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NOTES

TORT LIABILITY OF ORGANIZATIONS FOR INTENTIONALLY IMPAIRING ECONOMIC RELATIONS

The United States frequently has been characterized as a nation of "joiners," and it is true that private clubs, societies, clans, and incorporated and unincorporated associations do flourish in this country.[1] These organizations owe their significance to the desire of individuals to promote interests, whether for profit, pleasure or social welfare, which can be expressed most effectively in combination with others. For the most part the growth of private interest groups has been considered desirable, and their activities have been encouraged.[2] As society becomes more complex, however, the incidence of clashes between the interests of non-governmental organizations and individuals is ever-increasing. Often in the conduct of his affairs, an individual will arouse the enmity of an organization whose power he is practically helpless to combat, and whose ill will, translated into action, may cause him serious harm.[3] Consequently, when the benefits society derives from an organization's

1. "Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout history they have been manifested in 'joining.'" Mr. Justice Frankfurter, Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 728 (1951) (dissenting opinion).

"The multiplication of associations is one of the most striking features of modern social life. . . . Roughly they may be grouped according to their functions into occupational, religious, cultural and recreational bodies. Interests are often combined, however, and there is endless overlapping and duplication. Of their growing importance in the life of society there can be no doubt. . . ." Ginsberg, *Associations*, 2 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 285 (1930). See also LASKI, GRAMMER OF POLITICS (1925); HOBHOUSE, ELEMENTS OF SOCIAL JUSTICE (1922).

2. "The right of association is basic to a democratic society. It embraces not only the right to form political associations but also the right to organize business, labor, agricultural, cultural, recreational and numerous other groups that represent the manifold activities and interests of a democratic people. In many of these areas an individual can function effectively in a modern industrial community only through the medium of such organizations." EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 248 (1952).

3. Ths terms "damage" and "harm" will be used in a non-legal context to signify hurtful occurrences. They will not imply legal results as do such terms as "injury" and "wrong." See Note, *The Prima Facie Doctrine*, 52 COL. L. REV. 503 n. 2 (1952); RESTATEMENT, TORTS § 7 (1934).

activity are outweighed by the resultant harms, the organization's freedom of activity must be restricted.[4]

In its broadest sense the problem is manifest in all societies—that of allocating and controlling power. Governmental power may be checked by constitutions, traditions and the necessity of ultimate acceptance by the governed people; the accumulation of power by private organizations must be limited by legal doctrines, sociological forces or self-restraint. Traditionally, private puissance exercised in a manner which is harmful to others is controlled by application of tort law. Judicious application of tort principles, existent or yet to be developed, may provide a successful means of controlling abuse of power by organizations.

Recent attempts by the American Legion to repress showings of the movie "Limelight" graphically illustrate the manner in which an organization whose activity is generally deemed socially valuable may inflict substantial harm in the attainment of its goals. In furtherance of the Legion's belief that the leading actor, Charles Chaplin, has subversive affiliations, it has written letters to leading theaters throughout the country requesting that they refuse to exhibit the movie and expressing an intention to picket theaters which do not comply with its wishes. In some instances the warnings have been successful; in others the Legion has carried out its threat.[5]

Similarly, in 1951, the Catholic Church objected to the movie "The Miracle." Cardinal Spellman condemned it as a "vile and harmful picture," and an appeal was made to the public to abstain from going to see it.[6] The Paris theater in New York was picketed by various

4. "Society itself is an organization, and does not object to organization of social, religious, business, and all legal purposes. . . .

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which an individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the loss of submitting to terms which involve the sacrifice of rights protected by the constitution. . . ." Mr. Justice Lamar, Gompers v. Buck's Stove & R. Co., 221 U.S. 418, 439 (1911).

5. The American Legion has been supported in its campaign by the Veterans of Foreign Wars, Amvets, The Catholic War Veterans, the Jewish War Veterans, and the Disabled American Veterans. "By now 'Limelight' in the normal course of events should have been shown in approximately 2,500 theatres throughout the country. On February 15 it had been shown in only about 150." W. Murray, *Limelight, Chaplin And His Censors,* Nation, March 21, 1951, p. 248. See also *The Legion and Civil Liberties,* Nation, Sept. 6, 1951, p. 175; *The Legion and the ACLU,* New Republic, Sept. 8, 1952, p. 127.

6. New York Times, Jan. 8, 1951, p. 1, col. 2. The story of "The Miracle" is told by Crowther, *The Strange Case of "The Miracle,"* Atlantic Monthly, April 1951, pp. 35-37. It is retold by Mr. Justice Frankfurter in Burstyn v. Wilson, 343 U.S. 497, 507-510 (1951) (concurring opinion).

Catholic organizations, and on two occasions was emptied as a result of threats that the theater would be bombed if the movie were shown.[7]

In both examples the interests of individuals have conflicted with those of powerful organizations, and as a result of the organization's activity, economic expectancies have been impaired: The actors, producers, distributors and exhibitors of the movies have all suffered pecuniary losses. The harms were inflicted by means of energetic interference with relational interests—interests predicated upon one's associations with other persons. While most torts involve only two parties, the tortfeasor and the person injured, an injury to a relational interest always involves an additional person: The one with whom the injured party has had or would have had an advantageous relation but for the interference.[8] There are many types of relational interests, not all of which can be measured in monetary terms, such as the ordinary relationship between friends, or between a soap-box orator and his audience.[9] Although any relation may be subjected to harm, the courts are not inclined to protect those based on intangible values, but only "economic relations" which involve pecuniary advantages. For example, a tavern owner has an economic relation with his customers which is in direct conflict with the ideals of the Women's Christian Temperance Union; the question of tortious interference would arise if the WCTU prevented the customers from patronizing the tavern owner who would thereby be denied his expected profits.

I

The interests which one has in an economic enterprise have as their correlative an abstinence of a certain type of conduct on the part of others; for example a man's interest in free trade imposes a duty upon others not to interfere therewith. The courts obfuscate this area

7. At this time, coincidentally, the Paris theater also encountered difficulty in satisfying the New York Fire Department requirements. Burstyn v. Wilson, *supra* note 6, at 513, n. 18.

8. The concept of "relational interests" has been developed by Leon Green. In so doing Professor Green has made a scholarly contribution to the law of torts. This contribution has been a result of a conviction that injuries to relational interests constitute a formidable class of harms which can be isolated and categorized rather than diffused in other areas of the law. See GREEN, INJURIES TO RELATIONS (1940); *Relational Interests,* 29 ILL. L. REV. 460 (1934); *Trade Relations,* 29 ILL. L. REV. 1941 (1934); *Professional and Political Relations,* 30 ILL. L. REV. 314 (1935); *General Social Relations,* 31 ILL. L. REV. 35 (1936); *Basic Concepts: Persons, Property, Relations,* 24 A.B.A.J. 65 (1938).

9. Professor Green separates relational interests into five categories: (1) family relations, (2) trade relations, (3) professional relations, (4) general social relations, and (5) political relations. Green, *Relational Interests,* 29 ILL. L. REV. 460, 462 (1934).

by speaking in terms of absolute rights when in reality the rights are relative and can be limited or denied when superior private or social interests are involved.[10]

One who embarks upon an economic venture is expected to assume certain risks of pecuniary loss, the risks ordinarily attendant to competition.[11] Thus, many advocate a laissez faire approach to the conduct of business to prevent the unbalancing of the natural laws of economics; on the other hand, the prevalent attitude is that society has an interest in maintaining and promoting uninterrupted production and distribution. Consequently, anti-trust laws have been passed to promote free competition,[12] while statutes also have been enacted to restrict "unfair" competition.[13] This economic and political evolution has thus resulted in a partial abandonment of laissez faire with an accompanying extension of protection for those engaged in economic ventures.[14]

This tendency has been expressed also in the courts, where there has been an increasing awareness that a business is composed of valuable interests, both to the proprietor and society, which should be highly regarded and protected from damage. Originally, many of the economic interests which one has in a business, such as the expectancy that customers would purchase products or services,[15] were considered too intan-

10. "Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare." Earl, J., Losee v. Buchanan, 51 N.Y. 476, 485 (1873). See also Aikens v. Wisconsin, 195 U.S. 194, 204 (1904); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 254 (1917).

11. Callman states that a ". . . fighting mentality lies at the very base of the competitive relationship in business. One who does not have the courage and daring to assume the risks of this commercial battle should not attempt to carry on business as a private entrepreneur." 1 CALLMAN, UNFAIR COMPETITION AND TRADE MARKS 219 (2d ed. 1950).

12. This is evidenced, of course, by the condemnation of monopolies, cartels or combinations which gain control of an industry and stifle competition. Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U.S.C. §§ 1, 2 (1946); see Callman, *The Essence of Anti-Trust,* 49 COL. L. REV. 1100 (1949).

13. *E.g.,* Robinson-Patman Amendment, 49 STAT. 1528 (1936), 15 U.S.C. § 13 (1946). See Chafee, *Unfair Competition,* 53 HARV. L. REV. 1289 (1940).

14. It has been said that the laissez faire philosophy fell as a result of influences exerted by organizations. ". . . [T]he theory of laissez faire would have protected forever basic economic inequalities by demanding that they be left outside the range of political evaluation through legislation. . . . Above all, *it is group interest rather than atomistic individual interest that became the basis for legislation.*" ELLIOT AND MCDONALD, WESTERN POLITICAL HERITAGE 705 (1949).

15. The term "expectancy" is of vague significance. In a sense all rights can be said to involve an expectation that certain events will happen in the future. "Expectation" as used herein will refer to anticipation of a future pecuniary advantage. Expectations are of different sorts: A contracting party has an expectation that the other party will perform; an employee at will has an expectation of continued employ-

gible to be classified as "property." Today, however, this view has been discarded, and business expectancy is synonomous with "goodwill," which has long been considered property.[16] The classification of an economic expectancy as a property interest, however, does not guarantee to the possessor thereof any definite amount of protection;[17] the extent to which the interest is to be safeguarded must still be determined.

At common law it was actionable for a third person to entice a servant from his master's employ;[18] as early as 1621 an entrepreneur had an action against one who intimidated his servants and customers, threatening them with violence if they continued to deal with him.[19] Economic relations were not given extensive protection, however, until *Lumley v. Gye*[20] was decided in 1853. In this classic case the Queen's Bench held that a malicious interference with a contract for personal services would be actionable. For a time this rule was thought to apply only to personal service contracts,[21] but today the type of contract involved is immaterial.[22] The rule was also limited to existing agreements but it is now recognized that the contract can be in the process of negotiation.[23] The agreement must not be an illegal one,[24] but even though it is unen-

ment; and a business man has an expectation that customers will continue to trade with him.

16. Carter v. Knapp Motor Co., 243 Ala. 600, 11 So2d 283 (1943); Roraback v. Motion Pictures Operators Union, 140 Minn. 381, 168 N.W. 766 (1918); Coleman v. Whitnant, 225 N.C. 494, 35 S.E.2d 647 (1945); Louis Kamm v. Flink, 113 N.J.L. 582, 175 A. 62 (1934).

17. Professor Green disagrees with the classification of an expectancy as property. "Courts . . . have constantly expanded the property concept to include every sort of valuable interest which they deemed worthy of protection. This inadequacy of classification has proved extremely costly to legal science, for to do violence to the property concept by crushing into it a conglomerate of entirely distinct interests must necessarily break down all intelligible classification of interests, while the recognition of the several basic interests and their proper analysis eliminates confusion and at the same time opens a direct path to the heart of the most difficult problems." Green, *Relational Interests*, 29 ILL. L. REV. 460, 461 (1934). Classifying an expectancy as property does, however, give equity jurisdiction to protect the interest. See note 70 *infra*.

18. Blake v. Lanyon, 6 T.R. 221, 101 Eng. Rep. 521 (1795); Hart v. Aldridge, 1 Cowp. 54, 98 Eng. Rep. 964 (1774). The tort apparently had its origin with the Statute of Laborers, 23 Edw. III, c. 11 (1349).

19. Garrett v. Taylor, Cro. Jac. 567, 79 Eng. Rep. 485 (1621).

20. 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853).

21. Bowen v. Hall, 6 Q.B. Div. 133 (1881).

22. Wade v. Culp, 107 Ind. App. 503, 23 N.E.2d 615 (1939); Campbell v. Gates, 236 N.Y. 457, 141 N.E. 914 (1923).

23. Faulk v. Allen, 152 Fla. 413, 12 So.2d 109 (1943); Owen v. Williams, 322 Mass. 356, 77 N.E.2d 318 (1948). But the contract must not have been terminated, Rosenberg v. Raskin, 80 Cal. App.2d 335, 181 P.2d 897 (1947); nor breached, Case v. Kadota Fig Association, 35 Cal.2d 596, 220 P.2d 912 (1950); Burden v. Elling State Bank, 76 Mont. 24, 245 Pac. 958 (1926).

24. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); Rosenroff v. Finkelstein, 195 F.2d 203 (D.C. Cir. 1952).

forceable for failure to meet the statute of frauds, for indefiniteness in its terms, or because the statute of limitations has run, most courts rule that an inference constitutes a tort.[25] The interference need not lead to a breach of the contractual relation but is actionable if it makes performance more difficult.[26] The rules are less clear when the interference is with prospective contracts, or what might be termed a reasonable expectation of contracts, or simply a reasonable expectation of business. Extending the reasoning applied to interference with existing contracts, the courts generally declare that malicious interference with a business expectancy also constitutes a tort.[27]

To be actionable, harms to economic relations must be the result of intentional interference. There is no question of foreseeability since the actor interferes with full realization that harm will result;[28] in fact, the harm is frequently what the actor desires because only through damage to the economic relation can his purpose be effectuated. This situation invites application of the prima facie tort formula: An intentional

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25. *Statute of frauds:* Jackson v. Stanfield, 137 Ind. 592, 36 N.E. 345 (1894); Powell v. Leon, 172 Kan. 267, 239 P.2d 974 (1952). *Indefiniteness in terms:* Aalfo Co. v. Kinney, 105 N.J.L. 345, 144 Atl. 715 (1929). *Statute of limitations:* Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 381, 87 Atl. 927 (1913).

26. Keene Lumber Co. v. Levanthal, 165 F.2d 815, 822 (1st Cir. 1948); Wade v. Culp, 107 Ind. App. 503, 23 N.E.2d 615 (1939); Johnson v. Gustafson, 201 Minn. 629, 277 N.W. 252 (1938).

27. Original Ballet Russe v. Ballet Theatre, 130 F.2d 187 (2d Cir. 1943); Carter v. Knapp Motor Co., 243 Ala. 600, 11 So.2d 383 (1943); Goldman v. Feinburg, 130 Conn. 671, 37 A.2d 355 (1944); Doremus v. Henessey, 176 Ill. 608, 52 N.E. 924 (1898); Owen v. Williams, 322 Mass. 356, 77 N.E.2d 318 (1948); Roraback v. Motion Picture Operators Union, 140 Minn. 481, 168 N.W. 766 (1918); Huskie v. Griffen, 75 N.H. 345, 75 Atl. 595 (1909); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Pratt v. British Medical Association, [1919] 1 K.B. 244.

Of course the expectancy must be one which the law will recognize. There must, for example, be a degree of certainty that the expected advantage will accrue, and it has been held that one who has just begun a business cannot claim a legally-protected expectancy. The probability that persons will trade with him is too remote. Huegel v. Townsley, 213 Ind. 339, 12 N.E.2d 761 (1938); Van der Plaat v. Undertaker's & Liverymen's Ass'n of Passaic County, 70 N.J. Eq. 116, 62 Atl. 453 (1905). It would seem that the amount of protection granted to an expectancy is correlated to the degree of certainty that the future advantage will come into being.

28. The courts have not, as yet, accepted a rule that negligence leading to injury to economic relations is tortious. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); Baruch v. Beech Aircraft Corp., 175 F.2d 1 (10th Cir. 1949); Thompson v. Seaboard Air Line Ry., 165 N.C. 377, 81 S.E. 315 (1914). The person interfering must have knowledge of the economic relations and act with the intention of impairing them. Associated Flour Haulers & Warehousemen v. Hoffman, 282 N.Y. 173, 26 N.E.2d 7 (1940); DeMarais v. Stricker, 152 Ore. 362, 53 P.2d 715 (1936). It has been vigorously suggested, however, that negligence should also give rise to liability. See Carpenter, *Interference with Contract Relations.* 41 HARV. L. REV. 728, 737-42 (1928); Note, 20 U. OF CHI. L. REV. 283 (1953). It is submitted that Professor Carpenter's analysis of the law in regard to negligent interferences with contractual relations is more in the nature of wishful thinking than an acceptance of reality.

infliction of damage is actionable unless justified.[29] This theory, which had its origin in cases involving interference with economic relations, seems to have evolved from the definition of "malice." The *Lumley* case required, as an essential element to make the interference tortious, that the defendant shall have acted with malice.[30] The opinion did not clearly define, however, the state of mind required. In common parlance malice suggests malevolence or culpability, and for a time the courts required the existence of such a state of mind to hold an interference actionable.[31] Lord Bowen clarified the matter in *Mogul Steamship Co. v. McGregor:* ". . . [I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse."[32] Malice has thus become an implied element and means simply the absence of just cause or excuse.[33]

II

In prima facie tort cases the most difficult issue is whether or not the actor was *justified* in impairing an economic relation. If the actor possesses a privilege to engage in injurious activity which is superior to a person's right to be free from harm, there can be no recovery; the damage is *damnum absque injuria.*

To adjudge the issue of justification a court must examine policy considerations, weigh and balance the private and social interests involved.

29. The formula was stated by Justice Holmes in the following manner: "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." Aikens v. Wisconsin, 195 U.S. 194, 204 (1904). See also note 32 *infra* and accompanying text. The formula is often stated as follows: An intentional doing of a wrongful act is actionable unless justified. See Meason v. Ralston Purina Co., 56 Ariz. 291, 107 P.2d 224 (1940); American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 36 N.E.2d 123 (1941). That the formula, thus stated, begs the question by saying only that a "wrongful act is a wrong" is pointed out by Harper, *Interference with Contractual Relations,* 47 NORTHWESTERN L. REV. 873, 876 (1953); see also Note, 17 CORNELL L.Q. 509, 510 (1932).

30. Erle, J.: "He who *maliciously* procures damage to another by violation of his wrong or a breach of contract." (Italics added.) Lumley v. Gye, 2 El. & Bl. 216, 233, 118 Eng. Rep. 749, 756 (1853).

31. "It was really not until the end of the nineteenth century that general agreement was reached that the doctrine of Lumley v. Gye was not confined to cases of malevolence." Sayre, *Inducing Breach of Contract,* 36 HARV. L. REV. 663, 673 (1923). See Bowen v. Hall, 6 Q.B.D. 333, 338 (1881).

32. 23 Q.B. Div. 598, 613 (1898).

33. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631 (1941); Wometco Theatres v. United Artists Corp., 53 Ga. App. 509, 186 S.E. 572 (1936); Wade v. Culp, 107 Ind. App. 503, 23 N.E.2d 615 (1939); Louis Schlesinger Co. v. Rice, 4 N.J. 169, 72 A.2d 197 (1950); Reichman v. Drake, 89 Ohio App. 222, 100 N.E.2d 533 (1951).

On one hand, the court must prophesy the social utility of permitting the particular type of activity in which the defendant has engaged to continue in the future; on the other, it must determine the impact upon society of permitting such harms to be continually inflicted upon similar plaintiffs. The nature of the impaired economic relation and the means which defendant employed to effect the damage must also be evaluated.[34] Since such variable factors are involved, specific rules categorizing the types of interference which will be justified would be unwieldy, and each case must turn upon its own particular facts.[35] It may be argued that rules which require policy decisions upon which to predicate liability give the courts considerable power to make essentially legislative determinations.[36] The policy of redressing injuries to economic relations is of recent origin, however, and until precedents are established outlining the types of activity which will be considered justified, the law, of necessity, must be based on general principles and made as the cases arise.

Frequently a defendant asserts in justification that he was furthering a competing business interest when he damaged the plaintiff's economic relations, and the courts allow extensive harms under this claim.[37]

34. Note that the terms "privilege" and "justification" are used interchangeably. In fact, however, the latter is a broader term within which "privileges" are included. "The most important justification is a claim of privilege." Holmes, *Privilege, Malice, and Intent,* 8 HARV. L. REV. 1, 9 (1894).

The Restatement of Torts has given the following factors which are to be considered in deciding an issue of justification: (a) the nature of the actor's conduct, (b) the nature of the expectancy with which his conduct interferes, (c) the relations between the parties, (d) the interest sought to be advanced by the actor and (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand. RESTATEMENT, TORTS § 767 (1939).

"The term *justification* . . . does not admit of legal definition; it is essentially an economic problem. It indicates the existence of a situation in which the ordinary liability for the invasion of the interests of others is wanting. Justification thus to interfere with the rights of another, otherwise legally protected, exists wherever the facts and circumstances of the invasion disclose conflicting rights of such a character that public policy and the general social and economic well-being required a greater freedom on the part of the action than that allowed usually. From a social point of view, the general problem is always a weighing of the social or community interests in a reasonable protection of the interests of others. The court must strike a balance between these conflicting interests at a point which will best promote the general social security and the public weal." Note, 21 VA. L. REV. 791, 795 (1935).

35. "When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case. . . . Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair." Holmes, *Privilege, Malice, and Intent,* 8 HARV. L. REV. 1, 3 (1894).

36. "But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds." *Ibid.*

37. A detailed definition of the term "competition" will not be attempted. Competition will refer only to struggles between businessmen for the attainment of the same trade. It seems that only in this sense can the "privilege of competition" be

The social benefits underlying competition often outweigh the loss an individual may sustain; one must be permitted to advertise and persuade consumers to deal with him rather than a competitor, or the right to compete would be illusory.[38] In addition, a legal or moral duty,[39] an honest desire to promote the welfare of third persons,[40] or a personal self-interest[41] may justify interference with economic relations.

The possession of a privilege to engage in injurious activity is dependent upon its being exercised in a proper manner.[42] One cannot, for example, assert a privilege to threaten a competitor's customers with bodily injury even though the threats would be of inestimable competitive value to the actor, because use of such violent means is considered unfair competition.[43] Since the rule is frequently asserted that a person cannot justify iniquitous interference with another's business,[44] such practices as fraud, intimidation and disparagement will divest the actor of any defense of justification he might otherwise have had.[45]

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kept distinct from other privileges. In lieu of statutory prohibitions, harms to economic relations have been held to be justified by competition when, for example, styles or designs of a competitor have been imitated, Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929); or when employees are compelled by threats not to trade with a competitor of the employer, Lewis v. Juie-Hodge Lumber Co., 121 La. 685 (1908); Deon v. Kirby Lumber Co., 162 La. 671, 111 So. 55 (1926). See Wormser, *Inducing Breach of Contract, Justification, Competition,* 20 ORE. L. REV. 254 (1941).

38. SCHLICHTER, MODERN ECONOMIC SOCIETY 45 (2d ed. 1929).

39. Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913)—the authorities of a school cannot be held liable for compelling the students of their school to cease dealing with local restaurants and amusement centers, for the authorities stand in the relationships of parents to the children and as such have a duty to protect their health and morals. See also Jones v. Cody, 132 Mich. 13, 92 N.W. 495 (1902).

40. See Brimelow v. Casson, [1924] 1 Ch. 302—the defendant was justified in inducing theater owners to breach existing contracts or to refuse to enter into future contracts with the plaintiff, a producer of shows who allegedly paid his girls less than a living wage. The purpose of the interference was to force the plaintiff to increase the girls' wages and thus permit them to live comfortably without engaging in prostitution.

The case is criticized by Simonas, J., in Camden Nominees, Limited v. Forcey, [1940] 1 Ch. 352, 366. "Brimelow v. Casson stands alone, and has been the subject of a good deal of controversy. In a comparable case it would be my duty to follow it, though I would humbly suggest that on the facts stated in the judgment that case might have been simply disposed of by the application of the maxim *Ex turpi causa non viitur actio.*"

41. Braden v. Haas, Howell & Dodd, 56 Ga. App. 342, 192 S.E. 508 (1937); McGee v. Collins, 156 La. 291, 100 So. 430 (1924).

42. RESTATEMENT, TORTS § 890, comment e (1939).

43. See Handler, *Unfair Competition,* 21 IOWA L. REV. 175, 201 (1946); Wolff, *Picketing by Business Competitors,* 87 U. OF PA. L. REV. 1 (1939); Note, 41 COL. L. REV. 89 (1941).

44. Evenson v. Spaulding, 150 Fed. 517 (9th Cir. 1907); Gilley v. Hirsch, 122 La. 966, 48 So. 422 (1909); Tarleton v. McCawley, Peake 270, 170 Eng. Rep. 153 (1794).

45. *Fraud:* Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867 (1946); Taylor v. Pratt, 135 Me. 282, 195 Atl. 205 (1933); Andrews v. Lebis, 278

The courts and legal writers have been bothered by the role which motive should play in an action for interference with economic relations.[46] A rule seems to be emerging that injurious activity which would be justified if pursued with a "good" motive will be converted into an actionable tort if maintained for a "bad" motive.[47] Bad motive in this context signifies culpability, malevolence, spite or ill will toward the person harmed. If, for example, one enters a business for the sole purpose of injuring a competitor, the damage sustained thereby will be actionable.[48] The same acts would be justified by the privilege of competition if the actor had been promoting his business interests in good faith. Courts which disagree with this rule hold that one's bad motives cannot make an otherwise lawful act unlawful; that one's state of mind is irrelevant.[49] Such reasoning is weakened by the fact that motive is a significant factor in other types of tort cases. For example, it has long been a tort to subject a person to a malicious prosecution, an action in which proof of the actor's motive is usually essential.[50] One may not, out of spite, drill a well on his property for the purpose of draining a subterranean water supply which an adjoining property owner wishes to utilize,[51] construct a "spite fence" on his property to obstruct a neighbor's view,[52] or discharge explosives on his property out of a desire to

App. Div. 858, 105 N.Y.S.2d 325 (2d Dep't 1951); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945). *Intimidation* (putting one in fear, whereby he abstains from doing acts which he would otherwise have done or does acts which he would otherwise have left undone): Krigbaum v. Sparbaro, 23 Cal. App. 427, 138 Pac. 364 (1913); Graham v. St. Charles Street Ry., 47 La. Ann. 214, 16 So. 806 (1895). *Disparagement:* Foltz v. Moore McCormack Lines, Inc., 189 F.2d 537 (2d Cir. 1951); Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631 (1941).

46. Ames, *How Far An Act May Be a Tort Because of the Wrongful Motive of the Actor,* 18 HARV. L. REV. 411 (1905); Lewis, *Should the Motive of Defendant Affect the Question of His Liability?,* 5 COL. L. REV. 107 (1905); McKay, *Effect of Motive on the Lawful Character of Acts in Conspiracy Cases,* 27 PENN. B.A.Q. 371 (1936); Seavy, *Bad Motive Plus Harm Equals a Tort,* 26 ST. JOHN'S L. REV. 279 (1952); Terry, *Malicious Torts,* 20 L.Q. REV. 10 (1904).

47. Hanchett v. Chiatovich, 101 Fed. 742 (9th Cir. 1900); Ledwith v. International Paper Co., 64 N.Y.S. 810 (Sup. Ct. 1946); RESTATEMENT, TORTS § 709 (1939). See also notes 63, 66-68 *infra.*

48. Boggs v. Duncan Schell Furniture Co., 163 Iowa 106, 143 N.W. 482 (1913); Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 271 (1911); Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909).

49. Passaic Print Works v. Ely & W. Dry-Goods Co., 105 Fed. 163 (8th Cir. 1900); Sparks v. McCreary, 156 Ala. 382, 47 So. 332 (1905); Guethler v. Altman, 26 Ind. App. 587, 60 N.E. 355 (1901); Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923).

50. Sims v. Kent, 221 Ala. 589, 130 So. 213 (1930); Thurston v. Wright, 77 Mich. 96, 43 N.W. 860 (1889).

51. Gagnon v. French Lick Springs Hotel, 163 Ind. 687, 72 N.E. 839 (1902); Ames, *Law and Morals,* 22 HARV. L. REV. 111 (1908).

52. Griswold v. Horne, 19 Ariz. 56, 165 Pac. 318 (1917); Hornsby v. Smith, 191 Ga. 491, 13 S.E.2d 20 (1941); Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888); Racich v. Mastrovich, 65 S.D. 321, 273 N.W. 660 (1937).

frighten fowl from a neighbor's pond on induce fur-bearing animals to miscarry or devour their young.[53]

III

Persons seeking recovery for an injury to economic relations commonly believe that if the defendant is a group of persons rather than an individual, an action for civil conspiracy must be proved. A conspiracy is defined as an agreement to effectuate a lawful purpose by unlawful means or an unlawful purpose by lawful means;[54] if either the means or the purpose is bad, an action for conspiracy will lie. Criminal and civil conspiracies can be distinguished. The essence of the former is in the "agreeing" or "conspiring" to do unlawful acts, and the harm to society exists in the potential concerted action;[55] the gist of the latter, however, is the damage inflicted by acts pursuant to a conspiracy, and recovery is for consummated, rather than potential, concerted action.[56] Therefore, the allegation of "conspiracy" means nothing in a civil action.[57] Since the area of civil conspiracy is woefully confused,[58] a clearer picture of group liability for interferences with economic relations might be obtained by applying the same principles which are employed in cases of individual liability. The extent of injuries may differ, for persons acting in concert can ordinarily inflict damage which one acting alone could not accomplish,[59] but the prima facie theory

53. Hollywood Silver Fox Farm, Ltd. v. Emmett, [1936] 2 K.B. 468; Keeble v. Hickeringill, 11 East. 574, 103 Eng. Rep. 1127 (1706).

54. Maryland Cas. Co. v. Hosmer, 93 F.2d 365 (1st Cir. 1938); Dale v. Thomas H. Temple Co., 186 Tenn. 69, 208 S.W.2d 344 (1948).

55. Morrison v. California, 291 U.S. 82 (1934); Harno, *Intent in Criminal Conspiracy,* 89 U. PA. L. REV. 624, 635 (1941); Pollack, *Common Law Conspiracy,* 35 GEO. L. J. 328, 333 (1947).

56. DeBobula v. Goss, 193 F.2d 35 (D.C. Cir. 1951); see also Speegle v. Board of Fire Underwriters of Pacific, 29 Cal2d 34, 153 P.2d 426 (1945); Aaron v. Dausch, 313 Ill. App. 524, 40 N.E.2d 805 (1942); Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 Atl. 62 (1934); Werbelovsky v. Rosen, 260 App. Div. 222, 21 N.Y.S.2d 88 (2d Dep't 1940); Allen v. Ramsey, 170 Okla. 430, 41 P.2d 658 (1935); Martin v. Ebert, 245 Wis. 341, 13 N.W.2d 907 (1944).

57. Weiner v. Lowenstien, 314 Mass. 642, 51 N.E.2d 241 (1943); Martin v. Ebert, 245 Wis. 341, 13 N.W.2d 907 (1944). Proof of an actual agreement to do the injurious acts is of evidentiary value, however, in that it aids in proving concerted action. See Maryland Casualty Co. v. Hesmer, 93 F.2d 365 (1938); Hunter Lyon, Inc. v. Walker, 152 Fla. 61, 11 So.2d 176 (1943).

58. "When we consider the remedy available, no branch of the law seems less clear than that of conspiracy." Kevicsky v. Lorber, 290 N.Y. 297, 305, 49 N.E.2d 146, 149 (1946). See also 2 CALLMAN, UNFAIR COMPETITION 644 (2d ed. 1950).

59. It is often said that persons acting in concert have a peculiar power of coercion which an individual could not possess. Bedford Cut Stone Co. v. Journeymen S.C. Ass'n, 274 U.S. 37 (1927); Federal Trade Commission v. Raymond Bros.-Clark Co., 263 U.S. 565 (1924); A. T. Stearns Lumber Co. v. Howlett, 260

applies to group as well as individual action. When persons acting in concert intentionally impair the economic relations of others, and such acts cannot be justified, the group should be required to recompense the injured party.[60]

Just as in the case of interference by an individual, the liability of an organization will usually depend upon whether or not it can show justification. In order to determine the extent to which an organization is privileged, it is necessary to inquire into the purpose of its actions when the damage was inflicted, the importance to society of granting freedom of activity to the organization in such situations, the nature of the interest which has been impaired and the means employed to inflict the harm.[61]

A group of persons organized for the purpose of promoting the social welfare of its members or of advocating ideals for society cannot claim as privilege that it is in competition with a person operating an economic enterprise.[62] Nor is the parrying between organizations to gain the adherence of individuals competition; that is, social organizations or rival churches are not in economic competition with each other.[63] If such organizations are privileged to interfere with economic relations, it is not the privilege of competition, but "[t]he privilege extended to certain individuals to advance the interests of an economic group, a social group, or an institution recognized as desirable to society."[64]

Mass. 45, 157 N.E. 82 (1927); Shaltupsky v. Brown Shoe Co., 350 Mo. 831, 168 S.W.2d 1083 (1943).

60. Most courts assert that if it is actionable for one person to interfere with another's economic relations, then it is actionable for additional persons to assist in the interference. "Any injury to a business, whether the result of a conspiracy or not, is prima facie actionable. . . ." Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 1036 (1908). The persons acting in concert are jointly liable as wrongdoers. Lewis v. Ingram, 57 F.2d 463 (10th Cir. 1932); Baron v. Fontes, 311 Mass. 473, 42 N.E.2d 280 (1942).

In deciding the issue of whether the concerted action was justified primary concern would be given to the purpose of the group activity and the means employed. A difference between the common law conspiracy approach and that of the prima facie tort theory exists, however, in the fact that in the latter the purpose and means are viewed not in a vacuum but rather with a view to the broader social interests involved.

61. See note 34 *supra.*

62. Beekman v. Marsters, 195 Mass. 205, 80 N.E. 817 (1907); Schonwald v. Ragains, 32 Okla. 22, 122 Pac. 203 (1912). "Labor and capital are competitors, to be sure, with respect to the share of each in the product of industry. But there the analogy ends. Not competition but social welfare is the fountain head of labor's claims to justification (and also the source of its liabilities)." 1 TELLER, THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING 195, n.23 (1940); A. R. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 N.E. 940 (1908).

63. 1 CALLMAN, UNFAIR COMPETITION AND TRADE MARKS 16 (2d ed. 1950).

64. Note, 17 CORNELL L.Q. 509, 521 (1932).

A labor union promotes an interest which is recognized as socially-desirable—raising the living standard of employees.[65] Society has an interest in granting freedom of activity to a racial organization formed for the purpose of improving the standing of its race.[66] Religious societies perform an essential function, infusing moral character and providing spiritual guidance.[67] Veterans groups advance the commendable objectives of instilling Americans with patriotism.[68] But, can the NAACP, the Catholic Church or American Legion, for example, assert their generally beneficial attributes in justification of intentional acts that harm the economic relations of an individual? The extent to which an organization is privileged to inflict damage in a particular case is difficult to predetermine. One organization's freedom of activity may be much more restricted than that of another, for the strength of the privilege varies with the social importance of the organization's activity. Thus, the extent to which the Catholic Church could interfere with economic relations would probably be greater than any privilege afforded to the American Legion.

IV

Determination of group justification is complicated by the fact that organizations frequently employ some form of communication to facilitate their interference, and the argument has been advanced that limitation of their right to communicate would amount to an unconstitu-

65. ". . . [E]mployees may legitimately organize to promote their mutual advantage; to secure fair wages; to maintain high standards of workmanship; to elevate the material, moral, and intellectual welfare of the membership; to secure the abolition of child labor, the 'trucking' system, tenement house labor and prison labor; to secure better working conditions; to secure better hours; to induce employers to establish usages with respect to wages and working conditions which are fair, reasonable, and humane. . . ." Blanford v. Press Pub. Co.. 286 Ky. 657, 660, 151 S.W.2d 440, 442 (1941).

66. "The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reasons of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association." New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 561 (1937).

67. Religious societies have even been said to possess an absolute immunity from liability for torts. See Bianchi v. South Park Presbyterian Church, 123 N.J.L. 325, 8 A.2d 567 (1939). The better view seems to be that they can be sued as other corporations. Geiger v. Simpson M.E. Church, 174 Minn. 389, 219 N.W. 463 (1928); Bruce v. Central M.E. Church, 147 Mich. 230, 110 N.W. 950 (1907).

68. In its corporate charter, the purpose of the American Legion is said to be ". . . to promote peace and good will among the people of the United States and all nations of the earth; to preserve the memories and incidents of the Great War of 1917-1918; to cement the ties of love and comradeship born of service; and to consecrate the efforts of its members to mutual helpfulness and service to their country." 41 Stat. 285 (1919).

tional abridgement of free speech or press.[69] Realization that organizational interferences are usually of a continuing nature, thus suggestive that injunctive relief will be sought,[70] lends strength to the argument that limitation would be tantamount to prior restraint of speech.[71]

This issue has been pointedly presented in cases of picketing by labor unions. Peaceful picketing, in the sense that it is speech, has been protected from either legislative or judicial sanction, even though it seriously impairs economic relations.[72] It has also been said that the First Amendment protects the right to picket peacefully about matters other than hours, wage rates, and working conditions, such as disputes ". . . between a businessman and any citizen or group of citizens who may differ with him on a question of business policy."[73] Must it necessarily follow that the exercise of speech or press constitute a justification for damaging economic relations? The right to speak or communicate to others is not an absolute right, but one which can be limited when dominant social or private interests are involved.[74] First Amendment freedoms do not grant immunity from liability for defamation, inciting a riot or breach of peace, or publishing obscenities.[75] If communication

69. See Hague v. C.I.O., 307 U.S. 496 (1939); Moreland Theatre Corp. v. Portland Moving Picture Machine Operators' Protective Union, 140 Ore. 35, 12 P.2d 333 (1932); Note, 17 N.Y.U.L.Q. REV. 126 (1939).

70. Before an injunction will issue, the usual requirements to establish jurisdiction in equity must be met. The plaintiff must show that a "property" right is being impaired and that damages at law would be inadequate, speculative, or involve a multiplicity of suits. See deFuniak, *Equitable Protection of Business and Business Rights,* 35 KY. L.J. 261 (1947); *Requisites for Equitable Protection against Torts,* 37 KY. L.J. 29, 158 (1948).

71. Near v. Minnesota, 283 U.S. 697 (1930). Note also that if the communication is defamatory, one is met with the rule that equity will not enjoin the commission of a libel or slander. Francis v. Flynn, 118 U.S. 385 (1886); Lietzman v. Radio Broadcasting Station, W.C.F.L., 282 Ill. App. 203 (1935); Long, *Equity Jurisdiction to Protect Personal Rights,* 33 YALE L. J. 115, 119 (1923). Defamation of a business is often held enjoinable, however; see deFuniak, *Equitable Protection of Business and Business Rights,* 35 KY. L. J. 261 (1947).

72. Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293 (1943); American Federation of Labor v. Swing, 312 U.S. 321 (1941).

73. Ex parte Lyons, 27 Cal. App.2d 293, 295, 81 P.2d 190, 191 (1938).

74. Kovacs v. Cooper, 336 U.S. 77 (1949); Schneider v. Irvington, 308 U.S. 147 (1939); Shaefer v. United States, 251 U.S. 466 (1919). Note that many state constitutions, guaranteeing free speech, also expressly provide that liability shall attach for misuse of the right. See Warner v. Southern California Associated Newspapers, 35 Cal.2d 121, 216 P.2d 825 (1950); James v. Townsend, 21 Fla. 431 (1885); Osborn v. Leach, 135 N.C. 628, 47 S.W. 811 (1904); Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 Atl. 70 (1921).

75. *Defamation:* KVOS, Inc. v. Associated Press, 13 F. Supp. 910 (W.D. Wash. 1936); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947); Bailey v. Charleston Main Association, 126 W. Va. 292, 27 S.E.2d 837 (1943); Hotel and Restaurant Employees International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 236 Wis. 329, 294 N.W. 632 (1940), *aff'd,* 315 U.S. 437 (1941). *Breach of peace:* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cantwell v. Connecticut,

is tortious, one cannot invoke freedom of speech or press as an immunity from liability; this rule is applicable to the tort of unjustifiable interference with economic relations.[76]

The question remains whether or not injunction is the proper remedy when communication is involved. A number of courts have held that if the interference is effected by means of communication, an injunction will not lie, and the plaintiff is relegated to his remedy at law.[77] This is undoubtedly the law where peaceful, non-coercive and non-intimidating communication is involved. For example, if the American Legion were to appeal to the public not to view "Limelight" by advertising the facts about the film in a newspaper, its acts should be beyond the scope of injunctive relief. However, interference through communication frequently embodies elements that are not speech. Picketing, for example is not completely speech, but is inextricably bound up with other elements suggestive of violence and coercion.[78] The application of pressure through communication is not "free" speech; it is coercive speech.[79] Threatening communications go beyond the "market place of ideas," and such conduct is not constitutionally protected.[80] Consequently, the courts usually hold

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310 U.S. 296 (1940). *Obscenity:* United States v. One Book, Entitled "Contraception," by Marie C. Stopes, 51 F.2d 525 (S.D.N.Y. 1931); United States v. One Obscene Book, Entitled "Married Love," 48 F.2d 821 (S.D.N.Y. 1931).

76. A first impression is that to limit free speech to activity which is not tortious is to make the freedom dependent upon ever-changing classifications of acts which will constitute torts, and that a state may, through its legislature or judiciary, capriciously expand its tort concepts, thereby necessarily delimiting the areas of free speech. Such an argument would seem to be unwarranted. Free speech abridgments are readily reviewable and any capricious tort classifications could be declared unconstitutional as unreasonable encroachments upon free speech. The argument was made by the petitioner and rejected by the Court in Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

77. Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S.W. 391 (1902); Lindsay v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127 (1908).

78. Picketing ". . . is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." Mr. Justice Douglas, Bakery & Pastry Drivers & Helpers, Local 802 of International Brotherhood of Teamsters v. Wohl, 315 U.S. 769, 776 (1941) (concurring opinion).

79. When a threat is conveyed by communication, the speech is only incidental to the making of the threat. It is the means whereby the speaker impresses his demands upon the minds of his hearers. The purpose of the communication is not to influence conduct by an appeal to reason but rather to dominate reason by fear of future injury.

80. The purpose of the First Amendment is not to protect the utterance of threats but rather to promote the dissemination of ideas. "Back of the guaranty of free speech lay the faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. . . . [U]tterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." Mr. Justice Frankfurter, Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).

that whenever such factors are present, although a form of communication is utilized, an injunction is an appropriate remedy.[81]

Manifestly, the desirability of free communication should be a factor to be considered in resolving an issue of justification.[82] The interest which a democratic society has in encouraging its citizens to speak openly on social and economic affairs is obvious and has been carefully weighed in cases where either this right or the right to pursue economic relations free from interference must yield.[83]

V

When an organization impairs economic relations, one of the means invariably used is a boycott, involving systematic efforts to deny the person attacked the benefits of his economic relations.[84] A distinction is commonly drawn between primary and secondary boycotts, although such a line is frequently difficult to determine. In a primary boycott pressure is brought to bear directly upon the person with whom those boycotting have a grievance;[85] since they are intentional inflictions of damage, primary boycotts are prima facie unlawful and require justification.[86] In a secondary boycott, however, social or economic pressure is directed toward third persons, with whom the individual sought to be harmed has valuable economic relations, to persuade them to discon-

81. Southern Ry. v. Machinists' Local Union, No. 14, 111 Fed. 49 (W.D. Tenn. 1901); Scofes v. Helmar, 205 Ind. 596, 187 N.E. 662 (1933); State *ex rel.* Allai v. Thatch, 361 Mo. 190, 234 S.W.2d 1 (1950); Peters v. Central Labor Council, 179 Ore. 1, 169 P.2d 870 (1946); Swenson v. Seattle Central Labor Council, 27 Wash. 2d 193, 177 P.2d 873 (1947).

82. See Northwestern Pac. Ry. v. Lumber & Sawmill Workers' Union, 31 Cal.2d 441, 189 P.2d 277 (1948); Shively v. Garage Employees Local Union No. 44, 6 Wash.2d 560, 108 P.2d 354 (1940). In both cases the element of communication is weighed against the damage inflicted to economic relations in an attempt to achieve a socially desirable result.

83. See Musso v. Miller, 265 App. Div. 57, 38 N.Y.S.2d 51 (3d Dep't 1942); Bentley v. Mountain, 51 Cal. App.2d 95, 124 P.2d 91 (1942). The Restatement of Torts has also recognized that one has a privilege to honestly advise persons to discontinue or not to enter economic relations with third persons. RESTATEMENT TORTS § 772 (1934).

Note that in both the "Limelight" and "The Miracle" incidents the interferences, in addition to being accomplished by communication, also suppress a form of speech. If the interferences had not taken place, a number of persons would have attended the theaters, and the movies would have taken their place in the market place of ideas. There are, therefore, speech considerations on the part of the persons harmed as well as the interfering organizations which must be balanced in resolving the question of justification. This is also true in the censorship-of-books situations.

84. Paramount Enterprises v. Mitchell, 104 Fla. 407, 140 So. 328 (1932); McNeill v. Hall, 220 N.C. 73, 165 S.E.2d 456 (1941); Dick v. Northern Pac. Ry., 86 Wash. 211, 150 Pac. 8 (1915).

85. Paramount Enterprises v. Mitchell, *supra* note 84; Marvel Baking Co. v. Teamsters' Union Local No. 524, 5 Wash.2d 346, 105 P.2d 46 (1940); United Union Brewing Co. v. Beck, 200 Wash. 474, 93 P.2d 772 (1939).

86. RESTATEMENT, TORTS § 765 (1939).

tinue the relationship.[87] Secondary boycotts have been condemned by the courts and legislatures.[88] When labor unions or other powerful organizations apply pressure in such a manner, the injuries which result are difficult to justify.

Watchtower Bible & Tract Society v. Dougherty[89] involved a secondary boycott by an organization other than a labor union. To force the discontinuance of a radio program conducted by the plaintiff, the defendants, officers of the Catholic Church in Philadelphia, threatened a combined refusal to deal with a department store which had a controlling interest in the radio station unless the store employ its influence to have the program discontinued. In the suit for damages the court held for the defendant. That the defendants were privileged to employ such tactics to interfere with the plaintiff's economic relations does not appear from the court's opinion; nor did the court use prima facie tort reasoning in reaching its conclusion. The opinion does not even mention that a secondary boycott is involved, but says simply that the leaders of the church "cannot be mulcted in damages for protesting against the utterances of one who they believe attacks their church and misrepresents its teaching nor for inducing their adherents to make similar protests."[90] An important factor not discussed by the

87. Paramount Pictures v. United Motion Picture Theater Owners, 93 F.2d 714 (10th Cir. 1947); W. E. Anderson Sons Co. v. Local Union No. 311, Int'l Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, 156 Ohio St. 541, 104 N.E.2d 22 (1952). The concept of "secondary boycotts" is vague, however. The phrase has such an uncertain meaning that the American Law Institute abandoned attempts to adopt rules in relation thereto. See RESTATEMENT, TORTS § 801 (1939). Some courts apparently feel that the distinction between "primary" and "secondary" boycotts is the amount of force which is used by the boycotters rather than the person upon whom the pressure is applied. See, for example, Smythe Neon Sign Co. v. Local Union No. 405 of Int'l Brotherhood of Electrical Workers of Cedar Rapids, 226 Iowa 191, 254 N.W. 126 (1939). See also Comment, 11 So. CALIF. L. REV. 476, 488 (1938).

The classic case involving a secondary boycott is Quinn v. Leatham, [1901] A.C. 495. The plaintiff, Leatham, a wholesale slaughterer, refused to accede to union demands that he discharge his non-union employees and hire union employees in their place. To force Leatham to hire union men, the union directed pressure at one Munce, a large retailer of meats, upon whose purchases the business of Leatham was dependent. The employees of Munce belonged to the union, and Munce was informed that unless he discontinued purchasing meat from Leatham, his employees would be called out on strike. The case is discussed in GREGORY, LABOR AND THE LAW 39-46 (2d ed. 1949).

88. The principal statute making secondary boycotts an illegal labor practice is the Labor Management Relations Act, 61 STAT. 136 (1947), 29 U.S.C. § 158(b)(4)(A) (Supp. 1952). See also Haverhill Strand Theatre v. Gillen, 229 Mass. 413, 118 N.E. 671 (1918); Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937); Parker Paint & Wall Paper Co. v. Local Union No. 813, 87 W. Va. 631, 105 S.E. 911 (1921). *Contra:* Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 Pac. 107 (1917).

89. 337 Pa. 286, 11 A.2d 147 (1940).

90. *Id.* at 287, 11 A.2d at 148. In a Note on the *Watchtower* case, the author states: "From the decision in the instant case, it cannot be determined whether a cause

court is the nature of the relational interests impaired. Not only were economic interests involved; the relation between the Watchtower Society and its listening audience was primarily spiritual. It is submitted that perhaps such intangible relations should be accorded protection by the courts even in the absence of economic harm.[91]

Concerted activity frequently includes a combination of acts which, though lawful if performed by individuals, may become unlawful when done in concert with others. Some cases hold that lawful acts done in combination cannot give rise to group liability;[92] an increasing number of courts hold, however, that privileges afforded to individuals can be divested when exercised in concert with others.[93] The latter principle is illustrated by an English case, *Clifford v. Brandon,*[94] in which it was alleged that the defendant and others prevented plaintiff "from acquiring fame and profit" in the theater by "hiring persons to hoot, hiss, groan, and yell at the plaintiff during the performance [of Hamlet], and for hooting, hissing, &c., together with such persons. . . ." Because of the concerted action, the plaintiff was compelled to desist from performing the play, and the manager of the theater was induced to discharge him. The court held that an actionable wrong had been committed; the

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of action [for interference with non-contractual relations] was not recognized, or was admitted subject to privilege." Note, 90 U. OF PA. L. REV. 754, 756 (1940).

91. The courts, as yet, have not given extensive protection to relational interests which are non-economic and cannot be measured in terms of money. Such interests are protected only from libel and slander. GREEN, TORTS 1330 (1931). For example, if the Paris theater were showing "The Miracle" free of charge, and no pecuniary losses resulted from the interference by the Catholic Church, it is unlikely that any court would protect the relational interest which the theater has with its non-paying audience. Non-economic relations can, however, be of great importance to an individual. The relation which one has with his church or his friends is essential to the individual's social well-being, and courts may in the future protect such interests. For example, it has been said that "[i]t is the legal right of every man to enjoy social relations with his friends and neighbors. He is entitled to visit them and their families and to have them visit him and his family. The free and unhampered exercise of rights is necessary to his happiness, comfort, and well-being. If he be unlawfully deprived of that right by others, he is entitled to redress." Deon v. Kirby Lumber Co., 162 La. 671, 679, 111 So. 55, 58 (1926).

Under such a cause of action, one might be granted protection from private as well as governmental interferences with speech, religion and other civil rights which involve a relational interest.

92. Lambert v. Georgia Power Co., 181 Ga. 624, 183 S.E. 814 (1936); Olmstead, Inc. v. Maryland Casualty Co., 218 Iowa 997, 253 N.W. 804 (1934); Johnson v. East Boston Sav. Bank, 290 Mass. 441, 195 N.E. 727 (1935).

93. Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North America, 274 U.S. 37 (1927); Deon v. Kirby Lumber Co., 162 La. 671, 111 So. 55 (1926); Clark v. Sloan, 169 Okla. 347, 37 P.2d 263 (1934); Judevine v. Benzies-Montanye Fuel and Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936).

94. 2 Camp. 358, 170 Eng. Rep. 1183 (1809).

privilege which an individual has to express his feelings in a theater can be divested when that conduct is exercised in concert with others.[95]

This principle is also applicable to situations involving a concerted refusal to deal. Individuals often assert a privilege to deal or refuse to deal with whomever they please regardless of their motive for so doing—a privilege "not to contract."[96] The privilege is based upon a "free will" concept which dictates a policy that individuals should be permitted free choice in selecting the persons with whom they will have economic relations.[97] The privilege provides incentive for those engaged in economic enterprises to make highly acceptable the goods or services which they have to offer.

The privilege must, however, be exercised individually and can be lost when the refusal to deal is in combination with others.[98] For example, if every employer in an industry were to simultaneously make an individual judgment not to hire a certain person, the person ostracized would have no grounds for recovery. If, however, the employers were to combine to exclude him from employment for the purpose of inflicting harm they would be liable.[99] All combined refusals

95. Sir James Mansfield, after stating that the audience has a right to applaud or hiss any part of a performance or any performer on the stage, and in this manner to express feelings excited at the moment by the performance, went on to say: "But if any body of men were to go to the theatre with the settled intention of hissing an actor or even of damning a piece, there is no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and the persons concerned in it might be brought to punishment." *Id.* at 370, 170 Eng. Rep. at 1187. See also Gregory v. Duke of Brunswick, 6 Man. & G. 205, 134 Eng. Rep. 866 (1844).

96. "It is the right, long recognized, of a trader engaged in a strictly private business, freely to exercise his own independent discretion as to the parties with whom he will deal." Brosius v. Pepsi-Cola Co., 155 F.2d 99, 102 (3d Cir. 1946).

Privilege "not to contract" is a phrase coined by Holmes. Vagelahn v. Guntner, 167 Mass. 92, 104, 44 N.E. 1077, 1080 (1896) (dissenting opinion). See also Holmes, *Privilege, Malice and Intent,* 8 HARV. L. REV. 1, 8, 13 (1894).

Although the courts speak of refusing to deal as a right, it is submitted that it more nearly resembles a privilege, in that its effect is to justify an intentional infliction of harm. See Green v. Victor Talking Machine Co., 24 F.2d 378 (2d Cir. 1928). But see Carpenter, *Interference with Contract Relations,* 41 HARV. L. REV. 728, 752 (1928).

97. See Brown, *The Right to Refuse to Deal,* 25 YALE L. J. 194 (1916); Notes, 58 YALE L. J. 112 (1949); 29 KY. L. J. 225 (1941).

98. When one attempts to exercise his privilege of free dealing in concert with others, he will often violate statutes passed to prevent restraint of trade. See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); United States v. Lorain Journal Co., 93 F. Supp. 794 (N.D. Ohio 1950). The common law policy against restraints of trade leads to a similar result. See Nissen v. Andres, 178 Okla. 469, 68 P.2d 47 (1936).

99. Blacklists by employers have been condemned by the courts and legislatures. Corneiller v. Haverhill Shoe Mfrs. Assoc., 221 Mass. 554, 109 N.E. 643 (1915); Hundley v. Louisville & N. R.R., 105 Ky. 162, 48 S.W. 429 (1903); Green, *Relational Interests,* 29 ILL. L. REV. 1041, 1052 (1935).

to deal are not per se unlawful; they are merely prima facie unlawful and must be justified.[100] Thus, if the employers in the above example were to have a recognized self-interest in blacklisting the individual, their conduct might be justified.[101] If the members of a social organization refuse to deal with an individual, their acts probably would be justified. If one who is engaged in an economic enterprise excites the animosity of an organization such as the American Legion or NAACP, and its members refuse to deal with him, the organization undoubtedly will not be liable for the losses caused by the combined withdrawal of patronage. Such acts would be justified by the fact that the organization was attempting to promote its own welfare.[102]

VI

In most situations an organization is not satisfied with merely a withdrawal of its own patronage, so attempts are made to influence the conduct of non-members. Usually, the objects sought by the organization can be accomplished only by influencing the conduct of third persons. A theater probably would not be dissuaded from showing a movie by the refusal of a single organization, representing only a segment of its potential customers, to attend the movie; a substantial portion of the public would have to be kept from the theater. How far may an organization go in coercing or inducing third persons to boycott an objectionable individual, movie, play or book?

The courts and legislatures are ready to control violent interferences

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100. "Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable to him for that harm, even though they would not be liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances." RESTATEMENT, TORTS § 765 (1939).

101. New York, C. & St. L. Ry. v. Schaeffer, 65 Ohio St. 414, 62 N.E. 1036 (1901)—employers could combine to refuse employment to one who has shown himself to be incompetent, inefficient, dishonest or negligent. See also Rhodes v. Granby Cotton Mills, 87 S.C. 18, 68 S.E. 824 (1910).

102. See, for example, Kuryer Publishing Co. v. Messmer, 162 Wis. 565, 156 N.W. 948 (1916)—officers of the Catholic Church were not liable for compelling members to cease reading the plaintiff's newspaper, under pain of expulsion from the church. The court did say, however, that the result ". . . might be otherwise if they attempted to forbid social or business intercourse with the plaintiff in respect to trade or commerce or something which ordinarily could not affect the faith of the members." *Id.* at 568, 156 N.W. at 949. See also Heinrich v. Weins, 8 Sask. L. 153, 23 D.L.R. 664 (1915).

An organization may be said to have a privilege of retaliation against one who attacks the group. The privilege is implicit in Watchtower Bible and Tract Society v. Dougherty, 337 Pa. 286, 11 A.2d 147 (1940). This is an established defense to an action for libel or slander. Israel v. Portland News Pub. Co., 152 Ore. 225, 53 P.2d 529 (1936).

with economic interests, such as the means usually employed by the Ku Klux Klan.[103] If an organization were to forcibly prevent persons from dealing with an individual, or if a riot were incited to prevent the individual from doing business, the courts would have no difficulty in holding the organization liable.[104] But organizations do not often employ such ill-contrived methods; damage to economic relations is usually accomplished by a subtle use of power, skillfully applied in strategic places.[105]

Labor union activities which influence the conduct of third persons are extensively covered by administrative, judicial and statutory law. After a long struggle, unions have gained an established place in American society; they promote an interest which the courts, even in absence of statute, recognize as desirable.[106] A labor union is justified in inducing third persons to cease dealing with an objectionable entrepreneur,[107] provided its purpose is lawful,[108] and it does not employ unlawful means.[109] The courts can draw upon union cases for useful analogies in considering interference by non-labor organizations.

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103. *E.g.*, IND. ANN. STAT. § 10-1506 (Burns 1933). See also Perkins v. State, 35 Okla. Crim. Rep. 279, 250 Pac. 544 (1926).

104. See notes 44, 45 *supra*, and accompanying text. Riotous conduct is inhibited by criminal sanctions; *e.g.* IND. ANN. STAT. § 10-1505 (Burns 1933); but civil liability also attaches for damages which result therefrom. Calcutt v. Gerig, 271 Fed. 220 (6th Cir. 1921).

105. In a letter to the INDIANA LAW JOURNAL, April 8, 1953, Professor Leon Green said that ". . . the individual is being squeezed, and he has become an abject victim of all sorts of pressure groups if they turn upon him. The official political group through its agencies has deserted the field and left the individual to make the best of the situation, and frequently has become a party to his persecution."

106. ". . . [T]he courts have recognized the right of labor unions to engage in concerted action. . . . The fear that they have grown so strong as to endanger vital civil liberties and disrupt the functioning of our economic system is an argument exclusively for the consideration of the legislature." Smith Market Co. v. Lyons, 16 Cal.2d 389, 403, 106 P.2d 414, 422 (1940).

107. American Steel Foundries, v. Tri-City Central Trades Council, 257 U.S. 184 (1921); United Chain Theatres v. Philadelphia M.P.M.O. Union, 50 F.2d 189 (E.D. Pa. 1931); Denver Local Union No. 13 of Int'l Brotherhood of Teamsters v. Perry Truck Lines, 106 Colo. 25, 101 P.2d 436 (1940); Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 48 N.E.2d 1 (1943).

108. "Whether the purpose for which a strike is instituted is or is not a legal justification for it is a question of law to be decided by the court. To justify interference with the rights of others the strikers must in good faith strike for a purpose which the court decides to be a legal justification for such interference." DeMinico v. Craig, 207 Mass. 593, 598, 94 N.E. 317, 319 (1911). The following purposes have been held to be unlawful: To compel the breach of existing contracts, United Shoe Machinery Corp. v. Fitzgerald, 237 Mass. 537, 130 N.E. 86 (1921); to compel an employer to adopt a closed shop, Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327 (1903); Peters v. Central Labor Council, 179 Ore. 1, 169 P.2d 870 (1946); to compel the discharge of non-union employees, Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900).

109. They must not interfere with economic relations by such means as intimidation, coercion, duress, fraud or actual violence. Their privilege must be exercised in a peaceful manner. Isolantite, Inc. v. United Electrical Radio and Machine Workers of America, C.I.O., 132 N.J. Eq. 613, 29 A.2d 183 (1943). See also notes 43-45 *supra*, and accompanying text.

The defendants in *A. S. Beck Shoe Corp. v. Johnson*[110] were members of a Negro organization, "The Picket Committee of the Citizens' League for Fair Play," which demanded that businessmen in the Harlem area employ a certain percentage of Negroes in their establishments. Upon the plaintiff's refusal to comply, the defendants picketed his business. Customers were prevented from entering the plaintiff's store, and one woman was injured by the picketers as she attempted to enter. The court held that since the picketing was not done in furtherance of a "labor dispute," it could be enjoined.[111] The court observed that a "racial dispute" was involved, and it would be contrary to sound public policy to permit a racial organization to further its interests by picketing; if Negroes were allowed to resort to such measures, then whites could picket demanding that white workers be re-employed. The court seemed to weigh the interests and concluded that society would be best served by inhibiting the concerted conduct in this particular situation.

In *Green v. Samuelson,*[112] decided a year later, the facts were similar, but only peaceful picketing was employed by the Negro organization. This court also granted an injunction, saying that the picketing was in furtherance of a racial dispute and the public peace would be jeopardized by permitting such organizations to picket. In dicta, however, the court recognized a legitimate purpose to be served by a racial organization attempting to encourage employment of its people, and said that if proper means, such as public meetings, propaganda and personal solicitation, were used to accomplish this purpose, such conduct could not be enjoined.[113] Such groups have a privilege to induce third persons by peaceful persuasion to discontinue dealing with an objectionable person, but this privilege is lost when the organization resorts to picketing as a means of persuasion.

These cases indicate that the interests served by a racial organization will not justify picketing to enforce demands made upon businessmen.[114] *Julie Baking Co. v. Graymond,*[115] is apparently the only case

110. 274 N.Y. Supp. 946 (Sup. Ct. 1934).

111. There are statutes taking away the power of equity to enjoin "labor disputes." The most prominent is the Norris-LaGuardia Anti-injunction Act, 47 STAT. 70 (1932), 29 U.S.C. 101-115 (1946). "Little" Norris-LaGuardia Acts have been passed in most of the states. *E.g.* IND. ANN. STAT. § 40-504 (Burns 1952).

112. 168 Md. 421, 178 Atl. 109 (1935).

113. *Id.* at 429, 178 Atl. at 112.

114. On the problem of picketing by racial organizations, see also New Negro Alliance v. Sanitary Grocery, 303 U.S. 552 (1938), holding that the racial organization had picketed as a result of a "labor dispute," and that such activity could not, therefore, be enjoined. In Hughes v. Superior Court, 339 U.S. 460 (1950), the Supreme Court held that a state, through its courts or legislature, could decide that the purpose of picketing by a racial organization is illegal.

115. 274 N.Y. Supp. 250 (Sup. Ct. 1935).

which deviates from the doctrine that picketing is permitted only when the interests of a labor organization are involved. A consumers' organization in the *Graymond* case picketed the bakery of the plaintiff, who allegedly was charging extortionary prices, in an attempt to compel him to lower them. The court upheld the organization's right to picket as an appropriate means to express its dissatisfaction. "Rendering themselves articulate in protest against what they regard as extortionate prices for necessities of life should be permissible."[116]

Superficially, this decision seems clearly out of harmony with the cases involving picketing by racial organizations.[117] Closer examination, however, indicates the merit in distinguishing the two situations. The social importance of permitting conduct harmful to economic relations seems greater for a group formed on racial lines to reduce discrimination against its members than for a group of persons dissatisfied with prices. Logic would seem to demand that, since the extent of privilege is correlated with the social value of the organization's activity, the racial group would be afforded greater freedom. This conclusion is weakened, however, by the realization that activity of the two groups almost invariably leads to different results. The issues which give rise to affirmative conduct by a consumer group are not set in an emotionally explosive context; third persons would usually remain passive to the dispute. Conversely, racial disputes animate social disquietude and invite violent retaliation by opposing racial groups. As a result, the social policy of preventing riots or breaches of the peace may outweigh the interest in permitting picketing to mitigate discrimination. This consideration is not limited to racial disputes—for example, religious controverses could easily lead to breaches of the peace, and the probability of retaliatory violence thus becomes an important factor at all times in deciding whether an organization is justified in resorting to picketing to impair economic relations. Courts should not, however, declare that picketing by racial or religious organizations is unlawful per se, nor that consumer group picketing is absolutely privileged, but should carefully weigh the facts surrounding the dispute and determine whether, all things considered, promoting the ends of the organization outweighs

116. *Id.* at 252.

117. In a discussion of the *Graymond* case, it was stated that ". . . when the necessaries of life are withheld from the consumer by extortionate prices and are not available from other sources without inconvenience and expense, the consumers should be permitted to protest by advertising their grievance to the public and soliciting public cooperation. However, as our economic system does not usually place consumers in a position analogous to that of labor, the courts obviously should exercise the greatest caution in allowing them to bring economic pressure to bear on the seller by means of picketing." Note, 21 VA. L. REV. 791, 796 (1935).

the sanctity of the economic relations being impaired. Moreover, justification should be sparingly acknowledged, only for peaceful, non-coercive picketing.

The conduct of third persons can be influenced by more peaceful means than picketing; persons may be "advised" or "peacefully persuaded" to discontinue an economic relation. *Camden Nominees Limited v. Forcey*[118] deals with the issue of whether a voluntary, non-labor organization is justified in interfering with economic relations by peacefully persuading third persons to cease dealing with a businessman. The defendants were members of an association of tenants formed for the purpose of inducing the plaintiff, an owner of tenement houses, to provide better heating service in his flats. To effect this purpose, the organization sent letters which were calculated to, and did, induce non-member tenants to withhold their rent payments. In granting an injunction, the court held that the organization's acts were not justified, that it owed no duty to the tenants to promote their welfare. The argument was also rejected that there existed a state of affairs in which a strong and powerful person, the landlord, was taking advantage of a weak and oppressed group of persons, the tenants, and that the latter were justified in using a method which would otherwise be wrongful to equalize their disproportionate bargaining power.[119]

Organizations often interfere, not only to further their own self-interest, but also to promote the welfare of society. Thus, the American Legion sincerely believed that if it suppressed "Limelight," funds would be diverted from the pockets of persons who, given the opportunity, would destroy the American way of life.[120] When may an organization, perceiving a redoubtable situation which the law seems incapable of handling, resort to interference with economic relations in an attempt to remedy the situation? This question seems to be clearly answered

118. [1940] 1 Ch. 352.

119. The judge observed that the latter argument ". . . was one which appeared to be directed less to my reason than to my emotions. . . . It is a dangerous proposition that inequality in wealth or position justifies a course otherwise actionable, and that tenants may against their landlord adopt measures of self-help because in their judgment the law does not afford them adequate remedy for his default." *Id.* at 366.

120. Speaking of a meeting between the American legion and motion picture executives held on March 31, 1952, Robert Pitkin reports: "At that meeting, Commander Wilson defined the Legion's method as that of giving the widest possible distribution to (a) information identifying communists, and (b) information which seemed strongly to relate people and activities to communist influence.

"He recognized that the path that events had taken was damaging an entire industry. But the Legion would continue its public information program, he said. It was mandated to do so by its conventions, and dedicated to do so by its principles." Robert Pitkin, *The Movies and the American Legion,* The American Legion Magazine, May, 1953, p. 39.

by *American Mercury, Inc. v. Chase,*[121] a suit to enjoin the defendants from interfering with the sale and distribution of the plaintiff magazine. The defendants were members of a self-appointed organization which examined books and magazines to discover "unlawful" writings. If the defendants decided that a book or article violated the law, they would warn leading distributors of the unlawfulness and imply that if the distributors dealt with the objectionable publication, they would be subject to prosecution. In effect, the organization was a private censorship board overseeing the public morals. Although the court assumed that the organization was "actuated by a sincere desire to benefit the public and to strengthen the administration of the law,"[122] it issued an injunction because the acts of the organization constituted an unjustifiable interference with the plaintiff's business. The organization had a right to advise distributors as to the legality of the publications, but it had no right to subordinate their will by threats of prosecution.[123] The court also remarked that the organization's acts were in the nature of a secondary boycott against the publisher which was illegal under Massachusetts law.[124] This case would seem to warrant the proposition that when an organization is opposed to the conduct of one engaged in an economic enterprise, honestly believing that such conduct is detrimental to society, only non-coercive advice can be given to third persons who deal with the objectionable person, and any threatening or intimidating action by the organization is unjustifiable.

If an action were brought against the American Legion or Catholic Church groups to recover for the damage they have inflicted upon the economic relations of parties interested in "Limelight" or "The Miracle," what might be the result? Both organizations have intentionally inflicted harm to economic relations for which they would be prima facie liable. To escape liability they would have to show that their harmful activity was justified. The purposes of both organizations are indeed noble, and they are no doubt privileged to peacefully influence the conduct of third persons by advising them not to deal with the one who is considered objectionable. They apparently have not, however, "advised" or appealed to the reason of either theater owners or prospective theater audiences, but have used secondary boycotts; by actual or threatened picketing, an unlawful activity when engaged in by a non-labor organization, they

121. 13 F.2d 224 (D. Mass 1926).
122. *Id.* at 225.
123. "Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would be unfounded. The defendants know this and trade upon it." *Ibid.*
124. Ibid.

have dominated the will of third persons, causing them to sever economic relations with the actors, producers and distributors. In light of existing tort principles, therefore, harms thus inflicted appear to be actionable.

Non-governmental organizations frequently attempt to impose their will upon non-members by an effective display of power. An individual whose economic expectancy is impaired by the activities of an organization, but who is not protected by the courts for lack of a constitutional or contractual remedy, should not remain unprotected. Principles in the law of torts may provide his remedy, and at the same time offer a means for restraining the excessive zeal of a stimulated organization. When applying these principles, a court must evaluate delicately balanced private and social interests and visualize the impact upon society of permitting or disallowing continuation of the particular activity in which the organization has engaged.

EFFECTIVENESS OF STATE ANTI-SUBVERSIVE LEGISLATION

Communism poses a unique threat to the existence of this nation. Ordinarily the enemies of democracy associate themselves with the imperialistic aspirations of certain nations; but while Communism is identified with the expansionist aims of Russia, it also constitutes an international conspiracy which defies identification of its members by the characteristics of nationality, color, or creed. An adherent to this conspiracy may be a known, respected and educated American citizen who is nevertheless subservient to the philosophy of Communism. All states have enacted laws to protect their citizens from such persons. The objective of this discussion is to examine the propriety of the trend in state legislative efforts to combat the threat of Communism.

Of the many baneful facets of Communism, perhaps the most detestable is the paradoxical utilization of constitutionally guaranteed rights by Communists to protect themselves from the imposition of punishment and disabilities by a government which they seek to overthrow by force and violence.[1] This "use" of the Constitution to parry

1. The most frequently invoked constitutional guaranty is the right against self-incrimination. The prevalence of Congressional and state hearings accounts for this. However, defenses relied upon by Communists during their prosecution under subversion and sedition statutes are those of the First and Fourteenth Amendments.

For examples of reliance on the privilege against self-incrimination see *Hearings before the Committee on Un-American Activities House of Representatives on Com-*