Non-Commercial Purpose as a Sherman Act Defense

John E. Coons†

Introduction

THIS article is principally an analysis of some fascinating antitrust cases that have never been tried. The defendants in these imaginary suits have combined to restrain trade for any conceivable purpose—other than the purpose of gaining for themselves an economic benefit. In approaching these legal chimeras, consideration also will be given to related, but more orthodox, antitrust defendants—such as labor unions and cooperatives—who, by combining to restrain trade, have sought economic benefits but have not done so in that role of the competitive businessman which is the traditional posture of the antitrust defendant.

One of the whimsical realities of antitrust enforcement has been the de facto license granted to defendants acting with non-economic purposes to impose restraints of trade, some of which logically appear to fall within the purview of the Sherman Act. In part, this anomaly may be explained as an appreciation by the Antitrust Division of practical and political limits of enforcement,¹ but the acceptance of these same restrictions by private plaintiffs is less easily understood. Consider, for example, the following factual situations, in part hypothetical, but thoroughly realistic:

1. Negroes in a southern town unite in their refusal to patronize transportation facilities that segregate their passengers according to race.²

† Associate professor of law, Northwestern University. The author is indebted to his colleague, Professor James A. Rahl, for his helpful comments, to Messrs. Roger Mitten and Roland Roegge for their able work as student assistants, and to the editors for their patience.

¹ The Assistant Attorney General in charge of the Antitrust Division has indicated, in testimony before a Senate Committee, and in a letter to the author, that the possibility of employing the antitrust laws in the protection of civil rights had received some consideration from the Justice Department, but that no action had been taken to date. Letter From Lee Loevinger, Assistant Attorney General, Antitrust Division, Feb. 14, 1962.

² The reader will recognize this skeletal description as a reference to the boycotts in Montgomery, Alabama, in 1955 and 1956. For a fuller description and consideration of some of the legal problems arising from such activity, see Comment, The Common-Law and Constitutional Status of Anti-Discrimination Boycotts, 66 YALE L.J. 387 (1957). That the Montgomery boycott was not a unique and ephemeral phenomenon
2. An anti-Communist group of private citizens publishes lists of television and radio performers, producers, and writers whose loyalty it questions. The group attempts to persuade broadcasters to refuse to employ such persons or to perform their works, and threatens to withdraw patronage from sponsors on whose shows they are permitted to appear.3

3. Church members or a citizens’ group agree among themselves to abstain from purchases of books and magazines on a disapproved list or to refrain from attending certain movies. The group withdraws its patronage from those who deal in the proscribed material and induces others to join in the boycott.4

These examples, stripped of their emotive character, could be reduced roughly to this essence:

X, Y, and Z, who are buyers, agree to cease dealing with A, a seller, either permanently or until A either abandons or adopts certain practices.

As condensed, our hypotheticals appear to be cut and dried violations of the Sherman Act, ready for incorporation in a Restatement of Trade Regulation. Such examples could be multiplied indefinitely. Traditional defenses could, of course, be raised by defendants in each of these hypotheticals, either as originally stated, or as stripped down. For example, the requisite relation to interstate commerce often would be at issue,5 and constitutional or other privilege might, in some cases, be alleged; but uncertainty on the commerce question has been no deterrent to antitrust action in other areas, and the First Amendment has not spared newspapers from attack under the Sherman Act.6 Years ago, it was demonstrated by Philip Marcus that, in situations comparable to our hypotheticals, there is a wealth of Supreme Court antitrust doctrine available to the Government and private litigants.7 Mr. Marcus’ able analysis will not be repeated

As attested by the recent boycott of city buses in Albany, Georgia. The boycott resulted in total discontinuance of service by the company for three weeks. At latest report, the company will resume limited service for predominantly white districts. Chicago Daily News, Feb. 19, 1962, p. 4.


7 Marcus, Antitrust Laws and the Right to Know, 24 IND. L.J. 513 (1949); Marcus, Civil Rights and the Ant-Trust Laws, 18 U. Chi. L. REV. 171 (1951). The only explicit statutory exemptions based upon non-economic group purposes are the excep-
here. For our purposes, we may, and do, adopt his conclusion that the Act
can apply to the kind of defendants involved in our hypotheticals, a con-
clusion which is supported by the one antitrust decision precisely in point
and by a number of compelling analogies.8 At the same time, the analysis
suggested here will depart from the conclusion that the Sherman Act ap-
plies to such defendants in precisely the manner and degree manifested by
the decisions involving businessmen. The existing reluctance of potential
plaintiffs may well exaggerate the immunities that will be recognized when
and if litigation ensues, but it seems sufficiently clear that at least some
exemptions will be granted. An attempt will be made here to define the
bases and limits of such exemptions.

The explanation for the existing reluctance to litigate may lie in large
measure in a vague general thesis concerning the antitrust laws that is prob-
ably widely held but seldom articulated. Reading between the lines, this
thesis may be detected in the work of almost any major commentator.9
These writers are engaged in a discussion that is almost purely economic
in content. Its points of reference are monopoly, oligopoly, workable com-
petition, and pricing systems. In such a context, most of our hypothetical
cases would be awkward freaks. Litigation over such matters would be an
affront to the notion of an antitrust law confined by nature to the arena of
commercial conflict between entrepreneurs mutually contending for eco-
nomic power. Under this thesis, antitrust simply represents rules for mar-
ket behavior and is limited to conflicts arising within the traditional market
milieu of the typical antitrust case. This view would exclude the Negro
bus boycott from antitrust consideration because it somehow falls outside
this classic setting. Where the line is drawn is unclear. Indeed, it is rarely
considered. Thus, the problems in these areas have been left for disposal
under relevant doctrines of torts10 and constitutional law.11

If this feeling about the antitrust laws is vague, it is nonetheless strong.
It apparently has inhibited ordinarily litigious civil rights groups from add-
ing to their legal arsenal doctrines which would not depend for their vi-
tality upon state action.12 Perhaps these groups shun the Sherman Act

8 Council of Defense v. International Magazine Co., 267 Fed. 390 (8th Cir. 1920);
see Marcus, supra note 7.
9 The expression of the objectives of antitrust contained in the Attorney General's
Committee Report is interesting in this respect. Even the minority of the Committee,
which expressed its views of those objectives in broad terms, ignores completely any
potential threat to competition except that from businessmen. AT'TY. GEN. NAT'L
10 See pp. 713-25 infra; 66 YALE L.J. 397, supra note 2.
11 66 YALE L.J. 397, supra note 2.
12 The reluctance to litigate is showing signs of coming to an end. In an action
recently filed in the United States District Court for the Northern District of Illinois,
fifty-five hospitals plus medical associations and insurance companies have been
made antitrust defendants, the plaintiffs being Negro doctors claiming systematic
exclusion from hospital staffs and consequent economic injury. Morris v. Chicago

Another suit reportedly has been filed in a federal district court in Michigan nam-
because they fear its application to one of their own most important weapons, the boycott, but this fails to explain the diffidence of the individual plaintiffs on both sides of the civil rights fence who would not be expected to take into account policy questions of this sort. Why, for example, did the Montgomery Bus Company resist the prospect of a treble damage award against the NAACP after the bus boycott? The irony of finding a friend in the federal court could well bring the South back into the Union.

An examination of other possible practical and doctrinal justifications for this vague and conservative thesis about the Sherman Act discloses some basic questions about national antitrust policy. One dimly perceived argument for the limitations presently observed may be the fear that extension of antitrust to such cases would open a Pandora's box of litigation over any group activity with the remotest effect on competition. May we expect a Sherman Act prosecution of a boy scout troop that refuses to deal with a corner drug store trading in saucy magazines? Understandably, this reductio ad absurdum might be feared by judges and writers holding policy objections to extension of the act, but why should plaintiffs share this concern?

A more promising explanation may inhere in the noncompetitive relationship of the potential defendant and the victim of his restraint. In the hypothetical situations posed, the restraining activity is undertaken by persons not in competition in the market affected—indeed, not in business at all. The organizers of the campaign against alleged communist sympathizers in the television industry were not competing with writers for a greater share of the television market; nor were the Montgomery Negroes competing for customers with the bus company. Indeed, these potential defendants, insofar as their eventual goal is concerned, are not operating on any economic level. The economic effect achieved is merely a means to a non-economic end. It may be that the supposed exemptions, in the end, are based upon a difference in the purpose of the group imposing restraints on commerce. In the examples given, the heart of the defendant's purpose is the creation of effects which are non-economic. The bus boycott involves primarily a social purpose; the movie boycott a moral one; the television blacklisting a political one. The mainspring of group activity is ideological, and individual self-interest—at least economic self-interest—is greatly diffused, if it exists at all. That the nature of defendants’ purpose may be relevant to the existence of antitrust liability for concerted action affecting competition is the principal hypothesis to be considered in this article.

The Supreme Court has said on occasion that the only matter at issue in antitrust litigation is the effect or intended effect on competition. At other

---

13 See note 3 supra.

times, it has acted as if this were not true. Which position the Court would maintain if faced with a group refusal to deal by Negroes attempting to implement the announced national policy of equal opportunity is a matter for serious consideration. The issue of these special cases is a primary issue of antitrust, posing the question whether the Sherman Act can distinguish among the non-economic goals of defendants on the basis of policies unrelated to the protection of competition. Before proceeding to this, however, it will be important to define more precisely that aspect of the group will which makes these cases unique and renders them the potential object of special treatment under the Sherman Act.

II

Some Definitional Problems

A. Three Aspects of Group Will and a Suggested Nomenclature

For the moment, our primary concern will be to distinguish three aspects or levels of group will which may have some relevance to antitrust liability in our special cases. Eventually, we shall label these motive, intent, and purpose for reasons which will appear once the three levels are described.

The Montgomery bus boycott is perhaps the clearest example of activity involving all three levels. Here, we see potential antitrust defendants deliberately imposing upon the bus company a concerted restraint which seriously curtails its business. This effect on the company is foreseen, and it is willed. The defendants have acted in order to achieve a diminution of the company's revenue. In these actions, we see distinctly one aspect of voluntary activity—the will to achieve an immediate market effect. This goal of defendants, however, does not exhaust the meaning of their undertaking. Indeed, to them as a group, it has merely a functional or technological significance. The "real meaning" of the activity to the group itself is the achievement of the more remote goal of equal opportunity. Viewed in relation to this goal, the boycott has no independent significance and is merely a means. Equal opportunity, on the other hand, is desired for its own sake. We see, then, two distinct aspects of the group will, but there is a third as well. As to each Negro participating in the boycott, there may be an independent subjective reason for his action. Presumably, this subjective, individualized reason would, in most cases, be identical to the ultimate group reason of equal opportunity, but this need not be so. The individual may well act for subjective reasons of spite, love, the desire to conform, or other cause.

Let us consider another example. A group of citizens organizes to boycott newsdealers who carry magazines which appear on a list of disapproved publications. At the level of means, the group has willed the economic ostracism of the offending dealers. The boycott and the injury to the dealers' business are, however, purely functional and not desired for their own sakes.

---

16 See discussion of the cases involving labor union defendants, pp. 729-42 infra.
What is desired is two-fold: the removal of certain literature; and, even more ultimately, the improvement of public morality. At the same time, on the side of the individual within the group, a variety of subjective reasons may exist, laudable or otherwise.

As a final example, suppose that retail lumber dealers boycott those wholesalers of lumber who engage also in the retail trade. Again, the group has willed a series of actions and results—the withholding of their custom, injury to the wholesaler, and eventual withdrawal by the wholesaler from the retail trade—all of which have a purely functional significance. The final or ultimate group goal is maximization of profits, to which the activities described are related as means. Finally, from the third, purely subjective aspect, the individual retailer may have acted from spite, greed, or even a hope to promote the public welfare.

It may appear, then, that in group restraints of trade, as, indeed, in any reasoned human activity, we may speak of three aspects of will. Of the first two aspects, one relates to effects desired by the actors as means, the other to effects desired intrinsically or as ends in themselves. One envisions mediate, the other final, goals. Both of these aspects can be stated objectively in terms of the results hoped for or expected on each level. A third aspect or level is purely subjective and unrelated in any necessary way to either an objective course of action or an objective final result which is the purpose of such action. In speaking thus, we do not ascribe any ontological status to these three “aspects” of will. For our purpose, the categories may be conceived as imposed extrinsically, as it were, from the side of the judge and as notions rather than existential fact. They represent merely three perspectives of the defendants’ will not essentially different from those long ago suggested by Holmes as possessing jural relevance. As such, they may prove useful in their application to our special cases, and that is all we can expect of them.

It is important to select names for our three categories in order to avoid the need for such cumbersome analysis in every case. First, in considering defendants’ will from its purely subjective aspect, we are dealing with what is commonly called motive, and we will adopt that word as descriptive of the category. Motive will not be of great importance to this study.

Second, in speaking of that aspect of the defendant’s will which relates to means, we will use the word intent. In antitrust cases, we will commonly

---

16 The reader may recognize this situation as that involved in Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).
17 Holmes, Privilege, Malice, and Intent, 8 Harv. L. Rev. 1 (1894). Holmes adopted a different nomenclature, but recognized, in substance, the same three-level division—the purely subjective, the merely functional, and the teleological or final.
18 Webster, New International Unabridged Dictionary 1600 (1969), offers (among others) this definition: “That within the individual, rather than without, which incites him to action.”
19 Webster is not very helpful, defining intent as “An intending or purposing; also, that which is intended or purposed; as, with intent to kill; the intent and meaning of the devisor; hence, design; purpose; intentions.” Id. at 1292.
ask, what effects upon the market did the defendant intend—referring to those effects which, in the eyes of the defendants, are merely means to a more ultimate goal. Third, that goal which is desired not as a means, but in and for itself, we will call purpose. For example, in the garden variety of antitrust cases involving businessmen as defendants, the purpose of the restraint is profit.

This distinction between the words intent and purpose is not to be found clearly set forth in the cases, which, in general, use the words as synonyms. Unfortunately, there is no word in English which applies exclusively to either of the categories drawn. The selection of words, then, is somewhat arbitrary, although two partial justifications may be offered in addition to the author's caprice. First, with regard to "intent," there exists in the literature of the criminal law a common use for the word, consistent with that suggested here. "Intent" is used in the criminal law to describe conscious and deliberate performance of an act without reference either to defendants' anterior subjective motive or to any objective policy justification for the act. In a homicide, to ask the question, "Did A intend to kill B?" is to ask whether A, whatever his reasons, consciously and voluntarily performed acts which reasonably could be foreseen to cause the death of B. Having determined A's intent, justification, such as self defense, may thereafter be proved, but is a separate question. It is in this sense that the word intent is used in this study.

The only warrant for the meaning assigned here to "purpose" is the author's impression that the common-law restraint of trade cases, in general, prefer to describe defendant's ultimate aim as "purpose" when deciding upon the justification of a prima facie tort. In these cases, the courts are examining, first, the means employed by the defendant (which relate to "intent" as used here) and, latterly, the ultimate "purposes" to which these means were directed. Such use of "purpose" seems exactly con-
sistent with the meaning adopted here. Admittedly, the antitrust decisions
frequently, or even usually, treat the words as synonyms in cases which in
fact are concerned only with what we have chosen to call "intent."

It is not suggested that, in any given case, intent and purpose will stand
clearly apart as mutually exclusive. Frequently, they will overlap or co-
alesce and will remain distinct only as ideas. In the boycott against the
offending newsdealers, for example, it was suggested above that the re-
moval of objectionable literature could be viewed as an end in itself—that
is, as "purpose." Yet, it may also be viewed on the functional side as a
means to the even more ultimate end of public morality. In that sense, it
constitutes "intent." To carry the point even further, in such a case, the
enhancement of morality may itself contribute as a means to even more
finalistic "purposes" and thus, in some sense, justly be called an object of
defendants' "intent." In other words, there is some difficulty in deciding
at what point along the continuum of cause and effect in the defendants’
plans "intent” ends and “purpose” begins. The difficulty is lessened, though
not eliminated, if we apply a rule of thumb that, when a thing is desired
for its own sake, it is "purpose," even if it also constitutes a step in a de-
sign to achieve more remote effects.

Before leaving this matter, it would be well to advert once more to the
distinction between motive and purpose, which, in some respects, appear
suspiciously alike. Purpose is not merely motivation in disguise, even if, in
some sense, both refer to defendants’ “real reason” for acting. It will be
remembered we are dealing with group activity. Strictly speaking, a group
cannot possess a motive. Only individuals have motives, and only by co-
incidence will individual motives within a group be identical. The purely
subjective elements of group activity are incapable of any description
which is valid for the group as a whole. Purpose, on the other hand, can be
postulated of any group. While in part subjective, it can be stated objec-
tively. Indeed, group purpose can only be stated objectively. This objective
character permits purpose to be evaluated in terms of public policy, which
in turn permits it to have jural consequences.

B. Types of Purpose: More Nomenclature

It will be useful, for purposes of communication, to distinguish and label
three very general kinds of relevant purposes that may be held by potential
antitrust defendants. The nomenclature is highly arbitrary.

Commercial Purpose: Under the label "commercial" we shall include
only that purpose of businessmen which is the ordinary stated reason for
individuals becoming entrepreneurs—in a word, profit.

Economic Purpose: Under this category will be included all purposes re-
lying to economic self-interest except the commercial purpose. The hired
laborer, under this view, has an economic but non-commercial purpose.

Non-Economic Purpose: This expression will denote purposes which have
no substantial content of material self-interest. Boycotts by church groups are good examples.

Applying these labels in a given case may, of course, be difficult. Many, or most, purposes are complex in their content. The difference between economic and non-economic purpose may often represent merely an imperceptible gradation along a continuum. It is difficult, for example, to place anti-Negro real estate boycotts clearly in either the economic or non-economic category. In separating commercial purposes from the merely economic, some of the same difficulties may exist. Certain of the activities of cooperatives may present this problem. Even within the categories, there are ambiguities. The definition of commercial purpose begs the questions of who are businessmen and what is profit. I am happy to leave these problems to the economists, if only for the sake of getting on. Conceding the semantic conundrums, there is a sufficient content to the expressions “commercial,” “economic,” and “non-economic” purposes that we may find them useful in this discussion. We will frequently complicate the matter slightly by using the expression non-commercial purposes to cover both the economic and non-economic categories in one word. An occasional lapse from sheer ennui into a recognizable synonym will, I hope, be forgiven.

This article will now focus upon non-economic group purpose as the distinguishing element in our special cases. We will consider the efficacy of such purposes to alter results in cases of restraints which, gauged purely in terms of market effect or intended effect, would constitute violations of the Sherman Act. As a first step, we shall see how defendants with non-economic purposes have fared at common law.

III

Non-Economic Purpose at Common Law

The transfer value of common-law theory in antitrust problems is limited with respect to the kinds of non-ancillary group restraints which are the exclusive concern of this study. Yet, the common law may stimulate useful comparisons, and it will be instructive to examine briefly the relevance of defendants’ purpose, at least in those few decided cases which provide reasonably proximate analogies to our hypotheticals.

At common law, the purpose of the defendants is one of the factors weighed in assessing the legality of restraints of trade, including refusals to deal. From the time of its emergence as a recognized tort, the intentional interference with business expectations has included the notion that a lawful purpose sometimes will provide justification for an otherwise prima facie cause of action. Even group boycotts have been the beneficiaries of such a rule. Arnold v. Burgess, 241 App. Div. 364, 272 N.Y. Supp. 534 (1934); Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S.W. 691 (1903); Mogul S.S. Co. v. McGregor, 23 Q.B.D. 598 (1889).

In the Heim case, the restraint was held unjustified, but the court pointed out that “all combinations . . . are . . . by no means unlawful. Whether a combination is
purpose may be insufficient to justify the interference. Such cases will include, for example, violence and threats, disparagement of plaintiff's goods, mass picketing, and a multitude of other proscribed activities. Where the means employed are not clearly either reasonable or unreasonable, the purposes of group interferences with trade weighs heavily in the balance. In this area of doubt fall the kinds of action most to be expected from the non-economic groups which we consider here. Such action may be simply a group refusal to deal, or may also involve inducement of third persons to join in the refusal. Picketing and other common means of achieving the end sought may also be involved. In such cases, as the coercive quality of the means increases, the court will be especially concerned with the purpose of the group effort.

lawful...is ascertained by the character and purpose of the combination..."

97 Mo. App. at 73, 71 S.W. at 694. The obvious qualification of this principle is that concerted activity is more difficult to justify, especially where directed against secondary parties, as, for example, some of the blacklisting in television has been. See note 3 supra. An individual trader is free to engage in much more strenuous competition. But see Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909).

24 Evenson v. Spaulding, 150 Fed. 517 (9th Cir. 1907); Gilly v. Hirsh, 122 La. 966, 48 So. 422 (1909); Restatement, Torts §§ 766, 767 (1934).

25 Braun v. Armour & Co., 254 N.Y. 514, 173 N.E. 845 (1930) (publication of defendant indicated that plaintiff, a kosher butcher, sold bacon); see Handler, Unfair Competition, 21 Iowa L. Rev. 175, 196-201 (1936).


27 See generally Handler, supra note 25. One of the most interesting recent developments has been the limits judicially imposed upon “informal” governmental action. Orders and “suggestions” by the police to newsdealers to remove certain material, or the distribution of lists of disapproved magazines to retailers and distributors, have met with disapproval and injunction in cases where the court has found a threat of official action implicit in the facts. Whether such threats are improper only where no violation of law by plaintiff exists, or whether the technique is proscribed in all cases, is not clear. Such a case, involving the controversial Henry Miller novel, “Tropic of Cancer,” was recently decided by the Superior Court of Cook County, Illinois. Plaintiffs, “individual prospective purchasers” of the book, sought to enjoin the Police Commissioner of the City of Chicago and the chiefs of police of certain suburbs from interfering with its sale. The court examined the obscenity question under prevailing tests, especially Roth v. United States, 354 U.S. 476 (1957), and found the book “not obscene.” As to interference, the court said:

Those who object to the book are free to condemn and even to urge others to reject it. Organizations, such as church societies, and other sincere groups are free to condemn any book they deem objectionable. . . . Such voluntary efforts are praiseworthy and consonant with democratic principles.

After citing Roth again, the court continued:

However, that is a far cry from censorship established by law whereby all readers are geared to the taste of the relatively few.

[L]iterature which has some social merit, even if controversial, should be left to individual taste rather than to governmental edict.

[L]et not the government or the courts dictate the reading matter of a free people.

The justifying purpose traditionally proffered by defendants in restraint of trade cases is commercial self-interest—the typical defense of aggressive businessmen in the run-of-the-mill competitive situation. The analogous economic self-interest of labor is the justifying purpose for union activities which constitute restraints of trade. In the approach adopted by the Restatement of Torts for concerted refusals to deal imposed by businessmen, self-interest alone is suggested as a justifying purpose. We should observe, however, that the Restatement is engaged primarily in an effort to distinguish economic self-interest cases from the so-called “spite” cases. A group refusal to deal, the sole object of which is injury to the plaintiff, is difficult to justify. Most of the common-law cases involve either spiteful injury or self-interest as the defendant’s purpose. It is, therefore, an easy transition from the notion that self-interest may justify to the conclusion of

28 Katz v. Kapper, 7 Cal. App. 2d 1, 44 P.2d 1060 (Dist. Ct. App. 1935); Mogul S.S. Co. v. McGregor, 23 Q.B.D. 598 (1889) (examples of aggressive competition justified by self-interest). Contrast such cases with Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909). Here the defendant was a wealthy banker who set up a barber shop next to plaintiff’s shop for the sole purpose of destroying plaintiff’s business. The absence of economic self-interest prevented justification. In International & Great N. Ry. v. Greenwood, 2 Tex. Civ. App. 76, 21 S.W. 559 (Civ. App. 1893), the defendant had ordered his employees to withdraw their custom from plaintiff. The defendant was held responsible for the consequent injury because he did not hold a “legitimate purpose,” having acted from spite.

29 GREGORY, LABOR AND THE LAW 120-27 (2d ed. 1958); RESTATEMENT, TORTS §§ 802-04 (1934). Non-economic considerations, however, played an important role in at least one action involving labor union defendants. In Brimelow v. Casson [1924] 1 Ch. 302, theatrical unions refused to deal with the plaintiff, a producer, and induced theatre owners to join in the boycott. Justification was offered by defendants that plaintiff’s wages to the girls in the troupes were so low as to drive them into prostitution. The court made much of the immoral relationship between one of the 18-year-old chorus girls and a dwarf from the company and concluded:

[If justification does not exist here I can hardly conceive the case in which it would be present. These defendants... owed a duty to their calling, and to its members, and, I am tempted to add, to the public, to take all necessary peaceful steps to terminate the payment of this insufficient wage, which... had apparently been in fact productive of those results which their past experience had led them to anticipate. “The good sense” of this tribunal leads me to decide that in the circumstances of the present case justification did exist.

Id. at 313.

30 RESTATEMENT, TORTS § 765, comment d (1934). Other sections of the Restatement bestow a “privilege” which is in turn based, in part, upon “purposes” other than self-interest. Section 766 distinguishes concerted refusals to deal from “inducing refusals to deal.” In discussing the question of the “privilege” to so induce a refusal to deal, § 767, comment e, notes that “the actor may be seeking to promote not a selfish interest but a public interest,” and takes the position that a reasonable purpose to implement public policy will aid in establishing the privilege, if the actor is in good faith.

In this context, the meaning of the distinction between concerted refusals to deal and the inducement of third persons to withdraw patronage is not clear. The mere formation of any group inevitably involves inducement. Spontaneous and simultaneous agreement is not a normal human experience. One might wonder at what point the “group” has been formed so as to then constitute any further action by those same persons “inducement.” If the “induced” party joins in the group activity, is the case no longer one of inducement but simply a concerted refusal? Does the Restatement approach suggest a distinction between a formal group, such as a church or fraternity, which is capable of being “joined” in some symbolic way, and an informal collection of individuals with an agreed program?
that only self-interest may justify. Whether such a conclusion is true, or whether other purposes may serve as justification, can be better assessed if we examine the handful of cases involving non-economic purposes.

A. Cases Involving Privileged Relationships

Half a dozen American cases consider the freedom of clerics and teachers to impose restraints of trade without judicial interference or punishment. Since our interest here is as to the relevance of defendants' purpose, it will be well to bear in mind a distinction between purpose and what we will call "status immunity." To the extent that the defendants gain immunity merely by status—clerical or educative—these decisions are not apposite to our concern. To distinguish the effects of purpose and status immunity in these few cases is extremely difficult, and the analysis offered is therefore highly tentative. We may note that a relevant section of the Restatement of Torts treats the situation of clerics and educators under the classification "privilege." The comment to the section, however, suggests specifically that both status and a particular purpose are essential to the privilege. Here, we will distinguish these elements where this seems possible and useful.

Religious Leaders as Defendants. In Kuryer Publishing Company v. Messmer, a 1916 Wisconsin decision, most of the Catholic bishops of that state were joined as defendants. The plaintiff was a Polish language newspaper, apparently with significant circulation among Catholics. A pastoral letter was circulated and read in all the churches of the various dioceses describing the plaintiff newspaper as injurious to faith and proscribing its reading or possession in strong terms. The trial court held for defendants and refused examination of defendants on questions of purpose or motive, declaring the matter to be "of purely ecclesiastical cognizance" and beyond the jurisdiction of the civil courts. The Wisconsin Supreme Court affirmed per curiam, but added, "It 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."

---

32 Restatement, Torts § 770, comment d (1934):

Actor's purpose. The privilege ... is given to protect the welfare of the person induced. If the actor's conduct is not directed to this end, he is not protected by this privilege. His conduct is not so directed if he does not believe that danger to that welfare is threatened by the relation which he seeks to sever or prevent.

We should note that this section relates only to the inducement of others and not to a simple concerted refusal to deal. See note 30 supra.

31 162 Wis. 565, 156 N.W. 948 (1916).
34 Id. at 568, 156 N.W. at 949. In 1947, an irresistible footnote case was tried in an Ohio court of common pleas. One Yoder was "mited" by his Mennonite co-religionists for an apostasy which featured his purchase of an automobile to drive his sick daughter on 15-mile trips to the doctor. The "mite" declared by the Mennonite pastor forbade the parishioners from speaking to, working for, or having anything to do with the renegade. Yoder's business was injured by the boycott, and he sued for damages and an injunction. Pastor Nisley spoke to the court for the four defend-
The *Kuryer* decision obviously does not foreclose examination of purpose in the case of clerical defendants. Indeed, a standard requiring judicial consideration of that “which ordinarily could not affect the faith” focuses upon the fundamental aim of the restraint as the decisive factor. That purpose of the clerical defendant which is protected is the purpose to preserve the spiritual well-being of the church members as understood in the light of its own doctrine; and the protection is not expressed in absolute terms. When the danger posed by the business practice restrained to the religious purpose protected is minimal, the policy protecting freedom of trade can expect relatively greater recognition. For example, it is improbable that clerical status immunity and the religious purpose would justify a boycott the purpose of which was to alter or punish the religious views and expressions of the owner of a business which itself posed no threat to the faith or morals of defendants’ flock. Any supposed danger to faith from the plaintiff’s private views would be altogether too remote to constitute justification in the light of the important competing public policies involved.

A similar theme is reiterated in a 1940 Pennsylvania decision, *Watch Tower Bible and Tract Society v. Dougherty.* Here, the plaintiff was conducting programs over a radio station owned by a department store. The programs were offensive to the defendants, Catholic clergy, who organized protests to the store coupled with threats to withdraw patronage. The station thereafter failed to renew plaintiff’s contract when it expired. The case thus involves a secondary boycott of a most effective kind. In a brief opinion, the court denied plaintiff’s claim for damages, stating:

The defendants are leaders of their church. They cannot be mulcted in damages for protesting against the utterances of one who they believe attacks their church and misrepresents its teachings or for inducing their adherents to make similar protests. A right of action does not arise merely because a group withdraws its patronage or threatens to do so and induces others to do likewise where the objects sought to be obtained are legitimate.36

The language is equivocal. The status of defendants as church leaders is specifically noted. The justification, whatever its scope, might first be supposed to be limited to the clergy. The last sentence, however, is in no way confined to these defendants and appears to apply to any groups whatsoever, with the sole limitation on their freedom of action being that the objects sought be legitimate. If this broader second meaning was intended, it should be observed both that it is dictum and, also, that no clue is provided as to which objects of group action are “legitimate.” If the first

ants: “We have to have order in the church. But this is a matter of Christianity. If Andy ain’t a faithful member of the church he just ain’t.” One Solly Schlabach testified that he had been expelled from the church because he had refused to observe the mite on Yoder. After eight weeks he was reinstated after seeking forgiveness on his knees for “not miting Andy.” A jury awarded Yoder $5000 and the court issued an injunction barring existing and future mites. Chicago Daily News, Nov. 6, 1947, p. 1; 2d., Nov. 7, 1947, p. 1.

35 337 Pa. 286, 11 A.2d 147 (1940).

36 Id. at 288, 11 A.2d at 148.
meaning is correct, and the holding therefore limited to the clergy, the scope of justifying purpose suggested by the idea of "legitimate objects" is defined by other language in the quotation. That is, legitimate objects may be taken to mean the elimination of perceived "attacks" and "misrepresentations" spoken of in the second sentence. So interpreted, the result would bear resemblance to the Kuryer decision, where the only issue considered was the justification of clerical activity in matters affecting faith. Watch Tower does not cite the Kuryer decision.

Whatever the meaning and predictive value of these decisions, it is certain that the purpose of the defendants played some role in each case and can be expected to do so in any future litigation involving clerical defendants. How much the defendants' purpose was assisted by their status in justifying the restraints is a matter of conjecture, but it seems unlikely that the same latitude will be extended to lay defendants based on the justification value of religious purpose alone.37

37 Three decisions from courts of other countries deserve mention. In Sweeney v. Coote, [1906] 1 Ir. R. 51, aff'd, [1907] A.C. 221 (Ch.), an Irish school teacher was the victim of a boycott by parents of pupils in the school, who objected to her employment on the ground that she was Roman Catholic. The fascinating facts and opinions consume 85 pages of the reports, from the trial to the House of Lords, which held the allegations unproved. The Earl of Halsbury unburdened himself of the following interesting dictum:

If it were true that there had been such a combination, and if the object was what is suggested, to cause her to be dismissed, not upon any ground of personal objection to her, or any spite or ill will to her, but upon the ground that in the view of the parents and of the persons procuring the combination it was an undesirable thing for a Roman Catholic to be put in that position, I am of the opinion that that would form no ground of action.

[1907] A.C. at 223.

In Heinrichs v. Wiens, 8 Sask. 153 (Can. 1915), a Mennonite bishop was alleged to have induced his flock to terminate its custom with plaintiff to his total ruin. Held: The complaint did not state a cause of action. The decision does not illuminate the area of our concern, the court holding that any person may induce another not to contract, even with malice.

In the Case of the Bishop of Prato, an Italian decision discussed in Ciprotti, The Case of Bishop of Prato, 4 Catholic Law. 244 (1958), a pastoral letter described as "public sinners" a couple who had gone through the form of civil marriage rather than a religious ceremony. The couple commenced a criminal defamation proceeding and succeeded in the trial court. On appeal, the decision was reversed, the court holding that the bishop had acted within the scope of his office.

38 In People v. Flynn, 189 N.Y. 180, 82 N.E. 169 (1907), the plaintiff, a drama critic, was excluded from certain New York theatres by their Jewish owners because of his scurrilous attacks on their faith. The defendant was one of the organizers of the combination. He appealed his conviction under a criminal conspiracy statute and the court of appeals reversed, holding defendants were protected by their "motive" which was "to protect themselves from public articles reflecting on their personal integrity, and a protest against unjustifiable attacks upon their patrons and members of the Jewish Faith." Id. at 185, 82 N.E. at 171. It should be noted, however, that one of the justifications offered by defendant was that the actions taken against the critic were "necessary steps to prevent our business interests being injured." Id. at 184, 82 N.E. at 170. Thus, the decision is not to be regarded as involving a purely non-economic purpose. Cf. Gregory v. Duke of Brunswick, 6 Man. & G. 205, 1 Car. & K. 25 (C.P. 1843).

One of the unanswered questions is the extent, if any, to which the justification through status, immunity, and purpose rests upon a constitutional basis. It is arguable that the activity of the clergy, in these cases, is defensible as a free exercise of religion. Neither Kuryer nor Watch Tower raises the point. Any privilege so grounded would raise a host of problems relating to the nature of religious purpose and clerical
If further cases arise, there may be some effort to distinguish purposes of the kind involved in *Kuryer* and *Watch Tower* from activity directed by clerics and/or laymen against movies and magazines found objectionable on grounds of alleged indecency. This is the kind of suit most likely to arise today. Justification might be denied on the ground that the defendants’ purpose was not "purely ecclesiastical?" in the sense of the doctrinal disputes involved in the cases noted. This distinction seems unlikely to be adopted. If a justification is recognized, it will probably encompass any purpose relating to morality.

The School Cases. Berea College saw fit, in 1911, to forbid its students to visit eating houses not controlled by the college. Several students were expelled for violating the rule by entering plaintiff's restaurant. The end result was the ruin of the plaintiff's business which had depended on the college trade. The plaintiff was granted a temporary restraining order against the college authorities, and the Kentucky Court of Appeals eventually determined the dispute in *Gott v. Berea College*. The college prevailed, the court holding that no duty to Gott had been breached. The court argued that:

Like [sic] a father may direct his children, those in charge of boarding schools are well within their rights and powers when they direct their students what to eat and where they may get it; where they may go, and what forms of amusement are forbidden.40

Although the court took care expressly to find defendants’ activity reasonable, it then held the reasonableness irrelevant. The case is strong support for a broad status immunity for educators, and technically renders superfluous any defense based upon purpose. Yet, the relationship of the immunity to the reasonableness of the purpose perceived by the court is sufficiently proximate that a different result would not be surprising where the purpose was thoroughly arbitrary or spiteful.

In a similar case a few years earlier, the Supreme Court of Michigan scarcely noted the defendants' educative status and rested its decision upon the absence of malice and the reasonableness of the restraint. *Jones v. Cody* involved a school principal sued in equity by a store owner because the principal had enforced a rule of the board of education requiring pupils to status, and to the power of the judiciary to decide such questions. Furthermore, there is no logical reason to confine such constitutional protection to the clergy. It would seem an unpleasant anomaly to protect the clergy and hold liable the laymen who carry out the program. That the layman may exercise equally his own freedom of religion seems clear. Yet, to accord to laymen a wide constitutional privilege of organizing primary and secondary boycotts against dissenting groups for doctrinal purposes exceeds the limits of reason already somewhat strained in the *Watch Tower* case. The matter would be further complicated in dealing with sects the theology of which considers either all or none of its members clergy. See Comment, *Judicial Intervention in Disputes Within Independent Church Bodies*, 54 Mich. L. Rev. 102 (1955).

39 156 Ky. 376, 161 S.W. 204 (1913).
40 Id. at 381, 161 S.W. at 207.
41 132 Mich. 13, 92 N.W. 495 (1902). This case is diminished in importance because it involves only a single defendant.
go straight home from school. Noting the importance of defendant's good faith, the court applauded his careful surveillance of the children—the object of the board's rule. Although the court did not employ the word, the relevance of defendant's "purpose" is plain in the court's finding that the rule itself was reasonably designed to effect the judicially approved object.

The directors of a Tennessee school were less fortunate. Three years after *Gott v. Berea College*, the defendants in *Hutton v. Watters* demurred to a complaint alleging that plaintiffs' boarding house business was ruined by defendants' threats to plaintiffs' boarders—who were teachers and students—to deprive them of school benefits or to exclude them from school if they failed to leave plaintiffs' house. Defendants even met trains in order to contact and deter plaintiffs' potential boarders. According to the complaint, the conspiracy sprang, not from business rivalry, but from a quarrel begun when plaintiffs refused to exclude a boarder at defendants' request and to maintain prices at a level desired by defendant. The Tennessee Supreme Court held that the complaint stated a cause of action. The opinion treats the case as a standard commercial tort, citing and discussing a dozen cases involving disputes between businessmen. The decision speaks several times of justifying purpose, each time indicating that only "the advancement of his own lawful interests" is such a purpose. However, most of the supporting decisions cited as imposing liability were spite cases, and it would seem sensible to treat the *Hutton* case in this fashion as well. The decision distinguishes the *Gott* case as involving "the welfare of the students, or the right of the college to make rules for their control." Although the distinction is not convincing under the facts of *Hutton*, it may be instructive. It appears that the Tennessee court recognizes and is worried about the application here of a broader privilege that would exist for school officials when truly acting to protect their own students. By denying that defendants' entertained such a purpose, the case could be treated by the court under the standard commercial doctrines. The court, by indirect, suggests the relevance of purposes other than self-interest.

These three decisions are old and of doubtful import. They can support no convincing general argument about the protected purposes of teachers and school officials. Nonetheless, until we have more decisions on the point, it is no stretch to predict that the reasonableness of non-economic purposes will be weighed in passing judgment upon any acts by such persons effecting a substantial restraint of trade. As in the case of clerical defendants, the question is clouded by the notion of privilege arising from status, as is sug-

---

42 132 Tenn. 527, 179 S.W. 134 (1915).
43 Another decision involving school officials is Guethler v. Altman, 26 Ind. App. 587, 60 N.E. 355 (1901), in which a teacher and the school board were alleged to have acted with malice in dissuading pupils from trading with a storekeeper on the way home from school, as had been their habit. The decision sheds no light on the existence of a justification by purpose, since the court found that the action of the defendants did not constitute a wrong in any case. "We know of no authority holding that an action will lie for maliciously persuading a party not to enter into a contract." *Id.* at 590, 60 N.E. at 356.
gested in the *Gott* and *Hutton* decisions. At least the *Hutton* rationale accepts limits on this status immunity, and perhaps the most meaningful limits can only be stated in terms of the purpose of the restraint imposed, as suggested in *Jones v. Cody*. If the purpose of the restraint is a reasonable purpose of educators, *qua* educators, and the means employed are reasonable, the privilege is likely to be recognized.

**B. Cases Not Involving Privileged Relationships**

*Negro Boycotts.* At least four cases have reached appellate courts involving concerted refusals to deal engaged in exclusively by Negroes. All have been directed against discriminatory hiring practices by businessmen and have involved picketing and other activities in addition to withdrawal of patronage by the group. Obviously, the defendants’ purposes in such cases involve a blend of both economic and non-economic factors.

In *A. S. Beck Shoe Corporation v. Johnson*,44 withdrawal of patronage, the inducement of third persons, picketing, and an incident of minor violence all colored an attempt to achieve a "fair percentage" of Negro employment in what had been an all-white shop. The New York Supreme Court recognized the broad license conceded to union activity and noted the extreme difficulty in articulating a result other than as a balancing of interests on an *ad hoc* basis. It noted, with regard to our interest here, that "The damage inflicted by combative measures of a union ... must win immunity by its purpose." The injunction issued because the purpose of the Negroes was not a labor purpose, and because the dispute was solely a racial dispute. "The purpose of the defendants in having members of one race discharged in order to employ the members of another race will not justify this direct damage ..." The court went further and said the result would be the same even absent violence. The danger of white reprisals, the potential for violence, and "the precedent for similar activity in the interest of various racial or religious groups" formed the basis of a public policy against these practices when engaged in for these purposes.

The *Beck* case was decided in 1934. The following year, in *Green v. Samuelson*,45 the Maryland Court of Appeals upheld an injunction against a group of Negroes conducting a campaign against Baltimore merchants in colored neighborhoods to induce the merchants to employ all colored workers. The opinion is not clear, but the court seems to treat the defendants’ actions as involving certain unspecified threats to the employers. It is not surprising, therefore, that the injunction issued. The court went further, however, and approved the *Beck* decision, adopting its rationale that these are not truly labor disputes and that defendants may not advance the standard justification of economic purpose. On the other hand, the manner in which the court limited the scope of the injunction seems a

---

departure from the approach of the *Beck* case. As drawn by the lower court, the injunction had restrained defendants from "anything which may indirectly tend to injure the plaintiff's business." The Court of Appeals expressly noted the propriety of defendants' racial purpose and gave the following essay on means open to the defendants to achieve these purposes:

They may, by organization, public meetings, propaganda, and by personal solicitation, persuade white employers to engage colored employees and induce their people to confine their trade to those who accede to their wishes, and whether they succeed or fail will depend on the co-operation of their people.\(^{46}\)

The court does not state that the racial purpose would be positively helpful in establishing a justification. The effect of the purpose is judged only relatively. Compared to the already-recognized lawful purposes of labor organizations and business defendants, the racial purpose is less effective toward justifying the restraint. However, the racial purpose is not without effect absolutely, as is clear from the quotation. Compared, in turn, to a malicious purpose, the racial purpose may well be regarded as a justifying end to be taken into account in the total calculus of ends-means necessary to a decision in any case. In this respect, the *Green* case provides greater hope to defendants than the *Beck* case, which seems, at least superficially, to regard the racial purpose indeed as relevant, but as positively baneful.

Two years later, the same drama was re-enacted in the District of Columbia. The Court of Appeals for the District relied heavily on these two precedents to affirm a decree enjoining Negro defendants from peaceful picketing to induce an employer to engage colored workers in sales positions. The court's opinion in *New Negro Alliance v. Sanitary Grocery Company*\(^{47}\) is careful to distinguish defendants' purpose from "labor purposes" and to condemn, in sweeping fashion, concerted activity of this kind for racial ends:

To sustain such action on the part of an organization established merely to advance the social standing of its race would be in complete disregard of fundamental principles of public policy. . . . \(^{48}\)

An opinion by a concurring judge in the case is more explicit in stating his policy objection. Even peaceful activity for such purposes, he argues, tends to promote violence.\(^{49}\)

The *New Negro Alliance* decision was reversed by the Supreme Court on the ground that this was a labor dispute within the meaning of the Norris-LaGuardia Act and thus not subject to injunctive relief.\(^{50}\) The Court went further and, in dictum, approved the defendants' purpose on policy grounds. It declared that discrimination against workers based on color is even less

---

\(^{46}\) Id. at 429, 178 Atl. at 112.


\(^{48}\) Id. at 513.

\(^{49}\) Id. at 513-15 (Stevens, J., concurring).

\(^{50}\) 303 U.S. 552 (1938).
excusable than that based on union affiliation, thus suggesting the possibility that racial anti-discrimination purposes existing independently, as in the Montgomery bus boycotts, could have even greater justifying effect than the labor purpose taken by itself.

None of these cases anticipates the approach taken by the California Supreme Court in 1948 in *Hughes v. Superior Court*. Here, the defendants had as their purpose the employment of Negroes by the plaintiff merchant in proportion to Negro customers. As in the *Beck* case, the court found the group purpose to be positively inimical to public policy and therefore no justification. However, the evil involved was seen, not in the potential danger of racially oriented activities of this general kind as stated in *Beck*, but in the specific aim of the defendants to achieve proportional employment. This, in itself, the California court regarded as discrimination and thus against public policy, even though pursued in a peaceful manner. The United States Supreme Court affirmed on the narrow ground that the California decision did not offend the Fourteenth Amendment. The total effect of the California decision seems rather to support the justifying character of a racial purpose than to erode it as in the *Beck* case and the *New Negro* decision in the Court of Appeals. It can legitimately be expected in states adopting this view that peaceful picketing, boycotts, and inducement of third parties will be justified by a purpose to effect complete non-discrimination in the sense of equality of opportunity. Further, there can be little doubt in other jurisdictions that the foundations of any antithetic public policy announced in the earlier racial disputes have been seriously weakened in the last quarter century. Today, it would seem a fair assumption that the general view of the *Hughes* case would be adopted in most states. Whether the specific prohibition of group action to effect proportional integration remains intact is an open question.

---

51 29 Cal. 2d 850, 198 P.2d 885 (1948).
53 Concededly, this view does not take into account the predictable reluctance of southern state courts to encourage Negro boycotts. An interesting nisi prius case is reported in 3 RACE REL. L. REP. 719 (1958), involving a Negro organization in Tuskegee accused by the state of conspiring, in violation of a criminal statute, to boycott white merchants as a response to gerrymandering activity by the state legislature. The state sought an injunction. Alabama ex rel. Patterson v. Tuskegee Civic Ass'n, No. 2159, Cir. Ala., June 20, 1958. The court delivered a written opinion declaring that the state had failed to prove a conspiracy, but suggesting no weakness in the state's case based upon the purpose of the boycott.
55 It can be argued that, where no specific legislative enactment requires non-discrimination in employment, and discrimination is otherwise lawful, racial groups may impose pressures to achieve total or proportional employment. This argument ignores, however, the fundamental nature of the tort involved. That is, the purpose must be such as will justify the prima facie cause of action. It is not necessarily sufficient for justification that the end sought be an act which the businessman himself could legitimately perform. Moreover, where the declared national policy is clearly against discrimination, it would be difficult for a court to justify concerted activity designed to produce discrimination in even its most benevolent form.
C. The American Mercury Case

American Mercury Incorporated v. Chase\textsuperscript{56} is a classic episode in the history of officiousness and a unique landmark among unlawful restraints of trade. It is unique because neither before nor since has such a case been the subject of a judicial opinion.\textsuperscript{56} It is a landmark because it appears to thrust one kind of activity beyond the pale of justification by defendants' purpose. In this case, the Watch and Ward Society of Boston, acting in what it conceived to be the public interest, had engaged in regularly notifying publishers of books and magazines which of their products, in the opinion of the society, violated the law. This communication was coupled with the threat that distribution would result in criminal prosecution. Several publishers filed for an injunction in the United States District Court in Massachusetts. The court, in a short opinion, indicated the unlawfulness of defendants' means. It took brief note of defendants' non-commercial "motive" and the absence of malice, but indicated that these "do not enlarge their rights." It cited a few distant analogies from cases involving commercial restraints and labor activity and then held for plaintiff. That is all there is to the case.

Whether the result would have been the same had the threats of prosecution come from clerics is a matter for speculation. Clerical status plus a protective religious purpose might provide counter-weight sufficient to render such means lawful. On the other hand, interference of this kind involves, as a means, the usurpation of a governmental function—a factor not involved in the Watch Tower and Kuryer cases. Of course, it might make a difference if, instead of the dubious purpose to suppress communications, the case had involved defendants employing the same means to dissuade plaintiffs from violations of an FEPC statute. The purpose then would accord with clear public policy. In the American Mercury situation, the purpose to suppress publication is not clearly either good or bad. It teeters between a guarded public policy against a nearly indefinable obscenity and a lusty policy in favor of freedom of speech. Since the purpose was questionable, the means employed were of greater moment in determining the result. For this reason, the case is less significant in this discussion.

D. Miscellany and Conclusion

The 1934 sessions of the New York Supreme Court, which produced Beck v. Johnson,\textsuperscript{57} supplied another decision worth a brief glance, especially in view of its language. The decision in Julie Baking Company v. Graymonds\textsuperscript{58} held that a boycott and picketing by a neighborhood group of consumers, directed against high prices of plaintiff bakery, was protected. The Supreme Court recognized a general protection for picketing having a lawful purpose

\textsuperscript{56}13 F.2d 224 (D. Mass. 1926).
\textsuperscript{56}For cases involving threats from government officials, see note 27 supra.
\textsuperscript{57}168 Md. 421, 178 Atl. 109 (1935).
\textsuperscript{58}152 Misc. 846, 274 N.Y. Supp. 250 (Sup. Ct. 1934).
and not accompanied by violence, threats, or intimidation. The purpose of defendants was declared lawful, and the court made no findings concerning the truth of defendants’ assertions concerning plaintiff’s prices. “The right of an individual or group . . . to protest in a peaceable manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well-ordered society. It is an essential prerogative of free men living under democratic institutions.” The decision is somewhat peripheral to our present interest, as the purposes of the defendants were largely economic.69

In the Kosher Butchers60 case, the New York Supreme Court refused to enjoin Orthodox Jewish butchers from picketing plaintiff, a Progressive butcher, with signs stating that sale of Kosher poultry by plaintiff was no indication that the other meat sold by plaintiffs was Kosher. Approving defendants’ purpose, and noting the probable truth of defendants’ implication, the court stated that, “The right of giving public information of this character in a forcible manner is not limited to labor disputes.” Here, the ends desired were apparently non-economic for the most part, and the analogy to our hypotheticals is close. Indeed, the case may well be regarded as the only American decision involving group restraints imposed by laymen for purely religious purposes.

As a conclusion, it seems fair to say that the common law has accepted defendants’ purpose—commercial, economic, and non-economic—as an important factor in determining justification in restraint of trade cases. A non-economic purpose may either justify the restraint, be insufficient to justify, or may even positively injure the defendant. Only rarely is it of no concern whatsoever.

We will now proceed to examine the role of purpose in antitrust cases; first, those involving commercial competitors and, secondly, those in which the combatants are not in any ordinary sense competitors at all—the labor cases. If, in either class of cases, the defendants’ purpose has affected the result, we may be in a better position to articulate for our hypothetical cases

69 Another product of that session of the supreme court was People v. Kopezak, 153 Misc. 187, 274 N.Y. Supp. 629 (Ct. Spec. Sess. 1934). Here, tenants were picketing a landlord whose building was described on the pickets’ signs as a “firetrap.” These tenants were held to be disturbing the peace. The court stated that the proper mode of relief for the alleged conditions lay in calling them to the attention of the authorities. A similar restraint was recently the subject of a complaint filed in the Circuit Court of Cook County, Illinois. A group of suburban housewives had picketed a new housing development with signs indicating to prospective purchasers the overcrowded character of local schools. Their hope was either to dissuade potential buyers, or force the builder to erect more schools. The circuit court granted a temporary injunction without holding a hearing on the merits; the appellate court affirmed. Streamwood Home Builders, Inc. v. Brolin, 25 Ill. App. 2d 39, 165 N.E.2d 531 (1960). The picket signs were unusually expressive, and, unless we preserve here the inspirations of the angry muse, they will be lost to the ages. She spake thus:

We like the homes
And the builder too,
But we need schools,
And so will you.

an intelligible antitrust rationale which takes into account the distinguish-
ing element of defendants' purpose. At that point, the common-law experi-
ence may prove relevant.

IV

The Supreme Court on Defendants' Purpose

A. The Businessman Defendant and the Commercial Purpose

The decisions of the Supreme Court involving businessmen as defend-
ants basically are not germane to the unique issue posed by our hypothetical
cases. This requires some explanation.

First, our interest in the unusual factual situations originally posed
springs from the special character of defendants' purpose and not from any
unique quality observed in the means adopted to achieve that purpose.
Therefore, the Supreme Court's frequent pronouncements upon the im-
portance of the means willed by defendant—what we have called "intent"—
simply do not relate to the point at issue. Intent, as an object of judicial
scrutiny, involves none of the teleological aspects of defendants' will which
are of interest to us. This is simply a matter of being true to our definitions
just adopted. Purpose and intent are discrete, and our interest is in the ef-
fect of purpose. Intent—the will to employ means directed to an ultimate
purpose—may constitute a necessary element of certain antitrust offenses,\textsuperscript{61}
or intent may constitute evidence of the probable market consequences of
acts yet uncompleted;\textsuperscript{62} but that same intent will be present when the actor
is a Negro engaging in a boycott for purposes unrelated to profit. He, like
the businessman, intends certain market effects. It is possible that a dif-
ferent antitrust result will obtain in such a case, but, if so, that result will
spring, not from any variation in intent, but from the difference in the pur-
pose to which the intent is directed. We may therefore bypass the tangled
question of the degree to which antitrust liability turns upon intent,
whether in commercial or non-commercial cases.

With respect to motive, the same observation is appropriate. Whatever
the relevance of motive where businessmen are defendants, we now set it
to one side in discussing our non-commercial hypotheticals. The difference
in result, if any, in the latter cases will spring from purpose, not from motive.
The non-commercial cases may involve any conceivable motive; but so
may the commercial cases. A businessman may be "moved" by spite, love,

\textsuperscript{61} E.g., conspiracies under either § 1 or § 2 of the Sherman Act and attempts to
monopolize under § 2 may constitute violations even though the objective effects
achieved by the conspirators or would-be monopolist would be insufficient as a basis
for prosecution. In such cases, the intent of the defendants is critical. The offense of
monopolizing under § 2 also requires an "element of deliberateness," a factor which
has caused considerable difficulty in definition. \textsc{Att'y Gen. Nat'l Comm. Antitrust

\textsuperscript{62} Board of Trade v. United States, 246 U.S. 231 (1918). For a brief discussion of
this evidentiary use of intent, see pp. 747-48 \textit{infra}. 
or fear in the same manner as a Negro participating in a boycott. To discuss either motive or intent as they bear upon antitrust liability would distract from our primary concern and falsely suggest that either intent or motive constitutes a distinguishing mark of our special cases.

We are interested, then, in what the commercial cases tell us of the relevance of the businessman's purpose. The answer is, unfortunately, almost nothing. The reason is, quite simply, the uniformity of that purpose. Setting aside the cases involving labor unions as defendants, all the Supreme Court decisions involve businessmen bent upon the laudable purpose of making money. As Dean Rostow put it, "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." As the defendant might put it, "I'm not in business for my health." This does not mean that cases will never arise involving businessmen acting for purely non-commercial purposes. Perhaps, some past defendants before the Court have held such purposes in addition to their hope for profit, though it is difficult to discover any such decisions. The Supreme Court, however, has given neither weight nor recognition to such an ancillary purpose, and it seems quite safe to suppose that, in any case involving businessmen acting with reference to their businesses, the Court will disregard any oddment of non-commercial purpose.1

---


A possible exception to this eventually may take form in cases involving professional associations. So far, two antitrust actions against medical societies have reached the Supreme Court. United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952); AMA v. United States, 317 U.S. 519 (1943). In the AMA case, the defendants were found guilty of violating § 3 of the Sherman Act by restraining trade in the District of Columbia through various and systematic practices directed against group health plans and cooperating physicians. It does not appear that the defendants made any serious argument that the restraint was justified as an effort to control "unethical" practices, and the Court does not recognize purpose as an issue. Indeed, it treats the case as a standard commercial restraint. Id. at 528-29. In the Oregon Medical Society case, the Government sought injunctions against allegedly similar practices, charging violations of §§ 1 and 2. The issues were mostly factual, and the Court held that the only conduct of likely illegality had occurred more than seven years prior and was not likely to be repeated. The Court, however, delivered an interesting dictum:

There are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.

343 U.S. at 336. Clearly, the Court will be cautious about applying, without alteration, the orthodox analyses of market effects and intent, especially where the restraint is directed toward qualifications of physicians—a matter peculiarly within the expertise of the medical societies and traditionally within their power. See Comment, The American Medical Association: Power, Purpose, and Politics in Organized Medicine, 63 YALE L.J. 937 (1954). However sceptical the Court may be of the motivation of individual doctors, where the objective purpose of such restraints is salutary, it seems fair to predict that such purpose will be weighed. The subsequent antitrust cases involving the medical profession have turned mostly upon the less controversial ground of lack of necessary interstate commerce. Elizabeth Hosp., Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1957), cert. denied, 361 U.S. 884 (1959); Riggall v. Washington County Medical Soc'y, 240 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958);
In only one conceivable situation is purpose likely to aid a businessman—where a course of anti-competitive activity is undertaken despite its injurious effect on the actor's own trade. On the day that the white oil dealers of Montgomery refuse to sell to the bus company because it discriminates against Negro passengers, we may have to admit an exception.65 A benevolent public purpose conceivably may aid the businessman who is willing to ruin his business in its attainment, but we will have to wait for such a case. Meanwhile, it is safe to assume that business defendants act for profit, and, as long as this purpose is unvarying, it is of no use to us in making distinctions. It has been of no use to the Court. The profit purpose has constituted for the Court a datum—the stable ground upon which rests the existing structure of precedent for deciding cases involving business defendants. Around this familiar continent of commercial purpose, lap the waters of a sea of doubt. Only in the older labor cases has the Supreme Court probed this terra incognita where exotic purposes flourish and where familiar practices sometimes produce unexpected decisions.66

To eliminate possible misunderstanding, we should note here that the preceeding two paragraphs have nothing whatsoever to do with the so-called per se doctrine. Purpose is irrelevant in the business cases, not on the basis of any explicit rule excluding its consideration, but because of its invariability. It is as irrelevant in commercial cases falling within the Rule of Reason as it is in per se situations.67 Later, when we suggest an approach to

Spears Free Clinic v. Cleere, 197 F.2d 125 (10th Cir. 1952); Robinson v. Lull, 145 F. Supp. 134 (N.D. Ill. 1956). For the analogous common law and for various approaches under state antitrust laws, see Falcone v. Middlesex County Medical Soc'y, 62 N.J. Super. 184, 162 A.2d 324 (Sup. Ct. 1960), and cases cited therein. See generally Comment, Medical Societies and Medical Service Plans—From the Law of Associations to the Law of Antitrust, 22 U. Chi. L. Rev. 694 (1955).

65 The obverse of such a case may actually exist in certain southern areas where white sellers have refused to sell farm equipment to Negroes who register to vote. As we shall indicate later, the Court would be unlikely to regard such a non-economic purpose as helpful to the defendants because of its incompatibility with public policy. United States v. Beaty, 288 F.2d 653 (6th Cir. 1961); see Comment, Economic Coercion and the Civil Rights Act of 1957, 71 YALE L.J. 537 (1962). In another case known to the author, southern buyers have ceased to deal with a manufacturer which sponsored a television program presenting a sympathetic view of the plight of the Southern Negro.

66 The recent decision in Eastern Railroads Presidents Ass'n v. Noerr, 365 U.S. 127 (1961), is no exception. The Court did permit the defendants to "restrain trade" by its lobbying activities before state legislatures, but the result is based, not upon the defendants' purpose, which was clearly to achieve a commercial advantage, but upon the importance of the conflicting policy in favor of freedom of petition. This is discussed in more detail at 749-51 infra.

67 We have not overlooked the line of cases apparently excluding "justification" under the per se rule. Radiant Burners, Inc. v. Peoples Gas, Light, & Coke Co., 364 U.S. 656 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941). One might argue that, if business defendants' benevolent "purposes" are excluded by the per se rule, this is because they are relevant under the Rule of Reason. This is simply a confusion of terms. The existing business cases involve only intent, not purpose. For example, the Fashion Guild case involves an effort by defendants to eliminate destructive practices in the industry—perhaps a desirable result, but one simply intended as a means to the end (purpose) of commercial advantage. The Supreme Court has never had occasion to determine the relevance of purpose as here defined except, perhaps, in the labor cases. Nor have the lower courts considered the question, even in such bizarre situa-
the non-commercial cases, we will discuss the relevance of defendants' purpose, if any, in situations where the defendants have engaged in a concerted refusal to deal or other activities ordinarily said to fall within the per se rule.68

It is the invariability of the businessman's purpose and its consequent irrelevance that has permitted the Supreme Court, in the commercial cases, to adopt a desultory attitude toward the verbal distinctions attempted here. The Court has employed every conceivable synonym to describe the one aspect of defendants' will which was at issue—intent. The cases are strewn indiscriminately with intent, intention, purpose, aim, object, objective, reason, end, design, and even motive. The Court has had no need to distinguish. It may experience such need if faced with a restraint the clear purpose of which is non-economic. One might wonder if the Court has not already decided one class of cases involving purposes sufficiently different from those of businessmen to raise the kind of issue presented here. Most of the labor cases have certainly involved non-commercial purposes by the defendants. Upon examining the labor decisions prior to the recognition of special statutory immunities for labor in 1941, we shall find that such purposes were not only important to the results, but constitute the only basis upon which such results can be adequately explained. We turn now to those cases.

B. A Non-Statutory Privilege for Labor Unions Under the Sherman Act

The Union Defendant Prior to the Apex Hosiery case. Somewhere in the abyss separating the commercially oriented restraint from the group activities here considered there falls a considerable number of venerable antitrust decisions involving organized labor. Combinations of workingmen provide a reasonably proximate analogue to our hypothetical cases. The purposes of labor may be stated with relative simplicity as higher wages, better hours, and better working conditions. These purposes of labor unions may be primarily economic, but, at least in the sense of the term adopted here, they are non-commercial.69 Furthermore, the union does not seek, as

---

68 See pp. 751-52 infra.
69 There may be an objection to the dichotomy suggested between the purposes of business and labor. Such an objection might be argued thus: The distinction is a semantic quibble. Each group is seeking economic self-interest as its ultimate goal.
a means of achieving these purposes, to supplant the entrepreneur in his own function; rather, the union depends upon his continued well-being for its own success. The relationship is symbiotic rather than competitive. These qualities of labor's intent and purpose suggest the possibility of special treatment under the Sherman Act for two reasons. First, any restraint is not likely to be permanent, and consequently, is less significant. A permanent restraint would defeat labor's own purpose. Second, the labor purpose itself, if judicially approved, could be weighed against anticompetitive activity in justification. The analogy to the non-economic cases is clear. The bus boycott, for example, is not a competitive struggle in the transportation industry. The restraint is likely to cease when the purpose has been achieved. Furthermore, as with labor, the purpose itself could well be regarded as justification for the injury done to competition. If we should find that the non-commercial character of labor's purpose has been the occasion of judicial amnesty from antitrust penalties, we perhaps may conclude that the non-commercial aspects of other group restraints will be relevant if the issue arises. That the group purpose may be both non-economic and non-commercial should only reinforce the conclusion. That, at least, is the justification for now embarking upon a rather extended discussion of the Sherman Act and labor.

The cases we shall examine were all decided before 1941, the year in which United States v. Hutcheson gave full judicial recognition to the broad statutory antitrust exemptions for labor once thought to have been embodied in the Clayton Act in 1914. That Act was, in its relevant parts,

The real distinction between business and labor lies in the means employed to achieve their common purpose.

I concede this objection creates some difficulty, but I feel there are objective differences between labor and business purpose insofar as labor seeks a greater measure of security than businessmen, and also because labor emphasizes hours and working conditions to a greater degree. In any event, granting the argument insofar as the objective measure of the purpose is concerned—money, leisure, health—the distinction remains, for a different reason, a sensible one that any businessman or laborer would accept. Assuming a given amount of economic gain by an individual, there is a qualitative, if only subjective, difference between achieving that gain as an entrepreneur and achieving it as a wage earner. Individuals frequently accept a lower standard of living as a petty businessman in preference to becoming an employee (and vice-versa, with perhaps greater frequency). The legal profession is full of hungry practitioners who prefer their psychic wages to the opulent security of a corporate legal department (or a law school faculty).

A related objection may be that the difference between labor and business is not purpose but status, and that labor's immunity (and perhaps that of the other groups of interest here) is based upon status. The answer to this is that status, in this context, is largely a function of purpose. An illustration may help: In a southern Negro community, the members of a Negro labor union who work at the local plant agree at their church meeting to boycott the white druggist because he sells pornography. To call this a racial boycott or a labor boycott would be absurd. The restraint acquires its character from the purpose of the actors. The same group on strike for higher wages would be conducting a "labor" boycott.

76 312 U.S. 219 (1941). The Court, in this case, discovered in the combination of the Clayton and Norris-La Guardia Acts a congressional purpose to bestow upon labor the freedom to restrain trade without antitrust liability "so long as a union acts in its self-interest and does not combine with non-labor groups." Id. at 232. Any decisions following the Hutcheson case are of little utility in this discussion since they involve, in some measure, statutory exemptions from antitrust not available to the kinds of defendants of special interest to this study.
the product of a political struggle growing out of the decision of the Supreme Court in the *Danbury Hatters* case in 1908 and out of labor's annoyance at the settled habit of federal judges of issuing injunctions in labor disputes. In the *Hatters* case, the union had imposed a national consumers' boycott upon the plaintiff's hats as a part of its campaign to organize the entire industry. The Court found the boycott to be a restraint upon interstate commerce proscribed by the Sherman Act and awarded the plaintiff treble damages. It was the first decision by the Court on the applicability of the Act to labor, and its result caused great indignation among union sympathizers who were not to feel secure again until the passage of the Clayton Act, which was hailed by Samuel Gompers as the Magna Carta of labor. Sections 6 and 20 of that statute appeared superficially to have bestowed broad license to organizational strikes and boycotts and, equally important, seemed to have curbed the power of federal judges to issue injunctions in labor disputes.

It is not important to analyze in detail the manner in which the Supreme Court dismantled the statute nor to question the correctness of these obsolete decisions. It will suffice to note the result in the line of cases beginning with *Duplex Printing Press Company v. Deering*, which held, in effect, that sections 6 and 20 were merely declarative of the pre-existing law. The *Duplex* case involved a secondary boycott by machinists who refused to install printing presses manufactured by the remaining open shop in that industry. The Court cited *Danbury Hatters* as precedent, held the boycott and related activities a violation of section 1 of the Sherman Act, and approved the issuance of an injunction. This was 1920. Seven years later, it reaffirmed this result in the *Bedford Cut Stone* case, where union men refused to work on stone produced in non-union quarries. In between *Duplex* and *Bedford*, the Court decided the two *Coronado* cases, holding in the first case that a local organizational strike was insufficient in itself or in its effects to violate section 1, but holding in the appeal following a new trial that proof of defendants' intent to affect prices in interstate commerce made out the offense.

These decisions generated a storm of protest, much of it directed against the subjection of labor in any way whatsoever to the antitrust laws. It may seem incongruous in this context to speak of a labor exemption, and we must be clear. There is nothing inconsistent in conceding the Court's error in applying the Sherman Act to labor in the first place and our concomitant exemption.

---

71 Loewe v. Lawlor, 208 U.S. 274 (1908).
77 Coronado Coal Co. v. UMW, 268 U.S. 295 (1925); UMW v. Coronado Coal Co., 269 U.S. 344 (1922).
recognition of a limited privilege. We can also agree with the critics that the Court used the Act as a curb to otherwise legitimate union activity. The point is that, having applied the Act to labor in the *Danbury Hatters* case, the Court would be expected to apply it impartially to labor and business. Indeed, in a Court with the anti-labor bent credibly attributed to it by its critics, labor could have expected at best an even break. Yet, it is apparent, even in the fifty years of the Sherman Act preceding the *Apex Hosiery* decision, that the logic of the Supreme Court's general views on antitrust as applied to business was to be abandoned in the Court's handling of certain classes of labor cases.

A preferred position for labor even prior to the *Apex* case is deducible from the facts, first, that there are activities of labor which achieve, or are intended to achieve, effects which, if intended or achieved by businessmen acting in concert, would offend the Sherman Act, and, second, that such activities of labor were in fact exempt from the operation of the statute. Now, it was clear from the start that the very nature of unionism, its consensual and concerted character, and its economic significance made the labor movement a natural target for the broadly drawn prohibitions of the Sherman Act, once it was conceded that it applied at all. The element of combination was inevitably present, and the issues could immediately be narrowed to the intent and effect of such combination. In the now defunct decisions already noted, such combinations were held to be in violation of the Act, but with the exception of the *Coronado* decisions, these all involved secondary labor or consumer boycotts. The secondary boycott was an important union organizing technique, to be sure, but the local organizational strike was, both before and after the *Coronado* cases, a ubiquitous phenomenon on the American scene. Yet, never did the Supreme Court, in *Coronado* or any other decision, hold a local strike to constitute a violation of the Act solely because of its effects upon competition, however great these effects might have been. *Coronado* depended upon the purely subjective "intent" of the defendants to affect prices. However, the labor boycott cases before *Coronado* had emphasized the nature of the effect upon interstate commerce, and the later *Bedford Cut Stone* case was, in substance, to reaffirm this approach. There, the Court stated, "[I]t is this result, not the means devised to secure it, which gives character to the conspiracy." Assuming that the effect on commerce was the test—or

---

78 *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).
79 In the *Danbury Hatters* case, the Court had said: "The Act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce. . . ." 208 U.S. 274, 293 (1908). This language was approved in the *Duplex* case, 254 U.S. at 467. It is not suggested that these cases completely ignore the subjective elements, but the emphasis is upon the objective consequences, and there is no special effort, as was to be made in the *Coronado* cases, to separate these consequences from the purely subjective. See GREGORY, op. cit. supra note 73, at 205-17. See also Cavers, *Labor v. The Sherman Act*, 8 U. Chi. L. Rev. 246 (1941); Gregory, *The Sherman Act v. Labor*, 8 U. Chi. L. Rev. 222 (1941).
80 274 U.S. at 47. In all three boycott cases, the Court tended to confuse "restraint of trade" under the Sherman Act with "interferences" with commerce.
merely one test—of liability, was the local strike so different in its effect upon commerce as to protect it from antitrust action?

To suppose that a local strike, while it continues, cannot affect commerce in the manner of a secondary boycott by labor, or analogous activities by businessmen, seems obvious fancy. Note that we limit this to "while it continues." The Court, in the labor cases, could have disregarded altogether the question of the interim effect of the restraints imposed and asked simply whether the union organizational effort, if successful, would have illegally restrained commerce. More simply, the question then would be: Is the closed or union shop in itself a violation of the Sherman Act? The Court did not choose to approach the problem in this direct and simple fashion, and in view of its concern over interim effects upon commerce during labor boycotts, we may legitimately wonder why the anti-competitive effects generated during local strikes were not as unlawful as were the effects flowing both from secondary labor boycotts and from the garden variety of concerted refusals to deal organized by businessmen. A strike that closes a local concern with customers in other states perforce reduces the supply of goods entering interstate commerce and often may tend to increase the price, at least if the employer is a manufacturer. To the extent that it aids his competitors, it may even tend to monopoly. These effects differ in no material way from those of a secondary boycott, where the potential commerce is frustrated by a restraint imposed on the other party to the unmade or now abortive contract. Nor, while the strike lasts, does the effect differ markedly from that of restraints imposed on competitors by businessmen. The injury to the interstate business of a manufacturer might as well be caused by a combination of suppliers whose refusal to deal shuts his plant for want of raw material. With the plant closed, it is of no practical moment that the combination that closed it wore blue dungarees instead of grey flannel. To return to an earlier example, suppose that retail dealers, who are customers of lumber manufacturers, boycott those manufacturers who sell to the retail trade in competition with the dealers. Such a combination may restrain trade, but the effect of a strike against such a manufacturer might be even more destructive, while it endured, than the retailers' boycott. The retailers' refusal to deal would still leave the manufacturer free to sell to retail customers. The strike, if it closed the plant, would end sales to everyone. But the facts of the lumber boycott are the facts of Eastern States Retail Lumber Dealers Association v. United States, decided in the decade before the Coronado cases, and holding such concerted action by businessmen proscribed by the Sherman Act because of its obvious anti-competitive effect. As long as the Court chose to attach such importance to the effect upon commerce, it was involved in a contradiction in the local strike cases—a contradiction which, in substance, meant a special privilege for labor.

81 The Bedford Cut Stone case expressly rejects such an approach. Ibid.
82 234 U.S. 600 (1914).
A tacit recognition of privilege for labor may also be made out from the relative freedom of the railroad unions under the Sherman Act despite intermittent and often substantial restraints imposed by them upon such transportation through strikes and other activities. That these activities restrained interstate commerce in some sense is indisputable. Yet, in the whole history of the Sherman Act, no railroad strike has been held by the Supreme Court and few by lower federal courts to constitute an antitrust violation.\textsuperscript{83} It is often said in answer that the Sherman Act was not designed to "police" interstate commerce against all torts and crimes,\textsuperscript{84} but this is merely an artistic way of saying that the Act does not protect commerce from everything. Granting such a limitation on the Act, we see that it is at least designed to protect commerce from something called "restraint of trade." The only question in the railroad strikes (or any other case) would be whether this combination is doing the thing the statute abhors. The striking laborers certainly had an effect on commerce which no combination of businessmen could bring about with impunity. If the businessmen would be in "restraint of trade," why weren't the unions?\textsuperscript{85}

The virtual immunity of the local strike from liability despite its effect upon competition seems irreconcilable with the secondary boycott cases. We are not concerned with the correctness of either, but note only that the Court was careful to preserve the local strike from the full impact of an "effect on commerce" test for reasons it chose never to express.

The reason for the anomalous result, it seems to me, is that the Court had considerable concern for the purposes of the labor movement, but not enough that those purposes could consistently outweigh the Court's concomitant fear of a labor monopoly. The labor purpose could not suffice to justify an across-the-board boycott of non-union goods as part of an effort

\textsuperscript{83} \textit{In re} Debs, 158 U.S. 564 (1895), involved the famed Pullman strike of 1894. An injunction was obtained in the circuit court under the Sherman Act, but in the Supreme Court, the decision was affirmed on other grounds.

\textsuperscript{84} Apex Hosiery Co. v. Leader, 310 U.S. 469, 485-87 (1940).

\textsuperscript{85} The paucity of antitrust litigation in quite a different area tends to demonstrate a practical acceptance of limitations on the Sherman Act, analogous to those recognized on behalf of labor. The rise of the agricultural cooperative and the inevitably concerted character of its economic undertakings made it also fair game under the antitrust laws. The one-time concern that co-ops would come to dominate parts of the economy was sufficiently current in the early years of the Sherman Act that attacks under the statute might have been anticipated. However, no case reached the Supreme Court, and, in 1914, the Clayton Act recognized certain exemptions for agricultural cooperatives which were broadened in later statutes. 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958); 42 Stat. 388 (1922), 7 U.S.C. §§ 291-92 (1958)."These enactments are rooted, of course, in political and social as well as economic considerations." \textit{Att'y Gen. Nat'l Comm. Antitrust Rep.} 307 (1955). Quite so, and such considerations very likely spared the cooperatives from prosecution even before their implementation by statute. As with the labor union, the purpose of the cooperative is different in some relevant way from the purpose of businessmen. There are, of course, cases subsequent to 1914 involving cooperatives as antitrust defendants and interpreting the scope of the statutory exemptions. \textit{Id.} at 307-11. Thorelli describes the concern of Congress over the question of an exemption for cooperatives during the debates on the Sherman Act and in the decade succeeding its passage. \textit{Thorelli, The Federal Antitrust Policy} 172, 174, 176, 190, 193, 197, 231 f., 501, 508, 510, 514 (Stockholm 1954).
to organize a whole industry. The labor purpose could justify the local strike, the appearance of which was less ominous, even if its effects were often indistinguishable. 66

The only substantial argument in contradiction of this position lies in the then-supposed limits of the commerce clause. It might be thought that the immunity of local strikes was grounded upon a constitutional infirmity. At the time the Coronado cases were decided, the Court was still a good way from the latitudinarian views of later New Deal justices. Mr. Chief Justice Taft raised the constitutional issue in his opinions in these cases and, speaking of the obstruction to coal mining involved there, indicated that the union had imposed an "indirect" rather than a "direct" restraint upon interstate commerce. He noted, in the first Coronado case, that coal mining is not itself interstate commerce, but added:

[If] Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint. . . . 67

Later, he added, in the same opinion:

[If] in the case at bar, coal mining is not interstate commerce and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred. 68 (Emphasis added.)

Clearly, Taft leaves room for congressional power to eliminate threats to commerce from local strikes. True, he requires an intent to achieve interstate effects, but the intent, he says, may be objectively inferred from the character of the restraint. If objectively inferable from its "direct" effect, one might expect that the nature of the restraint, and not merely the gossamer subjective intent to affect commerce, would control in the usual case. However, it was important to Taft to make the legality of the local strike seem to turn upon subjective intent, for, if the objective effect upon commerce remained the test, all effective local strikes against industrial entities of any magnitude would logically be violations of the Sherman Act. The Court would not go so far; even the most conservative of courts admitted by then the lawfulness of peaceful local bargaining strikes. 69 At the same time, the peculiar facts in Coronado—which involved extreme violence, the destruction of goods loaded for shipment, and even deliberate murder—made the Supreme Court uneasy about surrendering altogether an important weapon against union efforts, local or otherwise, to eliminate all non-union shops in an entire industry.

66 See both Gregory, op. cit. supra note 73, and Cavers, supra note 79.
67 259 U.S. at 408.
68 Id. at 410-11.
69 See Gregory, op. cit. supra note 73, at 67, 106-11.
The Supreme Court itself later denied that the Coronado decisions had a constitutional basis,\(^9\) and it seems that, whatever emphasis was given there to the local aspects of the case, the Court's approach is more satisfactorily accounted for by the policy considerations noted. Both the Court's momentary retreat from effect as a basis of liability and its apparent concern over the constitutional problem are more easily explained by its solicitude for local bargaining strikes than by any serious doubts about the limits of the federal jurisdiction.

This conclusion, as well as our principal proposition that labor held a protected status, is reinforced by United Leather Workers v. Herkert,\(^9\) decided between the first and second Coronado cases. The facts were similar, except that it does not appear in the opinion that this was part of an effort to organize the entire industry. The Court made some inconclusive remarks on the jurisdictional question, which resembled those uttered by Chief Justice Taft in the first Coronado case. It drew the same dubious verbal distinction between direct and indirect restraints upon commerce and spoke also of the absence of intent to impose proscribed effects. The Leather Workers opinion is different, however, in that it seemed to place greater emphasis upon objective effect than the Coronado cases, stating that, if the "necessary effect" were to "monopolize the supply, control its price, or discriminate as between its would be purchasers," a direct restraint would exist. This language seems to require a much more potent effect upon commerce than had the boycott decisions. Taken literally, it seems to require a greater effect than could be expected of any but the most unusual labor activity. Neither the local strike nor the secondary boycott ordinarily produced such market consequences. Further, the Court specifically adopted the warning of the dissenting judge in the court of appeals, who had said:

> The natural, logical and inevitable result [of applying the Act] will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction provided any appreciable amount of its product enters into interstate commerce.\(^9\)

The Supreme Court added, "We can not think that Congress intended any such result."

The Leather Workers case was sometimes forgotten in the concern over the result in second Coronado. Actually, it probably represents more accurately the developing judicial attitude in the next sixteen years, further clarifies the preferred position of the labor purpose, and foreshadows the result in the Apex case.\(^9\)

**The Apex Case.** The Court's veiled and unpredictable protection for local strikes took on increased vitality and a new disguise in Apex Hosiery Co.-

---

\(^9\) Apex Hosiery Co. v. Leader, 310 U.S. 469, 509 (1940).

\(^9\) 265 U.S. 457 (1924).

\(^9\) Id. at 471.

pany v. Leader, a treble damage action by a Pennsylvania hosiery manufacturer. The plaintiff was the victim of a local organizational strike which turned into a lawless sit-down affair with the strikers, mostly non-employees, physically occupying the plant and preventing the shipment of 130,000 dozen pairs of finished stockings, 80 per cent of which were on order from outside the state. The strike was part of a union campaign to eliminate non-union competition by organizing all the remaining open shops in the hosiery industry. The Supreme Court found no violation of the Sherman Act in an opinion by Mr. Justice Stone, the perplexing qualities of which produced a spate of literature worthy in its sophistication of the Rule in Shelley’s Case.

That opinion first dismissed as irrelevant the rich assortment of torts engaged in by the defendants with the observation that the Sherman Act is not designed to police all violations of law affecting interstate commerce. The Court then emphasized repeatedly that, in enacting the antitrust laws, “The end sought was the prevention of restraints to free competition in business and commercial transactions . . . .” Later, the Court added the following:

[T]his Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services . . . .

Repeatedly, the Court uses “commercial competition” as the short term for the protected essence. This “commercial” factor is never satisfactorily clarified, but it was obvious that the Court hoped, by this emphasis, to distinguish and preserve the holdings in the secondary boycott cases. In discussing the Danbury Hatters, Bedford Cut Stone, and Duplex cases, it notes that the defendants there were “restraining purchases,” “restraining future sales,” and “curtailing a free market.” Why the imposition of local barriers to transportation would differ from secondary boycotts in its practical effects on these “transactions” is by no means obvious. As we have noted, the local strike could have, in one respect, an even more repressive effect. The purchasers of stone or hats in the secondary boycott cases were still theoretically free to purchase from the non-union producer, even if there would be difficulty in finding scabs to work their stone or customers to buy their hats; but if the clamp on commerce is imposed successfully at the source, the transaction is not only economically risky but, in effect, impossible.

In one rather impractical sense, however, there is intelligible meaning to the Court’s distinction between the boycott cases and the Apex situation insofar as the effect upon “transactions” is concerned. When the purchaser in the boycott situation yields to pressure and buys only union-made stone

---

9a 310 U.S. 469 (1940).
9b For a sampler, see Gregory, op. cit. supra note 73; Cavers, supra note 79; Landis, The Apex Case, 26 Cornell L.Q. 191 (1941).
9c 310 U.S. at 495.
or hats, a certain number of potential contracts are eliminated and others substituted. But, if this is meant to be contrasted with a local strike which closes the plant and shuts off transportation of finished goods, the difference is highly theoretical. The buyer's freedom to continue making abortive contracts with the struck producer is a distinction so tenuous as to confirm our suspicion that the result rests upon another basis.

In *Apex*, as in all the labor cases after 1920, it appears that the Court is struggling to maintain some hazily defined middle ground between two impossible positions. First, if it had ever been possible, it was no longer for the Court to determine legality upon the basis of the effects of an organizational campaign carried to a successful conclusion. The mere existence of closed or union shops, even on an industry-wide basis, now was clearly protected by the National Labor Relations Act. On the other hand, the Court could not appear to concentrate merely upon the means employed in such campaigns. This would put it in the position of "policing" interstate commerce under the Act, and in this posture, it would be difficult for the Court to explain why peaceful secondary boycotts were prohibited while violent local strikes were permitted. Thus, a court wishing to retain the Sherman Act as an effective force in labor cases could examine only the interim effects or intended effects of strikes and boycotts upon commerce, though even here the recent labor legislation left it upon shaky ground. What the Court hoped, apparently, was to maintain its freedom to weigh the ultimate bread and butter purposes of unions against the means employed to achieve them without seeming to do so. The Court was ready now to concede the lawfulness of industry-wide bargaining as a means of achieving labor's purpose; but it was not quite ready to concede the lawfulness of secondary boycotts as a means of achieving such industry-wide bargaining. Again, this was so even though the effects upon commerce from secondary boycotts seem identical to those generated by local strikes of the kind in *Apex*. In effect, through local strikes, the union was permitted by the *Apex* decision to nibble at the non-union portion of the industry. It could not, through secondary boycott, swallow all union shops in one bite.

The Court's solicitude for the *Danbury Hatters*, *Duplex*, and *Bedford* rationale is difficult to explain. Perhaps the keenest insight is supplied by Professor Gregory, who complains that this is "the sort of thing our Supreme Court does when it tries to keep its output politically and socially up to date and at the same time consistent." He is probably right. To suppose that the Supreme Court would actually have decided the *Danbury Hatters* case against the union in 1940 is probably an illusion. It is also worth noting that the Court might have been seriously embarrassed in the *Apex* case by an explicit recognition of a "justification" based upon defendants' purpose to improve the economic position of labor. The Court then would appear to be "justifying" violence and lawlessness. Not that this would follow in fact, for the Court was concerned only with antitrust

---

97 *Gregory, op. cit. supra* note 73, at 265.
violations to which the violence was in itself irrelevant; but, as Professor Gregory implies, we should not expect the judges to ignore what today's public relations man might denote as their "image."

The impression that the Court was seeking mobility is not allayed when we examine the stress that the Apex opinion puts upon the effect or potential effect of the restraint on price:

[S]ome form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.88

The Court noted that there was no showing that defendants had intended to affect price or that the delay in shipments had in fact affected price; therefore, it said, no offense was shown. Shortly thereafter, however, we find this language:

[S]uccessful union activity ... may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods ... an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.99

Apparently, after all, the union may suppress price competition to whatever degree it can, though the Court has just told us that this was the essence of forbidden restraints. Again logic suffers, but mobility is achieved, and labor receives an antitrust exemption unavailable to businessmen.

The Court's flirtation with the Rule of Reason is also instructive. Citing the Standard Oil case,100 the Court observed that the mere existence of restrictions upon competition does not impose liability. It noted that neither the Duplex nor Bedford cases, both of which followed the enunciation of the rule, had considered its application. The Court, in a footnote, declared that it was not necessary for it to determine now whether the Rule of Reason should have been applied in those cases. It then continued with this broad hint:

28 310 U.S. at 500–01.
99 Id. at 503–04.
100 Standard Oil Co. v. United States, 221 U.S. 1 (1911).
Restraints upon the competitive marketing of a manufacturer's product brought about by an agreement between the employer and his employees in order to secure continuous employment of the employees was [sic] held to be within the rule of reason and therefore not an unreasonable restraint of trade in National Association of Window Glass Mfrs. v. United States...\textsuperscript{101}

The Glass Manufacturers\textsuperscript{102} case involved both the union and companies as defendants. The union comprised all the handblown window glass workers in the country. The industry was moribund from the competition of machine-made glass, and the number of remaining artisans was insufficient to supply the hand factories with labor. By agreement of the companies and the union, the available labor was allocated, and each company agreed to manufacture only six months of the year. In a unanimous judgment with an opinion by Mr. Justice Holmes, the Court held that the Rule of Reason permitted whatever restraint on commerce was entailed. Where such application of the Rule might have carried the Court in future secondary boycott cases is anybody's guess, but it is difficult to resist the impression that the Court in Apex was inviting its invocation. The opportunity to test its protection never arose, for the Rule was swallowed up in the broad statutory amnesty discovered by the Court in the Hutcheson\textsuperscript{103} case.

If the escape from the boycott cases was difficult, circumventing the second Coronado decision was worse. That language of the Apex opinion already quoted which approved elimination of price competition based on wage differentials as a normal union objective is in flatfooted contradiction of the second Coronado case, wherein the union's intention to affect competition in this very manner had formed the basis of its offense. Justice Stone seems to offer as a distinction that the defendants' intent in Apex was merely to organize the industry while its intent in Coronado was to stabilize wages for the industry.\textsuperscript{104} He seems to forget both that he has just given his blessing for such a program and that, in any event, the organizational efforts of the defendants in Apex were, by the Court's own admission, directed to the end of stabilizing wages.

The intricacies of the Apex case are not worth pursuing further. We must only ask whether the Court's preservation of the secondary boycott cases and the Coronado decisions constitutes a scandal to our general thesis that labor's purpose achieved a limited antitrust immunity. It would seem not. Even if the distinctions between the older cases and Apex drawn by Justice Stone had substance, the Apex case at least reaffirms the pre-existing labor preference we have discussed; but the very difficulty of the Court in articulating a theoretical basis for the broadening freedom they clearly intended is in itself evidence of a concern with values other than the technical antitrust considerations advanced.

\textsuperscript{101} 310 U.S. at 507.
\textsuperscript{102} 263 U.S. 403 (1923).
\textsuperscript{103} United States v. Hutcheson, 312 U.S. 219 (1941).
\textsuperscript{104} 310 U.S. at 508-13.
The *Apex* case left the Court in a posture not greatly at variance from the drift of the common law, which historically had manifested a similar suspicion of union pressures directed against persons other than the employer involved in the labor dispute. Recognizing the economic purposes of labor as lawful and as protective when pursued by "normal" techniques, the courts had often declared the secondary labor boycott unlawful in itself, with little more in the way of analysis than was offered in the *Apex* opinion. The cases that had begun to depart from this tradition had distinguished the lawful from the unlawful in the secondary boycotts by an examination of the union purpose. If the defendants were promoting self-interest, the boycott was not unlawful in itself. In other words, these courts merely extended to the secondary boycott the same analysis ordinarily applied by the common law in the strike cases, where justification traditionally had been predicated upon self-interest. Perhaps, this is where the general sense, if not the dubious rationale, of the *Apex* case might eventually have led in handling the secondary boycott situations as well as other restraints imposed by labor. Indeed, this is almost precisely where it did lead in *United States v. Hutcheson*, where the Court was to say:

So long as a union acts in its self interest and does not combine with non-labor groups, the licit and the illicit under §20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

In the end, it was to be the union purpose—the broad purpose of self-interest—which was to protect it from the Sherman Act. Of course, *Hutcheson* involves an interpretation of statutory exemptions enjoyed by labor alone and is, to that extent, inapposite to our general theme, but the *Apex* case was not such a distance from this result, and was decided without reliance upon the Clayton or Norris-La Guardia Acts. It is this independence from amending legislation that has permitted the continued citation of the *Apex* decision in antitrust non-labor cases. In the court of appeals' decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc.* in 1958, the court based its decision on an extensive analysis of *Apex*. That case involved a concerted refusal to deal by manufacturers and distributors of appliances against a local retailer. The court of appeals found no violation because of the absence of effect or intended effect on price, quantity, or quality. The Supreme Court reversed unanimously, and Mr. Justice Black's opinion clearly applies a per se test for group refusals to deal. The *Apex* decision posing a rather awkward precedent in this context, Justice Black, who had joined

---

105 See GREGORY, *op. cit. supra* note 73, chs. 3–6.
106 The *Restatement of Torts* picked up this theme with respect to certain labor activities in restraint of trade and involving secondary parties, making the lawfulness of the activity turn upon the "substantial interest" of the actors. See, e.g., *RESTATEMENT, TORTS* §§ 802, 803, 806, 808 (1934).
107 312 U.S. at 232.
108 255 F.2d 214 (9th Cir. 1958).
with the majority in *Apex*, disposed of it in the following language of the greatest significance:

The court below relied heavily on *Apex Hosiery Co. v. Leader*, 310 U. S. 469, in reaching its conclusion. While some language in that case can be read as supporting the position that no restraint on trade is prohibited by §1 of the Sherman Act unless it has or is intended to have an effect on market prices, such statements must be considered in the light of the fact that the defendant in that case was a labor union. The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions which normally have other objectives. 

Can it be doubted that under the Sherman Act there has always been one law for labor and another for businessmen? If the labor cases teach anything, they tell us that there is more to the Sherman Act than a mechanistic computation of probable effects upon competition. In these grand legal fossils discarded in the evolutionary struggles of another generation inheres at least a grudging judicial respect for values other than, and sometimes inconsistent with, those of an unrestrained market. These values, as the perceived objects of group activity, we have given the name of purpose.

V

Some Miscellany in Lower Federal Courts

In 1920, the Circuit Court of Appeals for the 8th Circuit decided *Council of Defense v. International Magazine Company*, the only Sherman Act case clearly involving a restraint of trade imposed by defendants for purely non-economic purposes. That purpose was to assist in the war effort, and the means chosen to realize this patriotic end was the declaration of a statewide boycott of all publications in which Mr. William Randolph Hearst was interested. The individual defendants were the Governor and the Attorney General of New Mexico and the members of the Council which had been created by the state legislature to assist in defense planning during World War I. The Council members had decided that “Herr Hearst,” as they styled him, exercised a parlorous influence on the minds of New Mexicans whose enthusiasm for the war effort might be undermined by what was called “Hearstism,” a thing said by defendants to be “anti-British, un-American, and pro-German.” The boycott was helped along by a number of colorful publications of the defendants depicting Mr. Hearst in sundry unflattering prose, by dissemination of lists of cooperating dealers and distributors, and by the issuance of display cards for cooperating dealers (otherwise known as “real Americans”) who wished to manifest their antipathy to Hearstism and confirm their own patriotism. The Interna-

---

110 Id. at 213.
111 267 Fed. 390 (8th Cir. 1920).
tional Magazine Company, which owned some of the magazines subjected to the boycott, asked the federal courts to enjoin as a violation of the Sherman Act this high-spirited display of civic virtue. The district court granted a temporary injunction, and the circuit court of appeals affirmed. The opinion is interesting for reasons in addition to the unique character of defendants' purpose and the failure of that purpose to prevent the application of the Sherman Act.

First, we should note the court's handling of the defense of unclean hands, asserted on the basis of the "reprehensible attitude and conduct of Hearst," who apparently owned controlling interest in the plaintiff corporation. We should observe that the plaintiff company published only magazines, not newspapers, and that the unpatriotic expressions to which defendants had objected had been published solely in the Hearst newspapers. The court disposed of the defense in this fashion:

The issue that the complainant comes with unclean hands is not well taken. It is clear that the ownership of the magazines here involved was in the International Magazine Company, a corporation. In the absence of statutory provision, the corporation cannot be answerable for the action of a stockholder unconnected with the action of the corporation. They are separate entities in this respect, and each is answerable for his or its own acts, and for such alone. The alleged reprehensible attitude and conduct of Hearst was in no way reflected in any publication or action of the corporation. There is no showing whatsoever that any objectionable matter ever appeared in any of the magazines. The mere apprehension that this policy might be altered can furnish no firm ground to proceed against the corporation and its publications.\[112\]

At a later point in the opinion, the court again discussed Hearst's insidious predilections, but this time it did so in apparent connection with the substance of the defendants' wrongdoing rather than as a part of the unclean hands defense. Here is the language:

Whatever may have been the derelictions of Hearst as an individual or in his newspapers, it is absolutely clear that complainant, which was engaged solely in publishing and selling magazines, had published no objectionable matter in its magazines, and it had nothing to do with the Hearst newspapers, nor any interest in them. The declared and obvious purpose was to destroy complainant's business in New Mexico. This purpose was proceeding toward success, when halted by the injunction of the court below. The various defendants were planning and acting together to effectuate the above purpose. They were doing so without legal warrant or protection. Their acts amounted to a conspiracy to boycott or blacklist the magazines published by complainant. All of these publications came into the state through interstate commerce. The only purpose of shipping the magazines into New Mexico was for sale there; hence a movement which sought to prevent, and was succeeding in preventing, newsdealers, who were here
the importers, from receiving, handling, and selling such magazines, directly interfered with that commerce. We think this situation within the prohibition of the Sherman Act.\footnote{Id. at 411–12.}

The arresting feature of all this is the care taken by the court to refute defendants’ allegation that the plaintiff was the alter ego of Hearst. By indirection, it suggests the relevance of Hearst’s actions and attitudes with respect to foreign policy had he been plaintiff. If the court had merely felt such considerations relevant to support an unclean hands defense, such an equitable doctrine in itself would be intriguing;\footnote{And rather certainly wrong. See Comment, Limiting the Unclean Hands and In Pari Delicto Defenses in Anti-Trust Suits: An Additional Justification, 54 Nw. U.L. Rev. 456 (1959).} but the seeming relevance of “Hearstism” to the substance of the antitrust offense makes the case even more surprising. So understood, the decision suggests not only that the court will weigh defendants’ purposes in determining the existence of the offense, but that, in effect, the defendants’ program of harassment might have been justified by its patriotic purpose if it had been confined to the Hearst newspapers. The only trouble for our thesis in this rationale is that the very extravagance of the suggested immunity is itself the strongest kind of argument against any consideration whatsoever of defendants’ purpose. The implication of the dictum amounts to a reduction to absurdity.

\textit{Konecky v. Jewish Press,}\footnote{288 Fed. 179 (8th Cir. 1923).} also decided by the 8th Circuit in 1923, was equally bizarre in its facts. Konecky published a small newspaper which he claimed was being ruined by a conspiracy of defendants which had: (1) blackballed him in B’nai B’rith; (2) boycotted his subscribers; (3) tried to get plaintiff fired from a county job; (4) tried to prevent his acting as delegate to the Jewish Welfare Federation; (5) circulated lies to his advertisers; (6) subverted his employees; and (7) hired a detective to shadow him. The defendants’ ultimate purpose in destroying plaintiff is not disclosed. The court made short work of the case on the basis of then-current views of interstate commerce, but it also took pains to observe that a holding for plaintiff “would be a perversion of the Sherman Anti-Trust Act . . .” and “would further weaken it by making it ridiculous.” The purpose of the Act was “to prevent the growing tendency on the part of great accumulations of property and wealth to exercise a monopolistic control of the necessities of life.”\footnote{Id. at 182.} It is hard to make out precisely what the court meant and to perceive why at least some of defendants’ acts (for example, the secondary boycott) could not tend to monopoly of the market involved. The court seemed only to be interested in defendants who are sufficiently large that their efforts to destroy competitors are stripped of any of the personal and emotional overtones implicit in the \textit{Konecky} case. The court’s dicta fairly represent the abstruse conservative thesis that has inhibited the use of the Sherman Act in cases involving non-economic purposes. Such an ap-
proach vaguely suggests the idea that defendants’ purpose may be weighed as a kind of justification, but the notion is so veiled and immanent that analysis does not appear profitable.

Hughes Tool Company v. Motion Picture Association,117 a 1946 decision, involved the movie production code, a movie about Billy the Kid, and considerably too much of Miss Jane Russell. Under the production code, the major movie producers had agreed to submit all movies in advance for approval by the Production Code Administration. When approved as submitted or after deletions, the producer was granted the PCA’s seal of approval to exhibit with the movie. The Code also required the submission of advertising. Unsealed movies would ordinarily not be shown by 90 per cent or more of the exhibitors, either because their distributors would not handle them or because it would jeopardize their chances of getting sealed films. Plaintiff was a member of the defendant association. According to its agreement under the code, plaintiff submitted to the PCA its film, “The Outlaw,” which, after some difficulty and deletions, received the seal. However, some of the advertising featuring Miss Russell was never approved. A running engagement ensued between Mr. Hughes and the PCA, and Hughes finally commenced an equity action in the Federal district court seeking to restrain the defendant from revoking the seal, alleging, among other grounds, violations of the Sherman Act.

The court emphasized the inconsistency of the plaintiff’s claim. Plaintiff wanted to employ the seal, though he insisted that the whole program violated the antitrust laws. He in effect wanted enforcement of what he himself maintained was an illegal contract. The Hughes case would be more to the point if plaintiff had been seeking damages from the defendants or an injunction to restrain use of the seal by anyone. The case is chiefly relevant to our study because of the judicial benison bestowed upon the agreement of the competing producers to limit production to movies approved by the PCA. The court said:

The purpose of the approval is in furtherance of the proper purpose of the defendant to censor pictures which it may consider are not up to the highest possible moral and artistic standards. Defendant, I believe, owes that duty to the public. Even if it does not, it holds itself out as so doing, and the obligation is the same. If there is any restraint in such a proper purpose, it is a reasonable one.118

118 Id. at 1013. To what extent such decisions may amount to an invitation to vigilantism is impossible to assess. Reading the decision narrowly, the defense could be regarded as limited to one who is himself an entrepreneur, as were the defendants in the Hughes case, and thus not available to the merely officious; but this would seem to ground the antitrust immunity on the self-interest of the producer. Self-interest has not sufficed elsewhere to protect agreements to suppress production from antitrust penalties. If the basis of the protection is the supposed benefit to the public from restraints on production and distribution of movies, the purpose to achieve such results should logically protect others than the movie producers. Fundamentally, the question is not who should receive the protection from antitrust, but whether such private censorship is desirable as a matter of policy, whatever the source.
The implication that defendants' purpose in establishing the code was purely non-commercial may be a bit naïve. The movie codes grew and still grow as a direct response to public and legislative outcry against abuses in the industry. The censoring activity may be described more accurately as merely a means—one well adapted to realizing a standard commercial purpose of profit husbandry and providing a shrewd protection against regulation by government and the attacks and boycotts of private groups. Here, the court is adopting as justification what is in fact only an ancillary effect of a tactical technique designed to achieve a commercial purpose. Thus, though it would be tempting to argue that this amounts to justification through non-economic purpose held by business defendants, practically speaking, this is not such a case. When, despite the hue and cry of the outraged, the movie code is reduced to the maxim of this university—"Quaecumque sunt vera"—its object may be truly styled a "purpose." Meanwhile, it is only an effective device for self-preservation.

The predictive value of these three decisions is obviously very limited, and they can play no substantial role in formulating any general approach to the cases involving non-economic purposes. The Council of Defense case, however, does provide confirmation of the thesis that non-economic purpose confers no general immunity from the Sherman Act.

VI

An Approach to the Non-Economic Cases

Let us recapitulate briefly our steps to this point: We have defined purposes as those ends sought by defendants for their own sake; we have perceived that the unique quality of our special cases is the assertion by defendants of a non-economic purpose; with respect to the common-law restraints of trade, we have found non-commercial purposes—both economic and non-economic—relevant to the question of justification; under the antitrust decisions in the Supreme Court involving businessmen as defendants, purpose has been seen to be irrelevant because of its uniformity; in the Sherman Act labor cases, the distinctive economic but non-commercial purposes of labor appear to have justified restraints which, imposed by businessmen, would have been unlawful; the few antitrust cases involving non-economic purposes, all in lower courts, are of doubtful import and little predictive value.

We are now in as good a position as we can expect to suggest a general approach to be taken to these special cases; an approach that will take into account the distinctive purposes of the defendant groups. The thesis is

---

Codes are now a way of life in the communications industries. The National Audience Board reports recent orders of the National Association of Broadcasters censoring scenes from Christmas toy commercials on television. NAB Newsletter, Jan., 1962, p. 8.

119 In this respect, it differs little from the exclusion of writers from the movie industry on political grounds. See p. 754 infra.
hardly a radical one. It recognizes two uses for purpose. First, on the substantive side, antitrust liability should depend upon a weighing of the anti-competitive effects of defendants’ activities, actual and intended, against the policy advantage of defendants’ purposes and the likelihood of their realization through the means adopted. To the extent that the purpose is consistent with policy goals other than free competition, to that extent will it atone for the anti-competitive sins of the defendants committed in the course of its realization. Secondly, on the evidentiary side, defendants’ purpose may cast light upon the economic effects to be expected from a given restraint. We will consider first this evidentiary use of purpose.

**Purpose as evidence of effect on competition:** Knowledge of group purpose may be an indispensable aid to the court in assessing the probable effect upon competition to be expected in a given case. The Montgomery bus boycott, for example, may be said to adumbrate no serious and continuing restraint upon competition, not because the means are ineffective, but because realization of defendants’ purpose will coincide with and be equivalent to the termination of anti-competitive action. The boycott does not display the anti-competitive momentum and longevity of a similar restraint having as its purpose the transfer of profits from the injured company to the defendant group. The Negroes basically desire to keep the buses running and to bestow their custom upon the company, and the economic danger is thus attenuated.

Purpose might also shed light upon the economic effects to be expected from a boycott directed against newsdealers carrying magazines proscribed by the defendant group of consumers. Here, the realization of group purpose would drive the offending product from the market affected. In this respect, the evidence of purpose might aggravate rather than minimize the offense. It would not manifest merely a tendency to monopoly, as in the case of a commercial restraint, but would tend utterly to destroy the distribution of the product and ultimately the product itself. On the other hand, it might be argued that such a non-commercial and non-economic purpose is frequently evidence that the restraint will be limited in scope and puny in its force and may therefore be disregarded as insubstantial. In either event, the purpose of the group will be revealing on the question of economic effect.

The Supreme Court would surely make such use of purpose if a truly non-commercial restraint were set before it. It has long made such use of intent. Mr. Justice Brandeis uttered the basic formula in these words from *Chicago Board of Trade v. United States:* 120

---

120 246 U.S. 231, 238 (1918). At issue was a rule of the Board affecting the making of contracts during certain periods of time. The Court found the rule to be reasonable and valid on the basis of its nature, scope, and effects without resort to an examination of intent, and the quotation is therefore dictum. However, the language has been frequently cited by the Court and seems an accurate expression of the evidentiary value of intent. Jewel Tea Co. v. Local Unions, 274 F.2d 217, 223 (7th Cir. 1960); Standard Oil Co. v. United States, 337 U.S. 293, 313 (1949); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372 (1933).
The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. . . .

The language may be a bit confusing in the context of this article. When Brandeis speaks of "purpose," he uses it, not in the sense employed here, but as a synonym for "intent." The Board of Trade case involved strictly the standard commercial purpose, and this purpose was neither at issue, nor was it used as evidence. At issue was a practice of defendants which simply was a means to the ultimate end of enhancing the business of the traders. Brandeis is describing the evidentiary value of defendants' intent only. But, if and when the Court is faced with a case involving non-economic purpose, that purpose may serve an evidentiary function analogous to Brandeis' use of intent. Defendants' purpose may have served that very function, though not explicitly, in the labor cases. For example, the restraint upon commerce in the Apex case was less impressive in its expected magnitude because the victim's capitulation to the union would have had the effect of removing that restraint rather than making it permanent. Its permanence was the last thing the union desired.

Purpose as justification for an anti-competitive effect: The proposition that non-commercial purpose, in some cases, will justify otherwise forbidden restraints seems fairly predictable from our examination of the labor cases. This conclusion is unaffected by any authority to the contrary in the commercial cases, all of which ignore purpose altogether. It is assisted by the authority of the common-law cases, which stress the relevance of beneficent purposes, both economic and non-economic. It seems likely, therefore, that non-economic purpose will be accorded some justifying effect when the issue is presented. But the problems remain: Within what limits will such purpose be effective to justify; and what non-economic purposes will be considered? Certainly, no rigid formula is conceivable and the approach already suggested in outline is as precise as we would want the test to be. It is a question of striking a nice balance between the injury to competition and the promotion of non-economic social advantage through group action.

Group purpose may relate to public policy in three general ways. First, the purpose may be one which, if achieved by the free decision of the person who is the object of the restraint, would be unlawful under state or federal statutory law or judicially announced policy. For example, we saw the California court in Hughes v. Superior Court121 stating the unlawfulness of a group purpose to achieve employment opportunities for Negroes on a proportional basis.

Secondly, the purpose may be one lawful if achieved independently by the person who is the object of the group restraint, but which, at the same

121 32 Cal. 2d 850, 198 P.2d 885 (1948), discussed at 723 supra.
time, is not a special object of policy. The hoped for result, in other words, is one to which the law would be indifferent. For example, the removal of magazines from a newstand, or the failure to employ a television writer, are perfectly lawful actions, but neither result is abetted by any public policy. The same might be said of a purpose to effect racial discrimination in hiring by private employers in a state without an FEPC law. If white groups in Arkansas conduct boycotts against merchants who hire Negroes, their purpose is one which would be lawful to the merchant himself, although not (we may hope) a goal of state policy.

Finally, the purpose may be one which the victim of the restraint could lawfully realize and which is, in addition, a specific object of policy. A group refusal to deal directed against newsdealers might have as its purpose the removal only of literature which is obscene within the meaning of a state criminal statute. The Montgomery boycotts may be another example. There the bus company was a public utility and, therefore, was itself in violation of law in practicing discrimination. The removal of unlawful discrimination would presumably be a desired object of state and certainly of federal policy.

Insofar as the group purpose accords with policy objectives, it could appropriately form a part of a federal court's total judgment upon the existence of an antitrust violation. There is an even simpler and more traditional way to state this. Purpose validly may be recognized as a part of the Rule of Reason. To be sure, it is not a part of the Rule of Reason that might readily have occurred to Chief Justice White, but the Rule is not so niggling or narrow that it must exclude all but economic considerations. There is, perhaps, no better example of its breadth than the recent result in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. Here, railroads had conducted a free-swinging and successful campaign to influence state legislators to pass legislation harmful to the trucking industry. The anti-competitive intent and effect was obvious. A treble damage and injunctive action by the truckers was successful through the court of appeals. The Supreme Court reversed in a unanimous judgment. The opinion by Mr. Justice Black is worth quoting at some length:

---

122 The same view might be taken of an effort to induce newsdealers to restrict sales of certain publications to adults. Even absent a state statute drawing such a distinction, the federal court would be free to recognize a policy favoring the protection of children in this fashion. Nothing in the numerous obscenity decisions commencing with Roth v. United States, 354 U.S. 476 (1957), would raise constitutional barriers to the implementation of such a policy.

The publishing activities of consumer unions also might be placed in this favored category. The question may arise in instances where defendant union, which is a disinterested service organization, has published warnings of defects in plaintiff's product, the plaintiff alleging infringement of its "right to an uninformed market."

123 Browder v. Gayle, 142 F. Supp. 707 (N.D. Ala.), aff'd without opinion, 352 U.S. 903 (1956). This should no doubt be contrasted with the situation reported in Englewood, New Jersey, where Negroes boycotted white merchants as a protest to alleged racial discrimination in public schools. Chicago Daily News, Feb. 8, 1962, p. 3. The attack upon innocent parties would seem to be beyond justification, even though the purpose would be clearly approved.

Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination[s] ... in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act. ... This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by §1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. ... To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. ...\textsuperscript{125}

And further:

Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical. ...\textsuperscript{126}

The Court also declared that it wished to avoid serious constitutional questions inherent in a contrary decision, but the opinion rests upon a statutory interpretation. As Professor Handler describes the result, "[T]here are areas of our economic and political life in which the precepts of antitrust must yield to other social values."\textsuperscript{127}

It is not here suggested that the facts of the Noerr case are apposite to our area of concern. The exemption recognized for the railroads is based, not upon their purpose, but upon the transcendent importance of the right to petition in the hierarchy of values recognized by the Court. Nevertheless, the Noerr case has relevance, for it manifests the necessity of a total judgment upon all value questions involved in the case—economic, political, social, and other. Again, with reference to the Noerr case, Professor Handler aptly suggests that, "This admirable technique of balancing conveniences is the very essence of the rule of reason."\textsuperscript{128}

With a vigorous wrench of the facts in Noerr, we might succeed in metamorphosing the case into a precedent for the special cases of interest here.

\textsuperscript{125} Id. at 136–37.
\textsuperscript{126} Id. at 140–41.
\textsuperscript{127} Handler, Recent Antitrust Developments, 71 Yale L.J. 75, 88 (1961).
\textsuperscript{128} Id. at 90.
Thus, the railroads' purpose could be said to be legislation and, since such a purpose ipso facto removes any question of its conformity with policy, the Noerr case would stand as a restraint justified by the propriety of its purpose. Unfortunately for our thesis, this is untrue. The railroads aimed at legislation, but hardly for its own sake. The Noerr decision involves only the standard purpose of businessmen to make profits. The justification of the restraint lies on the side of the means adopted for its imposition. Nevertheless, this does not diminish the importance of the case as an index of the kind of non-competitive and untraditional considerations which may exert influence in situations that "bear little if any resemblance to the combinations normally held violative of the Sherman Act." The Court indicates categorically that it is not an economic seismograph recording only the impulses of market reaction. It has eyes, and it knows an absurd result when it sees one.

But, if the Rule of Reason will perceive non-competitive considerations, and if it will take account of non-competitive purpose, what will it do with purposes which offend public policy or to which the court is indifferent? By parity of reasoning, we might conclude that a purpose antithetic to public policy ought to tip the scale in a doubtful case and subject defendants to antitrust sanctions. However, an inconsistency in approach here must be indulged and should not be alarming. This is precisely the teaching of the Apex case—that the Court does not want the Sherman Act to become a policing mechanism for all torts and crimes affecting commerce. Unlawful, non-economic purpose should not create antitrust offenses where none would otherwise exist. At the same time, the Court is free to bestow relief from liability where the purpose of defendants is non-economic and sufficiently productive of other policy goals. Thus, it limits the prohibitions of antitrust in two respects and, in so doing, confines it principally to the traditional milieu of the market place. Either an evil, non-economic purpose or an indifferent one would probably be of no consequence in antitrust litigation, but a benevolent, non-economic purpose may justify.

We come at last to what must have seemed throughout an obvious threat to the thesis advanced here. Much of the discussion is beside the point if the per se doctrine applies to our cases, nearly all of which involve concerted refusals to deal. Eminent scholars have recently stated in strongest terms their conviction that boycotts are beyond justification. Professor Handler remarks:

The prohibition is absolute. There are to be no exceptions, however extenuating may be the conditions generating the boycott.\textsuperscript{129}

\textsuperscript{129} Handler, Recent Developments in Antitrust Law: 1958–1959, 59 Colum. L. Rev. 843, 862 (1959). The author continues:

The interesting effort to discriminate between the justifiable and unjustifiable boycott has now been halted—both are unqualifiedly proscribed... 

\textit{Id.} at 864–65.
And Professor Oppenheim agrees:

While it was previously arguable that the Court has preserved a limited area for reasonable collective refusals to deal in exceptional instances, Klor's has reduced this prospect to a mirage.\textsuperscript{130}

Others still have doubts, and a few decisions have preserved defendants' hopes for limitations upon the scope of the per se rule.\textsuperscript{131} There is no point in re-examining here the cases discussed or the arguments so ably advanced on both sides. It may be that the Handler-Oppenheim view is more compatible with existing Supreme Court doctrine. Again, it is my position that that view and these cases are beside the point, for they assume a factual situation involving businessmen seeking to preserve and advance their commercial enterprise. The approach suggested here, for the cases of our special interest, stands or falls upon the non-economic character of the purpose involved. If this distinction is rejected, antitrust liability follows in the most mechanical, and frequently absurd, fashion. I cannot believe that the Supreme Court would apply the per se rule to the Montgomery bus boycott. This same, simple distinction, based on defendants' purpose, was adopted by the Court in the very case most often relied upon to demonstrate the absolutism of the per se rule. As the Klor's decision made clear, "The Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . . which normally have other objectives."\textsuperscript{132}

Finally, we note what obviously follows from the labor cases—that economic, but non-commercial, purposes may also justify restraints of trade under certain circumstances. Except for the labor cases, and perhaps the activities of cooperatives, it is hard to imagine cases where the purpose of defendants will be economic without being commercial. A possible example is currently in litigation involving a number of national social fraternities alleged to have conspired with a jewelry manufacturer to create a monopoly of the fraternity jewelry market.\textsuperscript{133} Each fraternity, as the means of receiving a price discount, signs an exclusive dealing contract. Whether the fraternity should be regarded as entertaining a "commercial purpose" is doubtful. Perhaps, this should depend upon whether the organization retains the discount and uses it for merely social purposes or whether it passes on the savings to the individual members. If the discount is used only for the social programs of the organization, the restraint might be regarded analytically as non-economic as well as non-commercial. On the other hand,

\textsuperscript{130} Oppenheim, Selected Antitrust Developments, 15 A.B.A. Section of Antitrust Law 37, 55 (1959). Also, see the opinion of the incumbent head of the antitrust division. Loevinger, Rule of Reason in Antitrust Law, 7 Pract. Law. 17 (1961).

\textsuperscript{131} See authorities cited note 65 supra.


\textsuperscript{133} There are eight related cases filed in the District Court for the Western District of Missouri involving, also, claims of patent infringement against the plaintiff in the antitrust actions. Sigma Chi Corp. v. J. A. Buchroeder & Co., Civil No. 684, on file, Nw. U.L. Rev.
if the members benefit individually by receiving discount prices for jewelry, the purpose, like that of cooperatives, falls somewhere near the line between the commercial and the merely economic.\footnote{4} Of course, treating the organization as having non-commercial purposes—economic or non-economic—would not automatically justify the restraint under the analysis here suggested. In any case, the court must weigh the injury to competition against the beneficent effects of defendants’ purpose.

Before concluding, it must be reemphasized that the analysis and approach here suggested do not purport to explain, defend, or criticize the apparent antitrust immunities informally recognized for certain specialized commercial restraints. A number of these unusual cases were given adverse comment by Mr. Marcus in his thoughtful articles.\footnote{3} The classic example is provided by the publication of fee schedules by bar associations.\footnote{5} This most heinous of antitrust sins seems rather studiously ignored, "Marcus, Antitrust Laws and the Right to Know, 24 IND. L.J. 513 (1949); Marcus, Civil Rights and the Antitrust Laws, 18 U. Chi. L. Rev. 171 (1951).

A motion on behalf of Sigma Chi suggests that, in its case, the discount is used "to defray, in part, the cost of the services provided by the fraternity to its chapters and members." Motion of Plaintiffs to Strike Certain Defenses and for Summary Judgment, etc., p. 15, on file, Nw. U.L. Rev. It seems difficult to characterize the fraternity’s activity as "commercial." The organization determines the use to which the discount will be put and the purposes of the organization are stated as follows:

\begin{itemize}
  \item[(a)] Cultivate and maintain high ideals of friendship, justice and learning;
  \item[(b)] Foster and preserve high academic standards;
  \item[(c)] Train undergraduate students in leadership responsibility and instill in them the ideals of good citizenship;
  \item[(d)] Inculcate and follow the Christian principles outlined by its founders;
  \item[(e)] Stimulate participation in college programs by its student members and develop close cooperation between them and college officials, faculty and other student organizations; and
  \item[(f)] Provide a helpful hand of brotherhood for the achievement of purposeful living to its members both during their college years and in the years that follow.
\end{itemize}

Id. at 4-5.

Although economic benefits may be involved incidentally under such a program, if the statement of purposes is taken at face value, they seem, in essence, to be non-economic.


\footnote{3} See Illinois State Bar Association, Economic Institute Handbook, June 22–24, 1960. The Handbook provides details of a coordinated program of a committee of the American Bar Association, and the state and local bars, to raise the economic status of the profession. The Handbook sets forth in detail recommended fee schedules for specific services. The local bars are exhorted as follows:

\begin{quote}
WILL YOU PLEASE DO THE FOLLOWING
\begin{enumerate}
  \item Call a meeting of your local Bar Association at the earliest possible date.
  \item Have full consideration given to the three fee schedules enclosed.
  \item Adopt one of the three schedules, making much revision as you may deem proper, in view of local conditions.
\end{enumerate}
\end{quote}

On file, Nw. U.L. Rev.

The request to the local bars is described as "the most important matter we have ever asked you to consider!" In justification of the bar’s concern over its economic status, the chairman of the Special Committee of the ABA suggests, in the Handbook, that "it must be remembered that the legal profession is one of service and its success is directly related to its unselfish service rendered to our nation." Cf. note 64 supra.
and, I trust, not simply because of the altruistic purposes of the actors. No doubt, the interstate commerce hurdle is substantial, especially in the local or state bar situation. In addition, however, the immunity manifested may be related to that bestowed in the *Noerr* case, where the Court held the anti-competitive lobbying activity of railroads to be protected by its "essential dissimilarity [to] agreements . . . traditionally condemned by §1 . . . ." The *Noerr* rationale seems to set apart a residual region of business activity wherein the Court will maintain its freedom to announce antitrust immunities based upon very special policy grounds. It is possible that the legal profession could be the beneficiary of such an absolution, though the articulation of the relevant policy might present some embarrassing difficulties.

Marking out enclaves of exempted commercial activity on an *ad hoc* basis may be useful if not done so frequently as seriously to impair predictability. The Court may face the temptation again to individualize its antitrust justice if the current suit by the "Hollywood Ten" should be accepted for review. Plaintiffs are seeking injunctions and treble damages in actions against the movie industry for its celebrated refusals to deal with uncooperative congressional witnesses. It will be interesting to see what relevance the federal courts will accord to defendants' aim of "controlling the possible subversive Communist propaganda that the hiring of Communist Party members might introduce to the movie-going public . . . ." A Court hard-pressed politically, but anxious to preserve the seeming inflexibility of the per se rule, would have a powerful incentive to protect the defendants by an application of the unanalyzable but unanswerable argument that there is an "essential dissimilarity" between this kind of activity and "agreements traditionally condemned." Whatever the result, as we noted with respect to the movie production code, this situation should not be confused with cases of non-commercial purpose. As the producers frankly admit, the exclusion of the controversial writers is a means of "protecting their investment . . . . from poor attendance or boycotting . . . ." It is not a spontaneous and selfless effort to protect Americans from their own political naïveté. Neither the producers nor the bar associations qualify for special justification based upon non-commercial purpose.

**Summary**

Though direct precedent is almost non-existent, there is no reason to suppose that defendants seeking to advance non-economic purposes are immune to antitrust prosecution. However, common-law and antitrust

---

137 365 U.S. at 136.
139 Brief for Appellee [defendant] on Plaintiff-Motion for Preliminary Injunction, p. 21, quoting from and adopting characterization by the district judge of defendant's "aims."
140 Ibid.
analyses suggest that non-economic purpose may be relevant in two respects: First, to the extent that the purpose of the restraint is consistent with public policy, it may be accorded weight in justification of the injury to competition involved. Second, in determining the extent of the injury to competition, defendants' purpose may serve as evidence of probable market consequences. Existing antitrust decisions involving defendants, such as labor unions, whose purposes are economic but non-commercial, may be explained on the basis of a similar rationale. Where a beneficent purpose is both non-commercial and non-economic, the justifying effect may be a fortiori, though this is unclear. It is theoretically possible that business defendants could assert the same justification based upon non-commercial purpose, but such purpose rarely would exist in cases involving businessmen.