to Evaluate Proprietary College Held Not a Sherman Act Violation*, 84 HARV. L. REV. 1912, 1917 (1971) (criticizing decision in *Marjorie Webster*).

¹⁶⁵ See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695-96 (1978).

seems appropriate.¹⁶⁶ The state of Missouri attempted to enjoin the boycott, charging that it violated section 1 of the Sherman Act.¹⁶⁷ NOW, of course, argued that noncommercial boycotts are beyond the scope of the Sherman Act. Both the District Court and the Eighth Circuit refused to pass on this argument.¹⁶⁸ Instead, both courts found the NOW boycott within the *Noerr*¹⁶⁹ exemption, holding that the defendant's activity constituted attempts to influence legislative action in Missouri to which the Sherman Act did not apply. We will assume, with Rostow, that the broader ground is correct and that nontrader cases like *Gott* and *NOW* are beyond the reach of section 1.¹⁷⁰

C. The Wisconsin Statute

A Wisconsin statute originally enacted in 1887 is substantively identical to Virginia's Conspiracy Statute.¹⁷¹ Its remedies, however, are less drastic. Only a criminal penalty was imposed for violations,¹⁷² although a

¹⁶⁶ *Missouri v. National Organization of Women*, 467 F. Supp. 289 (W.D. Mo. 1979), *aff'd*, 620 F.2d 1301 (8th Cir. 1980).

¹⁶⁷ *Id.* at 1302. In addition to the Sherman Act claim, Missouri asserted claims under the Missouri Antitrust Act and a common law tort claim, arguing that NOW had intentionally inflicted harm without legal excuse. 467 F. Supp. at 291. The Eighth Circuit held that *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), required a verdict for defendant on those state claims as well as the federal one. 620 F.2d at 1319.

¹⁶⁸ 467 F.2d at 305; 620 F.2d at 1319.

¹⁶⁹ We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly. Although such associations could perhaps, through a process of expansive construction be brought within the general prescription of "combination[s] . . . in restraint of trade," they bear little resemblance to the combinations normally held violative of the Sherman Act. . . .

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

¹⁷⁰ One commentator has suggested that the *Noerr* doctrine, *see* note 169 *supra*, has no application to the type of factual situation presented in the *NOW* case. *See Protest Boycotts*, *supra* note 159, at 1140-45. We agree. We differ with the writer's position that the antitrust laws should apply to noncommercial boycotts. Instead, the better result would have been merely to exempt noncommercial activity from the antitrust laws. Our principal objection to application of the antitrust laws in this context is the same one we would have to application of the Virginia Conspiracy Statute: we don't see the benefits of imposing treble damages on protest boycotts. Since state tort law imposes compensatory damages and, if necessary, punitive damages, it seems perfectly suited to handle the matter. Moreover, most protest boycotts are likely to be of short duration and without lasting commercial effects. Finally, if one were to follow this commentator's suggested analysis for applying the antitrust laws to protest boycotts, the considerations used are precisely those employed in a torts case. *Compare Protest Boycotts*, *supra* note 159, 1140-45 with RESTATEMENT (SECOND) OF TORTS § 766(b) (1977).

¹⁷¹ *See* WISC. STAT. ANN. § 134.01 (West 1974).

¹⁷² The only penalty provided by the statute is imprisonment for not more than one year or a fine of not more than five hundred dollars. *Id.*

private cause of action was implied.¹⁷³ The only activities excluded from the statute's ambit were those of labor unions.¹⁷⁴

A trial under this statute proceeds much like one in a traditional business tort case. A private plaintiff must prove an agreement between defendants to harm his business, and an act performed pursuant to such agreement done willfully (not inadvertently) and maliciously (without privilege) causing harm to the business.¹⁷⁵ Ordinarily such proof will not be difficult. The crucial issue under the statute will be that of privilege.¹⁷⁶ To decide this issue a court will consider not only the defendants' purposes but the methods employed to fulfill them. The burden of proving the legitimacy of both the goals and the methods used appears to be on the defendant.¹⁷⁷

While there have not been many Wisconsin cases dealing with the Injury to Business Part of its statute, it has become clear that the statute does limit the scope of the privilege of competition. For example, recall the classic boycott situation of *Boutwell v. Marr*.¹⁷⁸ Such conduct generally was permitted at common law as a proper method to protect competitive interests. In *Hawarden v. Youghiogheny & L. Coal Co.*,¹⁷⁹ however, the Wisconsin Supreme Court expressly rejected this defense.

¹⁷³ The Supreme Court of Wisconsin frequently has held that if a violation of § 134.01 causes damage to a person, that person has a cause of action for that violation *See, e.g.*, *Radue v. Dill*, 74 Wis.2d 239, 245, 246 N.W.2d 407, 511 (1976); *Judevine v. Benzies-Montange Fuel & Wholesale Co.*, 222 Wis. 512, ____, 269 N.W. 295, 301 (1936); *Boyce v. Independent Cleaners, Inc.*, 206 Wis. 521, ____, 240 N.W. 132, 135 (1932), *Randall v. Lonstorf*, 126 Wis. 147, ____, 105 N.W. 663, 664 (1905). The Wisconsin Supreme Court also has held that an overt act is not necessary for a civil action to arise under the statute. The only prerequisite to a civil suit under § 134.01 is that damage actually occur to the victim. *See Radue v. Dill*, 74 Wis.2d 239, 245, 246 N.W.2d 507, 511 (1976); *White v. White*, 132 Wis. 121, 129, 111 N.W. 1116, 1119 (1907).

¹⁷⁴ A strike conducted to enforce the labor demands of a union is not an activity prohibited by § 134.01. As long as the union is acting in good faith and is pursuing lawful purposes, a strike will not be enjoined under § 134.01 unless the union uses unlawful means to achieve their lawful purposes. *See Iron Molders' Union Local 125 v. Allis-Chalmers Co.*, 166 F. 45, 49 (7th Cir. 1908).

¹⁷⁵ *State v. Huegin*, 110 Wis. 189, ____, 85 N.W. 1046, 1062-65 (1901). *Huegin* was a criminal case but the court did outline the essential elements of a private cause of action. *Id.* *See also Cohn v. Zippel*, 12 Wis.2d 258, ____, 107 N.W.2d 184, 185 (1961); *Judevine v. Benzies-Montange Fuel & Wholesale Co.*, 222 Wis. 512, ____, N.W. 295, 301 (1936); *Martens v. Reilly*, 109 Wis. 464, ____, 84 N.W. 840, 843-44 (1901).

¹⁷⁶ *See generally* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 612 (1956).

¹⁷⁷ "We note that in order to maintain this action [under the statute], the plaintiff must prove that the defendants' purpose was as alleged, for if it appears that the defendants' purpose was solely to protect their own interests . . . , then the conspiracy falls from the purview of [the statute]." *Radue v. Dill*, 74 Wis.2d 239, 245, 246 N.W.2d 507, 511 (1976). Presumably, the defendant must show that the interest was legitimate. *See text accompanying notes 78-81 supra.*

¹⁷⁸ *See text accompanying notes 87-89 supra.*

¹⁷⁹ 111 Wis. 545, 87 N.W. 472 (1901).

Business boycotts placed too much power to harm rivals in the hands of the group to be tolerated.¹⁸⁰

The Wisconsin experience as yet is insufficient to give definitive answers to several significant questions. Does the statute apply to non-trader cases? In business cases, how should it be coordinated with the state's antitrust laws? What common law privileges other than competition are available under the statute? Some general remarks by Wisconsin state and federal courts are of assistance in dealing with all three. On several occasions Wisconsin courts have stated that the statute codifies the common law.¹⁸¹ Since injuries to business inflicted by nontraders were governed by the common law, presumably cases like *Gott v. Berea College* would be within the province of the statute. Does the statute mandate a plaintiff's victory here as it did in *Hawarden*? An affirmative answer could be supported on the ground that the statute displays a legislative design to forbid all boycotts interfering with business. Yet, this runs counter to the general Wisconsin position authorizing defendants to justify their conduct. Possibly, the statute increases the burden on the defendant to demonstrate that the interest asserted is of great social value and the method employed is the least restrictive necessary to attain the desired result. In this light the *Hawarden* defendants were seeking a legitimate goal—an improved competitive position—but employed a method which, for the reasons stated by the Vermont court in *Boutwell*, could not be permitted.¹⁸² A similar rationale could change the result in *Gott* also.¹⁸³

On the matter of the relation between the antitrust laws and the Conspiracy Statute, the Wisconsin decisions have stated that the two operate independently, for both were intended to forbid combinations stifling competition.¹⁸⁴ This explains the existence of complimentary

¹⁸⁰ It is undoubtedly true that, in the absence of any statute to the contrary, several persons may combine for the purpose of increasing their business and making great gains by any legitimate means, and if, as the incidental result of the combination, others are driven out of business, there is no actionable wrong It may at once be admitted that his sort of reasoning has been adopted by some of the courts which have been called upon to deal with the subject. It has not, however, been adopted by this court; in fact in the very recent case of *State v. Heugin*, . . . it was, in effect, repudiated.

111 Wis. 545, ____, 87 N.W. 472, 474 (1901). A reading of the case indicates, moreover, that the Wisconsin court was of the opinion that a boycott was illegal at common law. This explains the court's comment in *Heugin* that the Conspiracy Statute merely restates the common law. See *State v. Heugin*, 110 Wis. 189, ____, 85 N.W. 1046, 1064 (1901).

¹⁸¹ See e.g., *State ex rel. Nordell v. Kinney*, 62 Wis.2d 558, 561-62, 215 N.W.2d 405, 407 (1974); *State v. Heugin*, 110 Wis. 189, ____, 85 N.W. 1046, 1064 (1901).

¹⁸² See text accompanying note 46 *supra*.

¹⁸³ See text accompanying notes 100-102 *supra*. One would assume that today courts would focus more on the necessity of a total boycott to carry out the school's purpose and the legitimacy of the purpose and less on the defendant's status as an educator. Cf. Coons, *supra* note 68, at 120-21.

¹⁸⁴ See, e.g., *State ex rel. Nordell v. Kinney*, 62 Wis.2d 558, 561-62, 215 N.W.2d 405, 407 (1974); *State v. Heugin*, 110 Wis. 189, ____, 85 N.W. 1046, 1064 (1901).

standards. The antitrust laws prohibit combinations which unduly restrain competition, while the statute forbids malicious injury to traders. From this perspective let us reconsider *Fashion Originators Guild* and *Klor's*. *Fashion Originators Guild* presented a situation to which the antitrust laws clearly apply. For antitrust purposes all commercial boycotts are suspect since any joint efforts to exclude rivals by a powerful group may limit competition.¹⁸⁵ Assume a style pirate sued the guild. Whether the boycott would be wrongful under the statute is unclear. This situation may be distinguished from *Hawarden*. The Guild relied on more than mere self-interest. Indeed, it asserted that its actions were simply an example of permissible self help to enforce a recognized state policy. Just as one may use force to reclaim personal property from a thief while in fresh pursuit,¹⁸⁶ so the Guild could use self-help to protect their property against theft by the style pirates.¹⁸⁷ These defendants could have presented a strong argument that their legal remedy was inadequate.¹⁸⁸ A court also might find that the plaintiff came into equity with unclean hands.¹⁸⁹ Thus, even in cases involving purely pecuniary interests, the Wisconsin statute might permit boycotts which violate the antitrust laws.

The *Klor's* case may indicate the other side of the coin. Assuming that the defendants proved no justification for organizing their alleged boycott against the plaintiff other than the contention that retail competition could not be harmed by *Klor's* demise, a plaintiff might be limited to nonantitrust relief.¹⁹⁰ As suggested earlier,¹⁹¹ a judge might

¹⁸⁵ See text accompanying notes 141-144 *supra*.

¹⁸⁶ See PROSSER, *supra* note 3, § 22. The rationale behind the self-help remedy in torts is that there are some instances where pursuing legal remedies may be inadequate or ineffective because of the time involved in pursuing those remedies. *Id.* The privilege of using force in reclaiming stolen personal property, however, is restricted to only unusual cases. *Id.* A similar self-help defense exists in defamation cases. See *Shenkman v. O'Malley*, 2 A.D.2d 567, 574-577, 157 N.Y.S.2d 290, 297-300 (1957). See generally Annot., 41 A.L.R.3d 1083 (1972).

¹⁸⁷ See, e.g., *Fashion Originators' Guild v. FTC*, 114 F.2d 80, 84 (2d Cir. 1940) (self-help remedy permitted if defendants show retailers participated in torts to gain access to designs); *Wm. Filene's Sons Co. v. Fashion Originators' Guild of Am.*, 90 F.2d 445, 560-61 (1st Cir. 1937) (defense accepted in antitrust case); *Wolfenstein v. Fashion Originators' Guild*, 244 A.D. 656, 659-61, 280 N.Y.S. 361, 366-67 (1935) (injunction against boycott denied).

¹⁸⁸ Copying original but non-copyrighted designs is permissible. See, *Cheney Bros. v. Doris Silk Corp.*, 35 F. 27 (2d Cir. 1929).

¹⁸⁹ See *Wolfenstein v. Fashion Originators' Guild*, 244 A.D. 656, 660, 280 N.Y.S. 361, 367 (1935).

¹⁹⁰ Professor Posner recommends that when relief is not available under federal antitrust law, the victims of exclusionary boycotts should seek remedies under state tort law. See Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 532-35 (1974). [hereinafter cited as *Exclusionary Practices*]. Similarly, another commentator has suggested that there is no need to stretch the antitrust laws to these types of boycotts. The same result could be reached under the doctrine of tortious interference with business relations. See Callmann, *supra* note 81, at 131.

¹⁹¹ See text accompanying notes 151-158 *supra*.

properly hold, "there is no antitrust violation since competition has not been harmed, but this fact does not license defendants to harm plaintiff's business unlawfully. Our Conspiracy Statute was designed to give plaintiff a remedy in these circumstances. See *Hawarden*. Plaintiff has shown injury to business due to defendant's actions, and defendants have offered no permissible justification." Of course, our treatment of *Fashion Originators Guild* and *Klor's* is hypothetical. There is an excellent chance that a Wisconsin court would hold both defendants liable under either section 1 or its Conspiracy Statute. The basis would be that the coverage of the two acts coincide in situations involving boycotts. The overlap between the two in this regard is apparent. Our point is that such a view is not inevitable.

D. A Proposed Construction of the "Injuries to Business" Part of the Virginia Conspiracy Statute.

At present Virginia has three remedial schemes governing injuries to business, the State Antitrust Act,¹⁹² common law tort principles, and the Conspiracy Statute. Over the years the courts have been working out an accommodation between the first two.¹⁹³ In cases involving business rivals, the competitive values of antitrust generally are employed, while in those cases beyond the scope of such laws the defendant is relegated to his common law remedies. Plaintiffs ordinarily choose the antitrust route to recovery, when the option is open to them, because the relief authorized, especially triple damages, so far exceeds that offered by the common law.¹⁹⁴ Viewed in this light, the Conspiracy Statute is a sleeping giant. From the point of view of the private plaintiff, its mandatory triple damage remedy is equal to that authorized by the federal act and *greater than those authorized by state law*.¹⁹⁵ As suggested in the preceding section, the Conspiracy Statute has the potential to supercede both of the state's other remedial schemes in this area.¹⁹⁶ Since the interpretation given the statute could alter radically existing law in this area, careful consideration of this matter is necessary. We shall offer four possible constructions of the statute, indicating the superiority of the fourth.

¹⁹² SEE VA. CODE §§ 59.1-9.1 - .18 (1980). See also Walsh, *Virginia Antitrust Act in VIRGINIA STATE BAR ANTITRUST NEWS LETTER*, 2-4 (Aug. 1980).

¹⁹³ See note 81 *supra*.

¹⁹⁴ See *Exclusionary Practices*, *supra* note 190, at 532-35; Callman, *supra* note 81, at 131.

¹⁹⁵ The Virginia Antitrust Act authorizes a person threatened with injury because of a violation of its provisions to file for an injunction, collect damages, the cost of the suit and attorney's fees. In flagrant circumstances, the aggrieved party may collect not more than three times the amount of actual damages. See VA. CODE § 59.1-9.12(a)(b)(1980). The federal law, however, mandates treble damages in private suits for antitrust violations. See 15 U.S.C. § 15 (1976).

¹⁹⁶ See text accompanying notes 184-190 *supra*.

First, the statute could be viewed as codifying the common law. It would condemn all joint activity intended to inflict harm on a business unless the defendant demonstrated a privilege. The traditional balancing technique would be employed. Thus, on facts like those presented in *Boutwell v. Marr*,¹⁹⁷ a Virginia court would balance the interest of the parties in deciding if the defendant's boycott was privileged. The actual result could not be predicted. A second approach better seems to embody the legislative purpose.¹⁹⁸ Following the example of the Wisconsin court in *Hawarden*, a court might declare that boycotts to protect business interests are never legitimate on the ground that the clear purpose of the statute was to alter the common law to this extent at least. Other insufficient defenses would have to be worked out on a case-by-case basis.

Under either of these closely related interpretations, the statute would be given a life of its own apart from the state antitrust laws. At the same time, the state antitrust laws would become superfluous. Both statutes apply to business cases and under the second construction, both require similar results, but the Conspiracy Statute grants the plaintiff better remedies.¹⁹⁹ Only an inept attorney would rely solely upon the Virginia antitrust statutes.²⁰⁰

Further militating against either construction is the recognized close relationship between these two statutes. The Conspiracy Statute originally was part of the state's antitrust laws.²⁰¹ Two years after its enactment, the legislature shifted the Conspiracy Statute to the criminal part of the Code and added the specific remedy of mandatory three-fold damages, cost of suit, reasonable attorney's fees, and an injunction.²⁰² These civil sanctions appear to have been carried over from the Antitrust Act.²⁰³ In 1974, however, as part of a complete revision of these statutes, the legislature changed the civil remedy under the antitrust laws to single damages except in flagrant cases.²⁰⁴

¹⁹⁷ See text accompanying notes 87-92 *supra*.

¹⁹⁸ See text accompanying notes 13-21 *supra*.

¹⁹⁹ Compare VA. CODE § 18.2-500(a) (1979) (mandatory triple damages) with VA. CODE § 59.1-9.12(a)(1980) (triple damages awarded only in flagrant circumstances).

²⁰⁰ We realize that many, probably most, private antitrust claims would be brought under the federal act. Yet, it appears that the Virginia legislature has its own scheme for handling various kinds of injuries to business. This is the focus of our inquiry.

²⁰¹ See VA. CODE § 59-21.1 (Supp. 1962).

²⁰² See VA. CODE § 18.2-74.1:1(a)(b) (1964). In addition to the remedies of treble damages, cost of suit, reasonable attorney's fees and injunction, the 1964 version of the Conspiracy Statute included an immunity provision and a constitutional severability clause. *Id.*

²⁰³ The 1950 Antitrust Act provided for the same remedies as the 1964 Conspiracy Statute. See VA. CODE §§ 59-26, -32 (1950).

²⁰⁴ See VA. CODE § 59.1-9.12 (1980); see also *Nineteenth Annual Survey of Developments in Virginia Law: 1973-1974*, 60 VA. L. REV. 1461-63 (1974). The Virginia Antitrust Act no longer carries a criminal penalty. *But cf.* VA. CODE § 59.1-68.6 (1980 Supp.) (felony bid rigging statute).

It is submitted that this repeal of the mandatory triple damages provision is crucial to a proper construction of the Conspiracy Statute. The legislature must have intended for the two statutes to serve different purposes.²⁰⁵ This suggests the third possible construction of the Conspiracy Statute. A court might hold that if a case is within the purview of the state Antitrust Act, the Conspiracy Statute is not applicable. Rather, the latter must have been intended as a true antitrust supplement, governing conduct beyond the scope of these laws. Otherwise, price fixing or monopoly could be treated more leniently than boycotts, a peculiar result.²⁰⁶ Yet while this alternative seems preferable to the common law or Wisconsin approach, it too presents problems. If used against nontraders, such as the college president in *Gott*,²⁰⁷ who organized non-commercial boycotts, such defendants could be treated more harshly than businessmen engaging in anticompetitive activities. Certainly, there is nothing in the wording of the statute to indicate that such was the legislature's design.

Rather than any of the three noted above, we offer a fourth construction. Our proposal requires that the word "maliciously" in the statute be given a very specific meaning. Malice is an elastic word. Its meaning changes depending on the context.²⁰⁸ Although originally signifying ill will or spite,²⁰⁹ malice in torts more commonly means only that the

²⁰⁵ When provisions of the Antitrust Act conflict with provisions of the Fair Trade Act, the last enacted controls. *Standard Drug Co. v. General Elec. Co.*, 202 Va. 367, 375, 117 S.E. 2d 289, 297 (1960); *Benrus Watch Co. v. Kiusch*, 198 Va. 94, 98, 92 S.E. 2d 384, 388 (1956).

²⁰⁶ Cf. BORK, *supra* note 144, at 56 (price fixing and monopoly are principal abuses at which antitrust was aimed).

²⁰⁷ See text accompanying notes 100-102 *supra*.

²⁰⁸ See generally, J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 216-18 (1967); *Developments in the Law: Competitive Torts*, 77 HARV. L. REV. 888, 924 (1964). For example, the meaning of malice in malicious prosecution cases is two-fold:

A malicious prosecution is one that is begun in malice and if there is no malice found to exist in fact, the action must fail.

Any feeling of hatred, animosity or ill-will toward the plaintiff, of course, amounts to malice. But it is not essential to prove such ill-will. Any motive other than that of instituting the prosecution for the purpose of bringing the parties to justice, is a malicious motive on the part of the person who acts under the influence of it. If the defendant knew or actually believed the plaintiff innocent of the charges made, he acted maliciously. Although the fact that the defendant actually believed the plaintiff guilty does not conclusively negative malice.

1 F. HARPER & F. JAMES, THE LAW OF TORTS §4.6, at 320 (1956) (footnotes omitted). In defamation cases, on the other hand, the meaning of malice has changed drastically over a period of time. At one time, it meant nothing more than that the defendant's conduct was unprivileged. Now, there is constitutional malice, which means that the defendant made the statement knowing it to be false or with reckless disregard for the truth. See C. MORRIS, MORRIS ON TORTS 359-60 (2d ed. 1979).

²⁰⁹ See *Crawford v. Middletown*, 83 Eng. Rep. 308 (1674); *Greenwood v. Peick*, 79 Eng. Rep. 78 (1670); see also *Hearne v. Stowell*, 113 Eng. Rep. 986 (1740).

challenged behavior was without legal justification.²¹⁰ We suggest that in construing the Conspiracy Statute malice be given its original connotation: A malicious injury is one inflicted malevolently, for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired.²¹¹ So construed, the Conspiracy Statute would only apply if actual ill will were directed at the victim rather than the common and expected impersonal desire to get the best of one's business rivals. In short, our fourth and preferred construction adopts the common law malice formula for this purpose.²¹² Where the conspirators entertain mixed motives, malice could not be present. On the other hand, where only ill will is present, the mandatory triple damage provision of the Conspiracy Statute relieves the victim of the burden of either convincing a court that a flagrant antitrust violation was involved or of obtaining adequate punitive damages under tort rules.²¹³ Such a view would curtail the ambit of the statute yet permit it to supplement the antitrust law by punishing inherently antisocial conduct with an appropriately severe remedy.²¹⁴

To illustrate the working of our preferred construction of the statute, let us reconsider two business cases, *Boutwell v. Marr*²¹⁵ and *Klor's v. Broadway Hale's Stores, Inc.*²¹⁶ Under our view, the statute would not be applicable to *Boutwell* since the defendants' purpose was to improve their competitive position. So long as the defendant's goal is legitimate, the plaintiff is left to other remedies. Of course, the result is contrary to *Hawarden*, but in Wisconsin a private plaintiff is limited to actual damages.²¹⁷ The severity of the triple damage remedy mandated by the Virginia Conspiracy statute compels this difference in result.

Analyzing *Klor's* under the statute is more complicated. Assuming that competition in the economic sense would not be harmed by *Klor's*

²¹⁰ In *State v. Heugin*, 110 Wis. 189, ____, 85 N.W. 1046, 1062 (1901), the Wisconsin Supreme Court held that malice under the original § 134.01 meant "legal malice" which means a wrongful act done intentionally without just cause or excuse. On appeal, Justice Holmes upheld the Wisconsin statute largely on the ground that Wisconsin's definition of malice was well established in tort law. See *Aikens v. Wisconsin*, 195 U.S. 194, 203 (1904).

²¹¹ See *Tuttle v. Buck*, 107 Minn. 145, ____, 119 N.W. 946, 948 (1909); *Hutton v. Watters*, 132 Tenn. 527, ____, 179 S.W. 134, 135 (1975).

²¹² See text accompanying notes 182-185 *supra*.

²¹³ See note 199 *supra*.

²¹⁴ Adoption of the common law malice formula for the Conspiracy Statute would also be consistent with the Virginia court decisions as to when punitive damages are proper. In Virginia, punitive damages are proper only when the plaintiff can prove actual malice by showing actual ill will, malevolence or wicked intention. See *Jordan v. Suave*, 219 Va. 448, 452-53, 247 S.E.2d 739, 741-42 (1978); *Lee v. Southerland Corp.*, 219 Va. 23, 27-8, 244 S.E.2d 756, 759 (1978); *Giant of Virginia, Inc. v. Pigg*, 207 Va. 679, 685-86, 152 S.E.2d 271, 277 (1967).

²¹⁵ See text accompanying notes 87-89 *supra*.

²¹⁶ See text accompanying notes 152-154 *supra*.

²¹⁷ See *Radue v. Dill*, 74 Wis.2d 239, 245, 246 N.W.2d 507, 511 (1976).

demise, the antitrust laws should not apply.²¹⁸ Yet, our construction of the Conspiracy Statute provides plaintiff with a remedy. Since the defendants' actions served no competitive purpose, and no other legitimate purpose was suggested, apparently they were actuated by personal ill will. It is this situation to which the punitive remedy of the Conspiracy Statute ought to apply. On the other hand, if defendants demonstrated that their actions did have a lawful goal, Klor's could not establish malice and would be relegated to traditional tort remedies.²¹⁹

Our proposed construction of the statute should be applied to non-trader cases such as *Gott*. Where defendants demonstrate that the challenged conduct had a lawful purpose, the statute does not apply. Such a result leaves the court free to grant the plaintiff a single damage recovery based on traditional tort principles.²²⁰ In contrast, where the boycott is organized to satisfy a grudge, clearly an impermissible objective, triple damages should be granted to deter this defendant and others. In sum, our proposed construction merely limits the ambit of the statute but in no way limits a court in dealing with difficult cases such as *Gott*. As we view the matter, the triple damage provision may deter judges from finding liability against noncommercial boycotts because the remedy is so drastic.²²¹

III. Repeal of the Triple Damage Remedy

As the reader must realize, our proposed construction would greatly reduce the significance of the statute. The statute would be determinative in very few cases. Due to the triple damage provision, this result is necessary. Without the three-fold damage feature, the statute probably gives a good result. Certainly the Wisconsin approach illustrated by *Hawarden* is preferable to the common law majority position (our second proposed construction). Requiring defendants to demonstrate convincingly that the interests they seek to promote outweigh plaintiffs' right to trade free of such interference and that the goal could not be achieved in less harmful ways makes sense to us.

²¹⁸ See text accompanying notes 151-157 *supra*.

²¹⁹ For example, assume *Broadway Hale* claimed that it had organized the boycott to discipline Klor's for undercutting the prices of other retailers, a fact averred by Klor's in oral argument before the Supreme Court. See note 114. While such proof would establish a business motive on defendant's part, it also demonstrates vividly that Klor's demise would adversely affect competition and that the antitrust statutes do apply.

²²⁰ See text accompanying notes 90-99 *supra*.

²²¹ As previously indicated, many attorneys were of the opinion that this statute was to prevent civil rights sit-ins. See text accompanying notes 13-15 *supra*. Our interpretation would take the sit-in case outside the purview of the statute. Thus, we would not discriminate against this form of boycott. This leaves the court free to determine the legality of the civil rights boycott under constitutional and tort rules. In fact, by removing the triple damage sanction, courts may be more willing to grant relief to injured plaintiffs since only compensatory damages ordinarily would be awarded. Cf. 2 AREEDA & TURNER, *supra* note 149, § 331. (treble damages remedy inhibits finding of liability).

The triple damage remedy changes the entire complexion of the statute. What policy is served by this provision? The usual justifications in the antitrust context are that it is necessary to properly compensate private plaintiffs, deter would-be wrongdoers, and supplement government enforcement of these laws.²²² The case against three-fold damages under the antitrust laws has been made elsewhere and need not be repeated.²²³ The case against triple damages under the Conspiracy Statute is much stronger. Many antitrust violations are both difficult to detect and to prove.²²⁴ Price-fixing is an illustration. Where a group of sellers secretly agree to raise prices, neither their customers nor government enforcers may realize what is happening.²²⁵ Without some kind of punitive damage provision, there would be little economic disincentive not to cheat. If the price-fixers are caught, they cough up their illegal gains plus the costs connected with the suit, but if the cartel either is not discovered or its existence cannot be proved, the sellers keep their illegal profits. Since many—some believe the great majority²²⁶—cartels are never discovered, firms have a definite economic incentive to fix prices. The mandatory triple damages remedy reduces this incentive, for business firms recognize that if their illegal activities are discovered, the damages lost may well exceed the potential gains.²²⁷

Contrast the boycott situation with price-fixing. In the former, the victim is ordinarily aware of the restrictive activities. In most cases, the defendants will have told the businessmen of the boycott and the reasons for its implementation.²²⁸ Therefore, since the boycott, unlike the cartel, almost always will be detected and is easy to demonstrate, the need for an additional economic penalty is not as great. Moreover, the boycott victim has a greater incentive to sue than the cartel victim. The latter may pass on the higher prices to his customers, but the former has no such alternative.²²⁹

²²² See K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 63-77 (1976).

²²³ *Id.* at 81-96.

²²⁴ R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 227 (1976).

²²⁵ For a good, general discussion of the mechanics of price-fixing, see F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE*, 158-64 (1970). For an exhaustive analysis, see Erickson, *The Economics of Price Fixing*, 2 *ANTITRUST L. & ECON. REV.* 82 (1969).

²²⁶ See Posner, *A Program for the Antitrust Division*, 38 *U. CHI. L. REV.* 500, 514 (1971); Posner, *A Statistical Study of Antitrust Enforcement*, 13 *J. LAW & ECON.* 365, 418-19 (1970).

²²⁷ Deterrence is the theory. However, as Professor Posner has indicated, "the smoothly functioning cartel is less likely to generate evidence of actual agreement. What the law mainly penalizes is attempts to fix prices. The completed conspiracy often escapes attention." R. POSNER, *ECONOMIC ANALYSIS OF LAW* 116 (1973).

²²⁸ See, e.g., *Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207, 210 (1959); *FTC v. Fashion Originators' Guild*, 312 U.S. 457, 461 (1941).

²²⁹ For a discussion of the "passing on" defense in antitrust damage proceedings, see SULLIVAN, *supra* note 126, § 252.

For these reasons we think that the ordinary tort relief of actual damages plus punitive awards at the court's discretion better fits the needs of society. This would bring the statute into line with the Virginia Antitrust Act. We therefore recommend this change.²³⁰

²³⁰ The authors also recommend that the Conspiracy Statute's criminal penalty be abolished. As previously indicated, *see* note 23 *supra*, it is of no significance.