Mississippi College Law Review

Volume 15
Issue 1 *Vol. 15 Iss. 1*

Article 4

1995

The Law of Business Torts in Mississippi

James L. Robertson

David W. Clark

Follow this and additional works at: https://dc.law.mc.edu/lawreview

Part of the Law Commons

Custom Citation
15 Miss. C. L. Rev. 13 (1994-1995)

This Article is brought to you for free and open access by MC Law Digital Commons. It has been accepted for inclusion in Mississippi College Law Review by an authorized editor of MC Law Digital Commons. For more information, please contact walter@mc.edu.

THE LAW OF BUSINESS TORTS IN MISSISSIPPI

[Note: This Article has been divided with the second half appearing in 15 MISS. C. L. REV. (forthcoming 1995), ed.]*

*James L. Robertson***

*David W. Clark****

"Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition."[1]

I. THE PROBLEM

People have long seen predictability and clarity and reasonableness and practicability as virtues the law should pursue.[2] Particularly is this so in the world of business and commerce where we hope to encourage enterprise and investment and transaction. Long ago, Joseph Story saw the new nation's future tied to the growth of trade and that this presupposed an enlightened and uniform body of commercial law, ascertainable by reason and verifiable by experience, and to this end he gave us *Swift v. Tyson*[3] for the law of the land and *DeLovio v. Boit*[4] for the law of the sea. As all know, *Swift v. Tyson* met its demise on other grounds,[5] and it is one of the cruel ironies of fate that few see the success of the Uniform Commercial Code as the ultimate proof that Story was right.[6]

Markets exist because we have found in our legal structures minimally adequate means to the ends of predictability and clarity and reasonableness and practicability. Yet, Story's vision remains before us. No one doubts we enhance

---

* The second half deals with the following issues: trademarks, trade secrets, right of publicity, tortious interference with contracts, interference with other advantageous economic relations, and remedies.

** Partner, Wise Carter Child & Caraway, Jackson, Mississippi; Justice, Supreme Court of Mississippi, 1983-92; B.A., 1962, University of Mississippi; J.D., 1965, Harvard University.

*** Partner, Wise Carter Child & Caraway, Jackson, Mississippi; B.A., 1970, Millsaps College; M.A., 1971, Harvard University; J.D., 1974, University of Michigan. Much appreciation and credit is due Mr. Clark for his contribution of the Antitrust section (Part V) to this Article.

1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) [hereinafter Holmes, *Path of Law*].

2. See LON L. FULLER, THE MORALITY OF LAW ch. 2 (rev. ed. 1969), where the author perceptively describes eight "moralities" law must satisfy, at least to some minimal extent, if it is to perform its instrumental purposes.

3. 41 U.S. (16 Pet.) 1 (1842).

4. 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

5. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

6. Story was right in his vision that the country needed an enlightened and uniform commercial law. He was as wrong as he could be when he sought his end through a natural law jurisprudence. What drew the ire of Holmes and Brandeis and so many others was Story's acceptance of the old declaratory dimension of the natural law – the idea that law was somehow "out there" to be discovered by judges, and then "declared" publicly – and his application of that view to hold that judge-made law is not law at all but mere evidence of law. *See, e.g.*, Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth Century America – Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 442 (1986). It was Story's holding that the word "laws" within the Rules of Decision Act (presently 28 U.S.C. § 1652, then § 34 of the Judiciary Act of 1789) did not include judge-made law that proved the undoing of *Swift v. Tyson*.

the macroeconomic well-being of our nation to the extent we may enhance the predictability, clarity, reasonableness, and practicability of the law of commerce.[7] For example, and within the scope of what follows, Professor H. Lee Hetherington, while instructing us regarding the right of publicity and the problem of reasonably protecting the commercial value of a person's identity, tells us first the rights recognized must form "the organizing principle for a complex industry, responsible for a significant level of commercial and creative activity."[8] Hetherington cajoles lawmakers "to provide the certainty needed . . . [in this] economic sphere," to provide "simplified test[s]"[9] to the end of "predict[able] legal consequences,"[10] and to be prepared to "[sacrifice] some degree of flexibility for the correlative benefits of certainty and speed."[11] He is right to do so. Markets, like rivers, need stable banks.

This leads to the view from within. Market participants in this state are regulated on a dozen fronts, from taxation to employment relations. They often and justifiably find bewildering the plethora of legal limits to which they are held. At the very least, they seem entitled, within the core of each discrete area of regulation, to have the sovereign speak with one voice and tell them what it expects. Sporadically, with fits and starts, the law tries to do this, even to the point of conforming state law to legally superior federal law where the market participant is subject to both, and so in the area of income taxation, the rules and regulations are substantially similar. Franchise, use, and property taxes are committed to the state. Though well short of perfection and ever in need of tinkering with time, the Uniform Commercial Code is our greatest success to date – from sales to commercial paper to investment securities to documents of title to secured transactions. On the other hand, areas such as employer/employee relations are augmented by a major new statute seemingly every year, not to mention an evolving common law, enough to leave the head spinning.

Against this backdrop, in both its internal and external dimensions, from microeconomic and macroeconomic perspectives, we see the field of business torts as one of the law's least virtuous. We have seen a dozen or more frequently overlapping labels for the various mines in the field. Some see theoretical underpinnings and experiential conceptions varying from one tort to another, and inconsistently so. Fundamentally, we differ widely in our view of the nature of markets, of behavior within them, and of our ability to do more good than harm when we intervene.[12] We differ in our ideological visions, and this leads us to read

---

7. This is one of the principal lessons Professors Henry M. Hart, Jr. and Albert M. Sacks taught the legal community a generation ago. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 2-6 (tentative ed. 1958) [hereinafter HART & SACKS, LEGAL PROCESS].

8. H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1, 26 (1992).

9. *Id.* at 27.

10. *Id.*

11. *Id.* at 49.

12. *See, e.g.*, William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1 (1991) [hereinafter Page, *Ideological Conflict*].

rules of law differently. At another level, our law seeks objective external standards in one instance, while addressing another seemingly similar instance with internal standards.[13] At the level of adjudication, we are pulled toward a just judgment ex post *and* an intelligent precedent ex ante, trapped within the tensions of those inexorable judicial impulses to make Humpty Dumpty whole again and, at once, reduce the risk that his brothers and sisters will fall at all. The mines the market participant must negotiate are found among all of the known legal genera – public law (federal and state) and private law, and species: statute, case law, administrative regulation, and contract – and we must be sensitive to the import and nuances of this sort of legal landscape. We fall far from perfection in execution in all dimensions of our law.

A century ago Holmes described the plight of the lawyer's client: "People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves . . . ."[14] The question persists,[15] as the states whose wrath we risk incurring today are infinitely more active than in Holmes' day. The citizen's need for sound counsel regarding the dimensions of that risk is exponentially greater.[16] Economic endeavor is increasingly complex, and entrepreneurs have less and less time to act if they are to take full and measured advantage of each opportunity for profit. Of course, "[t]he legal counselor has a duty to inform the client of the view the courts will take of what is fair or unfair business conduct."[17] But there is more. The ever exploding cost of confrontation and litigation compels the client to seek not only a decision he can defend, but one he will not have to defend, and the trick is to figure out how to do this. After surveying but a corner of the field, Lawrence J. Franck reports, in what is, if anything, an understatement: "The difficulty in properly advising a client . . . is at once apparent."[18]

In a sensible society the market participant should be able to go to his lawyer and ask what the law asks of him, what the law proscribes, and be given a reasonably reliable and understandable answer, even if it be stated in the form of a general

---

13. *See, e.g.*, Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097 (1993).

14. Holmes, *Path of Law*, *supra* note 1, at 457.

15. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 223 (1990).

16. And so Professor Hetherington repeatedly emphasizes the need for predictability in the law regarding use of the commercial value of celebrity identity, and appropriately so. Hetherington, *supra* note 8, at 3, 27, 29, 30, 31.

17. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1.06, at 25 (3d ed. 1992).

18. Lawrence J. Franck, *The Tort of Wrongful Interference with Contracts: A Conflict of Values*, 38 MISS. L. INST. PROC. ON BUS. TORTS 131, 163 (1983).

standard. In the present context, Holmes' bad man metaphor[19] seems particularly appropriate. The market participant knows his business success will likely harm one or more of his competitors. He knows as well he will not satisfy every consumer. Not every contract will prove as profitable as once seen. Unhappy competitors, consumers, and contractors are potential plaintiffs, and so each market participant needs to be able to predict "the incidence of the public force"[20] and, to do this, he needs a lawyer. But what the client does not need is a lawyer who says, "Well, there is a federal statute that says thus and such. Then, the state act requires this or that. Behind all of this is the common law rule that may or may not apply."[21] And, of course, your contract says you must do so and so. He may, of right, demand, "But what must I do?" and, of right, expect an intelligible answer.[22] In one of his earliest legal insights, Holmes wrote: "The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent [or any combination thereof], which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as . . . law . . . ."[23] Today what we want almost as much is that no one will need to ask the judges to act.

II. THE LANDSCAPE

A. *Call It "Business Torts"—Because That Is What Many Call It and We Have To Call It Something*

For years market participants have pursued sharp practices as they have peddled their products and competed with one another, but the field of business torts is still not fully recognized as such and has experienced growth pains as it has

---

19. Holmes' most prominent expression of his bad man metaphor reads like this:

> You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force . . . . A man who cares nothing for an ethical rule which is believed and practised [sic] by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can . . . .
>
> . . . .
>
> . . . If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Holmes, *Path of Law*, *supra* note 1, at 459. *See also* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 218-22 (1993).

20. Holmes, *Path of Law*, *supra* note 1, at 457.

21. The last thing the lawyer needs is academic treatment considering "[o]nly Mississippi, non-statutory law" because this "makes the topic manageable." William C. Walker, Jr., *Common Law Protection of Economic Expectancies: "Business Torts" in Mississippi*, 50 MISS. L.J. 335, 336-37 (1979) [hereinafter Walker, *Common Law Protection*]. Not even the RESTATEMENT (THIRD) OF UNFAIR COMPETITION (Tentative Draft 1994), for all of its virtues, is wholly satisfying, as it addresses the market participant only vis-a-vis his competitor and not his consumer or contractor, and only in discrete areas of the law.

22. Professor J. Thomas McCarthy has written that "[u]nfair competition is mainly a common law tort only partially or occasionally codified or defined by statute. The 'law' of unfair competition is largely found in case law precedent." This observation strikes me as a bit dated, but what offends me more is McCarthy's "therefore": "Predictability and certainty in this area are probably not as great as in legal fields covered by specific codes, as, for example, the Uniform Commercial Code." 1 MCCARTHY, *supra* note 17, § 1.06, at 25. Descriptive of present reality in some jurisdictions, yes; but of what ought to be or must inevitably be, or, in the hands of lawyers with insight and vision, what is, No! Hence, this Article.

23. FREDERIC ROGERS KELLOGG, THE FORMATIVE ESSAYS OF JUSTICE HOLMES 92 (1984).

evolved. There is no general agreement as to what particular torts make up the field, nor whether it is limited to torts, properly so called, nor even whether we should see it as a single field susceptible of study and practice as such. Those of us who see the commonality that (to my mind) is undeniably present cannot agree whether to seek a unified field theory or accept a commonwealth of largely independent states. We cannot even agree what to call the field – "commercial torts" and "competitive torts" being but two titles as viable as "business torts." Some would use the label "prima facie tort." Others doubt continued use of "tort"[24] at all, a view given considerable support by the actions of the American Law Institute a few years back. The great bulk of the rules and remedies within the field were excluded from the Restatement (Second) of Torts in 1979.[25] A more enduring concern is whether – and, if so, to what extent – a part of the field should be left to private ordering,[26] with – to that extent – the public law relegated to an enabling and enforcement role and to providing default rules.

---

24. Most definitions of "tort" are stated at a sufficient level of abstraction that they add nothing to the word itself. *See* 1 McCarthy, *supra* note 17, § 1.03, at 16. We find in J.M. Griffin & Sons v. Newton Butane Gas & Oil Co., 50 So. 2d 370 (Miss. 1951), that "a tort is an unlawful violation of a private legal right." *Id.* at 373. *See also* Duncan v. Coahoma Bank, 397 So. 2d 891, 894 (Miss. 1981). Black's Law Dictionary (6th ed. 1990) defines a tort as "[a] private or civil wrong or injury . . . . A wrong . . . independent of contract." *Id.* at 1489. *Corpus Juris Secundum* says that "[a] 'tort' is a legal concept possessing the basic elements of a wrong with resultant injury and consequential damage which is cognizable in a court of law." 86 C.J.S. *Torts* § 1 (1954). This, of course, tells us nothing. The American Law Institute did not even try to define the term in either the first or second Restatement of Torts. (That *may* tell us something.) Perhaps the most useful expression is that in the latest edition of *Prosser on Torts*:

> It might be possible to define a tort by enumerating the things that it is not. It is not crime, it is not breach of contract, it is not necessarily concerned with property rights or problems of government, but is the occupant of a large residuary field remaining if these are taken out of the law. But this again is illusory, and the conception of a sort of legal garbage-can to hold what can be put nowhere else is of no help.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 1, at 2 (5th ed. 1984).

25. Professor Herbert Wechsler, then Director of the American Law Institute, offered this explanation:

> Readers familiar with the first Restatement will note a substantial change at the beginning of this volume in the scope accorded to Division Nine. The chapters (34, 35, 36 and 38) that were concerned with trade practices and labor disputes have been omitted, in the view that these subjects have become substantial specialties, in their own right, governed extensively by legislation and largely divorced from their initial grounding in the principles of torts.

Restatement (Second) of Torts introduction (1979). In the Introductory Note to the Restatement (Second) proper, we find

> [i]n the more than forty years since . . . [the first Restatement], the influence of Tort law has continued to decrease, so that it is now largely of historical interest and the law of Unfair Competition and Trade Regulation is no more dependent upon Tort law than it is on many other general fields of law and upon broad statutory developments, particularly at the federal level.

Id. § 1.

Both the Director's introductory comments and those of the Restatement as well suggest that, if restatement should be attempted in these areas, it would be done by separate project. In April of 1988, we had the formal announcement of the Restatement (Third) of Unfair Competition wherein the Reporter, Robert C. Denicola, explained, by reference to the foregoing comments, that "[t]he current project represents an independent restatement of the law relating to unfair trade practices." Robert C. Denicola, Reporter's Memorandum at xv (Apr. 1988) (Tentative Draft No. 1).

See also Professor Robert C. Denicola, Statement Before the 1988 Annual Meeting of the ALI (May 20, 1988), *in* 65 A.L.I. Proc. 460-61 (1988); Paul T. Hayden, *A Goodly Apple Rotten at the Heart: Commercial Disparagement in Comparative Advertising as Common-Law Tortious Unfair Competition*, 76 Iowa L. Rev. 67, 69 n.11 (1990); *supra* notes 7, 15.

26. Of course, too much horizontal private ordering and even some practical vertical arrangements may get a market participant into antitrust trouble.

Professor William C. Walker, Jr. acknowledges the problem but would stick with the label "business torts," offering a pragmatism: "The fact that some activities are usually called business torts is sufficient reason to treat them under that label."[27] He has a point, but whatever label one favors, we must keep well in mind it is only a label, taking care not to afford the one we pick power beyond the descriptive.[28] It is the field and its phenomena that should inform the phrasing of the label. What is important is what the label identifies, for that will be our subject of study.

B. The Long List of Business Torts and the Limits of Listing

What lies within the field? Most would include – without regard for rank, level of generality, or overlap – those "torts"[29] generally (if not generically) labeled as (1) defamation of product or producer, traditionally known as commercial disparagement or trade libel, or, more recently, injurious falsehood; (2) seller misrepresentations and false advertising, or, more generally, deceptive marketing; (3) trademark and trade name infringement; (4) unlawful imitation of product design and packaging, sometimes "passing off," or "palming off"; (5) (mis)appropriation of trade secrets and other trade values; (6) (mis)appropriation of the commercial value of a person's identity, sometimes known as the right of publicity; (7) unfair trade practices or, less descriptive but more familiar, unfair competition; (8) antitrust offenses such as combinations in restraint of trade, conspiracies to monopolize, price discrimination, tying arrangements, predatory practices, and the like; (9) improper use of conventional business tactics such as refusals to deal; (10) tortious interference with contracts and contractual relations; (11) (tortious?) breaches of covenants not-to-compete; ending with (12) the catchall/what-is-left (intentional or otherwise improper) interference with prospective economic advantages.[30]

Others would include actions labeled deceit, disparagement (or slander) of title, breach of (some) fiduciary duties, lender liabilities, and commercial fraud, while

---

27. William C. Walker, Jr., *Business Torts: An Introductory Overview of Some Common-Law Principles*, 38 MISS. L. INST. PROC. ON BUS. TORTS 1 (1983) [hereinafter Walker, *Business Torts*]. Professor Gary Myers uses the term in his recent article. Myers, *supra* note 13, at 1106-07.

28. We must be careful that we not succumb to what I have elsewhere and often labeled the tyranny of labels. *See, e.g.*, Whittington v. Whittington, 608 So. 2d 1274, 1284 (Miss. 1992) (Robertson, J., dissenting); Cunningham v. Lanier, 589 So. 2d 133, 140 (Miss. 1991); *see also* Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA L. REV. 671, 732 (1984); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 420 (1983).

29. Without implying that all are torts in the common law or even the Restatement sense, we must use some such term – though it be but a label itself.

30. *See, e.g.*, GEORGE J. ALEXANDER, COMMERCIAL TORTS (2d ed. 1988); *Developments in the Law – Competitive Torts*, 77 HARV. L. REV. 888 (1964) [hereinafter *Developments*]. Like others, Professor Walker mis-describes "intentional interference with economic relations" as the label for the competitive tort that "do[es] not fit under another tort formulation." Walker, *Common Law Protection*, *supra* note 21, at 337. He then treats as discrete torts less amorphous and more settled actions such as disparagement or trade libel, palming off or unfair competition, each of which at its core is a form of interference with economic relations. All business torts interfere with economic relations, and that they do so is what helps form the single field.

still others would add statutory actions such as patent and copyright infringement, unconscionability in contracts, usury, and civil RICO.[31] More recently we have a proclamation that there is a new business tort—at once a residual and an umbrella business tort, if you will: "[All] other acts or practices determined to be similarly actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the party seeking relief and the public,"[32] which, of course, is not that different from intentional/improper interference with prospective contractual and other economic expectancies,[33] except for the latter's more pronounced penchant for requiring proof of intent before liability is found.

However accurate or complete this or anyone else's list[34] may be as a matter of positive description, we need be ever sensitive to the lesson of experience, here as elsewhere, that it would be foolhardy to try to draft a detailed specification of all of the acts we wish to proscribe. "[U]nfair or fraudulent business practices may run the gamut of human ingenuity and chicanery,"[35] "given the creative nature of the scheming mind."[36]

C. *The Nature of the Field Beneath the Label*

There remains a problem of conception, one of the chicken-and-the-egg variety. Is the field—business torts, if I may—a field because it tends to be treated as such, or do we treat it as such because we see certain commonalities that tend to

---

31. In 1970, the Mississippi Legislature shortened the list one by repealing the Fair Trade Act of 1938, MISS. CODE ANN. § 1108 (1942) (repealed 1970). *See* 1970 Miss. Laws ch. 461.

32. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1(a) (Tentative Draft 1994). Compare the approach to "improper" conduct in the context of interference with prospective economic advantages as presented in RESTATEMENT (SECOND) OF TORTS § 767 (1979). *See also* ALEXANDER, *supra* note 30, at 181-82.

33. *See* RESTATEMENT (SECOND) OF TORTS § 766B (1979).

34. Professor McCarthy offers "some examples," suggesting this is the only way to see and appreciate the field:

infringement of trademarks and services marks;
dilution of good will in trademarks;
use of confusingly similar corporate, business and professional names;
use of confusingly similar titles of literary works on other literary property, and on commercial goods;
the appropriation of distinctive literary and entertainer characterizations;
simulation of a container or product configuration and of trade dress and packaging;
infringement of the right of publicity;
misappropriation of valuable business values;
"bait and switch" selling tactics;
false representations and false advertising;
"palming off" goods by unauthorized substitution of one brand for the brand ordered;
theft of trade secrets;
filing a groundless lawsuit or administrative challenge as an aggressive competitive weapon;
sending cease and desist letters charging patent infringement before a patent has been granted;
an unreasonable rejection of goods shipped under contract;
physically obstructing entrance to a competitor's place of business and harassing its customers.

1 MCCARTHY, *supra* note 17, § 1.05, at 22-24. Professor McCarthy makes clear he does not see his list as exhaustive. 1 MCCARTHY, *supra* note 17, § 1.05, at 22. For the most part, his examples fall within the list we have presented above. Notice that the last four are not what McCarthy calls "nominate torts." 1 MCCARTHY, *supra* note 17, § 1.05, at 24. See also the survey of the field found in KEETON ET AL., *supra* note 24, at 962-1031.

35. People *ex rel.* Mosk v. National Research Co., 20 Cal. Rptr. 516, 521 (Dist. Ct. App. 1962).

36. Barquis v. Merchants Collection Ass'n, 496 P.2d 817, 830 (Cal. 1972). *See also* Ronson Art Metal Works, Inc. v. Gibson Lighter Mfg. Co., 159 N.Y.S.2d 606 (App. Div. 1957), *quoted in* Electrolux Corp. v. Val-Worth, Inc., 161 N.E.2d 197, 204 (N.Y. 1959). *See generally* 1 MCCARTHY, *supra* note 17, § 1.03, at 18.

form a field? We promote predictability and clarity when we treat legal phenomena as before, yet we learn from experience that at times we cling to the past at the price of reasonableness and practicability. Law evolves, and we must allow it to evolve. Groupings of rules become attractive and plausible and beneficial as they regulate like phenomena, albeit those phenomena may evolve, and our perceptions and understandings may improve with time. Where we find sundry laws addressing persons pursuing a common practice, there is profit when we step back and look at the whole and see if the law speaks with clarity and with one voice. Judges and administrators are aided. One more easily applies the parts when one has in mind the whole—its breadth, its past, and what it tends to be. Citizens in search of the equitable administration of the law benefit as well, ex ante and ex post. And so Professor Walker is on point when he writes: "By viewing business torts as having a common theme and pattern, one may better understand the individual variations on that theme."[37] Though similar interests run throughout, their combination and intensity vary, an undeniable reality that has led some to think a single theory of action may well mask the differences without offering compensating advantages.[38] Still, I would think it unfortunate were the field seen and practiced as one occupied and serviced by isolated and discrete legal compartments—forms of action, if you will.

The serious point is that there is no natural law of business torts. The law of our field "is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified."[39] Seeing this precludes the perennial and pervasive practice of those who pursue what the law ought to be, the survey of statutes and cases without regard to jurisdiction. If we are to understand the positive law, we must limit ourselves to the positive expression of "some sovereign or quasi sovereign that can be identified," albeit we have some fifty "insulated chambers"[40] from which to pick. We have to choose, and, because I have lived my life in Mississippi and know its law and its ways better than those of any other jurisdiction, I choose *its* articulate voice, which includes the voice of the

---

37. Walker, *Business Torts*, *supra* note 27, at 1.

38. *See* 1 McCARTHY, *supra* note 17, § 1.14[1], at 44, 45; *Developments*, *supra* note 30, at 891. To the present point, I find the following quite apt:

> An examination of cases involving fact situations and circumstances similar to those involved in this suit indicate that they have been instituted and courts have considered them under various designations, among them libel, trade libel, disparagement of property, unfair competition and malicious interference with business. However, their being called one type of action or another has not prevented courts from applying in a given case principles, elements or law governing decision in one of the other type actions used as a vehicle for such a suit.

Royer v. Stoody Co., 192 F. Supp. 949, 950 (W.D. Okla. 1961). *See also* Hayden, *supra* note 25, at 68.

39. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). *See also* Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Jan. 29, 1926), *in* HOLMES-LASKI LETTERS II 822-23 (Mark DeWolfe Howe ed., 1953); Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Feb. 17, 1928), *in* HOLMES-POLLOCK LETTERS II 215 (Mark DeWolfe Howe ed., 1946).

40. In his dissent in Truax v. Corrigan, 257 U.S. 312 (1921), Holmes spoke of the sovereign prerogative of the people to experiment by enacting laws addressing their "desires . . . in the insulated chambers afforded by the several States." *Id.* at 344.

super-sovereign United States, to the extent the Constitution commands.[41] I would like to think what follows might help our vertically dual sovereign in making its voice more articulate and more predictable, clear, reasonable, and practicable.

---

41. I have found the articulate voice of the federal/state sovereign in Mississippi in a variety of sources. Most prominent are its statutes and the decisions of the federal courts and of the Supreme Court of Mississippi. I draw heavily upon published expositions, such as Walker, *Common Law Protection*, *supra* note 21, at 335; the six papers published in 38 MISS. L. INST. PROC. ON BUS. TORTS (1983); and the five papers presented May 21, 1993, at the University of Mississippi Center for Continuing Legal Education's seminar entitled "The New Business Practice: Business Torts, Intellectual Property & Unfair Trade Practices."

The work of Professor William H. Page in antitrust law is in a class by itself. *See, e.g.*, Page, *Ideological Conflict*, *supra* note 12; William H. Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 MICH. L. REV. 2151 (1990) [hereinafter Page, *Antitrust Penalties*]; William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Efficiency*, 75 VA. L. REV. 1221 (1989); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985) [hereinafter Page, *Scope of Liability*]. *See* discussion *infra* Part V. I have learned much from the work of two prominent Mississippi scholars, Professor H. Lee (Herky) Hetherington, *supra* note 8, and Professor Gary Myers, *supra* note 13, although each speaks normatively of what the law ought to be and ranges broadly beyond the bounds of Mississippi and thus offends the positivist's injunction.

A special word need be said about the Restatements of the Law, for one of the occasions for this piece is the American Law Institute's present publication of the Restatement (Third) of Unfair Competition. Restatements have no official standing as such. However articulate their voice, they are the law of no state. And yet it is an observable fact that Mississippi's courts and lawyers regularly resort to the Restatements as highly persuasive and often dispositive sources of law. This is so historically. *See, e.g.*, Lowndes Coop. Ass'n v. Lipsey, 126 So. 2d 276, 277 (Miss. 1961) (Restatement of Contracts § 75, Definition of Consideration); Shurley v. Aaron, 80 So. 2d 61, 62 (Miss. 1955) (Restatement of Property § 44, Definition of a Determinable Fee); Tri-State Transit Co. v. Martin, 179 So. 349, 351 (Miss. 1938) (Restatement of Torts § 461, Liability for Aggregation of Preexisting Injury); C.L. Gray Lumber Co. v. Shubuta Motor Co., 153 So. 155, 156 (Miss. 1934) (Restatement of Agency § 8, Definition of Apparent Authority). And it remains so today and across the legal spectrum. *See, e.g.*, Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 92-93 (Miss. 1992) (Restatement of Restitution §§ 14, 173); McCoy v. Colonial Baking Co., 572 So. 2d 850 (Miss. 1990) (Restatement (Second) of Judgments § 48, Preclusion in Loss of Consortium Claims); Newman v. Newman, 558 So. 2d 821, 823-25 (Miss. 1990) (Restatement (Second) of Conflicts of Laws §§ 258, 259, Interest in Movables Acquired During Marriage, Removal of Movables by Spouse to Another State, Law of Forum Governs Domicile, Respectively); Osborne v. Bullins, 549 So. 2d 1337, 1339 (Miss. 1989) (Restatement (Second) of Contracts § 360, Remedies for Breach of Promise to Purchase); Marter v. Scott, 514 So. 2d 1240, 1242-43 (Miss. 1987) (Restatement (Second) of Agency § 228, Applying § 228 Test for Whether Conduct of an Employee is Within the Scope of Employment); Allgood v. Allgood, 473 So. 2d 416, 421 (Miss. 1985) (Restatement (Second) of Trusts § 440, Trust Arising Where Transfer of Property Made to One Person With Purchase Price being Paid by Another).

The Restatements of Torts have been particularly influential. Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990) (Restatement (Second) of Torts § 652D, Invasion of Privacy); Brocato v. Mississippi Publishers Corp., 503 So. 2d 241, 244 (Miss. 1987) (Restatement (Second) of Torts § 611, Official Proceedings Privilege); City of Jackson v. Keane, 502 So. 2d 1185, 1188 (Miss. 1987) (Restatement (Second) of Torts § 930, Damages for Invasion of Real Property); Fulton v. Mississippi Publishers Corp., 498 So. 2d 1215, 1216 (Miss. 1986) (Restatement (Second) of Torts § 558, Defamation); Prescott v. Bay St. Louis Newspapers, Inc., 497 So. 2d 77, 79 (Miss. 1986) (Restatement (Second) of Torts § 652E, Publicity Placing Persons in False Light); Candebat v. Flanagan, 487 So. 2d 207, 212 (Miss. 1986) (Restatement (Second) of Torts § 652H, Invasion of Privacy); Thomas v. Global Boat Builders & Repairmen, Inc., 482 So. 2d 1112, 1115 (Miss. 1986) (Restatement (Second) of Torts § 928, Harm to Chattels); An Attorney v. Mississippi State Bar Ass'n, 481 So. 2d 297, 299 (Miss. 1985) (Restatement (Second) of Torts § 158, Trespass); Shaw v. Burchfield, 481 So. 2d 247, 255 (Miss. 1985) (Restatement (Second) of Torts § 766, Intentional Interference With Business Relations); Hardy v. Brantley, 471 So. 2d 358, 370 (Miss. 1985) (Restatement (Second) of Torts § 429, Liability for Tort of Independent Contractor Where Services are Accepted From Independent Contractor in Reasonable Belief that he is an Agent of the Employer); Rogers v. Huber, 239 So. 2d 333, 334 (Miss. 1970) (Restatement (Second) of Torts § 141, Affray or Similar Breach of Peace); Oden Constr. Co. v. McPhail, 228 So. 2d 586 (Miss. 1969) (Restatement (Second) of Torts § 392, Liability of One Supplying Chattels for Use of Others); Thompson v. Reily, 211 So. 2d 537 (Miss. 1968) (Restatement (Second) of Torts § 408, Liability of Lessor for Chattels); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966) (Restatement (Second) of Torts § 402A, Products Liability), *cert. denied*, 386 U.S. 912 (1967).

Yet there have been moments where the court has balked. *See, e.g.*, Pugh v. Easterling, 367 So. 2d 935, 937-38 (Miss. 1979) (refusing to adopt Restatement of Torts § 667, Effect of a Judgment of Conviction on Question of Probable Cause for Malicious Prosecution); Wilbourn v. Hardin, 234 So. 2d 606, 610 (Miss. 1970) (refusing to adopt Restatement of Torts §§ 357, 362, Liability of Lessor to Lessee for Condition of Property).

All of this before us, we do not compromise our stance as unrepentant legal positivists when we resort generously, although not blindly, to the recent Restatement (Third) of Unfair Competition and the generation-old Restatement (Second) of Torts. (We are not unaware that the American Law Institute has recently taken the first steps toward a Restatement (Third) of Torts.) *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 1, 1994); APPORTIONMENT OF LIABILITY, PROSPECTUS (1994).

Natural law or no, it is an observable fact of human behavior that most of us most of the time treat like cases alike, and different cases differently, and with maturity the more so. We tend to think our decisions should make sense to an intelligent layman and particularly to the parties to yesterday's case. When we fail in these, we experience guilt and seek grounds for excusing or justifying our behavior. This is why, over time, the law tends toward efficiency in policy and coherence in principle. As elsewhere, gain attends respect for the evolutionary process. Yet, what is actionable is a function of the positive law of the state and, by its nature, is inherently arbitrary, and it will remain so in spite of our best efforts.

D. The Harness That Holds the Competitive Imperative

Our common practice is enterprise and competition and bargain and exchange, the marketing of goods and services within a relatively free market economy, subject to the reasons for, and the realities of, the regulatory state. Each of the actions and remedies noted above addresses one facet or another of the behavior of markets and of those persons and collections of persons who make up the private sector and who buy and sell and contest with one another at each level, horizontally and vertically. As we will see, the policy judgment that tends to be found imbedded within, and that best explains and justifies, the rules in each of these legal compartments is that free market competition is good, that it serves the public interest when it is vigorous and innovative, but that this is so only when it is pursued by fair means.[42] Experience has taught us certain market practices have harmful effects in that they impair competition substantially. These range from the cartel and the monopoly which tend to destroy competition altogether to the dirty tricks that tend toward the law of the jungle. We have learned, if we are to pursue our policy fully, we must attend to these practices and proscribe those with known negative effects, although we debate passionately the means of doing so and the proper instrument of proscription.

But market participants and their practices are regulated vis-a-vis consumers as well and in no less important nor unrelated ways, and so we err when we limit the field to laws addressing competitive practices.[43] The positive law addresses many forms of market behavior two-fold, by rules regulating competition, on the one hand, and by rules governing the seller/buyer relationship, on the other. Deceptive marketing, for example, harms competitors and consumers. The same may be said of other forms of unfair competition. We each may expect that the law address us with a single voice, or, at least, that it not make of us simultaneous inconsistent demands.[44] We enhance the chance law will approach this end when it attends the policy undergirding the field. Here, vis-a-vis consumers, the policy judgment that seems to explain and justify the rules in the field is that freedom to contract and to

---

42. *See generally* 1 MCCARTHY, *supra* note 17, §§ 1.01-1.03.

43. Professor Myers states that "[t]he term 'business tort' describes a wide array of tort-based claims asserted in the context of disputes between competitors, customers, or parties in vertical relationships." Myers, *supra* note 13, at 1107.

44. *See* FULLER, *supra* note 2, at 65-70.

bargain and exchange is good, but only where the seller and buyer are competent adults acting in absence of fraud, duress, unconscionability, or other conduct the state's positive law has declared against public policy. There is potential for mischief when we exclude from our thinking and from the field (some) consumer protection laws. There is like potential when we fail to pursue accommodation and rational and productive coexistence of these laws and their underlying policies with the law of unfair competition.

E. Commonality and the Search for Principle

Given the disparate legal pedigree and history of the assorted torts listed above, it is not surprising few have come forward with an overarching principle unifying the area. Certainly, no such offering has commanded general assent. Professor McCarthy goes so far as to suggest that "no useful purpose is served by struggling for a sweeping definition."[45] But some have tried, and perhaps we can learn from their failures.

From time to time, as we have noted, a view labeled "prima facie tort" has surfaced. The notion is usually traced back to *Mogul Steamship Co. v. McGregor, Gow, & Co.*:[46] "[I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."[47] Holmes took a shot at it in *Aikens v. Wisconsin*:[48] "It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."[49] The prima facie tort has been less than successful,[50] if, for no other reason, its generality approaches abstraction. Professor Walker tried his hand a few years back: "A business tort provides protection for one's economic expectancies. . . . [T]hese torts provide redress when one's expectation of economic gain is thwarted by another."[51] This has the advantage of including, in theory, both competitors and buyers/consumers as protected parties and potential plaintiffs. It tells us some things we must know about the business tort but hardly enough. For example, we are told nothing of the law's central preference for the protection of *competition*, not *competitors*,[52] nor of the deeper union between antitrust and tortious interference law as each seeks to protect *fair* competition. Walker fails in the end because, as he admits, "not every interference with an economic expectancy will be sanctioned."[53] Some notion of

---

45. 1 McCARTHY, *supra* note 17, § 1.03, at 16.
46. 23 Q.B. 598 (1889).
47. *Id.* at 613.
48. 195 U.S. 194 (1904).
49. *Id.* at 204.
50. *See* ALEXANDER, *supra* note 30, § 6.1.
51. Walker, *Business Torts*, *supra* note 27, at 2.
52. *See* 1 McCARTHY, *supra* note 17, § 1.14[2], at 48; *cf.* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).
53. Walker, *Business Torts*, *supra* note 27, at 2.

impropriety in the interference is needed. After all, it is difficult to imagine *any* successful economic activity by *any* market participant that does not adversely affect someone else's economic expectancies.[54] This is inherent in a market economy. We want some businesses to disappoint some of their competitors' economic expectancies, to the end that the market will tend toward efficiency and consumers will enjoy quality goods and services at reasonable prices. Professor Walker's definition omits this core concern and, in consequence, suggests no principled way of distinguishing actionable acts and practices from those that are not. At the very least, something must be said about the defendant's means or the likely effects of his conduct. In point of fact, our law has much to say of means, as may presently appear.

III. AN INTERPRETIVE STRATAGEM[55]

A. An Overview

We may best answer the client's demand, "But what must I do?" if we understand the law of business torts *en grosse*. And we may best understand the law of business torts *en grosse* if we have well in mind a coherent approach to the interpretation of legal phenomena. In summary form, first we identify the valid rules in the field and the core content of each. We work our hardest to be good positivists.[56] Errors here are inevitable, but we hope to hold them to a bare minimum,

---

54. *See* 1 MCCARTHY, *supra* note 17, § 1.12, at 40; Franck, *supra* note 18, at 164.

55. In bits and pieces I have over the years struggled to articulate an intelligible approach to the interpretation of legal phenomena. Extrajudicially, I have done this through a series of articles. *See, e.g.*, James L. Robertson, *Myth and Reality – Or, Is It "Perception and Taste"? – In the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045 (1993) [hereinafter Robertson, *Myth and Reality*]; James L. Robertson, *Of Bork and Basics*, 60 MISS. L.J. 439 (1990) [hereinafter Robertson, *Bork*]; James L. Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure*, 8 MISS. C. L. REV. 111 (1988) [hereinafter Robertson, *Rule 11*]; Amy D. Whitten & James L. Robertson, *Post-Custody, Pre-Indictment Problems of Fundamental Fairness and Access to Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247 (1988) [hereinafter Whitten & Robertson, *Mississippi's Opportunity*]. Within my more constrained judicial role, I often spoke to the point. *See, e.g.*, Chevron U.S.A., Inc. v. State, 578 So. 2d 644, 651-53 (Miss. 1991) (Robertson, J., dissenting); Thornhill v. System Fuels, Inc., 523 So. 2d 983, 1003-09 (Miss. 1988) (Robertson, J., concurring); Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 357-58 (Miss. 1986) (Robertson, J., dissenting); Grisham v. Hinton, 490 So. 2d 1201, 1208-09 (Miss. 1986) (Robertson, J., concurring). Then there were the days when my efforts were more compromised by the need to command a majority of the court. *See, e.g.*, Richardson v. Canton Farm Equip., Inc., 608 So. 2d 1240, 1250 (Miss. 1992); Simmons v. Bank of Miss., 593 So. 2d 40, 43 (Miss. 1992); Mississippi Ins. Guar. Ass'n v. Vaughn, 529 So. 2d 540, 542 (Miss. 1988); J.L. Teel Co. v. Houston United Sales, Inc., 491 So. 2d 851, 857 (Miss. 1986); *In re* Brown, 478 So. 2d 1033, 1039-40 (Miss. 1985). I seek here to build on the ideas expressed in these disparate sources and settings.

56. The version of legal positivism we have in mind is that of Professor Hart in H.L.A. HART, THE CONCEPT OF LAW (1961). This is supplemented from time to time by references to Holmesean rhetoric. We regard positivism as the only tenable point of beginning if, as we hope, we may avoid charges of bias and prejudice. Alas, we may not escape positivism's incompleteness, much of which we seek to fill with resort to Dworkinian principles and integrity. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE]. Because we do this as a matter of conscious secular choice, we stay within the tenets of legal positivism. *Cf.* General Motors Corp. v. State Tax Comm'n, 510 So. 2d 498, 500 (Miss. 1987) (no natural law in state tax case); Dye v. State *ex rel.* Hale, 507 So. 2d 332, 342-47 (Miss. 1987) (positivistic approach to state separation of powers doctrine); Trigg v. Trigg, 498 So. 2d 334, 336 (Miss. 1986) (positivistic approach to participation action between married persons); Neal v. State, 451 So. 2d 743, 762 (Miss.) (positivistic approach to definition of mitigating circumstances in death penalty case), *cert. denied*, 469 U.S. 1098 (1984).

trusting those that remain will be seen as failures of eyesight, not integrity.[57] We may not ignore any rules fairly within the field, nor the authoritative content of any such rule, nor may we ignore the origin, nature, or life of those rules.

It is reasonably safe to proceed with the rules—the "business torts"—labeled and listed in Part II above. They are the yield of a full and fair survey of the work in the area. They seem the product of consensus. But, when we say this we must keep in mind that by definition the field consists of *all* rules that regulate the competitive practices of market participants vis-a-vis each other and their contractors and buyers and ultimate consumers. We face an open field. New kids on the block are as eligible to play as the veterans, an example being the emerging right of publicity. Besides this, each business tort rule has its core (of certainty) and its penumbra (of doubt), as does the field as a whole. Most judge-made rules are enmeshed in considerable dicta, confusion of concept, and other barriers to essential statement. A residual business tort inheres in the enterprise, as we have already seen.

We strive to understand the underlying principles which best explain these rules in the aggregate and best cohere among each other, for these principles must serve as our bedrock for filling the gaps[58] necessary to just adjudication in given cases, and en route resolving the uncertainties inevitably a part of any system of legal rules. These principles interact electromagnetically among each other. Their combined electromagnetic force gives life to other principles and rules. The process of interpolation and extrapolation is never-ending, for law is not something that is, but "a continuous process of *becoming*."[59] Though the words may not change, meaning inevitably will.[60]

There is a central notion, common to all rules (and not just rules of law). Imbedded within each rule is a purpose—one or more reasons justifying its existence, and what we should seek in the beginning is not necessarily what its author(s) had in mind, but the most sensible purpose and justification a hypothetical, omniscient, worldly and wise author drafting that rule may have in mind at the moment. We lawyer best when we afford each rule that circumstanced external reading that best *fits and justifies* that rule *today*.[61] Seeing this is essential to law's success as an instrumental enterprise. No formalistic straight-jacket or

---

57. I trust further that these inevitable failures of eyesight and understanding will not impugn the viability of the method I attempt here to present in summary form. No doubt there are others of greater perception and understanding who may apply the method to the field of business torts with greater effect.

58. *But see* Galloway v. Travelers Ins. Co., 515 So. 2d 678, 685-86 (Miss. 1987) (Robertson, J., concurring) (discussing filling gaps in law by reference to economic realities).

59. Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 930 (1951). *See also* O.W. HOLMES, JR., THE COMMON LAW 1 (1881) [hereinafter HOLMES, COMMON LAW] ("In order to know what [the law] is, we must know what it has been, and what it tends to become.").

60. *See* Andrews v. Lake Serene Property Owners Ass'n, 434 So. 2d 1328, 1332 (Miss. 1983). *See* discussion of "malice" *infra* Part IV.

61. I have often borrowed Ronald Dworkin's notion of legal interpretation having two dimensions: the dimension of fit and the dimension of justification. *See, e.g.*, Dye v. State *ex rel.* Hale, 507 So. 2d 332, 342 (Miss. 1987); Frazier v. State *ex rel.* Pittman, 504 So. 2d 675, 710 (Miss. 1987) (Robertson, J., concurring in part, dissenting in part); Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985). I do so again. As before, I make no promise that I define or use these dimensions as Dworkin would.

mathematical formula awaits. There is no escape from the lawyering job, and it is important that we pause to assess the attitude we need bring to our task.

B. *The Dimension of Fit*

1. A First Approach

We begin by identifying the valid rules in the field and proceed by drawing with as much precision as is reasonably practicable the positive core contours of each discrete rule. The rules constructed and assembled, we place them in a vertical ordering: federal constitutional law (where it exists), then federal statutory law at the top, and descending according to conventional rankings. Within state law, most familiar is that statute law trumps case law,[62] as do duly authorized administrative regulations. Many do not think of contracts and other private law species as law, but they are, and make no mistake about it. A contract renders less optional what you may do, if you are a party to it, as a statute that addresses you limits your choices. Though less important than in other areas, privately-made law forms are not an insignificant part of the law of business torts,[63] particularly in the vertical interactions of market participants.

In a field as historically balkanized as business torts has been, treating each as a discrete tort and restricting interpretation of each to its literal language will invariably prove unfortunate, and especially is this so with the non-statutory rules we must somehow tease from the often confused rhetorical flourishes of appellate judges, not to mention their often less-than-apt quotations from ambivalent encyclopedic authority. The law may not be a wholly rational and practicable construct, nor a seamless web, but the people it affects are entitled to our best efforts to make it so.[64] Professor Ronald Dworkin has suggested a useful approach to this end. We should "identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness."[65] We think of the law of business torts as an integrated whole, and we give that whole the most enlightened and coherent reading that we may find. That reading must fit the language and content of the rules, but it must not only fit; it must provide the best fit, and in seeking this best fit, we must respect the electromagnetic force of other law.

We gather together all of the valid rules in the field and imagine they were given us by a single author who took seriously his duty to enact a coherent, principled, and practicable corpus juris. But this does not mean we seek the intent of any particular lawmaker or body of lawmakers. The law demands a circumstanced

---

62. I trust we are well past the point of that ultimate instance of judicial arrogance where sensible persons still think statutes in derogation of common law should be strictly construed.

63. I realize the purist, the formalist, and those of limited imagination may shudder at the suggestion. I offer only that it is undeniable that much market behavior is regulated by private agreements—contracts—and no profit attends efforts to exclude these from the sources the lawyer should consult before advising the client what he must do.

64. Robertson, *Bork*, *supra* note 55, at 489.

65. DWORKIN, LAW'S EMPIRE, *supra* note 56, at 225.

external reading – the reading it would be given by a reasonably informed external observer, given the text and the circumstances that have given it birth and nurture[66] and the legislative facts that best justify its existence today.[67]

There is another thought experiment I find helpful at the dimension of fit and that I commend for inclusion in our interpretive arsenal.[68] It is a sort of trial and error tactic. In divining content and assigning meaning to a legal rule, particularly in difficult cases, we first intuit the possible principles within the text of that rule. We then take the principles we list and, one by one, in the case of each, ask whether an author, intellectually honest and faithful to the dream of a coherent and principled body of law, and who accepts the given principle and has pursued it through concrete rules of law, could have produced the rule(s) at hand. However congenial the principle, it must be discarded if it would not so yield the rule. For example, you may find attractive the principle of Christian charity and order your life by it in your relations with others. But you may not resort to that principle to explain and interpret the law of business torts. No one who accepted the principle of Christian charity and sought to implement his beliefs in writing the laws that govern the marketplace could have given us the rules that make up the field of business torts. The same may be said of social Darwinism at the other extreme, for no true disciple of that view could have given us the fairness component we find so prominent in each business tort. In the end, the principle prevails that best fits and explains the valid rules in the field. That principle becomes our legitimate and powerful resource for deciding the hard case when it arises.

2. The Concept of Legal Validity

To be a legitimate object of interpretation, a rule must be valid, and we must be clear what we mean when we say this. To say that a rule has validity is to make a foundational statement. It is a statement that may be made of any rule of any institution or practice, a statement that when true gives the rule its reality and enforceability. It pretermits notions the untrained mind seems ever to want to bring to the interpretive table, and ultimately frees the rule, in an aphorism familiar today in an altogether different setting, to become the best it can be.

We must flesh out the point. When a person asserts a right or a remedy, he may expect to be challenged, what rule confers that right, provides that remedy, and whence that rule?[69] Our duty to respect and enforce his claim hinges on his answer. What counts as law, and thus becomes social fact and a fit subject for legal interpretation, is only that which satisfies the criteria of legal validity [hereinafter CLV].[70] Those criteria are two-fold: (1) Did the person or persons who made the

---

66. I have elaborated this view in the case of wills and other donative documents. *See* Robertson, *Myth and Reality*, *supra* note 55, at 1045; and in the case of constitutional texts, see Robertson, *Bork*, *supra* note 55, at 439.

67. *See* Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 357 (Miss. 1986) (Robertson, J., dissenting).

68. Here again, I learn from Professor Dworkin. DWORKIN, LAW'S EMPIRE, *supra* note 56, at 240-50.

69. One familiar example today is the media's persistent claim of "the public's right to know."

70. Thirty years ago, H.L.A. Hart refocused our attention on the centrality of the concept of legal validity, and much of what follows flows from his work. HART, *supra* note 56, at 97-107.

rule at hand, by virtue of some other valid rule of law, have authority to make the rule?; and (2) Assuming the person or persons had rule-making authority, did they make the rule in accordance with the procedures specified by other valid rules of law?[71] We must attend both to the existence of law-making power and, as well, to its right exercise. These criteria are critical for all genera and species of law: the public law, such as constitutions, statutes, common/case/judge-made law, and administrative regulations; and also for the privately-made law, such as corporate charters, collective bargaining agreements, contracts, trusts, and wills. The CLV must be met in the case of each rule of whatever genera or species if that rule is to have the power to render non-optional things we might otherwise want to do or to generate rights that we may demand the state and its citizens enforce and respect.

For illustration, if a man dies and we ask whether his will is valid, we must first ask whether when he made the will he was over a certain age and was of sound and disposing mind, memory, and understanding. If we answer that question in the affirmative, we then ask, did this person who had by law been empowered to make a will, act in conformity with the procedural requisites for so doing?[72] And to this end, we ask whether the will was in written form, whether it was subscribed by the testator at the end, and whether it was properly witnessed; in other words, whether it complied with the various formalities the law insists upon before a will may be given effect.

The rules regarding the identification of persons with legal power to make wills, contracts, statutes, and constitutions and prescribing the procedural formalities requisite to each are customarily in written form. The case of statutes is illustrative and is particularly important in any inquiry into the field of business torts. A bill becomes law when it follows a certain procedural course and is enacted by the requisite majority of each house of the Congress or the state legislature, as the case may be, and when it is approved by the President or the governor.[73] Only that which has received these approvals acquires the status of law.

3. The Import of Legal Validity

What then do we do with these valid rules we so identify? When we ask this question, we are led immediately to a mistaken notion many otherwise sensible persons perennially find attractive. Our public expressions suggest we believe, when we interpret a valid rule regulating market behavior, or any other behavioral phenomena, for that matter, we are in fact finding and enforcing the specific wishes the lawmakers had in their collective minds at the time they made the rule. The text is seen transformed into the lawgivers' thoughts and their product. We see

71. Hart calls these criteria "secondary rules," or sometimes "secondary rules of recognition." HART, *supra* note 56, at 91-96.

72. *Cf.* Williams v. Mason, 556 So. 2d 1045, 1048-49 (Miss. 1990) (listing procedural requisites for contracts to bequeath property by will).

73. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 956-57 (1983) (House of Representatives resolution ordering deportation of alien declared unconstitutional because not passed by Senate or signed by President).

ourselves, first, finding the legislative intent if it be a statute before us, and, then, construing the statute in accordance with the intent so found,[74] a process that at the very least puts the cart before the horse. Worse, we see the act but a door between the reader and legislators' intent. Once the door opens we enter into the world of intent, and the textual door having served its purpose is laid aside. But this is all wrong! Nothing is more certain than that elementary notions of legal validity wholly preclude giving lawmakers' unexpressed intentions authoritative effect. "Judges interpret laws rather than reconstruct legislators' intentions."[75] We proceed, blithely oblivious to our inability to know but a part of a legislator's mind, and that imperfectly at best. Vain is the search for actual intent in a world where probable intent of a few, and at but one fleeting moment in time, is the most we may ever know. The inescapable reality is that lawgivers' subjective intent may not be known with sufficient certainty, completeness, and frequency that we may successfully ground in it our jurisprudence of legal interpretation, even if it were otherwise desirable that we should do so.

It is important to recall that no one votes for any extra-statutory "legislative intent." The chief executive approves no unwritten expression of legislative intent, and his approval is essential to the validity of the statute—a point we often overlook. No court charged with interpretation may grant authority to notions of legislative intent except insofar as that intent may be found embedded in the written words upon which the lawmakers do vote. "[W]e are not free to replace [law] with an unenacted legislative intent."[76] Nor do legislative committee reports, floor debates, and the dozens of other items comprising the political history of a statute emphatically bear the imprimatur of legal validity. "Judicial faithfulness to legislative will consists not in crude gropings into the consistently dark closets of legislative history but in a fine faithfulness to the mediating power of the legislative word."[77]

Yet, there is much mythology afoot about statutory interpretation, and few ideas[78] are as potentially pernicious as setting aside the text, and treating as authoritative, sources such as legislative intent and legislative history that do not enjoy the status of law. The former is ephemeral and the latter persuasive at best. The rules we respect and enforce may legitimately be found only among those materials satisfying the CLV. We have chosen the vessel of the written word to convey

74. We tend to do the same with all legal texts, including (to take an example far-removed) donative documents. RESTATEMENT (THIRD) OF PROPERTY (DONATIVE TRANSFERS) ch. 10-scope note; § 10.1 cmt. d (Preliminary Draft No. 2, Sept. 11, 1992).

75. Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring). *See also* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (Jackson, J., concurring).

76. *Cardoza-Fonseca*, 480 U.S. at 453 (Scalia, J., concurring).

77. Kansas City S. Ry. v. McNamara, 817 F.2d 368, 373 (5th Cir. 1987).

78. Almost as pernicious at the other end of the spectrum are the so-called "four corners" rule and the notion that statutes (or, for that matter, any other species of legal texts) may or should be divided by whether they are ambiguous or unambiguous. *See* Thornhill v. System Fuels, Inc., 523 So. 2d 983, 1006-07 (Miss. 1988) (Robertson, J., concurring).

the law's directives, and we must sail those vessels as ably as we may. Judge Thomas Gee has struggled with the point: "Our legislators are servants of the public, and when they speak in statutory language—that most public form of discourse—their motives and desires are submerged into a public product intelligible in a public context."[79] Judge Gee then warns provocatively of our failure to attend his admonition:

> If we do not take a legislative body at its word, we run the risk[80] of substituting our own normative (and inherently non-democratic) views,[81] of disrupting the strange political trade-offs that make democracy possible,[82] of—worst of all—polluting a public language of relatively fixed meaning and reference, a language necessary for the public discourse we call self-government.[83]

The point of all of this is to fix firmly in mind that each effort at interpreting a rule of law begins with—and is ever subject to critique by reference to—the CLV-approved text; that is, the language that has been enacted and thus formally made a part of the law. Only that, and all of that, which has satisfied the CLV, forms a part of the legal text so that it confers legal powers and rights and is a legitimate object of interpretation, so that when a citizen sues it becomes a necessary object of interpretation. Because of the highly generalized and at times even abstract language used in rules of law, competent interpretation is imperative. The phrasing may be fuzzy. The implicit policy judgments may be multiple and at odds one with the other. Not even statutes of limitations are always susceptible of mechanical application. The matter is more difficult at the level of common/case/judge-made law, for there we must extract from each case the most narrow reading of the rule which, applied to the facts, would yield the judgment of the court, and, then assimilate a series of such rules into a coherent prediction of what the court will likely do in fact in the next case.[84] I may not refrain from working because the draftsmen have made my work difficult.[85] Judgment and discretion are inevitable. The legal text is and must be our ultimate referent when questions of meaning are presented, for fidelity to law demands nothing less than that any interpretation of a legal text first and foremost must fit that text rather than some other text we may wish had been enacted.

---

79. *McNamara*, 817 F.2d at 373.

80. Judge Gee has drawn a line on these risks. "We will run these risks when the statutory language leads to absurdities . . . but not when the language of the statute merely makes Congress look foolish." *Id.*

81. The same phenomenon occurs when a court refuses to take a testator at his word and begins interpreting a will according to its view of the testator's intent. *See* Robertson, *Myth And Reality*, *supra* note 55, at 1051-52.

82. Here Judge Gee cites and quotes the colorful and less-than-reverent dissenting expression of Justice George Ethridge in Crippen v. Mint Sales Co., 103 So. 503, 505 (Miss. 1925).

83. *McNamara*, 817 F.2d at 373.

84. Holmes, *Path of Law*, *supra* note 1.

85. One of the worst legal texts I have seen is MISS. R. CIV. P. 11. Using the methods I describe here, I like to think I have made some sense of it. *See* Robertson, *Rule 11*, *supra* note 55, at 111.

4. The Circumstanced External Approach to Legal Interpretation

I know of no mandate in the positive law concerning how we read rules of law. Yet, it matters how we do so. Our lawmakers have selected the medium of the written word within which to create, ratify, and preserve the rules we go by. Because that medium bears CLV sanction, we must in our interpretive enterprise accept and work with the properties of language, not to mention the human condition. But when we approach difficult texts, we confront the fact that we have no particular interpretive stratagem that enjoys legal validity. That is why we are free – and duty bound – to fashion that approach to legal interpretation that makes our law the best it can be.

I would have us accept that we pursue circumstanced external standards for reading and interpreting legal texts. My suggestion has three dimensions: First, a circumstanced external approach to interpretation of legal texts is theoretically and practicably more satisfying. Perhaps it is a matter of taste, but by the nature of language I feel more comfortable saying that a text made by particular lawgivers under certain circumstances (insofar as we may know them) means this or that, rather than saying I have found the lawgivers' actual intent and will force the text to fit that intent. Second, and more pragmatically, the difficulty of finding lawgivers' actual subjective intent with any acceptable level of confidence, comprehensiveness, or frequency leaves us no choice but to pursue external standards.[86] Third, and surely most important to any good legal positivist, a circumstanced external approach to interpretation of legal texts affords a better explanation of what courts have been doing in fact, for it is all they can do in fact, albeit they often protest otherwise.

My idea is not original nor even of recent vintage. A hundred years ago, Holmes spoke of external standards in the reading of legal texts. Contracts rested "not on the parties having *meant* the same thing but on their having *said* the same thing."[87] Further, "nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent."[88] In the case of statutes, Holmes asked not "what the legislature *meant* . . . [but] what the statute *means*."[89] Of legal documents generally, he insisted:

> [W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were

---

86. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 102 (1990).

87. Holmes, *Path of Law*, *supra* note 1, at 464.

88. Holmes, *Path of Law*, *supra* note 1, at 464.

89. OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 207 (1921). *See also* Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) [hereinafter Holmes, *Legal Interpretation*] (emphasis added). I have often relied on this truism. *See, e.g.*, Estate of Stamper, 607 So. 2d 1141, 1145-47 (Miss. 1992) (interpretation of prior judgment of lower court); White v. Hattiesburg Cable Co., 590 So. 2d 867, 870 (Miss. 1991) (Robertson, J., concurring) (statutory interpretation); Chevron U.S.A., Inc. v. State, 578 So. 2d 644, 651 (Miss. 1991) (Robertson, J., dissenting) (constitutional interpretation); Bowe v. Bowe, 557 So. 2d 793, 795 (Miss. 1990) (interpretation of prior judgment of lower court).

> used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were.[90]

Holmes then put it all in context: "But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law."[91]

The case for an external approach to interpretation has been made in the context of a great variety of legal texts, from constitutions to contracts.[92] Of course, there remain many who resist, who insist that we seek the will-o-the-wisp, and so we continue to hear talk of the intent of "the Framers,"[93] the intent of the legislature,[94] the intent of the contracting parties,[95] and the like. But even in the latter instance, the contractor gives his assent to the other party's external symbols, not to some unexpressed or imperfectly-expressed thoughts of the other, and he conveys that assent with symbols of his own. The interpreting court must have resort to supplemental rules where the contract fails of full expression. That these may yield a reading beyond the actual intent of the parties is seen necessary that we give coherence to the contract whether its makers did so or not. In the case of statutes the point is even more potent, given the diverse persons voting for the new law, the variety of thoughts each may have entertained as he activated the "aye" lever, and the more widespread the potential for mischief if we do not resort to circumstantial external interpretive standards.[96] So also and the more so in the case of constitutions.[97]

Notwithstanding our confident proclamations of our pursuit of lawgivers' intent, we, all of us—hide-bound formalist to enlightened realist—have in practice been using external standards through the years. We have in fact been imputing intent instead of finding it. The search for intent is invariably a search of indicia of intent, and so of its proof. A holding that a legislature intended this or that is not and cannot be but a holding that a reasonable legislature providing this text under these circumstances would most likely have meant this or that. And if I am correct that this is what we have been doing all along, why should we not say so? Candor

---

90. Holmes, *Legal Interpretation*, *supra* note 89, at 417-18.

91. Holmes, *Legal Interpretation*, *supra* note 89, at 418.

92. *See, e.g.*, Martin v. Maldonado, 572 P.2d 763, 767 (Alaska 1977); C & M Realty Trust v. Wiedenkeller, 578 A.2d 354, 357 (N.H. 1990).

93. Mistretta v. United States, 488 U.S. 361, 398 (1989); Hunt v. Hubbert, 588 So. 2d 848, 863 (Ala. 1991) (concurring opinion).

94. *See, e.g.*, Ladner v. Inge, 603 So. 2d 1012 (Ala. 1992); *In re* Klein, 585 N.E.2d 809, 812 (N.Y. 1991), *cert. denied*, 112 S. Ct. 1945 (1992). I think, for example, of the enormous energy combatants have expended seeking the congressional intent behind the Sherman Act, much of which is outlined by Bill Page in his recent article. *See* Page, *Ideological Conflict*, *supra* note 12. The venerable text is difficult, unknowable enough without the foolishness of peering into the minds of less than economically sophisticated senators and congressmen a hundred years ago.

95. Towle v. John Hancock Mut. Life Ins. Co., 130 N.E.2d 685, 687 (Mass. 1955); Pearce, Urstadt, Mayer & Greer Realty Corp. v. Atrium Dev. Assocs., 571 N.E.2d 60, 63 (N.Y. 1991).

96. *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 56, at 318-27.

97. *See, e.g.*, Robertson, *Bork*, *supra* note 55, at 460-65.

seems to require such a confession, although a cherished myth be shattered. The theoretical underpinning of the interpretive phase of our law of business torts ought be declared what it has been, is, and will ever be: the reading of valid legal texts by circumstanced external standards.

There is a bonus in the end. The circumstanced external approach centers on the lawgivers' text, and when it does so it affords them a unique opportunity. Without sacrificing any of its benefits, this external approach affords our would-be lawgivers one of life's rare occasions when they both eat and keep their cake. It tells them that, to the extent they express well their lawful intent in writing, they may expect that intent will be honored, for a long, long time. If their wishes be complex and if they employ competent drafting, their skillfully-written legal text will almost certainly win judicial approval and realize in fact their actual intent for years to come. For all practical purposes, these well-written legal texts mean the same under any approach to interpretation. Because they are well-written, they seldom lead to litigation. Their meaning is seldom contested when parties do sue over disputed facts or some other point of law. But where the text is not so well-written, where the statute admits of ambiguity or mistake or its meaning is otherwise problematic—aye, there is the rub. It is in these cases that our approach matters most.

To be sure, there are critics on our other flank. Much rhetoric is offered today that objectivity in law is illusory and no legal interpreter however skillful or honorable can ever escape "the prejudices . . . [they] share with their fellow-men."[98] Some would see Professor Page's insightful description of competing ideologies in antitrust interpretation[99] as a case study proving the impossibility of objectivity in legal interpretation external both to the lawmaker and the interpreter. I would be the first to concede—and reply—we are in a realm where our "reach should exceed . . . [our] grasp, or what's a heaven for."[100]

C. *The Dimension of Justification*

1. A Matter of Policy and Principle

Policy is most prominently a pre-rule phenomenon. It informs our making of rules and their content. It informs our extending, amending, restricting, and repealing of rules. Policy plays an important though conceptually different role in the post-rule circumstanced external approach to legal interpretation. As we approach each rule, we construct the most sensible policy our hypothetical lawgiver drafting that rule may have had in mind had he given us that rule but today. But as we say this, we know often there are several policies beneath a rule and they do not always mesh as neatly as we would wish. Just punishment of offenders, prevention

98. HOLMES, COMMON LAW, *supra* note 59, at 1.

99. Page, *Ideological Conflict*, *supra* note 12, at 1.

100. Robert Browning, "Andrea del Sarto," *in* THE COMPLETE POETICAL WORKS OF ROBERT BROWNING 452 (1930).

of future offenses, holding the social cost of crime to its optimal level, promoting the public security, and rehabilitation are among the many not necessarily consistent policies imbedded within most of the rules of our criminal justice system. They hardly point to the same judgment in a given case. And so our constructive process has its accommodative dimension, which invariably means hierarchial rankings where one policy must trump.

We (re)construct policy to understand why we have the rule, but once we find the rule, policy must share the field. At the dimension of justification we must ever test our reading of the rule by its policy base, but we must also do more. Rules by definition are equally laden with language and underlying principles. For example, policy explains why we have certain business subsidy programs, but matters of principle and fidelity to text help us more in deciding a particular business entity's entitlement. Policy as well explains the existence of rules proscribing unfair competition, but we must resort to a circumstanced external reading of principle and text to aid our understanding and enforcement of a given rule in a given case.

Of course, coherence in principle is one principal policy we pursue.[101] No matter how sound our pre-legal policy judgments, a measure of our success in transmitting those policy judgments into legal rules is whether over a given field they are consistent in principle. And, no matter how adept we may be in positing our legal rules, the whole enterprise founders if we apply those rules arbitrarily and capriciously. Substantial congruence between declared rule and official action is a *sine qua non* of legal justice.[102]

2. The Purpose Implicit in Each Law and Why It Must Be Sought

We must elaborate. Each rule, whatever its source, necessarily implies and reflects certain core values and purposes, and it does this imperfectly. Rules of law do not come into being willy-nilly. They are always created by one or more persons having in mind some reason(s) for enacting and some end(s) believed worthy and attainable, but at enactment the umbilical cords from the rules to their makers are rent. We should read rules in a way that promotes the policies and purposes we find imbedded in their language and their life. As we do this, we need to be sensitive to the nature of law in the contemporary world. Law is a purposive endeavor subjecting human conduct to the governance of rules.[103] As such, it is a social fact that affects us all, and, while law may or may not be an inexorable presence, it is certainly a manipulable instrument. Because it is so, we should seek from our law means to the end of a society in which we should all want to live.

We do know this: Each rule, each decision, each lawsuit is the product of human choice. However and whatever we choose, each gives off incentives to

---

101. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY].

102. LON L. FULLER, THE MORALITY OF LAW 81-83 (rev. ed. 1964).

103. *See* Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455, 460 (Miss. 1986).

behavior. That rules in statutory form have this etiology and effect is apparent. The reason this is so in the case of judicial decisions is we accept the rule of precedent, the fundamental principle of justice that like cases should be treated alike and different cases *appropriately* differently, a principle we lawyers label stare decisis. Yet stare decisis is hardly self-executing, nor is adherence to precedent. Wise exercise of discretion inheres in competent judging. Because of stare decisis, each decision will come to stand for one or more rules of law. However the court articulates its judgment (so long as it is on the merits), the case will come to stand more or less for the most narrow rule(s) which, when applied to facts, will yield the judgment the court rendered. Because of this and because of stare decisis, each decision is an economic phenomenon the same as a new invention, a price change, a flood, a plant closing, whatever. Though many discrete ripples be little noted, *en masse* legal activity is a mighty force and markets move in its wake.

A metaphor may enhance the point. The law represented by each of the labels listed above in Part II should be seen as rocks cast into a body of water, each splashing at the first moment and affecting all around it and then generating waves as concentric circles which gradually spread and weaken in force and effect the more they expand.[104] Yet perfect symmetry is an illusion. Judge Posner is right when he reminds us that "there is no metric for determining the social, political, or economic 'distance' between a prior, 'analogous' case and the present case."[105]

The terrible truth is, once caught in the grip of these insights, we are forever after laden with responsibility, with the knowledge that how we manage the law really matters. The trick is to minimize our aggregate error so that we minimize the harm our law does at once to our individual liberties *and* our social, economic, and political health, and to do this in a real world where people disagree what is good and what is bad.

The point may be put more graphically. Deciding a lawsuit is like shooting a gun. The bullet is going to strike something. We surrender the alternative of hitting nothing when we enter the courthouse. The first question is whether and to what extent knowing this makes it worth the trouble to open our eyes and try to figure out whom and what we are likely to hit.[106] The second question requires that the gunman assess his alternatives and decide on balance whom or what it is best to (try to) hit. As I was taught many years ago, it is one of the "objective facts of social existence—that the pie of social living [is dynamic and it] *can* . . . shrink

---

104. Chief Justice Hawkins states that "[w]hen we have a case before us which we have the lawful authority to decide, we have *no authority not to decide it*." Shewbrooks v. A.C. & S., Inc., 529 So. 2d 557, 560 (Miss. 1988). Chief Justice Hawkins follows with numerous judicial expositions to like effect, beginning with Chief Justice John Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). *Shewbrooks*, 529 So. 2d at 560-61.

105. POSNER, *supra* note 86, at 92.

106. Judge Posner offers a striking example. "The judge who analogizes oil and gas to rabbits and foxes may think he is taking a small step; actually he is impeding the efficient exploitation of valuable resources." POSNER, *supra* note 86, at 92. Posner's point is that the "rule of capture" for acquiring rights in certain things may be fine when those things are plentiful, i.e., rabbits and foxes, but it creates considerable problems when applied to essential and scarce resources, i.e., oil and gas. POSNER, *supra* note 86, at 92 & n.40.

away to or toward nothing," that "[g]iven a minimum of material goods,[107] the supplies of these and other intangible satisfactions depend mainly upon people having the wit to avoid placing limits upon them by their own folly."[108] This truth obtains in the case of lawsuits as in legislation, and helps explain why we must afford our law the reading that proceeds from the best justification we may find for its present content in the world around us.

3. What Best Justifies This Rule Now, Not Then

At the dimension of justification, we focus upon the present, not the past. We seek the best justification that may be found for the rule today,[109] not the justification that historically preceded its creation, although the latter may certainly inform the former. Justifying the rule today en route to giving it its best interpretation seems intuitively plausible to my mind, but the dogged persistence of (original) intent-based approaches to interpretation requires that we say more.

Our approach is best seen when we place ourselves in the position of a judge of the highest court of a jurisdiction called upon to overturn a settled case/common/judge-made legal rule. If we look to the reasons that gave rise to the rule—and, by all means, we should—we may find them wanting. We may find "the grounds upon which it was laid down have long vanished since."[110] Of course, we may turn the suitor away on stare decisis, but, if vested rights and reasonable and potentially detrimental reliance are not likely to be disappointed, this may not suffice. "*[B]lind* imitation of the past"[111] is hardly an attractive ground for decision.

It may be that in such a case new justification for the rule may be found. Why should we discard a rule because it arose in times and for reasons far removed from today's needs and thinking, if there be good reason now why we should want to keep it? And, if the reason be good today, what possible difference could it make that the reason was not thought of by those who made the rule?[112] A century ago Holmes presented a powerful statement of this thesis in explaining why the maritime law maintained in rem process for vessels although the personification thesis that was the genesis of the rule had come to be recognized for what it was—a metaphysical fiction.[113] Today we have ways of thinking of the efficiency of rules not

107. The perpetual condition of relative scarcity of the (tangible and intangible) goods and services we desire is one of the fundamental circumstances of justice. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 128 (1971); HART, *supra* note 56, at 192-93.

108. HART & SACKS, LEGAL PROCESS, *supra* note 7, at 112-13.

109. *See* Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 357 (Miss. 1986) (Robertson, J., dissenting).

110. Holmes, *Path of Law*, *supra* note 1, at 469.

111. Holmes, *Path of Law*, *supra* note 1, at 469 (emphasis added).

112. We find this idea figures prominently in Equal Protection analysis. When a classification is being scrutinized under the familiar rational basis test, the court asks not what the lawmakers had in mind when the discriminatory classification was enacted, but whether "any state of [legislative] facts reasonably can be conceived that would sustain it." Allied Stores v. Bowers, 358 U.S. 522, 528 (1959). *See also* Federal Communications Comm'n v. Beech Communications, Inc., 113 S. Ct. 2096 (1993); Morey v. Doud, 354 U.S. 457, 463-64 (1957); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

113. HOLMES, COMMON LAW, *supra* note 59, at 26-38. Of course, here, as so often, Holmes was at least a hundred years ahead of his time.

known when those rules were made, and it hardly makes sense we should not use these new assessment tools when asked to change or modify a rule. If the new justification would suffice to make the rule if we did not have it, *a fortiori* it is grounds for keeping it. More difficult is the case where the new justification is not adequate in and of itself but couples with predictability and stability as reasons for retaining a rule. If this be so, if the new justification be the best justification we may find for the rule today – a better justification than that which originated the rule – we should allow that new justification to inform our retention and reading of the rule, although predictability and stability form a further part of our reason for acting. We exhilarate in our opportunity to administer our law well and intelligently as we have been freed from intent-based approaches.

4. The Stratagem Exemplified

A recent example may help make the point. This state has long adhered to the doctrine of employment-at-will and its rule which provides

> that a contract of employment for an indefinite term may be terminated at the will of either party. The employee can quit at will; the employer can terminate at will. This means either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.[114]

This rule arose in an era when employer and employee were thought of as equals. Personal autonomy was our primary value. Opportunity was seen limited only by the drive and ingenuity of the individual. Formalistic symmetry was a cardinal virtue in law, which came to be seen a perfectible science.

We see the world differently today. For six or seven years, there were rumblings of discontent with the rule.[115] Most prominently, these cases recognized that

> [s]uch contracts in form are reciprocal in that either party may terminate at will. Still, we may not remain insensitive to the fact that the impact of termination upon the employee is in general more adverse in a way that is qualitatively different than what the employer experiences when it is the employee who walks off the job. We approach this case cognizant of the force of Anatole France's pointed observation that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[116]

Three cases[117] of late appear to have moderately modified but resettled the rule at its core. The rule has been narrowed and is now clearly a default rule – the parties

---

114. Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874-75 (Miss. 1981).

115. I have been among the rumblers. See the line of cases from Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985) to Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1091 (Miss. 1987) (Robertson, J., concurring) through and including Bobbitt v. Orchard, Ltd., 603 So. 2d 356 (Miss. 1992).

116. *Shaw*, 481 So. 2d at 254. *See also Bobbitt*, 603 So. 2d at 361.

117. Hartle v. Packard Elec., 626 So. 2d 106, 108 (Miss. 1993); McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 606-07 (Miss. 1993); Rosen v. Gulf Shores, Inc., 610 So. 2d 366, 368-70 (Miss. 1992).

may modify it by contract. And we have a number of public policy exceptions,[118] whatever the parties agree. But otherwise the rule is unchanged. Though the ideas that led to the rule in the first place now seem silly, reflection on actual practice presents a different picture.[119]

To illustrate our method, we describe it at some length. Seldom in practice does the rule insulate arbitrary or malicious or irrational firings, for no sensible employer goes around firing people at random. To be sure, experience has taught that some employers are not so sensible and act for reasons we cannot sanction. We have addressed these and proscribed firings where widely-shared public policy persists.[120] These areas aside, the law allows economic self-interest to regulate and incite the behavior of both employers and employees. It presumes that, however imperfectly such self-interest may function as a regulator, it will work better than judicial intervention. Economic self-interest provides a powerful incentive to employers that they shape and enforce personnel policies that develop and maintain a stable, competent, and loyal work force of high morale. Self-interest enjoins employers from discharging competent employees, unless for some very good reason they feel they must. The rule accepts what surely common sense says we must accept, that employers are granted a broad discretion to make personnel decisions and to consider all legally permissible factors. And so no employer has a right of action when it invests years of time and trouble in training an at-will employee, only to have him/her quit for a better paying job elsewhere.

One important function the rule of employment-at-will performs in the real world is it tells employers that their personnel decisions will not be subject to nit-picking, second guessing, and Monday morning quarterbacking in courts of law. It proceeds on the assumption that judicial (and, particularly, jury) review of discharge decisions will almost certainly yield a harvest of injustice that will exceed that which we may experience from the regulatory regime of economic self-interest. The rule accepts the realities and inadequacies of the microscoping twenty-twenty hindsight the trial process brings to bear, the utter impossibility of

---

118. Beyond the whistleblower-type exception added in the *McArn* case, a plethora of statutory exceptions have excluded from the rule a number of practices we have found intolerable. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17 (1988) (an employer may not terminate an employee because of his race, color, religion, sex, or national origin); MISS. CODE ANN. §§ 93-11-111(9), - 117(2) (1994) (employees may not be fired for being subject to a child support garnishment). Many federal statutes prohibit employers from discharging employees who have exercised their rights to complain under a statute or have acted as a witness for another employee who has complained. *See generally* National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3), (4) (1975); Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3), 216(b) (1975 & Supp. 1982); Age Discrimination in Employment Act, 29 U.S.C. §§ 623, 631, 633(a) (1975 & Supp. 1982); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1975); Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794 (1975); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140, 1141 (1975); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, -3(a) (1981).

119. The most prominent professional exposition of the good sense of the law of employment-at-will is Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). *See also* Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989) (defending at-will rule on efficiency grounds); Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984) (same).

120. *See supra* note 118. Of course, nothing said here suggests we have permanently perfected the rules in the field.

recreating for the trier of fact the details and nuances and contours of making personnel decisions, and, as well, the near certainty that any such fact-finder will never quite fathom the full dimensions of that decision-making process.

Today the rule finds powerful justification in the expense of litigation. The aggregate economic costs of litigating a wrongful discharge case – to the employee, the employer, and the public providing the judicial resources – invariably approaches the realistic ad damnum dollars plaintiff and defendant fight over. The game is seldom worth the candle. It is accepted wisdom that efficiency is an important dimension of justice and that the efficient rule is one that minimizes the impact of transaction costs – in this case, the rule of at-will employment, a rule that, as modified and restricted, appears today more sensible than when it first became settled.[121] It is true our law has decided to pursue paramount policies of reducing discrete discrimination in the workplace. The existence of our many statutory and case law public policy exceptions does not deny the transaction cost problem, only that certain socioeconomic goals make it worth our while to endure those costs.

Mississippi's present rule of employment-at-will is thus justified. I suggest the best justification for the rule, at its core, runs along the lines just pursued, although further thought might improve the presentation. What must be seen is, it is no answer that what I have said above is value and opinion laden.[122] It is no answer that others may offer other values and opinions and may passionately argue they suggest a different rule.[123] A CLV-sanctioned rule has been settled. As we seek to interpret and apply that rule, we are met with the fact that its original justifications are no longer very good ones. Moreover, we have tailored and refined the rule as we have grown more sensitive to some of its nuances and inadequacies. But the tailored and refined rule persists. So we seek the best justification(s) we may find for today's rule today, and, when we do this, we see there are some pretty good reasons why we would want the rule in our modern law, reasons much more persuasive than the rule's original reasons. Implicit in our method is that, given time and exposure, these new justifications may be found wanting. Should this be so, CLV-sanctioned means exist for further modifying the rule or even repealing it altogether. If that day should come, once the new rule is in place, we should interpret it according to the dimensions of fit and justification and, at the dimension of justification, we should seek not just what the new lawmakers had in mind, but the best justification a Herculean[124] lawmaker may imagine for that new rule on the day of interpretation.

---

121. *See* Andrews v. Lake Serene Property Owners Ass'n, 434 So. 2d 1328 (Miss. 1983).

122. *Compare* Judge Gee's admonition in Kansas City S. Ry. v. McNamara, 817 F.2d 368, 373 (5th Cir. 1987). As (and to the extent) we have been faithful to the complex texts of the rules laid down, our justification is quite congenial with Judge Gee's expression.

123. I have done so. *See* cases cited *supra* note 104.

124. I refer, of course, to Professor Dworkin's mythical Judge Hercules. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 101, at 105-30; DWORKIN, LAW'S EMPIRE, *supra* note 56, at 239-66.

5. The Law and Its Reference to the Realities of the Phenomena It Regulates

It is demonstrable that we enhance the chance the law will well play its instrumental role when and to the extent we relate it to, and premise it upon, the empirical and social realities of the phenomena we seek to regulate. Those phenomena are natural; they are behavioral; and they are economic. In today's context, "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored,"[125] as well they ought to be. It is only common sense that the court should give the back of its hand to a claim "that simply makes no economic sense,"[126] nor is there any legal sense in limiting this injunction to antitrust cases. We should apply it throughout the business tort realm, as will presently appear.

These things said, there is no getting around the fact that very thoughtful and well-intentioned people often study and reflect on these phenomena and see very different landscapes. Some persist in seeing the earth as flat, others are equally convinced it is cubical. Nowhere is the contest so contentious as in our present field where pragmatic instrumentalists debate interminably the effect of state intervention in the market place.[127] Our approach to legal interpretation proceeds on the assumption these debates, at least in theory, have intelligible answers, if not necessarily "right" answers, and that we can and will listen to the debate and at the very least narrow the ground between the combatants. Fortunately, the success of our present enterprise turns on how well we see the rules in the field and how much sense we can make of the way we use those rules, all to the aid of the lawyer facing the client's question, "What must I do?"

6. The Best Justification for the Law of Business Torts: Herein of the Competition Imperative in Its Horizontal Dimension

What is (are) the best justification(s) for the law of business torts as we know it today? One general theme we may divine, a theme that seems to cover much of the field, is this: Conduct tends to be held actionable if, and only if, due investigation may yield the finding of legislative fact[128] that, should such behavior be pursued by an economically significant number of market actors, it would be substantially inimical to the efficient functioning of a free market economy, the competitive

---

125. Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072, 2082 (1992).

126. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). This, of course, assumes that courts and the judges who serve them accept their duty to inform themselves so that they have a pretty good idea what does and what does not make economic sense. *See also* Nichols v. Tri-State Brick & Tile Co., 608 So. 2d 324, 330-31 (Miss. 1992).

127. Again, see Professor Page's work in Page, *Ideological Conflict*, *supra* note 12, at 1.

128. I use the term "legislative fact(s)" as it is used in the Official Comment to FED. R. EVID. 201. That use is traceable to Professor Kenneth Culp Davis' seminal distinction in his article, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942). The reader should consult the closely related concept of "premise facts" in Judge Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1 (1988), and Professors John Monahan & Laurens Walker's "social authority" in their article, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986).

forces inherent therein, and the social advantages thought to flow therefrom.[129] It is the theology of the moment that success in the marketplace should turn on the relative merits of the goods or services a party offers to the public, and his efficiencies en route, and our law tends to reflect and be ever sensitive to these value judgments.

Today, however, we stop short of the oft-repeated declaration of times gone by that "[t]he public policy of the state of Mississippi, as evidenced by its legislation and the decisions of its courts, is undoubtedly one which . . . encourages free and untrammeled competition,"[130] for implicit in our law today is the firm belief there is a darker side, that transactions cost, that information costs as well, and is invariably imperfect, and, more globally, that markets do fail. Transactions we need do not take place. Monopoly has an ultimate winner, and, however harmless that may be in the parlor game, it yields not inconsiderable human misery in the real world. It is the sad lesson of history that untrammeled competition inevitably yields market failures that ultimately destroy competition. My good friend Lawrence J. Franck is on target when he reminds us of the view explaining and justifying much of our law in the field: "[A]lthough competition is seen as a positive social value, it must be kept within bounds, else it will self-destruct . . . ."[131] Yet Franck misses the mark when he suggests we confront here a conflict of values, "one that preaches the merits of competition, while erecting intricate barriers to its unfettered exercise."[132] This is not a conflict at all, but a single policy choice imbedded in our law of business torts, balancing pro-competitive benefits and anti-competitive costs. All that encourages fair competition "on the merits" is seen in the public interest. All that inhibits such competition is thought harmful, and this includes uninhibited market behavior.

To be sure, we have before us a value judgment, one which has its detractors, but it is not ours. The fair competition value judgment undergirds the law of business torts and is thus a vital resource in our interpretive arsenal, not because any lawmaker intended it or because it is demonstrably valid, but because it is demonstrably implicit in what all lawmakers in the field have collectively done. It is an inexorable presence in the law of business torts because it is there, because reasoning backward, we may start with the rules in the field and find that, on the whole, it fits and justifies them. The correctness of this choice would be difficult to prove empirically or otherwise, although experience suggests there is a case to be made, but correctness is a matter we approach only if we are thinking of making a future change. For the moment, for better or for worse, our law has opted for the view that competition is good, but unfair competition is bad.

---

129. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (Tentative Draft 1994); RESTATEMENT (SECOND) OF TORTS § 768 (1979).

130. Mississippi Power Co. v. City of Starkville, 4 F. Supp. 833, 836 (N.D. Miss. 1932).

131. Franck, *supra* note 18, at 149.

132. Franck, *supra* note 18, at 132.

Hear the oft-quoted passage from *Northern Pacific Railway Co. v. United States*:[133]

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive [sic] to the preservation of our democratic and social institutions. *But even were that premise open to question, the policy unequivocally laid down by the Act is competition.*[134]

We proceed on the premise – on the faith – that fair "[c]ompetition among those who market goods or services creates an incentive to offer quality products at reasonable prices and fosters the general welfare by efficiently allocating our economic resources."[135] And if this be the law's premise, it is at once imperative that our interpretation and enforcement of the law of business torts enhance and not retard fair competition. In consequence we declare our freedom to compete, but not unfairly. So seen, "[a] primary function of the law of [business torts] is the identification and redress of business practices that hinder rather than promote the efficient operation of the market."[136]

The law of business torts or, more specifically, unfair competition, is not a relief program for failed business enterprises. It is a rational outgrowth of our law's view that this is the way to assure that the public enjoys an efficient allocation of economic resources and the availability of the products we want at prices reasonably related to value. And so, when we encounter talk of the desirability of allowing market participants to compete to the maximum extent possible by reference to the relative merits or demerits of their goods or services, we must understand this is but the law's means to the end of the general welfare.

7. The Competition Imperative in Its Vertical Dimension

There is a second policy imbedded in the field. Competent adults have been traditionally held free to bargain, agree, and contract among themselves. Sellers and buyers thus contend with one another, the seller seeking to peddle his goods or services for as much of the buyer's pocketbook with which the former can persuade the latter to part, and the buyer seeking to get the best value for his money. This pro-competitive policy appears prominently in the law regulating market participants in their vertical interactions, albeit over time our law has evolved to take account of inequalities in market power and access to information. Sales to non-consumers are subject to a regime of commercial reasonableness[137] and an

---

133. 356 U.S. 1 (1958).

134. *Id.* at 4 (emphasis added).

135. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (Tentative Draft 1994).

136. *Id.* at cmt. g.

137. MISS. CODE ANN. § 75-2-201 (1981).

implied warranty of merchantability[138] and a general duty of good faith and fair dealing.[139] The law is more demanding when the market participant sells to a consumer. He is held to truth-in-labeling and truth-in-advertising. The consumer may of right expect reasonable access to instructions regarding use and warnings of dangers. He may expect the goods reasonably fit for particular purposes and free of manufacturing defects, failing which the seller must pay damages. And sales are subject to the general contract defenses: incapacity, fraud, duress, unconscionability, or other grounds we have by law declared contrary to public policy.

But at the fundamental points of price and product quality and whether to buy and sell at all, the law stays its hand in favor of competitive forces. Free, but fair, bargain and exchange and the choice between Cadillacs and Chevys remain the core policy with the law of business torts as it addresses vertical relationships in the marketplace.

D. Beyond Fit and Justification

1. Inevitable Imperfections in the Interpretive Enterprise

Our field posited, plowed, and pruned, we move beyond principle and policy. There is more we need to know of the nature and limits of law if we are to understand how it functions in the real world of business torts.

Interpretation must also regard the life of the law. We may no more freeze meaning and purpose of a legal text at the moment of enactment or promulgation than we may freeze a living being at the moment of birth. We may extend the metaphor: A man bears his parents' genes and may never escape their imprint. A law bears a like link to its makers. A man bears as well the moral and behavioral teachings of his parents and the milieu in which he matures. And so of laws, and in their maturity they flourish insofar as they adapt to the imperatives of life in inevitably ambiguous and ever-changing times. I am a part of all that I have met and so is our law, and so we must interpret its life as well as its language.[140]

We have noted above and we will discuss below a number of rules, but the reading that the rules require is not one we may literally or fully give them. In writing rules, we may never wholly escape our relative ignorance of fact nor correct the relative indeterminacy of our aim.[141] Open-texturedness is and will remain the order of the day,[142] as our quiver is found filled with arrows bent by attitude and indeterminacy. This is so in both making and interpreting law, and it serves well to explain our preference for a circumstanced external approach to reading rules of law. Over- and under-inclusiveness attend all efforts to produce within law hard-edged, case-decider rules and inevitably infect the system with more than a measure of official arbitrariness. "Rules make dichotomous cuts in continuous

---

138. MISS. CODE ANN. § 75-2-314 (1981).

139. Cenac v. Murry, 609 So. 2d 1257, 1272 (Miss. 1992).

140. DWORKIN, LAW'S EMPIRE, *supra* note 56, at 348.

141. *See* HART, *supra* note 56, at 125.

142. Even more so than Hart imagined. HART, *supra* note 56, at 121-32.

phenomena."[143] Yet when we see this and move to avoid it by moving to a more generalized form of legal directives, the inexorable results are inconsistencies, lack of predictability, and ad hoc judgments[144] – results no less arbitrary and undesirable that we label them unofficial arbitrariness. These thoughts reinforce our view that it is well we seek what the law means, not what the lawmaker meant. Our legal process at its very best seldom yields but a crude approximation of justice. And it seldom functions at its very best.

Still, levees are built and revetment laid with effect. There is within our faith and perception the possibility of a process of reasoned elaboration[145] that generally should be employed in divining and articulating the controlling rules or principles which when applied aid an adjudication. All of this is a part of the process lawyers will employ to reconstruct a judicial opinion, its holding and rationale, whether or not the court consciously or competently employed it. A case enacts the most narrow policy-grounded rule that could have produced the decision, so long as that rule is susceptible of principled expression and application in the field. All else said en route has only the power of reason behind it.

We fear judicial discretion at the macrolegal level and so often demand more of the legal process than it may yield. The principles of reason and precedent are not to be confused with such scientific principles as Einstein's gravity or even Boltzmann's thermodynamics, although attractive physical analogues may be found in quantum mechanics[146] and chaos.[147] We cling to widely-shared beliefs that the legal system will better serve society if it is founded upon justice qua reason and stare decisis. That it will be ever thus is not a function of scientific postulate but of thought of the alternative. A social order in which no respect is given precedent and in which irrationality in the decision-making process is acceptable will soon be one without a legal system, as the late Lon Fuller so well explained.[148]

2. A Trichotomy that Aids Understanding

Incorporating the realm of private law adds a touch of complexity best understood when we see the behavioral and economic phenomena of the field in three general categories: (1) those left entirely to private ordering, i.e., contract;

---

143. POSNER, *supra* note 86, at 46.

144. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1701 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

145. The idea of a process of reasoned evaluation, of course, is the centerpiece of HART & SACKS, LEGAL PROCESS, *supra* note 7, at 160-79, 486. Notwithstanding the critiques to which it may be vulnerable as an explanation of what courts do or ought to do, *see* Duncan Kennedy, *Freedom and Constraints in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986), the process retains its importance as a description of what the great majority of the bench and bar think courts and lawyers ought attempt. It remains a benchmark by reference to which many critique the judicial effort. For today it is enough that some such process exists as a means by which many thoughtful lawyers identify inarticulate and incompetent legal craftsmanship.

146. FRED ALAN WOLF, TAKING THE QUANTUM LEAP (1981). Quantum theory instructs us of the impossibility of determining at once the exact location of a particle and exactly where it is going. Substitute "law" for "particle" and the idea becomes quite telling. Whitten & Robertson, *Mississippi's Opportunity*, *supra* note 55, at 274.

147. JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1987); James P. Crutchfield et al., *Chaos*, SCI. AM., Dec. 1986, at 46-57.

148. FULLER, *supra* note 2, at 34, 46-49.

(2) those where the state enters the field, but in the form of background and default rules which parties are free to trade by reference to and to avoid altogether by contract; and (3) those where private agreement is preempted and the positive public law of the state says what market participants must and must not do, and with what consequence.

This trichotomy is a familiar part of the legal landscape, though we often are embarrassingly inarticulate in explaining it. Our law holds an implicit preference for private ordering. Individual autonomy and human dignity demand no less. Each of us is ordinarily a better judge of his/her needs than the wisest of sovereigns. Experience has taught markets are often better regulators than laws and that society succeeds when we see ourselves as rational wealth maximizers even when some of us are not. Where transaction is practicable to advance individual and economic interests, and vigilance a feasible means of protecting those interests, the state stays its hand save only to make us keep the promises we make. And the same where transaction costs are prohibitive.

There is a second broad sphere of endeavor where we again respect individual autonomy but where, because others are affected, it is important that everyone knows where he stands if the individual exercises his right not to function. And so we think of our laws of inheritance. Each person is afforded a dozen ways he/she may direct disposition of his/her property before and at death, but not everyone takes the time to make a will. We have statutes of descent and distribution as rules that control the estates of such persons in default. In the vertical dimension of the marketplace, rights of waiver and informed consent play an important role. Most prominently, market actors are free to bargain and sell rights in trade secrets and in one's identity and to negotiate terms, conditions, and price.

Fundamentally, historically, we have a law of torts because transaction is not always possible. The drivers of cars that collide have no chance to bargain regarding their rights and duties and the same of companies that compete. There are times when people are helpless to help themselves. The state steps in and imposes duties and provides remedies and will not take no for an answer. There are times when the sovereign's least ineffective way to respect individual autonomy and human dignity is to bring to bear its lawmaking machinery in all of its cumbersome crudity and costly compliance mechanisms.

3. The Integration of Laws of All Genera and Species

One important step in our interpretive stratagem is understanding that we give much too much weight to differences in the genera and species of law. We should read rules by reference to their form, their level of generality or specificity of expression, and the observable external circumstances of their conception, birth, and life. Much of the law of business torts is statutory. If the same rules were embedded in common law precedents, we would know how to use them. We would not hesitate to extend them and enforce them in cases functionally analogous to those which have given rise to and fall within the coverage of those rules. Such is the nature of the common law process. That the rules are of statutory species

compels no change in process. Instead of precedent and case law analogies, the statutes are available. The difference – the only difference – lies in the species and not the substance of the materials employed as the basis of deliberation and adjudication. This is a difference to which we should pay no heed.

"Statutory rules, like . . . common law rules, [are] only points of departure, only analogies, although exceptionally informative and persuasive and illuminating analogies."[149] The second Justice Harlan stated it well and famously a generation ago: "It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles – many of them deriving from earlier legislative exertions."[150] The fact that statutory rules emanate from the political organ with primary power and responsibility for setting the public policy of the state can only mean the courts should, if anything, take them *more* seriously than judge-made common law precedents. It takes but one enactment to give a statute all the legal validity it needs. A series of decisions over a period of time is generally necessary to settle a point of judge-made case law. Differences in genera and species matter only when we seek the locus of the authority to make changes or when we have need of vertical orderings to decide which of two conflicting rules trumps the other. Of course, the statutory rule trumps, making it all the more imperative that we search out the policy judgments imbedded in each statute so that we may enforce them in analogous circumstances and see that they shape the developing common law.

The counter-argument often heard is that the legislature, had it wished, could have passed a broader act. Of course, this is so, and it is always so, but the argument does not carry us far, for it proceeds from the familiar fallacy of the omniscient, indefatigable legislature.[151] Legislatures address problems presented to them, much as courts do. The squeaking wheel gets the grease. What we must see is that after the legislatures have acted, it makes no sense that the courts, faced with legally analogous cases, should feel they have to wait until another legislature comes along to fill a perceived legal gap. Again, Justice Harlan states that "[i]n many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the

---

149. J.L. Teel, Inc. v. Houston United Sales, 491 So. 2d 851, 857 (Miss. 1986); Grisham v. Hinton, 490 So. 2d 1201, 1209 (Miss. 1986) (Robertson, J., concurring). *See also* McCluskey v. Thompson, 363 So. 2d 256, 262-64 (Miss. 1978).

150. Moragne v. States Marine Lines, 398 U.S. 375, 392 (1970). This was hardly anything new. *See* James McCauley Landis, *Statutes and the Sources of Law*, HARV. LEGAL ESSAYS 212, 221-27 (1934); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 388 (1908) ("In other words, statutes are taken to be parts of the law for all purposes. The courts reason from them by analogy the same as from any other legal rules."); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-16 (1936); *see also* HORACE E. READ ET AL., MATERIALS ON LEGISLATION 43-48, 891-93 (4th ed. 1982). *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). *See also* Miles v. Apex Marine Corp., 498 U.S. 19, 23, 27 (1990).

151. The fallacy perennially persuades an odd lot of strange bedpersons: the ostrich who would deny to courts their subordinate role as interstitial lawmakers and the arrogant who would limit legislative law to literal language, e.g., those dinosaurs who still believe statutes in derogation of common law should be strictly construed, a myth most effectively dispatched in *McCluskey*, 363 So. 2d at 261-63.

conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical."[152] Principled decisions of the highest court of the jurisdiction set a tone lower courts dutifully implement in legally analogous cases. *Legislative decisions should have a like force that is even more powerful.*

Legislatures have the power to limit the coverage of their enactments, and to do so quite arbitrarily – as in the case of statutes of limitations, the age of majority, a threshold number of employees before an employer is subject to a certain enactment, and in setting speed limits.[153] At times it is not so important where the line is drawn as that there be one – it hardly matters whether we drive our automobiles on the right or the left side of the road, as long as everyone follows the same rule. But where the legislature has provided no arbitrary line of demarcation, it makes no sense that the court should provide one, absent some strong policy reason apparent from the field that there needs to be such a line. There is no greater virtue in arbitrary and capricious adjudications where they are induced by artificially limiting a statutory rule than where the rule is of common law origins.

A further dimension of this limited role of the various legal genera and species is our seeing all law as a part of, and as making up, a principled and integrated whole. This integration has both horizontal and vertical dimensions. Horizontally we seek, for example, the commonality that can join the law of deceptive marketing with the law of trade secrets with the law of interference with economic advantages. Vertically we seek to fuse federal and state law, statutory and case law, public and private law, respecting all the while established hierarchal orderings, from the Supremacy Clause on down, and, as well, those areas designated for private ordering.

To be a bit more concrete, it is less than helpful to address a trademark problem and say the Lanham Act provides thus and such, stopping there. It is as well inadequate to address a deceptive marketing problem and say the Mississippi Unfair Trade Practices and Consumer Protection Act [hereinafter MUTPCPA] says so-and-so and add no more. In each of these, respecting, of course, the supremacy of federal law to conflicting state law, the supremacy of statute to case law, and the like, we need to pursue an approach wherein each market participant, his lawyer, his advocate, and ultimately his judge may say the law of trademarks is thus-and-such, or the law of right of publicity is so-and-so.

As important as it is to understand these conceptual distinctions, we must not in practice accord them undue importance. Conceptually, federal law is supreme over state law, yet in practice each often influences the other. Judge Charles E. Clark gave practical expression when he stated:

---

152. *Moragne*, 398 U.S. at 392.

153. Judges make an arbitrary law as well. Could there be a more arbitrary rule than the traditional Rule Against Perpetuities? *See In re* Estate of Anderson, 541 So. 2d 423 (Miss. 1989). And no legislative enactment provides that child support terminates at age 21, even though the child is an unemployed college student a semester away from graduation. *See* Nichols v. Tedder, 547 So. 2d 766, 769-70 (Miss. 1989).

> [T]he issue is really whether we shall apply our regurgitation of the state redistillation of federal precedents or go more directly and realistically to the sources themselves. Actually, as far as I can discover, we have never found any difference in ultimate result, and so quite often lump federal and [state] law together . . . .[154]

IV. THE DECLINE OF MALICE AND INTENT: HEREIN OF THE CIRCUMSTANCED EXTERNAL MEANS-CENTERED APPROACH TO THE LAW OF BUSINESS TORTS

A. *The Fundamental Focus on Means and Effects*

You may safely bet the family farm the Supreme Court of Mississippi will not any time soon say, "But, I did not mean to hurt anybody" is a defense to a tort action. Equally certain, the court will hold liable the tort defendant who reasonably should have foreseen his actionable conduct would cause harm, though he plead, "I did not know I was going to hurt anyone." This leads to an interpretive problem that pervades the field. In its traditional form, it challenges the law that we do something sensible with the word "malice" and its derivatives that so confound and defy all attempts at expulsion. More important is whether at its core the law of business torts addresses at all an actor's intentions, his motives, and his purposes, or whether it focuses upon his conduct, his means, and the effects he causes.

I will answer at once. The primary substantive rules of positive law of business torts in Mississippi consist exclusively of objective, external standards, except when considering the assessment of civil penalties or punitive damages.[155] It is easy to show no statutory business torts make reference to subjective, internal standards—malice, purpose, intent, and the like. The case law is more difficult, for there is no getting around the fact that loose talk there abounds. But if you define case law as the positive law defines it—a case enacts the most narrow reading of the rule which, applied to the facts, would produce the judgment of the court—you will see all the rhetoric of malice and intent and the like fall as the leaves of a ginkgo tree. It matters not that the court may *say* it is holding the defendant liable because of his intent, his purpose, or his malice, because he is a bad man. My view is threatened only if in such a case the defendant would be exonerated for lack of actual intent, where it is shown he employed demonstrably unfair or improper means, means which harmed the plaintiff (whatever else they may have done), and, that, when he did what he did, the defendant reasonably should have foreseen those effects. No such case can be found.

B. *The Rise and Fall of Malice in the Law of Business Torts*

The word "malice" has a place and history in the law worthy of independent study. We think of murder as killing another with malice aforethought. There is an

---

154. Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 545 (2d Cir. 1956) (concurring opinion).

155. *See, e.g.*, MISS. CODE ANN. §§ 11-1-65(1)(a), 75-24-19(2) (1994).

action for malicious prosecution. The First Amendment forms a psychogenic overlay on the law of libel and emits its own unique brand of "actual malice."[156] Talk of malice abounds in the law of business torts. Perhaps this is understandable in the case of citizens and litigants, as survival in one's chosen life's work—not to mention the family's life savings—is often at stake. Exuberance in pleadings reaches the heights in business tort actions, as, for whatever reason, lawyers love to charge the opposing party acted maliciously.

Courts as well get caught up in the rhetoric and seem unable to see the mischief in the making in all this malice talk.[157] We would expect to find "malice" liberally sprinkled among the opinions of days gone by. In *Lumley v. Gye*,[158] for example, Justice Crompton announced he would hold a defendant liable who "maliciously procures a party" to breach her contract.[159] Older Mississippi cases condemned market participants who acted "maliciously and wantonly."[160] Yet as recently as 1992 we have seen the Supreme Court of Mississippi reiterating, as if by rote, "*malicious* interference" with business relations of another is an actionable tort.[161] That is certainly so, but surely it has long been clear that less-than-malicious interference may be actionable as well, and more broadly. Should we not have seen by now the greater includes and subsumes the lesser? What is curious is that malice is hardly mentioned in the legislation, which sensibly and in sharp contrast focuses on means and effects, a point to which we will return.

However much it may remain a favorite of lawyers in their pleadings and courts in their judgments, no sensible person today treats malice in the sense of spite or ill will or mean or evil thoughts as something the business tort plaintiff must prove to make his case. More than a century ago, Holmes showed intent subjects a defendant to "the same consequences [i.e., liability] as intent with malevolence superadded."[162] The Restatement advises us that "[t]he context and course of the decisions make it clear that what is meant is not malice in the sense of ill will but merely 'intentional interference without justification.' "[163] The Supreme Court of the United States has recently ruled that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the

---

156. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

157. I have long thought the matter of Freudian dimensions, but discretion counsels I should not pursue the point (at least, not here).

158. All E.R. Rep. 208 (Q.B. 1853).

159. *Id.* at 213.

160. Memphis Steam Laundry-Cleaners, Inc. v. Lindsey, 5 So. 2d 227, 232 (Miss. 1941); Wesley v. Native Lumber Co., 53 So. 346, 346-47 (Miss. 1910); Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co., 52 So. 454, 455 (Miss. 1910).

161. Nichols v. Tri-State Brick & Tile Co., 608 So. 2d 324, 328 (Miss. 1992). *See also* Protective Serv. Ins. Co. v. Carter, 445 So. 2d 215, 216 (Miss. 1983) ("a wrongful or a malicious interference"); Irby v. Citizens Nat'l Bank, 121 So. 2d 118, 119 (Miss. 1960) ("malicious interference"); Bailey v. Richards, 111 So. 2d 402, 407 (Miss. 1959) ("wrongful or malicious interference").

162. HOLMES, COMMON LAW, *supra* note 59, at 130.

163. RESTATEMENT (SECOND) OF TORTS § 766 cmt. s (1979); *Id.* ch. 37 introductory note at 5.

federal antitrust laws."[164] Nor does it state a claim under any other variant of the law of business torts.

Professor Walker tackles the problem in Mississippi and acknowledges that "malice has long been associated with intentional interference with economic expectancies."[165] As he sees it, some still hold malice to mean and contemplate the defendant market participant's "acting out of spite or ill-will."[166] Walker goes on to recognize that there are, notwithstanding, occasions when the defendant may be held liable "when ill-will malice is clearly absent from the facts."[167] Indeed, the well-known *Memphis Steam Laundry-Cleaners, Inc. v. Lindsey*[168] case that talks so much of malice defines it in the end as "the intentional doing of a wrongful act without just cause or excuse."[169] *Irby v. Citizens National Bank*[170] seemingly says the same thing when it sees the malicious act as one " 'done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant.' "[171] At best, charging malice gilds the lily; at worst, it adds needless confusion which may lead to mistaken and costly adjudication. But rather than abandon the word, we have redefined it. For those whose predisposition pretermits good sense, we hold to "malice" but define it to mean what would cause Mister Webster and the literate non-lawyer to shake their heads in disbelief.[172]

Professor Walker would go further and tuck the spite or ill-will variant of malice within the notion of non-legitimate ends and means. He would strip all thought of an adjectival description of the defendant's bent of mind from the concept of tortious malice. No longer would malice address the attitude with which the defendant acts. Walker offers what I take to be a mixed standard, part internal and part external. He would have malice (accepting that we cannot get rid of it) mean "[1] seeking non-legitimate ends in general, and [2] using inappropriate means to achieve the ends sought."[173] The former imports a subjective, internal standard,

---

164. Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2589 (1993). For a further discussion of this case, see G. Everett Sinor, Note, *The Belated Demise of* Utah Pie, 15 MISS. C. L. REV. 249 (1994). *See also* Myers, *supra* note 13, at 1132 & n.128.

165. Walker, *Common Law Protection*, *supra* note 21, at 341.

166. Walker, *Common Law Protection*, *supra* note 21, at 342.

167. Walker, *Common Law Protection*, *supra* note 21, at 342.

168. 5 So. 2d 227 (Miss. 1941).

169. *Id.* at 231.

170. 121 So. 2d 118 (Miss. 1960).

171. *Id.* at 119 (quoting 30 AM. JUR. *Interference* § 55 (1958)). The *Irby*-quoted definition has been followed—the blind leading the blind—in Merchants & Planters Bank v. Williamson, No. 91-CA-00615, 1995 WL 11209 (Miss. Jan. 12, 1995); Cenac v. Murry, 609 So. 2d 1257, 1268-69 (Miss. 1992); Nichols v. Tri-State Brick & Tile Co., 608 So. 2d 324, 328 (Miss. 1992); Galloway v. Travelers Insurance Co., 515 So. 2d 678, 682-83 (Miss. 1987); and Protective Service Life Insurance Co. v. Carter, 445 So. 2d 215, 217 (Miss. 1983).

172. *See* Holmes, *Path of Law*, *supra* note 1, at 52-53, 130. That the law may define a term any way it wishes, *see, e.g.*, Gunn v. Principal Casualty Ins. Co., 605 So. 2d 741, 743 (Miss. 1992); McLaurin v. Mississippi Employment Sec. Comm'n, 435 So. 2d 1170, 1171-72 (Miss. 1983), hardly suggests there is virtue in straying too far too often from accepted dictionary definitions.

173. Walker, *Common Law Protection*, *supra* note 21, at 342. Lawrence J. Franck digests the Walker analysis and suggests its acceptance "would go a long way toward alleviating the confusion resulting from the court's mechanistic repetition of 'malice' as an essential element of proof in an action for wrongful interference." Franck, *supra* note 18, at 154.

the latter an objective, external standard. These Walker equates with "improper"—the 1979 Restatement's original contribution toward doctrinal expression. He concludes the defendant should be held liable if he intentionally interfered with the plaintiff's economic expectancies *and* if the defendant sought "to accomplish some non-legitimate (improper) purpose by doing so . . . or use[d] wrongful (improper) means in seeking to accomplish the interference."[174] He says these things in the context of announcing the Mississippi law of interference with prospective contractual relations to be "generally consistent with the Restatement rules on this subject."[175] His service would be no less worthy had he taken the next step and done us the favor of removing malice from the business tort lexicon altogether, something the courts have done for all practical purposes.

C. *The External Standard Emerges*

Professor Walker has advanced the ball. Using the Restatement, he has helped us to see that talk of malice brings nothing but confusion to our subject. Morally-laden terminology seldom enhances the clarity of the law, and the present instance is no exception. But what Professor Walker has done lays bare another knot, if anything more difficult to untie. I refer here to whether we have in fact subjective internal standards that are necessary requisites of business tort liability, whether thought of pursuit of "non-legitimate [improper] purposes [ends]" plays a role in the law of business torts at all. Does purpose, intent, end sought, conscious reason for acting—call the actor's wish what you will—in fact form a necessary part of the most narrow reading of the rules of business torts? And, if it does not (as I believe it does not), surely there is no reason why we should wish it otherwise. Our law better serves its instrumental ends when we do away with any thought of purpose and ask instead—and only—whether the defendant's means were improper and whether their reasonably expected effects are on the whole inimical to the public welfare, that is, the benefits believed to flow from a freely and fairly competitive marketplace and from fair bargain and exchange. Seeing this helps us, while inquiring into intent or purpose or actor's ends but serves to confuse the familiar with the necessary.

The idea implicit in and best justifying the law in this area is that we allow market participants the chance to compete by reference to the quality of the goods and services they offer the public and the efficiencies with which they make those offerings.[176] The state does not intervene absent substantial anti-competitive macro- or microeconomic effects, or the reasonable probability thereof, nor should it. The point is fundamental, not only in theory but as a matter of practical necessity, given the inevitable crudity of the state's tools for intervention. Experience has taught that certain business practices predictably inhibit fair competition and produce anti-competitive effects, many of which we discuss below. We promote fair

---

174. Walker, *Common Law Protection*, *supra* note 21, at 347.

175. Walker, *Common Law Protection*, *supra* note 21, at 347.

176. Myers, *supra* note 13, at 1140-41.

competition by enacting laws tailored to proscribe predictably disadvantageous business practices. We have established and manned within our legal order a structure designed to prevent inefficient and unfair business behavior. We award damages so that the law's "threats may continue to be believed"[177] and that offended parties may have a measure of compensation for their losses. This is the point implicit in the enterprise, and, as this is so, it gives little thought to intentions and purposes but focuses upon effects and the means to those effects. However much in the moral world I may wish my neighbor to love me, I look to the law to keep him off my back and not waste its time worrying what he thinks of me.

To be sure, "malicious motives make a bad case worse, but they cannot make . . . wrong . . . [what] is in its essence lawful."[178] And so proof of malice, purpose, intent, and actor's ends are still relevant in the Rule 401[179] sense, but they are relegated to a role more modest and non-essential, though at times quite helpful – that of aiding in identifying actionable conduct, in reducing the risk that we may hold a defendant liable in error.[180]

D. The External Standard Explained, As We Meet the Memphis Steam Laundry *Case*

A tour of the case law tests and adds flesh to the point. Here we find, as we did with malice, talk of impermissible purposes prominently displayed. We have noted *Irby v. Citizens National Bank*,[181] in which the court lists two elements of a prima facie case of tortious interference with a contract: that the defendant's acts "[1] were intentional and wilful . . . [and 2] were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice)."[182] This language, of course, is hopelessly confusing, if not indecipherable. Market activity is by definition wilful and intentional. Every competitor, if he knows enough to compete, knows he is likely to

---

177. *Cf.* HOLMES, COMMON LAW, *supra* note 59, at 46.

178. 2 RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 9.14, at 74 (4th ed. 1982). *See also* Myers, *supra* note 13, at 1131-32.

179. *See* FED. R. EVID. 401; MISS. R. EVID. 401.

180. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. c (Tentative Draft 1994) ("Although a malicious motive is not sufficient to subject the actor to liability, a competitor motivated by ill will may be tempted to pursue impermissible means of competition in order to insure or enhance the harm to another. Evidence of such ill will may therefore justify close scrutiny of the actor's methods under the various rules enumerated in this Section. The actor's motives may also be relevant to the application of other rules of liability, including state and federal laws relating to unlawful restraints of trade."); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986), *discussed in* Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2083 (1992) ("Because the defendants had every incentive not to engage in the alleged conduct which required them to sustain losses for decades with no foreseeable profits, the Court found an 'absence of any rational motive to conspire.' "); *see* Nichols v. Tri-State Brick & Tile Co., 608 So. 2d 324, 330-31 (Miss. 1992).

181. 121 So. 2d 118 (Miss. 1960).

182. *Id.* at 119. The entire quotation reads:

> A prima facie case of wrongful interference with a contract [or prospective economic advantage] is made out if it is alleged (1) that the acts were intentional and wilful; (2) that they were calculated to cause damage to the plaintiffs in their lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which consists malice); and (4) that actual damage and loss resulted.

Id. (quoting 30 AM. JUR. *Interference* § 55 (1958)).

cause damage or loss, and are not all actors held to intend the natural and probable and reasonably foreseeable consequences of their actions? And these problems engulf the mind before it can begin to engage the (re)definition of malice.

An equally problematic, but in a sense far more revealing, approach to purpose appears in the *Memphis Steam Laundry* case:

> While it is true that competition in business, though carried to the extent of ruining a rival, is ordinarily not actionable, unless the dominant purpose to inflict injury is established, we are of the opinion that the jury was warranted in finding that the purpose to injure or destroy the business of the plaintiff was dominant throughout the period complained of. . . .[183]

This language is illuminating in that it recognizes the freedom to compete fairly as the value and policy best explaining and justifying business tort law, thought of which so effectively undermines the court's use of the defendant's purpose as a reason for holding it liable.

In the *Memphis Steam Laundry* case, the plaintiff and defendant were competitors in "the dry cleaning and pressing business" in Lee County and parts of Prentiss County, Mississippi.[184] It seems Memphis Steam Laundry saw this market area as having a significant profit potential and set its prices accordingly.[185] Lindsey, operating out of Booneville, saw this as his opportunity and set his prices for cleaning and pressing men's suits and ladies' dresses at roughly one-half what Memphis Steam Laundry was charging.[186] In time, four other local cleaning and pressing establishments in Tupelo felt the pinch and dropped their prices to a level competitive with Lindsey's.[187] Memphis Steam Laundry was quite unhappy with this turn of events and approached Lindsey, telling him that unless he raised his prices it "intended to break him."[188] Lindsey refused, and, true to its word, Memphis Steam Laundry promptly dropped its prices in the Tupelo area to one-half of what Lindsey was charging and even moved into Booneville where it offered direct head-on competition with Lindsey in his hometown, again charging but one-half what Lindsey was charging.[189]

Memphis Steam Laundry was pricing below cost and took a considerable loss, but one it was big enough to withstand, at least in the short run, as it maintained much higher prices in areas outside Lindsey's reach.[190] Over the same period of time, Lindsey suffered significant losses and ultimately brought suit.[191] Not surprisingly, a Prentiss County jury found for Lindsey, and on appeal the Mississippi

---

183. Memphis Steam Laundry-Cleaners, Inc. v. Lindsey, 5 So. 2d 227, 232 (Miss. 1941).

184. *Id.* at 229.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 232.

189. *Id.*

190. *Id.*

191. *Id.*

Supreme Court affirmed.[192] The court recognized that "[t]he reduction of prices is an act lawful in itself; it is an absolute right of the owner of a business."[193] The reason this is so is one of the benefits thought to flow from fair competition is holding down prices to the consumer. The Supreme Court of the United States has observed that " '[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.' "[194] Indeed, " 'cutting prices in order to increase business often is the very essence of competition.' "[195] The *Memphis Steam Laundry* Court turned, however, to the paradoxical premise that " 'at least as respects interference with a trade or calling . . . an act which is not of itself actionable may become so when done maliciously, wantonly, or without reasonable cause.' "[196] The court added that "instead of enlarging or dignifying its privilege to cut prices for the purpose of promoting its own business, it degraded the same into a wilful wrong when employing it as a weapon for the ignoble purpose of inflicting upon the plaintiff a wanton injury."[197]

Without question, representatives of Memphis Steam Laundry had made some rather indiscrete remarks, viz, "that they had a couple of million dollars and would spend the last dollar of it or break him."[198] It is difficult to have much sympathy for Memphis Steam Laundry, as the Prentiss County jury surely did not, socking it with an assessment of punitive damages.[199] The problem is this: Think of how the court, accepting its world view, would have approached the case if it had had no evidence of Memphis Steam Laundry's purpose. Suppose Memphis Steam Laundry's officials had had enough sense to keep their mouths shut, or that they had sought advice of counsel and were instructed, "Set your prices at whatever level you think sufficient to ruin Lindsey, but for heaven's sake, do not tell him or anyone else what you are about." If the Mississippi Supreme Court may be taken at its word and had faithfully applied the law it announced, it would have had to exonerate Memphis Steam Laundry. But surely this does not follow. Business tort liability does not turn on the defendant's oral discretion.

An oft-quoted opinion from another jurisdiction puts it well:

> [I]f the search for intent means a search for documents or statements specifically reciting the likelihood of anticompetitive consequences or of subsequent opportunities to inflate prices, the knowledgeable firm will simply refrain from overt description.

---

192. *Id.* at 233.

193. *Id.* at 231. *See also* Wagley v. Colonial Baking Co., 45 So. 2d 717, 722 (Miss. 1950).

194. Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2588 (1993) (quoting Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990)).

195. *Id.* at 2589 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

196. Memphis Steam Laundry-Cleaners, Inc. v. Lindsey, 5 So. 2d 227, 231 (Miss. 1941) (quoting 30 AM. JUR. *Interference* § 39 (1958)).

197. *Id.* at 232.

198. *Id.* at 229. Compare Professor Myers' perceptive analysis of the Fifth Circuit's clearly erroneous (except in the narrow sense that it may have been *Erie*-bound to enforce clearly bad Texas law) decision in Deauville Corp. v. Federated Department Stores, Inc., 756 F.2d 1183 (5th Cir. 1985). Myers, *supra* note 13, at 1128-29 & n.156.

199. *Memphis Steam Laundry*, 5 So. 2d at 228.

> If it is meant to refer to a set of objective economic conditions that allow the court to "infer" improper intent . . . then, using Occam's razor, we can slice "intent" away. Thus, most courts now find their standard, not in intent, but in the relation of the suspect price to the firm's costs.[200]

The point is sharpened when we distinguish knowledge from purpose. The court made clear that Memphis Steam Laundry could have cut its prices with impunity for the purpose of promoting its own business even though it did so with the knowledge that this would result in economic harm to Lindsey. The court said it was holding Memphis Steam Laundry liable, however, because it cut its prices for the purpose of inflicting economic harm on Lindsey, though it acted with the knowledge that this would aid its own business. Having liability turn on such a semantic distinction seems dubious even in theory. It is more so in practice when we understand the difficulty inherent in the fact-finding process, in having third persons (judge or jury) decide reliably the defendant's purpose as distinguished from what he merely knew.[201] As noted above, in a wide variety of contexts, the law presumes a man intends the natural and probable consequences of his voluntary acts, knowingly performed.[202] In the context of a charge of burglary, we take this view out of practical necessity, because we know the "intent of a defendant, dwelling in his mind, invisible to the outward sight, can never be proven by the direct testimony of a third person."[203]

An illustration from another arena where fair competition is our dominant concern helps us see the point. I speak of the sport of football. Every team goes through some sort of pre-game process designed to motivate its players to give their very best efforts in the game – to give a hundred and ten percent, it is often said. In this pre-game course, not uncommonly a team leader may exhort, "Let's go out and destroy those guys!" to the agreeable cheers of his mates. I have even heard it urged that we "humiliate them so badly they will never show their faces on a football field again, ever!" The players may really mean it, and they may in fact play as hard and as roughly as possible, and exchange many a mid-game growl intended to intimidate those across the line. But the officials care only whether they play by the rules, more generally, whether they play fairly. And, the other team of right has no complaint of its opponent's destructive intent, or of the accomplishment of that intent, if done fairly and by the rules. We can easily move to a market participant's meeting to motivate the members of its sales force and replicate the example – and think how silly a court would seem if it let such statements affect its judgment.

---

200. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) (citations omitted).

201. Finding what a person intends is difficult enough, even when he is trying to give us carefully written evidence of his intent. *See* Robertson, *Myth and Reality*, *supra* note 55, at 1045.

202. *See, e.g.*, Johnson v. State, 461 So. 2d 1288, 1293-94 (Miss. 1984); Hydrick v. State, 150 So. 2d 423, 424 (Miss. 1963); Foster v. Wright, 127 So. 2d 873, 875 (Miss. 1961); Standard Ins. Co. v. Anderson, 86 So. 2d 298, 301 (Miss. 1956).

203. Lee v. State, 146 So. 2d 736, 738 (Miss. 1962).

And, so it is more sensible that *Memphis Steam Laundry* be read by reference to the defendant's means – predatory price cutting – and the known predictable effects of those means, and forget about the defendant's purposes. Indeed, when we do this, we find that Memphis Steam Laundry's means and their predictable effects are quite likely condemned by the antitrust laws.[204] Section 2 of the Sherman Act condemns predatory pricing when it poses a threat of monopolization.[205] The Robinson-Patman Act[206] condemns Memphis Steam Laundry-style predatory pricing where there is a reasonable possibility of substantial injury to competition.[207] The law of business torts goes a step further. It affords no market participant a preferred status predicated on market position and power. The antitrust laws aside, predatory practices are actionable at the hands of a market participant foreseeably injured thereby. Is this not the most narrow reasonable reading – indeed, the only sensible reading – of the rule of *Memphis Steam Laundry*?

E. Doing Essentially the Same, But with a Lot Less Market Power

There is a further perspective from which we see the problem with a purpose-oriented approach to actionable conduct. A market participant may act with every hope, desire, and wish to harm his competitor – the putative plaintiff – but may be unable to do so by reason of lack of market strength, skill, position, whatever. The defendant in such a case may even be actuated by spite and ill will, but in many such cases it would make no sense to suggest imposition of liability. *Quality Stamp Co. v. Page's Supermarkets*[208] makes the point. Page had been distributing Quality Stamps at its supermarket.[209] It terminated its contract with Quality and began giving S&H Green Stamps to its customers.[210] Quality responded by mailing out coupons to Page's customers redeemable for one hundred Quality Stamps with the purchase of certain designated grocery items at food stores giving those stamps.[211] Page retaliated by offering to redeem the same coupons with S&H Green Stamps.[212] The court rejected Quality's claim, holding Page "was justified in offering to redeem the coupons mailed out by [Quality] as a defensive measure to

---

204. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. c (Tentative Draft 1994). We use the qualifier "quite likely" in that the *Memphis Steam Laundry* Court, without the Sherman Act or Robinson-Patman Act or state antitrust claims before it, did not state the facts as precisely as it no doubt would have done were it deciding claims under any of those acts. *See, e.g.*, 1 MCCARTHY, *supra* note 17, §§ 1.14[2], [3], at 48-50; Myers, *supra* note 13, at 1102-03.

205. Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884 (1993).

206. 15 U.S.C. § 13(2) (1988).

207. Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2586 (1993); Falls City Indus. v. Vanco Beverage, Inc., 460 U.S. 428, 434 (1983).

208. 149 So. 2d 348 (Miss. 1963).

209. *Id.* at 349.

210. *Id.*

211. *Id.*

212. *Id.*

prevent serious loss of customers at a critical time when he was changing over to the use of a new stamp."[213]

In a very real sense, Page's Supermarkets and Memphis Steam Laundry were doing the same thing. Each was trying to protect and expand its customer base. Arguably, the only difference between the two cases is that Memphis Steam Laundry had sufficient economic strength to inflict considerable harm upon Lindsey, while Page's Supermarket was merely struggling to survive with but a modest profit.[214] It may be that in the larger world, "[w]here a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern . . . or that might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist."[215] But we still focus on means and effects, not purposes or intentions.

I do not doubt the final judgment in *Quality Stamps* was the correct one, as was the case in *Memphis Steam Laundry*. An objective, external analysis of the defendant's behavior in each case makes this clear. To the contrary, a purpose-oriented approach to market impropriety only serves to confuse the core holding of both cases. Reflective thought suggests a purpose-oriented approach to market impropriety has never been necessary in this jurisdiction to explain a final judgment in a business torts case. As a child does his father, we should attend to what the courts do and not what they say.

V. Antitrust

A. The Statutory Scheme and Underlying Policy

1. The Federal and State Statutes

As a business tort, antitrust law derives almost entirely from federal statutes: the Sherman Act;[216] the Clayton Act;[217] and the Robinson-Patman Act amendments to the Clayton Act.[218] In 1892, two years after the passage of the Sherman Act, Mississippi passed, as did many other states, its own "baby Sherman Act."[219] Both the federal and state statutes provide private causes of action. As will be seen, the Mississippi Act serves primarily as an intrastate reflection of, or "supplement" to, the Sherman Act. It picks up where the federal act leaves off. Mississippi's baby Sherman Act addresses intrastate activities that do not "affect interstate commerce"; prohibits only the specific forms of unfair competition enumerated in the Act and may not reach, according to some courts, all of the types of "unfair

213. *Id.* at 350.

214. We know Memphis Steam Laundry was selling below cost sufficient that we may fairly label its practices "predatory." We do not know about Page.

215. Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072 (1992) (Scalia, J., dissenting) (citing 3 Phillip Areeda & Donald F. Turner, Antitrust Law § 813, at 300-302 (1978)).

216. 15 U.S.C. §§ 1-7 (1988).

217. 15 U.S.C. §§ 12-18, 19-26 (1988).

218. 15 U.S.C. § 13(a)-(f) (1988).

219. Miss. Code Ann. §§ 75-21-1 to -39 (1988).

competition" covered by the federal statutes;[220] and provides less relief to the aggrieved party.

Section 1 of the Sherman Act prohibits any "contract, combination . . . or conspiracy, in restraint of trade,"[221] and section 2 would punish any person "who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States."[222] To this statutory skeleton the courts have added the flesh of the antitrust torts. This discussion will be limited to sections 1 and 2 of the Sherman Act, the private right of action and remedies provided by the Clayton Act, and the corresponding Mississippi law.

Within this realm of "judge-made law," as elsewhere in the field, we find a series of interrelated objective standards by which a market actor may measure its conduct or the conduct of another. While some cases may speak of "motive" or "intent" and the significance of those states of mind to antitrust law,[223] the law itself, as reflected in the narrow necessary holdings of the opinions, focuses upon one's conduct, her methods, and the effects of her actions. Courts seldom have available to them, or see the need for, the secret memo or overheard statement that reveals the defendant's subjective "intent"—though courts or juries certainly may jump on such "smoking gun" evidence, when available, to bolster evidence of conduct and effect. Consistent with the principle presented in Part IV above, the absence of such evidence of subjective intent, by itself, has never kept a court from finding an antitrust defendant liable.

---

220. Main St. Publishers v. Land Mark Communications, 701 F. Supp. 1289, 1291 (N.D. Miss. 1988). Other courts have treated the federal and state laws as "analytically identical," or recognized that the parties regarded them as such. Walker v. U-Haul of Miss., 734 F.2d 1068, 1070 n.5 (5th Cir. 1984). *See also* Hardy Bros. Body Shop v. State Farm Mut. Auto. Ins. Co., 848 F. Supp. 1276, 1290-91 (S.D. Miss. 1994).

221. 15 U.S.C. § 1 (1988).

222. 15 U.S.C. § 2 (1988). The basic Mississippi statute is somewhat more specific, proscribing any "trust or combine," defining that to be

> a combination, contract, understanding or agreement, expressed or implied, between two or more persons . . . when inimical to public welfare and the effect of which would be:
> (a) To restrain trade;
> (b) To limit, increase or reduce the price of a commodity;
> (c) To limit, increase or reduce the production or output of a commodity;
> (d) To hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity; . . . or
> (e) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this chapter.

MISS. CODE ANN. § 75-21-1 (1988).

In early decisions, the Mississippi Supreme Court found that the phrase "inimical to the public welfare" is not an additional element to the described offenses; rather, the court held that the use of this term meant merely that the legislature had declared all of the described acts to be inimical to the public welfare and, hence, unlawful. Retail Lumber Dealers' Ass'n v. State Attorney Gen., 48 So. 1021, 1024 (Miss. 1909) (citing Barataria Canning Co. v. Joulin, 31 So. 961 (Miss. 1902)).

223. *See, e.g.*, *Walker*, 734 F.2d at 1071.

2. Private Actions and Remedies

a. Federal Law

Sections 4[224] and 16[225] of the Clayton Act provide for private rights of action for violations of the antitrust laws. Under section 4, a successful plaintiff is entitled to an award of "threefold the damages by him sustained."[226] Section 16 provides for injunctive relief for a person threatened with loss or damage from a violation of the antitrust laws.

The "antitrust laws" subject to this regime of private enforcement include, among others, the Sherman Act, the Clayton Act, and section 2 of the Robinson-Patman Act, which is an amendment to the Clayton Act.

To maintain an antitrust action, of course, one must have standing to sue. The private action for money damages presents a special standing issue. Section 4 of the Clayton Act limits relief to "any person who shall be injured in his business or property *by reason of anything forbidden in the antitrust laws*."[227] This "by reason of" language has led to the requirement that the plaintiff's injury, in order to be actionable, must have been caused by the antitrust violation and be of a type the antitrust laws were designed to prevent. In addition to the developing law, there is a substantial body of commentary discussing how antitrust claims and remedies should be shaped, or should "evolve," in order best to achieve the economic and social efficiencies implicit in the acts.[228] For example, some debate has revolved around whether *competitors* of the alleged antitrust law offenders should be allowed to sue to recover treble damages, since such a suit and recovery might not properly reflect, or help to avoid, the various costs, losses, or inefficiencies resulting from the offense.[229]

A key Supreme Court decision concerning "antitrust injury" is *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[230] In that case, several bowling alley operators charged that Brunswick had acquired failing bowling alleys as part of a monopolistic practice, in violation of section 7 of the Clayton Act.[231] Plaintiffs complained that, but for Brunswick's acquisition, those competing alleys would have gone out of business and the plaintiffs' profits would have been higher.[232] While the Supreme Court acknowledged that Brunswick's saving the failing competitors caused the plaintiffs' injury, the Court found that the acquisitions did not cause "antitrust

---

224. 15 U.S.C. § 15 (1988).

225. 15 U.S.C. § 26 (1988).

226. This is usually referred to as "treble damages."

227. 15 U.S.C. § 15 (1988) (emphasis added).

228. *See, e.g.*, Page, *Antitrust Penalties*, *supra* note 41; William Page & Roger Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 MICH. L. REV. 111 (1992).

229. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1 (1989); Page, *Antitrust Penalties*, *supra* note 41; Page & Blair, *supra* note 228.

230. 429 U.S. 477 (1977).

231. *Id.* at 479-80.

232. *Id.* at 481.

injury."[233] The Court noted that the same loss of profits would have been suffered whether the alleys had been purchased by Brunswick, had arranged refinancing to stay in business, or had been purchased by someone else.[234] The Court concluded that an award of damages would be "inimical to the purposes of these [antitrust] laws," because recovery under the plaintiffs' theory was "designed to provide them with the profits they would have realized had competition been reduced."[235] The Court found that the antitrust laws would not support an award of "windfall profits" that would have resulted from a loss of competition, i.e., the competing centers' being allowed to fail.[236]

The concept of "antitrust injury" has also been applied to preclude recovery by a retail gasoline marketer who claimed it lost sales to competitors that were participants in a refiner's "vertical, maximum price fixing scheme;"[237] by one seeking to block the acquisition by one competitor, which was the second largest firm in the market, of the third largest firm in the market;[238] by a takeover target which was challenging the proposed acquisition based upon claimed "loss of independent decision making" authority;[239] and by a stadium owner who sought to challenge a decision by the National Football League to prohibit the public sale of shares by the stadium's tenant team.[240]

One who is suing under the federal antitrust laws faces a further "standing" problem if she is claiming damages as an "indirect purchaser." In such a case, a retailer might complain that she had been required to pay higher prices to purchase from a distributor who was merely "passing on" the artificially high prices set by the antitrust-law-violator manufacturer. In a 1977 decision, *Illinois Brick Co. v. Illinois*,[241] the Supreme Court held that an indirect or "remote" purchaser may not maintain a claim for damages against a seller from whom she did not purchase, for unlawful overcharges she claimed were passed down to her through the distribution chain.

The Supreme Court gave several reasons for barring recovery by such indirect, though ultimate, purchasers. First, if both direct and indirect purchasers were allowed to recover for an antitrust violation, the defendant might face the risk of multiple liability.[242] Second, the Court felt it would put too great a burden on the lower courts to have to engage in the difficult task of apportioning damages among

---

233. *Id.* at 487-88 (quoting Wyandotte v. United States, 389 U.S. 191, 202 (1967)).

234. *Id.* at 487.

235. *Id.* at 488.

236. *Id.* at 488-89.

237. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

238. Cargill, Inc. v. Monfort, Inc., 479 U.S. 104 (1986).

239. Anago, Inc. v. Tecnol Medical Prods., 976 F.2d 248, 251 (5th Cir. 1992) (the loss of such independent decision-making authority did not constitute "antitrust injury" because it was not injury "related to the anticompetitive effects of the merger").

240. Sullivan v. Tagliabue, 828 F. Supp. 114 (D. Mass. 1993).

241. 431 U.S. 720 (1977).

242. *Id.* at 730.

purchasers at different levels of the distribution chain.[243] Third, the Court found that it should lead to more effective enforcement of the antitrust laws to concentrate the full recovery of the overcharges in the hands of the direct purchasers.[244] The Court noted that there could be an exception, thus allowing indirect purchaser recovery, for fixed quantity, cost-plus contracts, because the seller who is passing on the price increase does not risk any decrease in sales when its customer is committed to buying a set quantity regardless of price.[245] But note that recovery by indirect purchasers *is* specifically allowed in Mississippi under Mississippi Code section 75-21-9.[246]

b. State Law

As noted above, the Mississippi antitrust law basically mirrors and provides an intrastate supplement to the Sherman Act. There are several important differences, however, in the remedies available and the standing of certain potential plaintiffs.

The private right of action and available recovery are provided, and limited, by Mississippi Code section 75-21-9:

> Any person, natural or artificial, injured or damaged by a trust or combine as herein defined, or by its effects direct or indirect, may recover all damages of every kind sustained by him or it and in addition a penalty of five hundred dollars ($500.00), by suit in any court of competent jurisdiction . . . . Such penalty may be recovered in each instance of injury. All recoveries herein provided for may be sued for in one suit.[247]

Unlike the federal laws, there is no provision for recovery of treble or other special damages, other than the single penalty of $500, and no provision for the award of attorney's fees to the successful plaintiff. Actual damages, such as lost profits, may be proved as in other cases. Wholly conjectural or speculative damages may not be awarded.[248]

In contrast to the federal law of *Illinois Brick*,[249] an indirect purchaser may sue under state law to recover increased costs allegedly passed on to him. Section

---

243. *Id.* at 731-32.

244. *Id.* at 734-35.

245. *Id.* at 736. However, this cost-plus exception is a narrow one, and the direct purchaser is the proper plaintiff in almost every case. In Kansas v. Utilicorp United Inc., 497 U.S. 199 (1990), the plaintiffs were states that had sued as parens patriae on behalf of their states' consumers and state agencies that purchased natural gas from the defendant utility. The states alleged that certain gas producers had conspired to inflate the natural gas price and that the utility had passed along the overcharge in the form of increased rates, rates which were based upon the utility's cost of gas. The Supreme Court held that, although "any economic assumption underlying the *Illinois Brick* rule might be disproved in a specific case," it would be "unwarranted and counterproductive" to litigate a list of exceptions. The Court stood by its rule in *Illinois Brick*. *Id.* at 216.

246. *See* discussion *infra* Part V.A.2.b.

247. MISS. CODE ANN. § 75-21-9 (1991).

248. Ready-Mix Concrete & Concrete Prods. Co. v. Perry, 123 So. 2d 241, 246 (Miss. 1960).

249. 431 U.S. 720 (1977).

75-21-9 provides a right of action for damages to any person who is damaged by an antitrust violation, "or by its effects, direct or indirect."[250]

Federal law does not preempt such a state law that allows recovery by indirect purchasers.[251] Prior to the *Illinois Brick* decision, there apparently were only two states, Mississippi and Alabama, that allowed indirect-purchaser recovery.[252] Following *Illinois Brick*, a number of states adopted such provisions.[253] In Mississippi, only one decision has mentioned this aspect of Mississippi law. In *Hughes Construction Co. v. Rheem Manufacturing Co.*,[254] the court noted the plaintiffs, who claimed to represent a class of indirect purchasers of water heaters in Mississippi, apparently had carefully drawn their complaint to involve only a claim under section 75-21-9, not federal law.[255] There is no further discussion of recovery under Mississippi law.

3. Observations on Objectives of Antitrust Law

In passing the federal antitrust laws, "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent."[256] Obviously, both Congress and the state legislature wanted to prevent large "trusts," "combines," or other business "combinations" from using their size or collusion to strangle their (usually smaller) competitors or would-be competitors or otherwise force their higher prices upon consumers. Undoubtedly, given the timing of the federal and state enactments, there was a healthy dose of populist sentiment behind the statutes. But what are the best justifications for these laws today? What are the guides the courts use to shape their decisions? What makes one competitor's method of "competing" a violation, while another's escapes judicial disdain? When can an individual company's decisions on how it will "compete" be deemed a violation of the antitrust laws, thus opening it to a civil action by someone claiming to be injured thereby? How can a vigorous competitor know when it is about to overstep the line between intense, effective competition and a law violation?

The case law provides the objective guidelines for lawful business behavior. And there are economic and social principles and objectives guiding this evolution. The economic objective of a pro-competition policy, the policy best explaining and justifying the antitrust laws as we know them today, is in keeping with

---

250. MISS. CODE ANN. § 75-21-9 (1991).

251. California v. ARC Am. Corp., 490 U.S. 93 (1989) (reversing the Ninth Circuit's decision in *In re* Cement & Concrete Antitrust Litigation, 817 F.2d 1435 (9th Cir. 1987)).

252. *See, e.g.*, Crown Oil Corp. v. Superior Court, 223 Cal. Rptr. 164 (Ct. App. 1986); Tip Top Farms, Inc. v. Dairylea Coop., Inc., 497 N.Y.S.2d 99 (App. Div. 1985), *cert. denied*, 481 U.S. 1029 (1987).

253. New York v. Cedar Park Concrete Corp., 741 F. Supp. 494, 497 (S.D.N.Y. 1990); Union Carbide Corp. v. Superior Court, 679 P.2d 14, 28 (Cal. 1984) ("There is little applicable precedent governing the interplay of federal and state law on the subject. Several congressional proposals to overrule *Illinois Brick* have been unsuccessful. Six other states by statute have adopted a rule permitting, as does California, actions by indirect purchasers under state antitrust provisions.").

254. 487 F. Supp. 345 (N.D. Miss. 1980).

255. *Id.* at 346 n.1.

256. PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW § 103 (1978) (quoting Standard Oil Co. v. Federal Trade Comm'n, 340 U.S. 231, 249 (1951)).

classical economics: "To maximize consumer economic welfare through efficiency in the use and allocation of scarce resources."[257] At the same time, a pro-competition policy also promotes populist goals, in that it broadens entrepreneurial opportunities, limits business size, disburses wealth, and "substitutes the impersonal forces of the marketplace for the economic power of private individuals or groups to exploit or coerce those with whom they deal."[258]

In recent years, many commentators have argued that efficiency is the only goal of antitrust law. If the antitrust law would, by its overinclusive requirements or excessive penalties, discourage competitive behavior that is efficient, the law should be trimmed back or the remedies reduced.[259] Indeed, Professors Page and Blair and those of the "Chicago School" see the Sherman Act as the opportunity and means by which courts both learn how best to promote market efficiencies and shape the law to promote those efficiencies:

> The development of antitrust law—including the antitrust injury doctrine—is evolutionary. As one commentator has noted, "the Sherman Act can be regarded as 'enabling' legislation—an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways."[260]

Regardless of the debate, the courts have given the economic arguments, or "efficiency," priority over the "populist" goals, such as objections to business size or concentration. For example, size alone is no offense, and even a monopoly, if pursued and obtained consistent with principles of efficiency, does not violate the antitrust laws.[261] Furthermore, the antitrust laws promote the opportunity for competition "on the merits"; they do not protect businesses from the harsh reality of the competitive marketplace. The judicial utterance, so frequently heard in business torts, that the laws "protect competition, not competitors,"[262] originated in the field of antitrust.

B. Restraints of Trade Prohibited by Section 1 of the Sherman Act

Section 1 of the Sherman Act proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among

---

257. AREEDA & TURNER, *supra* note 256, § 103.

258. AREEDA & TURNER, *supra* note 256, § 103.

259. *See, e.g.*, ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445 (1985); William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980); Page, *Antitrust Penalties*, *supra* note 41; Page, *Scope of Liability*, *supra* note 41.

260. Page & Blair, *supra* note 228, at 112-13 (quoting HERBERT HOVENKAMP, ECONOMICS & FEDERAL ANTITRUST LAW 52 (1985)).

261. AREEDA & TURNER, *supra* note 256, § 104 ("Monopoly resting on economies of scale or obtained by 'skill, foresight and industry' does not violate the antitrust laws." (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966))).

262. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

the several States, or with foreign nations."[263] The Sherman and Clayton Acts provide criminal and civil sanctions for violations of section 1. A person who is injured in her "business or property" by reason of a section 1 violation may recover treble damages, i.e., three times actual damages, plus attorney's fees under section 4 of the Clayton Act.[264] By its terms, section 1 might appear to prohibit *all* contracts or other coordinated actions of two or more people that "restrained trade." Of course, many accepted business practices may be seen as "restraining" trade. For example, a contract by which one agrees to buy 1000 widgets from another over the period of a year "restrains" the buyer from changing suppliers after six months and 500 widgets.

The Supreme Court very early found section 1 to proscribe only the restraints of trade that "unreasonably" limit competition.[265] Over the years, courts have found violations that fit within one of a number of categories, depending upon such things as whether the "unreasonable restraint of trade" is the result of the collaborative action of direct competitors – deemed a "horizontal" restraint – or between firms at different market levels, such as restraints imposed by a manufacturer on its distributors – deemed a "vertical" restraint.[266] Within these categories, the courts also have grouped restraints by a requirement of proof – whether one must prove the effect on commerce or trade would be unreasonable. Certain restraints are deemed always to have pernicious effects upon competition and are deemed "per se" violations, being conclusively presumed unreasonable without much, if any, analysis of why the conduct unreasonably restrains commerce. All other restraining conduct requires more analysis – and proof – of how the conduct might hurt competition, analysis conducted under the "rule of reason." We will deal with these in turn.

Likewise, the Supreme Court of Mississippi has applied the state statutes to prohibit only "unreasonable" restraints – those that are, in the words of section 75-21-1, "inimical to public welfare."[267] Over seventy years ago, the court observed:

> It will be seen that this court in construing our statute prohibiting monopolies has applied the rule of reason, as has the Supreme Court of the United States in construing the federal statute against monopolies, as have also the courts of other states in passing on co-operative marketing contracts substantially the same as the one here involved. There must be an unreasonable or undue restraint of trade. It must be such a restraint of trade as is detrimental to the public interest.[268]

To be actionable, conduct generally must fall within one of the judicially recognized categories. There is no general cause of action, under Mississippi law or

---

263. 15 U.S.C. § 1 (1988).

264. 15 U.S.C. § 15 (1988).

265. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

266. Futurevision Cable Sys. v. Multivision Cable TV Corp., 789 F. Supp. 760, 765-66 (S.D. Miss. 1992).

267. State *ex rel.* Knox v. Edward Hines Lumber Co., 115 So. 598, 605 (Miss. 1928) (not all restraints are unreasonable); Brown v. Staple Cotton Coop. Ass'n, 96 So. 849, 855 (Miss. 1923).

268. *Brown*, 96 So. at 855.

otherwise, for "restraint of trade." If the challenged conduct does not fit within one of the judicially recognized forms or categories, the complaining party is probably out of luck.[269]

1. Requirements of a Section 1 Violation

There are three requirements of a violation under section 1 of the Sherman Act. The plaintiff must prove (1) the existence of a contract, combination, or conspiracy between or among at least two separate parties;[270] (2) that unreasonably restrains trade;[271] and (3) affects interstate commerce.[272] These are requisites for each type or category of antitrust offense or tort. Each will be discussed briefly below. It is again worth noting that no subjective analysis of a defendant's motive or intent, as distinguished from his conduct or the results of his conduct, is required or even very helpful.

a. Proof of Contract, Combination, or Conspiracy

Section 1 of the Sherman Act by its terms requires a "contract, combination . . . or conspiracy."[273] The existence of collective action is a requirement for both horizontal and vertical restraints actionable under section 1.[274] Section 1 does not reach independent action by a single person or company, regardless of its possible purpose or effect on the competition.[275] The Supreme Court has made it clear that section 1 does not reach a single firm's conduct that is "wholly unilateral."[276] A single individual or business may, for instance, unilaterally select those with whom it will deal, and refuse to deal with any others.[277] If a plaintiff cannot present evidence tending to prove the existence of an agreement or conspiracy with

---

269. *See, e.g.*, Hardy Bros. Body Shop v. State Farm Mut. Auto. Ins. Co., 848 F. Supp. 1276, 1290 (S.D. Miss. 1994). There, the plaintiffs challenged business practices as an unlawful "restraint of trade." But the court found the conduct was not one of the judicially recognized and prohibited "restraints" under state law – such as trademark infringement, monopolization by use of a trademark, or a restrictive covenant in an employment agreement – or an antitrust violation under state or federal law.

270. *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911); *Futurevision*, 789 F. Supp. at 765; AT&T v. Delta Communications Corp., 408 F. Supp. 1075, 1088 (S.D. Miss. 1976).

271. United States v. American Tobacco Co., 221 U.S. 106, 175-84 (1911); Consolidated Metal Prods. v. American Petroleum Inst., 846 F.2d 284, 289 (5th Cir. 1988).

272. Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975). Some courts cite a fourth requirement, necessary to private civil actions for damages, that there be an injury to the plaintiff. Abadir & Co. v. First Miss. Corp., 651 F.2d 422, 424 (5th Cir. 1981); *Futurevision*, 789 F. Supp. at 765.

273. 15 U.S.C. § 1 (1988). *See Standard Oil*, 221 U.S. at 58.

274. *See* Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992) (alleged conspiracy and joint action of plasma purchasers to reduce the prices paid to plasma donors); Gulf States Land & Dev., Inc. v. Premier Bank, 956 F.2d 502, 508 (5th Cir. 1992) (alleged conspiracy by a bank and its officers and directors); Walker v. U-Haul of Miss., 734 F.2d 1068, 1071 (5th Cir. 1984) (alleged vertical refusal-to-deal or dealer termination by manufacturer and its distributor).

275. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984); United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

276. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984).

277. *Colgate*, 250 U.S. at 307. *See also Walker*, 734 F.2d at 1071; Futurevision Cable Sys. v. Multivision Cable TV Corp., 789 F. Supp. 760, 766 (S.D. Miss. 1992).

a second market actor, there is no claim.[278] Of course, few antitrust defendants deliberately provide the proverbial smoking gun. The question is what the court should do in the absence of a contract or other plain evidence of agreement. In 1984, the Supreme Court attempted an answer.

> The correct standard is that there must be evidence that leads to exclude the possibility of independent action by the [defendants]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective.[279]

While one would prefer direct evidence to establish concerted action, one may, and more often must, rely upon circumstantial evidence scrutinized under the standard of *Monsanto Co. v. Spray-Rite Service Corp*. The Supreme Court added practical flesh to that standard in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[280] when it described the plaintiff's burden of proof to avoid summary judgment or a directed verdict when the allegation of concerted action rests solely on circumstantial evidence:

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of Section 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. . . . [Plaintiffs] in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs].[281]

In determining whether circumstantial evidence of concerted action is sufficient, the *Matsushita* Court mentioned the "motive" of a defendant, but we see that this consideration requires no subjective determination, no determination of defendant's state of mind. The Court found that there are two inquiries relevant to the sufficiency of the circumstantial evidence: (1) whether the defendant had "any rational motive" to join the alleged conspiracy; and (2) whether the defendant's conduct "was consistent with the defendant's independent interests."[282] The Court concluded that if the defendant "had no rational motive to conspire, and if [its] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."[283] In other words, the Court is applying an *objective* standard, a "does it make any sense for someone to act this way" test, together with an evaluation of defendant's *conduct*, and objective interests, in determining whether there may be sufficient evidence to support a claim.

---

278. *Gulf States*, 956 F.2d at 508 (granting summary judgment because, in response to affidavits in support of summary judgment, plaintiffs had "not responded with any evidence, direct or indirect, tending to prove the existence of a conspiracy" between a bank and its officers and directors).

279. *Monsanto*, 465 U.S. at 768.

280. 475 U.S. 574, 588 (1986).

281. *Id.* (quoting *Monsanto*, 465 U.S. at 768).

282. *Id.* at 587.

283. *Id.* at 596-97.

b. Proof That Restraint Is in or Affects Interstate Commerce

Section 1 requires that the challenged conduct be "in restraint of trade or commerce among the several states or with foreign nations."[284] While at first this was seen as limiting the Sherman Act to activities actually "in" interstate commerce,[285] it is now clear that an actionable restraint of commerce may be proven by showing only that the questioned activities "affect" interstate commerce.[286] This broader "affecting commerce" test is easier to satisfy. The Fifth Circuit recently reversed a district court's conclusion that a plaintiff had failed, in his allegations of price-fixing, adequately to plead federal jurisdiction.[287] The Fifth Circuit, perhaps applying an even broader, or lower, standard for such per se offenses, observed: "In cases involving agreements to fix prices, a showing that the alleged conspiracy would impede a specified measure of interstate commerce is not necessary; one need only show that an impediment to competition would occur in the marketplace."[288]

c. Proof That the Restraint Is Unreasonable

As noted before, section 1 of the Sherman Act has been held to prohibit only unreasonable restraints of trade, or restraints that unreasonably restrain trade.[289] Whether a restraint is "reasonable" is determined only by its effects on competition.[290] Proof of this element revolves around two standards, the "per se rule" and the "rule of reason."

The types of conduct to which the Supreme Court has applied the per se rule are seen as always, or almost always, harmful to competition. Justice Scalia recently restated the reasons for subjecting certain types of conduct to the per se rule:

> *Per se* rules of antitrust illegality are reserved for those situations where logic and experience show that the risk of injury to competition from the defendant's behavior is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior's pro competitive benefits and its anticompetitive costs.[291]

In the 1980s and 1990s, the Supreme Court limited the forms of conduct to which the per se rule applies. Still, the types of conduct that courts have found warranted per se prohibition include "horizontal and vertical price-fixing agreements,

---

284. 15 U.S.C. § 1 (1988).

285. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

286. McLain v. Real Estate Bd., Inc., 444 U.S. 232, 241-42 (1980); Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976).

287. Ancar v. Sara Plasma, Inc., 964 F.2d 465 (5th Cir. 1992).

288. *Id.* at 469.

289. Standard Oil Co. v. United States, 221 U.S. 1, 60-70 (1911); Consolidated Metal Prods. v. American Petroleum Inst., 846 F.2d 284, 289 (5th Cir. 1988).

290. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988).

291. Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072, 2092-93 (1992) (Scalia, J., dissenting).

the allocation of geographic territories or customers by direct competitors, certain tying arrangements, and certain concerted refusals to deal."[292]

The application of the per se rule renders unnecessary an in-depth analysis of the reason or justification for the restraint[293] as well as the nature, degree, and extent of market effect.[294] When the per se rule is applicable, the plaintiff generally will not have to prove that the challenged conduct has or is likely to have an adverse impact on competition. Likewise, in per se cases, the defendant will not be allowed to raise defenses based upon factors unrelated to the effect upon competition or the argument that competition may not be necessary or reasonable.

If the plaintiff does not have the benefit of a per se characterization of defendant's conduct, she must prove that the challenged practice "unreasonably" restrains commerce pursuant to some analysis of the probable purpose of the conduct and its actual effect on competition. Under the rule of reason, the defendant is not required to show that the practice is reasonable (under the per se rule, the defendant is not *allowed* to show that the practice is reasonable); rather, the plaintiff bears the burden of showing that a particular arrangement unreasonably restrains trade.[295] The plaintiff must show injury to *competition*, not just to a competitor, i.e., the plaintiff: "[P]laintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice."[296] If and when the plaintiff meets this requirement, the burden shifts to the defendant to provide evidence of the pro-competitive "redeeming virtues" of the combination or concerted action. If the defendant can make such a showing, the burden returns to the plaintiff "to demonstrate that any legitimate collaborative objectives proffered by the defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole."[297]

As an example, in *Capital Imaging Associates v. Mohawk Valley Medical Associates, Inc.*,[298] a group of radiologists claimed that a health maintenance organization and a physicians' association had conspired to exclude the radiologists from membership in the association.[299] In applying the rule-of-reason analysis to these

---

292. ABA ANTITRUST SECTION, ANNUAL REVIEW OF 1993 ANTITRUST LAW DEVELOPMENTS 17 (1994) (citing Capital Imaging Assocs. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 542-43 (2d Cir.), *cert. denied*, 114 S. Ct. 388 (1993)). *Cf.* United States Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 & n.2 (1st Cir. 1993).

293. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 422 (1990); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-22 (1940).

294. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

295. *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 374 n.5 (1967); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 295 (5th Cir. 1981); Cawley v. Braden Indus., 613 F.2d 751, 754-55 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980); Northwest Power Prods. v. Omark Indus., 576 F.2d 83, 90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

296. *Capital Imaging Assocs.*, 996 F.2d at 543.

297. *Id.* (quoting 7 PHILLIP AREEDA, ANTITRUST LAW § 1052, at 371 (1986)).

298. 996 F.2d 537 (2d Cir.), *cert. denied*, 114 S. Ct. 388 (1993).

299. *Capital Imaging Assocs.*, 996 F.2d at 539.

facts,[300] the Second Circuit found that the plaintiff had failed to meet its initial burden of showing that "the defendants' conduct or policy has had a substantially harmful effect on competition."[301] The court found that summary judgment for the defendants was appropriate because the plaintiff failed to meet its burden either by establishing that the defendants held market power in the relevant market or by presenting direct evidence of any harmful effects flowing from the defendants' conduct.[302] The court emphasized the importance of market power in rule-of-reason analysis "because market power bears a particularly strong relationship to a party's ability to injure competition."[303] Since the evidence showed that the defendants provided service to just over two percent of all HMO subscribers in the relevant market, the court concluded that the defendants "lacked the power to injure competition or force consumers to accept supracompetitive health care premiums or lower quality medical care."[304] Likewise, the court found that the plaintiff did not show that its exclusion from the physician's association had actual detrimental effects on *competition* – on the quality or quantity of health care available in the relevant market.[305]

This is but an example. The proof required by rule-of-reason analysis may be complex, extensive, and expensive. Injury to a competitor is insufficient. In recent years, the courts have sometimes used the "quick look" variation of the rule of reason to provide a shortcut analysis, either to determine whether the conduct should sufficiently harm competition so as to be deemed a per se violation, or to provide injunctive relief without going through all of the rule-of-reason analysis.

2. Horizontal Restraints

Sometimes it is not altogether easy to determine whether a restraint is horizontal or vertical, and courts have struggled to make the proper determination. Consider, for example, the case of a retail dealer who complains that the manufacturer terminated him at the direct request of a competitor-dealer who was upset that the first dealer would not agree to stop his price-cutting practices. This might appear to be simply a variation of a price-fixing arrangement between competitors, itself a horizontal arrangement. However, the Supreme Court determined that the categorization as horizontal or vertical is based only on the relationship between the parties to the agreement, not on the purpose or effect of the restraint.[306] According

300. Many courts have dealt with physician exclusion, such as by exclusive contract, as "exclusive dealing," to be evaluated under the rule of reason. Prior to a Fifth Circuit decision in 1982 and the Supreme Court's reversal in 1984, all courts had characterized exclusive hospital-physician contracts as "exclusive dealing" and analyzed the arrangements under the rule of reason. The case that changed this treatment was Hyde v. Jefferson Parish Hospital District, 686 F.2d 286 (5th Cir. 1982), *rev'd*, 466 U.S. 2 (1984). *See* David W. Clark, *Ties That May Bind: Antitrust Liability for Exclusive Hospital-Physician Contracts After* Jefferson Parish Hospital District v. Hyde, 54 MISS. L.J. 1, 16-17 (1984) [hereinafter Clark, *Ties That May Bind*].

301. *Capital Imaging Assocs.*, 996 F.2d at 546.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 (1988).

to the Court, the test is whether or not the restraint is the product of a horizontal agreement.[307] In other words, is the challenged "contract, combination or conspiracy" between direct competitors, or between actors at different levels in the market?[308]

The characterization of a concerted action as either "horizontal" or "vertical" is quite important. If the conduct involves agreement or coordinated action of competitors, i.e., a horizontal arrangement, it is much more likely to be seen as unreasonable, with no redeeming justification.[309] Thus, the conduct is more likely to be evaluated under the per se rule. We shall review the elements of several horizontal restraints deemed to violate section 1.

a. Price-Fixing or Other Arrangements Affecting Price

Perhaps no horizontal arrangement is seen as more damaging to competition, and less likely to have any redeeming social value, than price-fixing by competitors. Any arrangement which has the effect of stabilizing prices is prohibited, regardless of whether the parties use direct or indirect means to achieve the result. A significant and illustrative decision is *United States v. Socony-Vacuum Oil Co.*,[310] which held that an agreement to stabilize market prices by indirect means represented a per se violation of section 1, even though no prices were actually fixed: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[311] The Supreme Court found that the defendant gasoline refiners' attempts to stabilize market prices, albeit indirectly, were prohibited even if the defendants did not have the market power to fix prices in a particular market.[312] Any such horizontal agreement affecting price is prohibited, and the defendant is not entitled to show how the practice might be "reasonable" for some other purpose.

The courts have applied the per se rule to a variety of direct horizontal price-fixing arrangements. These include "conspiracies to submit noncompetitive rigged bids and thereby allocate successful bids among competitors[,] agreements to adhere to a price book[,] and, in certain circumstances, agreements among competitors to engage in cooperative price advertising."[313] Other agreements directly affecting price, but not setting the ultimate price, have been held to be violations. These include agreements to limit production or set quotas;[314] to limit

307. *Id.*

308. *Id.*

309. *Id.* ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.").

310. 310 U.S. 150 (1940).

311. *Id.* at 223.

312. *Id.* at 221.

313. ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 63-64 (3d ed. 1992) (citations omitted).

314. Hartford-Empire Co. v. United States, 323 U.S. 386, 406-07 (1945).

discounts;[315] to establish uniform costs and minimum mark-up percentages;[316] to discontinue free service;[317] to use specified accounting methods when making residential mortgage loans;[318] to utilize standard cash down payment requirements;[319] or to fix any other component of price.[320]

Section 1 of the Sherman Act also proscribes arrangements that may affect price only indirectly, although the more remote the probable effect upon price the more likely that rule-of-reason analysis, rather than the per se rule, will apply. Some practices that have been held to be improper means of indirectly controlling prices include agreements among competitors to set quotas or limit production,[321] to limit business (showroom) hours,[322] and to restrict price advertising.[323]

However suspect an agreement that affects price may be, if the practice is sufficiently removed from direct effect on price, it may escape per se treatment. In *United States v. Brown University*,[324] the court dealt with an agreement by the Massachusetts Institute of Technology [hereinafter MIT] and other universities to establish the amount of financial aid to be provided to applicants who were accepted by more than one of the participating schools. The district court used a "quick look" rule-of-reason analysis, finding that financial aid incentives were an important feature of student recruitment and found "abundant and uncontroverted evidence that the fundamental objective of the Ivy Overlap Group was to eliminate price competition among the member institutions."[325] While the district court declined to apply the per se rule, it also refused to analyze the actual economic effects of the concerted action.[326] However, the Third Circuit reversed and remanded the case for a more complete assessment of MIT's arguments that the challenged practice, the "overlap plan," served several beneficial objectives, such as promoting competition for qualified applicants on non-price criteria and improving competition by expanding the educational choices for certain applicant groups.[327] The court of appeals felt the complete rule-of-reason analysis was

---

315. United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 185-88 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

316. California Retail Grocers & Merchants Ass'n v. United States, 139 F.2d 978 (9th Cir. 1943), *cert. denied*, 322 U.S. 729 (1944).

317. United States v. Acquafredda, 834 F.2d 915, 917 (11th Cir. 1987), *cert. denied*, 485 U.S. 980 (1988).

318. Stavrides v. Mellon Nat'l Bank & Trust Co., 487 F.2d 953 (3d Cir. 1973).

319. Plymouth Dealers' Ass'n v. United States, 279 F.2d 128, 134 (9th Cir. 1960).

320. *See, e.g.*, Ancar v. Sara Plasma, Inc., 964 F.2d 465, 469 (5th Cir. 1992) (alleged conspiracy among blood plasma suppliers to "keep the purchase price of plasma artificially low" by "agreeing not to set the price based on market demand"); United States v. Airline Tariff Publishing Co., Trade Reg. Rep. (CCH) ¶ 45,092 (D.D.C. 1992) (use of ATP's computerized fare dissemination services to propose, and thus broadcast or negotiate, fare adjustments, among other practices).

321. Hartford-Empire Co. v. United States, 323 U.S. 386, 406-07 (1945).

322. *In re* Detroit Auto Dealers Ass'n, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

323. United States v. Gasoline Retailers Ass'n, 285 F.2d 688 (7th Cir. 1961).

324. 5 F.3d 658 (3d Cir. 1993) (all defendants other than MIT had entered into a consent decree before the trial).

325. 1992-2 Trade Cas. (CCH) ¶ 69,942 (E.D. Pa. 1992), *rev'd*, 5 F.3d 658 (3d Cir. 1993).

326. *Brown Univ.*, 5 F.3d at 664.

327. *Id.* at 678-79.

appropriate because the challenged "overlap plan" might be justified by its tendency to increase applicant choice and because the participating schools did not have the degree of economic self interest that might otherwise cast suspicion on their stated public interest rationales for the financial assistance collaboration.[328]

b. Division of Markets or Customers Among Competitors

Following close behind price-fixing schemes as likely candidates for per se prohibition are agreements by actual or potential competitors to divide or allocate markets. Like price-fixing agreements, such horizontal agreements are held unreasonable per se.[329] It is now clear that unlawful agreements to divide markets – i.e., agreements that each competitor will not sell in the other's designated territory – are not limited to agreements between actual competitors to divide up a market in which they already do business. The prohibition of market division also extends to *potential* competitors who agree not to enter each other's territory.[330] Agreements between or among competitors not to sell to specified customers are very similar to agreements to divide sales territories. In both situations competitors are agreeing to divide, and not compete against each other for, the available business. Similarly, arrangements have been held per se unlawful when a potential competitor agrees not to sell a particular product or product line to specified customers. All of these types of arrangements have been held to be per se violations of section 1 of the Sherman Act.[331]

c. Horizontal Refusals to Deal ("Group Boycotts")

If competitors agree among themselves not to deal with other competitors, customers, or suppliers, this concerted action may be subject to per se liability as a "group boycott" or "concerted refusal to deal." Some courts in recent years have declined, however, to apply the per se rule and have, instead, analyzed the arrangement under the rule of reason.

Earlier in this century, a horizontal refusal to deal was found in cases such as a group of retailers, as a group, refusing to deal with wholesalers who sold directly to consumers.[332] Then, in 1959, the Supreme Court treated as a per se offense an

328. *Id.* at 677.

329. *See* Palmer v. BRG, Inc., 498 U.S. 46 (1990); United States v. Topco Assocs., 405 U.S. 596 (1972); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

330. *Palmer*, 498 U.S. at 46.

331. *See, e.g.*, *Topco Assocs.*, 405 U.S. 596; Schlitz Brewing Co. v. Johnson, 123 F.2d 1016 (6th Cir. 1941).

332. *See, e.g.*, Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910) (affirming Mississippi Supreme Court decision at 48 So. 1021); *see* Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). For example, in *Grenada Lumber*, a group of retail lumber dealers agreed not to deal with any lumber manufacturer or wholesale dealer who sold direct to consumers. The State of Mississippi brought suit for injunctive relief under a Mississippi antitrust statute, the predecessor of section 75-21-1. The Mississippi Supreme Court affirmed an injunction to dissolve the association of agreeing retailers. Similarly, in Retail Lumber Dealers' Ass'n v. State Attorney Gen., 48 So. 1021, 1023 (Miss. 1909), the Mississippi Supreme Court dealt with an association of retail lumber dealers who agreed "to buy only from manufacturers and wholesalers who do not sell direct to customers." The court found that it did not need to inquire into the reasonableness of the conduct – whether or not it was designed to prevent "unfair" competition – because the legislature must have considered such a possibility and provided no such exception.

alleged conspiracy among manufacturers and distributors not to sell to Klor's, a retail competitor of a store that had approached the manufacturers and distributors, or to sell to it only at higher prices or on unfavorable terms.[333] The Supreme Court rejected defendants' arguments that there was no "intent" to affect prices since there were other stores in the area selling the same products.[334] The Court said these types of joint conduct, "[g]roup boycotts, or concerted refusals by traders to deal with other traders," were forbidden, regardless of any actual effect on competition.[335]

Numerous lower courts have followed the Supreme Court's lead in *Klor's, Inc. v. Broadway-Hale Stores* in treating group boycotts as per se violations of section 1. In 1985, however, the Supreme Court found that the defendant Wholesale Purchasing Cooperative, which had expelled one of its members without explanation or hearing, did not possess sufficient market power to affect competition.[336] Thus, no injury to competition will be presumed if the excluding or boycotting businesses do not have such market share and do not control exclusive access to something the excluded business must have to compete.

Also, a refusal to deal may not be horizontal, but vertical, such as a challenged agreement between a health maintenance organization and its participating physicians. One court has found that per se treatment for group boycotts "is principally reserved for cases in which competitors agree with each other not to deal with a supplier or distributor if it continues to serve a competitor whom they seek to injure."[337] This arrangement is more of a vertical arrangement, not a horizontal refusal to deal, and would not be subject to per se condemnation.[338]

Finally, in an important case from Mississippi, the United States Supreme Court held that there could be no common law liability for consumer boycotts of business that are politically motivated and designed to use economic force to effect political change. In *NAACP v. Claiborne Hardware Co.*,[339] retail merchants of Port Gibson and Claiborne County sued the NAACP and other organizations and individuals for a conspiracy to boycott their businesses. The merchants alleged, among other things, that the defendants' activities constituted a secondary boycott in violation of Mississippi Code section 75-21-1, as an unlawful horizontal boycott.[340] The merchants also claimed the defendants' conduct constituted an unlawful common law boycott effected by violence or threats of violence.[341] The Mississippi Supreme Court held that the facts provided no claim under the Mississippi antitrust law, because that law "has no application to boycotts to achieve

---

333. Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 209 (1959).
334. *Id.* at 210.
335. *Id.* at 210-12.
336. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 294-96 (1985).
337. United States Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993).
338. *Id.*
339. 458 U.S. 886, 920-24 (1982), *rev'g* 393 So. 2d 1290 (Miss. 1980).
340. *Claiborne Hardware*, 458 U.S. at 920-24.
341. *Id.*

political goals."[342] However, the Mississippi Supreme Court found that the use of force, violence, or threats made the boycott illegal, "regardless of whether it is primary, secondary, economical, political, social, or other."[343]

The United States Supreme Court reversed, finding that "all of respondents' losses were not proximately caused by violence or threats of violence."[344] Rather, the evidence showed this was a political boycott and any random acts of violence, if indeed there were any – "[t]he chancellor made no finding that any act of violence occurred after 1966" – did not cause the alleged damages.[345] Rather, the defendants were exercising their constitutional right to free speech under the First Amendment, and the state had no authority to compensate the merchants for "the direct consequences of nonviolent, constitutionally protected activity."[346]

3. Vertical Restraints of Trade

Vertical restraints arise out of agreements between buyers and sellers operating at different levels in the chain of distribution of the same product or service – between, for example, a wholesaler and a retailer, or a manufacturer and a distributor. Whether a particular vertical agreement is proscribed under section 1 of the Sherman Act depends upon the existence of concerted action and on the type of restraint. A manufacturer's independent action has always been recognized as protected from liability under section 1.[347] Likewise, there may be a variety of procompetitive reasons for arrangements between, for example, manufacturers and retailers; thus, almost all vertical arrangements are analyzed under the rule of reason. The only vertical restraints that are per se violations, thus requiring no proof of the unreasonableness of the restraint (i.e., any actual effect on competition), are agreements to fix the purchaser's resale price or price levels. After brief consideration of vertical restraints that involve some agreement on price or price levels, we turn to some of the more common vertical non-price restraints.

a. Vertical Price Restraints

Vertical price restrictions may come in a number of forms, all of which are subject to the per se rule. The per se prohibition had its origin in a 1911 decision, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[348] In that decision, the Supreme Court held that the agreement between a drug manufacturer and its customers to observe a minimum resale price was a per se violation of section 1 of the Sherman

342. *Claiborne Hardware*, 393 So. 2d at 1304.

343. *Id.* at 1301. The court found that this conduct violated Mississippi Code § 97-23-83, which makes a criminal offense any threatening, intimidating, or coercing a person to prevent him or her from doing business with another. *Id.*

344. *Claiborne Hardware*, 458 U.S. at 922.

345. *Id.*

346. *Id.*

347. United States v. Colgate & Co., 250 U.S. 300 (1919); Walker v. U-Haul of Miss., 734 F.2d 1068, 1071 (5th Cir. 1984); Aladdin Oil Co. v. Texaco, Inc., 608 F.2d 1107 (5th Cir. 1979).

348. 220 U.S. 373 (1911).

Act. The Court stressed that this maintenance of resale price infringed on the freedom of the dealers to sell products that they own.[349]

Even an agreement setting *maximum* resale prices is a per se violation.[350] This prohibition of a vertical agreement regarding maximum prices is just as much a violation, and a possible civil action, as a horizontal agreement, one among competitors, to fix maximum prices.[351] Further, a dealer termination or other vertical refusal to deal may be a per se violation, if it involves "some agreement on price or price levels."[352] However, even if a manufacturer and a distributor agreed that the manufacturer would terminate another distributor because of that other distributor's pricing practices, there would be no per se violation unless there was some understanding of what the prices or price levels would be by the remaining distributor.[353]

b. Tying and Exclusive Dealing Arrangements

A tying arrangement occurs when the seller of a product or service in one product market will sell his product or service to a buyer only if the buyer agrees to purchase, in addition, a second, distinct product or service. Tying has been prohibited on the ground that a manufacturer or other seller should not be able to use her power or position in one product market to advance her position in a different product market on a basis other than the competitive merits of both products.[354] Some arrangements do not have all of the critical characteristics of a tying arrangement and may simply be characterized as an " 'exclusive dealing' agreement or contract," in which a buyer agrees to deal with or obtain all of its requirements from only one seller or supplier.[355] Exclusive dealing arrangements foreclose a certain amount of competition in the market for the seller's product or service, but courts have long recognized that there may be a variety of justifications

---

349. *Id.* at 407-08. Later, there were efforts to avoid this decision by use of consignment arrangements, by which the retailer never actually owned the products he was selling at the agreed minimum price. The Supreme Court reached differing results in the two cases, depending upon whether the Court saw the consignment arrangement as serving a legitimate business purpose, or whether the arrangement was a "sham." *See* United States v. General Elec. Co., 272 U.S. 476, 488 (1926) (upholding consignment arrangement); Simpson v. Union Oil Co., 377 U.S. 13, 20-21 (1964) (finding the consignment system served "no legitimate business purpose" but was only a cover for a price-fixing scheme).

350. Albrecht v. Herald Co., 390 U.S. 145, 152 (1968) ("[A]greements to fix maximum prices 'no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' " (quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951))).

351. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (reaffirming *Kiefer-Stewart Co.*, 340 U.S. at 213).

352. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735-36 (1988).

353. *Id.* In a recent case one district court and the court of appeals imposed sanctions on a plaintiff's counsel for failing to observe the *Business Electronics* holding that there is no per se illegality unless there is actual agreement on price or price levels. In A-Abart Electric Supply v. Emerson Electric Co., 956 F.2d 1399 (7th Cir.), *cert. denied,* 113 S. Ct. 194 (1992), the plaintiff complained that Emerson stopped selling its new line of ceiling fans to plaintiff because a competing dealer said it would not carry Emerson's new fan line if Emerson also sold to the plaintiff. Plaintiff alleged a horizontal restraint and a per se violation of § 1 of the Sherman Act. Both the district court and the court of appeals noted the absence of any alleged agreement on price or price levels, said plaintiff's case "flies in the face" of *Business Electronics*, and imposed sanctions on plaintiff's counsel. *Id.*

354. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

355. *See, e.g.*, Clark, *Ties That May Bind*, *supra* note 300, at 11-15.

warranting such arrangements. For example, a car manufacturer may decide in a particular year to buy tires for its automobiles only from Goodyear. This decision could be based on considerations of quality, competitive bidding, or administrative convenience.

If such an arrangement were prohibited, the auto manufacturer might simply integrate its operations forward into the tire manufacturing industry and make its own tires. The antitrust laws are not seen as encouraging such partial vertical integration of operations – and the resulting increased concentration of industry – by discouraging what would seem like a perfectly reasonable business decision to deal, for some limited time, with only one seller or supplier.

Because the buyer in an exclusive dealing contract is ordinarily not itself selling the product that it is purchasing – except as a part of the resulting package, such as an automobile with tires – such exclusive arrangements are seen as strictly vertical ones. Exclusive dealing arrangements have been held to have less potential for misuse of market power than tying arrangements, in which the tying product seller may use its power in one product market to profit and affect competitive conditions in a completely different product market.[356] Because of this lessened potential for abuse of power in a particular product market, courts have responded less harshly to exclusive dealing arrangements than to tying arrangements. Courts are more willing to consider the possible justifications for an exclusive arrangement and will examine the purpose for the arrangement and its actual effects on competition – i.e., a rule-of-reason analysis.[357]

On the other hand, tying arrangements have not been seen as having the same potential for redeeming justification and have been subjected to the per se rule. Unlawful tying is said to have no purpose or effect other than the unfair intrusion into, and unfair profit and competition in, the market for the tied product. While some commentators have questioned this presumption of harm to competition,[358] courts consistently have found tying to be so offensive to the values underlying the antitrust laws that unlawful tying has been held to be a per se violation of section 1 of the Sherman Act.[359]

Four explicit characteristics of unlawful tying arrangements are generally recognized by courts: 1) two separate products, the tying product and the tied product, are involved; 2) the sale of one product or service is "conditioned" on the purchase of another; 3) the seller has sufficient market power in the tying product market to coerce purchase of the tied product; and 4) the arrangement affects a "not insubstantial amount" of interstate commerce.[360]

---

356. Clark, *Ties That May Bind*, *supra* note 300.

357. Clark, *Ties That May Bind*, *supra* note 300, at 14-15.

358. *See, e.g.*, BORK, *supra* note 259, at 365-81; *see* Clark, *Ties That May Bind*, *supra* note 300, at 15-21.

359. Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072 (1992); Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2 (1984).

360. *See, e.g.*, Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 498-99 (1969) [hereinafter *Fortner I*]; Clark, *Ties That May Bind*, *supra* note 300, at 23.

Some courts also require a plaintiff to establish an anti-competitive effect in the market for the tied product;[361] however, other courts have held that this proof of effect is part of the rule-of-reason inquiry and need not be addressed if the arrangement in question is determined to be a per se violation.[362]

An additional characteristic also has been recognized as implicit in unlawful tying arrangements: competition by the seller of the tying product in the market for the tied product, either by selling the tied product itself or through an entity in which it has an interest, or by receiving direct rebates or profits from another sale of the tied product.[363]

There are no Mississippi state court decisions addressing tying arrangements. However, the Mississippi Supreme Court has described as "monopolistic practices" a case where a defendant lumber company agreed to provide credit advances to a ready-mix concrete company in return for the concrete company's agreeing to purchase all of its cement from the lumber company and at a specified price.[364] In that decision, however, the Mississippi Supreme Court did not bother to analyze whether the lumber company owner had any market power in the market for the "tying product," i.e., the extension of credit. Indeed, on the facts of the case, the lumber company owner would not appear to have any distinctive credit product, and certainly none that could not also be offered, perhaps at even better rates, by someone else, such as a local bank.[365]

c. Vertical Refusals to Deal

Vertical refusals to deal usually relate to a manufacturer's terminating an existing distributor or refusing to enter into a relationship in the first instance with a distributor. If the manufacturer's action is used to enforce another antitrust violation, such as a tying arrangement, that violation would be held to the same

---

361. *See, e.g.*, Crossland v. Canteen Corp., 711 F.2d 714, 722 (5th Cir. 1983).

362. *See, e.g.*, Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1503 (11th Cir. 1985).

363. Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 456 (5th Cir. 1979); Griffing v. Lucius O. Crosby Memorial Hosp., 1984-1 Trade Cas. (CCH) ¶ 65,854 (S.D. Miss. 1984); Clark, *Ties That May Bind*, *supra* note 300, at 23-30. A recent decision misread *Jefferson Parish* as "disproving" such a "phantom fourth element" of a per se tying violation. In Action Ambulance Service v. Atlanticare Health Services, 815 F. Supp. 33 (D. Mass. 1993), the district court rejected the defendant's argument for dismissal on the ground that a firm cannot commit a per se tying violation unless that firm participates as a seller in the markets for both the tying and tied products. *Id.* at 36-37. The court seriously misread *Jefferson Parish*, however. As noted by the Fifth Circuit in *Jefferson Parish*, the hospital, as the seller of the tying product or service, plainly was participating in and profiting from sales in the tied product market. Jefferson Parish Hosp. Dist. v. Hyde, 686 F.2d 286, 291 (5th Cir. 1982).

The Fifth Circuit noted that the defendant hospital in reality was contracting with a small group of anesthesiologists and letting those physicians supervise a larger group of lower-priced anesthetists, but billing the patients the higher fee which an anesthesiologist would have charged if he or she, rather than the hospital's anesthetist, had provided all of the professional services. *Id.* at 287-88. Since the hospital and anesthesiology group billed jointly and split the fees evenly after deductions, this led to the hospital's realizing a substantial profit from the sale of the tied product, anesthesia services. *Id.* at 287-88, 291.

364. Ready-Mix Concrete & Concrete Prods. Co. v. Perry, 123 So. 2d 241, 244-45 (Miss. 1960).

365. *See, e.g.*, United States Steel Corp. v. Fortner Enters., 429 U.S. 610, 620-21 (1977) [hereinafter *Fortner II*] (Defendant had conditioned the grant of loans at quite favorable rates on Fortner's agreement to purchase defendant's prefabricated homes; the Supreme Court found insufficient evidence in the record that the defendant, U.S. Steel, had sufficient economic power in the market for the tying product; "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.").

standard as the underlying violation, a per se violation of section 1.[366] In other situations the refusal to deal may accompany or be used to enforce such restraints as territorial or customer restrictions, or exclusive dealing arrangements, and would, like those restraints, be subject to analysis under the rule of reason.[367]

In a recent Mississippi case, a new cable system operator that was seeking to "overbuild" areas already served by other cable service providers claimed that exclusive contracts between the existing cable companies, ESPN and the Learning Channel, constituted a conspiracy to prevent overbuilders from entering certain cable services markets.[368]

The district court deemed the effect of the exclusive agreements to be "insignificant" and found that the plaintiff-overbuilder had arranged alternative sources of programming.[369] Indeed, the exclusive contracts may have increased *inter*brand competition by forcing overbuilders to seek alternative programming suppliers and providing business for those suppliers.[370]

Dismissing the complaint, the district court rejected Futurevision's contention that the elimination of all *intra*brand competition would be a sufficiently anti-competitive effect to survive a motion to dismiss.[371] The court noted that under the Supreme Court decision in *Continental TV, Inc. v. GTE Sylvania, Inc.*,[372] a distributor who is complaining about his elimination in favor of another distributor must allege an anti-competitive effect at the interbrand level of competition.[373]

The district court also did not buy the plaintiff-overbuilder's argument that it need not prove that the two cable suppliers, ESPN and the Learning Channel, had market power in the interbrand market for cable programming *if* plaintiff could show that its ability to compete in the interbrand cable services market was significantly restricted as a result of the two exclusive contracts.[374] The court held that it must analyze the market power of those two programming suppliers and the programming market to determine whether the exclusive contracts had anti-competitive effects on interbrand competition, i.e., competition between and among programming suppliers.[375] The plaintiff did not offer proof regarding the market shares of ESPN and the Learning Channel, and the court dismissed the claims.[376] While some lower court decisions have looked at whether the purpose or "motive" behind a manufacturer's decision to terminate a distributor might be

---

366. *See, e.g.*, Barbara & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276, 1280 (4th Cir.), *cert. denied*, 484 U.S. 823 (1987).

367. *See, e.g.*, Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-59 (1977); Mendelovitz v. Adolph Coors Co., 693 F.2d 570, 576-78 (5th Cir. 1982); Hudson Sales Corp. v. Waldrip, 211 F.2d 268, 272-73 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954).

368. Futurevision Cable Sys. v. Multivision Cable TV Corp., 789 F. Supp. 760 (S.D. Miss. 1992).

369. *Id.* at 769.

370. *Id.* at 770.

371. *Id.* at 766.

372. 433 U.S. 36, 52 (1977).

373. Futurevision Cable Sys. v. Multivision Cable TV Corp., 789 F. Supp. 760, 768 (S.D. Miss. 1992).

374. *Id.*

375. *Id.* at 768-69.

376. *Id.* at 768-71.

anti-competitive,[377] the Supreme Court emphasizes an examination of the actual anti-competitive *effect* of such purpose or "intent."[378] Some courts have suggested that, in the absence of any anti-competitive effect, an anti-competitive "motive" or "intent" will not make a refusal to deal unlawful under the rule of reason.[379]

C. Monopolization and Attempt to Monopolize Under Section 2 of the Sherman Act and Mississippi Law

Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony . . . ."[380]

Mississippi's corresponding statute is Mississippi Code section 75-21-3, which provides in relevant part:

> Any corporation . . . or individual, partnership, or association of persons whatsoever, who, with intent to accomplish the results herein prohibited or without such intent, shall accomplish such results to a degree inimicable to public welfare, and shall thus:
>
> . . . .
>
> b) . . . monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management or control of any kind, class or description of business;
>
> . . . .
>
> d) or shall destroy or attempt to destroy competition in the manufacture or sale of a commodity, by selling or offering the same for sale at a lower price at one place in the state than another or buying or offering to buy a commodity at a higher price at one place in the state than another, differences of freight and other necessary expenses of sale and delivery considered;
>
> e) or shall destroy or attempt to destroy competition by rendering any service or manipulating, handling, or storing any commodity for a less price in one location than in another, the differences in the necessary expenses of carrying on the business considered, shall be deemed and held a trust and combine within the meaning and purpose of this section, and shall be liable . . . as in case of other trusts and combines.
>
> It shall be sufficient to make out a prima facie case of a violation of subdivision (e) of this section to show lower charge for the service therein mentioned in one locality than another, or to show a higher price paid for a commodity in one location than another, differences of freight and other necessary expenses of operating business considered.[381]

---

377. *See, e.g.*, Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1115-16 (5th Cir. 1979).

378. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-95 (1986).

379. *See, e.g.*, Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1156 (9th Cir. 1988); H&B Equip. Co. v. International Harvestor Co., 577 F.2d 239, 246 (5th Cir. 1978).

380. 15 U.S.C. § 2 (1988).

381. MISS. CODE ANN. § 75-21-3 (1991).

The monopolization cases in Mississippi have related almost entirely to the use of significant price reductions in one or some (but not all) locales to maintain a company's dominance or monopoly in a market. As is clear from the relevant statute, section 75-21-3, one's "motive" or "intent" is not really relevant. It is one's conduct and its effects that count.[382] The decisions bear this out.

Above in Part IV and later in Part XI, we discuss most of the relevant decisions, although not in an antitrust law context. Thus, for example, *Memphis Steam Laundry-Cleaners v. Lindsey*[383] was not brought under the antitrust statutes perhaps for purposes of venue.[384] As discussed above in Part IV, the defendant in that case plainly ran afoul of the pricing prohibitions of section 75-21-3(d) or (e). It does not take any evidence of overt threats to divine an anti-competitive objection from the defendant's pricing far below its own costs.[385]

A later decision, dealing specifically with the state antitrust laws, helps make the point. In *Wagley v. Colonial Bakery Co.*,[386] the Mississippi Supreme Court made it quite clear that one can be held liable for his conduct alone. Proof of words or other expressions of intent is quite unnecessary.

In *Wagley*, the plaintiff sued certain competing bakeries for conspiring to destroy competition by, among other things, charging lower prices, including prices below the cost of production, in areas where they competed with the plaintiff.[387] The court noted that one begins with the right to charge whatever prices he chooses.[388] However, this right to charge or reduce one's own prices becomes unlawful where *one's conduct shows* that "the exercise of the right [the reduction of prices] was [done] with the object of injuring the third person rather than primarily of benefitting the person exercising the right."[389] The court noted that all three defendants, one of which had never cut its prices before, set their price of bread in Jackson, where they competed with plaintiff, at a price which was "below the cost of production," and which obviously was lower than their prices outside Jackson.[390]

Just as a court need not have overt evidence of a party's intent or motive, a court may infer conspiracy (agreement) from *conduct*—"from the things actually

382. As a start, § 75-21-3 specifically provides that one will be liable for the proscribed conduct whether he is with "or without such intent." *Id.*

383. 5 So. 2d 227 (Miss. 1941).

384. The court in that case rejects a challenge to its jurisdiction, "the suit not having been brought under any anti-trust law so as to render it necessary that the same be filed in the county where the defendant has a domicile or place of business or its agent may be found, as provided for by Section 3445, CODE OF 1930 [Section 75-21-19 (1972)]." The suit could not have been brought in Prentiss County under that statute because the nonresident corporate defendant's resident agent for the service of process lived in Tupelo, Lee County. *Memphis Steam Laundry*, 5 So. 2d at 229, 230.

385. *Id.* at 232.

386. 45 So. 2d 717 (Miss. 1950).

387. *Id.* at 718.

388. *Id.* at 720.

389. *Id.* at 722.

390. *Id.* at 719.

done."[391] As discussed later in Part XI, circumstantial evidence – such as charging a price which would ultimately lead one to bankruptcy – is sufficient to establish that an action was taken with the objective of monopolizing or attempting to destroy competition.[392] *Memphis Steam Laundry* simply had proof of the facts that are not found in many cases and are not necessary for liability: "[*Memphis Steam Laundry* is] the only case we can find where proof was made by evidence of express threats."[393]

Finally, the court in *Wagley* made it clear that the phrase "inimicable to public welfare," contained for example in sections 75-21-1 and 75-21-3, does not add an element of proof.[394] That phrase, in Mississippi antitrust law, means simply that all of the conduct prohibited by the statute was determined by the legislature to be "inimicable to the public welfare."[395]

VI. Deceptive Marketing

A. A Federal Statute, a State Statute, a Sprinkling of Case Law, and a New Restatement

By reason of the Supremacy Clause, any understanding of the law of deceptive marketing in this state must begin with and may never escape the Lanham Act.[396] There we find section 43(a)[397] prohibiting "false designation of origin, or any false description or representation" which is generally understood "to proscribe the passing off of goods and services."[398] Historically, the courts read section 43(a) rather restrictively. Some thought it did little more than codify the common law.[399] Today the Act is seen as covering much more than conventional "passing off" and its reach has been extended to areas such as false advertising and misrepresentation through false description.[400]

Our most prominent source of state law is the MUTPCPA,[401] the liability standards of which give considerable if clumsy flesh to the general proscription of the Lanham Act. Before inquiring of these, there is a broader point we need note. Marketing imports communications and communications import speech, and the

---

391. *Id.* at 722 ("[C]onspiracies are seldom capable of proof by direct testimony.").

392. *Id.*

393. *Id.*

394. *Id.* at 720-21.

395. *Id.* at 721. *See also* Harvey v. State, 116 So. 98 (Miss. 1928) (monopolist in ice business in Water Valley dropped retail prices to only slightly over previous wholesale price, what the court found to be "one-half of a reasonable price to be paid for ice at that time," in order to undercut, not meet the prices of, a potential competitor).

396. 15 U.S.C. § 1125 (1988).

397. *Id.* at (a).

398. Restatement (Third) of Unfair Competition § 4 cmt. b. (Tentative Draft 1994).

399. *See, e.g.*, Chamberlain v. Columbia Pictures Corp., 186 F.2d 923 (9th Cir. 1951).

400. Restatement (Third) of Unfair Competition § 2 cmt. b. (Tentative Draft 1994); Alexander, *supra* note 30, at 67-71.

401. The MUTPCPA is codified at Miss. Code Ann. §§ 75-24-1 to -131 (1991 & Supp. 1994), and in relevant part mirrors the Federal Trade Commission's Revised Unfair Trade Practices & Consumer Protection Law (1966) [hereinafter FTC's Revised UTPCPL]. *See* Council of State Governments, 29 1970 Suggested State Legislation 141, 146-47 (1969) (published in Lexington, Ky.).

First Amendment limits the law's prerogatives in regulating speech. Though below the exalted plane of the political, commercial speech enjoys First Amendment protections and may be proscribed only where found false, deceptive, or misleading.[402]

Initially, the MUTPCPA is similarly general, prohibiting "unfair methods of competition" and "unfair or deceptive trade practices."[403] Thereafter, the MUTPCPA declares as "prohibited" eleven loosely-worded and obviously somewhat overlapping categories of "unfair methods of competition and unfair or deceptive acts or practices."[404] As a matter of positive description, these fall into two generic categories: (1) misleading trade identification; and (2) false or otherwise deceptive advertising. Each adds a bit of flesh to the highly generalized proscriptions of the federal and state law. Prudent lawyering blends the two, treating the MUTPCPA as providing (at least) eleven spokes for the Lanham Act's umbrella. We need to take a moment with each of these.

B. Passing Off

Section 75-24-5(2)(a) proscribes "passing off [one's own] goods or services as those of another."[405] One court long ago called passing off "a convenient name for the doctrine that no one should be allowed to sell his goods as those of another."[406] "Passing off originally denominated unauthorized use of trade identification, but today [1966] the term is also applied to cover substitution of a different brand of goods for the one requested by a customer."[407] Also known as "palming off," this form of unfair competition was prohibited and made actionable under pre-statutory Mississippi law.[408] In *Cockrell v. Davis*,[409] we find that " '[a] man must use his own name honestly and not as a means of pirating upon the good will and reputation of a rival by *passing off* his goods or business as the goods or business of his rival who gave the name its reputation and value.' "[410] There are two dimensions to the "passing off" evil. At one level, the offender deceives consumers and other buyers and interferes with their ability to distinguish among the goods and services of competing suppliers. Vis-a-vis the competitor, the "passing off"

---

402. *See, e.g.*, Ibanez v. Florida Dept. of Business & Professional Regulation, 114 S. Ct. 2084 (1994); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

403. MISS. CODE ANN. § 75-24-5(1) (1991).

404. MISS. CODE ANN. § 75-24-5(2) (1991).

405. The FTC's REVISED UTPCPL § 2(1) (1966) ("Alternative Form No. 3") is verbatim identical.

406. Vogue Co. v. Thompson-Hudson Co., 300 F. 509, 512 (6th Cir. 1924), *cert. denied*, 273 U.S. 706 (1926).

407. UNIF. DECEPTIVE TRADE PRACTICES ACT § 2(a)(1), 7A U.L.A. 277 (1966).

408. *See* discussion in Walker, *Common Law Protection*, *supra* note 21, at 364-71; Walker, *Business Torts*, *supra* note 27, at 6-11.

409. 23 So. 2d 256 (Miss. 1945).

410. *Id.* at 259 (quoting Carter v. Carter Elec. Co., 199 S.E. 737 (Ga. 1923) (emphasis added)).

offender diverts trade and unjustly enriches himself as he seeks to enjoy the benefits of favorable public perception of the competitor.[411]

A simple example may suffice. Bobby Baker runs a bakery of considerable renown and sells breads, cakes, and pastries to local supermarkets which in turn sell them to the public. Sheldon Schmuck operates a supermarket and for years sold Baker's products. Baker, seeking to take advantage of its favorable market reputation, raises its prices. Most of Baker's customers accept the price increase, passing them on to the consumer, but Schmuck refuses, in consequence of which Baker discontinues supplying bakery products to Schmuck. Thereafter, Schmuck continues to represent falsely to its customers that its bread and bakery products have been baked by Baker. In this example, Schmuck's passing its bakery products off as Baker's products violates section 75-24-5(2)(a).[412] The law labels and declares what Schmuck is doing an unfair means of competition.

Following subsection (a)'s proscription of "passing off," section 75-24-5(2) then continues to prohibit

> (b) Misrepresentation of the source, sponsorship, approval, or certification of goods or services;[[413]]
>
> (c) Misrepresentation of affiliation, connection or association with, or certification by another;[[414]] [and]
>
> (d) Misrepresentation of designations of geographic origin in connection with goods or services.[415]

But a moment's reflection, and we see these three species of misrepresentation—(b) through (d)—are each subspecies of the general sin of "passing off." Subsection (e) in many ways is redundant. It proscribes "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have."[416] A subsection (e) representation "that goods or services have sponsorship [or] approval . . . that they do not have" strikes me the same as a subsection (b) misrepresentation of the "sponsorship [or] approval . . . of goods or services." A subsection (e) representation that a person has an "affiliation or connection that he does not have" is the same as a subsection (c) "misrepresentation of affiliation [or] connection . . . by another." The

---

411. Others have made the same points. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 cmt. a (Tentative Draft 1994); Walker, *Common Law Protection*, *supra* note 21, at 364.

412. This example is an elaboration upon RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 cmt. f (Tentative Draft 1994).

413. The FTC's REVISED UTPCPL § 2(2) (1966) reads: "[C]ausing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services." *Id.*

414. The FTC's REVISED UTPCPL § 2(3) (1966) reads: "[C]ausing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another." *Id.*

415. The FTC's REVISED UTPCPL § 2(4) (1966) reads: "[U]sing deceptive representations or designations of geographic origin in connection with goods or services." *Id.*

416. The FTC's REVISED UTPCPL § 2(5) (1966) is verbatim identical.

draftsmen of the statute were no doubt lawyers and, like the present author, would never use one word when two or three would do just as well.

The new Restatement (Third) of Unfair Competition provides certain organizing principles, and, while the Restatement has no power to amend the statute, it may, with profit, be brought to bear on our reading of the statute and our efforts to see meaning and coherence in it. We have studied the Restatement with care and have compared it with the Lanham Act and the MUTPCPA, reading the statutes together and treating the latter as an elaboration of the former. When we do this, we find the new Restatement carries us well along the way to that reading of the law of deceptive marketing that best fits and flows from the best justification of its texts.

Restatement sections 4 and 5 offer helpful insights regarding "passing off."[417] First and foremost, the Restatement lets us see the commonality between and among the statutorily-prohibited acts and practices. Subsections (a) through (e) of section 75-24-5(2) are so similar that they could and probably should be coalesced into a single standard, although experience teaches we need a bit more than the highly generalized phraseology of section 43(a) of the Lanham Act. The Restatement combines these into a single standard that it then subdivides along lines more sensible and illuminating and quite different from the form of the statute, yet consistent with its substance. The Restatement helps us see that passing off and misrepresentation of source, and the like, take on two forms and are best seen as a coin both sides of which are easily grasped and understood. Section 4's direct "passing off" occurs when the market participant markets *his* goods or services so as to pass them off as the goods and services of *another*. Section 5 addresses the converse circumstance, reverse passing off, if you will. It occurs when the market participant markets *another's* goods and services so as to pass them off as *his own or those of a third party*. By reference to the statute, whether the market participant claims another's goods are his or whether he attributes his goods or services to another, we still have a case of "passing off goods or services as those of another."[418] All of this is easily "false designation of origin, or any false description or representation" within the Lanham Act.[419]

---

417. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 (Tentative Draft 1994) reads as follows:

> One is subject to liability to another if, in marketing its goods or services, it makes a representation likely to deceive or mislead prospective purchasers by causing them to believe falsely that its business is the business of the other, or that it is the agent, affiliate, or other associate of the other, or that the goods or services that it markets are produced, sponsored, or approved by the other.

Id.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 5 (Tentative Draft 1994) reads as follows:

> One is subject to liability to another if, in marketing goods or services manufactured, produced, or otherwise supplied by the other, it makes a representation likely to deceive or mislead prospective purchasers by causing them to believe falsely that it or a third party is the original manufacturer, producer, or supplier of the goods or services, if the representation is also to the likely commercial detriment of the other under the rule stated in § 3.

Id.

418. MISS. CODE ANN. § 75-24-5(2)(a) (1991).

419. 15 U.S.C. § 1125(a) (1988).

The Restatement adds more. It helps us see the law provides no per se rule. Misrepresentations are actionable only if they are "likely to deceive or mislead prospective purchasers."[420] Not only this, to be actionable a misrepresentation must deceive or mislead in a particular way directly related to the misrepresentation; that is, it must be likely to lead prospective customers to believe the particular misrepresentation. Restatement commentary makes clear "proof of actual deception is not required."[421] Rather, what the plaintiff must show is that the misrepresentation "creates a likelihood that a significant number of prospective purchasers will be deceived or misled with respect to the identity or commercial affiliation of the actor or the source or sponsorship of its goods or services."[422] Put otherwise, "[i]t is sufficient if the representation is likely to deceive or mislead a significant portion of its audience."[423]

This standard has its precursors in the Lanham Act.[424] We may find it in this state's case law as well. In *Dollar Department Stores v. Laub*,[425] the court said it was "concerned with whether it is likely that the public will be misled and whether the complaining party is likely to be injured."[426] *Dollar Department Stores* was a trade name case. The plaintiff proved prior use of the name, and the court enjoined the defendant's use of similar names likely to mislead or confuse the public, without regard to defendant's intent.[427] The principle on which the decision rests is at least broad enough that "passing off" and other misrepresentation cases fit within it.

The Restatement finds and sharpens this "likely to deceive" standard in cases where a market participant is suing a said-to-be-offending competitor for "passing off." The standard is also imbedded in the best reading of the MUTPCPA. For example, section 75-24-9[428] empowers the Attorney General to seek an injunction to proceed against persons engaging in prohibited acts or practices and provides that these proceedings may be had when the Attorney General first determines

---

420. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 4, 5 (Tentative Draft 1994). The Uniform Deceptive Trade Practices Act, which, again, has *not* been enacted in Mississippi, uses a "likelihood of confusion or of misunderstanding" standard. UNIF. DECEPTIVE TRADE PRACTICES ACT § 2(a)(2), (3), 7A U.L.A. 277 (1966). This test is noted in RESTATEMENT (SECOND) OF TORTS § 729 cmt. a (1988), as "a phrase which has long been used in statutes, Federal and State, and in court opinions . . . ." *Id.* *Cf.* Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc., 391 So. 2d 633, 636 (Miss. 1980) (factually erroneous advertisement actionable only if proximate cause of damages suffered by plaintiff).

421. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 cmt. c (Tentative Draft 1994).

422. *Id.*

423. *Id.* § 5 cmt. b.

424. *See, e.g.*, Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821 (11th Cir. 1982); Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc., 670 F.2d 642 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982); Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc., 659 F.2d 695 (5th Cir. 1981), *cert. denied*, 457 U.S. 1126 (1982). The Second Circuit, however, has taken a different view. Vibrant Sales, Inc. v. New Body Boutique, Inc., 652 F.2d 299 (2d Cir. 1981), *cert. denied*, 455 U.S. 909 (1982).

425. 120 So. 2d 139 (Miss. 1960).

426. *Id.* at 142.

427. *Id.* at 143.

428. MISS. CODE ANN. § 75-24-9 (1991).

"that proceedings would be in the public interest."[429] The "likely to deceive" interpretation is a perfectly sensible one for giving flesh and content to the statutory "in the public interest" standard. To the point, it proceeds from the best justification of that standard. It is hard to see how such a proceeding would be in the public interest if the otherwise actionable conduct is not reasonably likely to deceive a substantial portion of its audience. Conversely, "likely to deceive" seems a more realistic reading of the rule than actual deception, particularly for prospective injunctive relief.

On the other hand, "likely to deceive" does not fit the law regarding a purchaser's action for damages under section 75-24-15(1).[430] That statute provides a right of action for losses the consumer sustains "as a result of" the vendor's use of an act or practice prohibited by the statute.[431] If the consumer has not in fact been deceived, it seems only sensible to say that his loss has not been a result of the vendor's act or practice.

In Part IV we massaged the perennial problem whether proscribed conduct must have been intentional before the law will treat it as actionable. Neither the Lanham Act nor the MUTPCPA proscription of "passing off"[432] mentions intent. A review of the different statutory formula fails to yield any limitation of the tort to "intentionally passing off." Restatement commentary articulates the point. While noting that "fraudulent intent" was an essential element of the traditional common law action for deceit, we are told this view has been abandoned. Specifically, the commentary notes that "[s]tate and federal legislation, including § 43(a) of the Lanham Act . . . have . . . dispensed with the necessity of establishing an intent to deceive in connection with misrepresentations of source and other deceptive misrepresentations relating to the actor's goods and services."[433] The Restatement commentary goes on to make clear the rule at hand is to be regarded as presenting an objective or external standard. "Liability under this section is determined by an evaluation of the probable consequences of the actor's conduct and does not depend on subjective intent."[434] The Restatement view seems wholly consistent with settled Mississippi case law in the field.[435] In *Dollar Department Stores*,[436] the court said: "[I]f the use of similar names results in confusion or unfair competition, the use is constructively fraudulent even though the act may be done

---

429. *See also* MISS. CODE ANN. § 75-24-21 (1991) (empowering district attorneys and county attorneys to proceed alone or in concert with or in assistance of the Attorney General).

430. MISS. CODE ANN. § 75-24-15 (1991 & Supp. 1994).

431. *Id.*

432. *See, e.g.*, UNIF. DECEPTIVE TRADE PRACTICES ACT § 2(1)-(5), 7A U.L.A. 277 (1966).

433. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 cmt. d (Tentative Draft 1994). *See also* Walker, *Business Torts*, *supra* note 27, at 6.

434. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 cmt. d (Tentative Draft 1994). The commentary adds the practical observation that evidence of intent to deceive "may justify the inference that deception is likely." *Id.* Moreover, the presence of subjective intent to deceive may affect the relief awarded. The Restatement provides an illustration to the effect that an unintentional "passing off" may be the predicate for prospective injunctive relief but may not justify an award of actual damages or any other monetary relief. *Id.*

435. *See supra* Part IV.

436. 120 So. 2d 139 (Miss. 1960).

innocently."[437] That *Dollar Department Stores* was a trade name case imports no difference in principle.

There is a related point, though it concerns another subsection of section 75-24-5(2). With one exception[438] not relevant here, nothing in the statute requires a showing of intent before acts or practices may be actionable. Yet, *Deer Creek Construction Co. v. Peterson*[439] superficially construes the statute as identifying eleven species of fraud. While it appears that in a fit of pleading excess the plaintiff had charged the defendant with fraud, citing the statute, this was hardly necessary to a successful action.[440] If the statute does not require intent, it certainly does not require a showing of fraud – defining fraud as intent-plus. *Deer Creek*, an opinion hardly marked for its clarity, rejects the plaintiff's claim on alternate grounds but does so "first" on the ground "that there was no fraud proven by clear and convincing evidence."[441] To the extent that this is a construction of the statute, it is simply wrong,[442] and that it just does not fit the legal text is only one of the reasons it is wrong.

C. *Puffing*

The next two specifications of prohibited acts or practices within the MUTPCPA fall into a different category. These are:

> (f) Representing that goods are original or new if they are reconditioned, reclaimed, used, or secondhand;[443][and]
>
> (g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.[444]

Here, rather than addressing misrepresentations regarding the source or origin of goods or services, the Act addresses false statements regarding condition or quality. Indeed, some parts of subsection (e) fall within this category: "Representing that goods or services have . . . characteristics, ingredients, uses, benefits or quantities that they do not have."[445]

---

437. *Id.* at 143 (citing Cockrell v. Davis, 23 So. 2d 256 (Miss. 1945); Meridian Yellow Cab Co. v. City Yellow Cabs, 41 So. 2d 14 (Miss. 1949)).

438. MISS. CODE ANN. § 75-24-5(2)(i), (j) (1991).

439. 412 So. 2d 1169 (Miss. 1982).

440. *Id.* at 1171.

441. *Id.* at 1173.

442. The opinion reflects that in "Count II," the plaintiff charged the defendant with "fraudulently" representing certain facts and, "finally, that defendants committed a deceptive act as defined in . . . Section 75-24-5." *Id.* at 1171. It is not clear from the summary of the complaint whether the plaintiff charged and treated his § 75-24-5 claim as one importing fraud or whether he was charging fraud independent of the statutory claim. To the extent that plaintiff was proceeding on an independent fraud claim, of course, the clear and convincing evidence standard would apply. *See* McGory v. Allstate Ins. Co., 527 So. 2d 632, 637-38 (Miss. 1988).

443. The FTC's REVISED UTPCPL § 2(6) (1966) is identical, except that "deteriorated, altered" appear there between "are" and "reconditioned." *Id.*

444. The FTC's REVISED UTPCPL § 2(7) (1966) is verbatim identical.

445. MISS. CODE ANN. § 75-24-5 (1991).

The sort of representations proscribed here must have been made with some level of specificity. It is generally regarded that sales talk or mere "puffing" about the general virtues or vague merits of a product is not actionable. In *Thomas v. Mississippi Valley Gas Co.*,[446] the court quoted with obvious approval:

> [T]he rule is well settled that mere general commendations of property sought to be sold, commonly known as "trade talk," "dealer's talk," "seller's statement," or "puffing," do not amount to actionable misrepresentations where the parties deal at arm's length and have equal means of information and are equally qualified to judge the value of the property sold.[447]

Section 43(a) of the Lanham Act also addresses the point, albeit in language more general and vague than that of the MUTPCPA. Misrepresentations as to the condition or quality of goods fall within "any false description or representation" proscribed and made actionable under section 43(a). Again, intent to misrepresent is not required.[448] As before, however, a section 43(a) misrepresentation action must establish the materiality of the false or misleading statement and that the statement has a tendency to mislead or deceive a substantial portion of the intended audience. Again, as before, consumers lack standing under section 43(a).[449] Considering the remedial provisions of the MUTPCPA, however, this is not of great consequence.

The new Restatement addresses this category of deceptive trade practice, again from the point of view of a competitor and not a consumer, and provides:

> One is subject to liability to another if, in marketing goods or services of which the other is truthfully identified as the manufacturer, producer, or supplier, it makes a representation relating to those goods or services that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of the other under the rule stated in § 3.[450]

In elaborating upon types of misrepresentations within this rule and by way of distinction from the rules prohibiting "passing off," Restatement commentary provides:

> The misrepresentations described in this Section are typically made in an attempt to sell goods that the actor has on hand and are thus generally laudatory rather than derogatory. The seller may assert, for example, that the goods are fresh when in fact they are stale or deteriorated, that they are the manufacturer's latest style or highest quality when in fact they are outdated or seconds, or that they are warranted by the manufacturer in respects that exceed its actual undertaking . . . .[451]

---

446. 113 So. 2d 535 (Miss. 1959).

447. *Id.* at 538 (quoting 23 AM. JUR. *Fraud and Deceit* § 33 (1958)).

448. Burndy Corp. v. Teledyne Indus., Inc., 584 F. Supp. 656 (D. Conn.), *aff'd*, 748 F.2d 767 (2d Cir. 1984).

449. Colligan v. Activities Club, Ltd., 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

450. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 6 (Tentative Draft 1994).

451. *Id.* § 6 cmt. b.

Before a competitor may obtain relief, by way of injunction or damages, under this section, he must show likely commercial detriment.

> Commercial detriment to the party identified as the source of the goods or services is likely if the misrepresentation threatens to divert trade from that party to the actor, such as a misrepresentation by a seller that its used goods manufactured or supplied by the other are new. A misrepresentation is also to the likely commercial detriment of the manufacturer or supplier if it is likely to tarnish the reputation of the goods among prospective purchasers. Indeed, the manufacturer's good will may sometimes suffer even among prospective customers who do not in fact purchase the goods from the seller, but instead inspect and reject them under the false impression that they represent the manufacturer's current output or highest quality merchandise.[452]

D. Trade Libel

An arguably discrete form of unfair competition is defamation of product or producer, traditionally known as commercial disparagement or trade libel or, more recently, since the Restatement (Second) of Torts, injurious falsehood.[453] The Lanham Act does not expressly address the practice. Yet, the courts have recently expanded their reading of section 43(a) to include claims for unfair comparison advertising. Disparagement of a competitor's product may be integral to the primary misrepresentation claim.[454] The MUTPCPA expressly prohibits "[d]isparaging the goods, services, or business of another by false or misleading representation of fact."[455]

Professor Walker has analogized trade libel to the more aged common law tort known as slander of title, one element of which has always been that the false statement have been published "with malice."[456] Professor Walker goes on to consider the several quite different definitions of malice employed by the Supreme Court of Mississippi over the years and concludes, arguably correctly, that if malice is to be required, it be held to mean "scienter (knowledge of falsity or acting in reckless disregard of truth or falsity)" and not "the presence of ill-will (spiteful motive)."[457] But as we have seen, all of this begs the question whether malice, scienter, intent, or whatever one wants to call it need be shown at all.[458] It is certainly true that injurious falsehood within the Restatement (Second) of Torts requires, before liability may be imposed for pecuniary loss, that the defendant has:

> (a) [intended] for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

---

452. *Id.* § 6 cmt. c.

453. RESTATEMENT (SECOND) OF TORTS § 623A (1979).

454. ALEXANDER, *supra* note 30, at 166.

455. The FTC's REVISED UTPCPL § 2(8) (1966) is verbatim identical.

456. Walker, *Common Law Protection*, *supra* note 21, at 358. *See, e.g.*, Phelps v. Clinkscales, 247 So. 2d 819, 821 (Miss. 1971); Walley v. Hunt, 54 So. 2d 393 (Miss. 1951).

457. Walker, *Common Law Protection*, *supra* note 21, at 359.

458. *See supra* Part IV.

(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.[459]

Yet nothing in the Lanham Act requires a showing of intent before recovery may be had under section 43(a) for deceptive marketing in the form of commercial disparagement. Beyond this, the structure of the MUTPCPA precludes imposition of any intent or malice standard. Section 75-24-5(2) sets forth the various prohibited acts or practices and makes no requirement that they be shown to have been done intentionally or with malice before they may be actionable.[460] Section 75-24-9 empowers the Attorney General to seek injunctive relief against a practice proscribed in section 75-24-5(2) upon a showing "that any person is using, has used, or is about to use any method, act or practice prohibited by Section 75-24-5."[461] Nothing is said about intent. Section 75-24-15(1), which authorizes consumers to bring private rights of action, says nothing about intent. Only section 75-24-19(1)(b) which empowers the court to award a civil penalty not to exceed ten thousand dollars ($10,000.00) per violation requires the court to find that the defendant has acted willfully.[462] The apt analogy here is the law of punitive damages, which has always addressed intentional conduct.[463]

No doubt we should consider seriously that the action for trade libel or injurious falsehood is the analogue of the common law action for slander of title. Without doubt, slander of title is regarded as an intentional tort with proof of malice or intent a prerequisite to recovery. Moreover, we take quite seriously Restatement formulations, because the Supreme Court of Mississippi so often takes them seriously. On the other hand, there is no reason why either the common law analogies or Restatement formulation should be taken to engraft an intent requirement onto the MUTPCPA's subsection (h) disparagement, much less onto section 43(a) of the Lanham Act. No case or other reason appears that a court would correctly exonerate a trade libelant if plaintiff proves what the statutes require but stops short of proof of malice, intent, or scienter. The better interpretation is that there is no such intent requirement and that unintended disparagement at the very least may be enjoined.

E. False Advertising

Deceptive marketing by definition involves communications of facts that are erroneous, untrue, or otherwise misleading. These misrepresentations take two general forms: misrepresentations made directly to a prospective consumer or other purchaser, on the one hand, and, on the other, misrepresentations made to

459. RESTATEMENT (SECOND) OF TORTS § 623A (1979).

460. MISS. CODE ANN. § 75-24-5(2) (1991 & Supp. 1994).

461. MISS. CODE ANN. § 75-24-9 (1991 & Supp. 1994).

462. MISS. CODE ANN. § 75-24-19(1)(b) (1991 & Supp. 1994).

463. *See, e.g.*, MISS. CODE ANN. § 11-1-65 (1991); Independent Life & Acc. Ins. Co. v. Peavy, 528 So. 2d 1112, 1115 (Miss. 1988); Colonial Mortgage Co. v. Lee, 525 So. 2d 804, 807 (Miss. 1988); Mutual Life Ins. Co. v. Estate of Wesson, 517 So. 2d 521, 528 (Miss. 1987), *cert. denied*, 486 U.S. 1043 (1988).

the public at large, or a given segment thereof. These latter claims are commonly known as false advertising. The differences in the several kinds of deceptive marketing are differences of degree, and not kind.

Section 43(a) of the Lanham Act offers competitors a remedy for false advertising. The Act provides: "Any person who shall . . . use in connection with any goods or services . . . any false description or representation" shall be liable in an action brought by a competitor upon proper proof.[464] Established interpretations expand "false" to include "misleading" but require that the misrepresentation be materially false or misleading and that it actually deceives or has a reasonable tendency to deceive a substantial portion of its intended audience.[465]

The MUTPCPA elaborates the forms of false advertising so that they include, among others,

> (i) Advertising goods or services with intent not to sell them as advertised;[466]
>
> (j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;[467] [and]
>
> (k) Misrepresentations of fact concerning the reasons for, existence of, or amounts of price reductions.[468]

Of course, reflection on the eight other general types of deceptive acts the MUTPCPA makes actionable shows each forming the whole or a part of a claim for false advertising in the sense that each involves some sort of false or misleading misrepresentation with respect to goods or services offered for sale to the public.

Following the Lanham Act, the new Restatement (Third) of Unfair Competition requires here, as elsewhere, that before false advertising may be actionable, it must be such as "is likely to deceive or mislead prospective purchasers."[469] Professor Walker has suggested that the false advertising portion of the "statute has been narrowly interpreted . . . on proof of causation grounds,"[470] citing *Dixieland Food Stores v. Kelly's Big Star*.[471] The case reads the statute to require proof of causation, that plaintiff must show a "causal connection between the inaccuracy of the advertisement and any damages . . . [plaintiff may have] sustained."[472] That a plaintiff

---

464. 15 U.S.C. § 1125 (1988).

465. *See, e.g.*, Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777 (N.D. Ill. 1974).

466. The FTC's REVISED UTPCPL § 2(9) (1966) is verbatim identical.

467. The FTC's REVISED UTPCPL § 2(10) (1966) is verbatim identical.

468. The FTC's REVISED UTPCPL § 2(11) (1966) begins "(ii) making false or misleading statements of fact" and is otherwise identical. *Id.*

469. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 (Tentative Draft 1994).

470. Walker, *Business Torts*, *supra* note 27, at 13.

471. 391 So. 2d 633, 636 (Miss. 1980).

472. *Id.*

providing weak proof of proximate cause should not prevail hardly suggests the court is reading the statute narrowly. The point for the moment is that nothing in the nature or text of the statute, nor in *Dixieland Food Stores*, suggests the statute should be read narrowly, much less that a prudent lawyer should assume it so when advising the client, ex post or ex ante.

Here *Deer Creek Construction Co. v. Peterson*[473] is instructive. Homeowners brought an action against the contractor they had engaged to build their home.[474] The plaintiffs alleged that the contractor had represented that it would complete the residence within ninety days.[475] In point of fact, the home was not made available to the owner for some thirteen-and-a-half (13 1/2) months.[476] It is not clear from the opinion the precise manner in which the case was pleaded, the issues framed and litigated, but on appeal the court considered whether the ninety days' representation, which it appears had been well breached, fell within the proscription of section 75-24-5(2)(i), viz, "advertising goods or services with intent not to sell them as advertised."[477] The court rejected the plaintiffs' claim, holding that the term "advertising" meant "advertising and offering to the general public and does not include representations made during the negotiation process for the purchase of a particular item or items."[478]

Arguably, as a construction of section 75-24-5(2)(i) the decision is correct, but as a reading and application of section 75-24-5 as a whole, the decision is clearly in error. Assuming arguendo, that a contractor's representation to an owner that it can and will build a home within ninety days does not fit within any of the eleven enumerated unfair or deceptive acts or practices within section 75-24-5, it is nevertheless quite apparently an act of like kind or nature to the enumerated acts.[479]

On their face, MUTPCPA subsections (i) and (j) seem inconsistent with our proclamation that proof of actual subjective intent is not a requisite to recovery in business tort. The rule proscribes advertising goods and services with the intent not to supply them as advertised or with the intent not to supply reasonably expectable public demand. As good grammarians, we concede the language allows an action upon the advertisement and before a single sale is made. But a moment's reflection on the real world makes clear proof of intent will invariably take the form of proof of the objective fact from which the law presumes intent. No one in his right mind is likely to sue until the defendant has sold his goods other than as advertised or without being able to supply actual demand. We are back where we left off at the end of Part IV. Of course, the defendant may run his mouth and provide a smoking gun, as in *Memphis Steam Laundry*. More likely, the plaintiff will

473. 412 So. 2d 1169 (Miss. 1982).
474. *Id.* at 1171.
475. *Id.*
476. *Id.* at 1170.
477. MISS. CODE ANN. § 75-24-4 (1991).
478. Deer Creek Constr. Co. v. Peterson, 412 So. 2d 1169, 1173 (Miss. 1982).
479. From the facts before the court, the 90-day time limit was a part of Deer Creek's contractual undertaking, and Peterson was awarded damages for Deer Creek's breach thereof. *Id.* at 1171.

prove that the defendant did not in fact supply the goods as advertised or could not in fact supply public demand and that the circumstances were such that a reasonable seller should have known he would be unable to live up to his advertising, and no one will pause to peek inside the defendant's mind.

F. Other Means of Deceptive Marketing

One question that traditionally troubled Mississippi market participants was whether the enumeration of the MUTPCPA's eleven general and often overlapping categories of unfair methods of competition and unfair or deceptive acts or practices provides the limit of those which are actionable. The 1994 amendment to the MUTPCPA addresses the point. The law now prefaces the enumerated torts with the general declaration that "[u]nfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce are prohibited."[480] The question is whether this amendment makes actionable other unfair methods of competition and other unfair or deceptive acts or practices which are quite like unto the eleven enumerated acts or practices but cannot in candor be squeezed within any one of the eleven more specific boxes. The 1994 amendment could have followed its new general proscription with "including but not limited to" or some such expression. Competent draftsmanship could have made clear that the instances articulated in section 75-24-5(2) were illustrative and not exhaustive of section 75-24-5(1). The way the amendment is worded leaves a crack in the door for those who would argue the new language adds nothing of substance. This negative approach is nothing more than an interpretive trick we (sometimes) take seriously because we have a Latin maxim for it: *expressio unius est exclusio alterius*.[481]

The Uniform Deceptive Trade Practices Act [hereinafter UDTPA] solves this problem with a catch-all twelfth category of deceptive trade practice. Section 2(a) of the Act lists the same eleven categories of acts or practices in the Mississippi statute, by and large in identical language, and in a twelfth paragraph declares that "[a] person engages in a deceptive trade practice when, in the course of his business, vocation or occupation, he . . . engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding."[482] Mississippi has not enacted the UDTPA. Perhaps more important, we know the UDTPA was available to the legislature both in 1974 when it enacted the MUTPCPA[483] and in 1994 when it most recently amended the Act.

Another model act available and almost certainly Mississippi's model back in 1974 was the Federal Trade Commission's Revised Unfair Trade Practices and Consumer Protection Law [hereinafter FTC's Revised Law].[484] Section 2 of the

---

480. 1994 Miss. Laws, ch. 537, § 2 (codified at MISS. CODE ANN. § 75-24-5(1) (1991 & Supp. 1994)).

481. *See, e.g.*, 3 CORBIN ON CONTRACTS § 552, 206-08 (1951) (subjects not named were intended to be excluded).

482. UNIF. DECEPTIVE TRADE PRACTICES ACT § 2(a)(12), 7A U.L.A. 280 (1966).

483. *See* 1994 Miss. Laws, ch. 555.

484. COUNCIL OF STATE GOVERNMENTS, 29 1970 SUGGESTED STATE LEGISLATION § 72-31-00, at 146-47 (1969) (published in Louisville, Ky.).

FTC's Revised Law addresses unlawful acts and practices and affords states considering enactment three alternative forms. The first two are general proscriptions.[485] The Mississippi Legislature's enactment closely resembles "Alternative Form No. 3" which enumerates eleven specifications of unlawful acts and practices which, with only trivial exceptions, are verbatim identical to what appears in the MUTPCPA. The problem is that the FTC's Revised Law, like the UDTPA, contains a twelfth subsection:

> (12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding,[486]

and a thirteenth alternative subsection:

> (13) engaging in any act or practice which is unfair or deceptive to the consumer.[487]

The legislature did not enact subsections (12) or (13). Making law by not enacting leaves an odd taste. Remembering the criteria of legal validity, there is no recorded vote of the House or the Senate rejecting subsections (12) or (13). Nothing suggests these subsections were ever presented to the Governor. We are hard pressed to explain how the exclusion of these becomes positive law.

There is a more fundamental consideration. Recalling our discussion in Part III above, it is important to think seriously what we would do if the eleven rules or standards of section 75-24-5, instead of being in statutory form, had in fact been the product of eleven separate, albeit overlapping, lines of common law precedent.[488] It may have been, in each line of precedent, the court had from time to time been urged to speak with breadth but had declined. If this had been the case, accepted understandings of the common law process would mandate that we extend and enforce these principles in functionally analogous cases. The fact that the rules are in fact stated in statutory form does not change the process. As these statutory rules emanate from the legislature, the power of the value and policy judgments implied in each of the eleven enumerated deceptive practices is even greater than were they found only in common law precedents.

The Lanham Act is added to the equation. Section 43(a) makes actionable "any false description or representation" that is "use[d] in connection with any goods or services."[489] This language is certainly inimical to the suggestion that there be only a finite number of unlawful acts or practices, or that those practicing deceptive marketing should be allowed to escape because the Mississippi Legislature has failed to identify precisely the kind of conduct they pursue. Especially is this so since the 1994 MUTPCPA amendments proscribe without limitation "unfair methods of competition" and "unfair or deceptive trade practices."[490]

---

485. *Id.*
486. FTC's REVISED UTPCPL § 2(12) (1966).
487. FTC's REVISED UTPCPL § 2(13) (1966).
488. *See supra* notes 149-52 and accompanying text.
489. 15 U.S.C. § 1125 (1988).
490. MISS. CODE ANN. § 75-24-5(1) (1991).

The new Restatement addresses the problem and also finds it to be the law that unfair methods of competition are proscribed and are actionable whether expressly enumerated in statutory form or not. The Restatement addresses three principal areas of actionable conduct: (1) deceptive marketing; (2) infringement of trademarks or other indicia of identification; and (3) appropriation of trade values, including publicity rights and trade secrets. The Restatement goes on to recognize a right of redress from harm resulting "from other acts or practices of the actor determined to be similarly actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the party seeking relief and the public."[491] In commentary, the Restatement advises that it is addressing certain "recurring patterns of objectionable practices."[492] The same may be said for the enumeration of the eleven unfair methods of competition in section 75-24-5(2). Restatement commentary continues to explain that the specifically enumerated and addressed grounds "do not fully exhaust the scope of statutory or common law liability for unfair methods of competition, and Subsection (a) therefore includes a residual category encompassing other business practices determined to be unfair."[493] The commentary continues to explain the impossibility of providing a definitive test for delineating all methods of competition the court should deem unfair and, therefore, actionable, and declares this an evolving legal phenomenon.

> Courts continue to evaluate competitive practices against generalized standards of fairness and social utility . . . . An act or practice is likely to be judged unfair only if it substantially interferes with the ability of others to compete on the merits of their products in the marketplace or otherwise conflicts with accepted principles of public policy as established by statute or common law.[494]

The legislature, of course, always has the authority to step in and say, "No, we do not wish a given deceptive marketing practice to be unlawful, though it be functionally and legally analogous to the eleven enumerated practices." The legislature has authority to enact arbitrary limits on its laws. It seemingly has done the opposite. The 1994 amendment, albeit less than perfect in form, appears to clear our way to the enforcement of that first principle of justice—that like cases should be treated alike—and stands as a powerful injunction to the courts doing so.

---

491. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 (Tentative Draft 1994).

492. *Id.* § 1 cmt. g.

493. *Id.*

494. *Id.*